

**BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION**

Staff of the Missouri Public Services Commission,)	
)	
Complainant,)	
)	
v.)	Case No. RC-2012-0421
)	
Cintex Wireless, LLC,)	
)	
Respondent.)	

**CINTEX WIRELESS, LLC’S RESPONSE TO THE COMMISSION’S ORDER
DIRECTING CINTEX TO SHOW CAUSE WHY ITS ETC DESIGNATION SHOULD
NOT BE PROVISIONALLY REVOKED**

Respondent Cintex Wireless, LLC (“Cintex” or “Company”), pursuant to the Missouri Public Service Commission’s (“Commission”) June 20, 2012 Order Directing Cintex Wireless to Show Cause Why Its ETC Designation Should Not Be Provisionally Revoked, respectfully makes such showing here and requests that the Commission dismiss the Complaint seeking to revoke the ETC designation of Cintex.

The Commission Staff’s (“Staff”) Complaint and Motion for Order to Show Cause are premature. Staff has failed to show, or even properly allege, that any of Cintex’s actions were unlawful or unreasonable, or that those actions support the drastic remedy of ETC revocation. Staff has failed to meet its substantial burden as the proponent advocating that Cintex’s ETC designation should be revoked.

I. INTRODUCTION

Revoking a carrier’s status as an Eligible Telecommunications Carrier (“ETC”) is an extreme measure that can have a devastating impact on a company. Such extreme action would irrevocably damage Cintex’s reputation, Missouri business prospects, and ability to secure

additional ETC designations, and may result in a domino effect of revocations in other states. Staff's Motion seeks the equivalent of economic capital punishment. In light of these facts, the Commission has an obligation to take such a drastic measure only in extreme circumstances. Those circumstances are not present here.

Indeed, the Federal Communications Commission ("FCC") adopted a cautious approach and stated that revoking an ETC designation is appropriate only in "egregious cases."¹ To Cintex's knowledge, the FCC has never revoked an ETC designation. State commissions have been similarly circumspect. The few revocation cases identified have involved extreme—and demonstrably proven—instances of carrier fraud and/or egregious violations of Lifeline rules. For example, the Public Service Commission of Wisconsin revoked the designation of Midwestern Telecommunications, Inc. ("Midwestern")² after finding that Midwestern had, among other activities, sent Lifeline telephones to consumers who had never requested the phones, failed to disconnect telephones that did not have usage within 60 days as required by that commission's order, failed to properly verify customer eligibility in "numerous" instances, and provided "forged" documents in response to data requests.³

In the present case, however, Staff has adopted the opposite approach—revoke first, ask questions later. Staff urges revocation even though Cintex has not violated any Lifeline rules. The significance of this fact cannot be overemphasized: Staff seeks revocation of Cintex's authority to provide Lifeline service in Missouri, an extreme remedy that would have devastating

¹ *FCC Lifeline Rules; Eligible Telecommunications Carriers Offering Lifeline Service Are Reminded of their Obligation to Confirm Consumers' Eligibility and to Avoid Providing Duplicative Support*, Public Notice, 26 FCC Rcd 16411, 16412 (Mo.P.S.C. 2011).

² *See Application of Midwestern Telecommunications, Inc., for Authority to be Designated as an Eligible Telecommunications Carrier*, Final Decision, 2012 Wisc. PUC LEXIS 135 (Mo.P.S.C. 2012).

³ *Application of Midwestern Telecommunications, Inc., for Authority to be Designated as an Eligible Telecommunications Carrier*, Interim Order, 2011 Wisc. PUC LEXIS 566, *3-4 (Mo.P.S.C. 2011).

consequences to Cintex and its employees, absent any violation (indeed, absent any allegation of violation) of Missouri's (or the FCC's) Lifeline rules. This approach is unprecedented in the country. Staff's motives for filing its Complaint remain a mystery to Cintex, particularly in light of Cintex's eagerness to communicate with Staff via both conference call and email regarding any of its questions or concerns. Cintex can only guess that Staff's Complaint was prompted by news stories about Cintex and its owner on KMOV News that Staff references in paragraph 24 of its Complaint.

Several facts are indisputable. Cintex's marketing activities and operations in Missouri were limited and simple: Cintex prepared a mailer it sent to certain Missouri households. That mailer included two pieces of paper. The first piece was a Staff-approved application. The second was a cover letter that described the Cintex Lifeline offering. That cover letter, which Staff now alleges is misleading, *was included in Cintex's ETC Application and was part of the record on which the Commission relied in granting ETC designation.* Cintex sent those two documents to approximately 500,000 households in Missouri. Those households were not selected randomly—Cintex paid a reputable marketing company more than \$35,000 for the list. Cintex instructed the marketing company to include only households with incomes of less than \$30,000.

In response to the mailer, Cintex received approximately 10,000 applications from Missouri residents and accepted only approximately 1,300 of these. The majority of the applications were defective for various reasons. Staff asked for copies of all of the applications Cintex received in Missouri. Cintex timely complied, an action inconsistent with Staff's purported view that Cintex is a bad actor.

Cintex employees reviewed each application to determine whether each was complete and included the required proof of eligibility. Cintex also used an independent and reputable company called CGM, LLC to detect and reject duplicate applications. Cintex did not fraudulently invent applications, did not accept applications without proof of eligibility, and did not attempt to waste government money in any way. To the contrary, Cintex rejected far more applications than it accepted, demonstrating a respect for its obligations as a participant in a government-funded program and for preserving public money. Furthermore, in its prayer for relief, Staff requests that the Commission order Cintex to migrate its Missouri customers to another ETC in the event that its designation is revoked, indicating that even Staff believes that Cintex has engaged in no fraud in signing up such customers and that its customers truly are Lifeline eligible.

Following its response to a number of data requests that Staff submitted to Cintex, in May, 2012 Cintex requested a conference call with Staff counsel to address any remaining questions or concerns it may have regarding Cintex's activities in Missouri. On May 25, 2012 Cintex representative Robert Felgar and Cintex counsel Mark Johnson and Lisa Gilbreath held a conference call with Staff counsel and Staff representatives Cully Dale, John VanEschen, Dana Parish, and Natelle Dietrich. Cintex stated during that conference call that it was prepared to be transparent and honest, and wished to help in any way that it could. Cintex counsel followed-up with emails to Staff on May 30, 2012 and June 11, 2012, providing additional information to Staff and asking if Staff needs anything else from the Company. Staff counsel stated on June 11, 2012 that it did not think that it needed anything else from the Company. Nevertheless, on June 14, 2012 Staff filed its Complaint and Motion for Order to Show Cause.

Staff does not allege facts that are inconsistent with this narrative. Thus, the undisputed facts show that Cintex's activities were lawful, reasonable, and merit its continued ETC designation.

II. LEGAL STANDARD

“[I]n cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof.”⁴ In order to meet its burden of proof, Staff must convince the Commission it is “more likely than not” that Cintex acted unlawfully.⁵ Here, based upon the facts presented by Staff, Staff has not, and cannot, meet its burden that it is more likely than not that Cintex's actions, or non-actions, were unlawful or unreasonable, such that its ETC status should be revoked.

This is particularly true where the case is at only the most preliminary stage. No discovery has been conducted, no record evidence has been produced. Drawing the analogy to preliminary relief in civil litigation, as the complainant Staff must demonstrate that there is a substantial likelihood that it will prevail on the merits and that failure to revoke Cintex's ETC designation will inflict irreparable harm. As described in detail in Section IV below, Staff has failed to make an adequate showing that preliminary relief, which it labels “provisional,” is appropriate.

Indeed, Staff's Complaint fails even to “set forth in writing any act or thing done or omitted to be done . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission,” pursuant to Section 386.390 and 4 CSR 240-

⁴ *Staff of Mo. Public Serv. Comm'n*, 2009 Mo. PSC Lexis 856, *4 (Mo.P.S.C. 2009) citing *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548, *7 (Mo.P.S.C. 2001).

⁵ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. Ct. App. S.D. 1999) (The preponderance of the evidence standard is the minimum standard in civil disputes.).

2.070.⁶ Instead, Staff appears to state to the Commission that the public interest standard for approval of an ETC application is the proper standard by which its Complaint should be measured. Clearly, Staff is mistaken.

III. ARGUMENT

On September 9, 2011, in Case No. RC-2012-0076, Cintex filed its Application for designation as an ETC (“Application”) with the Commission. Staff made its recommendation that the Commission grant Cintex’s Application on December 16, 2011. The Commission then entered its Order designating Cintex as an ETC effective on December 31, 2011 (“Designation Order”).⁷

Now, after seven months and a significant financial investment by Cintex, Staff argues that Cintex’s ETC designation should be revoked based upon four primary allegations: (1) marketing in areas of Missouri without an ETC designation; (2) misleading marketing; (3) misstatements to regulators; and (4) unsuitable leadership. Staff’s allegations are misleading at best, as its Complaint contains incorrect facts and omits truthful and relevant facts, and are based upon fatally flawed legal theories.

A. CINTEX DID NOT INTENTIONALLY MARKET IN AREAS WITHOUT AN ETC DESIGNATION.

Count I asserts that Cintex is providing service outside of its authorized service area. It is of utmost importance to note that Cintex took every reasonable precaution to ensure that it provided service only within its authorized area and Staff’s Complaint does not allege otherwise.

⁶ All statutory citations are to the Missouri Revised Statutes (2000) as Amended, unless otherwise noted.

⁷ See Complaint ¶ 7.

Further, though Staff fails to mention this point, Cintex has not violated the terms of the Designation Order.

1. Cintex's vendor provided certain zip codes in error.

The facts underlying this issue are indisputable. On approximately February 7, 2012, Cintex emailed the list of approved wire centers to its vendor, BeQuick, and asked it to convert the wire centers into zip codes.⁸ On February 8, 2012, BeQuick provided Cintex a file with the zip codes associated with the approved wire centers. Cintex provided the list of “approved” zip codes to Infogroup, Inc. (“Infogroup”), its marketing vendor, and asked Infogroup to develop a list of Missouri households (1) within those zip codes, and (2) with incomes less than \$30,000.⁹

Unfortunately, and despite the fact that Cintex took all reasonable steps, BeQuick's query was incorrect, causing it to provide some zip codes in error. In an email dated June 27, 2012, BeQuick's Chief Technology Officer, Mr. Sean Biganski, explained that “[t]he query [he] built was keying off the city name instead of the rate center column.”¹⁰ Mr Biganski further stated that “some of the matches would be fine, [where] the city name matches the rate center in some cases, but it would definitely return undesirable results as well.”¹¹ Mr. Biganski concluded by saying “I am sure that this is bad news and we feel really bad this happened.”¹²

While the end result was a list that included some disallowed zip codes, Cintex's processes were reasonable and its intentions unimpeachable. There was no intentional effort to market outside of areas without an ETC designation. When the cause of the problem was discovered, Cintex updated its processes to ensure that this mistake is not repeated.

⁸ See BeQuick Notification created by BeQuick reflecting the Cintex request, attached as Ex. 1.

⁹ See the order confirmation from Infogroup that reflects the two parameters, attached as Ex. 2.

¹⁰ See June 27, 2012 email from BeQuick to Cintex, attached as Ex. 3.

¹¹ *Id.*

¹² *Id.*

What's more, because the FCC's new rules establish robust auditing requirements, the Commission can be assured that Cintex and other ETCs will be closely monitoring and monitored regarding the location of its subscribers. Audits performed by the Universal Service Administrative Company ("USAC") examine whether an ETC's Lifeline subscribers are located within its designated area. USAC will demand that the ETC return support received for customers outside of these areas.¹³ Accordingly, this issue is appropriately addressed in the audit process, as opposed to resorting to the extreme measure of revocation, which is unprecedented in this context.¹⁴ Indeed, there is no precedent, at the FCC or *any* state commission, for revoking an ETC designation for this reason.

2. Cintex has not violated the terms of the Designation Order.

Staff's allegations further fail, as Cintex has not violated the terms of the Designation Order. The Designation Order provides that "Cintex Wireless, LLC is designated as an eligible telecommunications carrier, throughout the service area listed in Attachment B to the application, to receive low-income federal Universal Service Fund support."¹⁵ In other words, the Designation Order prohibits Cintex from receiving reimbursement for Lifeline service provided outside of certain exchanges. To date, Cintex has received no low income support in Missouri. Thus, Cintex has not violated the terms of the Designation Order.

As the Designation Order recognizes, the Lifeline program is inexorably connected to federal government support. A carrier is not providing Lifeline service if it is not receiving

¹³ See USAC Audits, attached as Ex. 4.

¹⁴ An exception may be warranted where the ETC willfully and repeatedly disregards the limitations of its designated area. That is clearly not the case in this instance.

¹⁵ *Designation Order* at 3.

support through USAC.¹⁶ Since Cintex has not received government support, Cintex is not currently providing Lifeline service in Missouri, and the restrictions on its authorized service area do not apply. Cintex is simply offering a free non-Lifeline service in Missouri at Cintex's sole expense.

Indeed, the connection between Lifeline service and government reimbursement also is recognized by the FCC's rules. Section 54.401(a) provides that "Lifeline means a non-transferable retail service offering . . . [f]or which qualifying low-income consumers pay reduced charges *as a result of application of the Lifeline support amount described in § 54.403.*"¹⁷ Service absent government reimbursement is not Lifeline service, so the geographic restrictions in the Designation Order do not apply.

B. CINTEX DID NOT ENGAGE IN ANY MISLEADING ADVERTISEMENTS.

In Count II, Staff alleges that consumers were misled by Cintex's direct mail campaign. As the basis for this claim, Staff notes that the envelope used in the campaign included the words "YOU HAVE BEEN PRE-SELECTED!"¹⁸ Staff then focuses on the cover letter language stating that the recipient has been "selected to receive a special offer for a FREE WIRELESS PHONE" Despite acknowledging that "the materials go on to explain what is actually required to receive service from Cintex," Staff argues that "at least some of the recipients were misled by the materials as a whole, to mistakenly infer that the Commission had authorized

¹⁶ Consider the same question in the context of Medicaid. Assume that a patient, a nine year old girl, is gravely ill, her family does not qualify for Medicaid and her parents work for companies that do not provide health insurance. The girl's plight receives publicity in the local press, and an insurance company decides out of the goodness of its heart to provide her benefits as though she is a Medicaid patient. The carrier is not reimbursed for its services by the government. Clearly the girl is not a Medicaid patient and the insurance carrier is not providing Medicaid services. The Medicaid program is inexorably connected to government reimbursement.

¹⁷ 47 CFR § 54.401(a) (emphasis added).

¹⁸ Complaint ¶ 14.

Cintex to offer free phone service to them specifically, as a qualified recipient.”¹⁹ As a result, Staff argues Cintex’s advertisements are misleading.

However, as this material was included in Cintex’s ETC Application as Exhibit C, Staff was aware of such in September 2011, prior to its favorable recommendation and the Commission’s order granting Cintex’s Application. Thus, Staff’s claims are barred by the doctrines of collateral estoppel and laches. And, in any event, Staff fails to argue any legal principles upon which allegations of “misrepresentations” may be based, or to accurately articulate how or why Cintex’s advertisements were misleading.

1. Staff’s Attack on the Marketing Material Constitutes a Prohibited Collateral Attack.

Staff’s Complaint, as it applies to previous actions by the Commission, is an improper collateral attack on Commission decisions that are final. The Complaint fails to mention that the Commission’s Designation Order arose out of Cintex’s Application that publicly notified Staff and the Commission of *the exact language that Staff now claims is misleading*.²⁰ Cintex attached as Exhibit C to its Application, as a sample of its marketing material, a copy of an almost identical cover letter to the Application.²¹ Staff examined the Application closely, evidenced by the fact that it requested that Cintex answer numerous follow-up questions.

¹⁹ *Id.*

²⁰ In the May 25th conference call between Staff and Cintex, Staff asserted that the cover letter was misleading. Cintex responded that it had been completely transparent with the Commission in this regard and that it had attached a copy of an almost identical mailer to its application. Staff never responded substantively to this fact, although its first reaction was to deny (incorrectly) that Cintex had attached the mailer.

²¹ See sample marketing material, attached as Ex. 5.

The Commission's approval of Cintex's Application, including its marketing material, is a "final order," which under Section 386.550 is "conclusive."²² Neither Staff nor the Commission can attack a prior Commission decision and assert that a certain part of an approved application is no longer approved and is contrary to its rules. In *Lockhart v. Laclede Gas Co. et al.*, a complainant challenged a Commission order approving a stock transfer.²³ The Commission concluded that any such challenge was prohibited, explaining that "Staff is correct that any challenge to those prior orders of the Commission . . . would be an improper collateral attack on decisions that are final."²⁴

Similarly, in *Christ v. Southwestern Bell Telephone Co., et al.*, the Commission explained that "Section 386.390.1 authorizes complaints alleging violations of Commission orders, while Section 386.550 bars complaints attacking Commission orders."²⁵ In that decision, the Commission rejected a challenge to tariffs approved by Commission order. The Commission also emphasized that "[t]he Public Service Commission 'is purely a creature of statute' and its powers are limited to those conferred by the [Missouri] statutes . . ."²⁶

In *MoGas Pipeline*, the complainant argued that it was not attacking the Commission's prior decision regarding a tariff, rather, it was challenging the legality of the underlying tariff

²² While the Commission did not review the envelope containing the marketing material, the language that the recipient has been "pre-selected" contained on the envelope is substantially similar to the statement that the recipient has been "selected" contained in the marketing material. Indeed, the difference between the term "pre-selected" and "selected" is negligible. It was reasonable for Cintex to assume that because Staff and the Commission did not object to the language of the letter, they would not object to nearly identical terminology contained on the letter's envelope.

²³ *Lockhart v. Laclede Gas Co. et al.*, 2011 Mo. PSC Lexis 1410, *8 (Mo.P.S.C. 2012).

²⁴ *Id.*

²⁵ *Christ v. Southwestern Bell Telephone Co., et al.*, 2003 Mo. PSC Lexis 37, *35-35 (Mo.P.S.C. 2003).

²⁶ *Id.* at *31 (citing *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41,47 (Mo. en banc 1979)).

that the Commission interpreted in its decision.²⁷ The Commission ruled that since the complaint was indeed questioning the Commission's report on the tariff, it was an improper collateral attack.²⁸

Furthermore, Staff has not articulated any new evidence or change of circumstances that would prompt reexamination of the Commission's designation of Cintex as an ETC.²⁹ Accordingly, in this case, as in *Lockhart, Christ and MoGas.*, the Commission must respect the limitations placed upon it by Section 386.550. Staff's attack on Cintex's marketing material is a prohibited collateral attack on a Commission order.

2. Staff's Claim is Barred by the Doctrine of Laches.

The purpose of the doctrine of laches is to prevent injustice by prohibiting parties from filing claims late and thereby disadvantaging or injuring other parties.³⁰ Whether the doctrine applies in a particular case depends on the length of delay, the reasons for the delay, how the delay affected the other party, and the overall fairness in permitting the assertion of the claim.³¹ The doctrine has been recognized and applied by the Commission.³² Thus, where a claim is filed late, and the doctrine of laches is applicable, the Commission must disallow the claim.

In this case, Staff has had Cintex's marketing material since September 2011. Despite this, it waited almost *ten months*, until June 2012, to file a claim against Cintex alleging that the material is misleading. In the meantime, Cintex reasonably relied upon the Commission's

²⁷ *In the Matter of MoGas Pipeline*, 2011 Mo. PSC Lexis 110, *7 (Mo.P.S.C. 2011).

²⁸ *Id.* at *7-8.

²⁹ *See, e.g., In the Matter of the Application of Kansas City Power & Light Company for a Waiver or Variance of Certain Provisions of the Report and Order*, 2008 Mo. PSC Lexis 569, *6-7 (Mo.P.S.C. 2008). In *KCP&L.*, the company sought to overturn a previous ruling of the Commission by presenting evidence that it did not offer during the previous litigation in this matter. *Id.* at *7-8. The Commission ruled that "KCPL has not justified the application of any exception that would allow it to collaterally attack the Commission's decision." *Id.* at *8.

³⁰ *See In the Matter of the Application of Union Electric Company*, 2001 Mo. PSC Lexis 866, *3 (Mo.P.S.C. 2001).

³¹ *Hart v. Kupper Parker Communications, Inc.*, 114 S.W.3d 342, 350 (Mo. Ct. App. E.D. 2003).

³² *Id.*

approval of its Application and used the material in a marketing campaign. Indeed, Cintex was required to use the Commission-approved marketing material. Seeking approval for one marketing piece but using another could indeed constitute a misstatement to the Commission and a violation of the Designation Order. Raising the claim of misleading marketing *after the Commission approved the advertising and after Cintex completed its marketing campaign*, has seriously disadvantaged Cintex since Staff is now requesting that the Commission revoke Cintex's ETC designation. Thus, Staff's claim should be disallowed.

3. The Complaint Applies a Non-Existent Legal Standard.

Applying a hitherto unknown legal standard, the Complaint alleges that “*at least some of the recipients were misled . . .*”³³ Notably, the Complaint articulates no legal theory or Commission rule upon which its claim is based. Indeed, it does not appear that the Commission, or its enabling statutes, has established any rule or issued any decision relating to marketing by a carrier, much less how the Commission should handle allegations of “misleading” advertisements. As the Commission's power and duties are limited to those established by statute, and as Section 386.390 and 4 CSR 240-2.070 govern this Complaint, Staff's claims can only be brought in civil court, if at all.³⁴

Even if the Commission could adjudicate this claim, which it cannot, the Commission must look to civil claims such as negligent/fraudulent misrepresentations³⁵ or consumer

³³ Complaint ¶ 14.

³⁴ “The [Commission] is a creature of the statute and can function only in accordance with its enabling statutes.” *State ex rel. MoGas Pipeline, LLC v. Missouri Public Service Comm’n*, 366 S.W.3d 493 (Mo. 2012).

³⁵ To assert a misrepresentation claim against Cintex, Staff must prove that (1) Cintex supplied information in the course of its business; (2) because of a failure by Cintex to exercise reasonable care, the information was false; (3) the information was intentionally provided by the Cintex to customers in connection with a particular business transaction; (4) the customers justifiably relied on the information; and (5) due to the customers' reliance on the information, the customer suffered a pecuniary loss. *Wellcraft Marine v. Lyell*, 960 S.W.2d 542, (Mo. Ct. App. W.D. 1998).

protection laws³⁶ for guidance. In applying these standards, Staff has not met its burden of proving that: (1) the advertisement was misleading or (2) that any recipients were actually injured by the advertisement. At best, Staff has merely alleged such facts, and there is no evidence to support them.

Staff has alleged no facts to justify its position that the statement that the recipient has been selected to receive a special offer was false or misleading. The advertisement merely said the customer had been selected for an *offer*, it did not say the customer was guaranteed to receive a phone.³⁷

Further, Staff has not alleged that any potential recipient of the advertisement relied upon the statements contained therein, or that any recipient was damaged by acting in such reliance. It is well established that a required element of fraudulent or negligent misrepresentation is a pecuniary loss due to the customer's reliance on the information.³⁸ Similarly, to succeed on a claim under the Missouri Merchandising and Practices Act ("MMPA"), a plaintiff must prove, among other facts, that the deception resulted in an ascertainable loss of money or real or personal property.³⁹ No such losses are alleged or conceivably exist in this instance. If a recipient of the mailer mistakenly believed that he was pre-qualified for Lifeline service when in

³⁶ To succeed on a claim under the Missouri Merchandising and Practices Act, Plaintiff must prove: (1) the act, use or employment of; (2) a deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or a concealment, suppression or omission of a material fact; (3) occurring in connection with the sale or advertisement of any merchandise in trade or commerce; (4) resulting in an ascertainable loss of money or real or personal property; (5) occurring to a person who purchases or leases merchandise primarily for personal, family or household purposes. *See* MO. REV. STAT. § 407.020, et seq.; *Owen v. General Motors Corp.*, 2007 WL 1655760, *2 (W.D. Mo. 2007)

³⁷ *See* Missouri marketing material, attached as Ex. 6. The same analysis applies to the words printed on the envelope that contained this offer. Indeed, the statement that the recipient has been pre-selected in no way guarantees that recipient that he would receive a phone.

³⁸ *See e.g., Wellcraft Marine v. Lyell*, 960 S.W.2d 542 (Mo. Ct. App. W.D. 1998).

³⁹ *See* Section 407.025(1).

fact he was not, the sole consequence would be that he would not receive a service for which he was ineligible in the first instance.

Ultimately, if the Commission were to adopt Staff's standard, virtually all advertising by *any* company would be prohibited, since there are almost certainly "some" people, somewhere, who may misunderstand an advertisement at any given point. That surely cannot constitute grounds for the drastic remedy of ETC revocation.

4. Cintex's Advertising is Not Misleading.

The Complaint alleges that "some" recipients of the mailer were misled "to mistakenly infer that the commission had authorized Cintex to offer free phone service to them specifically, as a qualified recipient."⁴⁰ Cintex's mailer is not misleading and the Complaint offers no evidence or analysis to the contrary. First, the advertisement states *in clear twelve-point type, in the middle of the page*, that "[t]o qualify for the program you must participate in at least one of the following government programs. Please enclose a copy of one of the following: a benefit ID Card (Food Stamp card or Medicaid Card), a monthly statement from a government agency, or a copy of your LIHEAP Utility bill (if applicable)."⁴¹ The qualifying programs are listed prominently in a box almost directly in the middle of the page. The letter also states *in bold* **"Important: You cannot apply to the program if you or someone in your household is already enrolled in the lifeline program."**

And, just in case the reader missed this language, the mailer describes a three-step process in large, clear and prominent boxes, that to receive the free phone and Lifeline service, the consumer must "select the low-income program(s) in which you participate" and "enclose"

⁴⁰ Complaint ¶ 14.

⁴¹ See attached Ex. 6.

proof of participation in the applicable government program. Accordingly, the letter states explicitly, clearly, prominently, repeatedly, and in no uncertain terms, that consumers must satisfy certain conditions in order to qualify. The only way to conclude that the mailer is misleading is to completely ignore its clear and unambiguous language. Staff plainly ignores the language in the marketing material that demonstrably undermines its allegations.

Furthermore, even the language in the first sentence of the mailer, which is the primary focus of the Complaint, is truthful and clear. The letter correctly and accurately states that the recipient “has been selected to receive a special offer for a **FREE WIRELESS PHONE . . .**” The mailers were sent to Missouri households with incomes of less than \$30,000. Indeed, Cintex paid Infogroup, a well-established and highly-regarded marketing company that sells lists for direct marketing campaigns, more than \$35,000 to select these households on Cintex’s behalf. Thus, the recipients *were* “selected” to receive the offer. Staff, however, completely ignores the language in the mailer and transforms the words “you have been selected” into the words “you are a qualified recipient.”

Staff advocates that “some of the recipients were misled by the materials as a whole” despite the fact that the materials were truthful and despite the fact that the materials “go on to explain what is actually needed.”⁴² With an allegation based entirely on Staff’s *interpretation* of how consumers understood (or more accurately misunderstood) the truthful and accurate mailer, one would expect Staff to at least allude to evidence that supports its interpretation. Staff cites to no such evidence.

⁴² Complaint at ¶ 14.

If Staff's interpretation were accurate, and recipients of the mailer believed that they were "qualified recipient[s]," then one would expect many applicants to return their forms to Cintex without proof of their eligibility. After all, if they are already qualified, they do not need to prove that they are qualified. However, the overwhelming majority of applications received by Cintex included proof of eligibility (e.g., a copy of a Food Stamp card). Thus, applicants understood that receipt of the mailer by itself did not imply that they were qualified to receive Lifeline. The fact that the large majority of applicants included proof with their applications is conclusive evidence that recipients read and understood the mailer as intended. Recipients did not stop reading the mailer after the first sentence or first paragraph, as the Complaint implies. Staff's allegation that Cintex's advertising is misleading is plainly untrue.

C. CINTEX DID NOT MAKE MISSTATEMENTS TO REGULATORS.

In Count III, Staff alleges that Cintex made "misstatements to regulators." Despite the fact that one would expect, and fair treatment demands, a thorough investigation of the facts prior to making a serious allegation of this nature, Staff's investigation into the alleged misstatements was negligible, superficial, and flawed. Staff argues that there were two misstatements. First, Mr. Robert Felgar, general counsel of Cintex Wireless and a Cintex employee, is alleged to have misrepresented to the FCC the number of customers served by Cintex in Missouri. Second, Staff alleges that Cintex failed to disclose Liberty Wireless and Movida as having common ownership or management with Cintex. The allegations are simply wrong.

As alleged in the Complaint, in an email dated May 14, 2012, Mr. Felgar informed Kim Scardino, Deputy Division Chief of the FCC's Wireline Competition Bureau's

Telecommunications Access policy Division, that Cintex had “almost 10,000” customers in Missouri.⁴³ Staff suggests that Cintex failed to correct the record and inform the FCC that it actually had approximately 1,300 customers. Staff, however, is incorrect. On May 25, 2012 Cintex held a conference call with Staff counsel and Staff representatives Cully Dale, John VanEschen, Dana Parish, and Natelle Dietrich, during which it informed Staff that it had just 1,300 customers in Missouri. Staff brought to Cintex’s attention that Cintex had told the FCC that it had almost 10,000 Missouri customers. To correct that misstatement to the FCC, just after the conference call with Staff on May 25, 2012, Mr. Felgar sent an email to Ms. Scardino in which he informed her that the 10,000 figure was inaccurate, and that Cintex actually had approximately 1,300 customers in Missouri.⁴⁴ Accordingly, while Cintex did initially inform both the FCC and Staff that it had approximately 10,000 customers in Missouri, Cintex immediately corrected its inadvertent error on its own initiative.⁴⁵

Staff’s assertion that Liberty Wireless and Movida are affiliates of Cintex also is untrue. Staff’s evidence on this matter is limited to a Complaint filed by the United States Securities and Exchange Commission (“SEC”), which asserts that Mr. Greene is the CEO of Liberty Wireless, Movida, and Cintex Wireless. The SEC complaint, however, is inaccurate. Liberty Wireless and Movida are not corporate entities. Liberty Wireless and Movida are simply service marks registered by Cintex Wireless, LLC with the United States Patent and Trademark Office

⁴³ Complaint at ¶¶ 16-18.

⁴⁴ See Communications with Ms. Scardino, attached as Ex. 7.

⁴⁵ Note that Staff filed its Complaint on June 14, 2012, nineteen days after its conference call with Cintex. Yet Staff apparently did not contact Ms. Scardino during this time frame to ascertain whether Cintex had updated the record. Apparently Staff, having extracted an “admission” from Cintex during the conference call, was determined to use that information against Cintex in the Complaint, rather than inform Cintex that it believed that Cintex had an obligation to correct the record and provide it an opportunity to do so. Cintex requested the May 25th conference call in good faith in order to answer any questions regarding Cintex’s activities in Missouri. Cintex resolved to be open, honest, and transparent.

("USPTO") and used as trade names for a small number of non-Lifeline customers.⁴⁶ Put another way, Liberty Wireless and Movida are simply brands of Cintex, not affiliated companies.

Staff does not assert that the alleged misstatements are material, intentional, or that they serve some nefarious Cintex scheme. Staff does not even attempt to demonstrate that Cintex has benefited, or could benefit, from the alleged misstatements. Put simply, private companies and government agencies alike make inadvertent misstatements of fact. Such is a fact of life. Accordingly, Parties should be provided the opportunity to correct such errors, as Cintex has done prior to the filing of Staff's Complaint. Indeed, the Commission routinely provides parties with that opportunity. For example, the Commission granted a request by Assist Wireless, L.L.C. for leave to amend its application requesting designation as an eligible telecommunications carrier, in order to correct an "inadvertent misstatement."⁴⁷ In order to maintain consistency in its decisions, Cintex should be accorded similar treatment.⁴⁸

D. THE SEC LAWSUIT IS IRRELEVANT

Staff cannot show that Cintex violated Lifeline rules, or that Cintex is guilty of unlawful or unreasonable behavior in Counts I through III of its Complaint, and thus Staff hangs its case on the allegation that Cintex possesses "unsuitable leadership."⁴⁹ According to Staff, Cintex's leadership is unsuitable because Cintex's owner, Paul Greene, is being sued by the SEC for allegedly assisting another company inflate its earnings while Mr. Greene owned and led a

⁴⁶ See USPTO certificates, attached as Ex. 8.

⁴⁷ *In the matter of the Application of Assist wireless, LLC for Designation as an Eligible Telecommunications Carrier in the State of Missouri*, 2011 Mo. PSC LEXIS 940 (Mo.P.S.C. 2011).

⁴⁸ *Christ v. Southwestern Bell Tele. Co., L.P.*, 2003 WL 21276361, *5 (Mo.P.S.C. 2003) (holding that "[t]he Commission's seeks consistency in its prior [decisions] in order to provide reliable guidance."

⁴⁹ Complaint at ¶¶ 21-25.

company called APC Wireless.⁵⁰ This claim, however, fails for at least three reasons. First, as indicated above, the Commission lacks the power to adjudicate the claim since it does not allege any facts that constitute a violation of a law or Commission rule, order or decision. Second, Staff's standard for what constitutes "unsuitable leadership" is unprecedented, unworkable and unreasonable. Third, Cintex's operations, processes and procedures, which Staff did not investigate, demonstrate that its leadership is experienced, highly competent and committed to minimizing waste, fraud and abuse.

1. The Commission Lacks the Power to Adjudicate this Claim.

As discussed above, Section 386.390 provides that a complaint must "set forth in writing any act or thing done or omitted to be done . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission." Unsuitable leadership is not an "act or thing done or omitted to be done." Neither is unsuitable leadership a violation of any law, or of any rule, order or decision of the Commission. Thus, even if Cintex's leadership is unsuitable, which it most definitely is not, the Commission does not have the power to grant the Complaint on the basis of this claim.

Perhaps appreciating the flaw in this approach, the Complaint alleges that Cintex's designation should be revoked on the nebulous grounds that it "failed to advise Staff of either the underlying activities or the SEC's complaint, both of which Staff believes the Commission

⁵⁰ Mr. Greene denies any wrongdoing and is confident that he will ultimately prevail in the SEC civil case. Currently, the Court has delayed the case while considering whether it will allow the case to proceed forward. Specifically, on July 10, 2012, the Court issued an Order staying all discovery pending the Court's consideration of Mr. Greene's Motion to Dismiss, or, in the Alternative, for Summary Judgment, which if granted, will dispose of all issues in the case. *See Securities and Exchange Commission v. Familant et al.*, Minute Order, Case No. 1:12-cv-00119 (July 12, 2012). Nonetheless, even if the case is not dismissed outright, Mr. Greene will have later opportunities to have the case disposed of before trial or, if necessary, prevail at trial or on appeal.

would find material to its decision to grant an ETC designation . . .”⁵¹ However, there is no law or Commission rule, order or decision that required Cinex to disclose such information to the Commission on its own initiative. Cinex had an obligation to include certain elements, set forth in 4 CFR 240-3.570, in its Application and Cinex did so. To the extent that Staff believes applicants should provide additional information, Staff can request such information via data requests. Indeed, Cinex responded to a number of such requests in the application process and after receiving ETC designation. There is no *obligation*, however, that Cinex *guess* at what the Commission may “find material to its decision to grant an ETC designation.”⁵² Staff presumably knows what the Commission may find material, and it is Staff’s obligation to ask for that information.⁵³

In any event, the SEC complaint at issue was filed by the SEC on January 25, 2012, *after* the Commission issued its order designating Cinex an ETC on December 22, 2011. Thus, Cinex could not have “disclosed” the SEC Complaint in its September 9, 2011 Application.⁵⁴ Further, Staff’s contention that Cinex had an obligation to disclose the “underlying activities”⁵⁵ alleged in the SEC complaint, so that the Commission could consider these in its deliberations regarding Cinex’s ETC Application, is nonsensical.⁵⁶ Mr. Greene denies the allegations in the SEC complaint. He had the opportunity to settle the matter for a nominal amount but decided to fight instead. It defies logic to assert that a company or person has an obligation to disclose

⁵¹ Complaint ¶ 25.

⁵² *Id.*

⁵³ 4 CFR 240-3.570(5) provides that the Commission must find that an ETC application is in the public interest. There is no Commission order or decision, however, that requires an applicant for ETC status to disclose an unrelated allegation of civil accounting fraud so that the information may be considered by the Commission in its public interest analysis.

⁵⁴ Complaint ¶ 24.

⁵⁵ *Id.*

⁵⁶ Complaint ¶ 25

underlying activities which the company or person denies and which have not yet been alleged. Was Cintex supposed to *predict* what the SEC would *allege* were the underlying activities and then present those predictions to Staff? Simply stated, no law or Commission rule, order, or decision required Cintex to disclose the underlying facts of the SEC lawsuit, which had not yet been filed at the time of Cintex's ETC Application. Nor would such a requirement be reasonable.

2. The Complaint's Standard for "Unsuitable Leadership" is Unprecedented, Unworkable, and Unreasonable.

Staff's position is that an unproven allegation of civil accounting fraud by a government agency against a company's owner is grounds for revoking a company's authorization to participate in Lifeline. Such position is devoid of support in any statute, case law, or Commission, rule, order, or decision. It is also impractical and would prevent a significant number of companies from participating in the Lifeline program. Moreover, in cases such as this, where an ETC has a significant record of operations, the Commission should evaluate the likelihood that Cintex will comply with its rules, orders, and decisions based on that record, rather than on unrelated alleged misconduct.

i. Staff's Standard for Unsuitable Leadership is Unprecedented and Unworkable.

If the Commission were to adopt this standard, it *must* apply the same standard to other applicants and ETCs. It is well established that if an agency applies a policy or standard in one decision it must apply the same standard uniformly.⁵⁷ The reason for this is that unpredictability

⁵⁷ *Sunbeam Television Corporation v. Federal Communications Commission*, 243 F.2d 26, 28 (D.C. Cir. 1957).

and irregularity undermines public confidence and faith in the adjudicative process.⁵⁸ Further, an agency that does not apply its policies consistently “is engaged in self-contradiction.”⁵⁹

Thus, if the Commission adopts Staff’s standard and finds that Cintex’s designation should be revoked in large part because the SEC is suing Mr. Greene in an unrelated matter, the Commission *must* apply the same standard to other carriers.⁶⁰

As demonstrated by two recent cases, the Commission, to date, has not done so. First, on March 21, 2012, the United States Department of Justice (“DOJ”) filed a complaint against AT&T Corporation (“AT&T”) alleging that AT&T submitted “false and fraudulent” claims for payment to the FCC’s Telecommunications Relay Service (“TRS”) Fund, which is similar to the FCC’s low-income fund.⁶¹

The picture portrayed by the DOJ complaint is shocking. In an FCC program similar to Lifeline, AT&T collected millions of dollars from the government⁶² for calls that were 95 percent fraudulent. The fraudulent calls were placed by criminals in Africa to steal from U.S. merchants, probably costing millions of dollars.⁶³ The DOJ alleges that AT&T *deliberately* ignored FCC rules designed to prevent fraud and instead adopted “procedures that it knew would

⁵⁸ See *Luis Reyes-Reyes v. John Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004).

⁵⁹ See *Jennifer Ho v. Shaun Donovan*, 569 F.3d 677, 681 (7th Cir. 2009).

⁶⁰ Similar to federal agencies, Missouri agencies are required to satisfy basic standards of due process and are prohibited from making decisions that are arbitrary, unreasonable or capricious. See e.g., *Missouri National Education Association, et al. v. Missouri State Board of Education, et al.*, 34 S.W.3d 266, 281 (Mo. Ct. App. W.D. 2000).

⁶¹ *United States of America ex rel. Constance Lyttle v. AT&T Corporation*, Civil Action No. 10-1376 (filed on March 21, 2012) (“DOJ Complaint”).

⁶² The complaint explains that “TRS funds are United States funds. . . Because the TRS Fund is included in the federal budget, the FCC is required to include the TRS Fund in its annual financial statement. Expenditures from the TRS Fund accordingly reduce the government’s and the FCC’s total budgetary resources.” *DOJ Complaint* at ¶ 11.

⁶³ The DOJ complaint states that AT&T “received hundreds of complaints from the U.S. merchants on the receiving end of fraudulent IP Relay calls.” *DOJ Complaint* at ¶ 17. AT&T apparently was not moved by these complaints.

not verify” whether the caller was placing a legitimate call entitled to government support.⁶⁴ AT&T had full knowledge of these facts, yet consciously decided to ignore FCC rules and instead adopted procedures that would facilitate its continuation. It then asked the TRS Fund administrator for reimbursement for the calls it knew were fraudulent. It did this, according to the DOJ, because it wanted to meet its budget.

There is no rational basis upon which the Commission can conclude that an SEC lawsuit alleging accounting fraud is grounds for revoking a carrier’s ETC status, while simultaneously concluding that a lawsuit brought by the United States Government alleging *fraud on the government, in a program similar to Lifeline*, is acceptable.

Second, on April 19, 2012 the State of New York sued Sprint Nextel Corp. (“Sprint”) for its “knowing and *fraudulent* failure to collect and pay more than \$100 million in New York sales taxes . . . since July 2005.”⁶⁵ Virgin Mobile, a wholly-owned subsidiary of Sprint, filed an application to be designated an ETC in Missouri on February 1, 2012 in Case No. RA-2012-0264.

The New York Complaint alleges that Sprint’s decision not to collect and pay taxes “arose out of a *nationwide scheme* to gain an advantage over its competitors” and was “concealed” from taxing authorities.⁶⁶ Sprint also is alleged to have “misled millions of New York customers.”⁶⁷ The complaint asserts that “senior executives” authorized the scheme.⁶⁸ In short, a government agency is suing Sprint for engaging in a fraudulent scheme to deprive the

⁶⁴ *Id.* at ¶¶ 26-31.

⁶⁵ *People in the State of New York v. Sprint Nextel Corp., et al.*, Index No. 103917-2011, at ¶ 1 (filed April 19, 2012) (“*NY Complaint*”).

⁶⁶ *NY Complaint* at ¶¶ 2-3.

⁶⁷ *Id.* at ¶ 8.

⁶⁸ *Id.* at ¶ 61.

State of New York of more than 100 million dollars. Virgin Mobile is one of the largest wireless ETCs in the country.

As is the case with the lawsuit against AT&T, the lawsuit against Sprint is far more relevant to Virgin Mobile's fitness as an ETC than the lawsuit against Mr. Greene is relevant to Cintex's fitness. Furthermore, as far as Cintex can tell, neither AT&T nor Sprint has formally disclosed these actions to the Commission.

If the Commission is nevertheless determined to consider "character" in licensing matters, it should follow the FCC's approach, which has substantial experience in this regard. The FCC considers whether applicants possess "the basic threshold character qualifications necessary to be a licensee or permittee."⁶⁹ The FCC explained that in this context the "basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies."⁷⁰ In this context, the FCC will consider an "applicant's or licensee's willingness to violate other laws, and, in particular, to commit felonies . . ."⁷¹ The FCC may consider misdemeanor convictions "where there is a pattern of such convictions."⁷² The FCC does not consider civil violations unless "a specific *finding* of fraudulent representation *to another governmental unit is made*."⁷³ The FCC clarified that a "finding" meant that "there must be an ultimate adjudication by an appropriate trier of fact, either by a government agency or a court,

⁶⁹ *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 10 F.C.C.2d 1179, ¶ 6 (1985) ("*Policy Regarding Character Qualification*").

⁷⁰ *Id.* at ¶ 7.

⁷¹ *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252 (1990).

⁷² *Id.* at n.3.

⁷³ *Id.* at ¶ 37.

before we will consider the activity in our character determinations.”⁷⁴ Mere allegations are not sufficient.⁷⁵ In fact, not even consent decrees are sufficient since the “act of consenting to an agreement . . . does not necessarily imply wrongful conduct.”⁷⁶

Thus, under the FCC’s standard, the SEC complaint is irrelevant since (1) mere allegations are not considered, and (2) the SEC case is a civil matter and the complaint does not allege that Mr. Greene made misrepresentations to another government unit.⁷⁷

The FCC’s relatively narrow inquiry into the “character” issue was adopted after a review of a substantial record and with “the experience gained from years of evaluating the character qualifications of numerous applicants . . .”⁷⁸ The FCC explained that broad inquiries lead to “claims of inequitable treatment,” “complexity” and lengthy proceedings.⁷⁹ Generally, the FCC moved away from inquiries into whether licensees had good moral character and focused more

⁷⁴ *Id.* at ¶ 48.

⁷⁵ The Complaint does not cite any authority for the proposition that a company may be prevented from participating in a government program as a result of unsubstantiated allegations of civil wrongdoing. One important reason why decisions should not be based on mere complaints is that agencies frequently lose in court. The SEC is no exception. *See, e.g., S.E.C. v. Perry*, CV-11-1309 R, 2012 WL 1959566 (C.D. Cal. May 31, 2012) (Court grants summary judgment in favor of Defendants Michael Perry and Scott Keys); *S.E.C. v. Woodruff*, 778 F. Supp. 2d 1073 (D. Colo. 2011) (summary judgment in favor of former QWest president Afshin Mohebbi and accountant James Kozlowski following allegations that QWest engaged in schemes to overstate revenue); *S.E.C. v. Charles Johnson, et al.*, Case No. 1:05-CV-00036 (April 29, 2008) (jury verdict finding no liability as to defendants Wakeford and Kennedy in alleged accounting fraud case). In addition, on numerous occasions the Commission has expressed a deep respect for due process and fundamental fairness. *See e.g., Request of Southwestern Bell Telephone, for Competitive Classification*, 2005 Mo. PSC LEXIS 1269, *15 (Mo.P.S.C. 2005) (“the Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition . . .”); *Missouri-American Water Company’s Request for Authority to Implement a General Rate Increase for Water Service Provided in Missouri*, 2007 Mo. PSC LEXIS 1197, *160 (Mo.P.S.C. 2007) (“[t]he Commission went to great lengths to ensure that all due process requirements were satisfied . . .”). Revoking Cintex’s ETC designation on the basis of a complaint filed by lawyers is inconsistent with these principles.

⁷⁶ *Id.* at n.64.

⁷⁷ FCC precedent should carry significant weight because Lifeline is a federal program under the FCC’s purview.

⁷⁸ Policy Regarding Character Qualifications at ¶ 6.

⁷⁹ *Id.* at n.8.

closely on indicators that licensees would follow FCC rules.⁸⁰ If the Commission deems character relevant, it should adopt a workable approach, similar to that of the FCC.

ii. Applying Staff's Standard for "Unfit Leadership" is Unreasonable and Poor Policy.

Rather than pass judgment on Cintex leadership based on an unrelated SEC lawsuit, the Commission should focus on Cintex's actual operations. Cintex has extensive processes and procedures to prevent waste, fraud and abuse. For example, Cintex has two layers of protection to avoid providing duplicate Lifeline benefits. Before an application is accepted, the applicant's name, address, last four digits of social and other information is inputted into its back end systems. If the applicant is already receiving a Lifeline benefit at that address, Cintex will not receive an additional benefit for that applicant. In addition, at the end of the month, an independent Lifeline compliance company called CGM, LLC ("CGM") files Cintex's FCC Form 497 on Cintex's behalf and completes a second independent check to ensure that Cintex is not requesting more than one Lifeline benefit per applicant. Cintex pays CGM a significant amount of money each month to perform this service. That is not all, however. *Cintex goes beyond what is required by any rule* by having CGM check for duplicates not only in Cintex's own customer base, but in the customer base of CGM's other ETC clients, as well.⁸¹ Each of Cintex's Missouri customers went through this additional duplicate check.

⁸⁰ "Though no formal statistics are available, the SEC loses a significant percentage of the cases that it litigates. It is estimated that the SEC loses approximately 35% to 40% of the cases it litigates. With such a track record, common sense and due process demand that no conclusion can be drawn as to the validity of any SEC complaint until after the litigation process has been concluded. Indeed, the SEC frequently loses on appeal even after winning at trial, and thus only after the full exhaustion of appeals has concluded in favor of the SEC is it safe to apply any weight to SEC allegations.

⁸¹ See CGM Memorandum explaining the duplicate database service, attached as Ex. 9.

Cintex also goes beyond what is required by the rules when it performs face-to-face sales.⁸² In addition to requiring proof that the applicant is eligible for Lifeline, Cintex requires applicants to present identification that includes an address. The sales person is required to make a copy of the identification which is reviewed by a Cintex employee at headquarters. The Cintex employee compares the application and the identification to verify that the addresses match. This prevents the applicant and the sales person from providing fake addresses to circumvent Cintex's checks for duplicates. There is no rule that requires Cintex to take this precaution. Yet Cintex does so in order to prevent waste, fraud and abuse.

Cintex has implemented other processes that it believes ensure the integrity of its Lifeline program. For instance, Cintex does not rely on sales people to verify that applicants have provided adequate proof of eligibility. Rather, that determination is made by Cintex employees whose salaries are not tied to sales volumes. In short, Cintex has developed numerous thoughtful processes and procedures, some required by regulators and others not, to minimize waste, fraud and abuse. Far from being worthy of revocation, Cintex has adopted and developed best practices from which other ETCs can learn.

Significantly, Cintex has demonstrated its commitment to compliance and the Lifeline program to the Commission. For example, after Cintex started to receive applications from Missouri consumers, it became apparent that many failed to understand the standard Commission approved applications and frequently signed on the incorrect line. Cintex was uncertain whether

⁸² Cintex has never performed face-to-face sales in Missouri.

the Commission viewed such applications as acceptable, and therefore requested clarification.⁸³ Cintex directed its employees to handle applications consistent with Staff's guidance.

In addition, Cintex has received numerous data requests from the Commission and, to the best of its knowledge, has responded timely⁸⁴ and truthfully. Further, in May, Cintex requested a conference call with Staff and Staff counsel to address any questions or concerns it may have regarding Cintex's activities in Missouri. Cintex stated during the May 25, 2012 conference call with Staff and Staff counsel that it was prepared to be transparent and honest, and wished to help in any way that it could. Cintex counsel followed-up with emails to Staff on May 30, 2012 and June 11, 2012, providing additional information to Staff and asking if Staff needs anything else from the Company. Staff counsel stated that it did not think that it needed anything else from the Company.

Finally, despite the fact that Cintex is currently not being reimbursed from USAC for services provided in Missouri, Cintex nevertheless continues to provide free service to 1,300 customers at its sole expense. Far from reflecting unfit leadership, Cintex's interactions with Staff and its customers exhibit a thoughtful and responsible approach to its relationship with the Commission and the Lifeline program generally.

There can be no doubt that Cintex's considerable record as an ETC is substantially more indicative of the fitness of its leadership than unproven allegations by SEC lawyers regarding the alleged conduct of Cintex's owner in an unrelated matter. It is unreasonable and illogical to

⁸³ See Email from the Commission's Utility Policy Analyst, Dana Parish, attached as Ex. 10.

⁸⁴ In some cases Cintex requested extensions.

conclude that a well-operated and responsible company also possesses unfit leadership. But that is precisely the position advocated by Staff.⁸⁵

IV. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO PROVISIONALLY REVOKE CINTEX'S ETC DESIGNATION

The Commission's rules include detailed procedures regarding complaints. Staff, however, does not explain how it possesses the authority to "provisionally" revoke Cintex's ETC designation, and in fact, no such authority exists. Commission rule 4 CSR 240-2.150 provides that "(1) The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument. (2) The commission's orders shall be in writing and shall be issued as soon as practicable *after the record has been submitted* for consideration." [emphasis added]. Thus, the Commission's rules require that it reach a decision *after* it is in possession of a complete record. The rules do not contemplate or allow preliminary relief, which is what Staff is requesting.

Preliminary relief, such as a preliminary injunction, is an extraordinary measure since it involves granting relief before evidence is heard. Such relief therefore has the potential to cause injustice to one or more of the parties. Nonetheless, Staff does not explain why such extraordinary relief, and departure from the Commission's normal procedures, is appropriate.

Assuming that the Commission has the requisite authority, which it does not, the Commission should grant the preliminary relief requested by Staff only if Staff shows that the facts and circumstances satisfy the civil court standard for granting a preliminary injunction. Adopting this approach would prevent injustice.

⁸⁵ The Complaint does not allege or suggest that Cintex's operations, processes, or procedures are flawed, insufficient, or below industry standards. In fact, while Staff did provide Cintex with a number of data requests before it filed its Complaint, such requests did not address Cintex's processes and procedures.

Accordingly, Staff must show a “probability of success on the merits.”⁸⁶ As discussed at length, Staff’s attempt to revoke Cintex’s ETC designation is an extreme measure warranted only in cases of egregious misconduct. Yet no such egregious misconduct is alleged. In fact, Staff, which is understandably concerned with fraud, has not alleged that Cintex has engaged in any fraud. Revoking Cintex’s ETC designation based on the facts alleged would be unprecedented in the country. As described in detail above, Staff has failed to show, or even properly allege, that any of Cintex’s actions were unlawful or unreasonable and, therefore, cannot show a substantial likelihood of success on the merits.

In addition, the Missouri Supreme Court stated in *State ex. rel. Director of Revenue v. Honorable A. Rex Gabbert* that one must weigh “the movant’s probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and the public interest.”⁸⁷ Staff has not alleged irreparable harm to anyone, and in fact none exists. There is no ongoing waste of federal government resources, there is no ongoing fraud (and never has been), and there is no ongoing harm to consumers. In fact, the opposite is the case as Cintex decided on its own initiative to continue to serve its Missouri customers at its own expense. In addition, Cintex is not currently marketing in Missouri and has no intention of doing so until this matter is resolved. *Furthermore, Cintex is prepared to commit to refraining from any marketing in Missouri pending the final disposition of the Complaint.* Accordingly, the preliminary relief requested by Staff is unnecessary and overly broad.

⁸⁶ *State ex. Rel. Director of Revenue v. Honorable A. Rex Gabbert*, 925 S.W.2d 838, 839 (Mo. en banc 1996).

⁸⁷ *Id.*

The Missouri Supreme Court in *Gabbert* also made clear that the Commission must consider the harm that would come to Cintex if the requested preliminary relief were granted. As discussed in the above introduction, such relief would irrevocably damage its reputation, seriously damage its ability to secure additional ETC designations, and possibly result in a domino effect of revocations in other states. The Commission should allow a full record to develop before it decided a matter with such significant consequences to Cintex.

The Court in *Gabbert* stated that “[i]t is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy.”⁸⁸ Staff has not even attempted to satisfy its obligation, nor can it. Because the Commission does not have the authority to “provisionally” revoke Cintex’s ETC status, nor has Staff adequately plead sufficient facts for such preliminary relief even if the Commission did have such authority, the Commission should not provisionally revoke Cintex’s ETC status pending the resolution of Staff’s Complaint.

V. CONCLUSION

Staff has not, and cannot, meet its burden that it is more likely than not that Cintex’s actions were unlawful or unreasonable such that its ETC status should be revoked. Indeed, Cintex has not violated any of the Commission’s rules, nor has Staff alleged that it has done so. Instead, Staff has made allegations that are without merit and unsupported by the facts. If the Commission were to revoke Cintex’s ETC designation, not only would that decision have devastating effects on Cintex’s financial stability and business model, but it would set a dangerous precedent whereby a carrier would lose its ETC designation despite not violating any statute, despite not violating any of the Commission’s rules or statutes, despite a lack of any

⁸⁸ *Id.*

discernable facts that support any alleged wrongdoing and despite its undisputed efforts to operate its Missouri operations in a trustworthy manner. Accordingly, the Commission should rightfully allow Cintex to maintain its ETC designation and dismiss Staff's Complaint with prejudice.

If Staff is disposed to move for expedited treatment, Cintex will not oppose and will work with Staff to put together an expedited procedural schedule.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing has been emailed this 16th day of July 2012 to all counsel of record.

/s/ Mark Johnson

Attorney for Cintex Wireless, LLC