

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of a General Investigation of)
TAG Mobile, LLC to Show Cause Why)
This Commission Should Not Initiate) Docket No. 16-TAGC-323-SHO
Sanctions and Fines and Cancel, Suspend)
and Revoke Any Authority the Carrier)
Currently Holds.)

STAFF'S RESPONSE TO TAG MOBILE, LLC'S RESPONSE TO SHOW CAUSE ORDER

The Staff of the Kansas Corporation Commission (Staff and Commission, respectively) hereby responds to the *Response of TAG Mobile, LLC to Show Cause Order*, filed in this docket on February 17, 2016. In support of its response, Staff states as follows:

I. BACKGROUND

1. On November 15, 2012, in Docket No. 12-TAGC-843-ETC (12-843 Docket), the Commission issued an Order (12-843 Order) designating TAG Mobile, LLC (TAG) as a Lifeline-only Eligible Telecommunications Carrier (ETC) in specific wire centers served by Southwestern Bell Telephone Company, d/b/a AT&T Kansas (AT&T) in Kansas. The Commission's 12-843 Order granted TAG Lifeline-only ETC status for the purpose of receiving federal and state Lifeline support. Pursuant to federal and Kansas law, the 12-843 Order required TAG to "offer the services supported by federal universal service support mechanisms under 47 U.S.C. § 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another ETC) throughout the service area for which designation is received."¹

2. The 12-843 Order made clear that in order to obtain low-income Lifeline wireless ETC designation from the Commission, "TAG must utilize its facilities for all calls to or from its

¹ 47 U.S.C. § 214(e)(1)(A). See K.S.A. 66-2008(b).

Kansas customers.”² The 12-843 Order also required TAG to pass along to end-user consumers the entirety of its Kansas Lifeline Service Program (KLSP) discount.³

3. On January 14, 2016, the Commission issued in this docket an *Order to Show Cause* (16-323 Order) requiring TAG to show cause why it should not be subject to sanctions and fines and its ETC designation should not be cancelled, suspended and/or revoked. Attached to the 16-323 Order was a confidential “Independent Sales Organization Agreement” between TAG and Selectel, Inc. (TAG-Selectel Agreement or Agreement), effective October 20, 2014, detailing TAG’s affiliation with Selectel and forming a significant basis for Staff’s December 23, 2015, Report and Recommendation adopted by the 16-323 Order.⁴

4. In the 16-323 Order, the Commission found that ETCs who want to receive Kansas Universal Service Fund (KUSF) support for providing Kansas Lifeline service must meet the “own facilities” requirement of K.S.A. 66-2008(b).⁵ The Commission further found that Selectel, Inc. (Selectel), which has no ETC status in Kansas, was offering Lifeline service in Kansas through TAG’s ETC designation.⁶ Moreover, the Commission found TAG was not providing voice telephony service to low-income consumers as required by 47 C.F.R. 54.101(a), was not utilizing its own facilities or a combination of its own facilities and resale of another carrier’s services, and was not passing along its entire Lifeline discount to the end-use consumer.⁷

5. On February 17, 2016, TAG timely responded to the 16-323 Order.⁸ In particular, TAG alleged that: (1) TAG has met the “own facilities” requirement for providing Lifeline service

² Staff’s Report and Recommendation, p. 17, adopted as part of the 12-843 Order at ¶ 10.

³ 12-843 Order, ¶ B.

⁴ See 16-323 Order, ¶ 10.

⁵ 16-323 Order, ¶ 4.

⁶ 16-323 Order, §§ 7, 10.

⁷ 16-323 Order, §§ 7-8, 10.

⁸ Response of TAG Mobile, LLC to Show Cause Order (Feb. 17, 2016) (TAG Response).

pursuant to 47 U.S.C. § 214(e)(1)(A);⁹ and (2) TAG is passing along the entire Lifeline discount to end-use consumers, but is merely retaining the portion of the discount (i.e., the support) it needs “to apply to the costs of providing its portion of the services” and paying Selectel the rest “for the portion of the services Selectel provides.”¹⁰

6. TAG concludes that any Commission penalties or other sanctions against TAG are unwarranted,¹¹ and although TAG believes the TAG-Selectel Agreement conformed to “all FCC and KCC requirements, upon learning . . . that Staff felt otherwise, TAG terminated its agreement with Selectel.”¹²

II. STAFF’S RESPONSE TO TAG

- (1) TAG did not fulfill the requirement that it offer Lifeline services using “a combination of its own facilities and resale of another carrier’s services” through the TAG-Selectel Agreement

7. TAG appears to be arguing that it was offering Lifeline services using “a combination of its own facilities and resale of another carrier’s services” through some kind of lease or acquisition provision with Selectel and implies it was using its own facilities through a “commercial agreement” with Selectel.¹³ However, the TAG-Selectel Agreement terms do not support this conclusion.

8. TAG’s implication that it was using its own facilities through a “commercial agreement” with Selectel would only be relevant here if TAG were leasing or acquiring unbundled network element (UNE)-like facilities *from* Selectel to be used by TAG, because that is the kind of “commercial agreement” analyzed by the Commission in the 06-1277 Order, on which TAG

⁹ TAG Response, ¶¶ 8-11.

¹⁰ TAG Response, ¶ 13.

¹¹ TAG Response, ¶ 14.

¹² TAG Response, ¶ 15.

¹³ TAG Response, ¶¶ 2, 8.

relies.¹⁴ However, nothing in the TAG-Selectel Agreement provides for acquiring or leasing any facilities or services *from* Selectel, let alone UNE-like facilities or services.

9. The TAG-Selectel Agreement makes it quite evident that Selectel is providing the Lifeline services, and presents no evidence that Selectel is doing so with TAG facilities. Under the Agreement:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. According to TAG, it has been using “other facility arrangements” to provide Lifeline service, namely “providing service over TAG’s facilities” while also using “facilities obtained by Selectel” to handle “some of TAG’s traffic.”²⁰ The trouble here is that the TAG-Selectel Agreement states that Selectel itself [REDACTED]

¹⁴ See TAG Response, ¶ 2, fn. 5. See also Docket No. 06-GIMT-1277-GIT, Order (Nov. 28, 2006).

¹⁵ Agreement, p. 1.

¹⁶ Agreement, p. A-1.

¹⁷ Agreement, p. A-2 (*italics added*).

¹⁸ Agreement, p. A-2.

¹⁹ Agreement, p. A-2.

²⁰ TAG Response, ¶ 10.

[REDACTED]

[REDACTED] Therefore, in practice under the Agreement, [REDACTED]

[REDACTED]

11. The FCC has reaffirmed that the only carriers that will be deemed to meet the ETC requirements of 47 U.S.C. § 214(c)(1), and thus, authorized to provide Lifeline service, are carriers that provide voice telephony as defined under section 47 C.F.R. 54.101(a) as amended, using their own facilities. Hence, a Lifeline-only ETC does not meet the “own facilities” requirement of section § 214(c)(1) if its only facilities are those used to provide functions that are no longer the Lifeline-supported “voice telephony service” under amended rule 54.101, such as access to operator service or directory assistance.²² In this case, not only was TAG failing to use its own facilities to provide the Lifeline-supported services – it was not providing any of the services. As clearly listed in paragraph 9 above, Selectel was providing the supported services in their entirety.

12. Therefore, TAG was not fulfilling the “own facilities” requirement for providing Lifeline service.

(2) TAG unlawfully allowed Selectel, a non-ETC provider, to provide Lifeline services for end-use customers which TAG then claimed as its own Lifeline customers

13. TAG was granted ETC status in the 12-843 Docket. Selectel has never been granted ETC status, federally or in Kansas.²³ Therefore, TAG alone is authorized to provide Lifeline service in Kansas.²⁴ Simply put, Selectel was using TAG’s ETC designation to sign up Lifeline customers under TAG’s name. TAG then claimed the customers as its own and received the Lifeline

²¹ Agreement, pgs. 1, A-2.

²² See *In the Matter of Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, Report and Order and Further Notice of Proposed Rulemaking, Docket Nos. 11-42, 03-109, 96-45 and 12-23 (Feb. 6, 2012), ¶ 366.

²³ Selectel currently has an ETC petition pending with the FCC. See <https://www.fcc.gov/general/lifeline-compliance-plans-etc-petitions>.

²⁴ See K.S.A. 66-2008(b); K.S.A. 66-2006(c).

reimbursement. As a non-ETC designated carrier, Selectel has no legal authority to provide Lifeline service, and TAG has no legal basis to contract with Selectel to provide such services on TAG's behalf.²⁵

14. As mentioned above, [REDACTED]

[REDACTED] Indeed, the whole point of the Agreement was to authorize Selectel, which has no ETC status and which has not been properly reviewed by the Commission, to [REDACTED] Lifeline services under TAG's ETC designation, allow TAG to claim Selectel's Lifeline customers as its own, and allow for reimbursement from the Kansas (and Federal) programs. The Agreement was made because of TAG's inability to effectively market and sell Lifeline service into Kansas as it desired.²⁶ While Staff understands TAG's wish to "expand its service offerings in Kansas, and thus, increase the level of competition in the State," and TAG's hope of providing its customers "better service than they would otherwise have had as a result of the TAG/Selectel arrangement,"²⁷ an unlawful means does not justify a good consumer end.

(3) Because Selectel is not eligible to receive Kansas Lifeline support, TAG is not legally authorized to pass on any Kansas Lifeline support it receives to Selectel

15. TAG argues that it has applied the Lifeline discount to the calling plans offered by TAG in Kansas,²⁸ and that by partnering with Selectel on Lifeline, TAG was simply [REDACTED]

[REDACTED]

[REDACTED]²⁹

²⁵ See K.S.A. 66-2008(b) ("distributions from the KUSF shall be made" to qualified carriers or providers "that are deemed eligible").

²⁶ TAG Response, ¶ 6 (explaining that "[a]t the time the Selectel Agreement was executed, TAG had only expanded its service offerings into Kansas minimally due to limited resources and the demand for those resources caused by the growth of its company in other areas of the United States" and that the FCC had "foreclos[ed] Selectel's ability to obtain ETC status").

²⁷ TAG Response, ¶ 14.

²⁸ TAG Response, p. 6, heading B.

²⁹ TAG Response, ¶ 13.

16. Staff points out that the TAG-Selectel Agreement clearly makes TAG and Selectel

[REDACTED]

[REDACTED]³⁰ Thus, it seems odd for TAG to speak of “partnering with Selectel” in the provision of Lifeline service.³¹

17. Notwithstanding the TAG-Selectel “partnership,” the bigger problem is that TAG alone, as the carrier with ETC status, is eligible to receive a Lifeline subsidy from the KUSF. Selectel was unlawfully providing Lifeline service at TAG’s behest and then receiving remuneration from TAG in the form of Lifeline support for providing the service. TAG has no authority to take its own Lifeline support and pass it along to subsidize Selectel for providing a service Selectel is not legally authorized to provide. As stated above, the Commission has not conducted any review of Selectel to ascertain whether it is qualified to receive Lifeline support, and TAG cannot short-circuit this process simply by contracting with Selectel to provide Lifeline service.

18. Under both the federal and Kansas Lifeline service programs, TAG is required to pass along the entire discount, or subsidy, to the consumer.³² It follows that TAG cannot pass along any of the Lifeline subsidy to a non-ETC designated carrier such as Selectel. Because TAG was passing along [REDACTED] Lifeline subsidy to Selectel, TAG was not properly passing on its entire discount to the Lifeline consumer, a consumer to whom TAG alone is permitted to provide the Lifeline service.

III. Sanctions

19. Staff believes TAG did not reasonably rely on any interpretation of the federal and Kansas requirements for providing Lifeline service in Kansas. Rather, in light of the TAG-Selectel

³⁰ Agreement, p. 10, Section 8.5.

³¹ TAG Response, ¶ 13.

³² See 47 C.F.R. 54.403(a)(1); 12-843 Order, ¶ 4a.

Agreement, Staff views TAG's misinterpretation of and consequent failure to follow the Lifeline requirements as intentional and unreasonable. Indeed, TAG's actions demonstrate a wholesale departure from what TAG represented to the Commission in its ETC Application in the 12-843 Docket.³³ Therefore, as far as receiving Kansas Lifeline support is concerned, Staff requests that the Commission strongly consider whether TAG should be allowed to retain its ETC designation.

20. Staff also requests that the Commission impose penalties on TAG pursuant to the KLSP non-compliance guidelines in Docket No. 14-GIMT-105-GIT.³⁴ Under those guidelines, carriers "shall be required to repay over-collected monies to the KUSF," and certain fines may be levied for each month of carrier non-compliance, based on factors considered by the Commission.³⁵ Staff believes TAG's violations were intentional and continuous and there was no voluntary disclosure of the violations on TAG's part. The TAG-Selectel Agreement was terminated only upon TAG's learning of Staff's disapproval of the Agreement.³⁶ Staff is uncertain at this time how many months TAG was non-compliant with KLSP requirements or how much KUSF support should be repaid to the KUSF. Therefore, Staff does not have a specific recommended penalty amount at this time, but will recommend such an amount once more is known.

WHEREFORE, for the reasons stated above, Staff respectfully requests the Commission find that TAG has violated the federal and Kansas ETC rules for the provisioning of Lifeline service in Kansas, strongly consider revocation of TAG's ETC designation, and find that a specific penalty is warranted once more is known.

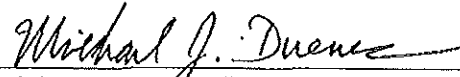
³³ See e.g., 12-843 Order, ¶ 10 (stating that "in Kansas TAG Mobile will utilize its ability to provide the *supported services through the use of its own facilities*") (italics added).

³⁴ *Order Assessing Penalties Against Southwestern Bell Telephone Company*, ¶ 2 (July 14, 2015) (Penalties Order).

³⁵ Penalties Order, ¶ 2(a)-(c).

³⁶ TAG Response, ¶ 15.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael J. Duenes". The signature is written in dark ink and is positioned above a horizontal line.

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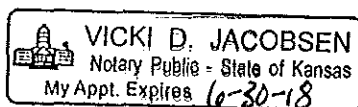
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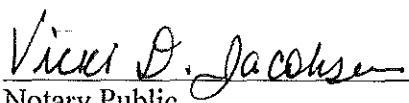
Michael J. Duenes, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Staff's Response to TAG Mobile, LLC's Response to Show Cause Order*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



Michael J. Duenes, S.Ct. #26431
Litigation Counsel
The State Corporation Commission
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 26th day of February, 2016.





Notary Public

My appointment expires: June 30, 2018

CERTIFICATE OF SERVICE

16-TAGC-323-SHO

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Response to Tag Mobile, LLC's Response to Show Cause Order (Public Version) was served via electronic service this 26th day of February, 2016, to the following:

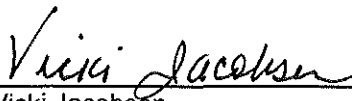
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