

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Virgin Mobile USA, L.P.)
Petition for Limited Designation as an) DOCKET NO. 10-2521-01
Eligible Telecommunications Carrier) REPORT AND ORDER

ISSUED: May 25, 2011

SYNOPSIS

The Commission grants Virgin Mobile USA, L.P. limited ETC designation, subject to specified conditions.

By The Commission:

This matter is before the Commission on the Petition of Virgin Mobile USA, L.P. (“Virgin Mobile” or the “Petitioner”) for Designation as an Eligible Telecommunications Carrier (“ETC”) in the State of Utah for the limited purpose of offering pre-paid wireless services supported by the federal Universal Service Fund’s (“USF”) Lifeline program.¹ Virgin Mobile, a wholly owned subsidiary of Sprint Nextel Corporation, proposes to offer these services under the trade name “Assurance Wireless Brought to You by Virgin Mobile.” Virgin Mobile currently offers facilities-based wireless services in Utah, having commenced in July 2002.

PROCEDURAL HISTORY

The Petition was filed April 12, 2010. Pursuant to the July 19, 2010, Interim Scheduling Order, the Commission held a duly-noticed technical conference on September 22, 2010, at which the Petitioner provided information supporting and clarifying the petition. Immediately following the technical conference the Commission convened a scheduling

¹ Virgin Mobile only seeks Lifeline support from the low-income program, not high-cost support. See *Petition for Limited Designation as an Eligible Telecommunications Carrier, filed April 12, 2010, p.1.*

conference to schedule the remainder of the case. The schedule included dates for filing testimony, and for an evidentiary hearing on January 5, 2011. Inclement weather prevented the Petitioner's representatives from traveling to Salt Lake City for the hearing. It was rescheduled for January 26, 2011. Shortly before the rescheduled hearing, a discovery dispute developed that resulted in the filing of supplemental testimony and a further postponement of the hearing to March 8, 2011.

At the March 8 hearing, four parties presented testimony in addition to the Petitioner: the Utah Division of Public Utilities ("Division"), the Utah Office of Consumer Services ("Office"), Salt Lake Community Action Program ("SLCAP"), and the Utah Rural Telecom Association ("URTA"). Parties filed opening briefs on April 7, 2011, and reply briefs on April 14, 2011.

STATUTORY REQUIREMENTS FOR ETC DESIGNATION
AND STATE JURISDICTION

Petitioner seeks ETC designation to receive the financial support described in Section 214(e)(1) of the Communications Act of 1934, as amended ("Act"), which declares that a properly designated ETC shall be eligible to receive federal USF Lifeline service support in accordance with Section 254 of the Act. The desired designation is accompanied by two important obligations the ETC must undertake throughout the service area for which the designation is received. The ETC must:

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

In addition to the foregoing statutory requirements, FCC rules² require ETCs to provide the following service functionalities as a condition of receiving USF support: 1) voice grade access to the public switched network; 2) local usage; 3) dual-tone, multi-frequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services; 6) access to operator services; 7) access to interexchange services; 8) access to directory assistance; and 9) toll-limitation for qualifying low-income consumers. As discussed more fully below, Virgin Mobile asserts its ability and willingness to meet all of these requirements.

The Commission's jurisdiction to act on this petition is conferred by Section 214(e)(2) of the Act:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) [quoted above] as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before 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.

² 47 C.F.R. § 54.101(a).

Some of the service territory addressed in the petition includes areas served by rural telephone companies. As to those areas this order examines whether the requested ETC designation is in the public interest.

POSITIONS OF THE PARTIES

Virgin Mobile testifies it will satisfy all of the requirements for ETC designation noted above through its pre-paid wireless services. It will offer qualifying customers a free “Assurance Wireless” branded, E911-compliant handset of the same type available to Virgin Mobile non-Lifeline customers and 250 free minutes per month for nationwide calling. Virgin Mobile’s Lifeline offering also includes a variety of other features at no additional charge including voice mail, call waiting, caller I.D., and E911 capabilities. Customers may purchase additional minutes for \$0.10 per minute, and text messages for \$0.10 per text. Customers may also choose from two higher-usage offers: 250 additional minutes each month (for a total of 500 minutes) at a cost of \$5.00, or 750 additional minutes each month and 1,000 text messages (for a total of 1,000 voice minutes and 1,000 text messages) at a cost of \$20.00. Calls to 911 and customer service are free of charge and do not use minutes. Moreover, there are no activation or connection charges for the Lifeline service.

Using the existing network infrastructure available to it as a subsidiary of Sprint Nextel, Virgin Mobile will provide all of the functionalities supported by the Lifeline program, throughout the Sprint Nextel service territory in Utah. Virgin Mobile has also committed to advertise the availability of its Lifeline service sufficiently to meet the statutory requirements using several types of media including newspapers, radio, television, direct mail, and the Internet.

As noted above, Petitioner seeks ETC designation for the entire Sprint Nextel service territory, which includes areas served by rural telephone companies.³ Its petition asserts the requested ETC designation is in the public interest, noting lower-income consumers are underserved in the competitive wireless market and often lack access to the options available to most consumers, e.g., free nationwide calling, voicemail, call waiting and caller ID. Increasing competition in the Lifeline market will increase pressure on carriers to provide service offerings tailored to the needs of consumers, according to Virgin Mobile.

Virgin Mobile maintains its Lifeline services will further the objectives of the Telecommunications Act of 1996 “to secure lower prices and higher quality services for ... consumers and encourage the rapid deployment of new telecommunications technologies.”⁴ Virgin Mobile argues its Lifeline-eligible consumers will gain access to high quality wireless telecommunications services – an initial increment free and additional increments at discounted prices. It refers to findings by the Federal Communications Commission (“FCC”) that Virgin Mobile’s Lifeline services provide “a wide variety of benefits to Lifeline-eligible consumers including increased consumer choice, high quality service offerings, and mobility.”⁵ Virgin Mobile testifies it has already received ETC status in 24 states and that its Lifeline services have been exceptionally well received.

Virgin Mobile further testifies its Lifeline offering is in the public interest, in part, because it includes payment of all applicable public interest surcharges. For example, although it does not seek state USF support, Virgin Mobile testifies it will continue its practice of

³ See Petition for a list of all wire centers for which Virgin Mobile seeks ETC designation.

⁴ See Post-Hearing Brief of Virgin Mobile USA, L.P., pp.9-10.

⁵ See Petitions for Designation as an Eligible Telecommunications Carrier in the States of New York, North Carolina, Pennsylvania, Tennessee and Virginia, Order, FCC 09-18 (rel. Mar. 5, 2009), at ¶ 38.

contributing to the state USF pursuant to Utah Code Ann. § 54-8b-15, as directed by the Commission.⁶ Additionally, Virgin Mobile will continue to pay the surcharge supporting 911 service. Virgin Mobile does not believe it is subject to surcharges for Poison Control and the Hearing Impaired Fund.

Utah Administrative Code R746-341-3 and 4 set forth the requirements for initial and continuing eligibility for Lifeline service. Recognizing the processes for verifying eligibility are currently under Commission review,⁷ Virgin Mobile testifies it is committed to work cooperatively with the Commission to establish the new verification processes and to fully comply with Utah law. Additionally, it has established a process for acquiring and reviewing applications for initial eligibility that it believes conforms to the existing rules governing self-certification and will serve adequately in the interim.

The Division reviewed the characteristics of the Petitioner's proposed services. It also evaluated Petitioner's sample marketing materials. Based on its analysis, the Division asserts Virgin Mobile meets the public interest standard of Section 214(e)(2) of the Act. In the Division's view, Virgin Mobile meets all of the Act's requirements and is entitled to ETC status throughout its Utah service territory, provided it is required to comply with the Commission's procedures for verifying customers' eligibility for Lifeline service, as applied to all other telecommunications companies. Subject to that qualification, the Division recommends approval of the Petition.

⁶ Virgin Mobile acknowledges it would need to file a new application should it desire to receive support from the state USF.

⁷ See Commission Docket No. 10-2528-01.

The Office recommends the Commission approve the requested ETC designation provided: 1) the Petitioner agrees to use a Utah-specific information sheet in promoting the service; 2) the Petitioner pays all appropriate fees and taxes; and 3) the Petitioner requires applicants relying on program-based eligibility to provide Virgin Mobile proof of participation in public assistance programs. Additionally, the Office notes with favor Petitioner's sixty-day deactivation policy proposed in Petitioner's rebuttal testimony. Under this policy Virgin Mobile will monitor usage of all Lifeline customers. If no usage appears on an account for any continuous sixty-day period, Virgin Mobile will promptly notify the customer that he or she no longer qualifies for Lifeline service. The disqualification will be subject to a thirty-day grace period during which the account will remain active and Virgin Mobile will attempt to ascertain the customer's desires. If the account continues to show no usage at the end of the grace period, the account will be de-activated. Virgin Mobile will promptly take the necessary steps to discontinue receiving the Lifeline subsidy, including for the free minute allotment provided during the grace period.

SLCAP testifies Lifeline is a critical service for low income households. SLCAP sees advantages in expanding access of such households to quality wireless service as an alternative to landline service. Yet, it is difficult to judge the comparability of such services where one offers limited calling time but nationwide toll-free access and mobility, while the other offers unlimited calling within a restricted area via a fixed land line. SLCAP asks the Commission to define what it considers to be appropriate Lifeline service, particularly in the pre-paid wireless market. SLCAP also asks the Commission to assure that those enrolling as Virgin

Mobile Lifeline customers meet the prescribed eligibility requirements and that Virgin Mobile pays its fair share of eligibility verification costs.

URTA is the only party opposing the Petition. Its opposition is confined to rural areas served by URTA members. URTA points out Section 214(e)(2) of the Act establishes a distinct standard for designating an additional ETC in an area served by a rural telephone company, namely a finding that the designation is in the public interest. URTA asserts such a finding at a minimum requires the ETC candidate to: 1) contribute to all public interest programs, 2) not negatively affect universal service, and 3) serve the same service area as the rural telephone company. URTA testifies Virgin Mobile fails these tests.

As to public interest program contributions, URTA argues Virgin Mobile cannot meet the public interest standard while declining to pay the Poison Control surcharge or to contribute to the Hearing Impaired Fund. Regarding universal service, URTA alleges granting Virgin Mobile ETC status will divert federal USF subsidies from URTA members, leave them with stranded costs and force their increased reliance on the state USF. Finally, URTA asserts the rural wire centers Virgin Mobile seeks to serve represent only part of its members' service areas. URTA warns of "unfair cherry picking" that will negatively affect rural customer service.⁸

DISCUSSION, FINDINGS AND CONCLUSIONS

Having weighed the evidence, we find Virgin Mobile, through its testimony and exhibits, has satisfied all federal and state requirements for ETC status. We further find it is in the public interest for Virgin Mobile to be designated an ETC in the State of Utah for the limited

⁸ See Initial Post-hearing Brief of the Utah Rural Telecom Association, April 7, 2011, p.5.

purpose of participation in the federal USF Lifeline program. This designation is based upon the final version of the Lifeline service offering Virgin Mobile presented in its testimony and exhibits, summarized in this order, and is subject to the conditions described below. We find Petitioner's free and discounted wireless services will enhance competition and will make the benefits of wireless service more available to lower-income consumers who have not had access to this technology due to typical contractual requirements of wireless carriers. Virgin Mobile's Lifeline service will increase consumer choice and improve consumer access to high quality mobile telecommunications capability. We note in particular the economic value to lower-income consumers of free voice mail, call waiting and caller ID functions, and the public safety value of broader access to E911. Our approval of the Petition presumes Virgin Mobile will carry out the plans it describes in the Petition to promote its Lifeline program, using fact sheets and other materials tailored to the unique features of its offering in this state.

We find no basis in the record to conclude Virgin Mobile's Lifeline offering will necessarily result in stranded costs for rural incumbent local exchange carriers ("ILECs") and increased reliance on the state USF. Similarly, we are not persuaded Petitioner's Lifeline offering will divert federal USF from rural ILECS. While we recognize the FCC is reassessing universal service rules in light of various market changes, it continues to approve petitions for ETC designation, including those of Virgin Mobile. Consistent with the FCC's findings in other cases, in evaluating the record before us, we find the public interest benefits of Virgin Mobile's proposed Lifeline program compelling. They clearly outweigh the speculative potential consequences URTA describes.

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As noted above, Utah Administrative Code R746-341-3 and 4 define the requirements for initial and continuing eligibility for Lifeline service. Several parties testified these requirements are critical in assuring publically-funded Lifeline programs benefit qualified applicants and, in particular, that such applicants receive only one discounted Lifeline service per household. Our proceeding to re-examine the process and cost of initially determining and annually verifying Lifeline eligibility, Docket No. 10-2528-01, is largely due to new certification issues arising in the context of pre-paid wireless Lifeline offerings like the one at issue here.

Virgin Mobile has committed to complying with the existing rules and has presented a reasonable plan for doing so. It has also committed to working cooperatively to establish a system of annual eligibility verification in the context of pre-paid wireless Lifeline service that conforms to Utah law through its participation in Docket No. 10-2528-01. Our favorable action on this Petition is conditioned on Virgin Mobile's compliance with the relevant laws, rules, and orders governing eligibility verification, as they presently exist and as amended following our examination of this subject in Docket no. 10-2528-01, including bearing the costs of verification as determined there. In its direct testimony, the Office recommended Virgin Mobile be required to implement a 60-day non-usage deactivation policy. Virgin Mobile has agreed to such a policy, the details of which are described above. Our approval of the Petition is conditioned on the implementation of this policy, in order to avoid wasting federal USF monies on unused services.

Virgin Mobile has committed to paying the state USF end-user surcharge applicable to its Lifeline services, just as it does now on the other services it currently offers in Utah. Utah Code Ann. § 54-8b-15(10)(a) imposes this surcharge and, as in the similar TracFone

proceeding, we find the USF surcharge is applicable to Virgin Mobile's Lifeline service.⁹ Utah Code Ann. §54-8b-15(10) does not limit the obligation to pay into the USF solely to those telecommunications corporations issuing traditional bills to customers. Rather, it requires USF contribution from: 1) telecommunications corporations; 2) that provide public telecommunications service; 3) through explicit charges determined by the Commission; 4) which charges may not apply to wholesale services; 5) and which charges shall be in the form of end-user surcharges; 6) applied to intrastate retail rates. Applying the plain language of the statute, Virgin Mobile is obligated to contribute to the state USF. There is no dispute that Virgin Mobile is a telecommunications corporation as defined in Utah Code Ann. § 54-8b-2(18) and that its proposed Lifeline program is a retail telecommunications service. There is no dispute that at least a portion of the Lifeline service will be intrastate. Therefore, Utah Code Ann. §54-8b-15(10)(b)(i) requires Virgin Mobile to "contribute to the fund on an equitable and nondiscriminatory basis."

In the TracFone decision we also addressed other potentially applicable surcharges for 911, Poison Control, and Hearing Impaired program funding. As noted above, URTA and other parties argue these surcharges, which are paid by customers of other telecommunications services, must be imposed on Virgin Mobile's Lifeline service. URTA argues unless these surcharges are assessed in rural areas, by definition the service in question cannot serve the public interest. Moreover, URTA asserts if Virgin Mobile is allowed to avoid the surcharges, its Lifeline service will enjoy an unfair competitive advantage over the rural ILECs.

⁹ See *In the Matter of the Petition of TracFone Wireless, Inc...*, Docket No. 09-2511-01, Order on Reconsideration, March 9, 2011, pp. 1-5.

Shortly after the March 8, 2011, hearing in this matter, the Utah Legislature passed amendments to Utah Code Ann. § 54-8b-10, making the mandatory surcharge to fund telecommunications devices for hearing impaired persons applicable to each telephone number of each residential and business customer in the state.¹⁰ As with the state USF, the Hearing Impaired program funding statute now explicitly applies to mobile telecommunications service to the extent permitted by the Mobile Telecommunications Sourcing Act, 4 U.S.C. § 116 et seq. The Commission is statutorily obligated to impose and collect this surcharge. Accordingly, we condition Petitioner's ETC designation on compliance with Utah Code Ann. § 54-8b-10.

The 911 and Poison Control surcharges require different treatment. As we stated in the TracFone order, by statute these surcharges are billed and collected by the provider of the local exchange service or radio communication access line service¹¹ and remitted to the State Tax Commission.¹² The statute governing the payment of the 911 surcharge specifies the State Tax Commission is the entity empowered to “collect, enforce, and administer the charge.”¹³ Similarly, the statute governing the Poison Control surcharge states the “State Tax Commission shall administer, collect, and enforce the [Poison Control Center fund]” charge.¹⁴ Accordingly, since the power to administer these surcharges resides in another agency, it is beyond our jurisdiction to determine whether these surcharges apply to the pre-paid services Virgin Mobile seeks to provide. As the Utah Supreme Court has held, we have “no inherent regulatory powers and can only assert those [powers] which are expressly granted or clearly implied . . . [and] any

¹⁰ The former version of the statute imposed the surcharge “on each residence and business access line.”

¹¹ See e.g., Utah Code Ann. § 69-2-5(3)(f)(i).

¹² See e.g., Utah Code Ann. § 69-2-5(3)(f)(ii).

¹³ Utah Code Ann. § 69-2-5(3)(i)(i).

¹⁴ Utah Code Ann. § 69-2-5.5(5)(a).

reasonable doubt of the existence of any power must be resolved against the exercise thereof.”¹⁵ Hence, whether the Petitioner must pay these public interest surcharges is a matter for the State Tax Commission to decide.

We do, however, emphasize our action on this Petition is conditioned on Petitioner’s ongoing compliance in all of its service territory with all Utah laws governing its operations. This obligation includes compliance with laws mandating payment of public interest program surcharges to the extent deemed applicable by the agency charged with responsibility to administer and enforce them. Virgin Mobile has represented to the Commission its service plan includes all applicable taxes and fees. We have no basis to find that it will not comply with all legal obligations imposed upon it. To the extent the State Tax Commission determines Virgin Mobile’s services are subject to the 911 and Poison Control program surcharges, we expect it to comply. Failure to do so would be grounds for revoking the ETC designation.

At the outset of this Order we describe the obligations a common carrier undertakes pursuant to Section 214(e)(1) of the Act when designated an ETC. As URTA notes, one aspect of this obligation is the ETC “...shall, throughout the *service area* for which the designation is received – (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title...” (emphasis added). URTA further notes the term “service area” is defined in Section 214(e)(5), as “... a geographical area established by a State commission ... for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone

¹⁵ *Hi-Country Estates Homeowners Ass’n v. Bagley and Co.*, 901 P.2d 1017 (Utah 1995) (alterations added).

company, ‘service area’ means such company’s ‘study area’ ...”¹⁶ URTA reasons because Virgin Mobile only seeks to serve specified exchanges in rural areas “unfair cherry picking” will negatively affect URTA members’ customers service.¹⁷ Virgin Mobile denies URTA’s allegation asserting cherry picking concerns are usually associated with requests for ETC designation related to high-cost fund support. Because Virgin Mobile only seeks support for its Lifeline service (i.e., low-cost support), not high-cost support to build out its network, it urges URTA’s argument is without merit.

Despite Virgin Mobile’s position, we find no basis in the record to conclude the plain language of the quoted statutes does not apply. Indeed, neither Virgin Mobile nor any other party offers any contrary authority. Accordingly, the ETC designation granted in this order, as to each area served by a rural telephone company, includes the concomitant obligation to offer the supported services throughout the service area, i.e., study area, of that rural telephone company. As to each such service area, we condition ETC designation on Virgin Mobile submitting a compliance filing within 30 days of this 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. 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.

ORDER

1. The Commission grants the Petition of Virgin Mobile for designation as an Eligible Telecommunications Carrier in the State of Utah for the limited purpose

¹⁶ The statute also specifies an alternative definition to be used in circumstances that do not apply here.

¹⁷ The specific wire centers for which Petitioner seeks ETC designation are specified in Exhibit 2 of the Petition.

of offering prepaid wireless services supported by the federal Universal Service Fund's Lifeline program.

2. This designation applies to the Lifeline services described in this Report and Order, supplemented by the more detailed information contained in the Petitioner's testimony and exhibits, to the extent it is consistent with this Report and Order. Virgin Mobile shall not implement any material change to the Lifeline services approved herein without prior Commission approval.
3. This designation is subject to the conditions, obligations, and limitations set forth in the body of this Report and Order.
4. This order does not authorize Virgin Mobile to receive state USF support. Any such support will require separate Commission authorization.

Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

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DATED at Salt Lake City, Utah, this 25th day of May, 2011.

/s/ David R. Clark
Hearing Officer

Approved and confirmed this 25th day of May, 2011, as the Report and Order of
the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#72895
DW#206757