

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
)	

Comments of the Corporation Commission of the State of Kansas on the Federal Communications Commission’s April 30, 2012 Further Notice of Proposed Rulemaking

The Kansas Corporation Commission (“KCC”) submits these comments in response to the FCC’s further notice of proposed rulemaking on reforming the rules governing contributions to the Federal Universal Service Fund (“FUSF”). FCC Doc. 12-46 (April 30, 2012) (“FNPRM”).

In these comments, the KCC rebuts the proposal of some parties that the FCC attempt once more to fund the FUSF through assessment of the intrastate revenues of providers, despite the 1999 decision by the U.S. Court of Appeals for the 5th Circuit holding that the FCC lacked jurisdiction to order such assessments. The KCC also requests that the FCC coordinate any changes it makes to the FUSF with the assessment rules governing State universal service funds (“State USFs”), in order to avoid undermining State USF contribution bases.

A. Background – Review of Current Rules

FCC rules in effect since 1999 provide that the FUSF is supported through contributions by telecommunications providers assessed on a percentage of their interstate and international revenues. (For simplicity, these Comments will use the term “interstate” to cover both the domestic interstate and international revenues assessed by the FUSF.¹) By contrast, the FUSF does not assess intrastate revenues. See 47 C.F.R. 54.706(b). Intrastate services instead presently contribute to achievement of universal service objectives through assessments of intrastate revenues by various State USFs, including the Kansas Universal

¹ The KCC recognizes that the FCC exempts certain providers whose revenues are entirely or overwhelmingly international from the duty to contribute to the FUSF, and that the FCC is considering whether to eliminate that exemption. See *FNPRM*, FCC Doc. 12-46 ¶¶ 193-208; 47 C.F.R. 54.706(b), (c).

Service Fund (“KUSF”). This system complies with 47 U.S.C. § 254(d), which requires that “interstate” service providers contribute to the FUSF, and 47 U.S.C. § 254(f), which requires that “intrastate” service providers support state universal service mechanisms.

B. FUSF Assessment of Intrastate Revenues Remains Unlawful and Bad Policy, so the FCC Should Decline Invitations to Attempt Such Assessments Again.

The FCC seeks comment on the suggestion of some parties that the FCC once again attempt to fund the FUSF by assessment of intrastate as well as interstate revenues. *FNPRM*, ¶¶ 129-130. The FCC assessed intrastate as well as interstate revenues from 1997 through 1999 to support the schools and libraries program. In 1999 the U.S. Court of Appeals for the 5th Circuit held in *Texas Office of Public Utility Counsel v. FCC* (“TOPUC”) that this assessment of intrastate revenues was beyond the FCC’s jurisdiction.² The FCC amended its rules later in 1999 to comply with that ruling, and so has not assessed intrastate revenues since that time.

The proposal that the FCC try again to assess intrastate revenues is flawed from a policy as well as legal perspective. From a policy perspective, a rule change that extends the FUSF contribution obligation to encompass intrastate revenues would result in providers in states with State USFs making a double contribution to support universal service on their intrastate revenues -- once to the FUSF, and once to the State USF. By contrast, such providers would make a single contribution on their interstate revenues -- to the FUSF. Such a regulatory regime would create a strong incentive for providers to classify an artificially high percentage of their traffic as interstate rather than intrastate. Because providers pass on their contribution costs, consumers would pay more for intrastate than interstate service, and have less incentive to purchase services still classified as intrastate. The predictable result would be shrinkage in the State USF contribution base, less ability of the states to shoulder part of the overall universal service burden, and so transfer of more of that burden to the FUSF.

From a legal perspective, nothing has happened in the last 13 years to undermine the Fifth Circuit’s holding that assessment of intrastate revenues to support the FUSF constituted

² 183 F.3d 393, 447-448 (5th Cir. 1999) (“TOPUC”).

FCC regulation of “charges” for intrastate service in violation of Section 2(b) of the Communications Act, 47 U.S.C. § 152(b). The Court found no exception to Section 2(b)’s general prohibition of FCC regulation of intrastate telephony applied, and so held that the FCC lacked statutory authority to assess intrastate revenues to support the FUSF:

[W]e conclude that § 2(b)’s [47 U.S.C. § 152(b)’s] broad language encompasses the FCC’s decision to assess intrastate revenues. The plain language of § 2(b) discusses “jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service...” We agree with CBT that the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a “charge ... in connection with intrastate communication service.”... We decline to exempt the FCC’s assessment of intrastate revenues from the ambit of § 2(b)....

If the point of § 2(b) was to protect state authority over intrastate service, allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers’ business decisions on how much intrastate service to provide or what kind it can afford to provide. This federal influence over intrastate services is precisely the type of intervention that § 2(b) is designed to prevent.³

The governing statute, 47 U.S.C. § 254, has not been amended in any relevant way in the years since the *TOPUC* ruling. There are no subsequent Supreme Court or other decisions that undermine *TOPUC*.⁴ The 5th Circuit did not find that the FCC has merely failed to adequately articulate a rationale, failed to cite sufficient evidence, or committed some other error that was “fixable” on remand.⁵ Rather the Court specifically held that assessing intrastate revenues was beyond the FCC’s “jurisdiction”, due to Section 2(b).⁶ In taking prompt action to comply with the Court’s ruling by halting assessment of intrastate revenues, the FCC correctly recognized that the Court’s holding was firm: “the court found that the Commission had exceeded its jurisdictional authority by assessing contributions for those programs based, in

³ *TOPUC*, 183 F.3d at 447 and n. 101.

⁴ The Fifth Circuit decided *TOPUC* several months **after** the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), held that the FCC has jurisdiction over intrastate interconnection matters pursuant to Section 251 of the Act. The 5th Circuit in *TOPUC* fully considered the Supreme Court’s decision and held that Section 254’s universal service provisions did not similarly authorize the FCC to assess intrastate revenues (and so did not override Section 2(b) as Section 251 did.) 183 F.3d at 446-448.

⁵ See *TOPUC*, 183 F.3d 393.

⁶ *Id.* at 447-448.

part, on the intrastate revenues of universal service contributors.”⁷ The Court’s jurisdictional statutory determination cuts off further debate until the statute is changed.

Advocates of FUSF assessment of intrastate revenues suggest that requiring providers of interstate service to contribute on “all revenue” is somehow different from expressly requiring providers to contribute on “intrastate and interstate” revenue. *FNPRM*, ¶ 130. Their suggested distinction is illusory. “All revenue” is simply the sum of interstate (including international) and intrastate revenue. So assessing “all revenue” is just another way of characterizing the assessment of “intrastate revenue” found unlawful by the 5th Circuit. The FCC should not disrupt the industry through making major changes unlikely to survive judicial review.

C. To Avoid “Robbing Peter to Pay Paul,” the FCC Should Ensure that Any Reforms it Orders to Protect the FUSF Contribution Base do not Undermine State USF Contribution Bases.

The KCC recognizes that the FCC is considering a variety of ways to expand the FUSF contribution base, and that assessing intrastate revenues is just one of them.

The KCC notes that each of the possibilities would likely impact the contribution base of State USFs. The FCC should recognize this and take steps to ensure it does not counterproductively shrink the contribution bases of State USFs in order to expand the contribution base of the FUSF. As contemplated by Section 254, which requires that federal and state governments partner to achieve universal service goals, State USF programs reduce the workload of the FUSF by meeting a substantial part of the overall need for universal service.⁸ If the FCC overlooks the critical step of coordinating FUSF contribution changes with the State USF contribution mechanisms, the FCC risks having to soon further enlarge the FUSF (and raise the FUSF assessment rate) in order to make up for shrinkage in State USF programs that now support universal service. For example, as described above, should the FUSF assess both intrastate and interstate revenue, while the State USFs assess only intrastate revenue, the

⁷ *Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket 96-45, and Sixth Report and Order in CC Docket 96-262*, 15 FCC.Rcd. 1679, ¶11 (1999).

⁸ “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.” 47 U.S.C. § 254(b)(5).

resulting incentive of providers to avoid classifying revenue as intrastate (and so subject to two layers of assessment) and of consumers to avoid purchasing services classified as intrastate (and so subject to two USF surcharges) would negatively impact State USF contribution bases.

In addition, a key limitation on State USFs is that “[a] State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State” only if the State mechanism does not “rely on or burden” the Federal USF mechanism. 47 U.S.C. § 254(f). Because “relying on” and “burdening” is in the eyes of the beholder, any changes to the current regime in which the FUSF assesses only interstate revenues and the State USFs assess only intrastate revenue are likely to result in provider non-payment of State USF assessments based on allegations that such assessments unlawfully rely on or burden the federal mechanism.

A further danger for State USFs is that providers persistently claim that wireless and Internet-protocol based services are subject to exclusively federal regulation and cannot be assessed by State USFs. Over the years, the KUSF has won rulings from the federal courts and the FCC that it may assess the intrastate revenues of both wireless and VoIP providers.⁹ However, because those rulings considered the specific federal and state contribution regimes now in place, providers will predictably claim these rulings no longer apply if the FUSF shifts to a radically different contribution system.¹⁰ This is particularly so if State USFs change their own contribution rules in response to changes to the FUSF contribution rules.

Accordingly, in any rulemaking order it adopts, the FCC should clearly declare that State USFs may either continue their current assessment system (assessing intrastate revenues) or switch to a new system parallel to the new FUSF assessment system, and that neither option

⁹ *Declaratory Ruling, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC.Rcd. 15651, ¶ 11 (2010) (“State USF VoIP Contributions Order”); *Sprint Spectrum, L.P. v. Kansas State Corp. Comm’n*, 149 F.3d 1058, 1061-1062 (10th Cir. 1998)(upholding KUSF assessments of wireless carriers).

¹⁰ *See, e.g. State USF VoIP Contributions Order*, 25 FCC.Rcd. 15651, ¶¶ 11, 15-17 (finding FCC’s current contributions rules are consistent with State USF assessment of VoIP revenues).

“relies on” or “burdens” the FUSF in violation of Section 254(f). For example, if the FCC decides the FUSF should assess telephone numbers and connections used for interstate calling, the FCC should confirm that State USFs may either (a) continue to assess intrastate revenues, even though the new FUSF contribution system is based on numbers/connections, or (b) assess all telephone numbers and connections used for intrastate calling, even though those numbers and connections are also used for interstate calling and so assessed by the FUSF. Similarly, in the unlikely event that the FCC directs that the FUSF assess intrastate revenues, the FCC should declare that State USFs may either continue to assess intrastate revenues only or, like the FCC, may switch to assessing both interstate and intrastate revenues.¹¹

Further, in any rulemaking order it adopts, the FCC should reaffirm the existing rulings cited above permitting State USFs to assess wireless carriers and VoIP providers, and explain how these rulings continue to apply in the new FUSF contribution environment. The FCC should endeavor to continue to allow State USFs to assess all providers the FUSF may assess.

The continued vitality of State USFs is too important to achieving the joint federal and state goal of supporting universal service to be left “twisting in the wind” for years after the FCC releases its rulemaking order. It took more than four years from the FCC’s 2006 rulemaking order imposing FUSF assessments on interstate VoIP revenue before the FCC issued its 2010 declaratory ruling that the KUSF may similarly assess intrastate VoIP revenue.¹² During that enforcement gap, providers who should have contributed to the KUSF took advantage of the uncertainty by not contributing, and State USFs faced several federal court lawsuits.¹³ With this new round of reforms, the FCC should pro-actively recognize the need to protect State USFs’

¹¹ If the FCC may assess both the interstate and intrastate revenues of interstate providers (as stated above, it can’t), it would logically follow that the States may similarly assess both the interstate and intrastate revenues of intrastate providers. See 47 U.S.C. § 254(d),(f) (allowing the FCC to assess providers of “interstate” services and allowing the States to assess providers of “intrastate” services).

¹² State USF *VoIP Contributions Order*, 25 FCC.Rcd. 15651, ¶¶ 14-16 (reviewing *Interim Contribution Methodology Order*, 21 F.C.C.R. 7518 (2006)).

¹³ *Id.*, ¶¶ 13-14 and n. 42.

contribution bases and actually do so in its rulemaking order, rather than leave the issue again to a patchwork of follow-up litigations in federal court and FCC declaratory ruling proceedings.

Conclusion

The FCC should decline invitations to fund the FUSF through assessment of intrastate revenues. Any attempt to do so would be contrary to the 5th Circuit's still-binding *TOPUC* decision, as well as bad policy. The FCC should coordinate whatever reforms of the FUSF contribution rules it does adopt in order to ensure that they do not "rob Peter to pay Paul" by undermining the contribution bases of State USFs which now assist the FUSF in supporting the joint federal/state universal service programs.

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Respectfully submitted,

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