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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Virgin Mobile USA,)	Docket No. 10-2521-01
L.P. Petition for Limited Designation as)	
An Eligible Telecommunications Carrier)	COMMENTS OF TRACFONE
)	WIRELESS, INC. ON UTAH
)	OFFICE OF CONSUMER
)	SERVICES APPLICATION FOR
)	REVIEW OR REHEARING

TracFone Wireless, Inc. (“TracFone”) hereby responds to the application for review or rehearing filed by the Utah Office of Consumer Services (“OCS”) in the above-captioned matter. As will be explained in these comments, TracFone respectfully disagrees with the assertion of OCS that telecommunications carriers designated as Eligible Telecommunications Carriers (“ETCs”) pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended,¹ should be required by the Commission to contribute to the Utah 911 and Poison Control Center funds as a condition of ETC designation.

By order issued September 13, 2010, TracFone was designated by the Commission as an ETC for the limited purpose of providing Lifeline service to low-income Utah households in Docket No. 09-2511-01. In an Order on Reconsideration issued by the Commission March 9, 2011, the Commission determined correctly that the

¹ 47 U.S.C. § 214(e)(2).

power to collect, enforce and administer the 911 and Poison Control Center charges resides with the State Tax Commission, not with the Commission. Since that power was not vested in the Commission, it is beyond the Commission's jurisdiction to determine the applicability of the 911 and Poison Control Center fees to prepaid services such as those of TracFone or to make remittance of such fees a condition of ETC designation.² The Commission reached the same conclusion in its May 25, 2011 Report and Order in the instant proceeding designating Virgin Mobile as an ETC.

In OCS's application for review, it asks the Commission not only to reconsider that aspect of the Virgin Mobile ETC Designation Order, but also to modify TracFone's ETC designation.³ To the extent that OCS is seeking change to the Commission's Order on Reconsideration affirming its designation of TracFone as an ETC, that request should be rejected as an untimely collateral attack on a Commission order that long since has become final. Commission Rule R746-100-11(f) requires that petitions for review or rehearing shall be filed within 30 days of the issuance of the order. Pursuant to that Commission rule, OCS's opportunity to seek rehearing of the Commission's March 9 Order on Reconsideration in the TracFone ETC matter expired April 8, 2011 -- three months ago. Moreover, Utah Code Ann. § 54-7-14 provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Accordingly, the Commission's March 9 Order on Reconsideration in the TracFone ETC matter, including its conclusion that the State Tax

² Order on Reconsideration at 5-6.

³ At n. 4 of its application for review or rehearing of the Virgin Mobile ETC Designation Order, OCS states as follows: "While the TracFone orders are final, the terms of TracFone's ETC designation may be, and the Office contends, should be, amended."

Commission, not the Commission, is empowered to collect, enforce and administer the 911 and Poison Control Center fees, is now final and conclusive.⁴

As for the substantive assertions made by OCS, they are in various ways incorrect. For example, OCS accuses the Commission of “improperly exempting carriers from complying with Utah law.”⁵ That allegation is unsupported and unsupportable. Nowhere in the Virgin Mobile ETC Designation Order (or, for that matter, in the orders issued by the Commission in the TracFone matter) has the Commission ever stated or implied that any carriers are exempted from complying with Utah law in general and the laws governing the 911 and Poison Control Center fees in particular. Neither has the Commission “excuse[d]” non-compliance with those laws as claimed by OCS.⁶ To the contrary, the Commission stated in both cases that if it is determined by the State Tax Commission that the 911 and Poison Control Center fees are applicable to the respective carriers, failure to comply with those fee requirements would be grounds for revoking their ETC designations.⁷ Threatened revocation of an ETC designation for failure to comply with a requirement hardly sounds like the language of exemption from that requirement or excused non-compliance with that requirement as asserted by OCS.

No less misplaced is OCS’s reliance on the Legislature’s enactment of H.B. 303, “Prepaid Wireless 911 Surcharge.” That bill enacts Utah Code Ann. § 69-2-5.7 by requiring collection of 911 fees on prepaid wireless services at the point of retail sale.

⁴ OCS’s reliance on Utah Code Ann. § 54-7-14.5 is misplaced. That provision does allow the Commission to alter or amend an order, but only “after providing an affected utility notice and an opportunity to be heard.”

⁵ OCS Application for Review or Rehearing, at 2.

⁶ *Id.* at 4.

⁷ TracFone Order on Reconsideration, at 7; Virgin Mobile Order, at 13.

What H.B. 303 did not do (notwithstanding OCS's assertion to the contrary) is transfer jurisdiction to collect, enforce and administer the 911 fee from the State Tax Commission to the Commission; nor did it even provide the Commission with joint jurisdiction over that fee. While the Legislature codified into law a requirement that 911 fees on sales of prepaid wireless services be collected at the point of retail sale, supervision of that law was not changed.⁸

Finally, OCS's attempt to limit the scope of the Utah Supreme Court in Hi-Country Estates Homeowners Ass'n v. Bagley & Co., Inc.⁹ is not persuasive. The holding in that case stands for the simple and correct proposition that the scope of the Commission's jurisdiction is limited to that afforded it by the Legislature. The Commission's statutory responsibilities are to regulate utilities' rates and services, not to enforce every state law to which those companies who happen to be utilities may be subject. The State Tax Commission -- not the Commission -- enforces state tax laws, including those tax laws governing the 911 and Poison Control Center taxes. It is no more within the Commission's statutory jurisdiction over the regulation of utilities to enforce those tax laws on the basis that the entities responsible for remitting the taxes are utilities than it would be for the Commission to purport to enforce the state's motor vehicle laws with respect to cars and trucks operated by utility companies; or to enforce state employment laws with respect to utilities' employment practices. Moreover OCS disregards the incontrovertible fact that the Commission's authority to designate ETCs in

⁸ TracFone does not dispute the applicability of the 911 and Poison Control Center fees to sales of prepaid wireless services following enactment of H.B. 303. As of July 1, 2011 (the effective date of that law), vendors of TracFone services in Utah are collecting and remitting those fees on their sales of TracFone services.

⁹ 901 P.2d 1017 (Utah 1995).

Utah is not derived from Utah statutes. Rather, that authority was bestowed upon the Commission by Congress through enactment of Section 214(e)(2) of the Communications Act.¹⁰ In short, the Commission's designation of Virgin Mobile as an ETC and its earlier designation of TracFone as an ETC were exercises by the Commission of authority granted to it by Congress, not by the Utah Legislature.

For the foregoing reasons, TracFone respectfully urges the Commission to deny OCS's application for review or rehearing of the Virgin Mobile ETC Designation Order.

Dated this 8th day of July 2011

HATCH, JAMES & DODGE

/s/ _____
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/s/ _____
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¹⁰ 47 U.S.C. § 214(e)(2).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 8th day of July, 2011, on the following:

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