

**Marguerite McLean**

090245-TP

**From:** bruce.may@hklaw.com  
**Sent:** Friday, June 18, 2010 4:45 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** sclark@radeylaw.com; jbeahn@skadden.com; Lee Eng Tan; Catherine Beard; Curtis Williams; plurie@virginmobileusa.com  
**Subject:** Docket No. 090245-TP - Electronic Filing  
**Attachments:** 090245-TP - Response to Motion to Dismiss.pdf

a. person responsible for the electronic filing:

D. Bruce May, Jr.  
Holland & Knight LLP  
Post Office Drawer 810  
Tallahassee, Florida 32302-0810  
Telephone: 850-224-7000  
[bruce.may@hklaw.com](mailto:bruce.may@hklaw.com)

b. The docket number and title are:

Docket No. 090245-TP - *In Re: Petition for limited designation as eligible telecommunications carrier (ETC) by Virgin Mobile USA, L.P.*

c. The name of the party on whose behalf the document is filed: Organize Now, Lloyd Moore and Gracie Fowler

d. The total number of pages in attached document:

e. A brief but complete description of each attached document:

Organize Now's, Lloyd Moore's and Gracie Fowler's Response to Virgin Mobile USA, L.P.'S Motion to Dismiss with Prejudice Petition for Formal Proceeding

Thank you.

**Jennifer Gillis | Holland & Knight**

Sr Legal Secretary

315 South Calhoun Street, Suite 600 | Tallahassee FL 32301

Phone 850.425.5605 | Fax 850.224.8832

[jennifer.gillis@hklaw.com](mailto:jennifer.gillis@hklaw.com) | [www.hklaw.com](http://www.hklaw.com)

Add to address book

To ensure compliance with Treasury Regulations (31 CFR Part 10, Sec. 10.35), we inform you that any tax advice contained in this correspondence was not intended or written by us to be used, and cannot be used by you or anyone else, for the purpose of avoiding penalties imposed by the Internal Revenue Code.

NOTE: This e-mail is from a law firm, Holland & Knight LLP ("H&K"), and is intended solely for the use of the individual(s) to whom it is addressed. If you believe you received this e-mail in error, please notify the sender immediately, delete the e-mail from your computer and do not copy or disclose it to anyone else. If you are not an existing client of H&K, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to H&K in reply that you expect it to hold in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of H&K, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.

6/18/2010

05114 JUN 18 2010  
FPSC-CLERK/CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition for limited designation as  
eligible telecommunications carrier (ETC) by  
Virgin Mobile USA, L.P.

Docket No. 090245-TP

Filed: June 18, 2010

---

**ORGANIZE NOW'S, LLOYD MOORE'S AND GRACIE FOWLER'S  
RESPONSE TO VIRGIN MOBILE USA, L.P.'S MOTION TO DISMISS WITH  
PREJUDICE PETITION FOR FORMAL PROCEEDING**

Organize Now, Lloyd Moore and Gracie Fowler (collectively, "Petitioners"), by and through undersigned counsel, hereby respond to Virgin Mobile USA, L.P.'s ("Virgin Mobile") Motion to Dismiss with Prejudice Petitioner's Petition for Formal Proceeding (the "Motion"), and state as follows:

**Summary**

1. Virgin Mobile's attempts to keep consumers and a consumer group from voicing their legitimate public interest and consumer protection concerns to the Florida Public Service Commission ("PSC" or "Commission") is unfounded and directly contravenes long-standing policy of the PSC to allow consumers to formally participate in telecommunications proceedings. In its zeal to keep the PSC from considering valid consumer interests, Virgin Mobile makes two hollow arguments. First, it argues that the Petitioners fail to state any claim for which the Commission can provide relief. Second, it argues that the Petitioners lack "standing" to protest the Commission's proposed action to designate Virgin Mobile as an eligible telecommunications carrier ("ETC"). Neither argument supports denial of Petitioners' rights to a formal administrative proceeding regarding their public interest and consumer protection concerns.

2. First, Virgin Mobile completely ignores the relief which Petitioners seek. Lest there be any doubt, Petitioners are requesting that the PSC review the Federal Lifeline Assistance

DOCUMENT NUMBER-DATE

05114 JUN 18 2010

FPSC-COMMISSION CLERK

---

Program (“Lifeline”) services which Virgin Mobile proposes to offer and determine that those services, as currently offered and as currently marketed, are not in the public interest and do not meet consumer protection safeguards. Petitioners are requesting that the Commission either deny Virgin Mobile ETC designation as currently proposed, or grant ETC designation with certain conditions that would ensure that such services are provided in the public interest and in accordance with consumer protection requirements.

3. Second, Virgin Mobile wrongly argues that Petitioners do not have standing to seek the relief they claim. Petitioners have specifically pled that they are eligible for Lifeline services and thus are potential consumers of the Lifeline services which Virgin Mobile proposes to provide. As such, Petitioners have direct, immediate, and substantial interests in the fairness of the terms and the marketing tactics under which Virgin Mobile’s Lifeline services are to be offered and promoted. Petitioners allege that the terms of Virgin Mobile’s proposed Lifeline services are not in the public interest, and that, as eligible consumers, they will be harmed by Virgin Mobile’s promotion of low-cost telecommunication services to attract customers who will subsequently incur unforeseen or excessive charges for other basic services. Virgin Mobile’s exceedingly narrow view of the public’s right to be heard would essentially exclude any consumer or consumer group which dares to challenge Virgin Mobile’s version of the facts. If Florida residents who are eligible Lifeline consumers have no standing to dispute public interest determinations concerning the terms by which an ETC applicant will provide Lifeline services, then it is unclear who could challenge such findings.

#### **Background**

4. Petitioners filed their Petition for Formal Proceeding on June 9, 2010, pursuant to Section 120.80(13)(b), Florida Statutes, and Rules 25-22.029 and 28-106.201, Florida

Administrative Code. The Petition addresses the PSC's May 19, 2010 Notice of Proposed Agency Action Order Granting Eligible Telecommunications Carrier Designation to Virgin Mobile USA, L.P., Order No. PSC-10-0323-PAA-TP (the "PAA Order").

5. The Petitioners' dispute certain "public interest" and "consumer protection" findings of the PSC based on the terms under which Virgin Mobile proposes to offer its services. Petitioners also dispute whether Virgin Mobile is eligible to bypass certain requirements related to safety and other issues imposed on it as a non-facilities-based provider subject to a prior order (the "Forbearance Order") of the Federal Communications Commission ("FCC"). Petition at 9-10.

6. Virgin Mobile moved for dismissal of the Petition on June 11, 2010, arguing that Petitioners failed to state a cause of action on which the PSC could grant relief, and failed to make allegations sufficient for purposes of establishing standing.

### Discussion

#### **I. Legal Standards**

7. From the outset, the PSC has "acknowledge[d] that dismissal is a drastic remedy, and one that should be granted only when the appropriate legal standard has been clearly met."<sup>1</sup> As Virgin Mobile concedes, the purpose of a motion to dismiss in an administrative adjudicatory proceeding is to test the sufficiency of the petition. For purposes of resolving this Motion, therefore, the PSC should construe all material facts and allegations in the light most favorable to the Petitioner.<sup>2</sup> Though Virgin Mobile quotes this very standard, it ignores it by making repeated

---

<sup>1</sup> *In re: Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc.*, Docket No. 050200-TX, Order No. PSC-05-1126-FOF-TX (Fla. Pub. Serv. Comm'n Nov. 8, 2005).

<sup>2</sup> *In re: Joint application for approval of transfer of control of Sprint-Florida, Inc., holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corporation to LTD Holding Company, and for acknowledgement of transfer of control of Sprint Long Distance, Inc., holder of LXC Registration NO. TK001, from Sprint Nextel Corporation to LTD Holding Company*, Docket No. 050551-TP; Order No. PSC-06-0033-FOF-TP (Fla. Pub. Serv. Comm'n Jan. 10, 2005) ("*Sprint-Florida/LTD Holding*").

factual arguments against the Petitions' allegations. Such arguments of fact should not be considered for purposes of determining the Petition's sufficiency.<sup>3</sup> Virgin Mobile will have an opportunity to prove its contentions at the formal proceeding which Petitioners seek. The recurring presence of such arguments, however, further demonstrates that there are ripe factual disputes to be addressed at such proceeding.

## **II. Petitioners Have Alleged Valid Claims for Relief**

### **The PSC has the power to provide the relief sought**

8. Virgin Mobile's argument that Petitioners have failed to state a claim for which relief can be granted is plainly wrong and completely ignores the relief which Petitioners seek. As indicated above, Petitioners are requesting that the PSC closely review the service offerings of Virgin Mobile and determine that as proposed those offerings are not in the public interest and do not meet consumer protection requirements. Petitioners are asking that the PSC either deny Virgin Mobile ETC designation as currently proposed, or grant ETC designation with certain conditions that would ensure that such services are provided in the public interest. There can be no doubt that the PSC can deny or grant the ETC application on public interest grounds. It is equally clear that the PSC can impose conditions on the grant of any ETC designation. Indeed, as the PAA Order provides, "[g]ranting of ETC designation shall be contingent on Virgin Mobile" meeting certain requirements listed on page 11 of the PAA Order.<sup>4</sup> Petitioners contend that these conditions should be expanded to address the public interest concerns raised in their Petition.

---

<sup>3</sup> *In re: Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc.*, Docket No. 050200-TX, Order No. PSC-05-1126-FOF-TX (Fla. Pub. Serv. Comm'n Nov. 8, 2005).

<sup>4</sup> The PAA Order also describes how the PSC previously imposed, as a matter of discretion, conditions on the designation of TracFone as an ETC. PAA Order at 6.

**The PSC's power and responsibility to consider the interests raised by Petition**

9. Virgin Mobile argues that the PSC is essentially powerless to address considerations outside of the nine enumerated service requirements set forth in 47 CFR 54.101, and paints the PSC as a clerical rubber stamp to approve or disapprove ETC applicants on the strict basis of narrow federal guidelines. Virgin Mobile's cramped view of the PSC's power in this area overlooks certain vital aspects of the regulatory framework.

10. First, under FCC rules, state commissions have primary responsibility to designate providers as ETCs. 47 U.S.C. § 214(e)(2); 47 CFR 54.201(b). Indeed, the PSC recognized its "primary responsibility" in this area in the PAA Order. PAA Order at 3. This is not a ministerial task, but an important discretionary function. The discretion vested with state commissions by the FCC is illustrated by its encouragement, but not requirement, to adopt certain standards as they see fit. *See, e.g.*, PAA Order at 5 ("The FCC encouraged states to also adopt these criteria" beyond the nine enumerated services under 47 CFR 54.101).

11. Second, the nine enumerated services are not the only considerations required of the PSC. As the PAA Order states, a state commission must also consider whether an ETC designation serves the "public interest" consistent with Sections 214 and 254 of the Telecommunications Act of 1996 (the "Act"):

Congress did not establish specific criteria to be applied under the public interest tests in Sections 214 or 254. The public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality communications at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.

PAA Order at 5 (emphasis added). The lack of specific criteria reflects the discretion that is invested with state commissions analyzing these factors.

12. Moreover, the PSC has exercised its broad authority in this sphere by determining that indeed it must consider other factors outside of the nine enumerated services to which Virgin Mobile would like to confine it. Significantly, these additional factors expressly include whether the ETC applicant is able to satisfy “consumer protection” safeguards.<sup>5</sup>

13. Virgin Mobile’s refusal to acknowledge these additional required considerations is striking given that the Petition raises concerns by low-income consumers who have specifically disputed the PSC’s findings with respect to whether the Lifeline services which Virgin Mobile proposes to offer are in the “public interest” and whether the way that Virgin Mobile offers those services meets “consumer protection” standards. Indeed, nowhere in Virgin Mobile’s 15-page Motion to Dismiss can one even find the term “consumer protection.”

14. Rather, Virgin Mobile chooses to argue in plain contravention of the law, including the regulatory background and authorities cited by the PAA Order itself, that the PSC’s only required determination is whether the ETC applicant can meet the nine enumerated services under 47 CFR 54.101.

15. Petitioners expressly dispute the PSC’s findings with respect to its determinations on the public interest and on the protection of consumers that the PSC is required to consider, as well as whether the FCC’s Forbearance Order should still apply.<sup>6</sup> Virgin Mobile attempts to argue that these disputes fail to state a valid claim for relief, but Petitioners have validly disputed facts that cannot be resolved as a matter of law. Moreover, the PSC cannot resolve those disputed issues simply by relying on Virgin Mobile’s version of the facts. Based on evidence

---

<sup>5</sup> *In re: State certification of rural telecommunications carriers pursuant to 47 C.F.R. 54.314*, Order No. PSC-05-0824-FOF-TL, issued in Docket No. 10977-TL (Fla. Pub. Serv. Comm’n Aug. 15, 2005); PAA Order at 5.

<sup>6</sup> Specifically, the Petition disputes the PSC’s proposed findings that “that Virgin Mobile has complied with the requirements listed on Page 5 of the PAA Order in order “to be eligible for ETC certification in Florida,” including demonstration of an “ability to satisfy consumer protection and service quality standards,” [PAA Order, p. 5.]; and that “Virgin Mobile’s petition to be designated as an ETC is in the public interest.” [PAA Order, p. 10.]. The Petition’s other two disputed issues are discussed below.

offered at a formal proceeding, the PSC certainly has the authority to determine whether the terms of Virgin Mobile's services are in the public interest, and could deny or appropriately condition the grant of any ETC designation to ensure that the public interest, including consumer protection interests, are served.

16. Accordingly, in resolving these disputes, Petitioners are requesting the PSC to review the Lifeline services which Virgin Mobile proposes to offer and determine that those services as currently offered and as currently marketed are not in the public interest and do not meet consumer protection safeguards. Petitioners are requesting that the PSC either deny Virgin Mobile's ETC designation as currently proposed, or grant Virgin Mobile ETC designation with certain specific conditions which would ensure that such services are provided in the public interest and in a fashion that meets consumer protection safeguards. Conditioning an ETC designation upon certain terms and conditions is certainly action which the PSC has taken before and thus is a valid claim for relief now.

17. Virgin Mobile makes specific arguments with respect to some of the disputes raised by Petitioners, but these fail for reasons set forth below.

**Text Messaging**

18. Virgin Mobile argues because text messaging is not one of the nine enumerated services required under 47 CFR 54.101, therefore it is completely irrelevant to the PSC's consideration. But Petitioners do not argue that text messaging is among the nine enumerated services; that is not the issue under dispute. Petitioners' dispute invokes other required findings of the PSC, specifically the "public interest" and "consumer protection."<sup>7</sup>

---

<sup>7</sup> It is worth noting that despite the purported inability to provide services outside of the nine enumerated categories, Virgin Mobile lists additional free products and services among its Lifeline offering including a free phone, free voicemail, free call waiting and free caller ID.



19. The terms under which text messaging services are or are not offered to Lifeline customers is a matter of public interest and consumer protection. Text messaging has become an increasingly important and prevalent form of communication, and it is appropriate for regulatory authorities to respond to the needs of the public in light of increasing use of evolving technologies. *See, e.g., Beattie v. Shelter Properties, IV*, 457 So. 2d 1110, 1113 (Fla. 1st DCA1984) (“Cable television is fast becoming a major medium of public communication, education, and entertainment, and there is unquestionably a significant public interest in the proper public regulation of such medium to the end that all members of the public, including apartment dwellers, may be adequately and equitably served.”).

20. As noted in the Petition, many municipalities now stay in contact with their residents through text messages, through which they provide communications ranging from storm warnings to street closings.<sup>8</sup> It is especially noteworthy that Virgin Mobile itself “will promote its Lifeline offerings to its existing customers, many of whom will qualify for Lifeline, through emails and text messaging campaigns.” PAA Order at 10 (emphasis added).

21. These terms are important to consider because Lifeline customers are likely to be less sophisticated and more vulnerable to predatory and deceptive marketing. For instance,

---

<sup>8</sup> Municipalities and public entities that use text messaging to provide alerts to their community include Miami-Dade County, *see* [http://www.inspironlogistics.com/wens/miami\\_dade/wens.cfm?wens\\_id=miami\\_dade](http://www.inspironlogistics.com/wens/miami_dade/wens.cfm?wens_id=miami_dade) (“Sign up for Free Miami-Dade County Alerts and we’ll notify you about the kinds of things that just can’t wait – public safety issues like weather advisories and more. In the event of an emergency, you’ll get a message on the device of your choice with details.”); Santa Rosa County, *see* <http://www.santarosa.fl.gov/emergency/publicwarning.html>, (“When breaking news happens and alerts are issued, you will receive an email or text message with up-to-date safety information.”); and the University of Central Florida, *see* <https://alert.ucf.edu/index.php?CCheck=1> (“UCF Alert is a multi-media communications system that provides timely and accurate information about emergency situations that could impact the university. The goal is to help keep the campus safe and informed during an emergency.”). This growing trend is consistent with other parts of the country, such as Washington D.C., *see* <https://textalert.ema.dc.gov/index.php?CCheck=1> (“The Alert DC system provides rapid text notification and update information during a major crisis or emergency. This system delivers important emergency alerts, notifications and updates on a range of devices including your email account, cell phone, pager, blackberry or wireless PDA.”), and New York City, *see* <https://a858-nycnotify.nyc.gov/NotifyNYC/Home.aspx> (“Notify NYC is offered for informational purposes to help make the public aware of emergencies and other planned incidents in New York City. While the City of New York will at all times attempt to provide accurate and timely information, under the circumstances, the City cannot guarantee its accuracy or timeliness.”).

Virgin Mobile's target market expressly includes "at-risk youth" and "non-English speakers." PAA Order at 9. And Lifeline customers, particularly those who are solicited by Virgin Mobile through the text messaging medium, are vulnerable to not being aware that the "free minutes" being provided do not include the increasingly prominent medium of text messaging. They are likely to assume that text messaging is included.

22. The PSC can and should remedy this failure to serve the public interest by requiring the availability of text messaging through the 200 "free minutes" or by providing "other relief as appropriate," as requested by the Petition. For instance, the PSC has the authority to consider. The PSC can and should condition the ETC designation on clearer advertising requirements if it found that such requirements were in the public interest.

23. Furthermore, Virgin Mobile's assertions of fact regarding its pricing terms in the footnote on page 5 of its Motion simply underscores that there are factual disputes. Indeed, Virgin Mobile's own footnote no. 12 demonstrates the uncertainty involved in relying on the "facts" as told by the applicant: Virgin Mobile states that "the rate for individual text messages is 50% lower for Lifeline customers: 10 cents per message" whereas the PAA Order states a charge of "\$0.15 per text." PAA Order at 9. And even if Virgin Mobile could prove a consistent version of its pricing, it is still within the PSC's authority to determine whether such pricing is fair, or whether it is misleading and harmful to Virgin Mobile's most vulnerable customers. The PSC and the Petitioners are not required to accept Virgin Mobile's assertions about the details of its pricing, or the competitiveness or fairness thereof. Virgin Mobile is not the arbiter of what is and what is not misleading or harmful to the consuming public; that is the fundamental role of the PSC.

24. Whether the terms of Virgin Mobile's text messaging services to Lifeline customers are in the public interest is a disputed fact, and the Virgin Mobile can respond with its facts at a formal proceeding. Virgin Mobile's assertion that Petitioner's concerns about text messaging are irrelevant and fail to state a valid legal claim, however, denounces the "public interests" that the Public Service Commission is intended to serve.

#### **Roll-Over Minutes**

25. Virgin Mobile similarly asserts that because there is no formal requirement that roll-over minutes be included as part of a Lifeline services offering, Petitioners' "opinion" and "preference" for a term different than what Virgin Mobile intends to provide states no valid claim for relief.

26. Petitioners dispute whether the terms of roll-over minutes under Virgin Mobile's Lifeline offerings, as well as how the services are marketed and promoted in light of the absence of roll-over minutes, are in the public interest and serve the interest of consumer protection. A public interest and consumer protection determination on this issue does not need an underlying regulation that roll-over minutes are required. The PSC's responsibility is not to simply check nine boxes, apply a rubber stamp, and move to the next application.

27. Moreover, the Motion states that some vendors provide roll-over minutes. Motion at 5. Consumers in Verizon Mobile's target market may assume that Virgin Mobile will as well. How Virgin Mobile promotes its services, how consumers are likely to interpret that promotion, and whether consumers are being adequately protected are unique disputed issues that a formal proceeding would resolve.

### **Misleading Pricing**

28. Similarly, Virgin Mobile announces that “nothing could be clearer” than its pricing structure. It quotes its promotional materials, provides a citation to its website, and recites the pricing terms of its offerings. Petitioners welcome this factual contest, but arguments in a motion to dismiss are not the proper time for it. The formal proceeding that Petitioners request will provide Virgin Mobile ample opportunity to prove its assertions with competent substantial evidence. And even if the promotional material which it cites were found not to be contrary to the public interest, there is nothing to show that this material is the exclusive means by which Virgin Mobile will promote its services, or that other materials and methods which it might use are materially the same. This is why it would be inappropriate to deny Petitioners an opportunity to dispute these facts based on a handful of footnotes attempting to dismiss the Petition with prejudice. This is particularly true where there is inconsistency in the Motion’s assertions and the facts in the PAA Order, as described above with respect to Virgin Mobile’s reference (in footnote no. 12) to a different price for text messages than listed in the PAA Order.

29. Moreover, Petitioner’s do not fail to state a valid claim for relief by disputing whether the means and manner of promoting Virgin Mobile’s offerings are in the public interest. As the Federal Trade Commission has stated, an “offer of ‘Free’ merchandise ... must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.” 16 C.F.R. § 251.1(a)(2).

30. Petitioners—who are consumers—dispute whether Virgin Mobile’s marketing of its services is sufficiently clear for purposes of the public interest, and therefore dispute the PSC’s finding that Lifeline services offered under these terms are in the public interest. Petitioning consumers are not required to accept the assertions of a corporate applicant about

whether that applicant's pricing terms are misleading to consumers. The formal proceeding which Petitioners have requested would provide a venue to resolve these competing factual allegations on their merits.

**Whether Virgin Mobile is a Facilities-Based Carrier**

31. Petitioners dispute whether Virgin Mobile is a facilities-based carrier and whether it should or should not be required to comply with the requirements the FCC's forbearance order. One of these requirements is certain 911 certifications ("PSAP Certification") to ensure that Lifeline customers receive full benefits from available telecommunications technologies related to emergency calls to 911.

32. Virgin Mobile has asserted a number of "facts" to the PSC regarding the acquisition by Sprint-Nextel and the implications of that acquisition with respect to its facilities. PAA Order at 7. The PAA Order is predicated on these "factual" assertions for purposes of its determinations. For instance, in reliance on these assertions, the PSC has made further inquiry, including posing questions to the Florida 911 Coordinator. *Id.* The 911 Coordinator has stated that Sprint-Nextel is Phase II compliant "in all counties where they serve Florida." *Id.* at 8. Phase II compliance involves the ability to track a phone's location from the service provider. *Id.* at n. 13. Even assuming that the predicate assertions are all true, it is unclear therefore what level of compliance Virgin Mobile's service would have in any counties where Sprint-Nextel does not serve Florida, particularly because these are mobile phones. Petitioners are not required to accept an ETC applicant's assertions and assurances of fact which relieve it from complying with conditions that at least the FCC thought were appropriate, and that the PSC should adopt.

33. The importance of safety considerations is obvious in this market. As reflected in the PAA Order, Virgin Mobile expressly intends to promote these services through a program

serving “at-risk youth,” through “public ... assistance agencies,” and through outreach efforts to “non-English speakers.” PAA Order at 9-10. Virgin Mobile has stated that the potential consumers of its services include those suffering from financial constraints, poor credit and intermittent employment. PAA Order at 8. The Lifeline market also naturally includes the elderly, the homeless, and other vulnerable populations. Virgin Mobile’s cavalier rejection of Petitioners’ attempt to even raise this issue as a valid matter of dispute is troubling.

34. And these safety concerns relate to just one of the issues raised in the compliance conditions of the FCC’s forbearance order. At least one other state commission has not granted a petition for ETC designation by Virgin Mobile on the basis of its failure to satisfy other conditions imposed under the forbearance order.<sup>9</sup> The underlying recommendation in that decision specifically acknowledged that Virgin Mobile applied on March 4, 2010 with the FCC for modification of the customer eligibility certification requirements at issue there.<sup>10</sup> That request to the FCC had not been granted, and to this day has not been granted. The recommended order proposed denying the West Virginia petition because Virgin Mobile did not address its proposed eligibility certification process or the criteria for customer eligibility. Based on that recommendation, the West Virginia Commission did not grant the petition. This is just one further example of the issues raised in Petitioners’ dispute of the finding that Virgin Mobile is indeed a facilities-based carrier and that the compliance conditions of the FCC’s forbearance order should no longer apply. If customer eligibility issues related to the forbearance order are sufficient to give pause to the West Virginia Commission, then certainly safety-related considerations highlighted in the instant Petition should also do so.

---

<sup>9</sup> See *Virgin Mobile USA, L.P., Petition for consent and approval for limited designation as an eligible telecommunications carrier - request for expedited treatment*, Case No. 10-0246-C-PC, Final Staff Memorandum (Pub. Serv. Comm’n of W. Va. May, 24, 2010).

<sup>10</sup> See Letter from Peter Lurie, Senior Vice President, Virgin Mobile U.S.A., L.P., to Sharon Gillett, Chief, Wireline Competition Bureau, WC Docket No. 09-197 of Federal Communications Commission (filed Mar. 4, 2010).

### III. Petitioners Have Alleged Valid Standing

Virgin Mobile seeks to deny these Florida consumers a right to be heard on disputes of fact regarding the PSC's public interest and consumer protection determinations. Notwithstanding the unsurprising narrowness of Virgin Mobile's proposed standing requirements, which would essentially deny any consumer the opportunity to raise these concerns, the PSC was created in the public interest to protect the public interest. The public has a right to be heard.

#### (A) Organize Now Has Alleged Valid Standing

Organize Now has alleged valid standing by meeting all of the requisite elements of associational standing, despite the arguments of Virgin Mobile addressed below:<sup>11</sup>

*(1) A substantial number of Organize Now's members may be substantially affected*

35. Virgin Mobile makes several strained and semantic arguments to deny these petitioning consumers their standing to dispute finding related to consumer protection and the public interest. But this approach again ignores settled policy of the PSC to broadly interpret standing claims by consumer groups. "Historically, this Commission has always permitted consumer groups, commercial customers and the like to intervene and participate as full parties in rate proceedings."<sup>12</sup> In doing so, it has "applied a broad interpretation to the term 'substantial interest' tempered of course by the constraints of reason and practicality."<sup>13</sup> Moreover, the strict standard related to a substantial "proportion" that Virgin Mobile urges without citation is inconsistent with the seminal case law addressing this issue, which holds that that "a substantial

---

<sup>11</sup> See *Fla. Home Builders v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982); *Farmworkers Rights Org., Inc. v. Dep't of Health & Rehabilitative Servs.*, 417 So. 2d 753 (Fla. 1st DCA 1982).

<sup>12</sup> *In re Investigation of the rates and charges of S. Bell Tel. & Tel. Co.*, Order No. 9171, Issued in Docket No. 790747-TP(PR) (Fla. Pub. Serv. Comm'n Dec. 12, 1979).

<sup>13</sup> *Id.*

number of its members,” is not even “necessarily a majority.” *See Fla. Home Builders Assoc. v. Dep’t. of Labor & Employment Security*, 412 So. 2d 351, 353-54 (Fla. 1982). This Motion is limited to the allegations, and the parties can attempt to prove factual assertions at the formal proceeding, but it is worth noting that Organize Now’s latest estimate of its membership reflects 37,000 members, 75% of whom are low-income.

36. Under these standards, Virgin Mobile’s hyper-technical arguments plainly fail. It argues that Organize Now lacks standing because an association whose “members include a substantial number of Florida residents who may be affected” has lesser standing than an association for which “a substantial number of its members may be substantially affected.” Under this exacting standard, a consumer group with tens of millions of substantially affected members would be denied standing if the affected members were not a substantial proportion. This cannot be the intent of the policy served under the associational standing jurisprudence.

*(2) The subject matter of the proceeding is within Organize Now’s general scope of interest and activity,*

37. Virgin Mobile argues that Organize Now has not alleged proper standing because, though Organize Now’s stated mission is to “serve the interests of low and moderate income families,” it also states that it does so “by developing community leaders to take action on issues affecting their communities” (rather than some other method which apparently would change the result under Virgin Mobile’s theory). The allegation plainly addresses the interests of low and moderate income families at issue in the petition, and the fact that Organize Now’s chosen instrument is the development of leaders within those communities does not affect the result. Under the more exacting standard Virgin Mobile would apparently impose, Organize Now would have no standing unless it served those interests exclusively, and its sole mission was



petitioning the PSC for relief on their behalf. If Organize Now has no associational standing, what association would?

38. Virgin Mobile also cites an order of dismissal in the *Sprint-Florida/LTD Holding*,<sup>14</sup> which it says involved an “administrative petition similar to the one at issue here.” This characterization conveniently ignores that the issues on which that petition was denied are readily distinguishable. The petitioner there was a trade union of communications workers which asserted an interest in protecting the employment of its members in connection with the PSC’s consideration of the transfer of control of a telecommunications certificate resulting from an internal corporate reorganization. Obviously these employment interests are not those that the PSC is intended to protect. Moreover, the trade union’s other claim, that as a customer it would be adversely affected by the “change of control” of a telecommunications company, was speculative at best.

39. Unlike the issues raised in *Sprint-Florida/LTD Holding*, the instant Petition raises concerns related to the public interest and consumer protection which are directly within the expressly stated zone of interests that the PSC is tasked to protect. Unlike the trade union in *Sprint-Florida/LTD Holding*, the instant Petitioners are themselves consumers eligible to purchase the services at issue. It is beyond imagination how Virgin Mobile can assert that the PSC should exclude the consuming public from its determinations as to whether Virgin Mobile’s Lifeline services are in the public interest and meet consumer protection standards.

40. It is worth noting as well that Organize Now is not a newcomer to this process, and that its past participation is entirely consistent with its standing allegations and disputed issues of fact. In particular, Organize Now sent a letter to the PSC on May 17, 2010 which

---

<sup>14</sup> *Sprint-Florida/LTD Holding*, Docket No. 050551-TP, Order No. PSC-06-0033-FOF-TP (Fla. Pub. Serv. Comm’n Jan. 10, 2005).

addressed the same consumer-related problems raised here.<sup>15</sup> The letter noted that while Organize Now “supports the Lifeline program and recognizes its importance, [Organize Now] want[s] to ensure that [Lifeline’s] customers, who are low-income and elderly residents are protected from future solicitations, ‘up-sales,’ or ‘bait-and-switch’ from any Lifeline program provider.” The letter further noted that based on a review of Virgin Mobile’s proposed terms, “many ... aspects of their offering are lacking and not in accordance with others in the industry.” Significantly, the letter stated that its purpose was to safeguard the interests of Florida’s low-income residents.

41. Virgin Mobile tries to argue that, contrary to Organize Now’s stated interest in low-income residents, it seeks to delay this valuable Lifeline service offering. This specious and unfounded argument suggests that because Lifeline is a service that benefits low-income residents, it could never be offered in a manner contrary to the public interest. As Organize Now has consistently maintained in this process, it supports Lifeline and Lifeline’s benefits to consumers. It takes issue with certain terms under which Virgin Mobile proposes to offer this service, which Organize Now does not believe are in the public interest. Organize Now’s position is entirely consistent with associational interests it has articulated.

42. It is also worth noting that Organize Now has followed exactly the process the PSC invited in its PAA Order. Another group, Advocates for Universal Access, attempted to oppose the PAA Order with a motion for reconsideration that was denied as procedurally improper. PAA Order at 6-7. The PSC noted that “upon the issuance of this PAA Order, persons whose interests are substantially affected and disagree with our decision may file a petition for formal hearing pursuant to Rule 25.22.029, Florida Administrative Code, during the

---

<sup>15</sup> See Document No. 03785-10, Docket No. 090245-TP, at 22-23 (Fla. Pub. Serv. Comm’n).

21-day protest period.” PAA Order at 7. That is precisely what Organize Now and the individual Petitioners have done.

43. Virgin Mobile also argues with respect to both Organize Now and the individual Petitioners that there is no alleged injury in fact, but only speculation. That arguments fails for reasons addressed below regarding individual petitioners, and if an association dedicated to serving the interest of low and moderate-income residents cannot dispute factual findings regarding the proposed provision of Lifeline services, it is unclear what association could.

*(3) The relief requested is of a type appropriate for Organize Now to receive on behalf of its members*

44. Virgin Mobile apparently does not object to the Organize Now’s allegation with respect to the third prong of the associational standing test. In any event, Organize Now has alleged that

the relief requested is of a type appropriate for the Organize Now to receive on behalf of its members. Specifically, Organize Now’s disputes with the PSC’s proposed findings directly relate to inadequate protections for consumers under Virgin Mobile’s service offerings, and the relief Organize Now seeks is directly related to benefiting those consumers.

Petition at 11. The allegation is sufficient.

**(B) Individual Petitioners Have Alleged Valid Standing**

The Individual Petitioners have also alleged valid standing despite the arguments of Virgin Mobile to the contrary:<sup>16</sup>

*(1) The Individual Petitioners will suffer an injury in fact which is of sufficient immediacy to entitle them to a Section 120.57 hearing*

---

<sup>16</sup> See *Agrico Chem. Co. v. Dep’t of Regulation*, 405 So. 2d 478, 482 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982); *Internat’l Jai-Alai Players Ass’n v. Fla. Pari-Mutuel Comm’n*, 561 So. 2d 1224 (Fla. 3d DCA 1990); *Village Park Mobile Home Ass’n, Inc. v. State Dep’t of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), *rev. denied*, 513 So. 2d 1063 (Fla. 1987).

45. Virgin Mobile alleges that Lloyd Moore and Gracie Fowler (the “Individual Petitioners”) have no standing because they can choose another Lifeline service offering in their area, and therefore are not harmed by Virgin Mobile’s terms. If this theory were correct, then no eligible consumer could ever challenge findings of fact regarding whether an ETC applicant’s proposed Lifeline services were being offered under terms conducive to the public interest. No matter how egregious the terms of each subsequent provider may be, the refrain would simply be that consumers can demonstrate no injury in fact, because they could simply choose a competing offering. Petitioners do not simply ask for better terms than the competition; Petitioners ask for terms that are consistent with the public interest the PSC is tasked to protect.

46. Under Virgin Mobile’s argument, the injury would apparently be less speculative if these were existing customers. But that theory implies that consumers could never challenge the proposed ETC designation of an applicant proposing to offer Lifeline services, because Virgin Mobile has no existing Lifeline customers in Florida. Virgin Mobile would certainly benefit from denying standing to consumers who specifically dispute the public interest and consumer protection aspects of services offered to these customers, but the PSC must consider the public interest and not deny the public’s right to a voice in proceedings based on the assertions of a corporate ETC applicant. This is particularly true since these services will be marketed to low-income consumers who will suffer the immediate harm of misleading or deceptive marketing and promotion.

47. Virgin Mobile also argues that no injury-in-fact can be ascertained from the reference to “general allegations” of safety-related concerns. One of the safety concerns, which is explicitly mentioned in the Petition, are certifications related to the use of 911 calls. Petition at 4. Petitioners have an interest in Virgin Mobile’s compliance with requirements imposed by

the FCC with respect to emergency 911 calls they may make with their Lifeline service. The Lifeline market consists of particularly vulnerable members of society. Their full access to 911 services is not a trivial or irrelevant issue, notwithstanding Virgin Mobile's attempt to evade even acknowledging the interests at stake. Again, if Petitioners do not have an interest, then who does?

*(2) The Individual Petitioners' substantial injury is of a type or nature which the proceeding is designed to protect*

48. Virgin Mobile also argues that the relief sought by Petitioners is not within the zone of interests protected by the PSC. The deficiency of this argument is already plain from the discussion above. The PSC has primary responsibility for granting or denying applications for ETC designations. The PSC must consider the public interest, including consumer protection standards. The PSC may condition the grant of ETC designation on the applicant's meeting certain conditions which would bring its offerings within the public interest. Individual Petitioners alleged exactly that:

This injury is the type that this proceeding is designed to protect because the PSC is formally required in these proceedings to determine, before granting ETC designation, whether Virgin Mobile's proposed ETC service meets consumer protection requirements and is consistent with the public interest. The PSC has the power to grant or withhold such designation, and can use such power to require changes in certain terms of Virgin Mobile's service offering to ensure compliance. Such a change in terms would directly benefit the Individual Petitioners as well as other consumers who are eligible for and desire Lifeline program services in the wireless market.

Petition at 11.

49. Virgin Mobile asserts that Individual Petitioners merely seek more attractive service terms, and that the PSC has duty to protect that desire. This ignores the allegation. Individual Petitioners seek conditions on Virgin Mobile so that its services, including the terms,

marketing, and provision of service, do not disserve the public interest and standards of consumer protection.

#### **IV. Virgin Mobile's Request for Oral Argument**

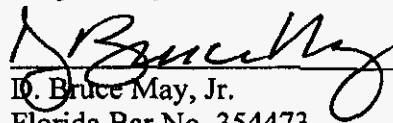
50. Virgin Mobile has also filed a request for oral argument to further explain its position in the Motion. Oral argument is inappropriate since the right of Petitioners to request a formal proceeding in this matter is patently clear. Should Virgin Mobile's Request for Oral Argument be granted, however, Petitioners request an opportunity to be heard.

#### **Conclusion**

Petitioners allege sufficient standing and grounds for relief to be entitled to a formal proceeding addressing the disputed issues of fact raised in the Petition. The public interest is a critical component of the PSC's findings for purposes granting an ETC designation, and these Petitioners have clear standing to dispute issues related to the public interest issues at stake.

WHEREFORE, Petitioners request that the PSC deny Virgin Mobile's Motion to Dismiss and grant Petitioners' Petition for a Formal Proceeding, or in the alternative, if the PSC does not believe that the Petition sufficiently alleges claims for which relief can be granted, allow Petitioners to amend the Petition.

Respectfully submitted,



D. Bruce May, Jr.

Florida Bar No. 354473

Kevin W. Cox

Florida Bar No. 0034020

**HOLLAND & KNIGHT LLP**

P.O. Drawer 810

Tallahassee, Florida 32302

(850) 224-7000

*Attorneys for Organize Now, Lloyd Moore  
and Gracie Fowler*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this

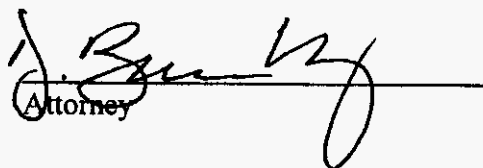
18th day of June, 2010, either by electronic transmission or U.S. Mail to the following:

Susan F. Clark  
Elizabeth McArthur  
Radey Thomas Yon & Clark  
301 S. Bronough Street  
Suite 200  
Tallahassee, FL 32399  
sclark@radeylaw.com

John Beahn/Antoinette Bush  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
jbeahn@skadden.com

Peter Lurie  
Virgin Mobile USA, L.P.  
10 Independence Blvd.  
Warren, NJ 07059  
plurie@virginmobileusa.com

Theresa Tan  
Office of the General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
ltan@psc.state.fl.us

  
Attorney

# 9539618\_v1