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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| |) | 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 |) | Response to Requests for Review, |
| |) | Rehearing and Reconsideration |

Virgin Mobile USA, L.P. (“Virgin Mobile”) hereby submits its response to the Utah Office of Consumer Services’ (“OCS”) Application for Review or Rehearing, and the Utah Rural Telecom Association’s (“URTA”) Petition for Review and Reconsideration, of the Report and Order issued May 25, 2011, by the Public Service Commission of Utah (“Commission”).

INTRODUCTION

The Commission’s May 25, 2011 Report and Order grants, subject to specified conditions, Virgin Mobile’s Petition for limited Eligible Telecommunications Carrier (“ETC”) designation in the State of Utah pursuant to Section 214(e) of the Communications Act, as amended,¹ for the limited purpose of offering prepaid wireless services supported by the federal Universal Service Fund’s (“USF”) Lifeline program. Virgin Mobile’s response to the requests for review, rehearing and reconsideration filed by OCS and URТА, will address certain conditions placed on Virgin Mobile and the public interest determination by the Commission in the Report and Order with respect to areas served by rural telephone companies.

¹ See 47 U.S.C. § 214(e).

I. Any Inconsistencies In The Remittance Of Fees By ETCs Noted By OCS Are Not The Result Of Inconsistent Treatment By The Commission Warranting Review Of The Report And Order

The Commission's grant of ETC status to Virgin Mobile is conditioned upon, among other things, Virgin Mobile's ongoing compliance with Utah laws including "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 Report and Order, p. 13.

OCS requests review of the Commission's orders requiring prepaid wireless service carriers, including Virgin Mobile, "to comply with Utah law, in particular the Utah universal service fund,² emergency telecommunications services support,³ and the hearing and speech impaired telecommunication surcharge.⁴" OCS Application for Review, p. 2. According to OCS, review of the May 25, 2011 Report and Order is necessary to determine whether "the Commission is improperly exempting carriers from complying with Utah law" and whether the Commission's initial ETC designations are consistent among applicants specifically with respect to regulatory fee provisions. *Id.*⁵

Any inconsistencies identified by OCS are not a result of action by the Commission that should subject the Report and Order to review and interfere with finality. Instead, to the extent that there may be or appear to be inconsistencies concerning the fees remitted by ETCs, those

² Utah Code Ann. § 54-8b-15 (West 2004).

³ 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).

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

⁵ OCS states that "[w]hile the TracFone orders are final, the terms of TracFone's ETC designation may be, and the Office contends should be, amended" citing Utah Code Ann. § 54-7-14.5. OCS Appl. for Review at n. 4. It is Virgin Mobile's position that any amendment of the Commission's orders or decisions in the TracFone Docket No. 09-2511-01 must not delay finality of the orders or decisions in this Virgin Mobile Docket.

inconsistencies are not within the jurisdiction of the Commission to resolve or are the result of voluntary commitments made by ETCs in the course of settlement negotiations.

OCS points out that Utah Code Ann. § 54-8b-10 was recently amended to apply the hearing and speech impaired surcharge to mobile telecommunications service. *Id.* at p. 4. Indeed, the Commission conditioned Virgin Mobile’s ETC designation on compliance with this amended statute.⁶ As established in the record, Virgin Mobile has been contributing to the state USF pursuant to Utah Code Ann. § 54-8b-15, and will continue to contribute to the state USF in a manner approved by the Commission,⁷ a requirement imposed on other ETCs as well.

OCS contends that the Virgin Mobile Report and Order did not, however, explain why the recently enacted “Prepaid Wireless 911 Service Charge,” Utah Code Ann. § 69-2-5.7, effective July 1, 2011, does not apply to an applicant for ETC designation.⁸ As the Commission made clear in the TracFone proceeding and reiterated in the Virgin Mobile Report and Order, at p. 12, the authority to collect, enforce and administer the 911 and Poison Control surcharges falls under the jurisdiction of the Utah State Tax Commission not the Commission. As a result, the Commission lacks the authority to determine whether ETCs are subject to these surcharges and to condition ETC designation on payment of these surcharges. The Commission treated Virgin Mobile and TracFone similarly with respect to the 911 and Poison Control provisions in effect at the time the respective orders issued, reasoning that the authority to enforce remittance of those fees resided with the State Tax Commission. In the Report and Order, the Commission stated, “To the extent the State Tax Commission determines Virgin Mobile’s services are subject to the

⁶ See Virgin Mobile Report and Order, p. 12.

⁷ See Testimony of Elaine Divilbliss, Tr. at p. 14, line 21 to p. 15, line 17; Virgin Mobile Post Hearing Brief, p. 8; Virgin Mobile Report and Order, p. 10. Virgin Mobile is not seeking distribution from the state USF.

⁸ The statute imposes a 911 service charge on prepaid wireless customers with respect to prepaid wireless products and services and a duty on retailers to collect the service charge at the point of sale. See H.B. 303.

911 and Poison Control program surcharges, we expect it to comply. Failure to do so would be grounds for revoking the ETC designation.” Report and Order, p. 13.

Prior to the passage of § 69-2-5.7, Virgin Mobile for its part remitted the 911 surcharge on behalf of its customers.⁹ Like the prior 911 provision, the now effective “Prepaid Wireless 911 Service Charge” is a state tax statute which is subject to the jurisdiction of the State Tax Commission. *See* H.B. 303. The new law does not impact the jurisdiction of the Commission, and the Commission’s reasoning, consistently articulated, still applies. OCS points out that ETC applicants i-wireless, LLC (“i-wireless”), Docket No. 10-2526-01, and Nexus Communications, Inc. (“Nexus”), Docket No. 11-2540-01, agreed to comply with § 69-2-5.7.¹⁰ Significantly, the Commission did not exercise jurisdiction to require compliance with § 69-2-5.7 by i-wireless and Nexus. Rather, these ETC applicants made affirmative and voluntary commitments in the course of the settlement process in an effort to secure approval. With respect to the surcharges that fall within the jurisdiction of the State Tax Commission, the Commission’s determinations have been entirely consistent among similarly situated ETCs.

OCS also expresses concern over the consistency of Lifeline eligibility determinations among ETCs, while acknowledging the ongoing proceeding specifically addressing this issue. Virgin Mobile has committed to comply with the requirements imposed by the Commission in Docket No. 10-2528-01, *Resolution of Certain Issues Related to the Designation of a Common Carrier as an Eligible Telecommunications Carrier*. As established in the record, Virgin Mobile is committed to complying with existing rules, implementing a 60-day non-usage deactivation

⁹ *See* Testimony of Elaine Divelbliss, Tr. at p. 15, lines 5-7; p. 23, lines 10-22; Virgin Mobile Post Hearing Brief, p. 9. OCS misstates Virgin Mobile twice in its Application for Review, n. 5. To correct OCS’s misstatements, Virgin Mobile’s Post-Hearing Brief, pp. 8-9, states: (1) that “Virgin Mobile currently submits the E911 fees, and does not submit the poison control surcharge or other public interest program surcharges” and (2) that “the Commission held [in the TracFone Reconsideration Order] that it lacks jurisdiction to determine whether ETCs are subject to the 911 surcharge, poison control surcharge, and other public interest program surcharges.”

¹⁰ On July 7, 2011, the Commission dismissed, at the request of Nexus, its application for designation as an ETC.

policy to avoid wasting federal USF monies on unused Lifeline services, and working cooperatively with the Commission to establish verification processes and implement procedures that fully comply with Utah law.¹¹

II. In Analyzing The Public Interest Considerations Concerning Designation Of An ETC In Rural Areas, The Commission Has Identified Relevant Factors But Has Applied Them Inconsistently

URTA, in its Petition for Review and Reconsideration, argues that the Commission must articulate factors to be considered in a public interest analysis pursuant to 47 U.S.C. § 214(e)(2) before designating an additional ETC for an area served by a rural telephone company. URTA Petition for Review, p. 4. According to URTA, since the Commission failed to articulate an exhaustive list of the factors that should be considered in rendering the public interest determination, the findings in the Report and Order are arbitrary and capricious. *Id.* at p. 3.

URTA overlooks the fact that the Commission effectively articulated the list of public interest considerations in granting TracFone ETC designation in Utah.¹² In the TracFone proceeding, the Commission weighed a number of factors in considering whether to grant ETC status to TracFone in rural areas, relying on the guidance provided by the Utah legislative policy declarations in the Utah Public Telecommunications Law and the goals of the federal universal service program.¹³ As a result of the Commission’s analysis, TracFone was granted permission to serve Lifeline customers in rural areas.

¹¹ See Testimony of Elaine Divilbliss, Tr. at p. 17, lines 4-19; Virgin Mobile Post-Hearing Brief, at p. 9; Virgin Mobile Report and Order at p. 10.

¹² The Utah Supreme Court held in *WWC Holding Co., Inc. v. Public Service Commission of Utah*, 44 P.3d 714, 717 (Utah 2002), that the Commission has been given statutory authority and discretion in 47 U.S.C. § 214(e)(2) “to determine which factors to consider in determining public interest, and how those factors should be weighed to arrive at the ultimate conclusion.”

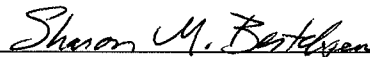
¹³ See TracFone Mar. 9, 2011 Order, p. 7. See also Utah Legislature’s declarations of state policy, Utah Code Ann. § 54-8b-1.1, and 47 U.S.C. § 254(b)(3). Virgin Mobile’s service in rural areas would further these goals.

While Virgin Mobile believes that URTA's concern over the lack of articulated factors is unfounded, Virgin Mobile does take issue with the inconsistent results based on application of those factors. As Virgin Mobile states in its Application for Review, the Commission has applied those factors inconsistently to similarly situated ETC applicants. TracFone has been designated as an ETC in areas served by rural telephone companies. Virgin Mobile and i-wireless have not. Virgin Mobile does not agree with URTA that the Commission is required to provide additional clarity with regard to the public interest factors, but does seek reconsideration of the Commission's Report and Order based on inconsistent application of the relevant public interest factors.¹⁴

CONCLUSION

For the foregoing reasons, Virgin Mobile respectfully requests that the Commission reconsider its inconsistent application of the relevant public interest factors with respect to areas served by rural telephone companies, and that it equally apply conditions placed on similarly situated ETC applicants.

Respectfully submitted,



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

Dated: July 8, 2011

¹⁴ As established in the record, Virgin Mobile has met its burden of demonstrating that ETC designation in its coverage area, including areas served by rural telephone companies, would serve the public interest. See Petition, pp. 15-17; Post-Hearing Brief, pp. 9-10; Reply Brief, pp. 2-5; Application for Review, pp. 3-6. See also *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); *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, 17804 (Wireline Bur. 2010).

CERTIFICATE OF SERVICE

I certify that on July 8, 2011, I caused to be served Virgin Mobile USA, L.P.'s Response to Requests for Review, Rehearing and Reconsideration upon the following persons via electronic mail to the e-mail addresses listed below:

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