

MEMORANDUM

To: Thomas E. Wright, Chairman
Robert E. Krehbiel, Commissioner
Michael C. Moffet, Commissioner

From: Janet Buchanan

Date: June 28, 2007

Re: Request to open docket regarding certification of a carrier's use of Kansas Universal Service Fund support.

08-GIMT-154-GIT

Executive Summary:

Staff recommends that the Commission open a proceeding to determine whether it should require ETCs to certify that they have used KUSF support appropriately. Staff suggests that the Commission ask parties to provide comments on the Commission's authority to impose such a requirement, the investment and expenses that should be considered as evidence of use of KUSF support, what modification to FUSF certification forms will be necessary, the timing of KUSF certification and the appropriate consequence(s) for failure to use KUSF support appropriately. The Commission may wish to specifically limit the comments of parties to the discussion of certification of KUSF support as well as reminding parties that it has addressed the necessity of performing audits of competitive ETCs.

Background:

On June 16, 2006, the Commission opened Docket No. 06-GIMT-1289-GIT, as required by the Kansas Court of Appeals decision in *Bluestem Telephone Company, et. al. v. Kansas Corporation Commission*, 33 Kan. App. 2d 817 (2005). The docket was opened to examine what effect, if any, the enactment of K.S.A. 66-2008(e) had on its determination of a competitively neutral manner for distributing Kansas Universal Service Fund (KUSF) support to eligible telecommunications carriers (ETCs). The Commission requested and received comments and reply comments from interested parties. Within their comments, the State Independent Alliance (SIA) and the Independent Telecommunications Group, Columbus, et. al. (ITG) suggested that in order to treat carriers in a competitively neutral manner, the Commission should require ETCs to certify the use of KUSF support. SIA and ITG seemed to suggest that competitive ETCs be subjected to audits similar to those required to establish support levels for rural independent carriers. Staff suggested that audits of competitive ETCs were not necessary to achieve competitive neutrality. However, Staff acknowledged that SIA and ITG might have a valid concern regarding whether competitive ETCs utilize support appropriately. Staff suggested the Commission consider whether it should require ETCs to certify the use of KUSF support in the same manner as it now requires for use of federal universal service support (FUSF support). In its order issued March 8, 2007, the Commission required Staff to file a memorandum to serve as a basis for opening a generic proceeding to explore the certification of use of KUSF support.

The Commission established its current FUSF certification procedures in Docket No. 05-GIMT-112-GIT (Docket 112). In order to certify that FUSF support has been used properly, an ETC must file the forms developed in Docket 112 for the Commission's review. With these forms, ETCs demonstrate how much FUSF support and KUSF support they receive and how they

have expended this support for new investment and expenses to operate in supported areas of the state for the previous calendar year. The ETCs also provide a verified statement that they will use support appropriately in the upcoming year. Staff reviews the information supplied on the forms to determine whether reasonable allocations were used to identify expenses associated with providing service in the study areas that receive FUSF support and determines whether ETCs spend all of the FUSF support they received. While KUSF support information is supplied, the Commission does not require the certification of the use of this support. Staff monitors the expenditures relative to the total amount of support received, including KUSF; however, no formal recommendations are made to the Commission regarding the use of KUSF support.

In addition to the incumbent carriers, Nex-Tech, Inc., Nex-Tech Wireless, L.L.C., H&B Cable Service, Inc., Sage Telecom, Inc., Epic Touch Co., and Sprint Spectrum, L.P. are eligible to receive KUSF support at this time. United Wireless Communications, Inc. has an application for ETC designation to receive KUSF support pending before the Commission. The amount of support received by competitive ETCs is, at this time, a small portion of the total KUSF support provided to carriers.

Analysis:

Procedural Issues

In the dockets addressing the certification of use of FUSF support, parties provided written comments on procedures and forms and attended workshops to discuss and narrow the number of issues requiring a Commission decision. Parties then filed additional comments on the issues that could not be resolved through the workshop process. Staff suggests that the Commission adopt a similar procedure for this docket. Staff recommends that the Commission

issue an order with the current FUSF reporting form attached and ask parties to comment on the use of these forms for KUSF certification and other issues identified below.

Commission Authority to Require Certification of Use of KUSF Support

In requiring carriers to certify the use of FUSF support, the Federal Communications Commission (FCC) has pointed to Section 254 (e) of the Federal Telecommunications Act (FTA). Section 254 (e) states that, “. . . [a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. . . .” This Commission’s procedures and forms for FUSF certification have been designed to address this statutory provision. The Kansas Telecommunications Act (KTA) does not contain a similar provision regarding the use of KUSF support; however, Staff suggests that the Commission has broad authority to require certification under K.S.A. 66-1,188 which provides the Commission with the “. . . full power, authority and jurisdiction to supervise and control the telecommunications public utilities. . .” doing business in Kansas. The Commission may also find authority under K.S.A. 66-2002(c) and (h). K.S.A. 66-2002(c) requires the Commission to adopt guidelines to ensure that carriers “preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.” K.S.A. 66-2002(h) requires the Commission to establish the KUSF and “. . . make various determinations relating to the implementation of such fund.” While Staff believes the Commission has the requisite authority under through these statutory provisions, the Commission may wish to seek comments from interested parties regarding its authority to require certification of the use of KUSF support.

What Investment and Expense Should Be Included in an Examination of Use of KUSF Support

The Commission may wish to ask interested parties to comment on whether the Commission's existing FUSF certification forms sufficiently address investment and expenses to be reviewed for KUSF purposes. Additionally, the Commission may wish to seek comment on whether a competitive ETC should be permitted to include some investment incurred prior to receiving KUSF support. It may be reasonable to include some historical investment and expense for a period prior to receiving ETC certification because the carrier may have increased its investment in anticipation of receiving KUSF support in the future. This does not appear to be an issue for incumbent ETCs since they have received either implicit or explicit support or both since they began investing in a network. Staff suggests that it may be appropriate to include investment amounts from the full year prior to a competitive ETC's certification request. For example, if a competitive ETC requested certification in 2004, then the carrier could provide investment amounts from 2003 to help justify support received in later years.

What Changes to the Existing Forms Would be Necessary

The Commission may wish to request comment on whether changes in the existing forms utilized for FUSF certification are necessary to facilitate certification of the use of KUSF support. If only minor modifications are necessary, Staff suggests that it could make recommendations regarding those competitive ETCs that fail to expend enough to cover their KUSF support using the same forms as used to generate its report regarding the use of FUSF. If significant modifications are necessary, then separate forms may be necessary for certification of use of KUSF support. Regardless of whether separate forms are needed, Staff suggests that it could provide the Commission with its analysis of the use of KUSF support concurrent with its analysis

of the use of FUSF support. However, the Commission may wish to request comments from interested parties regarding the timing of KUSF certification reports.

What is the Consequence of Failing to Utilize KUSF Support Appropriately

The Commission may wish to solicit comments on the appropriate consequence or consequences for ETCs that do not utilize KUSF support appropriately. The FCC has indicated that it could require a carrier to return support, withhold support, or recommend that a state revoke the carrier's ETC designation if support is used inappropriately. The Commission may wish to request that interested parties comment on whether these same consequences are reasonable if an ETC fails to utilize KUSF properly.

Recommendation:

Staff recommends that the Commission open a docket to determine whether it should require ETCs to certify the use of KUSF support. Staff recommends that the Commission attach the existing certification forms to its order and pose questions outlined above on which parties may provide comment as well as any other issues the parties believe need to be addressed. The Commission may wish to specifically limit the comments of parties to the discussion of certification of KUSF support as well as reminding parties that it has addressed the necessity of performing audits of competitive ETCs. After initial comments are received, a workshop can be scheduled to discuss and narrow the issues needing resolution by the Commission.

CC: Don Low

Susan Cunningham

Susan Duffy

Pat Shurtz