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090245-TP

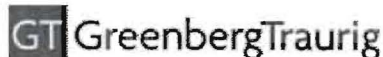
From: leera@gtlaw.com on behalf of BRECHERM@gtlaw.com
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To: Filings@psc.state.fl.us
Cc: BRECHERM@gtlaw.com; mercerdm@gtlaw.com
Subject: TracFone Wireless, Inc. - Comments in Opposition to Virgin Mobile USA, L.P.'s Amended ETC Petition (Docket No. 090245-TP)
Attachments: TracFone Wireless Inc Comments in Opposition to Virgin Mobile USA LP Amended ETC Petition sent 4-30-10.pdf

On behalf of TracFone Wireless, Inc., please find, attached in PDF format, its Comments in Opposition to Virgin Mobile USA, L.P.'s Amended Eligible Telecommunications Carrier Petition (13 pages).

Should you have any questions or need to discuss this matter please contact the undersigned.

Thank you.

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DOCUMENT NUMBER-DATE

03622 MAY-3 09

FPSC-COMMISSION CLERK

5/3/2010

**Before the
FLORIDA PUBLIC SERVICE COMMISSION**

In the matter of)	
)	
Virgin Mobile USA, L.P.)	Docket No. 090245-TP
)	
Amended Petition for Designation as an)	
Eligible Telecommunications Carrier)	
For the Limited Purpose of Offering)	
Lifeline Services.)	
_____)	

**TRACFONE WIRELESS, INC.'S COMMENTS IN
OPPOSITION TO VIRGIN MOBILE USA, L.P.'S AMENDED
ELIGIBLE TELECOMMUNICATIONS CARRIER PETITION**

TracFone Wireless, Inc. ("TracFone"), by and through its attorneys, submits these comments in opposition to the amended petition for designation as an eligible telecommunications carrier ("ETC") filed by Virgin Mobile USA, L.P. ("Virgin Mobile") on April 1, 2010. TracFone opposes Virgin Mobile's amended ETC petition to the extent that it seeks to be designated as a facilities-based carrier that is not subject to several important conditions that the Federal Communications Commission ("FCC") has found to be necessary to protect the public interest when an ETC does not provide service using its own facilities. Notwithstanding its recent acquisition by Sprint Nextel Corporation ("Sprint Nextel"), Virgin Mobile is and continues to operate as a wireless reseller and not a facilities-based carrier. As such, Virgin Mobile should be subject to the same FCC-imposed conditions as all other ETCs that do not have their own facilities, including, most importantly, those conditions imposed by the FCC to advance public safety purposes.

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I. INTRODUCTION

TracFone is a Delaware corporation with its principal offices located at 9700 NW 112th Avenue, Miami, Florida. TracFone is a reseller of commercial mobile radio service throughout the United States, including the State of Florida. With more than thirteen million customers nationwide, TracFone is the leading provider of prepaid wireless service in the United States. TracFone provides service through a “virtual network” consisting of services obtained from numerous licensed operators of wireless networks. TracFone has been designated by the Commission as an ETC. As such, TracFone provides its SafeLink Wireless® Lifeline service to low income households in Florida. Because TracFone, like Virgin Mobile, does not own, operate or maintain its own facilities, TracFone, like Virgin Mobile, may only be designated as an ETC pursuant to the Federal Communications Commission’s grant of forbearance from the facilities-based ETC requirement contained at Section 214(e)(1)(A) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)(1)(A)) and Section 54.201(i) of the FCC’s rules (47 C.F.R. § 54.201(i)). In granting TracFone and Virgin Mobile forbearance from those requirements, the FCC imposed a series of forbearance conditions on both companies. Several of those conditions specifically involve public safety.

This docket involves the amended petition of Virgin Mobile for limited designation as an ETC in the state of Florida. TracFone files these comments to ensure that the Commission does not issue an order concluding that Virgin Mobile is a facilities-based provider no longer subject to the FCC’s forbearance conditions. Section 214(e)(1)(A) of the Communications Act states that ETCs shall offer services, at least in part, over their own facilities. On December 5, 2007, Virgin Mobile filed with the FCC a petition requesting that the FCC exercise its forbearance authority under Section 10 of the Communications Act (47 U.S.C. § 160) with

respect to the facilities-based service requirement. The FCC granted the petition for forbearance in an Order dated March 5, 2009, subject to certain conditions.¹

The FCC's grant of forbearance was expressly conditioned on Virgin Mobile complying with the following five conditions: (a) provide its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes; (b) provide its Lifeline customers with E911-compliant handsets and replace, at no additional charge to the customer, non-compliant handsets of existing customers who obtain Lifeline-supported service; (c) obtain a certification from each PSAP where Virgin Mobile provides Lifeline service confirming that Virgin Mobile provides its customers with 911 and E911 access or if, within 90 days of Virgin Mobile's request for certification, a PSAP has not provided the certification and the PSAP has not made an affirmative finding that Virgin Mobile does not provide its customers with access to 911 and E911 service within the PSAP's service area, Virgin Mobile may self-certify that it meets the basic and E911 requirements; (d) require its customers to self-certify at time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from Virgin Mobile; and (e) establish safeguards to prevent its customers from receiving multiple Virgin Mobile Lifeline subsidies at the same address. In the Virgin Mobile Forbearance Order, the FCC also granted Virgin Mobile's petitions for ETC designation in New York, North Carolina, Pennsylvania, Tennessee, and Virginia.

In this docket, Virgin Mobile filed two ETC petitions. First, on April 29, 2009, Virgin Mobile filed a petition seeking limited designation as an ETC. On April 1, 2010, Virgin Mobile withdrew its then-pending ETC petition and filed an amended ETC petition seeking ETC

¹ *In the Matter of 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 (2009) ("Virgin Mobile Forbearance Order").

designation as a facilities-based carrier. Citing its recent acquisition by Sprint Nextel, Virgin Mobile has asserted the novel proposition that “it no longer resells Sprint’s services to customers” and “now operates as a facilities-based carrier in the State of Florida.”² Virgin Mobile further alleged that it is a “wholly-owned subsidiary of Sprint Nextel” and “[a]ccordingly, Virgin Mobile is capable of, and currently provides the supported services over an existing infrastructure in Florida.”³ In other words, simply because it had become a subsidiary of Sprint Nextel, Virgin Mobile erroneously asserted in its Amended ETC Petition that it should no longer be subject to the important public safety safeguards in the FCC’s Virgin Mobile Forbearance Order.

Ten days later, on April 10, 2010, without having received any comment on Virgin Mobile’s amended ETC petition, Commission Staff issued a Memorandum recommending that the Commission grant Virgin Mobile’s Amended ETC Petition. In the Memorandum, the Staff states: “As a result of the acquisition, Virgin Mobile attests that it is a wholly owned subsidiary of Sprint-Nextel. Virgin Mobile has acknowledged to staff that Virgin Mobile operates as a facilities-based carrier and no longer resells services in the State of Florida.”⁴ Commission Staff accepted Virgin Mobile’s representation that it is operating as a facilities-based carrier and did not provide any analysis of the facts or law relevant to a determination of whether a carrier has its own facilities. As such, if the Commission adopts the Commission Staff’s recommendation, Virgin Mobile would no longer required to comply with the public safety conditions previously imposed upon wireless reseller ETCs by the FCC. More importantly, Lifeline customers of

² Virgin Mobile’s Amended Petition for Designation as an Eligible Telecommunications Carrier for the Limited Purpose of Offering Lifeline Services, April 1, 2010 (“Virgin Mobile’s Amended ETC Petition”), at 2.

³ *Id.*, at 12.

⁴ Commission Staff Memorandum, April 10, 2010, at 2.

Virgin Mobile in Florida would have no assurances that they would have access to essential 911 and E911 service.

II. COMMENTS

The Commission's acceptance of Virgin Mobile's assertion that it is now a facilities-based provider, based on Virgin Mobile's status as a wholly-owned subsidiary of a company with facilities, would allow Virgin Mobile to provide Lifeline service without ensuring that Virgin Mobile's customers have access to 911 and E911 service.

A. Virgin Mobile's Status as a Wholly-Owned Subsidiary of Sprint Nextel Does Not Transform it into a Facilities-Based Carrier.

Virgin Mobile's sole basis for asserting that it is a facilities-based carrier is that it is a wholly-owned subsidiary of Sprint Nextel, a company that has its own network. Specifically, Virgin Mobile represents the following in its Amended ETC Petition:

On November 24, 2009, Virgin Mobile became a wholly owned subsidiary of Sprint Nextel upon completion of the companies' previously announced transaction. The FCC approved Sprint Nextel's acquisition of Virgin Mobile effective September 11, 2009. As a result of the Company's acquisition by Sprint Nextel, Virgin Mobile no longer resells the company's service. Instead, the Company now operates as a facilities-based carrier in the State of Florida like all other Sprint subsidiaries operating in the state.⁵

Virgin Mobile's amended ETC petition is devoid of any evidence that it has become a facilities-based provider, other than its conclusory assertion that, because it was acquired by another entity, it has suddenly become a facilities-based carrier. Simply because Virgin Mobile has been acquired by a facilities-based provider does not mean that Virgin Mobile has transformed itself into a facilities-based provider. Rather, as a matter of law, Virgin Mobile remains a separate and distinct legal entity which operates as a wireless reseller and not as a facilities-based carrier.

⁵ Virgin Mobile's Amended ETC Petition, at 2.

In Florida, as well as throughout the United States, it is a well-established legal principle that parent and subsidiary corporations are treated as separate and distinct entities with different rights, powers, and assets. *See Gladding Corp. v. Register*, 293 So.2d 729, 732 (Fla. Dist. Ct. App. 1974). The United States Supreme Court has held that a subsidiary did not have the right to claim the same legal status as its parent corporation. In so holding, the Court stated: “A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.” *Dole Food Co v Patrickson*, 538 U.S. 468, 474, 123 S.Ct. 1655, 1660 (2003) (citing *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (“Separate legal personality has been described as ‘an almost indispensable aspect of the public corporation’ ”)). The United States Supreme Court further stated that “[a]n individual shareholder, by virtue of his ownership of shares, does not own the corporation’s assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest.” *Id.* at 475 (citing 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 31 (rev. ed.1999)). Likewise, a subsidiary does not own the assets of its parent company.

As represented by Virgin Mobile, it is a wholly-owned subsidiary of Sprint Nextel, not a fully integrated division of Sprint Nextel that was created as the result of a merger of the companies. As such, Virgin Mobile is a distinct legal entity that may not claim facilities-based status based on the fact that its stock is owned by a company that happens to own telecommunications facilities. Prior to Sprint Nextel’s acquisition of Virgin Mobile, Virgin Mobile was a wireless reseller without its own facilities. Virgin Mobile has provided no basis to

this Commission to support the conclusion that Virgin Mobile now has its own network facilities.⁶

Furthermore, Virgin Mobile does not meet the definition of “facilities-based carrier” as that term is defined in federal law. A “facilities-based carrier” is an “entity that owns communications transmission facilities, is responsible for the operation and maintenance of those facilities, and holds an operating license issued by the Federal Communications Commission under the authority of title III of the Communications Act of 1934.” 18 U.S.C. § 1029(e)(10). As a wholly-owned subsidiary of Sprint Nextel, Virgin Mobile does not own Sprint Nextel’s network facilities, is not responsible for the operation and maintenance of those facilities, and does not hold licenses issued by the FCC pursuant to Title III of the Communications Act. As such, Virgin Mobile is not a facilities-based carrier under federal law. Accordingly, the conditions set forth in the FCC’s Virgin Mobile Forbearance Order should continue to apply to Virgin Mobile.

B. The Staff’s Memorandum Would Deny Florida Lifeline Consumers the Benefits of the Public Safety Safeguards Imposed by the FCC to Ensure that Low Income Households Have Access to 911 and Enhanced 911 Service.

The Commission’s acceptance of Virgin Mobile’s unsupported assertion that it has somehow become a facilities-based carrier, even though Virgin Mobile has not shown that it owns, operates or maintains its own FCC-licensed facilities, would deny low income Florida households the 911 and E911 service protections imposed by the FCC as an important

⁶ Nothing in Virgin Mobile’s amended ETC petition indicates or even suggests that Virgin Mobile is not still obtaining service from Sprint Nextel pursuant to a reseller agreement between the two companies -- as it did prior to its acquisition by Sprint Nextel. By e-mail dated April 7, 2010 from Elaine M. Divelbliss to Lee Eng Tan of the Commission staff, Virgin Mobile states that it “no longer resells Sprint’s services.” However, Virgin Mobile has provided no explanation as to how it provides services and pursuant to what arrangements, it obtains access to the Sprint Nextel network. Based on this bare-bones e-mail, whether or not Virgin Mobile is operating as anything other than a wireless reseller is, at best, questionable.

forbearance condition. In particular, by failing to require Virgin Mobile to continue to meet the PSAP certification condition, unconditional approval of Virgin Mobile's amended ETC petition would leave Virgin Mobile's Lifeline consumers in Florida without adequate assurances that they will have reliable access to 911 and E911 service.

The PSAP certification condition established by the FCC requires Virgin Mobile to obtain certification from each PSAP where Virgin Mobile provides Lifeline service confirming that Virgin Mobile provides its customers with access to 911 and E911 service. However, if within 90 days of Virgin Mobile's request to a PSAP for certification, a PSAP has not provided the certification and the PSAP has not made an affirmative finding that Virgin Mobile does not provide its customers with access to 911 and E911 service within the PSAP's service area, Virgin Mobile may self-certify that it meets the basic and E911 requirements.⁷ "If Virgin Mobile makes such a self-certification, Virgin Mobile must obtain from each of its underlying carriers that provide service to Virgin Mobile in the area served by that PSAP certification that the carriers route 911 and E911 calls from Virgin Mobile customers to the PSAP in the same manner that they route 911 and E911 calls from their own customers."⁸

⁷ TracFone is subject to the identical PSAP certification requirement and has expended substantial resources to comply with that requirement. As a result, all TracFone Lifeline customers are assured of reliable access to 911 and E911 service without regard to their activation status or the availability of prepaid minutes. Virgin Mobile Lifeline customers are entitled to no less.

⁸ Virgin Mobile Forbearance Order, ¶ 22.

The FCC provided the following explanation for imposing the PSAP certification condition on Virgin Mobile:

Given the importance of public safety, we condition this grant of forbearance on Virgin Mobile's compliance with the E911 requirements applicable to wireless resellers, as modified below, for all Lifeline customers. In light of the condition discussed below, that Virgin Mobile ensure its customers receive only one Lifeline-supported service, we find it essential that Virgin Mobile's Lifeline-supported service be capable of providing emergency access. Given the possibility that this Lifeline-supported service will be the customers' only means of accessing emergency personnel, we require that Virgin Mobile provide its Lifeline customers with access to basic and E911 service immediately upon activation of service. To demonstrate compliance with this condition, Virgin Mobile must obtain a certification from each PSAP where it provides Lifeline service confirming that Virgin Mobile provides its customers with access to basic and E911 service.⁹

As further explained by the FCC, the PSAP certification is "necessary to ensure that Virgin Mobile's Lifeline customers have meaningful access to emergency services."¹⁰ In addition, the FCC stressed that "with the possibility that the Lifeline service will be the customer's only access to emergency services and given the potential gravity of harm if such Lifeline customers cannot obtain such access, we believe that these conditions will further the protection of such Lifeline customers."¹¹ As noted by the FCC in the Virgin Mobile Forbearance Order, public safety is critical for wireless Lifeline services, and reliable access to 911 and E911 is especially important in situations where a Lifeline-supported wireless service is the consumer's only means for accessing emergency assistance. The fact that Virgin Mobile's wholesale network vendor -- Sprint Nextel -- has recently purchased the stock of the company does not make public safety any less important nor does it make Virgin Mobile's Lifeline customers any less reliant on Virgin Mobile for access to 911 and E911 service.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

When the FCC granted Virgin Mobile forbearance from the facilities-based requirement, it concluded that “requiring Virgin Mobile, as a wireless reseller, to own facilities does not necessarily further the statutory goals of the low-income program, which is to provide support to qualifying low-income consumers throughout the nation, regardless of where they live.”¹² Given that Virgin Mobile has provided no evidence that it owns facilities, the PSAP certification condition, as well as all other conditions imposed on Virgin Mobile by the FCC should continue to apply to Virgin Mobile’s provision of Lifeline service.

C. The Commission Lacks Authority to Determine that the FCC’s Virgin Mobile Forbearance Order is No Longer Applicable.

The FCC’s grant of Virgin Mobile’s request for forbearance, was specifically made subject to a series of FCC-imposed conditions. Absent forbearance, Virgin Mobile could not be designated as an ETC either by the FCC, pursuant to Section 214(e)(6) of the Communications Act, or by any state commission, including this Commission, pursuant to Section 214(e)(2). While Virgin Mobile has stated to the FCC in recent ETC petitions its opinion that the PSAP condition is no longer applicable to it because it is now facilities-based provider, Virgin Mobile has not petitioned the FCC for removal or modification of any of those conditions, including the PSAP certification condition.¹³ Virgin Mobile’s recent FCC ETC petitions in which it has asserted for the first time that it should no longer be subject to the FCC’s forbearance conditions in general and to the PSAP certification condition in particular, have been opposed by TracFone and by Citizens for Universal Access. To date, the FCC has not issued any orders which have

¹² *Id.*, ¶ 29.

¹³ *See, e.g., Virgin Mobile USA, L.P., Petition for Limited Designation as an Eligible Telecommunications Carrier in the State of Alabama*, filed January 15, 2010. Virgin Mobile has also filed ETC petitions with the FCC to be designated as ETC in Connecticut, Delaware, District of Columbia, and New Hampshire. In each of those petitions, Virgin Mobile only avers that the PSAP certification condition is inapplicable, and does not mention any of the other forbearance conditions.

addressed Virgin Mobile's attempt to be relieved of the forbearance conditions, including the PSAP certification condition.

In the absence of any such request or any action by the FCC either eliminating or modifying those conditions, the Virgin Mobile Forbearance Order and the conditions set forth therein remain binding on this Commission. This Commission does not have authority to accept Virgin Mobile's self-serving statement that it has somehow been transformed into a facilities-based provider that is no longer subject to the conditions set forth in the Virgin Mobile Forbearance Order, including those conditions imposed to ensure public safety. Only the FCC has authority to relieve Virgin Mobile from its obligation to comply with a FCC-imposed condition of forbearance.

III. CONCLUSION

By denying Virgin Mobile's Amended ETC Petition, or at least rejecting Virgin Mobile's request for relief from the PSAP certification condition, the Commission can avoid the unintended consequence of allowing a company (Virgin Mobile) that remains a wireless reseller and not a facilities-based carrier to provide Lifeline service to low income households without complying with the important FCC-imposed public safety safeguards that are applicable to all other wireless resellers. TracFone respectfully requests that this Commission find that Virgin Mobile is not a facilities-based wireless carrier for purposes of satisfying Section 214(e)(1)(A) of the Communications Act (47 U.S.C. § 214(e)(1)(a)) and find that Virgin Mobile remains subject to the conditions in the FCC's Virgin Mobile Forbearance Order, including the PSAP certification condition, if the Commission designates Virgin Mobile as an ETC.

Respectfully submitted,

s/Mitchell F. Brecher

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April 30, 2010

CERTIFICATE OF SERVICE

This is to certify that I have duly served TracFone Wireless, Inc.'s Comments in Opposition to Virgin Mobile USA, L.P.'s Amended Eligible Telecommunications Carrier Petition electronically or by U.S. mail, as indicated, on all parties listed, this 30th day of April, 2010, addressed as follows:

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