

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** June 30, 2010

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Analysis (Beard, Casey)  
Office of the General Counsel (Tan) *CSB* *AT* *AK*

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

**AGENDA:** 07/13/10 – Regular Agenda – Motion to Dismiss – Oral Argument Requested - Participation at Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Argenziano

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RAD\WP\090245.RCM.06-30-10.DOC

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### Case Background

On April 29, 2009, Virgin Mobile USA, L.P. (Virgin Mobile) filed a petition with the Florida Public Service Commission (Commission) for limited designation as an eligible telecommunications carrier (ETC) to receive universal service Low Income support in the State of Florida. The Commission issued PAA Order No. PSC-10-0323-PAA-TP (PAA Order) on May 19, 2010, to grant status ETC to Virgin Mobile.

On June 9, 2010, Organize Now, Lloyd Moore and Gracie Fowler (Joint Petitioners) filed a protest to the PAA Order and requested an administrative hearing.<sup>1</sup> On June 11, 2010, Virgin

<sup>1</sup> Staff notes that Organize Now did address its concerns in its May 17, 2010, letter filed in the instant docket. At that time, Commission Staff reviewed and considered the issues raised prior to the May 18, 2010, Agenda Conference.

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Docket No. 090245-TP

Date: June 30, 2010

Mobile filed its Motion to Dismiss, with prejudice, Organize Now and Consumers' Petition for Formal Proceeding along with a Request for Oral Argument. The Joint Petitioners filed their Response to Virgin Mobile's Motion on June 18, 2010.

Staff's recommendation addresses Virgin Mobile's Motion to Dismiss and its Request for Oral Argument. The Commission has jurisdiction pursuant to 47 U.S.C. Section 214(e)(2) of the Telecommunications Act of 1996 (the Act), Sections 120.80(13)(b), 364.10(2) and 364.11, Florida Statutes (F.S.) and Rule 25-22.029 and 28-106.201, Florida Administrative Code (F.A.C.)

### **Discussion of Issues**

**Issue 1:** Should Virgin Mobile's Request for Oral Argument be granted?

**Recommendation:** Yes, Virgin Mobile's Request for Oral Argument should be granted. Staff recommends allowing each side five minutes. (Tan)

**Staff Analysis:** Pursuant to Rule 25-22.0022(1), F.A.C., Virgin Mobile filed its Request for Oral Argument concurrently with its Motion to Dismiss, with prejudice. The respective arguments are summarized below.

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

Virgin Mobile requests that to the extent that the Commission would find it useful, oral argument would allow Virgin Mobile to further explain and respond to questions regarding universal service and its proposed Lifeline services. Virgin Mobile states it will also discuss the standard for granting a Motion to Dismiss. Virgin Mobile believes that oral argument will aid the Commission's understanding and evaluation of this issue and requests 15 minutes per side.

#### **Joint Petitioners Response to Request**

The Joint Petitioners argue that oral argument is inappropriate as the Petitioners have a clear right to request a formal proceeding in this matter. However, should the Commission decide to grant oral argument, the Joint Petitioners request an opportunity to be heard.

#### **Analysis**

The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

Staff believes that the Commissioners would benefit from oral argument on Virgin Mobile's Motion to Dismiss and Joint Petitioners' Response. Accordingly, staff recommends that the Commission grant Virgin Mobile's Request for Oral Argument. Staff further recommends that if the Commission decides to hear oral argument, Virgin Mobile and Joint Petitioners should each be allowed 5 minutes to address the Commission on this matter.

**Issue 2:** Should Virgin Mobile's Motion to Dismiss with prejudice Organize Now, Lloyd Moore and Gracie Fowler's Petition for Formal Proceeding be granted?

**Recommendation:** Yes. Staff recommends that the Commission grant Virgin Mobile's Motion to Dismiss, with prejudice. The Joint Petitioners' Petition for Formal Proceeding fails to adequately allege standing to proceed in this matter. (Tan)

**Staff Analysis:**

Standard of Review

Under Florida law the purpose of a motion to dismiss in state court is to challenge the legal sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). To sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., Order No. PSC-95-0614-FOF-WS, Docket No. 941121 (1995); Varnes, 624 So. 2d at 350. In determining the sufficiency of the petition, the Commission should confine itself to the petition and documents incorporated therein. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure.

Virgin Mobile's Motion to Dismiss, With Prejudice

Virgin Mobile's Motion to Dismiss states that the Joint Petitioners fail to state any claim for which the Commission may provide relief and asserts that Joint Petitioners lack standing to protest the proposed agency action.

As grounds for its Motion to Dismiss, Virgin Mobile argues that Joint Petitioners do not meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environment Regulation, 406 So. 2d 478, 482 (Fla 2d DCA 1981). Virgin Mobile asserts that both Lloyd Moore and Gracie Fowler have alternate Lifeline service available and therefore will not "suffer injury in fact" if they choose not to use Virgin Mobile's Lifeline service. Virgin Mobile further asserts that Organize Now does not meet the test for associational standing, as established in Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), because Organize Now did not prove that a substantial portion of its members will be affected, nor that a single member would suffer any injury in fact, or that the asserted interests in better benefits would fall within the zone of interest sought to be protected in this proceeding. Virgin Mobile argues that the Joint Petitioners seek more attractive terms for additional features, not the basic service that is the point of the Lifeline Program.

Virgin Mobile asserts that text messaging is not one of the nine enumerated services that must be part of the Lifeline Program to receive Universal Service funds.<sup>2</sup> Virgin Mobile

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<sup>2</sup> Voice grade access to the public switched network, local usage, dual-tone multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to

contends that text messaging has not been added to the list of nine supported services and that 47 U.S.C. Section 254(e) provides that federal universal service support may only be used for actual universal service and not for a stand-alone service such as text-messaging.<sup>3</sup> Virgin Mobile asserts that not providing text messaging is not a basis upon which ETC status can be denied.

Virgin Mobile argues that “roll-over” minutes are a pricing term that varies widely between wireless carriers. Virgin Mobile further asserts that there is no requirement in the Communications Act, the FCC’s rules, or the rules of this Commission that a wireless ETC carrier must offer roll-over minutes as part of its Lifeline service offering. Virgin Mobile believes that Joint Petitioners’ request for roll-over minutes is neither a valid claim for relief nor justification for withholding an ETC designation.

Virgin Mobile notes that there is no charge for the first 200 minutes of use per month and that subsequent minutes of use are 10 cents each, and therefore, its Lifeline pricing plan is not misleading. Virgin Mobile asserts that the claim that Virgin Mobile is misleading eligible customers by referring to the provided handset as a “free phone” is incorrect. The Federal Trade Commission regulations state that “free” simply means that consumers are not charged for the article.<sup>4</sup> Virgin Mobile assures the Commission that customers do not have to add any additional features for use of the handset; customers will not pay for activation or for connection of service and must affirmatively choose to add additional services.

Virgin Mobile asserts that the Commission has jurisdiction over Virgin Mobile’s ETC petition pursuant to Section 214(e)(2) of the Act. Virgin Mobile further asserts that there is no statutory requirement that the Commission give any consideration to the FCC Forbearance Order.<sup>5</sup>

Virgin Mobile requests that the Commission dismiss the Petition, with prejudice.

#### Joint Petitioners’ Response to Virgin Mobile’s Motion to Dismiss with Prejudice

The Joint Petitioners argue that it is the Commission’s policy to allow consumers to formally participate in telecommunications proceedings. The Joint Petitioners also dispute that they failed to state a claim for which the Commission can provide relief. The Joint Petitioners argue that “substantial interest” shall be construed broadly for consumer groups. The Joint Petitioners assert that Organize Now has 37,000 members, 75 percent of which are low-income. Organize Now further asserts that ETC certification is of interest to low and moderate income families.

The Joint Petitioners assert that the specific relief they are requesting is that the Commission review the Lifeline services that Virgin Mobile will offer because these services are

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directory assistance, and toll limitation for qualifying consumers. 47 C.F.R. Section 54.401(a)(3), referring to 47 C.F.R. Section 54.101(a)(1)-(a)(9).

<sup>3</sup> Motion at 4.

<sup>4</sup> 16 C.F.R. Section 251.1(b)(1971).

<sup>5</sup> In re Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. Section 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 3381 (2009)

not in the public interest and do not provide consumer protection safeguards. The Joint Petitioners request that the Commission deny the ETC designation as currently proposed or grant the ETC designation with certain conditions that enhance consumer protection and ensure it is in the public interest.

Lloyd Moore and Gracie Fowler assert they are eligible for Lifeline services and are potential customers of Virgin Mobile's Lifeline service, and therefore, have standing. Lloyd Moore and Gracie Fowler argue Virgin Mobile's current Lifeline service is not in the public interest, and they along with other members of Organize Now will be substantially harmed by unforeseen or excessive charges for other basic services. The Joint Petitioners argue that if Florida residents who are eligible Lifeline consumers lack standing to dispute public interest determinations for ETC certification, it is unclear who could challenge such findings.

The Joint Petitioners assert that the Commission establishes the requirements to receive ETC certification. The Joint Petitioners argue that the Commission may require more than the nine supported services when granting an ETC designation and should consider the public interest issue as defined by Section 214 and 254 of the Telecommunications Act of 1996, which includes the availability of quality communications at just, reasonable and affordable rates and the promotion of advanced telecommunications and information services.

The Joint Petitioners argue that text messaging has become an important form of communications. They assert further that Lifeline customers are likely to be less sophisticated and more vulnerable to predatory and deceptive marketing and customers may mistake minutes to include text messaging.

The Joint Petitioners argue that the Commission must require roll-over minutes because Lifeline customers may assume that roll-over minutes are included in its service. The Joint Petitioners warn that the Commission should not "simply check nine boxes, apply a rubber stamp, and move onto the next application."

The Joint Petitioners argue that Virgin Mobile's pricing structure is unclear and disputes the Commission's finding that Virgin Mobile's proposed Lifeline services are in the public interest.

The Joint Petitioners do not agree that Virgin Mobile is a facilities based carrier and argue that in order to ensure full benefits relating to 911 calls, the Commission should require Virgin Mobile to have PSAP Certification for all PSAPs in Florida beyond the counties where Sprint-Nextel serves Florida.

#### Analysis

Upon review of the Joint Petitioners' Petition, staff believes that Joint Petitioners have failed to state a cause of action upon which the Commission may grant relief. Staff recommends that the Commission should dismiss the protest, with prejudice, for the reasons provided below.

A. Standing

Agrico establishes a two-prong standing test. The first prong is that the person must suffer an injury in fact of sufficient immediacy to entitle the person to a Section 120.57 hearing and the second prong is that the injury is of a type which the proceeding is designed to protect. The 'injury in fact' must be actual and immediate and not speculative or hypothetical. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla 3d DCA 1990). See also Village Park Mobile Home Assn. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1<sup>st</sup> DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote). If both prongs of the test are not met, the person does not have standing to participate in a hearing.

Florida Home Builders Ass'n v. Department of Labor and Employment Sec., 412 So.2d 351 (Fla. 1982) and Farmworker Rights Organization, Inc. v. Dept of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1<sup>st</sup> DCA 1982) establish the test for associational standing. Associational standing is created when three factors are met. First, the association demonstrates that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; second, the subject matter of the proceeding is within the general scope and activity of the association; and third, the requested relief is a type appropriate to receive on behalf of its members.

In order to show such an interest, Lloyd Moore and Gracie Fowler must demonstrate that they will suffer an actual injury of sufficient immediacy to warrant relief. Lloyd Moore and Gracie Fowler have not alleged facts in their petition that demonstrate that they will suffer an actual or immediate injury. While Lloyd Moore and Gracie Fowler would be potential customers of Virgin Mobile's Lifeline service, neither the Protest nor the Response allege facts sufficient to establish that either person will suffer an injury in fact as a result of the outcome of this proceeding. Staff believes they have also failed to establish that their alleged injuries are of a type which the proceeding is designed to protect. Neither Lloyd Moore nor Gracie Fowler are required to become customers of Virgin Mobile's Lifeline service, nor have they stated that they are current Lifeline participants. The injury asserted by Lloyd Moore and Gracie Fowler, that as potential consumers of Virgin Mobile's Lifeline service, they are directly affected by the fairness of the terms and marketing tactics, is speculative on its face and not of sufficient immediacy to satisfy the second prong of the Agrico test.

Virgin Mobile's ETC certification proceeding creates additional choice for Lifeline eligible Floridians and allows Virgin Mobile entry into a highly competitive Lifeline marketplace. The Joint Petitioners argue that they will be immediately harmed if Virgin Mobile is granted ETC status in Florida. However, the provisioning of Lifeline services is now a competitive market. As such, there are multiple carriers for Lifeline eligible customers to choose from. Currently in Florida there are 3 wireless carriers and 19 wireline ETCs.

In addition, Organize Now does not meet all of the associational standing requirements. Organize Now is a recently incorporated tax-exempt organization, located in Orlando, Florida and is registered with the state. Organize Now's members will have a choice to become a customer of Virgin Mobile's Lifeline service, but may choose to use the service of a different Lifeline provider without any injury in fact. However, Organize Now has also failed to allege

that the association will suffer any injury in fact because the protest does not demonstrate that a substantial number of its members may be substantially affected by the Commission's decision in this docket; that the subject matter of the proceeding is within Organize Now's general scope of interest and activity; and that the relief requested is of a type appropriate for Organize Now to receive on behalf of its members.

In order for an organization to have associational standing to participate as a full party in a Commission proceeding, the members must be actually and substantially affected by the Commission's actions. As the members of Organize Now, including Lloyd Moore and Gracie Fowler, have the ability to choose an alternate Lifeline provider, staff believes that ultimately the Joint Petitioners lack standing to contest the PAA Order because there is no substantial or immediate injury in fact.

Staff notes that Section 120.569(2)(c), F.S., provides that dismissal of a petition shall, at least once, be without prejudice to petitions filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

As the petition shows, eligible Lifeline consumers may seek alternative Lifeline services from other companies such as Tracfone.<sup>6</sup> Because eligible Lifeline consumers cannot incur injury in fact when there is no obligation to use Virgin Mobile's Lifeline service, the defect cannot be cured. As Virgin Mobile is not currently an ETC, and does not have any customers in the Lifeline program, the Joint Petitioners cannot demonstrate sufficient immediacy of harm. Therefore, staff believes that Organize Now, Lloyd Moore and Gracie Fowler cannot remedy the fact that they will never suffer injury in fact that is of sufficient immediacy to satisfy the first part of the Agrico test.

For the reasons given above, staff recommends that the Commission grant Virgin Mobile's Motion to Dismiss, with prejudice. The Joint Petitioners' Petition for Formal Proceeding fails to adequately allege standing to proceed in this matter.

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<sup>6</sup> Petition, pg 3, stating that there are companies that participate in the Lifeline program.



Docket No. 090245-TP  
Date: June 30, 2010

**Issue 3:** Should this docket be closed?

**Recommendation:** Yes, if the Commission approves staff's recommendation, PAA Order No. PSC-10-0323-PAA-TP should be made final and the docket should be closed after time for appeal has run. If the Commission denies staff's recommendation, this docket should be set for hearing. (Tan)

**Staff Analysis:** If the Commission approves staff's recommendation, PAA Order No. PSC-10-0323-PAA-TP should be made final and the docket should be closed after time for appeal has run. If the Commission denies staff's recommendation, this docket should be set for hearing.