

Stephen F. Mecham (4089)
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
Telephone: 801 530-7300
Fax: 801 364-9127
Email: sfmecham@cnmlaw.com

Attorneys for the Utah Rural Telecom Association

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 Initial Post-hearing Brief of the Utah Rural Telecom Association
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INTRODUCTION

On April 12, 2010, Virgin Mobile USA, L.P. (“Virgin Mobile”) petitioned the Public Service Commission (“Commission”) for designation as an eligible telecommunications carrier (“ETC”) under 47 USC 214(e) to qualify for federal universal service funds to provide Lifeline service throughout the state of Utah. On August 26, 2010, the Utah Rural Telecom Association (“URTA”) petitioned the Commission to intervene in this proceeding which the Commission granted on September 20, 2010. As an association of rural telephone companies, URTA was concerned that Virgin Mobile’s petition failed to meet the public interest standard required under Section 214(e) before the Commission can designate a second ETC in areas where rural telephone companies serve.

After the parties filed pre-filed testimony, this matter came on for hearing March 8, 2011 before Hearing Officer David Clark, the Commission’s legal counsel. Virgin Mobile, the Division of Public Utilities, the Office of Consumer Services, Salt Lake Community Action Program, and URTA each sponsored witnesses who testified at hearing. Hearing Officer Clark

took the matter under advisement and allowed the parties to file initial briefs on or before April 7, 2011.

ARGUMENT

1. Section 214(e)(2) Creates a Higher Public Interest Standard for Designating Virgin Mobile an ETC in Areas Served by URTA Members Than is Required for Designating ETCs in Urban Utah

Section 214(e)(2) states:

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.

This section draws a clear distinction between designating ETCs in urban areas and designating ETCs in rural areas. The first sentence of the section establishes that the Commission's actions must be consistent with the public interest, convenience, and necessity in all areas. The last sentence of the section treats rural areas separately with a mandate that the Commission "...find that the designation is in the public interest." The public interest standard for designation in rural areas, therefore, must be higher than the public interest standard in urban areas. If that were not true, this section would not carve out rural areas for different treatment. Competition and customer choice alone, the traditional standard used to justify ETC designation in urban areas, are not sufficient to justify ETC designation in areas served by rural companies represented by URTA.

2. The Public Interest Test for Designating an ETC in Rural Areas Served by a Rural Telephone Company at Minimum Requires that an ETC Contribute to All Public Interest Programs, Not Negatively Affect Universal Service, and Serve the Same Service Area as the Rural Telephone Company

In pre-filed testimony and at hearing Douglas Meredith, URTA's witness, testified that the public interest test for designating an ETC in rural areas consists of at least three requirements: 1) an ETC pay all taxes and fees and contribute to all public interest programs¹; 2) a second ETC not negatively affect universal service or the customers of a rural telephone company; and, 3) an ETC serve the same service area served by the rural telephone company.² With respect to the first requirement, permitting an ETC to provide service without contributing to all of the public interest programs is by definition contrary to the public interest. The ETC would have a competitive advantage over the rural telephone company that must contribute to the programs and it would harm the public interest programs by requiring service without payment.

Insofar as the second requirement is concerned, Mr. Meredith testified at hearing that the Federal Communications Commission ("FCC") and the Federal-State Joint Board on Universal Service recently expressed misgivings about the effect granting ETC status to companies like Virgin Mobile and granting similar petitions that affect the high cost fund are having on universal service.³ The FCC is considering capping the federal universal service fund at 2010 levels which will make universal service a zero sum game throughout the nation. Additions to one company will mean losses to another and will lead to service deterioration for the customers of the companies that lose funding. A significant part of the funds is used to maintain

¹ Public interest programs in Utah include the state universal service fund, 911, Poison Control, and the Hearing Impaired Fund.

² Hearing Transcript at pp. 69 – 73; Exhibit 8, Douglas Meredith testimony at Lines 92 – 104, 124 – 150.

³ Hearing Transcript at pp 70 – 72.

companies' ongoing operations which will suffer if funding is cut.

It was on this basis the FCC refused to grant forbearance of certain rules to Partner Communications Cooperative in an order issued February 25, 2011 of which the Hearing Officer took administrative notice at hearing. The cumulative effect of actions that individually have only de minimus impact is becoming a serious public interest consideration for the FCC and should concern this Commission for the negative effect its successive orders in this and other ETC dockets will have on URTA members and their customers.

For the third part of the test, Section 214(e)(5) contemplates that the service area of a provider granted ETC status be the study area, or the entire service area of the rural telephone company where another provider is designated an ETC. Granting a provider ETC status only in certain exchanges of a rural telephone company will invariably result in unfair cherry picking. The selection of exchanges is itself cherry picking and will lead to deteriorated service in the service area of the rural telephone company. That is not in the public interest and should not be permitted.

3. Under the Public Interest Test for Rural Areas and Sections 214(e)(2) and 214(e)(5), Designating Virgin Mobile an ETC is Not in the Public Interest

Designating Virgin Mobile an ETC in URTA members' rural service areas is not in the public interest. Virgin Mobile fails to meet all three parts of the minimal public interest test. First, at hearing, Elaine Divelbliss, Virgin Mobile's witness, testified that although Virgin Mobile pays the 911 surcharge and contributes to the state universal service fund, it does not pay the Poison Control surcharge or contribute to the Hearing Impaired Fund.⁴ Allowing Virgin Mobile to be an ETC without paying for these two public interest programs is by definition not in the public interest. Doing so will give Virgin Mobile a competitive advantage over URTA

⁴ Hearing Transcript at p. 23.

members and will harm the two programs by allowing Virgin Mobile customers to benefit from them without paying for them and straining the programs.

Second, granting ETC status to Virgin Mobile will divert federal universal service funds from URTA members and deteriorate service to their customers. In addition, though Virgin Mobile is not seeking funds from the state universal service fund, allowing Virgin Mobile to serve in URTA members' service areas will leave the URTA members with stranded costs and adversely affect the state fund and customers throughout the state who pay into that fund. The cumulative effect of the successive ETC dockets the Commission is addressing currently is negative and not in the public interest.

Third, Section 214(e)(5) assumes that Virgin Mobile's service area will match URTA members' study areas or their entire service areas. That section states in relevant part:

In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410 (c) of this title, establish a different definition of service area for such company.

Virgin Mobile is only seeking to serve in certain exchanges within URTA members' service areas which will undoubtedly lead to unfair cherry picking and will negatively affect URTA members' customers' service. That is not in the public interest.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, Virgin Mobile's petition seeking designation as an ETC in the rural areas of the state served by URTA members is not in the public interest. URTA therefore recommends that the Commission deny Virgin Mobile's petition. If the Commission is inclined to grant some part of Virgin Mobile's petition, URTA recommends that the Commission limit the grant to the areas of the state not served by URTA members. The precedent for this

alternative recommendation is the Western Wireless case in which the Commission designated Western Wireless an ETC solely in Qwest's service area and found that making the designation in URTA members' service areas was not in the public interest. The Utah Supreme Court upheld the Commission's decision in *WWC Holding Co., Inc. v. Public Service Com'n of Utah*, 44 P.3d 714, 2002 UT 23. The Commission could find this decision to be in the public interest if Virgin Mobile is also required to support all of the public interest programs.

DATED and SUBMITTED this 7th day of April, 2011.

Stephen F. Mecham

CERTIFICATE OF SERVICE

I certify that on April 7, 2011, I caused to be served the Initial Post-hearing Brief of the Utah Rural Telecom Association in Docket 10-2521-01 by electronic mail on the following:

DIVISION OF PUBLIC UTILITIES

Patricia Schmid pschmid@utah.gov
William Duncan wduncan@utah.gov
Casey Coleman ccoleman@utah.gov

OFFICE OF CONSUMER SERVICES

Paul Proctor pproctor@utah.gov
Cheryl Murray cmurray@utah.gov
Eric Orton eorton@utah.gov

SALT LAKE COMMUNITY ACTION PROGRAM

Betsy Wolf bwolf@slcap.org
Sonya Martinez smartinez@slcap.org

VIRGIN MOBILE

John M. Beahn jbeahn@skadden.com
Sharon Bertelson bertelsons@ballardsphar.com

TRACFONE WIRELESS

Mitchell Brecher brecherm@gtlaw.com

s/Stephen F. Mecham