

PAUL H. PROCTOR (2657)
Assistant Attorney General
Utah Office of Consumer Services
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0552
pproctor@utah.gov

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Virgin Mobile USA, L.P. Petition for Limited Designation as an Eligible Telecommunications Carrier	Docket No. 10-2521-01 UTAH OFFICE OF CONSUMER SERVICES' APPLICATION FOR REVIEW OR REHEARING
---	---

As provided by Utah Code Ann. § 54-7-15 (West Supp. 2010) and Utah Code Ann. § 63G-4-301 (West 2009), the Utah Office of Consumer Services requests that the Commission review and correct its May 25, 2011 Report and Order. Generally, the Office's purpose for this application is to bring about substantive consistency for regulating pre-paid wireless carriers that are designated eligible telecommunications carriers (ETC). As of the date this application is filed, only TracFone Wireless, Inc. has commenced operating as an ETC in Utah following the December 1, 2010 Amended Report and Order and March 9, 2011 Order on Reconsideration in Docket No. 09-2511-01. However, in addition to the order designating Virgin Mobile as an ETC, the Commission has

pending ETC designation applications from I-wireless, LLC, Docket No. 10-2526-01, and Nexus Communications, Inc., Docket No. 11-2540-01.

This application for review pertains to the Commission's orders requiring pre-paid wireless carriers to comply with Utah law, in particular the Utah universal service fund¹, emergency telecommunications services support², and the hearing and speech impaired telecommunication surcharge.³ Review or rehearing is necessary because the Commission is improperly exempting carriers from complying with Utah law. In addition, the condition that pre-paid wireless ETCs must require Lifeline applicants to document eligibility has not been consistently imposed.

To a degree, the proceeding in Docket No. 10-2528-01 is expected to impose uniform standards upon ETCs, particularly with respect to Lifeline eligibility determination and verification, and to implement procedures to guard against misuse of lifeline telephone service and misuse of the ETC designation. See December 2, 2010 Notice of Agency Action and March 14, 2010 Supplement to Notice of Agency Action, Docket No. 10-2528-01. However, it is essential that

¹ Utah Code Ann. § 54-8b-15 (West 2004).

² Utah Code Ann. § 69-2-5 (West 2010) (911 emergency telecommunications service), § 69-2-5.5 (poison control), and § 69-2-5.6 (E-911 emergency service), § 69-2-5.7 (Prepaid Wireless 911 Service Charge).

³ Utah Code Ann. § 54-8b-10 (4) (West Supp. 2010).

initial ETC designations be equitable, consistent among applicants and consistent with the law. The Virgin Mobile order fails in this regard.⁴

I. THE COMMISSION ERRONEOUSLY CONSTRUES AND APPLY'S UTAH LAW TO EXEMPT VIRGIN MOBILE FROM CONTRIBUTION TO THE PUBLIC EMERGENCY TELECOMMUNICATIONS SERVICES FUNDS.

The Commission conditions both Virgin Mobile's and TracFone's ETC designation on the companies' compliance with Utah law, in particular a determination that pre-paid wireless services are subject to the emergency telephone services surcharge. For both companies, failure to comply "would be grounds for revoking the ETC designation." Virgin Mobile May 25, 2011 Order, page 13; TracFone March 9, 2011 Order, page 7. However, under the circumstances, this condition is meaningless. The Commission is ignoring an unambiguous determination that pre-paid wireless services are subject to the 911 service charge.

An enrolled copy of 2011 General Session H.B. 303 is attached. Titled "Prepaid Wireless 911 Service Charge," H.B. 303 enacts Utah Code Ann. § 69-2-5.7 providing for the collection of a pre-paid wireless 911 service charge from a prepaid wireless customer at the point of retail sale. 911 service charge revenue is distributed to 911 emergency telecommunications services, statewide E-911 emergency service fund, and to fund the Poison Control Center. H.B 303 passed

⁴ While the TracFone orders are final, the terms of TracFone's ETC designation may be, and the Office contends should be, amended. Utah Code Ann. § 54-7-14.5 (West Supp. 2010).

March 10, 2011, was signed by the Governor March 23, 2011, and is effective July 1, 2011.

The Commission must be aware of this telecommunications legislation. The Virgin Mobile May 25, 2011 Order on page 12 refers to the amendment to section 54-8b-10, 2011, General Session S.B 209 passed March 10, 2011, signed by the Governor March 25, 2011. An enrolled copy of 2011 General Session S.B. 209 is attached. Because S.B. 209 “now explicitly applies [the hearing and speech impaired surcharge] to mobile telecommunications service”, the Commission conditioned Virgin Mobile’s ETC designation on compliance with the amended statute. However, the Virgin Mobile May 25, 2011 Order disregards H.B. 303.

Under the Virgin Mobile and TracFone orders, compliance with Utah law is a condition to the ETC designation, and the failure to do so is grounds for revoking the designation. The Virgin Mobile May 25, 2011 Order is unreasonable and not in the public interest because it excuses non-compliance and offers no judicious explanation why section 69-2-5.7 does not apply to an applicant for ETC designation.

II. THE COMMISSION’S REPORT AND ORDER RESULTS IN INEQUITABLE AND DISCRIMINATORY APPLICATION OF UTAH LAW.

The most recent ETC applications from i-wireless, LLC, Docket No. 10-2526-01, and Nexus Communications, Inc., Docket No. 11-2540-01, commit to comply with section 69-2-5.7. In Paragraph 12 A to the Stipulation submitted by parties to the i-wireless docket, the Parties recommend that “i-wireless’ provision

of its universal service offering as an ETC be governed by the following additional requirements: Verification that appropriate taxes and fees are being paid. These taxes and fees include items such as: state USF, 911 and E911 fees, and poison control.”

In Docket No. 11-2540-01, Nexus agrees to comply with guidance from PSC staff by paying the emergency telecommunications service charges. Nexus’ witness Steven Fenker states in his pre-filed direct testimony, lines 10 to 19 on page 11:

In addition, **based on the oral guidance of Utah PSC staff**, Nexus understands that all ETCs in Utah, including resellers such as Tracfone, must pay Poison Control Center and E911 fees in Utah on a per-subscriber basis. Since Nexus is a facilities-based carrier, Nexus agrees that it would have to contribute to these funds if other similarly situated carriers are also directly contributing. Based on this information, Nexus is willing to pay to the State of Utah 8 cents per month for each local exchange switched access line or revenue producing radio communications access line to fund E-911 Emergency Services, and 7 cents per month for each local exchange switched access line or revenue producing radio communications access line to fund the Poison Control Center, as required by Utah statutes. Nexus will pay these fees in accordance with its regular taxation schedule as required by the statutes. (Emphasis added.)

III. THE COMMISSION ERRONOUSLY INTERPRETS AND APPLIES THE UTAH SUPREME COURT OPINION IN HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION.

Based upon *Hi-Country Estates Homeowners Ass’n v. Bagley and Co.*, 901 P.2d 1017 (Utah 1995), in the TracFone and Virgin Mobile orders the Commission disregarded state law imposing surcharges to support public emergency telephone services. The Commission reasoned that “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.” Virgin Mobile May 25, 2011 Order, page 12; TracFone March 9, 2011 Order page 5 – 6.⁵ The sentence from *Hi-Country* claimed as an authoritative jurisdictional limitation, is nothing more than dictum; it is no more significant or helpful because it is often repeated. If the facts of *Hi-Country* are understood and the law applied to those facts, the Supreme Court’s opinion in fact directs the Commission to condition an ETC designation upon compliance with emergency telecommunications services funding statutes.

Hi-Country concerns a private, quiet title dispute between a water utility and a homeowners’ association, and a claim for betterment for the cost of improvements should the association be declared the legal owner. The Commission was not a party to the quiet title action. While this civil action was pending, the Commission conducted a hearing and issued a March 1986 decision that included a determination of the allowable rate base for the purpose of setting rates. No party claimed and the Supreme Court did not find that the Commission’s decision was outside its statutory jurisdiction.

⁵ Virgin Mobile cited the TracFone order to support its claim that it is under no obligation to contribute to 911, poison control or other public interest program surcharges, such as the speech and hearing impaired surcharge, and that the Commission lacks jurisdiction to order the same. Post-Hearing Brief, April 7, 2011, page 8 - 9. Virgin Mobile ignores both H.B. 303 and S.B. 209 from the Utah Legislature’s 2011 General Session. As noted, the Commission imposes S.B. 209 but without explanation, omits all reference to H.B. 303.

The civil dispute reached the Supreme Court because approximately four years and four months after the Commission's rate decision, the trial court determined the value of the water system and improvements was \$98,500.00, denying the association's contention that the Commission's rate base determination, \$16,334.99, was binding upon the trial court. However, in September 1993 the Utah Court of Appeals reversed the trial court, ordering the trial court to defer to the Commission's rate base determination for the purpose of the betterment issue in the quiet title action. *Hi-Country Estates Homeowners Ass'n v. Bagley and Co.*, 863 P.2d 1 (Utah Ct. App. 1993).

In the Supreme Court, the association argued that the Commission's jurisdiction includes a determination of "the fair market value of property for all purposes" and was binding on the trial court in this private, civil, quiet title action. The Supreme Court quite correctly held that the Commission decisions plainly are not binding in any forum other than its own, stating "[i]t is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute." 901 P.2d at 1021 (citations omitted).

The *Hi-Country* holding that defines the Commission's jurisdiction under Utah Code Ann. § 54-4-1 (West 2004), § 54-4-4 (West Supp. 2010) and § 54-4-21 (West 2004), is that the Commission is granted the power to act for "purposes necessary to regulate and supervise public utilities." *Id.* The Commission has broad supervisory powers of any activity of a utility that affects or is closely

connected to the utility's rates or the protection of consumers.⁶ As to the right of a utility to even operate in Utah, the Commission must first determine that the present or future public convenience and necessity does or will require the utility's service, and the Commission "may attach to the exercise of the rights granted by the certificate the terms and conditions as in its judgment public convenience and necessity may require." Utah Code Ann. § 54-4-25 (1) and (4) (d) (West Supp. 2010).

There is another error in the application of *Hi-Country*. While not clearly expressed, the Virgin Mobile May 25, 2011 Order suggests that *Hi-Country* supports the conclusion that the Commission's jurisdiction is preempted by the State Tax Commission's authority over the 911 and Poison Control surcharges. There is nothing in *Hi-Country* that touches upon the issue of preemption, whether express or implied, as between two state government entities with responsibilities or interest in the same subject matter. The Commission does not offer any analysis from which one can conclude that assigning responsibility for the 911 and Poison Control surcharges to the State Tax Commission was intended to remove this singular function of a telecommunications corporation from the Commission's jurisdiction, supervision and regulation. The Commission does not even attempt

⁶ The *Hi-Country* opinion notes that even in contractual matters, normally outside of the purview of the Commission's jurisdiction, the Commission has the power to construe contracts affecting matters within its jurisdiction. 901 P.2d at 1023. The Commission has broadly defined what affects matters within its jurisdiction. See In the Matter of the Petition of Desert Power, L.P., Docket No. 04-035-04, Report and Order Resolving Desert Power Contract Dispute, September 20, 2006 (determining whether a force majeure event has occurred in connection with a generation plant yet to be constructed, not connected to the regulated utility and not producing energy).

to describe how the State Tax Commission fully occupies the field of regulating the field of emergency telephone service funding, truncating the Commission's jurisdiction.

The *Hi-Country* opinion affirms the role of the Commission in the supervision and regulation of every public utility in Utah and the business of each utility. The Commission's jurisdiction includes all things necessary or convenient to those powers. It is plain error and a violation of statute, not to condition an ETC designation upon compliance with Utah law, including section 69-2-5.7.

IV. PRESERVATION OF ISSUES.

To the extent that the Virgin Mobile May 25, 2011 Order relies upon the Commission's analysis of the pre-paid wireless telecommunications business model, including billing practices, use of third party retailers for re-sale of telecommunications services, and data collection practices, and the Commission's interpretation of statutes contained in the TracFone September 13, 2010 Report and Order, the December 1, 2010 Amended Report and Order, and the March 9, 2011 Order on Reconsideration, the Office requests review or rehearing based upon the facts and law presented in the Office's July 15, 2010 Post-Hearing Opening Brief, July 29, 2010 Post-Hearing Reply Brief, and December 30, 2010 Request for Reconsideration filed in Docket No. 09-2511-01.⁷

⁷ Utah Code Ann. § 54-7-15 (2) (b) (West Supp. 2010).

V. CONCLUSION.

In this docket and in the TracFone docket, as the Virgin Mobile May 25, 2011 Order heavily relies upon it, the evidence proves and the Commission recognizes the importance of emergency telecommunications services and the funding of similar public interest services, such as hearing and speech impaired access. Most important, the 2011 Utah Legislature removed all doubt of a pre-paid wireless carriers' obligation to fund such services. It would be plain error for the Commission to not correct its report and order in this docket and impose appropriate conditions upon an ETC designation.

Dated this 23rd day of June 2011.

Paul H. Proctor
Assistant Attorney General
Attorney for the Utah Office of
Consumer Services

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Utah Office of Consumer Services' Application for Review or Rehearing were served upon the following by electronic mail on June 23, 2011:

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037
<mailto:brecherm@gtlaw.com>
<mailto:mercercdm@gtlaw.com>

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfmecham@cnmlaw.com

Patricia Schmid
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
pschmid@utah.gov

Gary A. Dodge
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Email: gdodge@hjdllaw.com

Sonya L. Martinez
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, Utah 84101
smartinez@slcap.org

Sharon M. Bertelsen (#9759)
BALLARD SPAHR LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221
bertelsens@ballardspahr.com

John M. Beahn
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington D.C. 20005
john.beahn@skadden.com

Peter Lurie
Elaine Divelbliss
Virgin Mobile USA, L.P.
10 Independence Blvd.
Warren, NJ 07059
Peter.Lurie@virginmobileusa.com
Elaine.Divelbliss@virginmobileusa.com

Paul H. Proctor
Assistant Attorney General