

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Audit of Birch Telecom of)
Kansas, Inc. by the Kansas Universal Service)
Fund (KUSF) Administrator Pursuant to K.S.A.) Docket No. 18-BTKT-033-KSF
2016 Supp. 66-2010(b) for KUSF Operating)
Year 20, Fiscal Year March 2016-February 2017.)

ORDER ADOPTING AUDIT REPORT

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and determination. Having examined its files and record, and being duly advised in the premises, the Commission finds and concludes as follows:

1. On August 1, 2017, the Commission directed GVNW Consulting, Inc. (GVNW) to perform an audit of Birch Telecom of Kansas, Inc. (now Birch Telecom of Kansas, LLC d/b/a Birch Communications and now hereinafter referred to as “Birch”) for Kansas Universal Service Fund (KUSF) purposes.

2. On June 29, 2018, GVNW filed its Audit Report, dated June 28, 2018, making three reporting findings for Birch in Operating Year 20.¹ The GVNW Audit Report findings are as follows:

Audit Finding No. 1:

Birch reported revenue to the KUSF net of discounts for the period of March through June 2016, thereby underpaying its assessment by \$2,508.

Audit Finding No. 2:

Birch reported calculated revenues to the KUSF based on assessments collected from subscribers and recorded as a KUSF liability. The aggregate monthly KUSF liability was divided by the assessment rate to determine revenue reported in its monthly reports. This

¹ Kansas Universal Service Fund Audit Report, Docket No. 18-BTKT-033-KSF (July 29, 2018).

would have been an accurate way to determine the Birch KUSF obligation, except for the fact that it did not report all revenue as noted in Finding Nos. 3.

Audit Finding No. 3:

Birch failed to report December 2016 revenue or pay the related assessments to the KUSF from the KUSF surcharge collected from subscribers for that month. Birch eventually submitted a Revised Carriers Remittance Worksheet (CRW) for December 2016 on June 8, 2018, together with corrected revenue to the KUSF Administrator, and remitted payment in the amount of \$27,904, some seventeen months after it was due.²

3. The Audit Report also highlights Birch's repeated failure to comply with its KUSF obligations, including the timely submission of CRWs, assessment payments and the Company's annual Identification and Operation form. In response to these violations, the GVNW Administrator has assessed multiple penalties for Birch, based on past Commission Orders for KUSF compliance. Birch paid late payment and filing penalties in the amount of \$4,744.92 for the Year 20 accounting period. The Audit Report further recommends an additional penalty under K.S.A. 2017 Supp. 66-138 for Birch's failure to report its December 2016 revenue and to pay the corresponding KUSF assessment in a timely manner. Because of the numerous filing deficiencies Birch has experienced in Operating Year 20 and other operating periods, GVNW also recommended Staff be directed by the Commission to initiate show cause proceedings in the event Birch continues not to meet its statutory and regulatory KUSF obligation to submit timely reports and assessment payments. In addition, GVNW took issue with Birch claiming confidentiality for all the information submitted to GVNW as part of the audit process. GVNW correspondingly urged disclosure of information it did not regard as a trade secret or confidential commercial information, and in which the Commission has not been inclined to give a confidential designation under its Protective Orders or in a disclosure analysis under K.S.A. 2017 Supp. 66-1220a.³

² *Ibid* at 1 and 2.

³ *See*, Birch – Request for Confidential Treatment and GVNW letter dated June 28, 2018.

4. Birch filed a response to the GVNW Audit Report on July 12, 2018, within the thirteen day period authorized for submitting a reply.⁴ In the response, Birch accepted Audit Finding No. 1 related to the underpayment for computing revenue to the KUSF net of discounts during the period between March and June 2016, indicating the mistake was inadvertent and only gave rise to a minimum payment of \$2,508.⁵ Birch accepted Audit Finding No. 3 associated with its failure to report intrastate revenue for December 2016 and to pay a timely assessment, but indicated no additional penalty should be ordered for the delinquency.⁶ Birch stated the deficiency occurred as a result of a data processing error to a third-party tax preparer. Birch submitted it timely corrected the error when apprised of it, the deficiency only covered a one month reporting period, it reported the revenue in a revised report and paid the KUSF assessment. Birch also indicated it had already paid significant fines and penalties related to the reporting and underpayment. In regard to a directive to have Staff initiate a show cause proceeding in the event of future deficiencies, Birch stated it was unnecessary and stressed the seriousness to which it takes its reporting and other regulatory obligations. Birch also indicated it had changed its reporting procedures to eliminate late filings that had occurred as a result of a misunderstanding of the due date and going forward was minimizing the number of delinquent filings. Finally, Birch agreed to waive certain confidentiality designations it had made to information in a portion of Attachment D, Attachment E and Attachment F to the Audit Report, which it stated did not need to be treated as confidential.

5. The Commission finds the GVNW Audit Report to be thorough and complete and accepts it as filed and updated. Birch does not dispute the audit filings related to the reporting

⁴ Birch Telecom of Kansas, LLC's Response to GVNW Audit Report.

⁵ *Ibid* at 2.

⁶ *Ibid*.

deficiencies, but it does take issue with GVNW's recommendations for penalties under K.S.A. 2017 Supp. 66-138 and the proposed directive to Commission Staff regarding the initiation of a show cause proceeding in the event of future filing delinquencies by Birch. The Commission will now address the GVNW recommendations and the confidentiality designations that Birch has agreed to waive.

6. Telecommunications carriers contributing to the KUSF were required to report gross revenue prior to recognizing customer discounts for KUSF reporting purposes through June 30, 2016. Birch reported revenue after deducting discounts to customers for the period from March through June 2016, resulting in an under-payment of \$2,508. GVNW identified this underpayment in Audit Finding No. 1, and Birch agrees this amount should be paid to the KUSF. GVNW recommends that Birch be directed to submit an Audit True-up Report for the period of March through June 2016 and to pay the additional \$2,508 to the KUSF within 30-days of the issuance of this Order. The Commission finds that the GVNW recommendation should be accepted and GVNW should issue a Compliance Report after Birch has filed the True-up and made payment.

7. Audit Finding No. 2 confirms that Birch met its responsibilities in reporting intrastate revenue to the KUSF by computing the total amount of KUSF collected from customers and dividing it by the KUSF assessment rate. GVNW performed additional audit testing to establish that Birch applied its KUSF assessment rate to total assessable revenue derived from recurring and non-recurring service plans. With respect to the methodology used by Birch, GVNW recommends no further action regarding the methodology used to report revenue to the KUSF, except as identified in Audit Finding No. 1, related to the discount adjustment, and Audit Finding No. 3, where Birch failed to report its revenue for December 2016. The Audit Report does advise Birch in fulfilling its KUSF obligation to submit Quarterly True-up Reports to reflect material

changes, billing errors or corrections, or changing circumstances affecting its reported revenue and KUSF assessment. The Commission reminds Birch that it is obligated to report its intrastate net retail revenue for KUSF purposes and is responsible for ensuring it meets its KUSF obligations. Therefore, Birch is directed to take steps to ensure this methodology ensures it meets those obligations and to submit Quarterly and/or Annual True-Ups, as appropriate, if at any time this methodology would result in Birch not meeting its KUSF obligations.

8. Audit Finding No. 3 encapsulates Birch's failure to properly report its December 2016 intrastate retail revenue and KUSF assessments. Birch reported no intrastate revenue (\$0.00) for December 2016, but collected \$27,904.13 in KUSF assessments. It made two certified filings to the KUSF Administrator reflecting no revenue. GVNW and Commission Staff contacted Birch repeatedly about the anomaly of reporting no revenue, but failed to reach a satisfactory resolution. Birch indicates the December 2016 revenue was not reported as a result of a data processing error by its third-party tax preparer and represents it attempted to correct the problem in January 2017, but apparently was unsuccessful in correcting the error. Finally, on June 8, 2018, Birch submitted a revised December 2016 CRW and remitted payment of \$32,452.63, consisting of \$27,911.31 of assessments and \$4,541.31 of penalties.

9. In conjunction with Birch's failure to report its December 2016 revenue, GVNW recommends the Commission consider assessing penalties under K.S.A. 2017 Supp. 66-138 for non-compliance with Commission Orders. Birch's failure to provide its intrastate retail revenue and the corresponding KUSF assessment payment of \$27,911.31 violates not only Commission Orders but also statutory authority to make contributions to the KUSF on a fair and equitable basis.⁷ Birch was obligated to report monthly intrastate revenue for December 2016 and to remit

⁷ K.S.A. 2017 Supp. 66-2008 (a).

the \$27,911.31 collected from customers, but did not do so for seventeen months. It also falsely verified an inaccurate CRW stating that it had no revenue for the month and falsely reaffirmed this inaccurate revenue in its annual KUSF assessment True-up for the March 2016 – February 2017 fiscal year. Although it was contacted numerous times by the KUSF Administrator and Staff regarding the apparent deficiency in its reporting and its assessment, Birch failed to correct the problem for a period of seventeen months.

10. The Commission concludes that the assessment of a penalty under K.S.A. 2017 Supp. 66-138 is an appropriate remedy for submitting inaccurate reports for December 2016, not remitting payment of the assessment collected from subscribers, not correcting the reports in a reasonable time period after numerous inquiries by the KUSF Administrator and Staff, and not taking more affirmative action to correct an error that resulted in a significant underpayment to the KUSF in the amount of \$27,911.31. The assessment of a penalty under K.S.A. 2017 Supp. 66-138 is not duplicative of other penalties assessed against Birch for late payment, late filing and delinquent penalty balances establish by Commission Orders involving the KUSF. KUSF penalties have not been established for the more serious infractions of failing to report revenue, pay assessments or filing incorrect verified reports. Accordingly, in this instance, the Commission has decided to institute K.S.A. 66-138 penalties. K.S.A. 66-138 provides a range of penalties between \$100 and \$5,000 for each violation occurring under the Public Utilities Act. The penalty for reporting revenue late is the greater of \$100.00 or 1% of the assessment owed for each late filing.⁸ In making its determination, the Commission elects to institute a penalty of \$100 for each outstanding month revenue was not reported and payment not made for the 17-month period. The Commission assesses a penalty of \$1,700.

⁸ Order, Docket No. 06-GIMT-332-GIT, January 23, 2006.

11. As part of the Audit Report, GVNW attached a memorandum listing multiple reporting delinquencies that establish a pattern of KUSF non-compliance, which have resulted in the assessment of KUSF penalties. These infractions relate to late CRW reporting and assessment payments, as well as late filings of the Company Identification and Operations form. Because of the frequency of late filings and payments, GVNW has requested the Commission to direct Commission Staff to initiate show cause proceedings against Birch, if the filing and payment delinquencies continue. Given the number of filing and payment delinquencies, the Commission directs the Commission Staff to initiate show cause proceedings when it is apprised of continued delinquencies on behalf of Birch. K.A.R. 82-1-237 provides that the Commission may commence show cause proceedings when it is apprised of a carrier's violation of law or any of its orders. This is the standard practice of the Commission, and the Commission is concerned about Birch's history of non-compliance with its KUSF obligations. Birch, therefore, may be subject to the Commission levying additional penalties for any non-compliance with its KUSF obligations in the future.

12. The Commission is concerned by Birch's failure to comply for a seventeen month period and that such non-compliance may only result in a penalty when brought to the Commission's attention. The Commission wants to further investigate this matter and appropriate sanctions. Accordingly, the Commission directs GVNW and Staff to develop a process and the appropriate penalty(ies) to levy when a Company fails to comply with its obligations to correct prior filings or remit payment of assessments collected from subscribers in a timely manner. The Commission is also concerned about the gravity of reliance upon a Company's verification of its KUSF compliance that is not accurate. Staff or GVNW is directed to file a Report and Recommendation addressing these issues and suggesting appropriate penalties. Since all companies required to contribute to the KUSF will be impacted by the Commission's decisions on

this matter, such Report and Recommendation shall be filed in the current annual KUSF Docket, 18-GIMT-084-GIT, no later than August 31, 2018.

13. The Commission has determined that when a proceeding is conducted involving confidential commercial information involving the KUSF, the disclosure of this information is governed by K.S.A. 2017 Supp. 66-1220a and may be provided if the various factors in the statute warrant review. K.S.A. 2017 Supp. 66-1220a, however, only relates to trade secrets and confidential commercial information. There are considerable amounts of information in a regulatory proceeding that are neither a trade secret nor confidential and should be publicly disclosed. To distinguish between confidential and non-confidential information, the Commission has consistently defined confidential information to include: (1) material or documents that contain information relating directly to specific customers; (2) employee-sensitive information; (3) marketing analyses or other market-specific information relating to services offered in competition with others; (4) reports, work papers or other documentation related to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration; (6) contract negotiations; and, (7) information concerning trade secrets, as well as private technical, financial, and business information. In this docket, GVNW requested Birch to disclose certain information that was not confidential. GVNW requested Exhibits D, E and F be publicly disclosed as non-confidential. Birch agreed to waive confidentiality designations to a portion of Exhibit D as well as Exhibits E and F. Accordingly, the information should be made public in an updated Audit Report.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission accepts and adopts GVNW Consulting, Inc.'s Audit Report filed June 29, 2018.

B. Birch Telecom of Kansas, LLC, is to submit KUSF True-up audit reports for the period of March through June 2016 and make additional payment of \$2,508.

C. Birch Telecom of Kansas, LLC, is to pay \$1,700 in accordance with K.S.A. 2017 Supp. 66-138 (a) (1) as set forth in paragraph no. 10 of the Order. Birch's payment shall reference this Docket, 18-BTKT-033-KSF, be made out to the Commission's Fiscal Office, 1500 SW Arrowhead Road, Topeka, Kansas 66604-4027, and submitted no later than thirty (30) days from the date of this Order.

D. GVNW Consulting Inc. is directed to file a Compliance Report within 60-days of the issuance of this Order and an updated Audit Report.

E. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529 (a) (1).⁹

F. The Commission retains jurisdiction over Birch Telecom of Kansas, LLC, and the subject matter of this Docket for the purpose of issuing such additional orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 07/31/2018



Lynn M. Retz
Secretary to the Commission

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⁹ K.S.A. 66-118b; K.S.A. 77-503 (c) and K.S.A. 77-531(b).

CERTIFICATE OF SERVICE

18-BTKT-033-KSF

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of first class mail/hand delivered on 08/01/2018.

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