2011.12.22 12:18:36
Kansas Corporation Commission
/S/ Patrice Petersen-Klein

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Mark Sievers, Chairman
Ward Loyd
Thomas E. Wright

In the Matter of Determining a Methodology to Identify and Report Kansas Prepaid Wireless Service Revenue for Kansas Universal Service Fund (KUSF) Purposes.	)	Docket No. 11-GIMT-842-KSF

FINAL ORDER ADDRESSING STAFF'S REPORT

The above captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being duly advised in the premises, the Commission makes the following findings:

I. Background

1. On September 9, 2011, the Commission opened this docket, at Staff's recommendation in its Report and Recommendation dated May 19, 2001, and filed June 14, 2011, to determine a methodology for wireless carriers to identify and report prepaid wireless service revenue for Kansas Universal Service Fund (KUSF) purposes in a consistent manner. The Commission made all wireless service providers in Kansas parties to this docket because the Commission was uncertain which wireless service providers offer prepaid wireless service, and mailed notice of the opening of the docket to 68 separate entities. Order Opening Docket and Setting Procedural Schedule, issued 9-9-2011 (Order Opening Docket), ¶ 4.

2. Staff explained that some wireless carriers identify Kansas revenue when the location of the sale of the prepaid minutes, or the KUSF-assessable portion of the purchase price

assigned to the preloaded minutes of use of a prepaid wireless phone, is in Kansas. Other providers identify Kansas revenue when a customer identifies a Primary Place of Usage (PPU) in Kansas and a Kansas telephone number is assigned. Staff was unsure whether wireless providers consistently report prepaid wireless service revenue at the time of sale, over time as the service is used, or by means of some other methodology. The KUSF administrator, GVNW Consulting, Inc., had advised Staff of its concerns that prepaid wireless service providers were not identifying or reporting intrastate revenues in a consistent manner. Order Opening Docket, ¶ 1.

3. In its order opening this general investigation, the Commission requested comments on how parties identify prepaid wireless service revenue for federal universal service fund (FUSF) and KUSF purposes, and when the revenue is reported. The Commission also provided an opportunity for reply comments. The initial procedural schedule was subsequently extended at the request of CTIA – The Wireless Association (CTIA) to make comments due October 28, 2011 and reply comments due November 14, 2011. Order Granting CTIA's Motion for Extension of Time to File Comments, issued 10-14-2011. Comments were filed by Southwestern Bell Telephone Company, TCG Kansas City, Inc., AT&T Communications of the Southwest, Inc., AT&T Corp., SBC Long Distance, LLC, Bell South Long Distance Inc., SNET America, Inc. and New Cingular Wireless PCS, LLC (collectively, AT&T); Easy Telephone Service Company d/b/a Easy Wireless (Easy Wireless); Sprint Nextel Corporation (Sprint); T-Mobile Central, LLC (T-Mobile); U.S. Cellular Corporation (U.S. Cellular); Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless); N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless (Viaero); and CTIA.

4. Only Staff provided reply comments. Reply Comments of Commission Staff (Reply), filed November 14, 2011. Staff summarized the comments of the parties and made

recommendations. The Commission has reviewed the comments and Staff's summary but will not summarize all comments in detail for purposes of this order.

5. In Staff's Reply, Staff observed that providers that use the point-of-sale methodology may do so because prepaid wireless service is like prepaid toll service. Staff noted that when a prepaid toll calling card is sold, the provider identifies the revenue as earned in this state, identifies the jurisdictional usage related to the card, and allocates the revenue between the interstate and intrastate jurisdictions. The other revenue identification methodology used by prepaid wireless service providers is PPU, which identifies the revenue from customers that indicate a Kansas PPU and who are assigned a Kansas telephone number. The latter is the same method used for traditional wireless service. Reply, p. 2.

II. Issues

A. Identification of Kansas Revenue

Comments of the Parties

6. The Commission incorporates the summary of the comments made by Staff in its Reply, ¶¶ 8-13, herein. The Commission notes AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon all indicated that they use the PPU method. AT&T, for example, informally indicated that when a customer activates a prepaid phone or card, the customer must identify a PPU. If that PPU is in Kansas, a Kansas telephone number is assigned and the revenue is identified as from Kansas. AT&T also uses a traffic study to allocate revenue that is not directly identified to a revenue category. Reply, p. 4.

7. Although Verizon uses the PPU method, Verizon suggests a point-of-sale methodology that Verizon proposed is superior because bills are not issued to customers for prepaid wireless service and the only time the prepaid provider may collect the KUSF surcharge

from customers is at the point-of-sale. Verizon requests that the Commission adopt the same methodology as established in E911 legislation, adopted during the 2011 legislative session, for prepaid wireless providers for the point-of-sale approach. See Substitute for Senate Bill 50 (SB 50), L.2011, ch. 84, §§ 1-28, effective January 1, 2012. This would require new legislation making retailers responsible for collection. Reply, p. 5

8. CTIA also argued for adopting legislation to require retailers to collect the KUSF assessment from the customer at the time of sale like the E911 approach. CTIA argues K.S.A. 66-2008 does not specifically address treatment of prepaid wireless revenues for purposes of the KUSF. Like Verizon, CTIA stated that prepaid wireless cards or phones are widely available from retailers and argued that because consumers are not issued bills, it is not possible for a prepaid wireless provider to pass on its KUSF assessment. Reply, p. 5. CTIA complains a prepaid service provider must pay the KUSF assessment out of the sales price, putting them at a competitive disadvantage to postpaid providers who add the KUSF assessment to the total amount of the purchase price billed.

9. CTIA suggests that, as with E911 fee collection, retailers should collect the assessment at the time of sale by multiplying the effective KUSF assessment rate by the intrastate Safe Harbor percent, which would then be applied to the assessable KUSF revenue to derive the KUSF assessment that would be collected and submitted to a state agency for ultimate remittance to the KUSF. Reply, p. 6. CTIA argues this approach is more equitable than permitting some customers to escape responsibility for paying into the KUSF and indicates some prepaid wireless providers engage in regulatory arbitrage for state USF purposes by falsely identifying or allocating revenue to avoid paying into a state USF or to pay a lower state USF rate. Reply, p. 6. CTIA asserts it is not necessary to adopt a uniform revenue identification

method during the period the Commission proposes this legislation and argues, as does Verizon, that each company should be allowed to use whatever method it desires. Reply, p. 6.

10. Staff noted that K.S.A. 66-2008(a) requires wireless telecommunications service providers to contribute to the KUSF and authorizes, but does not require, those carriers to collect an amount equal to their contribution, or a lesser amount, from their customers. Staff observes the statute places responsibility for contributing to the KUSF on wireless telecommunications carriers, not retailers and consumers as would the proposals by CTIA and Verizon. Reply, p. 7.

11. Staff notes the point-of-sale methodology proposed by CTIA and Verizon results in prepaid wireless service providers shifting their responsibility for the KUSF assessment to customers and retailers, unlike all other telecommunications providers -- resulting in unequal treatment in contrast with CTIA's claimed concern with equality in the treatment of customers and service providers to ensure a level playing field for competition. Reply, 9

12. Staff also observes that the legislative point-of-sale methodology proposed by Verizon and CTIA would expand the Commission's oversight responsibility for ensuring providers comply with their KUSF reporting obligations, as well as GVNW's current responsibility to conduct audits, from telecommunications and interconnected VoIP providers to every retailer selling prepaid wireless service. Reply, p. 9.

13. Staff noted that the point-of-sale methodology currently used for prepaid toll calling service cards recognizes that the underlying service provider both earns the revenue and has the ability to identify how the service is used, enabling it to allocate revenue between the services and jurisdictions. This approach also provides the service provider with flexibility to ascertain the best means of recovering its KUSF assessment such as conducting an annual traffic study to determine the percentage of intrastate usage. The provider, if electing to recover the

assessment from the customer, may increase the purchase price or decrease the prepaid minutes of use. This approach could be applied equally to wire line or wireless service. Reply, pp. 7-8

14. Staff notes the point-of-sale methodology is currently in use for prepaid toll service calling cards, and has been successfully so used since 1997, prepaid toll service providers have not raised issues with this method, and its use was reaffirmed by the Commission in its August 13, 1999 Order in Docket No. 94-GIMT-478-GIT. Therefore Staff suggests the Commission could employ this method as it presently exists without any legislative change. Reply, p. 10.

15. With regard to the PPU method, Staff observes AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon have all made management decisions to utilize this method to consistently identify Kansas revenue for both traditional and prepaid wireless service. Staff notes both traditional and prepaid wireless service customers may move out of state and maintain a Kansas phone number, and in both cases, reliance must be placed on the customer to advise the wireless service provider that his or her PPU has changed. Staff notes an advantage to adopting this method would be that the majority of Kansas providers would likely not need to alter their internal accounting or billing systems. Reply, p. 10.

16. Whether the point-of-sale currently used for prepaid toll cards or the PPU methodology is selected, Staff states the difference between the overall Kansas revenue and KUSF receipts would not likely be significant. When the Commission selected the wireless industry's proposal that revenue be identified using the PPU methodology instead of the billing address, the overall change to the KUSF was minimal although certain companies may have experienced more significant differences. Reply, p. 10-11.

17. Staff noted its concern regarding CTIA's statement that regulatory arbitrage is occurring, and stated that if CTIA is or becomes aware of any provider engaging in the fraudulent activity of falsely identifying or allocating revenue to avoid proper state USF payments, CTIA should report such activity to the appropriate state commission. Reply, p. 11.

18. Staff recommended that the Commission adopt either the point-of-sale methodology or the PPU methodology. The point-of-sale method is already used for prepaid toll calling, and the PPU method is already widely used by prepaid wireless service providers. No legislative changes would be required for either of these methods. Reply, p. 14.

Commission Discussion

19. The Commission does not consider it prudent to approve any revenue allocation methodology that would necessitate a legislative change as proposed by Verizon and CTIA. Staff has pointed out areas of concern to the Commission inherent with that plan, including the possibility of a broadened Commission jurisdiction and extending GVNW audit oversight to include a broad range of retailers. 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.

20. Staff and the parties have not voiced strong preferences with regard to a choice between the PPU and the point-of-sale methodologies for allocation of intrastate revenues from prepaid wireless services. Staff has pointed out some advantages of adopting point-of-sale, the current methodology used for prepaid toll cards, or the PPU. However, the Commission finds

that the PPU methodology should be adopted as a consistent means of reporting revenue for purposes of the KUSF by prepaid wireless providers. As Staff points out, this method has already been widely approved by management of many of the wireless carriers for use for prepaid wireless service revenue allocation, has already been widely used by the major wireless carriers for prepaid wireless without issues, and should require the least amount of change to current billing and accounting systems. The wireless carriers requested and received Commission approval of their use of the PPU methodology in Docket 06-GIMT-943-GIT. This request was based on a desire for uniformity and efficiency in light of the carriers' nationally-based billing systems, as it enabled them to source and assess the KUSF in the same manner as federal law requires for taxes and fees. Order Granting Requests of Joint Petitioners, issued September 7, 2006. In addition, the Commission notes this methodology is similar to that used for KUSF revenue reporting purposes for interconnected VoIP.

21. The Commission observes that Verizon and CTIA have asked, absent a legislative solution as they have proposed, that the Commission permit carriers to use any method they choose. However, Staff and GVNW have raised a reasonable and valid concern that intrastate revenues be identified and reported in a uniform manner. The Commission noted the need for ensuring that all carriers are identifying and reporting revenues for purposes of the KUSF in a consistent manner in its Order Setting Year 15 Assessment Rate, Per Line Maximums, and Canceling Hearing, issued 1-13-2011, Docket No. 11-GIMT-201-GIT. Since it is already widely used and there have not been issues arising from its use, the PPU methodology should result in the least degree of regulatory burden while meeting the need expressed by the Commission, Staff, and GVNW for a consistent method of reporting revenue.

22. The Commission shares Staff's concern regarding possible regulatory arbitrage. CTIA should report any such activity of which it is aware to the appropriate state commission.

B. Allocation of Revenue

Comments of the Parties

23. Staff observed that revenue from prepaid minutes purchased with a phone or card that permit use for different services (voice, text messaging, and/or data) must be allocated between KUSF-assessable revenue from voice services and the revenue from other services or the phone itself. The voice service revenue is then allocated between the interstate and intrastate jurisdictions. Reply, p. 8.

24. Staff noted the Commission has adopted three methodologies for this allocation, citing Order Adopting Staff's supplemental Testimony Regarding Changes Affecting the Kansas Universal Service Fund, issued September 8, 2006, *In the Matter of the Investigation to determine the March 1, 2006, Assessment for the Tenth Kansas Universal Service Fund Year*, Docket No. 06-GIMT-332-GIT. First, in direct assignment, revenue is identified to the specific jurisdiction in which it is earned. Secondly, traffic studies done by or for the companies and specific to their sales or traffic may be used. Third, the Safe Harbor method is a default allocation approved for both the FUSF and KUSF that assigns 37.1% of the revenue to the interstate jurisdiction and 62.9% to the intrastate jurisdiction. Reply, p. 8. Staff points out that the largest traditional wireless providers in Kansas use traffic studies to perform allocation for FUSF and KUSF purposes. Reply, p. 8.

25. Providers reported using all three methods of allocation of revenues between the interstate and intrastate jurisdictions: direct assignment, traffic studies, and Safe Harbor. The

Commission adopts herein Staff's summary of the comments as set forth in Staff's Reply, ¶¶ 25-28.

26. Easy Wireless stated that revenue earned from Lifeline subscribers should be allocated based on how the revenue is reported by the wireless provider on FCC Form 497. Staff reviewed the FCC's Form 497 used for direct assignment allocation. Staff reported the instructions failed to specify how to allocate revenues earned from Lifeline subscribers. Reply, pp. 11, 12.

27. Staff recommended that since some wireless providers only offer prepaid and not traditional wireless services, the Commission adopt the three methodologies to allocate revenues between the interstate and intrastate jurisdictions. Reply, pp. 12-13, 14. Staff suggested that as with traditional wireless service, it would be assumed that the prepaid wireless provider uses the Safe harbor method to allocate its revenue, unless the provider files a pleading with the Commission stating whether the provider will use the direct assignment or company-specific traffic study methods, or a combination. Staff recommended that any such pleading be accompanied by an affidavit from a company officer verifying that the method is used by the company for FUSF purposes as well. To minimize the burden for carriers offering both traditional and prepaid wireless services, Staff suggested that the Commission permit such carriers to file one pleading and affidavit for both services. A pleading and affidavit should be submitted to the Commission whenever a service provider changes its methodology, or the percentages allocated to the interstate and intrastate jurisdictions change. Reply, pp. 12-13.

28. Staff observed that adoption of the three allocation methods is supported by the comments. The comments indicated that the majority of providers used these methods. Staff observed that this approach would ensure both consistency of the allocation methodologies used

by all wireless service providers and that 100% of a provider's prepaid wireless service revenues are subject to USF requirements. Reply, pp. 13. Staff recommended the Commission adopt these three methodologies for prepaid wireless services because they are already appropriately being used for prepaid wireless service and traditional wireless services for both FUSF and KUSF purposes. Reply, p. 13.

Commission Discussion

29. The comments do not suggest Staff's recommendations are controversial. As Staff has observed, these methods of allocation are widely used. Adoption of Staff's recommendation will provide clarity in how allocation is performed by all wireless service providers, promote consistency between FUSF and KUSF allocation methodologies, and ensure that prepaid wireless service revenues are fully subject to USF requirements. Staff's recommendations regarding revenue allocation provide flexibility to companies to select an allocation method they believe best and seek to minimize any regulatory burden. The Commission finds Staff's recommendations reasonable and adopts them.

30. Whatever revenue allocation method a prepaid wireless provider uses is required to be identical for both KUSF and FUSF purposes. The Commission will assume that a prepaid wireless provider is using the Safe Harbor method to allocate its revenue, unless the provider files a pleading with the Commission stating that the provider will use the direct assignment or company-specific traffic study methods, or a combination. Such pleading shall be accompanied by an affidavit from a company officer verifying that the method is also used by the company for FUSF purposes. A company may file one pleading and affidavit for both prepaid and traditional wireless services. A pleading and affidavit shall be submitted to the Commission whenever a

service provider changes its methodology, or the percentages allocated to the interstate and intrastate jurisdictions change.

C. Timing of Reporting Revenue

Comments of the Parties

31. Most carriers indicated that they report the prepaid, assessable revenue categories for the KUSF as the service is used and the revenue is earned. These carriers record a liability when their prepaid services are purchased and recognize the revenue over a period not exceeding the length of time allowed to use the service. One carrier indicated it reports revenue when the service is purchased due to the fact the service must be used within 30 days. Reply, p. 13.

32. Staff noted CTIA proposed that carriers should be permitted to use whatever method they desired for purposes of reporting allocated revenues for KUSF purposes, as long as it is consistent with GAAP and FUSF requirements, until the legislative proposal it advocated requiring retailers to collect a KUSF surcharge at the time of purchase is adopted. Reply, p. 13. Because the Commission does not approve or adopt the CTIA proposal, this suggestion has no relevance.

33. Staff recommended that the Commission permit carriers to report prepaid service revenues when earned (when the service is used). Staff observed that the comments from the parties indicate that they are appropriately recording deferred revenue for the purchase price and recognizing revenue as it is earned, or on an immediate basis when the service is or must be used within a short time period. Reply, 13-14. Staff recommended this approach continue to be used. Reply, 14.

Commission Discussion

34. The Commission notes most carriers already report the prepaid, assessable revenue categories for KUSF purposes as the service is used and the revenue is earned, as Staff has recommended. The Commission believes consistency in the manner of reporting should be maintained. Because most companies already report their revenues in this manner, adopting this recommended revenue reporting requirement should result in the least impact on prepaid wireless service providers while providing the desired consistency in the reporting of revenue for KUSF purposes. The Commission finds Staff's recommendations reasonable and adopts them.

35. Prepaid wireless service providers shall report prepaid service revenues when earned, as the service is used, per Staff's recommendation, including reporting revenue immediately when the service must be used within a short time period, such as within 30 days.

III. CURB's Petition to Intervene

36. On September 12, 2011, the Citizens' Utility Ratepayer Board (CURB) filed a Petition to Intervene. Petition to Intervene, September 9, 2011 (Petition). CURB was placed on the service list and has received all filings, including Staff's Reply. CURB did not seek to submit comments or reply comments, and the Commission has been advised that CURB does not oppose Staff's recommendations. In excess of 30 days have passed since the date reply comments were due, and since the filing of Staff's Reply, and there is no reason for further delay in the entry of the final order by the Commission. To take affirmative action upon CURB's Petition would, in the interests of fundamental due process, require that the Commission allow CURB additional time for reply or comment regarding CURB's direct interest in the proceeding. The Commission has adopted Staff's recommendations in this order, and to avoid impairment of the interests of justice and the orderly and prompt resolution of this proceeding CURB's Petition should be denied. K.S.A. 2010 Supp. 77-521(a)(3); K.A.R. 82-1-225(a)(3).

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission adopts the PPU methodology for reporting revenue for purposes of the KUSF, as discussed above in paragraphs 19-22.

B. The Commission requests that CTIA advise the Commission immediately of the occurrence of any instance of regulatory arbitrage activities as identified in its comments in order that the Commission might take appropriate action.

C. The Commission adopts Staff's recommendations with regard to allocation of revenue for KUSF purposes, as discussed above in paragraphs 29-30.

D. The Commission adopts Staff's recommendations with regard to timing of reporting of revenue for purposes of the KUSF, as discussed above in paragraphs 34-35.

E. CURB's Petition to Intervene is denied for the reasons set forth in paragraph 36.

F. The parties have fifteen days, plus three days if service is by mail, from the date the order is served in which to petition the Commission, for reconsideration of any issues decided herein. K.S.A. 66-118b; K.S.A. 2010 Supp. 77-529(a)(l).

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

BY THE COMMISSION IT IS SO ORDERED.

Sievers, Chmn; Loyd, Com.; Wright, Com, dissenting in part.

Dated: DEC 22 2011

ORDER MAILED DEC 22 2011

Patrice Petersen-Klein
Executive Director

crr

Docket No. 11-GIMT-842-KSF

Commissioner Wright, dissenting in part:

I concur with the Order but would grant CURB intervention. The statutory scheme contemplates that CURB has discretion to intervene.

Thomas E. Wright /by PNK
Commissioner Thomas E. Wright

IN RE: DOCKET NO. **11-GIMT-842-GIT** DATE DEC 2 2 2011

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The Docket Room hereby certified that on this ____ day of ________________, 20______, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.

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ORDER MAILED DEC 2 2 2011

The Docket Room hereby certified that on this ____ day of ______________, 20______, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.

IN RE: DOCKET NO. **11-GIMT-842-GIT** DATE DEC 2 2 2011

PLEASE FORWARD THE ATTACHED DOCUMENT (S) ISSUED IN THE ABOVE-REFERENCED DOCKET TO THE FOLLOWING:

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES

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Regulatory & Governmental Affairs ST MESSAGING SERVICES, LLC 1720 Lakepointe Dr Ste 100 Lewisville, TX 75057		

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Kathleen Makas VIRGIN MOBILE USA, L.P. 10 INDEPENDENCE BLVD WARREN, NJ 07059		
Andrew Plocienneczak WDT WIRELESS 13644 Neutron Rd Dallas, TX 75244		

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NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
Regulatory & Governmental Affairs ZTARMOBILE, INC. 16 Village Ln Ste 250 Cojleyville, TX 76034-2950		

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