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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

VIRGIN MOBILE USA, L.P.

**Application for Limited Designation as a
Wireless Eligible Telecommunications
Carrier**

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Docket No. 14-0475

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys and pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), 83 Ill. Adm. Code 200.800, respectfully submit their Reply Brief (“RB”) in the above-captioned proceeding.

I. INTRODUCTION

On July 23, 2014, Virgin Mobile USA, L.P. (“Virgin Mobile”) filed its *Petition of Virgin Mobile USA, L.P. for Limited Designation as a Wireless Eligible Telecommunications Carrier* (“Petition”) requesting designation as a Wireless Eligible Telecommunications Carrier (“ETC”) under Section 214(e)(2) of the Federal Telecommunications Act of 1996 (“1996 Act”), 47 U.S.C. § 214(e)(2), and Section 54.201(c) of the Rules of the Federal Communications Commission (“FCC”), 47 C.F.R. § 54.201(c). (*See generally*, Petition.) Staff and Virgin Mobile filed Initial Briefs (“IBs”) on January 14, 2015. Pursuant to the

briefing schedule set by the Administrative Law Judge, this RB follows. (Tr. 23:13-18, Dec. 17, 2014.)

II. RESPONSE TO VIRGIN MOBILE ARGUMENTS

A. Virgin Mobile's Commitment to Comply with E9-1-1 Requirements

Virgin Mobile argues that “[u]nder existing Commission practice and the FCC’s ETC Designation Order, Virgin Mobile’s stated commitment to pay all applicable E9-1-1 fees in a timely manner is sufficient to satisfy Virgin Mobile’s ETC designation burden.” (Virgin Mobile IB, 6.) Virgin Mobile argues that further inquiry beyond the Company’s general commitment “exceeds Commission practice and the FCC’s Designation Order.” *Id.* at 6. The Commission should reject Virgin Mobile’s argument.

Implicit in Virgin Mobile’s argument is that it has made a clear commitment to pay all applicable E9-1-1 fees. It has not. In response to a data request from Staff, Virgin Mobile states “assuming Lifeline users receive only the Virgin Mobile primary Lifeline service package in Illinois, Virgin Mobile would not remit E-911 fees to the Illinois Department of Revenue...” (Staff Ex. 1.0, Attachment A, 14.)

Virgin Mobile refers to the FCC’s Designation Order and asserts that it makes clear that, with respect to an ETC requirement, an ETC applicant is merely required to make a commitment to comply with the requirement in order to that requirement. (Virgin Mobile IB, 5-6.) The passages Virgin Mobile quotes from the FCC’s Designation Order, however, make clear that the FCC requires an ETC applicant to make “specific commitments” and to “demonstrate its commitment and ability” to meet such commitments. *Id.* When asked to make a specific commitment and demonstrate its ability to meet its E9-1-1 obligations,

Virgin Mobile indicated it would not pay E9-1-1 fees with respect to its primary Lifeline offering. *Id.*

Virgin Mobile also argues that “as demonstrated by existing ETC designation orders, the Commission does not require confirmation of future compliance with PW9SA requirements following ETC designation.” *Id.* at 7. This is misleading and wrong. The Commission has in at least one other proceeding required a carrier to remit E9-1-1 surcharges with respect to its prepaid wireless base Lifeline offering. (ICC Staff Ex. 2.0, 8.) What is unique with respect to this proceeding is not that Virgin Mobile is being asked to demonstrate compliance with PW9SA, but rather that Virgin Mobile has indicated it will not pay E9-1-1 fees with respect to its primary Lifeline offering.

B. Commission Jurisdiction

Virgin Mobile argues that “there is no statute or regulation which permits the Commission to order an ETC applicant to initiate a separate legal proceeding with the Illinois Department of Revenue (“DOR”) to resolve Staff’s question concerning the applicability of the PW9SA to Lifeline federal subsidies.” *Id.* at 8. Virgin Mobile is incorrect. Carriers must meet all requirements the Commission deems appropriate and reasonable to ensure that an ETC designation is consistent with the public interest, convenience, and necessity. *See, In the Matter of Federal-State Joint Bd. On Universal Service, Highland Cellular, Inc.*, 2004 WL 770088 (FCC 04-37), ¶21 (Apr. 12, 2004) (“Highland Cellular ETC Order”).

The importance of the wireless E9-1-1 system to the preservation of public safety and health cannot be overstated, and thus funding of the system is crucial. (Staff Ex. 1.0, 23:501-502.) From a public policy perspective, all carriers that provide E9-1-1-capable

wireless service have the obligation to collect and remit the appropriate wireless E-9-1-1 surcharge. *Id.* at 23-24:502-505. A carrier that does not remit the surcharge, or does not remit the full and correct amounts of, wireless E9-1-1 surcharges, increases its profitability at the expense of the Illinois wireless E9-1-1 system and the public safety and health. *Id.* at 24:505-507.

With respect to Virgin Mobile's reading of the Illinois E-9-1-1 statutes, and PW9SA in particular, Virgin Mobile's assertion that it is not required by law to pay E9-1-1 surcharges is unconvincing. Its potential failure to meet its E-9-1-1 requirements demonstrates a shortcoming in Virgin Mobile's technical capability to comply with rules and regulations applicable to its service offering. It also tends to show that, given the importance of the wireless E9-1-1 system to the preservation of public safety and health, Virgin Mobile's designation is not in the public interest.

It is within the Commission's authority – in fact, it is the Commission's duty - to ensure that an ETC designation is consistent with the public interest, convenience, and necessity. Staff continues to recommend the Commission do so by requiring Virgin Mobile to seek guidance from the DOR with respect to its interpretation of the EW9SA.

Virgin Mobile further asserts that the Commission has no authority to interpret carrier's remittance of surcharges under PW9SA. (Virgin Mobile IB, 8.) That is not correct. For purposes of determining ETC eligibility, and inherent in a determination of public interest, convenience and necessity, the Commission can and must determine the veracity of Virgin Mobile's commitments to comply with the laws, rules and regulations of the State of Illinois. (Staff IB, 7.) Virgin Mobile attests that its commitment to pay all applicable E9-1-1 fees in a timely manner is "sufficient to satisfy Virgin Mobile's ETC

designation burden.” (Virgin Mobile IB, 6.) The Commission certainly can require Virgin Mobile to specify how it is committing to comply with E9-1-1 rules and regulations and whether that commitment is, in the Commission’s view, consistent with those laws, rules and regulations. If not, any such commitment is meaningless.

Notably, Staff did not go so far as to recommend that the Commission find that Virgin Mobile’s decision not to pay E9-1-1 fees with respect to its primary Lifeline offering is in violation of the PW9SA, which the Commission certainly could do. (Staff IB, 22-23.) Instead, Staff, giving Virgin Mobile the benefit of the doubt for its questionable position and in deference to the DOR’s oversight of PW9SA, recommended Virgin Mobile seek clarification from the DOR. *Id.*

In making its jurisdictional arguments, Virgin Mobile asserts facts that are not in evidence and are, in fact, not true. In particular, Virgin Mobile asserts for the first time in its IB that “the Commission already has information in its possession that answers the question Staff raises.” (Virgin Mobile IB, 9.) No information reported to Staff or provided to Staff by the DOR indicates whether E9-1-1 surcharges are being paid for Lifeline verses non-Lifeline services. Further, there is no evidence that, as Virgin Mobile asserts again for the first time in its IB, the DOR is in possession of such information. PW9SA does not reference any distinction in E9-1-1 surcharges with respect to whether that service is paid for by the consumer from its own funds or whether the service is paid for by the consumer through the use of its Lifeline credit and, therefore, there is no reason for the DOR to collect this information. Virgin Mobile’s assertion that Staff has access to, or can obtain from the DOR, information on whether other ETCs in Illinois are paying E9-1-1 surcharges on their Lifeline lines is unsupported and false.

C. E9-1-1 Surcharges for Virgin Mobile's Base Lifeline Plan

Virgin Mobile offers several arguments for why it believes the PW9SA does not require it to pay E9-1-1 surcharges with respect to its Lifeline services including: (1) a Virgin Mobile customer “makes no ‘purchase of prepaid wireless telecommunications services’”; (2) “there is no Consumer to impose the fee upon”; (3) and “there is no Seller.” *Id.* at 12-13. Virgin Mobile’s arguments incorrectly interpret the Lifeline program and should be rejected.

Lifeline customers purchase prepaid wireless telecommunications service from Virgin Mobile. The Federal Lifeline is a subsidy that is provided to, and on behalf of, *an eligible customer* and enables *the customer* to pay for telecommunication services, selected by *the customer*. It is not a subsidy to Virgin Mobile. The fact that the federal subsidy is given directly to the ETC providing service to the customer on behalf of the customer does not change the fact that this subsidy is the *customer's* to use for purchasing telecommunications service. Indeed, the *customer* has the choice to expend the subsidy either with Virgin Mobile, or any other ETC serving the relevant service territory. The FCC rules make this clear. For example, the FCC requires ETCs to certify, with respect to their Lifeline service, that they “will pass through the full amount of support to the qualifying low-income consumer.” 47 C.F.R. § 54.403(a)(1). Virgin Mobile’s arguments that nothing is bought, the Lifeline consumer is not a “consumer”, and that Virgin Mobile is not a seller are all based upon the false premise that a Lifeline service is not bought by the customer. It is. The fact that the entitlement is given directly to Virgin Mobile for and on behalf of the customer, and indeed at the customer’s direction, does not alter the fact

that the Lifeline subsidy is the entitlement being used by the customer to buy Virgin Mobile's wireless telecommunications service.

Virgin Mobile further argues that it "does not collect any 911 surcharges" and PW9SA requires "the fee to be imposed on the consumer and not on the provider." (Virgin Mobile IB, 14.) Nothing prevents Virgin Mobile from collecting these surcharges from its Lifeline customers. Virgin Mobile's argument is essentially that if a provider elects not to collect the E9-1-1 surcharges from its customers, then it does not have to remit E9-1-1 charges. There is no basis for such a self-exemption policy in the law.

IV. CONCLUSION

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission approve Virgin Mobile's Petition for ETC status subject to the recommendations included in Staff's Initial Brief.

Respectfully submitted,

Matthew L. Harvey
John L. Sagone
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, Illinois 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
mharvey@icc.illinois.gov
jsagone@icc.illinois.gov

*Counsel for the Staff of the Illinois
Commerce Commission*

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