



1. The Utah Office of Consumer Services

The Utah Office of Consumer Services (“Office”) asserts: “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.” We agree and note the limited ETC designation granted in the Report and Order “...is conditioned on [Virgin Mobile’s] ongoing compliance in all of its service territory with all Utah laws governing its operations.”<sup>1</sup> Utah Code Ann. § 69-2-5.7, to which the Office specifically refers, only became effective a few days ago on July 1, 2011. Because the new law has been passed and is now effective, we hereby amend the Report and Order to add, as a specific condition of Virgin Mobile’s ETC designation, compliance with Utah Code Ann. § 69-2-5.7.

In general terms, this new law applies a 911 service charge to sales of pre-paid wireless telecommunications services. This service charge provides the means for pre-paid wireless services sold through retail outlets to contribute to the funding of emergency services addressed in Utah Code Ann. §§ 69-2-5, 69-2-5.5, and 69-2-5.6 (911 emergency telecommunications services, the Poison Control Center, and statewide unified E-911 emergency service). The new law renders moot our discussion in the Report and Order of the applicability of these sections to the pre-paid wireless services Virgin Mobile will offer.<sup>2</sup> The new law clearly applies to Virgin Mobile’s Lifeline prepaid wireless service. The State Tax Commission collects, enforces and administers the prepaid wireless 911 service charge, just as with the other emergency services telecommunications charges. As the Report and Order notes, these functions are beyond our jurisdiction.

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<sup>1</sup> Report and Order, p.13.

<sup>2</sup> See Id. at 12-13.

In its application, the Office also expresses concern that the condition requiring Lifeline applicants to document eligibility has not been consistently imposed. As the Office mentions, we are currently re-examining Lifeline eligibility verification in Docket No. 10-2528-01, due in large part to new certification issues arising in the context of pre-paid wireless Lifeline offerings. For TracFone Wireless, Inc., i-wireless, LLC (currently the only other ETCs offering Lifeline in Utah through pre-paid wireless services) and Virgin Mobile, ETC status is conditioned on compliance with the relevant laws, rules, and orders governing eligibility verification, as they presently exist and as amended following our decision in Docket No. 10-2528-01, including bearing the costs of verification determined there. We also re-emphasize our intent that the verification of continuing eligibility under the new process to be defined in Docket No. 10-2528-01 will begin as soon as practicable after the Lifeline applicant self certifies. The implementing details will be part of our order in that docket.

2. Virgin Mobile USA, L.P.'s Application for Review

Virgin Mobile requests review of the condition in the Report and Order requiring it to certify its technical capability and commitment to provide service throughout the service area, i.e., study area, of each rural telephone company for which it seeks ETC designation. Virgin Mobile argues the evidence it presented demonstrates its Lifeline program will offer a variety of public benefits and will further the attainment of public policy goals, including facilitating access to high quality, affordable public telecommunications services and increasing competition, as a means of providing wider customer choices for such services.

We agree in general with Virgin Mobile's summary of its evidence. The record it established is, in major part, the foundation of our finding the limited ETC designation Virgin

Mobile requests is in the public interest, including in rural areas. This finding, however, is necessarily conditioned on various compliance items, including the one Virgin Mobile asks us to reconsider. As explained in the Report and Order, this particular condition is based on the obligations a common carrier undertakes pursuant Title 47 of the United States Code, Section 214(e), when designated an ETC. Section 214(e)(1) provides an 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). 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 company, ‘service area’ means such company’s ‘study area’ ...”<sup>3</sup>

As the Report and Order explains, this statute requires the condition that Virgin Mobile provide its services in rural areas throughout the service area, i.e., study area, of the incumbent rural telephone company, rather than only serving the wire centers specified in its petition. Virgin Mobile failed to address this statutory requirement either at the hearing, in its post-hearing briefs, or in its application for review. While Virgin Mobile’s assertions about the public benefits of its Lifeline offering are generally applicable to all areas in the State of Utah, it failed to present legal argument or evidence to rebut the contentions of URITA that Virgin Mobile must comply with 214(e)(5), i.e., that it must serve throughout the study area

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<sup>3</sup> The statute also specifies an alternative definition to be used in circumstances that do not apply here, namely where “... the Commission [FCC] and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) [47 USCS § 410(c)], establish a different definition of service area for such company.”

encompassing the wire centers it prefers to serve. We find no basis in the record to conclude Virgin Mobile's petition complies with Section 214(e)(5) without the condition imposed.

The Utah Rural Telecom Association ("URTA") provides additional support for the condition. URTA maintains because Virgin Mobile only seeks to serve specified exchanges in rural areas, unfair "cherry picking" (also referred to as "creamskimming") will negatively affect service to URTA members' customers. As we understand it, URTA by this term refers to the practice of targeting certain communities or customers that are the least expensive to serve, thereby adversely affecting the incumbent rural telephone company's ability to serve the entire service area. We note this concern over potential "creamskimming" has been a factor in the Federal Communications Commission's ("FCC") analyses of requests for ETC designations in rural areas not subject to state jurisdiction.<sup>4</sup> Additionally, the FCC has concluded even where creamskiimming is not the motive, granting a carrier ETC status for only its licensed portion of a rural study area could have the same impact on the rural telephone company.<sup>5</sup> While Virgin Mobile generally and superficially denies URTA's "cherry picking" allegation, the record provides no evidence on which to conclude Virgin Mobile's selected rural telephone company wire centers would not result in creamskiimming. There are no study area demographic data or information about whether the selected wire centers are high cost or low cost, in relation to other wire centers in the relevant study areas, to persuade us otherwise.

Virgin Mobile also argues the Report and Order is inconsistent with TracFone's ETC designation because TracFone is not subject to the condition in question. Virgin Mobile is

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<sup>4</sup> See *Federal-State Joint Bd. on Universal Service, Highland Cellular, Inc.*, Memorandum Opinion and Order, 19 F.C.C.R. 6422 ¶¶ 29-32 (2004) ("Highland Cellular Order").

<sup>5</sup> See *Federal-State Joint Bd. on Universal Serv., Virginia Cellular, LLC*, Memorandum Opinion and Order, 19 F.C.C.R. 1563, ¶¶ 33-35 (2004) ("Virginia Cellular Order").

incorrect. The perceived inconsistency is explained by a fundamental difference in the operating characteristics of the two carriers as presented in their applications. Virgin Mobile requests ETC designation for specified wire centers that align with its existing Utah service area.<sup>6</sup> As presented in TracFone's petition for limited ETC designation, TracFone's arrangements with a variety of wireless providers enable it to offer its Lifeline program "throughout Utah," and specifically wherever wireless service is available in Utah.<sup>7</sup> In its application, TracFone did not identify only certain wire centers in rural areas it would serve, unlike Virgin Mobile. Moreover, its commitment and capability to serve throughout Utah were not contested in its application proceeding. There were no allegations of "cherry picking" or "creamskimming." Virgin Mobile's service offering in rural areas is limited by the constraints of its own system. These factual distinctions justify the differences in our orders.

3. Utah Rural Telecom Association's Petition for Review and Reconsideration of the Report and Order

URTA asserts the Report and Order is arbitrary and capricious because, in URTA's view, the Report and Order does not articulate and apply a "standard" in analyzing the public interest "factor" of 47 U.S.C. § 214(e)(2).<sup>8</sup> URTA in testimony and briefs advocates three factors it characterizes as minimum requirements for granting ETC status in rural areas (i.e., the areas served by its rural telephone company members). The ETC applicant must: 1) pay all taxes, fees and public interest program contributions, 2) not negatively affect universal service

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<sup>6</sup> See *Virgin Mobile's Petition for Limited Designation as an Eligible Telecommunications Carrier*, p.5, fn.5, and *Exhibit 2*.

<sup>7</sup> See *Petition of TracFone Wireless, Inc...*, August 15, 2009, p. 2.

<sup>8</sup> See *Utah Rural Telecom Association's Petition for Review...*, June 27, 2011, p. 3.

funds (“USF”), and 3) serve the same service area as the rural telephone company.<sup>9</sup> URTA argues Virgin Mobile is lacking in each area. The Report and Order addresses each of these criteria in making the public interest finding.

First, Virgin Mobile has committed to pay all applicable taxes, fees, and contributions, and the Report and Order expressly requires this. Specifically, the Report and Order requires Virgin Mobile to comply with all applicable laws, including making the requisite contributions to the state USF and hearing impaired program funds. Moreover, with the recent effectiveness of Utah Code Ann. § 69-2-5.7, discussed above, any question concerning Virgin Mobile’s obligation to collect the emergency services telecommunications charges has been resolved. No other issues of this kind have been raised in this matter. URTA’s first factor is satisfied.

Second, the Report and Order examines URTA’s assertions about USF impacts and finds them to be without evidentiary support. URTA asserts Virgin Mobile’s program will divert federal USF from URTA members. We doubt the propriety of addressing such concerns at the state level. If inequities or other concerns exist, those are properly remedied by the FCC, not by one state commission. In any case, recent FCC orders approving Virgin Mobile’s Lifeline program in other jurisdictions undercut URTA’s contention. Of course, Virgin Mobile’s ETC status will have some impact on the federal USF. A purpose of seeking limited ETC designation is to obtain financial support from the federal USF Lifeline program. As noted in the Report and Order, while we are aware the FCC is reassessing universal service rules, having expressed concern about growing demands on the federal USF, the FCC continues to approve petitions for

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<sup>9</sup> See *Initial Post-hearing Brief of the Utah Rural Telecom Association*, filed April 7, 2011, pp. 3-6.

limited ETC designation, including those of Virgin Mobile.<sup>10</sup> Accordingly, it is evident the FCC continues to view the impacts of Virgin Mobile's Lifeline service on the federal USF to be acceptable in relation to the public benefits of its service.

As to the state USF, URTA's assertion that "allowing Virgin Mobile to serve in URTA members' service areas will leave the URTA members with stranded costs and adversely affect the state fund..." has no evidentiary support.<sup>11</sup> The Report and Order examines this unsubstantiated prediction of harm to URTA members, in relation to Virgin Mobile's commitment to pay into the fund as required by statute and its unequivocal declaration that it does not seek state USF support. The Report and Order re-enforces that declaration by specifically requiring that any such support for Virgin Mobile would require a new application and separate Commission authorization.<sup>12</sup> Additionally, the condition imposed to preclude creamskimming mitigates any potential for stranded costs. Further, URTA provides no legal or factual basis for the Commission to weigh any supposed "stranded costs" in relation to the benefits of designating another ETC in Utah. It provides no evidence of what investments will be stranded or how the provision of Lifeline service would strand such investments. The Report and Order adequately addresses URTA's conclusory speculation about adverse impacts on the state USF, finding no significant likelihood of adverse USF impacts is demonstrated. If

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<sup>10</sup> See Transcript of Hearing, March 8, 2011, p. 9, in which Elaine Divelbliss testifies 23 states have now granted limited ETC status to Virgin Mobile, including the FCC's order of December 29, 2010, granting Virgin Mobile limited ETC designation in four states.

<sup>11</sup> See Report and Order p. 9. We note in an analogous setting in which an incumbent motor carrier argued for denial of authority of a competitor to enter the incumbent's market, the Utah Supreme Court stated: "In this regard, we note that although an applicant generally has the burden of proof in a proceeding for new authority, a protestant who urges an adverse impact on it as a reason for denying the application, has the burden of proof on that point. That burden cannot be met simply by conclusory statements in oral testimony." *Milne Truck Lines, Inc. v. Public Service Commission of Utah*, 720 P. 2d 1373, 1379 (Utah 1986).

<sup>12</sup> See Report and Order, pp 9-10.



anything, Virgin Mobile will strengthen the state USF through its contributions to the fund. The Report and Order also finds the public benefits Virgin Mobile's Lifeline program will afford clearly outweigh the speculative potential consequences URTA alleges. URTA's second factor is satisfied.

Third, the Report and Order examines the federal statute's requirement that ETCs serve the same service area, i.e., study area, as the rural telephone company. Because the Report and Order conditions ETC designation on compliance with Section 214(e)(5), URTA's third factor is satisfied.

The foregoing discussion demonstrates the Report and Order appropriately considers each of the factors URTA specifies as the required elements of the Commission's public interest analysis. Nevertheless, URTA criticizes the Report and Order for allegedly relying on "the promotion of competition and consumer choice," as the only "factor" supporting the public interest finding. URTA reasons that this "factor" "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."<sup>13</sup> URTA is incorrect. Simply because the Commission follows legislated policies promoting universal service, competition and consumer choice does not make our findings and conclusions void of substance. Moreover, the Report and Order's consideration of URTA's three public interest factors contradicts URTA's argument. We nevertheless take this opportunity to recapitulate the additional factors we weighed in reaching our finding that Virgin Mobile's

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<sup>13</sup> See *Utah Rural Telecom Association's Petition for Review...*, June 27, 2011, p. 3.

limited ETC designation would be in the public interest in rural areas, subject to specified conditions.

We recognize in the Report and Order that 47 U.S.C. § 214 (e)(2) establishes the Commission must find an ETC designation is in the public interest when the area proposed to be served is already served by a rural telephone company. Our determination of the issue of public interest in any proceeding is fact, law, and industry specific. In judging whether this standard has been met in this and other ETC cases, we examine a number of different factors. Our judgment about what factors to consider and their relative weight is informed by the policies and principals underlying the federal and state universal service telecommunications laws, the decisions of the FCC, as well as the facts and circumstances associated with each individual application.

In the Report and Order we find Virgin Mobile'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, in part, to typical contractual requirements of wireless carriers.<sup>14</sup> Virgin Mobile's Lifeline service will increase consumer choice and improve consumer access to high quality mobile telecommunications capability.<sup>15</sup> 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.<sup>16</sup> These findings apply with at least equal, if not greater, force in rural areas where newer telecommunications technologies may not yet be fully deployed. In supporting these findings the

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<sup>14</sup> See Report and Order pp. 8-9.

<sup>15</sup> Id.

<sup>16</sup> Id.

Report and Order relies upon the following factual assertions, the vast majority of which are uncontested:

1. Virgin Mobile will satisfy all of the statutory requirements for ETC designation including providing the specified service functionalities and the required advertising using several types of media including newspapers, radio, television, direct mail, and the Internet.
2. Virgin Mobile 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 (as well as the option to purchase additional minutes and texting capability at discounted rates).
3. Virgin Mobile’s Lifeline service will include a variety of technological features at no additional charge including voice mail, call waiting, caller I.D., and E911 capabilities.
4. There are no activation or connection charges for the Lifeline service.
5. Virgin Mobile will use the existing network infrastructure available to it as a subsidiary of Sprint Nextel and is prepared to begin Lifeline service within days of authorization.
6. 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.

7. Increasing competition in the Lifeline market will increase pressure on carriers to provide service offerings tailored to the needs of consumers.
8. The FCC has found that Virgin Mobile's Lifeline services (offered in other jurisdictions) provide "a wide variety of benefits to Lifeline-eligible consumers including increased consumer choice, high quality service offerings, and mobility."
9. Virgin Mobile commits to pay all applicable taxes and public interest surcharges.
10. Virgin Mobile does not seek state USF support.
11. Recognizing the methods for verifying eligibility are currently under Commission review, Virgin Mobile commits to work cooperatively with the Commission to establish new verification processes and to fully comply with Utah law.  
  
Additionally, Virgin Mobile 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.
12. Following its review of the Virgin Mobile application, the Division of Public Utilities concluded Virgin Mobile meets the public interest standard of Section 214(e)(2).
13. Virgin Mobile has already been granted the limited ETC designation it seeks in Utah, in 23 other states.

URTA's criticism of the emphasis on competition and consumer choice in the Report and Order is unjustified and disregards the legislative mandate to promote competition. While the Report and Order also addresses other factors (as discussed above), the objectives of

enhancing competition and consumer choice are prominent in the Report and Order for good reasons. The goals of the federal universal service program and the legislative policy declarations of the Utah Public Telecommunications Law each place significant emphasis on enhancing competition and consumer choice. Federal law provides 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 . . . that are reasonably comparable to those services provided in urban areas...”<sup>17</sup> The Utah Public Telecommunications Law declares it is the policy of the state to “(1) endeavor to achieve the universal service objectives of the state... (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 telecommunications corporations and public telecommunications services as competition develops...”<sup>18</sup>

These legislative policies are, in fact, fundamental in our consideration of applications for ETC designation.<sup>19</sup> Consequently, findings related to the affects of the requested ETC designation on competition and consumer choice are key factors in our analysis and are justifiably prominent in the Report and Order.<sup>20</sup> Our findings, summarized above, are based on the detailed description in the Report and Order of the services and functionalities

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<sup>17</sup> 47 U.S.C. 254(b)(3) (emphasis added).

<sup>18</sup> Utah Code Ann. § 54-8b-1.1(1)-(4) (emphasis added).

<sup>19</sup> See *In the Matter of the Petition of TracFone Wireless, Inc...*, Order on Reconsideration, March 9, 2011, p. 7.

<sup>20</sup> See Report and Order, pp. 4, 5, 6, 8, and 9.

Virgin Mobile proposes to offer under the terms of its Lifeline program, its plans for promoting these services, and its operational capabilities to provide them. Moreover, but for URTA's concerns about the impacts on its members, Virgin Mobile's proposed Lifeline program and its capacity to carry the program out are essentially uncontested. Furthermore, there is little, if any, controversy about the beneficial impacts for qualifying customers of the Lifeline services Virgin Mobile desires to offer.

The FCC's approach to evaluating ETC applications like the one at issue here further supports our analysis in the Report and Order. While it is not the case in Utah, some state public utility regulators, by state law, lack jurisdiction to designate ETCs who provide service through wireless technology. In such cases the FCC determines ETC status. In applying the Section 214(e)(2) public interest standard in areas served by rural telephone companies, the FCC examines "whether the benefits of an additional ETC in the wire centers for which [a competitor] seeks designation outweigh any potential harms."<sup>21</sup> It characterizes this examination as a "fact-specific" exercise.<sup>22</sup> It describes the factors it weighs, as follows: "...in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh [1] the benefits of increased competitive choice, [2] the impact of the designation on the universal service fund, [3] the unique advantages and disadvantages of the competitor's service offering, [4] any commitments made regarding quality of telephone service, and [5] the competitive ETC's ability to satisfy its obligation to serve the designated service

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<sup>21</sup> See Virginia Cellular Order, supra note 5, ¶28; see also Highland Cellular Order, supra note 4, ¶22.

<sup>22</sup> Virginia Cellular Order, supra note 5, ¶28.

areas within a reasonable time frame.”<sup>23</sup> Although not specifically referencing the FCC’s approach, the Report and Order demonstrates our consideration of each of these five factors.

As already mentioned, the Report and Order discusses the unique nature of Virgin Mobile’s program and the impact on competition at pages 4, 5, 6, 8, and 9, providing detailed support for our findings related to FCC criteria 1, 3, 4, and 5. We note, for example, Virgin Mobile’s offer includes a free E-911 compliant handset, 250 free minutes per month to use in accessing a nationwide calling area, and a variety of free service enhancements, including voice mail, call waiting, and caller I.D. Under Virgin Mobile’s program, Lifeline customers gain access to mobile telecommunications capability without the requirements of activations fees and service contracts. Moreover, Virgin Mobile is prepared to offer these services immediately through existing network infrastructure available to it as a subsidiary of Sprint Nextel. The offering of such services will advance competition and consumer choice for lower-income customers.

Regarding FCC criteria 2, the impact on the USF, as discussed above and in the Report and Order, no evidence in the record supports URTA’s speculation its members will need to draw more from the state USF because of Virgin Mobile’s Lifeline program. Moreover, the limited ETC designation will have no direct adverse state USF impact because Virgin Mobile does not request state USF fund support. Any such support would require further Commission approval. In fact, although Virgin Mobile will not draw from state USF, our Report and Order requires it to pay into the state USF. Finally, as already noted, URTA’s reference to FCC

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<sup>23</sup> Id.

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concerns over demands on federal USF are more than outweighed by the FCC's own actions in continuing to approve Virgin Mobile's applications in other jurisdictions.

The foregoing review of FCC decision factors addressing applications for ETC designation further supports the propriety of the factors considered in the Report and Order, and the related findings and conclusions.

We hereby re-affirm the Report and Order as amended and clarified here. To the extent not granted in this order, the applications and petitions for review, rehearing and reconsideration are 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.

DATED at Salt Lake City, Utah, this 13<sup>th</sup> day of July, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary

D#207979