

Sharon M. Bertelsen (#9759)
BALLARD SPAHR LLP
201 South Main Street, Suite 800
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Counsel to Virgin Mobile USA, L.P.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

)	Docket No. 10-2521-01
In the Matter of Virgin Mobile USA, L.P.)	
Petition for Limited Designation as an)	Virgin Mobile USA, L.P.'s
Eligible Telecommunications Carrier)	Application for Review
)	

Pursuant to Utah Code Ann. §§ 54-7-15 and 63G-4-301 and Utah Administrative Code Rule 746-100-11, Virgin Mobile USA, L.P. (“Virgin Mobile”) hereby requests review of a portion of the May 25, 2011 Report and Order issued by the Utah Public Service Commission (the “Commission”), which grants Virgin Mobile limited Eligible Telecommunications Carrier (“ETC”) designation in the State of Utah, subject to specified conditions.

I. INTRODUCTION

In this proceeding, Virgin Mobile, a wholly owned subsidiary of Sprint Nextel Corporation, filed a petition with the Commission seeking designation as an ETC in the State of Utah pursuant to Section 214(e) of the Communications Act, as amended (“Act”), for the limited purpose of offering prepaid wireless services supported by the federal Universal Service Fund’s (“USF”) Lifeline program.¹ Since Virgin Mobile currently offers facilities-based wireless services in Utah, it requested ETC designation within its existing coverage area, which includes areas served by rural telephone companies.

¹ See 47 U.S.C. § 214(e).

On May 25, 2011, the Commission issued a Report and Order in this Docket granting Virgin Mobile's petition for limited designation as an ETC, subject to specified conditions. This Application for Review addresses the condition in the Report and Order on ETC designation in areas served by a rural telephone company. Specifically, this Application requests review of the condition placed on Virgin Mobile as to each service area served by a rural telephone company, that Virgin Mobile's ETC designation is conditioned upon "the concomitant obligation to offer the supported services throughout the service area, i.e., study area, of that rural telephone company." For each such service area, the Commission conditioned ETC designation on Virgin Mobile submitting a compliance filing within 30 days of the date of the Report and Order "certifying its technical capability and commitment to provide service, as defined in Section 214(e)(1) of the Act, throughout the respective rural telephone company study area." The Report and Order provides that "ETC designation is not granted for any rural telephone company service area (i.e., study area) in which Virgin Mobile does not certify its ability and willingness to provide the requisite service throughout the service area." Report and Order, p. 14.

Virgin Mobile respectfully requests Commission review of this condition, and asserts the following in support of its request.

II. ARGUMENT

Under Section 214(e) of the Act, the Commission has the authority to designate as ETCs common carriers that meet the statutory requirements and the Commission has the responsibility to determine that the ETC designations are consistent with the public interest, convenience and necessity. The Commission also has the responsibility to regulate certain aspects of the Lifeline program.²

² See Utah Admin. Code R746-341.

A. Designation of Virgin Mobile in Rural Areas to the Extent of its Existing Coverage Area is in the Public Interest

When a carrier seeks ETC designation in areas served by rural telephone companies, the Commission must find that the designation is in the public interest under Section 214(e)(2) with respect to those areas. Virgin Mobile has met its burden of demonstrating that designation will serve the public interest in its existing coverage area in Utah, including areas that are served by a rural telephone company.

Although Congress did not establish specific criteria for the public interest test in Section 214, the Federal Communications Commission (“FCC”) developed a public interest analysis for instances where it has jurisdiction over an ETC applicant. The FCC, in determining the public interest, “considers the benefits of increased consumer choice and the unique advantages and disadvantages of the applicant’s service offering.”³

As established on the record, in its petition, its testimony and its post-hearing briefs, Virgin Mobile has described how its entry into the Lifeline market would significantly benefit eligible customers in all areas of Utah, including areas that are served by a rural telephone company. Its Lifeline program will offer a variety of public benefits. Virgin Mobile will provide qualifying Utah customers with the advantages of its high-quality wireless services and substantial value proposition for low-income consumers.⁴ It will offer Lifeline customers a free Assurance Wireless branded E911-compliant handset, 250 free minutes per month, the ability to call nationwide, the benefit of mobility, and access to a variety of other features at no additional

³ *In the Matter of Virgin Mobile USA, L.P. Petitions for Designation as an Eligible Telecommunications Carrier in the States of Alabama, Connecticut, District of Columbia, Delaware and New Hampshire*, Order, 25 FCC Rcd 17797, 17799 (Wireline Comp. Bur. 2010) (“*VMU 2010 Order*”). The FCC adopted one set of criteria to be considered in evaluating the public interest for ETC designations in both rural and non-rural areas.

⁴ This is consistent with a goal of the Communications Act, as amended by the Telecommunications Act of 1996, “to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies” to all citizens, regardless of geographic location or income. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

charge, including voice mail, call waiting, caller I.D., and E911 capabilities. Calls to 911 and customer service are free of charge and without using minutes. Customers may purchase additional minutes at favorable rates. The FCC, after conducting a public interest analysis of Virgin Mobile's ETC offering, made the following conclusions:

We find that Virgin Mobile's universal service Lifeline offering will provide a variety of benefits to Lifeline-eligible consumers including increased consumer choice, high-quality service offerings, and mobility. In addition, the prepaid feature, which essentially functions as a toll control feature, may be an attractive alternative to Lifeline-eligible consumers who are concerned about usage charges or long-term contracts.⁵

Virgin Mobile has demonstrated that authorizing it to offer its high-quality wireless Lifeline services over the Sprint Nationwide Network will provide the fundamental benefits of increasing competition and expanding participation in the Lifeline program in all areas of Utah.

The Commission, in determining that granting TracFone Wireless, Inc. ("TracFone") ETC designation in Utah -- including areas that are served by rural telephone companies -- would be in the public interest, relied on the Utah legislative policy declarations in the Utah Public Telecommunications Law⁶ and the goals of the federal universal service program.⁷ As the Commission recognized in that proceeding, "[t]he potentially substantial increase in applications submitted in Utah would go far towards making quality telecommunications service

⁵ *Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A); Petitions for Designation as an Eligible Telecommunications Carrier in the States of New York, North Carolina, Pennsylvania, Tennessee and Virginia*, Order, 24 FCC Rcd 3381, 3395 (2009); *see VMU 2010 Order* at 17804.

⁶ *See* Order on Reconsideration, p. 7, Docket No. 09-2511-01 (Mar. 9, 2011). *See* Utah Legislature's declarations of state policy, in Utah Code Ann. § 54-8b-1.1 (2)-(4), to "(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state; (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state; (4) allow flexible and reduced regulation for . . . services as competition develops." Virgin Mobile's service in rural areas would further these goals and the goals in § 54-8b-1.1 (8)-(10), to "(8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry; (9) enhance the general welfare and encourage the growth of the economy of the state through increased competition . . . and (10) endeavor to protect customers who do not have competitive choice."

⁷ *See* 47 U.S.C. § 254(b)(3) (the preservation and advancement of universal service shall be based, in part, on the following principle: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services . . .").

a reality, especially for transient and low-income consumers, *including those in rural areas.*" Order on Reconsideration, p. 8 (emphasis added). All of the public policy goals cited by the Commission in granting TracFone's petition would also be furthered by Virgin Mobile's provision of Lifeline services in rural areas.

B. The Condition Placed on Virgin Mobile is Inconsistent with the ETC Designation of a Similarly Situated Carrier and Competitor

Virgin Mobile's ETC designation is conditioned upon the obligation to offer the supported services throughout the service area of each service area served by a rural telephone company. This condition is inconsistent with the ETC designation of TracFone in Docket No. 09-2511-01. TracFone, a prepaid wireless carrier designated for Lifeline only purposes like Virgin Mobile, is not subject to the same condition. In imposing this condition vis-à-vis rural service areas on Virgin Mobile but not TracFone, the Commission is treating Virgin Mobile differently from another similarly situated company. Treating Virgin Mobile differently by imposing this additional condition on its ETC designation would be discriminatory and inconsistent with Article I, § 24 of the Utah Constitution, which states that "[a]ll laws of a general nature shall have uniform operation." Utah courts interpret Article I, § 24 to mean that a law must apply equally to all persons within a class, and that "persons similarly situated should be treated similarly. . . ."⁸ Because there is no relevant difference between Virgin Mobile and TracFone as similarly situated ETCs as pertains to this condition, the Commission's imposition of the condition on Virgin Mobile would place it at a competitive disadvantage for the provision of Lifeline services.

Regulatory obligations and conditions imposed on Virgin Mobile should be universally applicable to all ETCs that are similarly situated and, for that reason, it would be inappropriate to

⁸ *Malan v. Lewis*, 693 P.2d 661, 669-670 (Utah 1984).

require Virgin Mobile alone to have its ETC designation conditioned in this manner. Removing the condition would place Virgin Mobile on regulatory parity with TracFone for offering Lifeline services, consistent with the public interest and the Utah Constitution.

Ensuring that regulatory obligations and conditions are equally applied to all similarly situated ETCs on a non-discriminatory basis, will promote competition and facilitate access to high-quality, affordable public telecommunications services to all residents in the state, regardless of geographic location or income, consistent with the Utah Legislature's declarations of state policy set forth in the Utah Public Telecommunications Laws.⁹

III. CONCLUSION

For the foregoing reasons, Virgin Mobile respectfully requests that the Commission reconsider the condition placed on Virgin Mobile with respect to the service areas of rural carriers in the public interest and place equal regulatory obligations and conditions on all similarly situated ETCs in a competitively neutral and non-discriminatory manner, in accordance with the uniform operation of laws requirement of the Utah Constitution, legislative intent to promote competition, and other Utah public policy declarations as set forth in Utah Code Ann. § 54-8b-1.1.

Respectfully submitted,

Sharon M. Bertelsen
Counsel to Virgin Mobile USA, L.P.

Dated: June 24, 2011

⁹ See discussion on Utah Code Ann. § 54-8b-1.1 in n. 6, *supra*. This is also consistent with the goal of the Communications Act to secure lower prices and higher quality services for all Americans, regardless of geographic location or income. See discussion in n. 4, *supra*.