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IN THE SUPREME COURT OF OHIO

Virgin Mobile USA, L.P., :
: Appeal from the Public Utilities
Appellant, : Commission of Ohio
:
v. : Public Utilities Commission of Ohio
: Case No. 10-2377-TP-COI
The Public Utilities Commission of Ohio, :
:
Appellee. : 12-2036

NOTICE OF APPEAL OF APPELLANT VIRGIN MOBILE USA, L.P.

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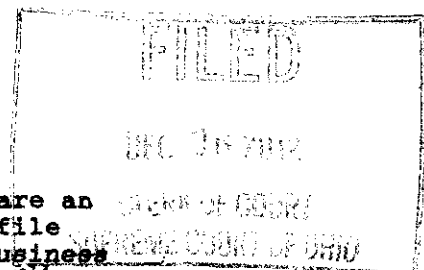
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Notice of Appeal of Appellant Virgin Mobile USA, L.P.

Appellant Virgin Mobile USA, L.P. hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio, from an Entry of the Public Utilities Commission of Ohio ("PUCO" and "Appellee") entered on October 10, 2012, in PUCO case no. 10-2377-TP-COI. The Entry is attached hereto and fully incorporated herein as Exhibit A.

Appellant was and is a party of record in PUCO case no. 10-2377-TP-COI, and timely filed its Application for Rehearing of the Appellee's May 23, 2012 Finding and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied, with respect to the issues on appeal herein, by entry entered on October 10, 2012. The Appellant alleges that Appellee's May 23, 2012 Finding and Order, and Appellee's October 10, 2012 Entry on Rehearing in PUCO case no. 10-2377-TP-COI are unlawful, unjust and unreasonable in the following respects as set forth in Appellant's Application for Rehearing:

Assignment of Error I

The Ohio statute violates the U.S. Constitution as it levies a state tax on the federal government.

Assignment of Error II

It is improper under state law to consider USAC reimbursement from the federal Lifeline program as includable for purposes of calculating the amount of wireless 9-1-1 assessment.

Assignment of Error III

It is discriminatory and anti-competitive, and therefore contrary to the public interest, to assess the 9-1-1 charge in a way that affords prepaid carriers no mechanism to recover the cost of the assessment from Lifeline customers.

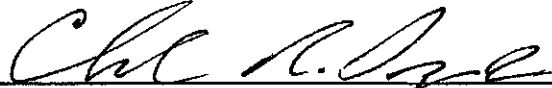
Assignment of Error IV

The order directing wireless carriers to remit previously unremitted 9-1-1 fees that would otherwise have been collected retroactively to the date of ETC designation constitutes retroactive ratemaking and violates Ohio law.

WHEREFORE, Appellant respectfully submits that the Appellee's May 23, 2012 Finding and Order and Appellee's October 10, 2012 Entry on Rehearing in PUCO case no. 10-

2377-TP-COI are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully Submitted,



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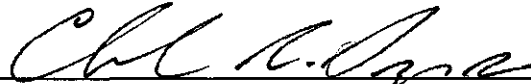
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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to all parties to the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code on December 6, 2012.



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CERTIFICATE OF FILING

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



Charles R. Dyas, Jr., Counsel of Record

*COUNSEL FOR APPELLANT,
VIRGIN MOBILE USA, L.P.*

EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission)
Investigation into the Provision of)
Nontraditional Lifeline Service by) Case No. 10-2377-TP-COI
Competitive Eligible Telecommunications)
Carriers.)

ENTRY ON REHEARING

The Commission finds:

- (1) Pursuant to its May 23, 2012, Finding and Order, the Commission established certain requirements for the provision of Lifeline service, including those necessitated by the Federal Communications Commission's (FCC's) Report and Order in *In the Matter of Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 12-23 (rel. Feb. 6, 2012).
- (2) On June 22, 2012, TracFone Wireless, Inc. (TracFone) and Virgin Mobile USA, LP (Virgin Mobile) each filed an application for rehearing regarding the Commission's Finding and Order.
- (3) Pursuant to the Entry on Rehearing of July 18, 2012, the applications for rehearing were granted for further consideration of the matters specified in the applications for rehearing.
- (4) In its first assignment of error, TracFone submits that the Commission erred by determining that 9-1-1 and Telecommunications Relay Service (TRS) fees are applicable to eligible telecommunications carriers (ETCs) which provide only "non-billed, free" Lifeline services. In its second assignment of error, TracFone objects to the requirement that wireless resellers pay such fees retroactively to the time of their initial ETC designation without regard to whether those

fees were collected from consumers or could have been collected from consumers of those services.

In support of its first assignment of error, TracFone asserts that under Ohio law, ETCs providing "non-billed, free" Lifeline services are not required to remit 9-1-1 fees on those services. TracFone submits that, while the Commission is correct that Section 4931.61, Revised Code, is applicable to providers of prepaid wireless service, it erred by concluding that all wireless reseller Lifeline services are prepaid services and, thus, encompassed under Section 4931.61, Revised Code. Therefore, TracFone opines that the fee collection and remittance obligations set forth in Section 4931.61(A), Revised Code, are not applicable to its wireless Lifeline services since they are not prepaid services but, instead, are non-billed and free.

Specific to the Commission's rationale for applying the collection methods set forth in Section 4931.61(A), Revised Code, TracFone rejects the Commission's determination that "[r]eimbursement of payment by USAC [Universal Service Administrative Company] is the functional equivalent of the point-of-sale for the previous month's service" (Application for Rehearing at 4 citing Finding and Order at 44). TracFone asserts that there is no support for the conclusion that the provision of funding from USAC is in any way the equivalent of a point-of-sale transaction.

According to TracFone, the point-of-sale collection methods are defined by statute in order to establish a mechanism for collection of the 9-1-1 fees from end user consumers of prepaid wireless services, and not from the service provider itself. Specifically, TracFone opines that 9-1-1 fees are obligations imposed on consumers and are not intended to be gross receipt or income taxes imposed on service providers. Based on the manner in which its Lifeline service is provided, TracFone states that it has no opportunity to collect 9-1-1 fees from its Lifeline subscribers since the subscriber receives the service without charge through a "non-billed, free" Lifeline program.

In support of its position that the Commission is inappropriately transferring the obligation for the collection of 9-1-1 fees, TracFone objects to the Commission's directive that "there should be no reduction in a subscriber's monthly allotment of minutes" (*Id.* at 6 citing Finding and Order at 44). Based on this directive, TracFone submits that the Commission is demanding that it, and not its subscribers, must pay the 9-1-1 fees out of its own resources.

Relative to the other collection methods provided under Section 4931.61(A), Revised Code, TracFone submits that neither method is applicable to "non-billed, free" Lifeline services. For example, in regard to the mechanism of reducing, on a monthly basis, a subscriber's prepaid account balance by the amount of the fee, TracFone avers that this mechanism is not feasible if the unused minutes do not carry over, thus, eliminating the potential of a balance of unused minutes from which the fee can be deducted. Specific to the "total revenue" method set forth in Section 4961(A)(3), Revised Code, TracFone asserts that the Commission's Finding and Order will result in an unfunded mandate in which it will be required by the Commission to remit 9-1-1 funds out of the USAC reimbursement proceeds while, at the same time, being required by the FCC, pursuant to 47 C.F.R. 54.403(a)(1), to provide consumers with one hundred percent of the Universal Service Fund support received from USAC.

Further, TracFone asserts that the Commission's Finding and Order will impose the financial burden of funding 9-1-1 and TRS on qualified low-income households enrolled in "non-billed, free" Lifeline programs. TracFone states that the Commission's election to impose this financial burden is inappropriate public policy and is inconsistent with how other states have applied their own similar laws to address the same issue (*Id.* at 8, 9 citing South Carolina, Tennessee, and Virginia).

In its second assignment of error, TracFone responds to the Commission's requirement that "all wireless resellers of Lifeline service shall remit any previously unremitted funds

that would have been collected using one of the methods set forth above beginning at such time as the provider was first designated as a [competitive eligible telecommunications carrier] CETC in Ohio by the Commission" (*Id.* at 9 citing Finding and Order at 44). In addition to the previously stated arguments regarding its alleged inability to collect the required funds, TracFone asserts that by limiting the retroactive remittance requirement to just wireless resellers, the Commission is discriminating against this subset of nontraditional providers and is affording more favorable treatment to all other CETCs. According to TracFone, such treatment violates 47 U.S.C. 253(b) due to the fact that it imposes a requirement that is not competitively neutral.

- (5) Similar to TracFone, Virgin Mobile, in its application for rehearing, asserts that the Commission erred in its determination that USAC reimbursement under the federal Lifeline program is includable for the purposes of calculating the 9-1-1 assessment. Virgin Mobile also contends that the Commission erred by ordering the remittance of 9-1-1 fees that would have been collected retroactively to the date of the ETC designation.

In support of its proposition, Virgin Mobile states that Section 4931.61(A), Revised Code, does not contemplate the payment of a 9-1-1 wireless surcharge under the scenario in which a subscriber's service is paid for directly by the federal government pursuant to a subsidy in accordance with 47 C.F.R. 54.403.

Based on its reading of the Commission's Finding and Order in this case, Virgin Mobile believes that the Commission is inappropriately attempting to levy a state tax on the federal government. Specifically, Virgin Mobile asserts that there is no mechanism pursuant to 47 C.F.R. 54.403 for wireless service providers to bill the federal government for any additional costs such as state taxes.

In support of its position, Virgin Mobile submits that it is providing services under a program of the federal

government and, as such, it stands in the shoes of the federal government as its agent. Virgin Mobile notes that in the case of "no charge" Lifeline service, there is no revenue generated by the subscriber relative to the basic monthly service. Therefore, by requiring it to remit 9-1-1 fees out of the federal USF subsidy, Virgin Mobile submits that the Commission is effectively imposing a tax on the federal government due to the fact that the only revenue that it collects comes from the federal government in the form of Universal Service Fund subsidies. According to Virgin Mobile, the act of the Commission taxing the federal government to support the state's 9-1-1 program is a violation of the Supremacy Clause of the U.S. Constitution. Additionally, Virgin Mobile considers the Commission's attempt to seek 9-1-1 payments from companies such as itself to be an "end-run around the federal government's immunity from such taxes" (*Id.* at 8).

Similar to TracFone, Virgin Mobile asserts that it is improper under state law to consider USAC reimbursement from the federal Lifeline program as includable for the purposes of calculating the amount of the wireless 9-1-1 assessment. In particular, Virgin Mobile submits that, pursuant to Sections 4931.61 and 4931.62, Revised Code, the wireless subscriber shall pay the applicable 9-1-1 charge. Therefore, Virgin Mobile insists that the subscriber, and not the service provider, is the party responsible for payment of the charge.

While recognizing that Section 4931.61, Revised Code, provides three methods by which a prepaid provider can collect the wireless 9-1-1 charge from a subscriber, Virgin Mobile argues that these methods do not compel the carrier to pay the charge where no money changes hands between the subscriber and carrier and there is no means to collect the charge from a subscriber. Virgin Mobile believes that to shift the liability from the subscriber to the carrier would be in conflict with the statute. Further, Virgin Mobile argues that to require the carrier to pay the 9-1-1 fee, instead of the subscriber by effectively taxing the carrier's USAC reimbursement, is improper. Responding to the Commission's reference to Section 4931.62(B), Revised Code,

to support its determination that wireless service providers should assume the subscriber's liability for the wireless 9-1-1 charge, Virgin Mobile highlights that the statutory language reflects that the liability for the wireless 9-1-1 surcharge is first and foremost that of the subscriber and that the provider may assume the subscriber's liability, but is not required to do so.

Additionally, Virgin Mobile contends that the Commission's requisite carrier payment of the 9-1-1 fee is not consistent with the Commission's stated intent of competitive and technological neutrality relative to the provision of Lifeline service to eligible subscribers. Rather, Virgin Mobile asserts that the required payment of the fee is discriminatory and anticompetitive, and, therefore, contrary to the public interest due to the fact that it affords prepaid carriers with no mechanism to recover the cost of the assessment from Lifeline customers. As a result, Virgin Mobile states that it will be forced to pay the 9-1-1 assessment out of its own pocket, with no ability to offset the cost by recovering it from its Lifeline customers. In support of its position, Virgin Mobile notes that, unlike traditional wireline Lifeline service providers and CETCs (including wireless) offering Lifeline discounts to be deducted from the regular price of a service plan, Virgin Mobile is unable to recover the cost of the 9-1-1 assessment from its customers since it is a "no-charge" Lifeline service provider.

As further support as to why it should not be required to pay the 9-1-1 assessment out of its USAC reimbursement, Virgin Mobile believes that the profit margins associated with the provision of "no-charge" Lifeline service are generally slim. According to Virgin Mobile, it is possible that the imposition of the additional costs in the form of a nonrecoverable 9-1-1 surcharge could place enough additional strain on already-slim margins to make the "no-charge" Lifeline product financially infeasible for some prepaid wireless carriers.

Finally, Virgin Mobile responds to the Commission's requirement that wireless carriers retroactively remit previously unremitted 9-1-1 fees that would have otherwise

been collected as of the date of the ETC designation. Specifically, Virgin Mobile considers this directive to be a retroactive ratemaking in violation of Ohio law. Citing *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶11, Virgin Mobile opines that the Finding and Order's directive to retroactively pay unremitted 9-1-1 fees plainly violates the Ohio Supreme Court's prohibition against setting rates in such a way as to make up for dollars lost during the pendency of the Commission proceeding.

- (6) Upon a review of the arguments raised by TracFone and Virgin Mobile, the Commission finds that the applications should be denied.
- (7) Specific to the arguments set forth in the context of the first assignments of error raised by both TracFone and Virgin Mobile, the applications for rehearing are denied. While both TracFone and Virgin Mobile contend that Section 4931.61, Revised Code, is not applicable to their Lifeline service activities that are offered on a nonbilled and free basis, it is clear that, pursuant to Sections 4931.61 and 4931.62, Revised Code, there is a legislative expectation that all wireless subscribers contribute towards the support of wireless 9-1-1 costs. To this point, the Commission calls attention to the fact that nowhere in Section 4931.61, Revised Code, is there an exemption regarding the applicability of its statutory provisions to Lifeline customers in general or for nonbilled Lifeline customers who simply receive a monthly lump sum of minutes without incurring any specific monthly charge.

Upon a review of the arguments presented, it is apparent that the most significant obstacle to TracFone and Virgin Mobile complying with the Commission's Finding and Order is the very business model that these entities have elected to adopt for the purpose of capturing Lifeline market share. While it may be problematic for these entities to assess the requisite \$.28 charge per billed number, the entities pursued their business model despite being informed of their Lifeline and TRS obligations at the time of their ETC designations.

To this point, the Commission notes that the requirements regarding contribution to both 9-1-1 and TRS support were set forth in the May 21, 2009, Supplemental Finding and Order in Case No. 97-632-TP-COI (97-632), *In the Matter of the Commission Investigation of the Intrastate Universal Service Discounts*, designating TracFone as an ETC and the corresponding Entry on Rehearing in 97-632 in which the Commission denied TracFone's application for rehearing. See 97-632, Supplemental Finding and Order, May 21, 2009, at 13; 97-632, Entry on Rehearing, July 8, 2009, at 7, 8). Similarly, these requirements were addressed in the May 19, 2011, Finding and Order in Case No. 10-429-TP-UNC (10-429), *In the Matter of the Application of Virgin Mobile USA, L.P. dba Assurance Wireless for Designation as an Eligible Telecommunications Carrier in the State of Ohio*. See 10-429, Finding and Order, May 19, 2011, at 10.

The Commission notes that TracFone and Virgin Mobile assert that they are unable to avail themselves of the collection mechanisms provided pursuant to Section 4931.61(A)(1) and (2), Revised Code, due to the fact that the end user does not receive a bill and does not maintain a balance of rollover minutes. While such conditions may not exist, Section 4931.61(A)(3), Revised Code, provides that for any subscriber of prepaid wireless service, a wireless service provider or reseller shall calculate the wireless 9-1-1 charge by dividing the total earned prepaid wireless telephone revenue from sales within this state received by the wireless service provider or reseller during the month by fifty, multiplying the quotient by twenty-eight cents and remitting this amount pursuant to division (A)(1) of Section 4931.62, Revised Code. Therefore, the Commission concludes that this support mechanism places the obligation of remittance on the ETC independent of an end user bill or existence of a balance of rollover minutes. Specifically, the Commission believes that division (A)(3) exists specifically for business models, such as TracFone and Virgin Mobile, that do not fit under division (A)(1) or (2). Otherwise, there would be no reason for the inclusion of division (A)(3) under the statute.

Although both TracFone and Virgin Mobile consider such a recovery to be an inappropriate tax, it is not a tax at all. Rather, it is simply a support mechanism to ensure that the public interest is served through the continued offering of 9-1-1 and TRS systems. Pursuant to the positions advocated by TracFone and Virgin Mobile, one of two results will occur. First, TracFone and Virgin Mobile will be treated differently from all other ETCs in the state of Ohio and will unduly benefit as a result of their Lifeline subscribers receiving the benefits of 9-1-1 and TRS notwithstanding the fact that no support contribution is made on behalf of their customers. The alternative scenario is the untenable result that the "nonbilled, free" Lifeline customers of TracFone and Virgin Mobile not receive access to 9-1-1 and TRS services. Neither of these results is acceptable. Rather, to the extent that TracFone and Virgin Mobile desire to continue offering their respective "nonbilled, free" Lifeline service offering, they should contribute the appropriate support consistent with Section 4931.61(A)(3), Revised Code, and either self-fund these contributions or redesign their service offerings in order that their subscribers can contribute towards this support either through an additional charge or through the deduction of rollover minutes.

Further, contrary to the position advocated by Virgin Mobile, the required support contributions do not violate the Supremacy Clause of the U.S. Constitution through the imposition of a tax on the federal government. In regard to this determination, the Commission points out that the Lifeline subscriber is the actual recipient of the federal Lifeline support. Through the existing process, the Lifeline subscribers allocate their subsidy to the CETC for the purpose of reimbursing the company for its provisioned service. This subsidy is utilized for the purpose of providing eligible subscribers with a specified number of minutes each month. The value of this benefit is unchanged as a result of the Commission's Finding and Order due to the fact that value of a subscriber's monthly allotment of minutes remains the same. Any applicable 9-1-1 and TRS surcharge is unrelated to

the monthly number of minutes received by the Lifeline subscriber.

Separate and apart from the number of minutes utilized by an individual Lifeline subscriber, the Commission is simply requiring that CETCs, like all other regulated telephone companies, contribute support to the 9-1-1 and TRS systems in the state of Ohio due to the fact that they have subscribers who may avail themselves of those systems. This is nothing more than good, nondiscriminatory public policy. To do otherwise will result in others being required to subsidize the Lifeline subscribers of TracFone and Virgin Mobile relative to 9-1-1 and TRS.

Finally, the Commission emphasizes that pursuant to Section 4927.02(A)(9), Revised Code,

It is the policy of the state to not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services.

Therefore, consistent with this policy directive, the Commission cannot continue to allow TracFone and Virgin Mobile to gain a competitive advantage due to their unwillingness to contribute towards the provision of 9-1-1 and TRS service, while their competitors continue to be required to provide the necessary contributions.

- (8) With respect to the second assignment of error regarding the requirement that all wireless resellers of Lifeline service shall remit any previously unremitted funds that would have been collected at such time as the provider was first designated as a CETC in the state of Ohio, the Commission finds that the applications for rehearing should be denied. In particular, the Commission finds that this directive does not constitute retroactive ratemaking on behalf the Commission. Rather, the designation of both companies as an ETC was conditioned upon their contribution to the state of Ohio's 9-1-1 service and TRS for all of their wireless subscribers, including those

enrolled in Lifeline service. See 97-632, Supplemental Finding and Order, May 21, 2009, at 13; 10-429, Finding and Order, May 19, 2011, at 10.

Additionally, the Commission highlights that pursuant to Section 4905.84, Revised Code, those carriers required by federal law to provide customers access to TRS are to be assessed an annual fee to cover the costs incurred by the TRS provider. The affected carriers include commercial mobile radio service providers.

Therefore, these were not new obligations but, rather, existed from the time that TracFone and Virgin Mobile commenced provisioning Lifeline service in the state of Ohio. In other words, notwithstanding the Commission's May 23, 2012, Finding and Order, both companies were already obligated to comply with the obligation to contribute to 9-1-1 and TRS support on behalf of their Lifeline customers. Further, the Commission notes that the requirement of CETCs contributing to support the state of Ohio's 9-1-1 service and TRS, as well as the payment of the annual Commission assessment, are not limited to wireless resellers of Lifeline service, but have been applied to all designated wireline and wireless CETCs.

Finally, the Commission clarifies that while all wireless resellers of Lifeline service are required to remit any previously unremitted funds that would have been collected as of the time that the provider was first designated as a CETC, this requirement is also applicable to all CETCs, including wireline providers, to the extent that have not been properly remitting their 9-1-1 fees.

It is, therefore,

ORDERED, That the applications for rehearing be denied in accordance with Findings (6), (7), and (8). It is, further,

ORDERED, That, to the extent not specifically addressed, all other arguments are denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

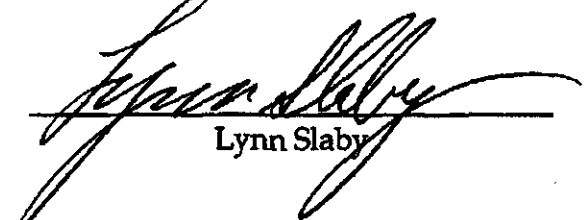
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser

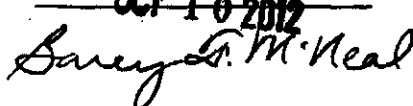

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