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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| In the Matter of Virgin Mobile, USA, L.P.       | ) |   |
| Petition for Limited Designation as an Eligible | ) | <b>Docket No. 10-2521-01</b>              |
| Telecommunications Carrier                      | ) | Utah Rural Telecom Association's Petition |
|   | ) | for Review and Reconsideration of the     |
|   | ) | Report and Order                          |

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Pursuant to Utah Code Ann. §§ 63-46b-12 and 54-7-15, Utah Rural Telecom Association (“URTA”) hereby submits its Petition for Review and Reconsideration of the Report and Order, dated May 25, 2011, granting ETC designation to Virgin Mobile USA, L.P. (“Virgin Mobile”).

**STATEMENT OF THE CASE**

On April 12, 2010, Virgin Mobile filed a petition with the Public Service Commission for designation as an eligible telecommunications carrier (“ETC”), pursuant to 47 U.S.C. § 214(e). URTA filed a petition to intervene, which the Commission granted. URTA opposed the petition for ETC status. On March 8, 2011, the Commission held a hearing on Virgin Mobile’s petition and received briefs from the parties.

In support of the petition, Virgin Mobile testified that its E911-compliant handset would provide customers nationwide calling, voice mail, caller I.D., and E911 capabilities. Virgin Mobile argued that the ETC designation was in the public interest because lower-income consumers are underserved, because they lack access to options available to other customers, and because

competition in the Lifeline market will pressure other carriers to provide additional services to customers. Virgin Mobile further testified that the public interest is served because Virgin Mobile will pay all applicable public interest surcharges (except for poison control and hearing impaired charges).

In opposition to the petition, URITA argued that Virgin Mobile must prove that its ETC designation would actually serve the public interest, which finding requires a different standard for rural areas. Accordingly, URITA argued that the public interest prong of the analysis at least requires Virgin Mobile to pay all applicable public interest programs, to avoid negatively affecting universal service, and to serve all of the same service areas as the rural telephone company (no cherry picking).

On May 25, 2011, the Commission issued the Report and Order, in which it granted ETC status to Virgin Mobile. While the Report and Order stated that granting ETC status to Virgin Mobile is in the public interest, the Report and Order failed to recognize or establish a standard in analyzing the “public interest” factor of 47 U.S.C. § 214(e)(2). Because the Commission did not articulate and apply a standard to determine if the public interest is served, the Report and Order does not comply with 47 U.S.C. § 214(e)(2). Furthermore, because the Commission did not articulate the standard, the findings are necessarily arbitrary and capricious.

### **ARGUMENT**

47 U.S.C. § 214(e)(2) states “[b]efore designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.” The Commission did not indicate what standard it would follow in determining the public interest factor of § 214(e)(2). It did not establish a standard or attempt to apply the evidence to a particular standard. It is impossible for URITA, a reviewing court,

or future ETC applicants, to determine what factors the Commission believes are, and are not, relevant to the public interest test, or to know how significant any one factor is in the analysis. The findings of the Commission are therefore arbitrary and capricious.

The Commission merely found (i) that Virgin Mobile's free and discounted wireless service will enhance competition and will make wireless service more available to lower-income consumers, (ii) that the service will increase consumer choice and improve access to high quality telecommunications capabilities, (iii) that lower income consumers will have access to voice mail, call waiting, caller I.D., and broader access to E911. The Commission was not persuaded by the arguments from URTA regarding dilution of USF funds from rural ILECs. The Commission concluded that it finds "the public interest benefits of Virgin Mobile's proposed Lifeline program compelling."

Though the Commission made the comments noted above, it did not establish a standard by which such factors are analyzed, compared to each other, or assessed. URTA cannot determine, in this docket or any future docket, which factors are relevant to the public interest analysis and which factors are not. URTA cannot determine if any identified factors are more heavily weighted than others. URTA cannot determine what other factors the Commission considered, or may consider, in analyzing the public interest. In the end, it appears that, boiled down to its essence, the only factor relied on by the Commission is the promotion of competition and consumer choice.

This analysis, however, cannot be the sole standard because every single petition seeking ETC status would, if granted, result in consumer choice and competition; thus, the public interest test would always be satisfied and this constrained reading would create a nullity in the Act and render the public interest standard void of substance. Rather than simply concluding the competition is

always in the public's best interest, the Commission is required to articulate a standard of what is and is not considered in a public interest analysis, and then balance all of the competing interests that affect the public's interest. The Commission must then make specific findings that ETC designation requested is, in fact, in the public's best interest. The Commission did not do this in the Report and Order. The portion of the Report and Order finding that the ETC designation is in the public interest is should be vacated and the Commission should articulate a public interest standard and apply the evidence before it to that standard to see if the public interest is, in fact, served by designating the Petitioner as an ETC. Unless and until it has done this, the Commission has not complied with 47 U.S.C. § 214(e)(2), and ETC designation is improper.

### **CONCLUSION**

For the reasons stated above, the Commission should vacate the portion of the Report and Order finding that ETC designation is in the public interest, establish a standard for determining if, in this rural area, the public interest is served, and then apply the facts and evidence to that standard to see if Virgin Mobile qualifies for ETC status.

DATED this 24<sup>th</sup> day of June 2011.

BLACKBURN & STOLL, LC

/S/ Brett N. Anderson

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Attorneys for Utah Rural Telecom Association

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2011, I caused to be served a copy of the Utah Rural Telecom Association’s Petition to Review and Reconsider of the Report and Order on the following persons in the manner indicated below at the following addresses:

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| <b>Division of Public Utilities</b>        | <b>Office of Consumer Services</b>       | <b>Salt Lake Community Action Program</b>    |
| Patricia Schmid<br><i>pschmid@utah.gov</i> | Paul Proctor<br><i>pproctor@utah.gov</i> | Betsy Wolf<br><i>bwolf@slcap.org</i>         |
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|  |  |
|--|--|
| <b>Tracfone Wireless</b>                     | <b>Virgin Mobile</b>                                   |
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- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**
- by **Personal Service**

Dated this 24<sup>th</sup> Day of June, 2011

BLACKBURN & STOLL, LC

/S/ Brett N. Anderson  
Brett N. Anderson