



May 21, 2013

Mr. David Corliss
City Manager
City of Lawrence
PO Box 708
Lawrence, Kansas 66044

Dear Mr. Corliss:

I am writing on behalf of WOW! Internet, Cable and Phone to express concern regarding the request for economic development funds by Community Wireless Communications dba Wicked Broadband ("CWC"). This Application was submitted as part of the consent agenda at the May 14, 2013 city commission meeting.

The CWC proposal requests consideration for the following in order to facilitate the expansion of a fiber based Internet service in Lawrence.

- One time infrastructure grant of \$500,000;
- Waiver of the first \$20,000 in franchise fees each year for five years – retroactive to third quarter, 2013;
- Co-location of splice cases in City hand holes where CWC currently leases fiber from the City of Lawrence;
- Permission to splice fiber lease from the City;
- 30 year lease at \$10 on a 12-count fiber buffer tube connecting the City Hall with the Law Enforcement Center; and
- 30 year lease at \$10 on 24-count fiber whenever the City installs new fiber optic cable.

For the reasons we set forth below, the City should reject the Application in its entirety.

Background

As you know, WOW! Internet, Cable and Phone has (through its subsidiary Knology and predecessor companies) provided cable television, high speed data and telephone services in Lawrence since 1972. WOW! is a regional company that operates in the Midwest and Southeastern United States, and is currently the 9th largest cable television provider in the country. WOW!'s hybrid coax and fiber system allows it to provide video, high speed data and phone services to its Lawrence customers, including Internet speeds up to 50 Mbps for residential customers and any speed desired with business customers connected via fiber. (dependent upon customer need and customer premise equipment) WOW! has been widely recognized for its outstanding services and customer service.

WOW! has nearly 30,000 customers in Lawrence, and has roughly 102 full time local employees. Over the years, WOW! and its predecessors have invested millions of dollars in the construction of its state of the art communications system and intends to continue invest in the market to meet customer demand and provide services that give customers that are competitively priced. Currently, we are upgrading equipment and circuit routes in order to provide increased speeds in the future.



As a franchised cable television provider, WOW! provides capacity and support for local PEG channels, and pays the City nearly \$1 million in annual franchise fees. Moreover, WOW! provides discounted cable and Internet service to schools and government facilities. WOW! has never asked for fee waivers, concessions or governmental subsidies or assistance.

Community Wireless Communications Co., d/b/a Wicked Broadband

CWC applied for and was granted a state-issued video service authorization (or franchise) from the Kansas Corporation Commission in 2009. In the past, there has been discussion whether CWC had any intention of providing truly competitive video service because its video offering was limited to access to Netflix, Hulu and other services delivered via an Internet application. The contractual arrangement for subscription TV with Dish Network takes away any question of defining CWC as a “cable operator.” Per K.S.A. 12-2022, CWC is a “video service provider.” K.S.A. § 12-2022(j) defines “video service provider” as a “cable operator” (as defined in 47 U.S.C. §522(5) or a “competitive video service provider.”

The above designation is important because CWC would be required to pay franchise fees on the video service (K.S.A. § 12-2024(b-e). Further, CWC is under obligation to pay the City of Lawrence 5% of its broadband revenue. While there is no legal precedent for the City to request fees on broadband revenue, in 2010 CWC offered this in exchange for access to City-owned fiber along 23rd street for a one-time payment of \$30,000. CWC’s new request to receive a waiver for the first \$20,000 in franchise fees is disingenuous and not consistent with the previous deal made with the City of Lawrence. The \$30,000 access to City owned fiber was provided at well below market rates to CWC, in exchange for the commitment to pay such fees.

CWC has received favorable treatment in the past and now asks for more money, favorable treatment and concessions, while competitors like WOW! and AT&T (and their customers) pay full freight. The City should anticipate legal challenges to any further subsidies directed only to CWC.

Use of Taxpayer Money to Subsidize One Competitor over Another is Bad Public Policy and is Inconsistent with Applicable Law

There is significant competition in Lawrence for communications related services. WOW! (and previous companies) have competed in the Lawrence marketplace for phone, Internet and TV services with AT&T and others since 2001. In addition to AT&T as a main competitor, wireless carriers (like AT&T, Verizon and Sprint) and satellite companies (like Direct TV and Dish Network) also provide alternative choices for Lawrence residents for phone, internet and video services.

We welcome fair competition in the marketplace. Marketplace competition results in better services at lower prices. Former FCC Chairman Kevin Martin described the benefits of unfettered competition in this way:

“[T]he Commission has tried to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest. Competition is the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products. Competition and choice in the video services market will benefit the consumer by resulting in lower prices, higher quality of services, and generally enhancing the consumers’ experience by giving them greater control over the purchased video programming. We need to continue our efforts



to create a regulatory environment that encourages entry into this market and more choice for consumers.”¹

Lawrence residents have many existing viable choices for communications services to meet their telecommunications and video needs, with various technologies and at price points that are affordable and reasonable. That is a direct result of marketplace competition. **Still, this robust marketplace competition is reliant on a regulatory landscape that is nondiscriminatory and competitively neutral, so that one competitor is not given an advantage over another.** This notion of competitive neutrality (especially in the communications arena) is not just good public policy, it is legally required.

Section 253(a) of the Communications Act declares that state and local governments are prohibited from imposing any legal requirement that may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."² Section 253(c) preserves the "authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, **on a competitively neutral and nondiscriminatory basis**, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."³ In applying Section 253, the Commission has stated that it will consider whether the state action "materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment."⁴

The provision of subsidies, concessions and benefits to one telecommunications competitor over another violates both the letter and the spirit of this Federal law. It is discriminatory and certainly limits the ability of competitors like WOW! to "compete in a fair and balanced legal and regulatory environment."

Kansas state law has similar requirements regarding the nondiscriminatory management of public rights of way. K.S.A. 17-1902(d) ("The authority of a provider to use and occupy the public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the city. A city may exercise its home rule powers in its administration and regulation related to the management of the public right-of-way provided that **any such exercise must be competitively neutral** and may not be unreasonable or discriminatory.") Moreover, the Video Competition Act, K.S.A. § 12-2021, et seq. also makes it clear that competitive video service providers and cable operators are to receive equal treatment under the law.

WOW! and its former owners have invested millions of dollars in private capital as a speculation risk and have competed fairly with other Lawrence communications service providers. Companies like WOW! and AT&T are willing to invest millions of dollars in a community like Lawrence so long as there is a level regulatory playing field. Not once has WOW! or its predecessors asked for concessions from the City. Should the City approve the CWC Application, other competitors should be provided the same funding and concessions in order to be treated on a competitively neutral basis. With city budgets under

¹ Written Statement of the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, Before the Senate Committee on Commerce, Science and Transportation, U.S. Senate (February 1, 2007).

² 47 U.S.C. § 253(a).

³ 47 U.S.C. § 253(c).

⁴ *In re California Payphone Association*, 12 FCC Rcd 14191, at ¶ 31 (1997); and *TCI Cablevision of Oakland County*, FCC 97-331, at ¶ 98 (1997).



taxpayer scrutiny, approval of CWC's Application would and should be subject to public criticism and questioning as to whether this is the best use of economic development funds.

These same competitive neutrality considerations apply to every aspect of the CWC Application, including the City granting CWC access to fiber for \$10. This is of course far below the lowest market-based price. If the City has excess fiber and desires to sell it, then it should be sold at or near market value, with all market participants having an equal opportunity to purchase the fiber. It should not be given away to CWC.

The Competitive Marketplace Will Respond to Consumer Demand for Ultra High Speed Services, Without Taxpayer Funds and Without the Marketplace Distortion Caused by Government Subsidies Directed to Only One Marketplace Participant

The CWC Application outlines in detail the need for Google-like services. Although, there is certain seductive appeal to the 1 Gigabit service to the home via fiber, the City must question if there really is market demand for such service in Lawrence. We suggest that, if and when there is, the private marketplace will fulfill that demand without the use of taxpayer funds. The Application states that other competitors have fallen behind and the only true alternative for faster Internet and accompanying growth in the local economy is Wicked Broadband---and only with economic development funds. Following the announcement on April 16 that Wicked Fiber was created to provide Google-like services, Lawrence residents were asked to pre-register to determine what location would receive the Internet products priced at \$50-100 per month. Although we may not have the most current information, it is our understanding that none of the Lawrence neighborhoods have qualified per the requirements first set forth by Wicked Fiber.

WOW! is absolutely dedicated to the Lawrence community and is committed to providing services in the community for a long time. An entire infrastructure and technology study is underway at WOW! and plans are in progress to roll-out market appropriate services as they become available and as warranted by consumer need. This commitment includes faster Internet speeds. As preparation for future product offerings, WOW! recently dropped the practice of charging for additional bandwidth use that exceeds specific allotments in Internet packages. This has been very well received in the marketplace.

Finally, the City staff should review the history of CWC and Freenet. This study should outline the requests that Mr. Joshua Montgomery has presented to the City, all in attempts to gain some government-sanctioned competitive advantage. Beyond the requests made, staff should also determine the success of these endeavors and whether or not the investments and concessions have yielded the expected results. In the end, if the City determines to fund this type of project, it should both carefully analyze the qualifications of the ultimate recipient and the ultimate impact upon the overall competitive landscape for communications services. The City Commission is tasked to represent all Lawrence residents and businesses and not set a standard of favoring one company over another when there is an established competitive environment giving residents and businesses choices. There is no evidence that the City has suffered a lack of economic growth because of some lack of high speed data choices.

The bottom line is: there is an inherent inequity in using the tax and other resources of government to prop up one private enterprise, to the detriment of the other competitors in the marketplace. Moreover, this type of high-end investment jeopardizes City revenues on a highly speculative venture that, if unsuccessful, could result in more taxes and higher rates for all City services. It is unfair to use tax dollars, which all residents are compelled to pay, to finance a single company that is providing optional goods and services enjoyed by only some.



We look forward to further conversations and meeting regarding this subject. In the meantime, if you have any questions, please feel free to call.

Sincerely,

Debra Schmidt
System Manager – Lawrence Division
WOW!

cc: Diane Stoddard, Assistant City Manager