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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 Reply Brief of the Utah Rural Telecom Association
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Pursuant to the briefing schedule established by Hearing Officer David Clark at the hearing March 8, 20011 in this matter, the Utah Rural Telecom Association (“URTA”) submits the following Reply Brief:

Reply to the Division of Public Utilities

In its initial post-hearing brief, the Division of Public Utilities (“Division”) recommends that the Commission designate Virgin Mobile an eligible telecommunications carrier (“ETC”) “...for the limited purpose of providing Lifeline service to qualified customers with the condition that the Commission should require Virgin Mobile to follow the same procedures as any other telecommunications corporation to verify potential customer’s eligibility for the subsidy.¹” According to the Division, Virgin Mobile meets the requirements of 47 U.S.C. § 214(e)(1) and the public interest requirements of 47 U.S.C. § 214(e)(2).

URTA does not contest that Virgin Mobile meets the “paint by numbers” test of Section 214(e)(1), but the Division has failed to show that Virgin Mobile’s petition meets the public interest requirements of Section 214(e)(2). This section sets a higher public interest standard for

¹ Division brief at 5.

the Commission to designate an ETC in rural areas where URTA members provide service. In response to this requirement the Division states: “It is the Division’s position that, as long as Virgin Mobile uses a Commission-approved method of customer eligibility verification and continues to pay into Utah’s USF, Virgin Mobile meets the public interest standard contained in Paragraph 2 of Section 214(e).²”

The Division’s proposed standard is indistinguishable from the general standard to designate an ETC. The second paragraph of Section 214(e)(2) establishes that all ETC designations throughout the state must comport with the public interest in stating:

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). (*Emphasis added.*)

The Division’s position disregards the very next sentence of Section 214(e)(2), however, that continues: “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 second sentence assumes a heightened standard of public interest for rural areas served by rural providers like URTA members; otherwise the sentence is just a waste of words.

The Division would encourage the Commission to designate an ETC anywhere in the state if the provider simply uses a Commission-approved method to verify customer eligibility and contributes to the state universal service fund. That is a misinterpretation and misapplication of the law and sets a woefully inadequate standard for designating an ETC in rural areas. It takes

² Division brief at 4.

no account of all of the other public interest programs³ to which a telecommunications provider must contribute and support. It takes no account of the harmful impact granting ETC status has on these programs without providing contributions. It takes no account of the negative impact granting ETC status has on the incumbent telecommunications providers and their customers in rural areas. It takes no account of the consequent stranded costs granting ETC status has on the state universal fund and other customers in the state who pay into it. It takes no account of the damaging impact successive grants of ETC status have on the federal universal service fund. And finally, it takes no account of and fails to even address the Section 214(e)(5) requirement that an ETC's service area be the entire study area of an incumbent rural telephone company to prevent destructive cherry picking. That is exactly what Virgin Mobile proposes to do by petitioning to serve in only certain exchanges served by URTA members. URTA urges the Commission to reject the inadequate public interest standard the Division proposes for designating an ETC in rural areas and to reject Virgin Mobile's petition.

Reply to Virgin Mobile

In its initial post-hearing brief, Virgin Mobile takes most of the brief to argue that it meets all of the requirements of Section 214(e)(1) and just two paragraphs to claim that designating Virgin Mobile an ETC is in the public interest. As stated above, URTA does not dispute that Virgin Mobile meets the "paint by numbers" test of this section. URTA, however, does dispute Virgin Mobile's contention that its application meets the public interest requirements for designation as an ETC in rural areas served by URTA members. Virgin Mobile's position suffers from the same defect as the Division's; namely that it ignores the language in Section 214(e)(2) distinguishing rural areas from urban areas in the Act.

The basis for Virgin Mobile's contention with respect to the public interest is that it will

³ i.e., the 911 program, Hearing impaired fund, and Poison Control.

provide competitive choice and more services to low-income consumers. While this statement, if true, may be adequate for ETC designation in urban areas, it is inadequate to meet the heightened standard for designation in rural areas. To the extent Virgin Mobile attempts to address any other public interest considerations, it admits that it does not intend to support any of the public interest programs to which it does not already contribute.⁴ This position will unquestionably harm these programs contrary to the public interest.

Like the Division, Virgin Mobile fails to address the negative impact of its proposed ETC designation on the incumbent providers and their customers, on the state universal service fund, and on the federal universal fund. Nor does Virgin Mobile try to mitigate the destructive cherry picking its proposal will allow by not requiring Virgin Mobile to serve the entire service area of the incumbent rural providers other than to state the Federal Communications Commission (“FCC”) did not require that an analysis be done.⁵ That explanation does not address the requirement of Section 214(e)(5) that service areas of an entrant match the service area of an incumbent. Additionally, it does not mitigate the cherry picking Virgin Mobile’s petition will allow or reflect the fact that the FCC has had second thoughts about the impact petitions like Virgin Mobile’s are having on incumbent providers and the federal universal service fund.⁶ While Virgin Mobile has raised proceedings in its testimony and pleadings in which the FCC decided in Virgin Mobile’s favor, more recent proceedings illustrate the FCC’s reluctance to determine that incremental increases in universal service fund distributions are in the public interest.⁷

⁴ Virgin Mobile brief at 8 – 9.

⁵ Elaine Divilbliss Direct Testimony at 18.

⁶ Hearing Transcript at 70 - 71. Witness Douglas Meredith testified that the FCC refused to forbear in another matter because of the cumulative impact forbearance and other similar decisions it has made have on other providers and the federal universal service fund.

⁷ *Id.*

In a further attempt to justify ETC designation, Virgin Mobile maintains that “[l]ower-income consumers are underserved in the competitive wireless market, and often lack the vibrant wireless telephony choices available to most consumers.⁸” There is no evidence on the record of this proceeding that low-income customers are underserved anywhere in Utah. Virgin Mobile filed the Sullivan Study, but this study has no Utah-specific data and is therefore irrelevant to the question of public interest in this proceeding. Virgin Mobile’s petition fails to meet the public interest requirement of Section 214(e)(2) for ETC designation in rural areas.

Conclusion

Based on the foregoing URTA recommends that the Commission deny Virgin Mobile’s petition. Virgin Mobile has not met the heightened public interest standard required by Section 214(e)(2) for designation as an ETC in the rural areas served by URTA members.

DATED and SUBMITTED this 14th day of April, 2011.

Stephen F. Mecham

⁸ Virgin Mobile brief at 9.

CERTIFICATE OF SERVICE

I certify that on April 14, 2011, I caused to be served the Reply Brief of the Utah Rural Telecom Association in Docket 10-2521-01 by electronic mail on the following:

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