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June 9, 2010

VIA HAND DELIVERY

Ms. Ann Cole, Director
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

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

Dear Ms. Cole:

On behalf of Organize Now, Lloyd Moore and Gracie Fowler (collectively, "Organize Now and Consumers"), enclosed for filing in the matter referenced above are the original and 7 copies of Organize Now and Consumers' Petition for Formal Proceeding.

Please acknowledge receipt of this filing by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance.

Sincerely,

HOLLAND & KNIGHT LLP



Kevin Cox

KC:kjg
Encls.

- cc: Susan F. Clark (w/encl.)
- Elizabeth McArthur (w/encl.)
- John Beahn (w/encl.)
- Antoinette Bush (w/encl.)
- Peter Lurie (w/encl.)
- Theresa Tan (w/encl.)

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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 9, 2010

**ORGANIZE NOW'S, LLOYD MOORE'S AND GRACIE FOWLER'S
PETITION FOR FORMAL PROCEEDING**

Organize Now, Lloyd Moore and Gracie Fowler (collectively, "Organize Now and Consumers"), by and through undersigned counsel and pursuant to Section 120.80(13)(b), Florida Statutes, and Rules 25-22.029 and 28-106.201, Florida Administrative Code, file this Petition for Formal Proceeding ("Petition") disputing the Florida Public Service Commission'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").

In support of their Petition, Organize Now and Consumers state:

Summary

1. Organize Now and Consumers file this petition to dispute the PSC's findings that Virgin Mobile's proposed service offerings under the Federal Lifeline Assistance Program ("Lifeline" or the "Lifeline program")—a program intended to subsidize and improve low-income persons' access to telecommunications services—will meet that intended purpose. Instead, the terms of Virgin Mobile's service offerings to low-income consumers will contravene the intended effect of the Lifeline's assistance by imposing unfair, unjust and unreasonable costs on these consumers for fundamental services. Indeed, by offering the services as "free" to enroll subscribers but then imposing charges for certain vital services, by not allowing the pre-paid

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minutes to “roll-over,” and by charging increasing rates for additional minutes and services, Virgin Mobile will potentially mislead and unjustly profit from the low-income persons that the Lifeline program is intended to help. Organize Now and Consumers also dispute the finding that a standing order of the Federal Communications Commission (“FCC”) granting Virgin Mobile a forbearance under certain conditions, including safety-related requirements, is no longer applicable due to Virgin Mobile’s assertion that it is now a facilities-based carrier.

Parties

2. Petitioner Organize Now is an organization dedicated to serving the interests of low and moderate income families by developing community leaders to help its members to take action on issues affecting their communities. It is a tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code. Organize Now’s principal place of business is 231 East Colonial Drive, Orlando, Florida, 32801, and its phone number is 321-331-5586. Organize Now’s members include Florida residents who are eligible for services under the Lifeline program, who use Lifeline services, and who would use affordable and properly explained wireless services provided through the Lifeline program.

3. Lloyd Moore is a Florida resident who is eligible for Lifeline services and who would use affordable and properly explained wireless services provided through the Lifeline program. Mr. Moore’s address is P.O. Box 618607, Orlando, Florida, 32861, and his phone number is 321-331-5586.

4. Gracie Fowler is a Florida resident who is eligible for Lifeline services and who would use affordable and properly explained wireless services provided through the Lifeline program. Ms. Fowler’s address is 2125 Stanley Street, Orlando, Florida 32803, and her phone number is 407-341-3157.

5. The Florida Public Service Commission (“PSC”) is the agency affected by this Petition. The PSC’s address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

6. The other party whose direct substantial interests will be affected by these proceedings is Virgin Mobile USA, L.P. (“Virgin Mobile”). Virgin Mobile’s address is 10 Independence Blvd., Warren, New Jersey 07059.

Procedural Background

7. The Lifeline program was established in 1984 and was designed to ensure that every American has access to a phone regardless of socio-economic status.¹ The program provides subsidized or discounted phone service to low-income Americans. In order to support the subsidies and discounts, companies that participate in the program—eligible telecommunications carriers (“ETCs”)—receive monies from the Federal Universal Service Fund (“USF”) which is funded by contributions from telecommunications providers. To participate in the Lifeline program and receive these monies from the USF, a company must be designated as an ETC. 47 U.S.C. §214(e).

8. The PSC has jurisdiction pursuant to Section 214(e)(2) of the Telecommunications Act of 1996 (the “Act”) and Sections 364.10(2) and 364.11, Florida Statutes, to address a petition by a wireless telephone service provider seeking designation as an ETC. To qualify as an ETC, a provider must offer enumerated services listed in 47 CFR 54.101, such as local usage and access to emergency services. In addition, the PSC must consider other factors including the ETC applicant’s ability to satisfy consumer protection standards and whether the requested ETC designation will serve the public interest. 47 U.S.C. § 214(e)(2); *In re: State certification of rural telecommunications carriers pursuant to 47 C.F.R. 54.314*, Order

¹ See, e.g., *In re: Requests for approval of tariff filing to offer a Lifeline Assistance Program*, Order No. PSC-95-1245-FOF-TL, issued in Docket No. 951011-TL, 95 FPSC 10:224, at 1 (Fla. Pub. Serv. Comm’n Oct. 10, 1995).

No. PSC-05-0824-FOF-TL, issued in Docket No. 10977-TL (Fla. Pub. Serv. Comm'n Aug. 15, 2005).

9. Virgin Mobile is a wireless telephone service provider focusing on the “pay-as-you-go” or pre-paid market.

10. On December 5, 2007, Virgin Mobile filed a petition with the Federal Communications Commission (“FCC”) seeking forbearance from section 214(e) of the Act, which requires that an ETC offer service using its own facilities or a combination of its own facilities and resale of another carrier’s services.² At that time, Virgin Mobile was admittedly not a facilities-based carrier, but rather a pure wireless reseller. By Order 09-18, issued March 5, 2009, in Docket 96-45, the FCC granted Virgin Mobile forbearance from the facilities-based requirement (the “Forbearance Order”). The Forbearance Order was conditioned on Virgin Mobile’s compliance with certain enumerated requirements, including certifications related to customer access to 911 services (“PSAP certification”). Virgin Mobile has an application pending with the FCC to modify the Forbearance Order filed on March 4, 2010;³ no action has been taken upon this request.

11. On April 29, 2009, Virgin Mobile filed a petition with the PSC for limited designation as an ETC in order to receive universal service Lifeline support in the State of Florida.

12. On April 10, 2010, Virgin Mobile withdrew its initial petition and filed an amended petition. In the amended petition, Virgin Mobile asserts that it was acquired by Sprint-Nextel in November of 2009 and, as a result, it claims that it now operates as a facilities-based carrier and no longer resells services in Florida. Furthermore, Virgin Mobile asserts that since it

² *Virgin Mobile USA, L.P. Petition for Forbearance*, CC Docket No. 96-45 (filed Dec. 5, 2007).

³ 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).

is no longer a reseller, the FCC Forbearance Order and conditions imposed thereunder are no longer applicable.

13. On May 19, 2010, the PSC issued the PAA Order proposing to grant Virgin Mobile's petition, which included certain findings discussed below. The PAA Order provided that any person whose substantial interests are affected by the action proposed in the PAA Order may file a petition for a formal proceeding no later than June 9, 2010. Organize Now and Consumers file this Petition accordingly.

Disputed Findings of Material Fact and Ultimate Facts Alleged

14. In the PAA Order, the PSC acknowledged that "the ability to satisfy consumer protection and service quality standards" is a requirement for ETC designation. [PAA Order, p. 5.] This criteria was specifically adopted by the PSC, pursuant to the FCC's encouragement, in Docket No. 010977-TL, by Order No. PSC-05-0824-FOF-TL, issued August 15, 2005. [PAA Order, p. 5.] With respect to Virgin Mobile's Petition, the PSC determined that Virgin Mobile had complied with this requirement, in addition to the others, to be eligible as a designated ETC in Florida. [PAA Order, p. 5.]

12. The PAA Order also acknowledged that it must consider whether an ETC designation serves the public interest consistent with Sections 214 and 254 of the Act. [PAA Order, 8.] The PAA continued,

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, p. 8.] The PSC determined that Virgin Mobile's petition to be designated as an ETC was "in the public interest." [PAA Order, p. 10.]

13. For several reasons, Virgin Mobile's service does not satisfy consumer protection and service quality standards sufficient for ETC designation. Additionally, the benefits of its proposed services are not consistent with the public interest purposes of the Act, including the fundamental goals of universal service and of ensuring the availability of quality communications at just, reasonable and affordable rates.

14. Specifically, Virgin Mobile's service is harmful to the intended beneficiaries of the Lifeline program by: not including texting service within a customer's "free" pre-paid minutes; charging Lifeline customers higher rates for texting services than are charged to non-Lifeline monthly customers; not allowing a customer's unused minutes to roll-over; charging increasing rates for minutes beyond the pre-paid minutes; and otherwise misleading consumers by promoting its services as "free." These deficiencies are particularly harmful to low-income consumers and are inconsistent with the purposes of the Act and the Lifeline program.

15. A customer who signs up for Virgin Mobile's program for the Lifeline market, Assurance Wireless, receives a free phone sponsored by Virgin Mobile and 200 minutes that are paid by the USF for each month at a rate of \$0.05 per minute. But these minutes come with unreasonable and unwarranted conditions. For example, this airtime may not be used to send text messages; instead, customers are required to pay additional, up-front fees for the ability to send and receive text messages. This hurts consumers. Text messaging is no mere incidental feature of the modern communications service market, but has become an increasingly important and mainstream method of communication. In fact, many municipalities now stay in contact with their residents through text messages, through which they provide communications ranging

from storm warnings to street closings.⁴ Assessing special charges for text messages perpetuates a gap in communications services between low-income persons and others which Lifeline was intended to close. Texting should be offered a part of any basic package, and should be offered at preferential pricing, especially when paid for by the USF. Virgin Mobile's failure to do so is inconsistent with the purposes of the Act and the Lifeline program.

16. Virgin Mobile's failure to allow customers' unused monthly minutes to "roll over" for the next month's service also disserves the public purpose intended by the Act. Pre-paid minutes in the Lifeline program are paid for by the USF. Virgin Mobile will receive payment for the minutes whether customers use them or not. Only 200 minutes are pre-paid; allowing roll-over would not create unpredictability in capacity requirements. Setting arbitrary expiration dates on the minutes allows Virgin Mobile to profit from the Lifeline program to the detriment of consumers and to the detriment of the USF. These minutes are not "free" as represented by Virgin Mobile. They are paid for by the USF, and customers should be allowed to use them at their convenience.

17. Additionally, Virgin Mobile's pricing methodology is potentially misleading to consumers. For instance, the USF will apparently pay just \$.05 per minute for the initial 200

⁴ 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 ("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.").

minutes, yet the Virgin Mobile consumers will pay double, triple or more when they purchase additional minutes. Most cell phone plans become less expensive as more minutes are consumed, yet Virgin Mobile seeks to increase fees for further consumption for its poorest and most vulnerable customers.

18. Likewise, it is improper for Virgin Mobile to insist that customers purchase additional text messages and other services at rates that are higher than many retail customers of Virgin Mobile pay. For example, under Virgin Mobile's services to the Lifeline market, consumers have the option of purchasing 200 text messages in blocks, for \$5.00. However, Virgin Mobile's monthly customers can purchase 1,000 text messages for \$5.00. This is a significant price discrepancy, and detrimental to Lifeline consumers, particularly in the context of enticing customers with a "free phone" and advertising the first block of minutes as "free" when in fact they are paid for monthly by the USF. Because Virgin Mobile receives monthly payment, these customers are "monthly" customers, and should be entitled to the same preferential text message pricing received by other Virgin Mobile customers.

19. Additionally, Virgin Mobile's advertising of its offering as "free" is misleading to consumers. The USF pays for the services provided, thus, they are not "free." It is misleading to the customer, because it creates the impression that Virgin Mobile is sponsoring or giving away the minutes. They are not. The USF is paying for these minutes.

20. In sum, these deficiencies contravene the purposes of the Lifeline program and the public interest purposes of the Act. Eligible Lifeline consumers should not be marketed a free phone and then find out that they have to pay out-of-pocket for fundamental services. The failure to allow roll-over of unused minutes paid for by the USF does not help consumers, results in excessive profit, and is furthermore inconsistent with the purposes of the Act. Low-income

consumers should not face increasing rates for additional minutes while non-Lifeline customers see their rates decline, or incur higher rates for texting services than non-Lifeline customers pay.

21. In addition to the foregoing deficiencies, the PSC's PAA Order fails to give proper consideration to the FCC's Forbearance Order on Virgin Mobile. After reciting that "Virgin Mobile was purchased by Sprint-Nextel in November 2009," the PSC leapt to the conclusion "that Virgin Mobile is now a facilities based wireless provider and forbearance from the facilities requirement is unnecessary in this docket." [PAA Order at 6.] But given that the FCC's Forbearance Order is still in place, and because there is no uncontradicted evidence that Virgin Mobile is a facilities-based provider, it is premature for the PSC to dismiss the FCC's Forbearance Order as no longer applicable. Because these conditions relate predominantly to safety concerns, they are of particular importance to the already vulnerable customers that the Lifeline program is intended to benefit.

22. Accordingly, disputed issues of material fact include but are not limited to the following:

- a. the PSC's proposed finding "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.];
- b. the PSC's proposed finding that "Virgin Mobile's petition to be designated as an ETC is in the public interest." [PAA Order, p. 10.];

- c. the PSC's proposed finding that "Virgin Mobile is now a facilities-based wireless provider and forbearance from the facilities requirement is unnecessary in this docket," [PAA Order at 6.]; and
- d. the PSC's proposed finding that it can relieve Virgin Mobile of obligations under the conditions imposed by the FCC Forbearance Order, including the PSC's proposed finding that Virgin Mobile is "no longer a wireless reseller required to obtain PSAP certification," [PAA Order at 7.].

Notice of Proposed Agency Action

23. Organize Now and Consumers received notice of the PSC's proposed agency action on or about June 3, 2010, when they were advised of it by other consumer advocates.

Substantial Interests Affected

24. Lloyd Moore and Gracie Fowler (the "Individual Petitioners") are Florida residents who are eligible for Lifeline service, who desire wireless services under the Lifeline program, who are in the areas covered by Virgin Mobile's proposed service, and who would immediately benefit from clearly explained wireless services under the Lifeline program at a fair, just and reasonable price, and in full compliance with the safety-related certifications described above. The Individual Petitioners suffer injury in fact from the onerous terms of Virgin Mobile's service offering and safety-related certification concerns as outlined in the disputed issues and deficiencies described above. Without changes in these terms, the Individual Petitioners will not subscribe for the Virgin Mobile service or will subscribe for the service and pay unnecessary

expenses and/or receive insufficient benefits. Either result is inconsistent with the intent of the Act and the Lifeline program.

25. 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. Accordingly, the Individual Petitioners have standing to request a formal hearing. *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).

26. Organize Now is an association organized to protect the interest of low and moderate income persons whose members include a substantial number of Florida residents who may be substantially affected by the PSC's final order in this matter, including a substantial number of members that are Florida residents who are eligible for Lifeline service, who desire wireless services under the Lifeline program, who are in the areas covered by Virgin Mobile's proposed service, and who would immediately benefit from clearly explained wireless services under the Lifeline program at a fair, just and reasonable price, and in full compliance with the safety-related certifications described above.

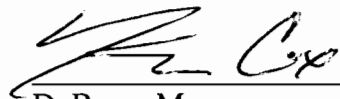
27. Because Organize Now is organized to protect the interest of low and moderate income persons, the subject of this proceeding (i.e., Lifeline service) is directly within Organize Now's scope of interest and activity. Moreover, the relief requested is of a type appropriate for the Organize Now to receive 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. Accordingly, Organize Now has standing to request a formal proceeding. *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).

WHEREFORE, Organize Now and Consumers request that the PSC conduct a formal proceeding pursuant to Chapter 120, Florida Statutes, addressing all issues related to whether Virgin Mobile's designation as an ETC is in the public interest, and

- a) deny or otherwise withhold final approval of the Petition unless Virgin Mobile agrees to allow text messages to be deducted from monthly minutes;
- b) deny or withhold final approval unless Virgin Mobile agrees to permit unused minutes to roll-over to subsequent service periods;
- c) deny or withhold final approval unless Virgin Mobile agrees more fairly structure the pricing of minutes beyond the 200 minutes purchased by USF, in comparison to rates paid by non-Lifeline customers;
- d) deny or withhold final approval unless Virgin Mobile agrees not to promote its Lifeline service offerings with the misleading term "free;"

- e) deny or withhold final approval unless Virgin Mobile agrees to fully comply with the conditions previously imposed by the FCC's Forbearance Order; and
- f) grant such further relief as the PSC deems appropriate.

Respectfully submitted,




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*Attorney 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 by U.S. Mail to Susan F. Clark and Elizabeth McArthur, Radey Thomas Yon & Clark, 301 S. Bronough Street, Suite 200, Tallahassee, FL 32399; John Beahn and Antoinette Bush, Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, N.W., Washington, DC 20005-2111; Peter Lurie, Virgin Mobile USA, L.P., 10 Independence Blvd., Warren, NJ 07059; and Theresa Tan, Office of the General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 this 9th day of June, 2010.



Attorney

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