

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE PETITION OF)
VIRGIN MOBILE USA FOR DESIGNATION)
AS AN ELIGIBLE TELECOMMUNICATIONS)
CARRIER FOR LIFELINE SERVICES)
_____)**

Case No. 11-00158-UT

FINAL ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission”) upon the Recommended Decision of the Hearing Examiner (“Recommended Decision”) issued in this case by Anthony F. Medeiros. Having considered the Recommended Decision (a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference), and the record in this case, and being fully informed in the premises,

THE COMMISSION FINDS AND CONCLUDES:

1. The Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“Act”),¹ directed the Federal Communications Commission (“FCC”) and the states to act jointly to establish support mechanisms to ensure the delivery of basic telecommunications services to all residents. Among the Act’s stated principles for universal service are: promoting the availability of quality services at just, reasonable and affordable rates; increasing access to advanced telecommunications services throughout the nation; and advancing the availability of such services to all consumers, including those in low income, rural, insular and high cost areas at rates that are reasonably comparable to those charged in urban areas.² The Act

¹ *Id.*

² 47 U.S.C. § 254(b).

requires every telecommunications carrier that provides interstate telecommunications services to contribute to the Universal Service Fund (USF) to preserve and advance universal service.³

2. The Act provides that on request of a telecommunications carrier and “consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier”⁴ Pursuant to 47 U.S.C. § 214(e), to be eligible for universal service funding a telecommunications carrier must be designated as an ETC. The federal Act gives state commissions the “primary responsibility” for the designation of ETCs.⁵

3. Therefore, and pursuant to other applicable law, this Commission has jurisdiction over the parties and the subject matter of this case.

4. In his Recommended Decision, the Hearing Examiner recommends that the Commission designate Virgin Mobile USA, L.P. (“Virgin Mobile”) as an ETC for the provision of Lifeline services. The RD concludes, “In sum, having analyzed Virgin Mobile’s demonstration of compliance with the Commission’s five-part public interest test and with fulfillment of all other relevant requirements and additional commitments, the record supports a finding that the designation of Virgin Mobile as an ETC for the limited purpose of providing federal Lifeline service throughout New Mexico in the areas of the Sprint network specified in this decision and Order, and with the exclusion of

³ 47 U.S.C. § 254(d).

⁴ 47 U.S.C. § 214(e)(2).

⁵ *Id.*

Tribal Lands, is consistent with the public interest and advances the goals of universal service.” RD at 63-64. Overall, the Recommended Decision is well taken and should be adopted by the Commission, subject to the findings made below.

5. We find it useful here to provide additional background for the exclusion of Tribal Lands from the ETC designation for Virgin Mobile. First, as the RD makes clear in several places, Virgin Mobile is not requesting Lifeline-only ETC designation in those areas in New Mexico officially designated as federally recognized Tribal Lands. First, as the RD makes clear in several places, Virgin Mobile is not requesting Lifeline-only ETC designation in those areas in New Mexico officially designated as federally recognized Tribal Lands. The Commission also notes that in its 2009 Order granting Virgin Mobile forbearance from the facilities requirement under Section 214(e)(1) of the federal Act and conditional Lifeline-only designation in limited ETC designation in four states under Section 214(e)(6) of the Act, the FCC expressly excluded Tribal Lands from its designated service areas in those states.⁶ Second, under FCC rules, Lifeline support must be passed directly from the ETC to the qualifying low-income consumer in the form of discounts off the subscriber’s monthly service.⁷ Lifeline support is a fixed, per-line amount nationwide. Prior to the *Lifeline Reform Order*, the reimbursement framework for Lifeline support consisted of four tiers – basic support under Tiers 1-3 and Tribal Lifeline support under Tier 4.⁸ The full amount of

⁶ *In the Matter of Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, et al., CC Docket No. 96-45, Order, 24 FCC Rcd 3381, 3396, para. 40 (2008).

⁷ See 47 C.F.R. § 54.403.

⁸ The old four-tier structure was summarized in the *TracFone Recommended Decision*, Case No. 09-00300-UT, at 38, as follows: “All eligible subscribers receive

support for subscribers under Tiers 1-3 was \$10.00 per month, with an additional \$25 per month of support under Tier 4 Tribal Lifeline to low-income consumers residing on Tribal lands. The FCC's *Lifeline Reform Order* eliminated Tiers 1-3 and established instead an interim flat-rate support amount of \$9.25 per line per month beginning with April 2012 disbursements.⁹ Tier 4 support was renamed "Tribal Lands" Lifeline support, but the amount of support and its structure were not changed so that subscribers receiving Tribal Lands support will continue to receive that support plus the interim flat rate in lieu of Tier 1-3 support.¹⁰ Therefore, subscribers receiving Tribal Lands support will receive a much greater discount than those who are not receiving that support.

6. Virgin Mobile timely filed Limited Exceptions to the Recommended Decision. Virgin Mobile states in its Limited Exceptions that it "appreciates the thorough and thoughtful Recommended Decision presented by the Hearing Examiner and requests the Commission affirm the Hearing Examiner's Recommended Decision, with [two] limited exceptions." We note that Virgin Mobile is taking exception to its own language as presented in its Amended Proposed RD. First, Virgin Mobile takes exception to a reporting requirement contained in Section V (I)(8), arguing that it is unnecessary

Tier 1 support, which provides a monthly discount equal to the incumbent local exchange carrier's Subscriber Line Charge, which today is capped at \$6.50. Tier 2 support provides an additional \$1.75 per month in federal support, available in all states. Tier 3 support provides one-half of the subscriber's state Lifeline support amount, up to a maximum of \$1.75 per month. Only subscribers residing in a state that has established its own Lifeline program may receive Tier 3 support, assuming that the ETC has all necessary approvals to pass on the full amount of this total support in discounts to subscribers. Finally, Tier 4 support provides eligible subscribers living on Tribal lands up to an **additional \$25 per month** towards reducing basic local service rates, but the rules specify that the discount cannot bring the subscriber's rate for basic local service below \$1." See *Lifeline Reform Order*, FCC 12-11, para. 53.

⁹ *Lifeline Reform Order*, FCC 12-11, para. 58.

¹⁰ *Id.* paras. 59, 474.

because it is duplicative of annual reporting requirements. The RD requires the carrier to file a report with the Commission containing the number of complaints received from New Mexico Lifeline customers during the previous calendar year by March 31, of each year, commencing in calendar year 2013. According to Virgin Mobile, the annual reporting rules already require ETCs to file this information on an annual basis.¹¹

7. Virgin Mobile asks us, either to eliminate Section V(I)(8) of the Recommended Decision, or to amend it to read as follows:

"Virgin Mobile shall file an annual report with the Commission on the number of complaints received from New Mexico Lifeline customers during the previous calendar year. Complaints shall be classified as prescribed by 17.11.27.8(B)(6) NMAC and filed in accordance with the Commission's rules for annual ETC reporting beginning in 2013."

According to Virgin Mobile, this change would eliminate "a duplicate reporting requirement that provides no additional substantive benefit to the Commission," and it would provide the information in an "already established annual ETC reporting docket that is, in part, for inclusion of this identical information." *Ltd. Exc.* at 2. Virgin Mobile's first Limited Exception is well taken and should be granted in the form of the proposed amended language set forth above.

8. For its second Limited Exception, Virgin Mobile asserts that the reporting requirement in Section V (I)(1)(c) of the Recommended Decision is unduly burdensome and unjustified. The second to last sentence of Section V(I)(1)(c) of the RD would require Virgin Mobile's Lifeline customer application and certification forms to identify all "FCC-deemed Tribal Lifeline-eligible areas in New Mexico." The carrier explains that Tribal Lifeline is not automatically available in any Tribal area. Rather, a company

¹¹ See 17.11.27.1 et al. NMAC.

wishing to offer Tribal Lifeline must receive such authority either from a state commission or the FCC. If the state commission lacks or fails to assert jurisdiction, then the carrier must join with the Tribal Authority to the FCC to obtain such approval.¹² Under such circumstances an area is not eligible for Tribal Lifeline until the FCC has issued an order approving an application that the area be eligible. As related by Virgin Mobile, a representative of the FCC has told it that the FCC does not have a list of areas in New Mexico where Tribal Lifeline is available. Even if Virgin Mobile had this information, it argues, the information can change at any time and would therefore require ongoing tracking and updating. The requirement, it is argued, could result in confusion on the part of Virgin Mobile's Lifeline applicants if the list erroneously implies that Tribal Lifeline is available in all of the areas listed.

9. Virgin Mobile asks us, either to eliminate Section V(I)(1)(d)(8) of the Recommended Decision, or to amend it to read as follows:

"[t]he forms shall also include a listing of federally recognized Tribal areas and the Eastern Navajo Agency."

Virgin Mobile seeks to change language that it, itself, proffered in its Proposed Recommended Decision presented to the Hearing Examiner in a filing dated March 9, 2012 (as amended June 8, 2012). More importantly, neither the proffered language nor the limited exception really addresses the issue of potentially impeding access of eligible customers to Tribal Lands support; *see* ¶ 5 herein. The Commission finds that preventing customer confusion requires a more affirmative and definite statement to clarify that customers eligible for Tribal Enhanced Lifeline qualify for a larger discount than can be

¹² *See In the Matter of Federal-State Joint Board on Universal Service et al.*; CC Docket No. 96-45, 18 FCC Rcd 10958 (May 21, 2003).

offered by Virgin Mobile. Accordingly, Virgin Mobile's Second Limited Exception is not well taken and should be denied. Instead, the Commission finds that the following language should be inserted:

If you reside on Tribal or Pueblo Lands in New Mexico, you may qualify for up to an additional \$25 of Enhanced Tribal Lifeline support monthly from other carriers that provide that service. That discount is larger than what you would get if you signed up with Virgin Mobile at this time.

10. With regard to the issue of Virgin Mobile's refusal to pay the Utility and Carrier Inspection Fee (UCIF) (*cf.* NMSA 1978, § 63-7-20), the RD notes the argument of the New Mexico Exchange Carriers Group (NMECG) that, because Virgin Mobile is obligated to pay the UCIF but refuses to do so, its Petition should be denied as contrary to the public interest. The RD finds, consistently with other recent ETC designation cases of this Commission that Virgin Mobile must formally attempt to obtain a ruling from the Taxation and Revenue Department as to whether its UCIF practice is compliant with applicable governing law. As the RD notes, in other Commission cases, Staff has asserted that the issue should be taken up in a generic proceeding.

[I]t was Staff's conclusion that the Commission would best be served by opening a new docket that would allow broader participation by ETC applicants such as TracFone and the numerous wireless carriers that do or do not file and pay Utility and Inspection fees to weigh in on this important threshold issue of the Commission's subject matter jurisdiction.¹³

¹³ *In The Matter Of The Petition Of TracFone Wireless, Inc. For Designation As An Eligible Telecommunications Carrier In the State Of New Mexico For the Limited Purpose Of Offering Lifeline Service To Qualified Households*, Case No. 09-00300-UT, Recommended Decision at 51, *quoting*, Motion to Hold Cases in Abeyance and Establish New Docket [footnote omitted].

11. As in the TracFone and T-Mobile cases,¹⁴ the present RD finds that a petitioning carrier like Virgin Mobile whose designation is otherwise in the public interest should not be denied Lifeline-only ETC status solely on the basis of declining to pay the UCIF, especially in light of the ongoing industry-wide debate before this Commission over jurisdiction and responsibility for UCIF remittances. The RD notes and agrees with the decretal paragraph of the Recommended Decision in T-Mobile, at 53, which states that, “a new docket shall be opened immediately to resolve the issue of the duty of wireless telecommunications carriers to pay the Utility and Carrier Inspection Fee under NMSA 1978, [§] 63-7-20.” *See* RD at 54-55. The Commission agrees.

¹⁴ Case Nos. 09-00300-UT and 12-00097-UT, respectively.

IT IS THEREFORE ORDERED:

A. Except as expressly modified herein, the Commission accepts and adopts the Recommended Decision in its entirety.

B. The express modifications to the Recommended Decision consist of the adoption of: 1) the amended language proposed in the Limited Exceptions of Virgin Mobile, as set out in ¶ 6 of this Final Order, and 2) the Commission's prescribed language as set out in ¶ 8 of this Final Order.

C. A new docket shall be opened to consider whether wireless telecommunications carriers are obliged to pay the Utility and Carrier Inspection Fee (UCIF) pursuant to NMSA 1978, § 63-7-20.

D. This Final Order is effective immediately.

E. Copies of this Final Order shall be served electronically on all parties whose e-mail addresses and shall otherwise be served via regular mail.

F. This Docket is closed.

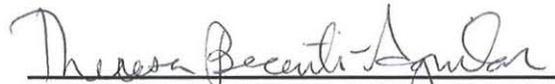
ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 11th
day of October, 2012.

NEW MEXICO PUBLIC REGULATION COMMISSION



PATRICK H. LYONS, CHAIRMAN





THERESA BECENTI-AGUILAR, VICE CHAIR



JASON A. MARKS, COMMISSIONER



DOUGLAS J. HOWE, COMMISSIONER



BEN L. HALL, COMMISSIONER

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CERTIFICATE OF SERVICE

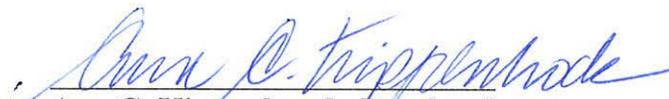
I HEREBY CERTIFY that a true and correct copy of the foregoing **Final Order** adopted October 11, 2012, was served by e-mail on October 12, 2012, to the parties listed below.

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DATED this **12th** day of October 2012.

NEW MEXICO PUBLIC REGULATION COMMISSION


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