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

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Audit of Virgin Mobile USA, L.P. by the Kansas Universal Service Fund (KUSF) Administrator Pursuant to K.S.A. 2015 Supp. 66-2010(b) for KUSF Operating Year 19, Fiscal Year March 2015-February 2016.	))))))	Docket No. 17-VMBZ-023-KSF

ORDER DENYING VIRGIN MOBILE'S PETITION FOR RECONSIDERATION

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings:

1. On August 2, 2016, the Commission directed GVNW Consulting, Inc. (GVNW) to conduct an annual audit of Virgin Mobile USA, L.P. (Virgin) pursuant to K.S.A. 66-2010(b) and to file its Audit Report by June 30, 2017.

2. On June 1, 2017, GVNW filed its Audit Report finding Virgin failed to report all of its Lifeline subscriber-related revenues to the Kansas Universal Service Fund (KUSF), and owes an estimated $227,000 to the KUSF for January 2012 through February 2017.[1]

3. Virgin is a reseller of prepaid Commercial Mobile Radio Services (CMRS).[2] The Company is required to report its revenues and pay the related assessments to the KUSF on a

[1] Kansas Universal Service Fund Audit Report (Audit Report), June 1, 2017, p. 1.
[2] *Id.*, p. 2.

monthly basis.[3] While Virgin is authorized to collect its assessment from its customers, it has elected to pay the assessment itself, rather than pass it through to its customers.[4]

4. Virgin receives $9.25 per month from the federal Lifeline program for each eligible Kansas Lifeline subscriber in lieu of collecting the $9.25 from its customers.[5] Virgin has chosen not to report this revenue to the KUSF, claiming that it does not collect a monthly recurring service charge (MRC) from customers and federal Lifeline support is exempt from the KUSF.[6]

5. GVNW determined all carriers offering Lifeline service are required to report gross intrastate retail revenue charged to the customer, including charges recovered from state or federal Lifeline support.[7] Accordingly, GVNW concluded the $9.25 federal Lifeline reimbursement provided to Virgin in lieu of the customer paying the MRC, should have been reported for KUSF purposes.[8] GVNW estimates Virgin owes $227,000[9] to the KUSF, representing the $9.25 per month, per Lifeline customer for the period January 2012 through February 2017.[10]

6. GVNW's Audit Report recommended the Commission: (1) direct Virgin to include all Lifeline revenue, including the $9.25 federal Lifeline reimbursement, to the KUSF; (2) order Virgin to submit true-ups for January 2012 until the time Virgin corrects its reporting

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[3] *Id.*
[4] *Id.*
[5] *Id.*, p. 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] On June 28, 2017, GVNW filed a correction letter explaining that its Audit Report provided two separate estimates of the money Virgin owes to the KUSF. GVNW estimates Virgin owes $227,000, not $227,700.
[10] Audit Report, p. 3.

practice; and order Virgin to pay the additional assessments within 60 days of a Commission order.[11]

7. On July 11, 2017, the Commission issued an Order Accepting and Adopting GVNW Consulting, Inc.'s Audit Report and Recommendations (Order), directing Virgin to include all Lifeline-related revenue, including revenue that would be collected directly from the end-user, absent customer Lifeline eligibility, including the $9.25 federal Lifeline reimbursement to the KUSF within 60 days.[12]

8. On July 21, 2017, Virgin filed its Petition for Reconsideration of the Order, claiming GVNW's recommendations violate state and federal law.[13] Specifically, Virgin argues Section 254(f) of the Telecommunications Act of 1996 bars the Commission's efforts to assess Lifeline disbursements from the federal Universal Service Fund (FUSF) because the assessment: (1) relies on and burdens FUSF mechanisms;[14] and (2) is not applied in an equitable and nondiscriminatory fashion.[15] Virgin also claims assessing FUSF funds undermines the policy behind the FUSF of ensuring low-income consumers have access to telecommunications and information services at affordable rates.[16]

9. Virgin argues that the Commission lacked any legal grounds, and simply relies on reporting instructions from Staff and GVNW to find Virgin must pay KUSF assessments on its FUSF monies.[17] Virgin claims Staff relied on an erroneous reading of the KUSF instructions, which provide "[f]or Lifeline subscribers, report the total gross intrastate customer service

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[11] *Id.*
[12] Order Accepting and Adopting GVNW Consulting, Inc.'s Audit Report and Recommendations, July 11, 2017, Ordering Clause B.
[13] Petition for Reconsideration, July 21, 2017, ¶ 3.
[14] *Id.*, ¶ 6.
[15] *Id.*, ¶ 7.
[16] *Id.*, ¶ 10.
[17] *Id.*, ¶ 11.

charge prior to any Federal or State Lifeline credit or discount."[18] Since it does not charge its customers for Lifeline service, Virgin contends those instructions do not apply.[19]

10. Lastly, Virgin believes this dispute is better addressed in a general investigation.[20]

11. On July 31, 2017, Staff filed its Response to Virgin's Petition for Reconsideration, claiming requiring carriers to report the intrastate portion of their federal Lifeline revenue does not burden the FUSF.[21] Staff explains the Commission adopted revenue identification and allocation mechanisms to ensure revenues are not subject to double assessment.[22] Carriers elect how to allocate revenue earned in Kansas between interstate and intrastate jurisdiction.[23] Only the federal Lifeline revenue allocated to intrastate revenue is assessed for KUSF purposes, leading Staff to conclude reporting the intrastate portion of federal Lifeline revenue reimbursement to the KUSF does not violate 47 U.S.C. §254(f).[24]

12. In countering Virgin's argument that assessing federal Lifeline revenues for KUSF purposes is not equitable and nondiscriminatory because it treats federal Lifeline revenues differently than other federal support, Staff argues Virgin ignores the purpose of Lifeline support.[25] Staff contends federal Lifeline support is essentially a revenue replacement program, where the customer pays less for service, but the carrier receives the same amount of revenue as it would serving a non-Lifeline customer.[26] Federal Lifeline support is based on the number of

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[18] *Id.*, ¶ 12.
[19] *Id.*
[20] *Id.*, ¶ 14.
[21] Staff's Response to Virgin Mobile USA, L.P.'s Petition for Reconsideration, July 31, 2017, ¶ 5.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*, ¶ 6
[26] *Id.*

Lifeline customers served by the carrier. In comparison, federal high cost support is based on the costs incurred to provide service to high-costs areas, rather than specific customers.[27]

13. On August 3, 2017, Virgin filed its Reply to Staff Response to Petition for Reconsideration claiming that Kansas is the only state to order Virgin to pay state USF assessments on federal Lifeline payments.[28] Virgin claims that both the federal USF remittance form and South Carolina's USF remittance form specifically instruct Lifeline reimbursements are excludable from USF payment calculations.[29]

14. Virgin argues the Commission's order is only binding on Virgin, resulting in a violation of K.S.A. 66-2008(a), which requires all providers to contribute to the KUSF on an equitable and nondiscriminatory basis.[30] Virgin claims it received no notice that its federal Lifeline reimbursement would be subject to KUSF assessment.[31]

15. While Virgin is correct that carriers are required to pass along the entire subsidy to eligible Lifeline customers,[32] the Commission is not directing Virgin to reduce the subsidy provided to Lifeline customers. Instead, the Commission is only instructing Virgin to pay the KUSF assessment. It remains Virgin's decision whether to collect the assessment from its end users or pay the assessment itself. As the provider, Virgin, not its customers, is obligated to pay the KUSF assessment.[33]

16. In relevant part, 47 U.S.C. § 254(f) provides:

> A State may adopt regulations not inconsistent with the [Federal Communications] Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and

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[27] *Id.*
[28] Virgin Mobile Reply to Staff Response to Petition for Reconsideration, Aug. 3, 2017, ¶ 2.
[29] *Id.*, ¶ 3.
[30] *Id.*, ¶ 5.
[31] *Id.*, ¶ 6.
[32] *Id.*, ¶ 11.
[33] K.S.A. 66-2008(a).

> nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within the State ... that do not rely on or burden Federal universal service support mechanisms.

There are two prongs to §254(f): (1) are carriers contributing to the state USF on an equitable and nondiscriminatory basis; and (2) do State regulations rely on or burden FUSF mechanisms. The Commission addresses the second prong first. Neither Congress nor the Federal Communications Commission has provided much guidance on how to interpret what constitutes relying on FUSF mechanisms.[34] Virgin relies on *AT&T Corp. v. Public Util. Comm'n of Texas*, 252 F. Supp.2d 347 (W.D. Tex. 2003) and *AT&T Communications, Inc. v. Eachus*, 174 F. Supp. 2d 1119 (D. Or. 2001) to support its claim that requiring it to contribute to the KUSF based on monies received from the FUSF violates Section 254(f). In *Eachus*, AT&T challenged Oregon's assessment of a surcharge on interstate and international telecommunication services.[35] *Eachus* held "the surcharge, to the extent it is based on interstate revenue, is in conflict with 47 U.S.C. §254."[36] But *Eachus* distinguished intrastate revenue, explaining, "[t]here can be no question that taxing interstate telecommunications burdens communications carriers. The same can be true of taxing intrastate telecommunications. The Act intended for carriers to contribute to the universal service fund, both state and federal. Thus, a certain burden must be permitted."[37]

17. Similarly, in Texas, AT&T objected to paying federal and state USF fees on its revenue from interstate calls.[38] At issue before this Commission is Virgin's obligation to report its Kansas intrastate revenue to the KUSF.[39] Therefore, the two AT&T cases relied on by Virgin

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[34] *See AT&T Communications, Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1123 (D. Or. 2001).
[35] *Eachus*, 174 F. Supp. 2d at 1120.
[36] *Id.*, at 1122.
[37] *Id.*, at 1124.
[38] *AT&T Corp. v. Public Util. Comm'n of Texas*, 373 F.3d 641, 644 (5th Cir. 2004).
[39] Staff's Response to Virgin Mobile USA, L.P.'s Petition for Reconsideration, ¶ 4.

provide no support for Virgin's claim that assessing its intrastate revenue is an impermissible burden.

18. The issue of whether the KUSF assessment is discriminatory is based on Virgin's policy of not charging its customers for Lifeline service. Virgin elected not to collect the assessment from its customers. The question is whether Virgin is being discriminated against for its decision to offer free Lifeline service, while recovering $9.25 per month from the federal Lifeline program and not collecting its KUSF assessment from its Lifeline customers. K.S.A. 66-2008(a) requires all carriers that provide intrastate telecommunications service or interconnected VoIP service to contribute to the KUSF based on their intrastate telecommunications services net retail revenue and authorizes carriers to collect the assessment from its customers. Presumably, Virgin sees some benefit in not passing the KUSF assessment through to its customers. After voluntarily pricing its services to not bill its customers for the KUSF assessment costs, Virgin can hardly claim the Commission's decision to require Virgin to contribute to the KUSF is discriminatory, regardless of whether the contribution comes from the corporation itself or its customers. Virgin does not identify any authority that suggests it should be relieved from its obligations to contribute to the KUSF under K.S.A. 66-2008(a), merely based on its own decision not to bill its customers. To the contrary,

> the decision to pass on KUSF contribution costs to customers is a business judgment beyond the purview of the court. If commercial mobile service providers are concerned that a rise in monthly billings will drive away customers, those companies are free to assume some or all of the costs themselves. All telecommunications providers in Kansas are subject to the same assessment (on an equitable basis) and face identical economic considerations.[40]

[40] *Mountain Solutions, Inc. v. Kansas Corp. Comm'n*, 966 F. Supp. 1043, 1046 (D. Kan. 1997), *aff'd sub nom. Sprint Spectrum, L.P. v. Kansas Corp. Comm'n*, 149 F. 3d 1058 (10th Cir. 1998).

Accordingly, even though Virgin made a business decision that may result in it assuming the assessment costs itself, rather than pass it on to its customers, it remains subject to the same assessment as other carriers. Therefore, Virgin is being required to include its federal Lifeline revenues for KUSF assessment purposes on an equitable and nondiscriminatory basis.

19. As the only party to this Docket, Virgin is correct in claiming it is the only party bound by the Commission order. But, it does not follow that Virgin is being singled out or being assessed in an unequitable or discriminatory fashion. In Docket No. 17-TFWZ-022-KSF, the Commission required TracFone Wireless, Inc. to report the total gross intrastate customer charge prior to any state or federal Lifeline credit or discount reimbursement to the KUSF.[41] TracFone began reporting total gross intrastate customer charges, including its Lifeline credits, to the KUSF effective April 2017.[42] The Commission's treatment of Virgin is consistent with its approach in the 17-TFWZ-022-KSF Docket. Virgin remains subject to the same assessment as other carriers as required by K.S.A. 66-2008.

20. Virgin states it is unaware of any other state that requires carriers to pay state USF assessments on federal Lifeline payments.[43] This Commission is bound by K.S.A. 66-2008, which requires all carriers that provide intrastate telecommunications service or interconnected VoIP service to contribute to the KUSF based on their intrastate telecommunications services net retail revenue. How other states treat their own USF funds has no bearing on the Commission's obligations under K.S.A. 66-2008. Similarly, Virgin's argument that the federal USF remittance form and South Carolina's remittance form "specifically instruct that Lifeline reimbursements

[41] Order Accepting and Adopting GVNW Consulting, Inc.'s Audit Report and Recommendations, Docket No. 17-TFWZ-022-KSF, June 22, 2017, Ordering Clause B.
[42] Kansas Universal Service Fund Audit, Docket No. 17-TFWZ-022-KSF, June 1, 2017, p. 1.
[43] Virgin Mobile Reply to Staff Response to Petition for Reconsideration, ¶ 2.

are *excludable* from USF payment calculations"[44] does not impact the Commission's obligations under K.S.A. 66-2008.

21. Virgin faults the Commission for not giving it adequate notice that FUSF payments would be treated as assessable revenue.[45] GVNW's Audit Report, filed June 1, 2017, found Virgin failed to report all Lifeline subscriber related-revenues to the KUSF.[46] The Audit Report included Virgin's Response, in which Virgin argued, "Kansas' effort to impose KUSF assessments on Lifeline disbursements from the FUSF is barred by Section 254(f) of the Telecommunications Act of 1996."[47] Virgin's Response evidences it was on notice of GVNW's position.

22. Even if Virgin were not given adequate notice, it fails to allege any resulting damages. The Commission is requiring Virgin to repay money it failed to report to the KUSF, rather than penalizing Virgin for non-compliance. Since the Commission is not imposing a penalty, Virgin is not harmed by the alleged inadequate notice that the Commission is treating federal Lifeline revenue as assessable revenue. Virgin has not requested a hearing in this Docket. Instead, it has advocated for a general investigation.[48] Under K.A.R. 82-1-232(b)(1), an order may be issued without a hearing, and it is the responsibility of the party affected by the order to petition the Commission for a hearing.[49] By failing to request a hearing, Virgin's due process argument rings hollow.

23. Virgin also argued the Audit Report should be limited to March 1, 2015 through February 28, 2016.[50] But Virgin does not provide any supporting authority. Under K.S.A. 66-

[44] *Id.*, ¶ 3.
[45] *Id.*, ¶ 6.
[46] Audit Report, p. 1.
[47] *Id.*, Attachment D, p. 1.
[48] Virgin Mobile Reply to Staff Response to Petition for Reconsideration, ¶ 9.
[49] K.A.R. 82-1-232(b)(1).
[50] Petition for Reconsideration, ¶ 4.

2010(b), the KUSF Administrator is responsible for collecting and auditing all relevant information from carriers receiving or providing KUSF funding. K.S.A. 66-2010(b) contains no time constraints on the audit period.

24. Since Virgin has failed to show the Commission's adoption of the Audit Report is unlawful or unreasonable as required in a petition for reconsideration,[51] Virgin's Petition for Reconsideration is denied.

THEREFORE, THE COMMISSION ORDERS:

A. Virgin Mobile's Petition for Reconsideration is denied.

B. To the extent this Order constitutes final agency action as defined by K.S.A. 77-607(b)(1), Lynn M. Retz, Secretary to the Commission, is the agency officer designated to receive service of a petition for judicial review of behalf of the agency.[52]

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: AUG 15 2017

Lynn M. Retz
Lynn M. Retz
Secretary to the Commission

BGF

Order Mailed Date
AUG 16 2017

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[51] *See Peoples Natural Gas Div. of Northern Natural Gas v. Kansas Corp. Comm'n*, 7 Kan. App. 2d 519, 526, *rev. denied* 231 Kan. 801 (1982).
[52] K.S.A. 77-529(d).

CERTIFICATE OF SERVICE

17-VMBZ-023-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 AUG 1 5 2017.

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