

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

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

**STAFF'S RESPONSE TO VIRGIN MOBILE USA, L.P.'s PETITION FOR
RECONSIDERATION**

COMES NOW the Staff of the State Corporation Commission of the State of Kansas ("Staff" and "Commission", respectively) and in response to the Petition for Reconsideration of Virgin Mobile USA, L.P. (Virgin Mobile) filed July 21, 2017, states the following:

1. Virgin Mobile has not included the \$9.25 monthly Federal Lifeline program revenues it receives for Kansas subscribers in its revenues for Kansas Universal Service Fund (KUSF) assessment purposes,¹ asserting that because the revenue is not collected directly from Lifeline subscribers, it is not subject to the KUSF assessment. In support of its assertion, the Company claims: (1) the Commission improperly applied the KUSF assessment outside of the audit period; (2) the Company properly excluded Federal Lifeline support from its KUSF revenues; and (3) imposing KUSF obligations on Virgin Mobile is inconsistent with administrative procedures and due process.² Staff disagrees.

I. The Commission Correctly Applied Corrections Outside of the Audit Period.

2. Virgin Mobile's claim that the Commission erroneously adopted corrections to its KUSF obligations outside of the March 2015 through February 2016 audit period is incorrect. K.S.A. 66-2010(b) requires the KUSF Administrator to: (1) collect and audit *all* relevant

¹ July 11, 2017 Order, page 2.

² July 21, 2017 Petition for Reconsideration.

information filed by providers; (2) verify, based the provider's calculations, the provider's KUSF obligation; and (3) collect *all* moneys due to the KUSF from providers. The KUSF Administrator cannot audit every provider every year, thus, the Commission adopted an audit process in which sixteen (16) providers are audited each year,³ with the Audit Procedures used during the KUSF audits approved by the Commission annually. The Audit Procedures, filed in the annual KUSF assessment Docket, are publicly available and require the KUSF Administrator to expand the audit if necessary.⁴ The Audit Procedures do not in any way limit the period for which a provider must correct its KUSF reporting as imposing such a limit would moot the requirement for the Administrator to audit *all* relevant information, as well as the requirement for a provider to meet its KUSF obligation. Furthermore, the Commission has not adopted a period in which to apply audit findings, as to do so could infringe upon the Commission's fiduciary duty as it relates to the KUSF. Nor is this circumstance unique to Virgin Mobile, as the Commission has required providers that incorrectly reported revenue, paid assessments, or received monies outside the audit period to correct such errors to ensure the provider meets its KUSF obligations.⁵

II. The Company Improperly Excluded Federal Lifeline Support from its KUSF Revenues.

3. Virgin Mobile asserts 47 U.S.C. §254(f) prevents a state from requiring a provider to report its Federal Lifeline support for KUSF purposes and doing so "relies on" or "burdens"

³ Docket No. 94-GIMT-478-GIT (Docket 94-478), Oct. 30, 1998 Order.

⁴ GVNW became the KUSF Administrator, effective Nov. 1, 2008. The KUSF Audit Procedures have contained the provision for the auditor to expand the audit period and information reviewed when necessary since at least the audits for March 2007-February 2008. See Docket No. 07-GIMT-276-GIT, Jan. 11, 2010 Order Accepting Audit Report and Docket No. 15-GIMT-073-GIT, July 14, 2016 Order Accepting GVNW's KUSF Year 19 Audit Selections, Proposed Revisions to Selection Criteria, and Audit Review Procedures, adopting Audit Procedures in effect for Virgin Mobile's audit.

⁵ For example, see Docket No. 07-SNKT-184-KSF, Aug. 2, 2007 Order Adopting Final Audit Report of Southern Telephone by Solix, Inc. and Directing Southern Telephone to Comply, requiring Company to file correction effective with the 2000 calendar year; Docket No 06-SSLZ-780-KSF, Sept. 25, 2005 Order No. 2 Accepting Audit and Directing Sprint Spectrum to Comply and remit corrections effective the audit period and subsequent year; and Docket No. 14-GIMT-105-GIT, Sept. 9, 2014 Order Adopting Adjustments and Refund to AT&T 's KUSF Account, directing the Company to remit corrections effective with the 2010 calendar year.

the Federal Universal Service Fund (FUSF) mechanism. In support of its claims, Virgin Mobile cites to *AT&T Corp. v. Public Utility Com'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).

4. Both cases cited above are irrelevant to a provider's obligation to report all of its Kansas *intrastate* revenue to the KUSF. *AT&T Corp. v. Public Utility Com'n of Texas* is not relevant as the issue raised in that case involved whether a state could extend its Universal Service Fund (USF) assessment to *all* taxable revenue. Specifically, the Court found Texas' regulation applied the Texas USF on all providers' intrastate revenues, but also resulted in the Federal and Texas USF assessments being applied to the same interstate and international revenues. This resulted in multi-jurisdictional carriers being assessed twice on the same revenues and, therefore, the Court found that imposing the Texas USF assessment on multi-jurisdictional carriers' interstate revenues was inequitable and discriminatory. Likewise, *AT&T Communications Inc. v. Eachus* is irrelevant to the reporting issue raised in this docket because that case addressed a state applying its USF policies to interstate revenue that was also assessed for FUSF purposes. *AT&T Communications, Inc. v. Eachus* resulted in the Court determining that by assessing both interstate and intrastate revenue, the State of Oregon relied on the same revenue as that assessed for FUSF purposes, therefore, burdening the FUSF mechanism.

5. The requirement for all carriers to report the *intrastate* portion of their Federal Lifeline revenue does not rely on interstate or international revenue that is assessed for FUSF purposes and, thus, does not burden or rely on the FUSF mechanism. Instead, the Commission has adopted revenue identification and allocation mechanisms to ensure revenues are not subject

to double-assessment.⁶ This means providers, including Virgin Mobile,⁷ elect how to allocate the total revenue earned in Kansas between the interstate and intrastate jurisdictions, with only the Federal Lifeline revenue allocated to the *intrastate* jurisdiction subject to the KUSF assessment. This prevents a multi-jurisdictional carrier from being assessed on the same revenue as it is assessed on for FUSF purposes and means the inclusion of Federal Lifeline revenue, received in lieu of collecting the monies from low-income subscribers, does not violate 47 U.S.C. §254(f). Furthermore, 47 U.S.C. §254(f) specifically authorizes states to require all telecommunications carriers to contribute to state USFs and establish additional definitions and standards as long as they do not rely on or burden Federal USF mechanisms. The Commission's policies prevent the KUSF from relying on or burdening the FUSF mechanism since the KUSF assessment only applies to intrastate revenue. Thus, contrary to Virgin Mobile's claims, the inclusion of the intrastate portion of Federal Lifeline revenue reimbursements reported for KUSF purposes does not violate 47 U.S.C. §254(f).

6. Virgin Mobile also asserts subjecting Federal Lifeline revenues to the KUSF assessment is not "equitable and nondiscriminatory" because KUSF contributions are not required for other Federal support funds received by providers. Virgin Mobile fails to recognize the differences between the purpose of the Lifeline program and other USF support programs. 47 C.F.R. §54.407(b) states the Federal Lifeline reimburses a provider for "each qualifying low-income consumer receiving Lifeline service" since the Federal Lifeline program supports low-income subscribers through a reduction in their service price via the \$9.25 reimbursement to the provider. In other words, the Federal Lifeline program lowers the price the Lifeline subscriber

⁶ Docket 94-478, Feb. 3, 1997 Order on Reconsideration; Docket No. 06-GIMT-332-GIT, Sept. 8, 2006 Order; Docket No. 03-GIMT-932-GIT, Sept. 2, 2003 Order; and Docket No. 07-GIMT-432-GIT, Sept. 22, 2008 Order.

⁷ Docket No. 16-GIMT-067-GIT, April 3, 2017 Affidavit of Andy Lancaster on behalf of Virgin Mobile, L.P.

pays for service and allows the provider to receive the same level of revenue for the subscriber as it would have received if the subscriber was not a Lifeline subscriber.⁸ The Lifeline program is essentially a revenue replacement program. In contrast, the Federal high-cost support program is not based on a per customer subscriber base, but instead on a provider's costs and expenses incurred to provide service to consumers living in rural, insular, high-cost areas.⁹

7. Virgin Mobile also alleges it is discriminatory to require its Federal Lifeline revenues to be included for KUSF purposes because it “cannot recover the KUSF assessments on FUSF funds from its customers”¹⁰ due to the method Virgin Mobile chooses to conduct its business. Virgin Mobile markets its Lifeline service as “free” and does not issue monthly bills; therefore, contending it cannot recover its KUSF assessment from consumers unlike other providers that elect to render bills to subscribers. Virgin Mobile made a business decision to market its Lifeline services as “free,” not render monthly bills to subscribers, or collect its assessment from subscribers. Virgin Mobile's decision to employ this business model does not mean the Commission can ignore that K.S.A 66-2008(a) states the Commission shall “require *every* telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services and ...*every* provider of interconnected VoIP service ...to contribute to the KUSF based upon the provider's intrastate telecommunications services net retail revenues on an equitable and nondiscriminatory basis.” The statute does not state KUSF obligations are required “unless the provider chooses not to render a monthly bill or market its services as free to its subscribers”.

⁸ *In the Matter of Lifeline and Link Up Reform and Modernization*, 27 F.C.C.R. 6656, ¶11-16 (Rel. Feb. 6, 2012) Report and Order and Further Notice of Proposed Rulemaking, ¶¶ 11-16. *See also* 47 C.F.R. §54.407(b) stating Federal Lifeline is provided for “each qualifying low-income consumer receiving Lifeline service” and prohibits a provider from receiving more in revenue reimbursement than its monthly service rate.

⁹ 47 C.F.R. §36 and 47 C.F.R. §54.

¹⁰ Virgin Mobile's Petition for Reconsideration, ¶9.

Clearly, K.S.A. 66-2008(a) requires *every* provider listed to contribute to the KUSF regardless of their business model. Furthermore, K.S.A. 66-2008(a) authorizes, but does not require a provider to collect its assessment from subscribers.

8. Virgin Mobile further alleges that since it cannot recover its KUSF assessment from its subscribers, its Federal Lifeline revenues are reduced, thereby violating 47 U.S.C. §254(b)(1) and (b)(3). Virgin Mobile is correct in that it cannot reduce the Federal Lifeline subsidy provided to consumers as a means of paying its KUSF assessment; however, the obligation to pay the KUSF assessment is Virgin Mobile's, not its subscribers. Virgin Mobile is statutorily required to pay its KUSF assessment regardless of whether it elects to recover its assessment from customers or pay it from its own funds. The Commission has reiterated that K.S.A. 66-2008(a) does not impose the KUSF on subscribers, but on providers and those providers are authorized, but not required, to collect their assessment from customers.¹¹ Furthermore, contrary to Virgin Mobile's claims, the Commission has determined it cannot provide an advantage to a prepaid wireless provider due to the business model under which it has elected to operate. Specifically, in Docket No. 11-GIMT-842-GIT, CTIA claimed that if a provider does not issue bills to consumers, the provider is disadvantaged because it cannot collect its KUSF assessment.¹² Responding, the Commission stated:

As it is, the responsibility for collection of the KUSF revenue under K.S.A. 66-2008(a) is on prepaid wireless carriers, and authority does not exist for the Commission to shift that responsibility to retailers and customers as necessitated under the approach advocated by CTIA and Verizon. As Staff has observed, this results in unequal treatment of prepaid wireless service providers as opposed to other telecommunications providers.¹³

¹¹ Docket 94-478, Feb. 3, 1997 Order on Reconsideration, ¶ 28.

¹² Docket No. 11-GIMT-842-GIT, Oct. 28, 2011 Initial comments of CTIA-The Wireless Association.

¹³ Docket No. 11-GIMT-842-GIT, December 22, 2011 Order. ¶19.

10. Virgin Mobile elected the business model under which it operates, making the decision to market its Lifeline service as “free”, not rendering bills to subscribers, and not collecting its KUSF assessments from subscribers. The Commission cannot discriminate against other providers and provide an advantage to Virgin Mobile for selecting its particular business model.

III. Imposition of KUSF Obligations on Virgin Mobile is Consistent with Administrative Procedures and Due Process.

11. Virgin Mobile asserts that the Commission appears to have relied on the KUSF Instructions in ordering Virgin Mobile to include its Federal Lifeline revenues in its revenue reported for KUSF purposes. Contrary to Virgin Mobile’s assertion, the KUSF Instructions rely on Commission Orders and Kansas statutes,¹⁴ including K.S.A. 66-2008(a) which requires all providers “to contribute to the KUSF on an equitable and nondiscriminatory basis.” Lifeline revenues have been included in the revenue reported for KUSF purposes since the KUSF was implemented, however, when the KUSF was implemented, only wireline incumbent and competitive local exchange carriers (ILEC and CLEC, respectively) participated in the Lifeline program. Recognizing the change in the telecommunications industry, the Commission adopted the accounting rules for the ILECs, contained in 47 C.F.R. §32 (Part 32) for KUSF reporting purposes. Since the Commission does not determine the accounts other providers use for recording revenues, adoption of the Part 32 rules serve as guidelines for the revenues to be reported to the KUSF for all carriers, regardless of service technology. Pursuant to Part 32, ILECs record their monthly local service tariffed rate (e.g. \$15.00) in the applicable local service revenue account regardless of whether a subscriber qualifies for the Lifeline program or not. This is because it does not matter if the revenue is fully recovered via the subscriber or

¹⁴ GVNW Audit Report, Attachment C.

reimbursed from the Lifeline program.¹⁵ Additionally, Staff explained to Virgin Mobile that when it became aware, outside of an audit, that a Lifeline provider marketing its Lifeline service as “free” to subscribers had not reported the service rate (including Federal Lifeline revenue reimbursements) for KUSF purposes,¹⁶ Staff worked with the provider and GVNW to ensure the provider came into compliance with its KUSF obligations and worked with GVNW to clarify the KUSF Instructions to help ensure that all providers report their revenues in a consistent manner.¹⁷

12. Virgin Mobile further asserts the Commission should impose KUSF obligations related to Lifeline revenues to the Company only through a generic docket. Virgin Mobile expresses doubt that other providers report their Lifeline reimbursements for KUSF purposes,¹⁸ but offers no support for its statement. The KUSF Instructions are sent to all providers at the beginning of a new KUSF Fiscal Year and maintained on the KUSF website.¹⁹ The Commission has taken steps to uphold its duty to ensure that all providers report their revenues consistent with Commission policies. Furthermore, GVNW is duty-bound to advise the Commission if it finds that a provider is not doing so, as GVNW has done in this instance and Staff is not aware of any other provider that is not reporting its Federal Lifeline revenues to the KUSF for assessment purposes. Notably, 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.

¹⁵ Docket 94-478, Aug. 13, 1999 Order on issue of uncollectible revenue and additional KUSF revenue reporting issues, Attachment GL-2. See also KUSF Instructions, Attachment E, “Reportable Revenues,” containing an overview of revenues and revenue categories to be reported by providers, available for viewing at: <http://www.gvnw.com/USF/KUSF.aspx>.

¹⁶ GVNW Audit Report, Attachment C.

¹⁷ Id.

¹⁸ Petition for Reconsideration, ¶8.

¹⁹ See KUSF Instructions for the most recent years may be viewed at : <http://www.gvnw.com/usf/kusf.aspx>

WHEREFORE, Staff submits its Response to Virgin Mobile's Petition for Reconsideration and recommends the Commission deny Virgin Mobile's Petition and affirm the Commission's July 11, 2017 Order accepting and adopting GVNW Consulting, Inc.'s Audit Report and recommendation.

Respectfully submitted,

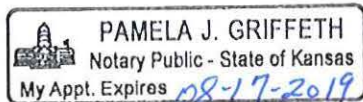


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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Otto A. Newton, being duly sworn upon his oath, deposes and states that he is Litigation Counsel for the Kansas Corporation Commission; that he prepared the foregoing *Staff Response to Virgin Mobile USA, L.P.'s Petition for Reconsideration* and that the statements therein are true to the best of his knowledge and belief.



Otto A. Newton

SUBSCRIBED AND SWORN to before me this 31st day of July, 2017.

My Appointment Expires: August 17, 2019

CERTIFICATE OF SERVICE

17-VMBZ-023-KSF

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Response to Virgin Mobil USA, L.P.'s Petition For Reconsideration was served by electronic service on this 31st day of July, 2017, to the following:

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