THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

In the Matter of the Investigation to Address Obligations of VoIP Providers with Respect to the KUSF	)))	Docket No. 07-GIMT-432-GIT

IMPLEMENTATION ORDER ADOPTING STAFF REPORT AND RECOMMENDATION AND REQUIRING VOIP PROVIDERS OPERATING IN KANSAS TO REPORT AND REMIT TO THE <u>KANSAS UNIVERSAL SERVICE FUND BY JANUARY 15, 2009</u>

NOW COMES the above-captioned matter for consideration and determination by the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records and being fully advised in the premises, the Commission finds and concludes as follows:

1. On November 2, 2006, the Commission issued its order opening this docket (Nov. 2 Order) for the purposes of determining whether voice over internet protocol (VoIP) providers should be required to contribute to the Kansas Universal Service Fund (KUSF). The Nov. 2 Order solicited comments and reply comments that the parties filed on December 15, 2006, and January 12, 2007, respectively.

2 On April 30, 2007, the Commission issued its Notice of *Ex Parte* Communications, Notice of Additional Legal Authority, and Order Regarding Additional Comment (April 30 Order). In addition to alerting the parties to a letter received by the Commission from the Kansas Legislature's House Energy and Utility Committee, the April 30

Order took notice of a decision made March 21, 2007 by the United States Court of Appeals for the Eighth Circuit in which the Court addressed appeals dealing with the subject matter of this docket. The Commission requested additional comment on that decision, and additional comment was received in June, and July, 2007.

3. On January 9, 2008, the Commission issued its Order Making Interim Findings and Conclusions Relative to Questions Posed for Investigation (Jan. 9 Order). The Jan. 9 Order determined: 1) there was no Federal authority barring the Commission from requiring VoIP providers to contribute to the KUSF; 2) there was no express state authority requiring or permitting contributions to the KUSF from VoIP providers – such authority could be implied, but that such implications always carried a litigation risk unless legislation were crafted that granted the Commission the authority to require contributions from VoIP providers; 3) that using the Federal Universal Service Fund's (FUSF) safe harbor mechanism to identify intrastate revenues was appropriate; and 4) that using New Mexico's three methods for determining contributions to the KUSF from VoIP providers was appropriate. No party petitioned for reconsideration of the Jan. 9 Order.

4. On February 12, 2008, the Commission issued an order and scheduled an industry workshop on March 13, 2008, to address implementation issues. Due to a family medical emergency with the Staff facilitator, the March 13, 2008 workshop was rescheduled to July 2, 2008. Meanwhile, on June 11, 2008, the Commission issued an order which noted that Senate Bill 49, passed during the 2008 legislative session, amended K.S.A. 66-2008(a) to permit the Commission to require interconnected VoIP providers to contribute to the KUSF to the extent not prohibited by federal law. The Commission also noted that the Federal District Court in Nebraska had enjoined the Nebraska Public Service Commission from requiring VoIP providers

to contribute to the Nebraska Universal Service Fund because the Nebraska court determined that such contributions would be unlawful as being pre-empted by the Federal Communications Commission, but that the Court Decision employed a different analysis, did not consider competitive and technological neutrality, and was not binding on the 10^{th} circuit. The Commission determined the implementation workshop should be resumed, directed Staff to work with industry to hold the workshop either July 2 or 3, 2008 and to file a report on the workshop within 45 days of the workshop. On June 16, 2008, Staff filed its notice that the workshop would occur on July 2, 2008, via teleconference at 10:00 a.m. CST.

5. Staff filed its report on August 1, 2008. Staff's report made several recommendations to facilitate VoIP providers in Kansas contributing to the KUSF, including modifications to current reporting and remitting forms and instruction sheets, and included a list of identified VoIP providers. Staff requested the Commission adopt the recommendations contained in its report and issue an order requiring interconnected VoIP providers operating in Kansas to contribute to the KUSF no later than January 15, 2009.

6. Initially, the Commission notes that K.S.A. 66-2008(a) as amended through passage of SB 49, states in part:

> The commission shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services *and, to the extent not prohibited by federal law, every provider of interconnected VoIP service, as defined by 47 C.F.R. 9.3 (October 1, 2005)*, to contribute to the KUSF on an equitable and nondiscriminatory basis. Any telecommunications carrier, telecommunications public utility, wireless telecommunications service provider *or provider of interconnected VoIP service* which contributes to the KUSF may collect from customers an amount equal to such carrier's, utility's or provider's contribution, but such carrier, provider or utility may collect a lesser amount from its customers.

The amendment to K.S.A. 66-2008(a) gives this Commission explicit direction that it shall require every provider of interconnected VoIP service in Kansas, to the extent not prohibited by federal law, to contribute to the KUSF on an equitable and nondiscriminatory basis. The Commission stated in its Jan. 9 Order its conclusion that although there was no federal authority that expressly permitted or precluded the Commission from requiring VoIP providers to contribute to the KUSF, such authority could be implied from federal law. And, on August 5, 2008, the Commission notes that the FCC filed an *amicus* brief in the Eighth Circuit Court of Appeals, in *Vonage Holdings Corp. and Vonage Network, Inc. v. Nebraska Public Service Commission, et al.,* 08-1764, in which it specifically stated that by its promulgation of its rules, it did not intend to pre-empt states from requiring VoIP providers to contribute to state universal service funds. In its brief, the FCC stated that the federal district court:

> erred when it concluded that Vonage was likely to succeed on its claim that the *NPSC USF Order* was preempted under the rationale of the *Vonage Preemption Order.* Unlike the state regulations at issue in the *Vonage Preemption Order*, Nebraska's decision to require interconnected VoIP providers to contribute to the state's universal-service fund does not frustrate any federal rule or policy. Rather, the *NPSC USF Order* is fully consistent with the FCC's conclusion that the *VoIP USF Order* that requiring interconnected VoIP providers to contribute to the federal universal-service fund would serve the public interest.[1]

7. Additionally, the Commission notes K.S.A. 66-2008(a) adopts the FCC's definition of "interconnected VoIP service," which can be found at 47 C.F.R. §9.3 and which defines interconnected VoIP service as that which:

a. Enables real-time, two-way voice communications;
b. Requires a broadband connection from the user's location;
c. Requires Internet protocol-compatible customer premises equipment (CPE); and,
d. Permits users generally, to receive calls that originate on and to terminate calls to the Public Switched Telephone Network (PSTN).

[1] Brief of FCC – http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf – p. 12.

The Commission notes Staff's discussion in its August 1 Report of the FCC's "Contribution Order" in which the FCC noted that VoIP obligations to contribute to the FUSF "apply regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party. Staff's report further notes that the participants to the workshop agreed Staff's report would address this issue and recommend that further clarification is unnecessary.

8. The Commission agrees with Staff's report and finds it unnecessary to clarify whether the requirement for interconnected VoIP providers to contribute to the KUSF apply to "nomadic" or "fixed" providers. Neither "nomadic" nor "fixed" are defined at 47 C.F.R. §9.3; as such, the Commission finds it only necessary to reiterate that K.S.A. 66-2008(a), as amended, defines interconnected VoIP by referring to the definition in 47 C.F. R. §9.3.

9. Staff's report next discusses how interconnected VoIP providers can be identified. Staff recommended several methods: 1) self-reporting to the KUSF; 2) publicly-available information, including FCC databases, public advertisements, and the Internet; 3) other companies and customers; and, 4) modification of the Commission's telecommunications annual reports. The Commission believes that all the methods identified, above, should be sufficient to identify interconnected VoIP providers required to contribute to the KUSF, and instructs Staff to use all methods it deems prudent to identify interconnected VoIP providers as defined in K.S.A. 66-2008(a), as amended.

10. Staff's report next turned to the timing of KUSF implementation for VoIP providers. Staff recommended that the Commission report revenue and pay assessments "for the first data month occurring 90-day[s] after the issuance of a Commission order adopting such

requirements."[2] Staff further noted that "[i]nterconnected VoIP providers should also remit a 'Company Identification and Operations,' or Attachment B in the Instruction Packet, to the KUSF Administrator within 60[]days of the order. In the event that a company cannot revise its billing system to allow it to collect its assessment from end-user customers at the same time it is required to report and contribute to the KUSF, companies should be authorized to 'back-bill' end-user customers up to the amount the companies owe to the KUSF, provided that such billing occurs within the same KUSF fiscal year."[3] Staff further noted that various companies at the workshop requested various implementation periods, with most of the participants indicating that a 90-day implementation period would be sufficient. The Commission finds that 90 days should be a sufficient implementation period, in that 90 days will be sufficient to allow for modification of billing systems to accommodate the KUSF assessment. Interconnected VoIP providers shall commence modification of billing systems immediately so as to be able to report the December 2008 data month's revenues and pay that assessment to the KUSF on or before January 15, 2009. The Commission instructs interconnected VoIP providers to report intrastate revenues on line 7 of the non-ILEC Carrier Remittance Worksheet, contained in Attachment C to Staff's August 1 Report.

11. Staff's report also recommends the Commission determine that "[i]nterconnected VoIP providers identify intrastate revenues based on a customer's primary physical service address, identified by the customer upon service in initiation, and updated accordingly." At the workshop, several participants suggested identification of Kansas revenues based on a customer's physical service address or E911 address. Staff noted in its report that no workshop participants could later provide it with FCC instruction on the issue and that other states used

[2] Staff Report, filed August 1, 2008, p. 6.
[3] Id., pp. 6-7.

either billing address or primary place of use for revenue identification. Staff recommended using a customer's primary service address, which, in the majority of cases, should be the E911 address, but noted that the issue could be revisited in the future, if necessary. The Commission finds Staff's recommendation to be reasonable and adopts the same. Staff noted that 97% of incumbent LEC lines, as reported for the year ended December 31, 2007, have E911 capability. The Commission believes this method will be the most reliable to identify the revenue source, but may revisit the issue in the future should the need arise.

12. Staff further recommended the Commission adopt the FCC's methodologies and allow interconnected VoIP providers to identify intrastate revenue subject to the KUSF assessment through direct assignment, a company-specific traffic study, or the inverse of the FCC safe harbor, currently 35.1%. As is current Commission practice for wireless carriers, the Commission will assume that the interconnected VoIP provider will use the inverse of the FCC safe harbor unless the VoIP provider requests Commission to use either of the alternative methods identified. If a VoIP provider wishes to use an alternative method, it must file a pleading in the KUSF year docket (a KUSF "year" runs from March 1 of a year through February 28/29 of the following year) in which it wishes to use that alternative method. The pleading shall request Commission approval of the proposed alternative method, and accompany the pleading with an affidavit from an officer of the company confirming that the method proposed to be used in Kansas is the same as that used for federal purposes.

13. The Commission notes that, like all other entities that report and remit to the KUSF, interconnected VoIP providers are subject to penalties for failure to comply. Initially, as noted by Staff, payments to the KUSF must be received at the bank and the Administrator by the due date of the 15th of each month. Post-marking a payment or remittance worksheet by the 15th

will make the payment or worksheet late and subject to late penalties, so the Commission cautions contributors to post payments and worksheets well in advance of the 15th each month to ensure timely arrival. If the 15th of the month falls on a weekend or holiday in which the bank is not open, then the due date is the next business day. As Staff notes in its report, a late *payment* penalty of 1% of the assessment owed, 12% cumulative, has been in effective since February 1997. In March 2006, the Commission adopted a late *worksheet* penalty of 1% of the assessment owed, 12% cumulative, or $100, whichever is greater. As Staff noted, neither Staff nor the KUSF administrator have authority to waive penalties and that a company seeking such a waiver should file such a request with the Commission.

14. In summary, the Commission by this order and the Jan. 9 Order:

a. Finds that K.S.A. 66-2008(a), as amended, defines interconnected VoIP by referring to the definition in 47 C.F. R. §9.3.

b. Finds that all the methods outlined by Staff, above, should be sufficient to identify interconnected VoIP providers required to contribute to the KUSF, and instructs Staff to use all methods it deems prudent to identify interconnected VoIP providers as defined in K.S.A. 66-2008(a), as amended

c. Finds that 90 days should be a sufficient implementation period, in that 90 days will be sufficient to allow for modification of billing systems to accommodate the KUSF assessment. Interconnected VoIP providers shall remit an Attachment B, Company Identification and Carrier Operations, to the KUSF Administrator, by December 15, 2008. Interconnected VoIP providers shall commence modification of billing systems immediately so as to be able to report the December 2008 data month's revenues and pay that assessment to the KUSF on or before January 15, 2009. The Commission instructs interconnected VoIP providers to report intrastate revenues on line 7 of the non-ILEC Carrier Remittance Worksheet, contained in Attachment C to Staff's August 1 Report.

d. Finds that interconnected VoIP providers shall use a customer's primary service address, which, in the majority of cases, should be the E911 address, for revenue identification.

e. Finds that interconnected VoIP providers shall identify intrastate revenue subject to the KUSF assessment through direct assignment, a company-specific traffic stuffy, or the inverse of the FCC safe harbor, currently 35.1%. If any interconnected VoIP providers wish to use a method other than the inverse of the federal safe harbor, it must file a pleading in the KUSF year docket (a KUSF "year" runs from March 1 of a year through February 28/29 of the following year) in which it wishes to use that alternative method. The pleading shall request Commission approval of the proposed alternative method, and accompany the pleading with an affidavit from an officer of the company confirming that the method proposed to be used in Kansas is the same as that used for federal purposes.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission makes the findings and orders as set out, above.

B. The parties have fifteen days, plus three days if service of this order is by mail, from the date this order was served in which to petition the Commission for reconsideration of any issue or issues decided herein. K.S.A. 66-118b; K.S.A. 2007 Supp. 77-529(a)(1).

C. 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.

Wright, Chr.; Moffet, Com; Harkins, Com.

Dated: SEP 22 2008

ORDERED MAILED

SEP 22 2008

Susan Duffy EXECUTIVE DIRECTOR

Susan K. Duffy
Executive Director

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