

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

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

**PETITION FOR RECONSIDERATION**

1. COMES NOW Virgin Mobile USA, L.P. (“Virgin Mobile”), and pursuant to the Commission’s Order Accepting and Adopting GVNW Consulting Inc.’s Audit Report and Recommendation issued July 12, 2017 (the “Order”) hereby files its Petition For Reconsideration pursuant to K.S.A. Sec. 66-118(b) and K.S.A. 2016 Supp. Sec. 77-529.

2. Additionally, Virgin Mobile consents to electronic service and directs that all service, pleadings, testimony, briefs, and orders should be directed to counsel for Sprint at the following email address: [diane.c.browning@sprint.com](mailto:diane.c.browning@sprint.com).

3. In its Order, the Commission adopted GVNW’s Audit Report and Recommendation (“Audit Report”) with respect to Audit Finding No. 1, and directed Virgin Mobile to “include all Lifeline-related revenue, including revenue that would be collected directly from the end-user, absent the customer’s Lifeline eligibility (including the \$9.25 Federal Lifeline reimbursement) to the KUSF.”<sup>1</sup> The Order also directed Virgin Mobile to “submit Audit True-ups for the period January 2012 through the period when Virgin Mobile ceases this reporting practice to correct this audit deficiency and pay the additional assessments owed within 60 days of the issuance of an Order.”<sup>2</sup>

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<sup>1</sup> Order at p. 3.

<sup>2</sup> Ibid.

4. The Commission should reconsider its Order and reject the Audit Report with respect to Audit Finding No. 1, because GVNW's recommendation is improper and violates federal and Kansas law, as set forth below.

**A. The recommended additional assessment improperly encompasses periods outside the audit period.**

5. The relevant audit period is the KUSF Year March 1, 2015 through February 28, 2016. It is improper for the Audit Report to recommend an additional assessment outside the audit period. Any recommended additional assessment should be limited to the period March 1, 2015 through February 28, 2016.

**B. Virgin Mobile properly excluded Federal Universal Service Fund ("FUSF") Lifeline disbursements from its revenue subject to Kansas Universal Service Fund ("KUSF") assessments.**

6. The Commission's effort to impose KUSF assessments on Lifeline disbursements from the FUSF is barred by Section 254(f) of the Telecommunications Act of 1996. That provision grants states like Kansas the authority to adopt state universal service programs only to the extent that such programs "do not rely on or burden Federal universal service mechanisms." 47 U.S.C. § 254(f); *see also AT & T Corp. v. Public Utility Com'n of Texas*, 252 F.Supp.2d 347 (W.D. Tex. 2003); *AT & T Communications, Inc. v. Eachus*, 174 F.Supp.2d 1119 (D. Or. 2001). The Commission's attempt to impose state universal service contribution requirements on Federal Lifeline disbursements plainly violates this statutory command, as the Commission both "rel[ies] on" and "burden[s]" the FUSF by imposing Kansas universal service contribution obligations on monies received from the FUSF.

7. The Commission's assessment of Lifeline funds received from the FUSF is also barred by Section 254(f)'s requirement that KUSF assessments be "equitable and nondiscriminatory." Here, the Commission requires contributions on Lifeline funds received

from the FUSF, but does not require contributions on *other* FUSF funds received by providers. To the contrary, the remittance instructions provide that “Federal High-Cost Support payments” be excluded from revenue, even though “Federal . . . Lifeline program credits or discount reimbursements are to be reported as revenue.” Kansas Universal Service Fund (KUSF) Carrier Remittance Worksheet (CRW) Instructions March 2016 – February 2017 (FY 20) at 8. It is inequitable and discriminatory to require KUSF contributions on some FUSF funds carriers receive but not on others, yet this is precisely what the Commission has done here.

8. Even if the Commission were permitted to require contributions on federal Lifeline subsidies, it would be inequitable and discriminatory to impose those obligations on providers through individual provider audits like the one at issue here. Virgin Mobile doubts that most, much less all, Kansas Lifeline providers (particularly those offering a no-charge service) contribute to the KUSF based on their federal Lifeline subsidies. Indeed, given the statutory prohibitions against such contributions described above, many such providers likely (and correctly) would conclude such obligations are impermissible. Unless the KCC rejects Audit Finding No. 1, it will impose an inequitable and discriminatory contribution obligation on Virgin Mobile, essentially singling out Virgin Mobile from among all other Lifeline service providers in Kansas for differential and discriminatory treatment. Such selective enforcement violates Section 254(f)’s requirement that state universal service contributions be equitable and nondiscriminatory.

9. The KUSF assessment impermissibly discriminates, as well, because Virgin Mobile, as a practical matter, cannot recover the KUSF assessments on FUSF funds from its customers. The Lifeline service offered by Virgin Mobile d/b/a Assurance Wireless is provided

at no charge to the customer.<sup>3</sup> Accordingly, Virgin Mobile does not issue its Lifeline customers monthly bills, and thus cannot impose KUSF surcharges on those customers. This leaves Virgin Mobile, unlike other Lifeline providers and FUSF recipients in Kansas who issue bills to their customers, unable to avail itself of the recovery mechanism permitted under K.S.A. Sec. 66-2008(a).

10. Further, the Commission's assessment of FUSF funds impermissibly conflicts with Federal Universal Service policy decisions. *See AT & T Corp. v. Public Utility Com'n of Texas*, 252 F.Supp.2d 347; *AT & T Communications, Inc. v. Eachus*, 174 F.Supp.2d 1119. The Federal Communications Commission has determined the appropriate level of FUSF Lifeline disbursement to meet its statutory obligation to ensure that "low-income consumers" "have access to telecommunications and information services" and that rates for low-income consumers be "just, reasonable and affordable." 47 U.S.C. § 254(b)(1); 47 U.S.C. § 254(b)(3). The Commission's imposition of KUSF contribution obligations on FUSF Lifeline monies reduces the amount of FUSF funds Lifeline providers receive, undoing the considered policy decisions of the FCC. By requiring KUSF contributions on FUSF moneys, the Commission imposes additional costs on Lifeline consumers and providers, potentially increasing costs for Kansas consumers above the level found to be "affordable" by the FCC or, in the worst case, driving providers from the market and denying Kansas consumers the access to telecommunications and information services mandated by Section 254. *See also* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or

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<sup>3</sup> Customers have the option to purchase additional services above and beyond the baseline no-charge offer. For these customers, Virgin Mobile pays the KUSF assessment on the intrastate portion of the "top-up" revenues collected from the customers.

intrastate telecommunications service.”). For this reason, as well, Audit Finding No. 1 should be rejected.

**C. The Audit Report improperly seeks to impose KUSF contribution obligations on Virgin Mobile inconsistent with appropriate administrative procedures and due process.**

11. Finally, the Commission appears to rely on revisions to its instructions by GVNW and Staff as authority for KUSF assessments on FUSF monies. Email from Sandy Reams, Assistant Telecommunications Chief, Kansas Corporation Commission, to Andy Lancaster, Virgin Mobile (Feb. 20, 2017) (“Several years ago, GVNW and Staff became aware that a wireless Lifeline only Eligible Telecommunications Carrier (ETC) marketed its monthly service as free and, thus, did not report the monthly service charge revenue to the KUSF. Staff reached out to that ETC and worked with GVNW to modify the KUSF Instructions”). To the extent that the Commission seeks to impose KUSF contribution obligations, those obligations should be imposed through appropriate administrative processes that, consistent with requirements of due process, afford the public and the affected parties notice and the opportunity to be heard.<sup>4</sup> If the Commission wishes to seek KUSF contributions on FUSF funds it could, for example, open a general investigation docket to consider the legality and policy implications of such contributions.<sup>5</sup> What it should not do, however, is impose such obligations through an individual, non-public audit of a single provider. For this reason, as well, the Commission’s attempt to impose KUSF contributions on FUSF monies is improper.

12. Furthermore, Staff’s reliance on the KUSF Instructions cited in the draft audit report is misplaced. Those instructions state, “For Lifeline subscribers, report the total gross intrastate customer service charge prior to any Federal or State Lifeline credit or discount.”

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<sup>4</sup> See K.S.A. Const. Bill of Rights § 18 (“All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.”).

<sup>5</sup> K.S.A. 66-1,191; K.S.A. 66-2008.

(Draft audit report, Attachment C, page 2 of 4.) This statement requires contributions based on the *customer service charge*. But Virgin Mobile does not charge its customers for its Lifeline service. There is, in other words, no “customer service charge” to report, and no basis for the Finding that Virgin Mobile was required to report these revenues.

13. Furthermore, because the language requires providers to report the customer service charge, it failed to provide Virgin Mobile notice of the asserted requirement that revenues that are *not* charged to or received from customers should, in fact, be reported as customer service charges. Accordingly, the instructions cited by Staff did not constitute adequate notice to Virgin Mobile of Staff’s position, and it would be a violation of Virgin Mobile’s due process rights to assess these amounts.

14. Finally, Virgin Mobile urges the Commission to consider the legal and policy questions raised by Audit Finding Number 1 through a general investigation docket or similar proceeding. Notably, Virgin Mobile – a prominent national Lifeline provider – is not aware of *any other state that requires state USF contributions on FUSF Lifeline subsidies*. This is, in short, an issue of first impression for not only for Kansas and Virgin Mobile, but also for the entire nation and the entire Lifeline industry. Moreover, as detailed above, Audit Finding Number 1 conflicts directly with federal law and policy. The Commission should take up the significant legal and policy questions presented here only through public administrative procedures that allow all potentially impacted Lifeline service providers in Kansas an adequate opportunity to protect their interests.<sup>6</sup>

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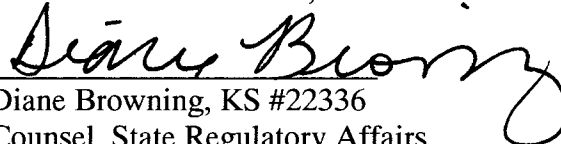
<sup>6</sup> See K.S.A. 77-506 (providing that “[a]t any point in a state agency proceeding the presiding officer or other state agency official responsible for the proceeding: (1) May convert the proceeding to another type of state agency proceeding if the conversion is appropriate, is in the public interest and does not substantially prejudice the rights of any party.”).

15. For all the foregoing reasons, the Commission should reconsider its Order and reject GVNW Consulting, Inc.'s Audit Report and Recommendation with respect to Audit Finding No. 1.

Respectfully submitted this 21st day of July, 2017.

VIRGIN MOBILE USA, L.P.

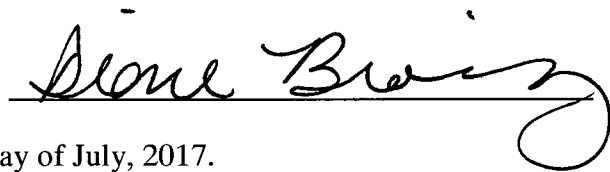
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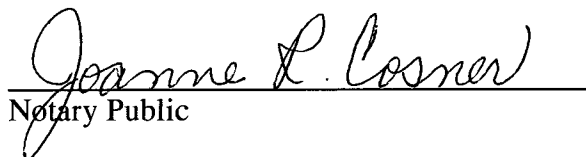
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#### VERIFICATION

I, Diane Browning, being of lawful age duly sworn, state that I have read the above and foregoing Petition for Reconsideration and verify the statements contained herein to be true and correct to the best of my knowledge and belief.



Subscribed and sworn to before me this 21 day of July, 2017.

  
Notary Public

