

**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)

**VIRGIN MOBILE REPLY TO STAFF RESPONSE TO
PETITION FOR RECONSIDERATION**

1. COMES NOW Virgin Mobile USA, L.P. (“Virgin Mobile”), and in reply to Staff’s Response to Virgin Mobile’s Petition for Reconsideration filed on July 31, 2017 in the above-referenced docket (“Staff’s Response”), states as follows:

2. Staff’s Response fails to acknowledge several important points raised in Virgin Mobile’s Petition for Reconsideration (“Petition”). First, Staff’s legal analysis is tenuous because it is a plain and simple fact that Virgin Mobile, a prominent national Lifeline provider, does not pay state USF assessments on Federal Lifeline payments in *any other state, nor has Virgin Mobile ever been ordered to do so by any other state.*¹ Whether Staff acknowledges it or not, this is an issue of first impression nationally, not just for Virgin Mobile, but for the entire wireless Lifeline provider industry. Staff’s Response attempts to obfuscate this fact by referencing federal accounting rules for ILECs.² But the reality is, if the legal basis to assess Federal Lifeline payments in this manner were as clear as Staff claims it is, then other states would be imposing the same requirement on wireless Lifeline providers. The fact that no other state has ever ordered Virgin Mobile to pay a state USF assessment on Federal Lifeline payments illustrates that the legal basis for Staff’s position is questionable. Despite Staff’s attempt to

¹ Petition for Reconsideration at 6.

² Staff Response at 7.

downplay the national and industry-wide significance of this issue, Kansas will be the first state to impose such a requirement if it continues down this path.

3. To the contrary, both the Federal USF remittance form, and at least one other state USF remittance form (South Carolina) that Virgin Mobile is aware of, specifically instruct that Lifeline reimbursements are *excludable* from USF payment calculations. For example, the instructions to Federal Form 499A (Federal USF reporting form) expressly provide that “[r]evenues that filers receive as universal service support from either states or the federal government” are “not end-user revenue” and are excluded from the calculation of Federal USF assessment.³ (See Exhibit A attached.) Likewise, the instructions to the South Carolina USF remittance form expressly provide that federal and state USF payments are treated as “excluded or non-assessable revenue.”⁴ (See Exhibit B).

4. Staff’s Response also states that “Lifeline revenues have been included in the revenue reported for KUSF purposes since the KUSF was implemented; however, when the KUSF was implemented, only [ILECs and CLECs] participated in the Lifeline program.”⁵ This is of no consequence to the analysis. If other carriers choose to voluntarily pay an assessment on Federal Lifeline payments, in particular carriers who have the ability to pass through the charge to customers (which Virgin Mobile does not), that has no bearing on whether Kansas can legally *require* Virgin Mobile to do so.

5. Further, by issuing an order that is binding *only* on Virgin Mobile, and not any other wireless Lifeline providers that offer a no-charge service, Staff violates the very statute it cites, K.S.A. 66-2008(a), which requires all providers to contribute to the KUSF on an equitable

³ 2017 Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at p. 22.

⁴ 2017 South Carolina Universal Service Contribution Worksheet Instructions, at 7.

⁵ Staff’s Response at 7.

and nondiscriminatory basis.⁶ While Staff claims it is “not aware of” any other provider that does not report Federal Lifeline payments as assessable revenue for KUSF purposes,⁷ Staff ignores the fact that the only party in a position to know whether this is true or not is the Commission itself, since company-specific records are not available to Virgin Mobile or presumably to any other party other than the Commission. The Commission’s duty to ensure that the rules are applied equally and consistently to all carriers extends far beyond a general “awareness,” or lack thereof, by Staff as to how carriers are reporting Federal Lifeline payments. Any assertion by Staff as to whether all carriers are, or are not, treating Lifeline payments consistently should be backed up with evidence in a docket that applies equally to all providers, not in an order that is binding only on one carrier.

6. Staff’s Response also attempts to downplay Staff’s reliance on the KUSF remittance instructions as legal authority for its treatment of Federal USF payments,⁸ but Staff completely misses the point. Virgin Mobile’s point is that the KUSF remittance instructions were inadequate to put Virgin Mobile on notice of Kansas’s unique outlier position with respect to the treatment of Lifeline payments. Staff is attempting to use the remittance instructions to excuse itself after-the-fact for its failure to provide actual, meaningful notice of its position and to comply with its due process obligations to Virgin Mobile. Staff cites *not a single source of actual notice* to Virgin Mobile that Virgin Mobile was required to treat Federal USF payments as assessable revenue. In Sandy Reams’ email to Virgin Mobile dated February 20, 2017 (Attachment C to the GVNW Audit Report), she cites a collaboration with another unnamed wireless ETC (not Virgin Mobile) in which Staff apparently came to the conclusion that it should

⁶ Staff’s Response at 7, *citing*, K.S.A. 66-2008(a).

⁷ Staff’s Response at 8.

⁸ Staff’s Response at 7.

clarify the KUSF remittance instructions.⁹ Virgin Mobile was not a party to that alleged collaboration with another wireless ETC and had no knowledge of its outcome. It is unclear to Virgin Mobile why Staff would cite to an unrelated, off-the-record collaboration with another wireless ETC, resulting in a change to the remittance worksheet instructions, except for the purpose of relying on the remittance instructions to excuse Staff from its notice and due process obligations to Virgin Mobile.

7. Such an “off the record change” cannot be the basis for Staff going back in time and claiming that is entitled to “collect all moneys due to the KUSF from providers.”¹⁰ Staff’s assertion leads to the untenable conclusion that any Commission order can retroactively change the rules and then serve as the basis for collecting money due for a period of time before the rules were changed. Such an action would be a clear violation of the filed rate doctrine and is equally bad policy in the context of collecting remittances to the KUSF. While it is common for an audit to look at previous periods as asserted by Staff,¹¹ underlying this assumption is the premise that the same rules apply in the previous period as the one being examined. It is improper for Staff to claim on the basis of “working with another provider” that it has changed an instruction on the reporting form, and then to seek under the guise of an audit to retroactively collect for periods before the changed instruction.

8. As previously noted in the Petition, Staff’s reliance on the KUSF remittance worksheet instructions is flawed. The instruction form for the KUSF Year March 2014 - February 2015 states: “For Lifeline subscribers, report the total gross intrastate *customer service charge* prior to any Federal or State Lifeline credit or discount reimbursements.” As Virgin

⁹ Attachment C to GVNW Audit Report, at p. 2 of 4.

¹⁰ Staff’s Response at 1-2.

¹¹ Staff’s Response, at 6.

Mobile explained in its Petition, there is no “charge” for Virgin Mobile’s Lifeline service.¹² Accordingly, these instructions were inadequate to put Virgin Mobile on notice that it was supposed to treat Federal USF payments in Kansas differently than it treats them in every other state. Principles of due process dictate that Virgin Mobile should have been afforded notice and the opportunity to be heard.¹³

9. Staff also asserts that “nothing has prevented a wireless Lifeline provider or a group of wireless Lifeline providers from raising this issue with Staff and GVNW, or filing a petition with the Commission prior to the Commission’s July 11, 2017 Order.” It is not clear to Virgin Mobile how Staff believes Virgin Mobile should have raised an issue with the Commission prior to having any notice that it is, apparently, an issue. Nonetheless, Virgin Mobile agrees wholeheartedly with Staff that a public proceeding is the appropriate venue for this issue to be examined. That is exactly why Virgin Mobile urged in its Petition that the Commission should open a general investigation docket, or convert the instant proceeding to such a docket.¹⁴

10. Finally, Staff’s argument that assessing Federal Lifeline payments does not violate federal law because the assessment applies only to intrastate revenue¹⁵ misses the mark. Whether or not an intrastate factor is applied, Kansas’ approach violates the plain language of Section 254(f) of the Telecommunications Act of 1996, which prohibits state universal service programs that “rely on or burden Federal universal service mechanisms.” By forcing Virgin Mobile to use Federal universal service support to pay Kansas universal service assessments,

¹² Petition at 6.

¹³ See K.S.A. Const. Bill of Rights Sec. 18 (“All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.”)

¹⁴ Petition at 6.

¹⁵ Staff Response at 3-4.

Kansas both relies on and burdens the Federal universal service mechanism, contrary to Congress' command.

11. In addition, as explained in the Petition, the FCC has undertaken considered policy decisions to determine the appropriate amount of Lifeline subsidy providers receive from the FUSE. The federal regulations provide that “[f]or each qualifying low-income consumer receiving Lifeline service, the reimbursement amount *shall equal* the federal support amount”¹⁶ The federal regulations also provide that “[f]ederal Lifeline support in the amount of \$9.25 per month *will be made available* to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer . . . ,” subject to phase-down beginning in 2019.¹⁷ By assessing Federal USF payments that Virgin Mobile receives, regardless of whether an intrastate factor is applied to the amount, the Commission is denying Virgin Mobile the full benefit of the \$9.25 reimbursement to which it is entitled, in violation of 47 C.F.R. 54.407(b) and 47 C.F.R. 54.403. Furthermore, Virgin Mobile is required under federal law to “pass through the full amount of support to the qualifying low-income consumer”¹⁸ as a condition of receiving the federal subsidy. While Virgin Mobile is required to pass through \$9.25 of support to Kansas consumers, at the same time the Commission prohibits Virgin Mobile from effectively collecting the full \$9.25 per consumer from the Federal Fund by assessing the Federal payments, whether or not an intrastate factor is applied. This increases Virgin Mobile’s cost of providing service to Lifeline customers, and potentially violates 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 intrastate service.”)

¹⁶ 47 C.F.R. 54.407(b) (emphasis added).

¹⁷ 47 C.F.R. 54.403(a)(1) (emphasis added).

¹⁸ 47 C.F.R. 54.403(a)(1).

12. 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 2nd day of August, 2017.

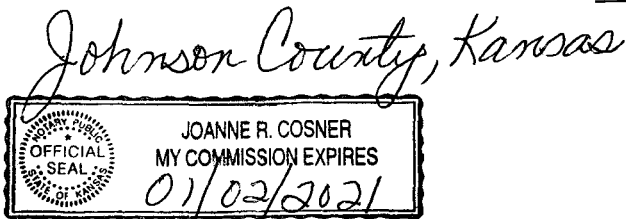
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VERIFICATION

I, Diane Browning, being of lawful age duly sworn, state that I have read the above and foregoing Reply to Staff Response to 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 3 day of August 2017.



Joanne R. Cosner
Notary Public

3. APPORTIONING REVENUES AMONG REPORTING CATEGORIES

a. General Information

Good-faith estimates

If revenue category breakout cannot be determined directly from corporate books of account or subsidiary records, filers may provide on the Worksheet a good-faith estimate of the breakout.

- Good-faith estimates should be based on information that is current for the filing period.
- Filers should maintain documentation for good-faith estimates and entities may not simply report all revenues on one of the “other revenue” lines.

Column (a) required

Filers with any revenues for Lines 303–314 and 403–420 may not omit the dollar amounts from column (a), even if all of the revenues are for interstate or international services.

Block 3 vs. Block 4 revenues

Filers may report revenues from contributing resellers (i.e., universal service contributors) on Lines 303 through 314 and must report all other revenues on Lines 403 through 418. *See* Section IV.C.4 for additional information on reporting revenues from resellers.

- In many cases, the line-item categories are duplicated in Block 3 and Block 4.
- *Intercarrier compensation and universal service support*: The following categories of revenues are not end-user revenue and are reported in Block 3. For these revenue items, the filer is not required to retain Filer 499 ID information or verify that the customer is a reseller.

Category of Revenue	Report on
Per-minute switched access charges and reciprocal compensation	Line 304
Revenues received from carriers as payphone compensation for originating toll calls	Line 306
Charges for physical collocation of equipment pursuant to 47 U.S.C. § 251(c)(6)	Line 307
Revenues that filers receive as universal service support from either states or the federal government	Line 308
Revenues received from another U.S. carrier for roaming service provided to customers of that carrier	Line 309

- *Carriers required to use the USOA*: Carriers that are required to use the Uniform System of Accounts (USOA) prescribed in Part 32 of the Commission’s rules should base their responses on their USOA account data and supplemental records, dividing revenues into

Exhibit A

2017 South Carolina Universal Service Contribution Worksheet Instructions

charges, roaming charges assessed on customers for calls placed out of customers' home areas, and local directory assistance charges. End-user prepaid wireless service revenues attributable to activation and daily or monthly access charges should be reported on Line 213.

TOLL SERVICES:

Line 208 -- All revenues (excluding international) from prepaid calling cards provided either to customers or to retail distributors. Revenues should represent the amounts actually paid by customers (face value) and not the amounts paid by distributors or retailers, and should not be reduced or adjusted for discounts provided to distributors or retail establishments. All prepaid card revenues are classified as end-user revenues. For purposes of completing this Worksheet, prepaid card revenues should be recognized when the cards are sold.

Line 209 -- Operator and toll calls with alternative billing arrangements should include all calling card or credit card calls, person-to-person calls, and calls with alternative billing arrangements such as third-number billing, collect calls, and country-direct type calls that either originate or terminate in a U.S. point. These lines should include all charges from toll or long distance directory assistance. Filers should include revenues from all calls placed from all coin and coinless, public and semi-public, accommodation and prison telephones.

Line 210 -- Filers should report ordinary long distance revenues on these lines, including revenues from most toll calls placed for a fee and flat monthly charges billed to customers, such as account maintenance charges, PCCC pass-through charges, and monthly minimums. This category should include ordinary message telephone service (MTS), WATS, subscriber toll-free, 900, "WATS like," and similar switched services.

Line 211 -- All revenues from long distance private line service including revenues from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. Line 211 should include frame relay and similar services where the customer is provided a dedicated amount of capacity between points in different basic service areas. Do not include revenue from international calls (to be reported on Line 216).

Line 212 -- All other long distance services should include all other revenues from providing long distance communications services. Line 212 should include toll teleconferencing, switched data, frame relay and similar services where the customer is provided a toll network service rather than dedicated capacity between two points. Do not include revenue from international calls (to be reported on Line 216).

EXCLUDED OR NON-ASSESSABLE REVENUE:

Line 213 -- End-user prepaid wireless service revenues attributable to airtime should be reported on Line 213.

Line 214 -- Universal service support revenues include all universal service support from either states or the federal government filers received during the calendar year. Revenues to be reported include Lifeline Assistance reimbursement for the waived portion of subscriber line, presubscribed interexchange carrier charges or credits for subsidized services provided to schools, libraries, and rural health care providers.

Exhibit B