

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Virgin Mobile USA, L.P. Petition for)	CC Docket No. 96-45
Forbearance from 47 U.S.C. § 214(e)(1)(A))	
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in the State of New)	
York)	
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in the State of)	
Pennsylvania)	
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in the State of)	
Virginia)	
)	
Petition for Limited Designation as an Eligible)	
Telecommunications Carrier in the State of North)	
Carolina)	
)	
Petition for Limited Designation as an Eligible)	
Telecommunications Carrier in the State of)	
Tennessee)	

ORDER

Adopted: March 4, 2009

Released: March 5, 2009

By the Commission:

I. INTRODUCTION

1. In this order, we conditionally grant a petition filed by Virgin Mobile USA, L.P. (Virgin Mobile) pursuant to section 10 of the Communications Act of 1934, as amended (the Act), requesting that the Commission forbear from the requirement that a carrier designated as an eligible telecommunications carrier (ETC) for purposes of federal universal service support provide services, at least in part, over its own facilities.¹ Subject to the conditions that we describe below, we grant Virgin Mobile forbearance from the facilities requirement for ETC designation for Lifeline support only.

2. We also conditionally grant the petitions of Virgin Mobile for limited designation as an ETC eligible only to receive universal service Lifeline support in its licensed service areas in New York.

¹ Virgin Mobile USA, L.P. Petition for Forbearance, CC Docket No. 96-45 (filed Dec. 5, 2007) (Forbearance Petition). On December 5, 2008, pursuant to section 10(c) of the Act, the Wireline Competition Bureau extended until March 5, 2009 the date on which the Forbearance Petition shall be deemed granted in the absence of a Commission decision that the petition fails to meet the standard for forbearance under section 10(a) of the Act. *Virgin Mobile USA, L.P. Petition for Forbearance*, CC Docket No. 96-45, Order, DA 08-2670 (Wireline Comp. Bur., rel. Dec. 5, 2008); 47 U.S.C. § 214(e).

Virginia, North Carolina, and Tennessee, pursuant to section 214(e)(6) of the Act.² Due to the Pennsylvania Public Utility Commission's assertion of jurisdiction over wireless ETC designations, we dismiss without prejudice Virgin Mobile's petition for designation as an ETC in Pennsylvania.³ Having conditionally granted Virgin Mobile's petition for forbearance from the facilities requirement of section 214(e)(1), we now conclude that Virgin Mobile has satisfied the remaining eligibility requirements of section 214(e)(1) and the Commission's rules to be designated as an ETC eligible only for Lifeline support.⁴ Virgin Mobile's ETC designations will not take effect until the Wireline Competition Bureau has approved Virgin Mobile's plan for complying with the conditions outlined in this order.⁵

II. BACKGROUND

A. Procedural History

3. Virgin Mobile is a non-facilities-based commercial mobile radio service (CMRS) provider (i.e., a pure wireless reseller) that provides prepaid wireless telecommunications services.⁶ On December 5, 2007, Virgin Mobile filed a petition 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.⁷ Virgin Mobile states that its request for forbearance satisfies the statutory requirements and is in the public interest.⁸ Further, Virgin Mobile agrees to abide by the

² Virgin Mobile USA, L.P. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45 (filed Dec. 5, 2007) (New York ETC Petition); Virgin Mobile USA, L.P. Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, CC Docket No. 96-45 (filed Dec. 5, 2007) (Virginia ETC Petition); Virgin Mobile USA, L.P. Petition for Limited Designation as an Eligible Telecommunications Carrier in North Carolina, CC Docket No. 96-45 (filed Apr. 29, 2008) (North Carolina Petition); Virgin Mobile USA, L.P. Petition for Limited Designation as an Eligible Telecommunications Carrier in Tennessee, CC Docket No. 96-45 (filed Apr. 29, 2008) (Tennessee Petition). In its petitions filed in December 2007, Virgin Mobile requested eligibility for participation in the Lifeline and Link-Up programs; it later limited its request in its ETC petitions to eligibility for Lifeline support only. Virgin Mobile USA, L.P. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45 (filed May 7, 2008); Virgin Mobile USA, L.P. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45 (filed May 7, 2008). Virgin Mobile does not seek eligibility for high-cost support.

³ Virgin Mobile USA, L.P. Petition for Designation as an Eligible Telecommunications Carrier in the State of Pennsylvania, CC Docket No. 96-45 (filed Dec. 5, 2007) (Pennsylvania ETC Petition). Virgin Mobile later amended its request for ETC designation in Pennsylvania to limit its eligibility for federal universal service support to the Lifeline program only. Virgin Mobile USA, L.P. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania, CC Docket No. 96-45 (filed May 7, 2008). See *infra* para. 33 (discussing jurisdiction of the Pennsylvania Public Utility Commission).

⁴ Lifeline is the universal service low-income program that provides discounts to qualified low-income consumers on their monthly telephone bills. See 47 C.F.R. §§ 54.401-54.409.

⁵ See *infra* para. 44.

⁶ Forbearance Petition at 2.

⁷ See Forbearance Petition. On December 13, 2007, the Bureau issued a public notice seeking comment on Virgin Mobile's Forbearance Petition. *Comment Sought on Virgin Mobile's Petitions for Forbearance and Designation as an Eligible Telecommunications Carrier in the State of New York and Commonwealths of Pennsylvania and Virginia*, CC Docket No. 96-45. Public Notice, 22 FCC Rcd 21538 (Wireline Comp. Bur. 2007) (*Virgin Mobile Forbearance and ETC Public Notice*). Comments on the Forbearance Petition were filed by the National Association of State Utility Consumer Advocates and the Public Utility Law Project of New York, Inc. (NASUCA/PULP), the Pennsylvania Public Utility Commission, and the United States Telecom Association (USTelecom). Reply comments were filed by NASUCA and Virgin Mobile.

⁸ Forbearance Petition at 8-13.

conditions imposed on TracFone Wireless, Inc. (TracFone) as part of the Commission's decision granting TracFone's request to forbear from the ETC facilities requirement for Lifeline support only.⁹ Specifically, in the *TracFone Forbearance Order*, the Commission required TracFone to: (a) provide its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes; (b) provide its Lifeline customers with E911-compliant handsets and replace, at no additional charge to the customer, non-compliant handsets of existing customers who obtain Lifeline-supported service; (c) comply with conditions (a) and (b) as of the date it provides Lifeline service; (d) obtain a certification from each Public Safety Answering Point (PSAP) where TracFone provides Lifeline service confirming that TracFone provides its customers with 911 and E911 access; (e) require its customers to self-certify at the time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from TracFone; and (f) establish safeguards to prevent its customers from receiving multiple TracFone Lifeline subsidies at the same address.¹⁰ Recently, the Commission modified condition (d) to allow TracFone to self-certify compliance if, within 90 days of TracFone's request, a PSAP has not provided the certification and the PSAP has not made an affirmative finding that TracFone does not provide its customers with access to 911 and E911 service within the PSAP's service area.¹¹

4. Contemporaneously with the Forbearance Petition, Virgin Mobile filed petitions seeking limited ETC designation in New York, Pennsylvania and Virginia, and on April 29, 2008, Virgin Mobile filed petitions seeking limited ETC designation in North Carolina and Tennessee.¹²

B. Applicable Statutes and Rules

5. The Act provides that only an ETC shall be eligible for universal service high-cost and low-income support.¹³ Section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations.¹⁴ Section 214(e)(6) directs the Commission, upon request, to designate

⁹ *Petition of TracFone Wireless, Inc. for Forbearance from 47 U.C.S. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15098-9, para. 5 (2005) (*TracFone Forbearance Order*); Letter from Peter Lurie, Virgin Mobile, to Marlene H. Dortch, FCC, CC Docket No. 96-45, at 2 (filed July 10, 2008) (July 10 *Ex Parte* Letter); Letter from John M. Beahn, Counsel for Virgin Mobile, to Marlene H. Dortch, FCC, CC Docket No. 96-45, Attach at 6 (filed Oct. 24, 2008) (October 24 *Ex Parte* Letter).

¹⁰ *TracFone Forbearance Order*, 20 FCC Rcd at 15098-99, para. 5.

¹¹ *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc.*, CC Docket No. 96-45, Order, FCC 09-16 (rel. Mar. 5, 2009) (*TracFone PSAP Certification Modification Order*).

¹² See *supra* note 2. The Wireline Competition Bureau sought comments on the five Virgin Mobile ETC designation petitions. *Virgin Mobile Forbearance and ETC Public Notice*, 22 FCC Rcd at 21538; *Comment Sought on Petitions Filed by Virgin Mobile USA, L.P. for Limited Designation as an Eligible Telecommunications Carrier in North Carolina and Tennessee*, CC Docket No. 96-45, Public Notice, 23 FCC Rcd 8297 (Wireline Comp. Bur. 2008). Comments on Virgin Mobile's ETC petitions were filed by the St. Regis Mohawk Tribe and TracFone.

¹³ 47 U.S.C. § 254(e). A carrier need not be an ETC to participate in the schools and libraries or rural health care universal service programs. 47 U.S.C. § 254(h)(1)(A) and (B)(ii). See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9015, para. 449 (1997) (*Universal Service First Report and Order*) (subsequent history omitted) (concluding that any telecommunications carrier, not just ETCs, may receive universal service support for providing supported services to schools and libraries); see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-46, Fourteenth Order on Reconsideration, 14 FCC Rcd 20106, 20114-5, para. 19 (1999) (*Fourteenth Order on Reconsideration*) (finding that although only ETCs may receive universal service support, a non-ETC that provides supported services to eligible rural health care providers may offset the value of the discount provided against its universal service contribution obligation and, to the extent such discount exceeds its contribution obligation, receive a refund).

¹⁴ 47 U.S.C. § 214(e)(2); see *Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (*Twelfth Report and Order*).

as an ETC “a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission.”¹⁵ Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1).¹⁶ Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.¹⁷ Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.¹⁸ To be eligible for ETC designation, a carrier must also meet certain statutory requirements including offering service over its own facilities or a combination of its own facilities and resale of another carrier’s service.¹⁹

6. The low-income support mechanism of the universal service fund consists of the Lifeline and Link-Up programs.²⁰ Collectively, the Lifeline and Link-Up programs are designed to reduce the monthly cost of telecommunications service and the cost of initial connection, respectively, for qualifying consumers. Lifeline provides low-income consumers with discounts of up to \$10.00 off the monthly cost of telephone service.²¹ Link-Up provides low-income consumers with discounts of up to \$30.00 off the initial costs of installing telephone service.²² Recognizing the unique needs and characteristics of tribal communities, enhanced Lifeline and Link-Up provide qualifying low-income individuals living on tribal lands with up to \$25.00 in additional discounts off the monthly costs of telephone service and up to \$70.00 more off the initial costs of installing telephone service.²³ Virgin Mobile seeks eligibility to receive support only for the Lifeline portion of the low-income program.²⁴

7. The Commission had in the past declined to extend ETC status to pure resellers. In the *Universal Service First Report and Order*, the Commission found that the plain language of the statute requires that a carrier seeking ETC designation must own facilities, at least in part, thus precluding a carrier that offers services solely through resale from being designated as eligible.²⁵ The Commission

¹⁵ 47 U.S.C. § 214(e)(6).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 47 U.S.C. § 214(e)(1); *see also* 47 C.F.R. § 54.201(d).

¹⁹ 47 U.S.C. § 214(e)(1)(A).

²⁰ 47 C.F.R. §§ 54.401, 54.411.

²¹ *See* 47 C.F.R. § 54.401(a)(2).

²² *See* 47 C.F.R. § 54.411(a)(1).

²³ *See* 47 C.F.R. §§ 54.405(a)(4), 54.411(a)(3). Under the Commission’s rules, there are four tiers of federal Lifeline support. All eligible subscribers receive Tier 1 support, which provides a discount equal to the ETC’s subscriber line charge. Tier 2 support provides an additional \$1.75 per month in federal support, available if all relevant state regulatory authorities approve such a reduction. (All fifty states have approved this reduction.) Tier 3 of federal support provides one half of the subscriber’s state Lifeline support, up to a maximum of \$1.75. Only subscribers residing in a state that has established its own Lifeline/Link-Up 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. Tier 4 support provides eligible subscribers living on tribal lands up to an additional \$25 per month towards reducing basic local service rates, but this discount cannot bring the subscriber’s cost for basic local service to less than \$1. *See* 47 C.F.R. § 54.403.

²⁴ *See supra* note 2.

²⁵ *Universal Service First Report and Order* 12 FCC Rcd at 8875, para. 178 (adopting the Federal-State Joint Board on Universal Service’s analysis and conclusion); *see Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 172-73, paras. 160-161 (Fed-State Jt. Bd. 1996).

reasoned, without distinguishing among the various universal service support programs, that it was appropriate to deny pure resellers universal service support because pure resellers could receive the benefit by purchasing wholesale services at a price that reflects the universal service support received by the incumbent provider.²⁶ Also in the *Universal Service First Report and Order*, the Commission found that although resellers were not eligible to receive universal support directly, they were not precluded from offering Lifeline services.²⁷ Resellers could offer Lifeline services by purchasing services at wholesale rates pursuant to section 251(c)(4) that reflect the customer-specific Lifeline support amount received by the incumbent local exchange carrier (LEC) and then passing these discounts through to qualifying low-income customers.²⁸ The Commission, in so finding, considered only that the underlying carrier was an incumbent LEC, subject to price-regulated resale obligations. Further, the Commission declined to forbear from the facilities requirement, finding that the statutory criteria had not been met.²⁹ Making no finding with respect to the first two prongs, the Commission concluded that forbearance was not in the public interest because allowing pure resellers to receive universal service support would result in double recovery by the resellers.³⁰ In making this finding, the Commission again did not distinguish among the various universal service support programs. Specifically, it did not consider whether providing only Lifeline support directly to a pure wireless reseller would result in double recovery.

8. In the 2005 *TracFone Forbearance Order*, however, the Commission determined that providing only Lifeline support directly to a pure wireless reseller did not result in double recovery.³¹ Specifically, the Commission found that because low-income support distribution is customer-specific and because TracFone's wholesale providers are not subject to section 251(c)(4) resale obligations, providing Lifeline support directly to TracFone would not result in double recovery.³²

C. Commission Requirements for ETC Designations

9. An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c) of the Act; (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of the [supported] services and the charges therefore using media of general distribution;" and (5) if the petitioner meets the definition of a "rural telephone company" under section 3(37) of the Act, the identity of its study area, or, if the petitioner is not a "rural telephone company," a detailed description of the geographic service area for which it requests an ETC designation from the Commission.³³

²⁶ *Universal Service First Report and Order*, 12 FCC Rcd at 8866, para. 161 and 8875, para. 178.

²⁷ *Id.* at 8972, para. 370.

²⁸ *Id.* The Commission noted that it would reassess this approach in the future if the Lifeline program appeared to be under-utilized. *Id.*

²⁹ *Id.* at 8875-76, para. 179.

³⁰ *Id.*

³¹ *TracFone Forbearance Order*, 20 FCC Rcd at 15100, para. 12.

³² *Id.* at 15100-01, para.12; 47 U.S.C. § 251(c)(4).

³³ See *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (*Section 214(e)(6) Public Notice*).

10. In the *ETC Designation Order*, the Commission adopted additional requirements for ETC designation proceedings in which the Commission acts pursuant to section 214(e)(6) of the Act.³⁴ Specifically, consistent with the recommendation of the Federal-State Joint Board on Universal Service, the Commission found that an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.³⁵ In addition, ETCs designated by the Commission pursuant to section 214(e)(6) of the Act must file annual reports with the Commission.³⁶

11. Prior to designating an ETC pursuant to section 214(e)(6) of the Act, the Commission determines whether such designation is in the public interest.³⁷ In the *ETC Designation Order*, the Commission adopted one set of criteria for evaluating the public interest for ETC designations for both rural and non-rural areas.³⁸ Specifically, in determining the public interest, the benefits of increased consumer choice and the unique advantages and disadvantages of the applicant's service offering are considered.³⁹ As the Commission noted in the *ETC Designation Order*, however, the same factors may be analyzed differently or may warrant a different outcome depending on the specifics of the proposed service area and whether it is rural or non-rural.⁴⁰

III. DISCUSSION

A. Forbearance Petition

12. For the reasons provided below, we conditionally grant Virgin Mobile's request for forbearance from section 214(e) of the Act for the purpose of considering its requests for limited ETC designation eligible for Lifeline support only.⁴¹ This forbearance grant is conditioned on Virgin Mobile

³⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371 (2005) (*ETC Designation Order*); see also *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1564, 1565, 1575-76, 1584-85, paras. 1, 4, 27, 28, 46 (2004) (*Virginia Cellular Order*); *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6438, paras. 1, 33 (2004) (*Highland Cellular Order*).

³⁵ See *ETC Designation Order*, 20 FCC Rcd at 6380, para. 20 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 19 FCC Rcd 4259, para. 5 (Fed-State Jt. Bd. 2004)); 47 C.F.R. § 54.202.

³⁶ 47 C.F.R. § 54.209.

³⁷ 47 U.S.C. § 214(e)(6); 47 C.F.R. § 54.202(c). See *ETC Designation Order*, 20 FCC Rcd at 6388-96, paras. 40-57; *Virginia Cellular Order*, 19 FCC Rcd at 1575, para. 27; *Highland Cellular Order*, 19 FCC Rcd at 6431-32, para. 21. The Commission places the burden on the ETC applicant to demonstrate that the public interest is served. *ETC Designation Order*, 20 FCC Rcd at 6390, para. 44.

³⁸ *ETC Designation Order*, 20 FCC Rcd at 6389-90, paras. 42-43.

³⁹ 47 C.F.R. § 54.202(c).

⁴⁰ *ETC Designation Order*, 20 FCC Rcd at 6390, para. 43. In analyzing the public interest factors in this instance, there is no rural/non-rural distinction because Lifeline support, unlike high-cost support, is not determined based on whether the service area is rural or non-rural. See 47 C.F.R. § 54.403.

⁴¹ In addition, and on our own motion, we forbear from section 54.201(d)(1) of the Commission's rules. 47 C.F.R. § 54.201(d)(1). This section mirrors section 214(e) of the Act and requires that ETCs be facility-based, at least in part.

complying with the following conditions: (a) provide its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes; (b) provide its Lifeline customers with E911-compliant handsets and replace, at no additional charge to the customer, non-compliant handsets of existing customers who obtain Lifeline-supported service; (c) comply with conditions (a) and (b) as of the date it provides Lifeline service; (d) obtain a certification from each PSAP where Virgin Mobile provides Lifeline service confirming that Virgin Mobile provides its customers with 911 and E911 access or if, within 90 days of Virgin Mobile's request for certification, a PSAP has not provided the certification and the PSAP has not made an affirmative finding that Virgin Mobile does not provide its customers with access to 911 and E911 service within the PSAP's service area, Virgin Mobile may self-certify that it meets the basic and E911 requirements; (e) require its customers to self-certify at time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from Virgin Mobile; and (f) establish safeguards to prevent its customers from receiving multiple Virgin Mobile Lifeline subsidies at the same address.⁴² Finally, as explained below, within thirty days of the release of this order, we require Virgin Mobile to file with the Commission a plan outlining the measures it will take to implement these conditions.

13. Section 10 of the Act requires that the Commission forbear from applying any regulation or any provision of the Act to telecommunications services or telecommunications carriers, or classes thereof, in any or some of its or their geographic markets, if the Commission determines that the three conditions set forth in section 10(a) are satisfied.⁴³ Specifically, section 10(a) provides that the Commission shall forbear from applying such provision or regulation if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴⁴

For the reasons discussed below regarding our conditional grant of Virgin Mobile's forbearance request, we find that forbearance from section 54.201(d)(1) is warranted.

⁴² See *TracFone Forbearance Order*, 20 FCC Rcd at 15098-99. Commenters have raised concerns about the administrative costs, complexities, and burdens of granting Virgin Mobile's Forbearance Petition and its associated ETC designation petitions. See USTelecom Comments at 2; PA PUC Comments at 2. We find that granting Virgin Mobile this conditional forbearance will serve to further the statutory goal of providing telecommunications access to low-income subscribers while establishing the necessary safeguards to protect the universal service fund and the functioning of the low-income support mechanism. To the extent, however, that our predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, the parties can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21508-9, para. 26 n.85 (2004); see also *Petition of SBC Communications Inc. for Forbearance from Structural Separations Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004); *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998). Additionally, we expect that the conditions we impose here will be incorporated into any grant of the ETC designation petitions and any violation of such conditions may result in loss of ETC status.

⁴³ 47 U.S.C. § 160(a).

⁴⁴ *Id.*

14. In addition, when considering the public interest prong under section 10(a)(3) of the Act, the Commission must consider “whether forbearance ... will promote competitive market conditions.”⁴⁵ If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.⁴⁶ Forbearance is warranted, however, only if all three prongs of the test are satisfied. For the reasons explained below, we find that Virgin Mobile satisfies all three prongs.

15. As in the *TracFone Forbearance Order*, in analyzing Virgin Mobile’s Forbearance Petition we must consider the statutory goals of two related but different provisions of the Act.⁴⁷ We first examine the statutory goals of universal service in section 254 of the Act specifically in the context of “low-income consumers.”⁴⁸ We then consider the statutory purpose underpinning the facilities requirement in section 214(e) of the Act as it relates to carriers qualifying for federal low-income universal service support.⁴⁹ After careful examination of the regulatory goals of universal service as applied to low-income consumers, we determine that a facilities requirement for ETC designation is not necessary to ensure that a pure wireless reseller’s charges, practices, classifications or regulations are just and reasonable when that carrier seeks such status solely for the purpose of providing Lifeline-supported services. Indeed, for the reasons provided below, we find that the facilities requirement impedes greater utilization of Lifeline-supported services provided by a pure wireless reseller.

16. Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934.⁵⁰ Congress renewed its concern for low-income consumers in the Telecommunications Act of 1996 when it established the principles that guide the advancement and preservation of universal service.⁵¹ Specifically, the Act directs the Commission to consider whether “consumers in all regions of the Nation, *including low-income consumers* and those in rural, insular, and high cost areas, ... have access to telecommunications [services] ... at rates that are reasonably comparable to rates charged ... in urban areas.”⁵² We therefore examine the facilities requirement from which Virgin Mobile seeks forbearance in light of the statute’s goal of providing low-income consumers with access to telecommunications services.

17. Just and Reasonable: As an initial matter, we note that a provision or regulation is “necessary” if there is a strong connection between the requirement and regulatory goal.⁵³ Section 10(a)(1) of the Act requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation for Lifeline support only is necessary to ensure that the charges, practices, classifications or regulations are just and reasonable and not unjustly or unreasonably discriminatory.⁵⁴

⁴⁵ 47 U.S.C. § 160(b).

⁴⁶ *Id.*

⁴⁷ *TracFone Forbearance Order*, 20 FCC Rcd at 15099-100, para. 6.

⁴⁸ 47 U.S.C. § 254(b)(3).

⁴⁹ 47 U.S.C. § 214(e).

⁵⁰ 47 U.S.C. § 151 (“to make available, so far as possible, *to all the people* of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable rates”) (emphasis added).

⁵¹ 47 U.S.C. § 254(b); see *Universal Service First Report and Order*, 12 FCC Rcd at 8789, para. 21 and 8793, para. 27.

⁵² 47 U.S.C. § 254(b)(3) (emphasis added).

⁵³ See *CTIA v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003).

⁵⁴ 47 U.S.C. § 160(a)(1); 47 U.S.C. § 214(e).

18. As the Commission found in the *TracFone Forbearance Order*, the facilities requirement is not necessary to ensure that Virgin Mobile's charges, practices, and classifications are just and reasonable and not unjustly or unreasonably discriminatory where it is providing Lifeline service only. As discussed above, in the *Universal Service First Report and Order* the Commission declined to extend ETC status to pure resellers because it was concerned about double recovery of universal service support.⁵⁵ In making this decision, however, the Commission considered the issue in the context of wireline resellers and without differentiating among the types of universal service support and the basis of distribution. Lifeline support, designed to reduce the monthly cost of telecommunications services for eligible consumers, is distributed on a per-customer basis and is directly reflected in the price that the eligible customer pays.⁵⁶ Because it is customer-specific, a carrier who loses a Lifeline customer to a reseller would no longer receive the Lifeline support to pass through to that customer. The issue of double-recovery about which the Commission was concerned in the *Universal Service First Report and Order* was applicable only when the underlying wholesale provider was an incumbent LEC subject to regulated resale rates under section 251(c)(4).⁵⁷ In that case, the Commission was concerned that a reseller would receive both the benefit of the statutorily-mandated lower resale rates as well as receiving the universal service subsidy for serving the Lifeline customer.⁵⁸ That, however, is not the case before us. Because Virgin Mobile's CMRS wholesale provider, Sprint Nextel, is not subject to section 251(c)(4) resale obligations, the resold services do not reflect a reduction in price due to Lifeline support.⁵⁹ Therefore, we find that allowing Virgin Mobile to receive Lifeline support directly from the fund would not result in double recovery to Virgin Mobile and that the concern raised by the Commission in the *Universal Service First Report and Order* does not apply here.

19. As in the *TracFone Forbearance Order*, we find that Virgin Mobile, as a reseller, is by definition subject to competition and that this competition ensures that its rates are just and reasonable and not unjustly or unreasonably discriminatory.⁶⁰ We note that Virgin Mobile's Lifeline offering will compete with at least one other Lifeline offering, whether from the underlying CMRS provider, if this provider is an ETC, or from the incumbent wireline carrier.⁶¹ We also believe that this competition will spur innovation amongst carriers in their Lifeline offerings, expanding the choice of Lifeline products for eligible consumers. We note that Virgin Mobile purchases wireless network services on a wholesale basis from Sprint Nextel and manages and markets the entire customer relationship.⁶²

20. For the reasons provided above, we find that the requirements of the first prong of section 10(a) are met. Where, as here, the wireless reseller is forgoing all universal service support but Lifeline, which is customer-specific and is designed to make telecommunication service affordable to eligible consumers, the facilities requirement is unnecessary to preserve the integrity of the universal service program or the fund. By limiting Virgin Mobile's eligibility to Lifeline support, the facilities requirement is not necessary to ensure that Virgin Mobile's charges, practices, and classifications are just and reasonable.

⁵⁵ See *supra* para. 7; *Universal Service First Report and Order*, 12 FCC Rcd at 8861, 8873, 8875, paras. 151-152, 174, and 178.

⁵⁶ 47 C.F.R. §§ 54.401, 54.504.

⁵⁷ See *Universal Service First Report and Order*, 12 FCC Rcd at 8876, para. 179; 47 C.F.R. § 251(c)(4).

⁵⁸ See *Universal Service First Report and Order*, 12 FCC Rcd at 8876, para. 179.

⁵⁹ Virgin Mobile Reply Comments at 5.

⁶⁰ Forbearance Petition at 8; Virgin Mobile Reply Comments at 3.

⁶¹ See 47 C.F.R. § 54.405(a) (requiring ETCs to offer Lifeline service).

⁶² Forbearance Petition at 2. Virgin Mobile states that its customers pay in advance for its service without credit checks or long-term service contracts. *Id.*

21. Consumer Protection. Section 10(a)(2) requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation only for Lifeline support is necessary for the protection of consumers. We find that imposing a facilities requirement on a pure wireless reseller is not necessary for the protection of consumers subject to the conditions described below. Specifically, we conclude that forbearance from this provision will actually benefit consumers. Indeed, if Virgin Mobile is ultimately granted limited ETC status, it would be offering Lifeline-eligible consumers a choice of providers for accessing telecommunications services not available to such consumers today. The prepaid feature may be an attractive alternative for such consumers who need the mobility, security, and convenience of a wireless phone but who are concerned about usage charges or long-term contracts. We also note that Virgin Mobile states that its handsets are capable of transmitting enhanced 911 information to the appropriate PSAP.⁶³

22. Given the importance of public safety, we condition this grant of forbearance on Virgin Mobile's compliance with the E911 requirements applicable to wireless resellers, as modified below, for all Lifeline customers.⁶⁴ In light of the condition discussed below, that Virgin Mobile ensure its customers receive only one Lifeline-supported service, we find it essential that Virgin Mobile's Lifeline-supported service be capable of providing emergency access. Given the possibility that this Lifeline-supported service will be the customers' only means of accessing emergency personnel, we require that Virgin Mobile provide its Lifeline customers with access to basic and E911 service immediately upon activation of service.⁶⁵ To demonstrate compliance with this condition, Virgin Mobile must obtain a certification from each PSAP where it provides Lifeline service confirming that Virgin Mobile provides its customers with access to basic and E911 service. Virgin Mobile must furnish copies of the PSAP certifications to the Commission upon request.⁶⁶ To ensure that the benefits of Lifeline service are made available to Virgin Mobile's customers in a timely manner, however, we allow Virgin Mobile to self-certify compliance with the 911 and E911 availability condition if, within 90 days of Virgin Mobile's request, a PSAP has not provided the certification and the PSAP has not made an affirmative finding that Virgin Mobile does not provide its customers with access to 911 and E911 service within the PSAP's service area.⁶⁷ In making a request for certification, Virgin Mobile must notify the PSAP that Virgin Mobile has the option to self-certify within 90 days of the request if the PSAP has not provided the certification and the PSAP has not made an affirmative finding that Virgin Mobile does not provide its customers with access to 911 and E911 service. Virgin Mobile may not self-certify compliance until 90 days after it has provided a PSAP with notification of the 90-day self-certification period adopted in this

⁶³ Virgin Mobile Reply Comments at 8 (handsets compliant with 47 C.F.R. § 20.18(h)).

⁶⁴ In their jointly-filed comments NASUCA and PULP raise concerns about Virgin Mobile's ability to provide adequate 911 service if the TracFone conditions are not also imposed on Virgin Mobile. If the TracFone conditions are imposed on Virgin Mobile, NASUCA/PULP support grant of the Forbearance Petition. See NASUCA/PULP Comments at 4; NASUCA Reply Comments at 3.

⁶⁵ Under section 20.18(m) of our rules, wireless resellers have an independent obligation, beginning December 31, 2006, to provide access to basic and E911 service, to the extent that the underlying facilities-based licensee has deployed the facilities necessary to deliver E911 information to the appropriate PSAP. 47 C.F.R. § 20.18(m). Section 20.18(m) further provides that resellers have an independent obligation to ensure that all handsets or other devices offered to their customers for voice communications are location-capable. *Id.*

⁶⁶ We recognize that, as a practical matter, if Virgin Mobile's underlying facilities-based licensee has not deployed the facilities necessary to deliver E911 information to the appropriate PSAP, Virgin Mobile will not be able to offer Lifeline-supported service to customers residing in that area.

⁶⁷ If a PSAP has conducted testing and notified Virgin Mobile within the 90-day period of concerns regarding the ability of Virgin Mobile customers to access 911 and E911 services, Virgin Mobile may not self-certify compliance until it has addressed the PSAP's concerns (for example, issues with Virgin Mobile's underlying wireless provider concerning access to 911 and E911 services), such that the PSAP can provide the required certification. In this circumstance, Virgin Mobile may self-certify 180 days after requesting certification from the PSAP if the PSAP does not approve or deny the certification within that period.

order. Virgin Mobile also may not make such a self-certification until it has provided a PSAP with all of the information and/or equipment requested by the PSAP in analyzing Virgin Mobile's ability to provide 911 and E911 service to its customers. If Virgin Mobile makes such a self-certification, Virgin Mobile must obtain from each of its underlying carriers that provide service to Virgin Mobile in the area served by that PSAP certification that the carriers route 911 and E911 calls from Virgin Mobile customers to the PSAP in the same manner that they route 911 and E911 calls from their own customers. Virgin Mobile is required to retain such underlying carrier certifications and provide them to the Commission upon request. Virgin Mobile must provide PSAPs with copies of any self-certifications at the time they are filed. If after Virgin Mobile makes a self-certification a PSAP finds that Virgin Mobile does not provide its customers with 911 and E911 access, upon receiving notice of this finding Virgin Mobile must immediately notify the Commission of this finding and explain how it plans to come into compliance with this condition.

23. As an additional condition, Virgin Mobile must provide only E911-compliant handsets to its Lifeline customers, and must replace any non-compliant handset of an existing customer that obtains Lifeline-supported service with an E911-compliant handset, at no charge to the customer. The Commission has an obligation to promote "safety of life and property" and to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.⁶⁸ The provision of 911 and E911 services is critical to our nation's ability to respond to a host of crises, and this Commission has a longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans, including Lifeline customers.⁶⁹ We believe that these conditions are necessary to ensure that Virgin Mobile's Lifeline customers have meaningful access to emergency services. We reiterate that, with the possibility that the Lifeline service will be the customer's only access to emergency services and given the potential gravity of harm if such Lifeline customers cannot obtain such access, we believe that these conditions will further the protection of such Lifeline customers.

24. We are not persuaded by comments regarding the impact on the size of the universal service fund and the associated contribution obligation if we grant the Forbearance Petition.⁷⁰ Because section 10(a)(2) requires that we consider the welfare of all "consumers," we must consider the effect a grant of this petition will have on consumers who will likely shoulder the effects of any increased contribution obligation since carriers are permitted to recover their contribution obligations from customers.⁷¹ If Virgin Mobile is able to obtain ETC designation for Lifeline-only services, we do not expect this to significantly burden the universal service fund and thus negatively affect consumers through increased pass-through charges of the carriers' contribution obligations. The Commission has recognized the potential growth of the fund associated with high-cost support distributed to competitive ETCs.⁷² Virgin Mobile, however, would not be eligible for high-cost support. In 2007, low-income

⁶⁸ *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14020, para. 144 (2005).

⁶⁹ *Id.*

⁷⁰ See, e.g., PA PUC Comments at 4.

⁷¹ See 47 C.F.R. § 54.712.

⁷² See *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1577, para. 31 (2004); see also *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6433-4, para. 25 (2004); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers, RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, WC Docket No. 05-337, CC Docket No.

support accounted for only 11.8 percent of the distribution of the total universal service fund; whereas, high-cost support accounted for 61.06 percent.⁷³ Any increase in the size of the fund would be minimal and is outweighed by the benefit of increasing eligible participation in the Lifeline program, furthering the statutory goal of providing access to low-income consumers. Significantly, granting Virgin Mobile's Forbearance Petition will not have any effect on the number of persons eligible for Lifeline support.

25. We further safeguard the fund by imposing additional conditions on this grant of forbearance. Specifically, as a further condition of this grant of forbearance and in addition to all other required certifications under the program, we require that Virgin Mobile require its Lifeline customers to self-certify under penalty of perjury upon service activation and then annually thereafter that they are the head of household and only receive Lifeline-supported service from Virgin Mobile.⁷⁴ The penalties for perjury must be clearly stated on the certification form. Additionally, to further strengthen this requirement, we require that Virgin Mobile track its Lifeline customer's primary residential address and prohibit more than one supported Virgin Mobile service at each residential address.⁷⁵ We are confident that these conditions will eliminate concerns regarding Virgin Mobile's customers receiving more than one Lifeline subsidy per household.

26. Some commenters expressed concerns about Virgin Mobile distributing its service through retail outlets.⁷⁶ The PA PUC argues that Virgin Mobile will not have the requisite control over the retailer's employees to ensure compliance with Lifeline rules and certifications.⁷⁷ We recognize this possibility and thus, as required in the *TracFone Forbearance Order*, we also require that Virgin Mobile distribute its Lifeline service directly to its Lifeline customers. Specifically, while customers may purchase handsets at Virgin Mobile's retail outlets, we require that Virgin Mobile deal directly with the customer to certify and verify the customer's Lifeline eligibility. Virgin Mobile commits to implementing procedures that are analogous to the procedures discussed in the *TracFone Forbearance Order*.⁷⁸ Thus, Virgin Mobile must have direct contact with the customer, whether by telephone, fax, Internet, in-person consultation or otherwise, when establishing initial and continued eligibility.

27. In light of the conditions we have outlined here, we believe that appropriate safeguards are in place to deter waste, fraud, and abuse. We strive to balance our objective of increasing participation in the low-income program with our objective of preventing and deterring waste, fraud, and abuse. We find that we have struck the appropriate balance here. We are also mindful of the fact that other prepaid pure wireless carriers may similarly seek eligibility for Lifeline-only support. Given the

96-45, Order, 23 FCC Rcd 8834, 8837-38, paras. 6-7 (2008).

⁷³ *Trends in Telephone Service*, Wireline Competition Bureau, Federal Communications Commission, Table 19.1 and Chart 19.1 (Aug. 2008). As of March 2007, the average monthly federal support per non-tribal Lifeline customer was \$8.57. *Id.* at Table 19.7. See 47 C.F.R. § 54.403. Tribal customers are eligible for up to an additional \$25 per month in Lifeline support. 47 C.F.R. § 54.403(a)(4).

⁷⁴ To monitor compliance, we require that Virgin Mobile maintain the self-certifications and provide such documentation to the Commission upon request.

⁷⁵ Virgin Mobile has agreed to meet this and all of the conditions required of TracFone in the *TracFone Forbearance Order*. See July 10 *Ex Parte* Letter at 2; October 24 *Ex Parte* Letter, Attach at 9. These conditions are in addition to, and do not supplant, the certification and verification eligibility already required by our rules for federal default states and any similar state rules for the non-federal default states. See, e.g., 47 C.F.R. § 54.410 (requiring initial certification and annual verification of eligibility).

⁷⁶ See NASUCA Reply Comments at 2; PA PUC Comments at 5.

⁷⁷ PA PUC Comments at 5.

⁷⁸ Virgin Mobile Reply Comments at 9. The Commission rejected the point of sales procedure that would allow the prospective Lifeline customers to submit qualifying information to the retail vendor in the *TracFone Forbearance Order*. *TracFone Forbearance Order*, 20 FCC Rcd at 15104, para. 19.

safeguards we put in place aimed at ensuring that only eligible consumers receive such support and that they receive such support only once, we do not believe that similar requests will have a detrimental impact on the fund. We note that to the extent any similarly situated prepaid wireless reseller seeks forbearance from these requirements for the purpose of providing only Lifeline support, it will be expected to comply with all the conditions we imposed upon TracFone, which Virgin Mobile has agreed to do.⁷⁹

28. Accordingly, we find that, subject to the 911 and E911 conditions and the self-certification and address limitation conditions set out above, the ETC facilities-based requirement is not necessary for consumer protection. We thus conclude that the second prong of section 10(a) is satisfied.

29. Public Interest. Section 10(a)(3) requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation for Lifeline support only is in the public interest. In this instance, based on the record before us, we find that the statutory goal of providing telecommunications access to low-income consumers outweighs the requirement that Virgin Mobile own facilities, where Virgin Mobile, should it be designated an ETC, will be eligible only for Lifeline support. Thus, we find that requiring Virgin Mobile, as a wireless reseller, to own facilities does not necessarily further the statutory goals of the low-income program, which is to provide support to qualifying low-income consumers throughout the nation, regardless of where they live.

30. The Lifeline program is designed to reduce the monthly cost of telecommunications service for qualifying low-income consumers.⁸⁰ Presently only about one-third of households eligible for low-income assistance actually subscribe to the program.⁸¹ As noted in the *TracFone Forbearance Order*, we expanded eligibility criteria and outreach guidelines for federal default states in an effort to increase participation.⁸² In 2005, the Commission launched a joint initiative with the National Association of Regulatory Utility Commissioners to raise awareness of our Lifeline and Link-Up programs among low-income consumers.⁸³ We believe even more can be done to further expand participation by those subscribers that qualify and thus further the statutory goal of section 254(b). Therefore, consistent with the Commission's assertion in the *Universal Service First Report and Order* concerning under-utilization of the program, we conclude it is appropriate to consider the relief requested with the goal of expanding eligible participation in the program.⁸⁴ With only about one-third of Lifeline-eligible households actually subscribing, we believe that granting Virgin Mobile's Forbearance Petition serves the public interest in that it should expand participation of qualifying consumers. Accordingly, we conclude that forbearing from the facilities requirement for Lifeline support only, subject to the conditions set forth above, satisfies the requirements of section 10(a)(3).

31. Further, we reject USTelecom's argument that the Act does not allow carriers to pick and choose the type of universal service support that they will receive.⁸⁵ Consistent with the *TracFone*

⁷⁹ July 10 *Ex Parte* Letter at 2; October 24 *Ex Parte* Letter. Certain commenters advocate for the imposition of the TracFone conditions. See NASUCA/PULP Comments at 5; USTelecom Comments at 1-2; NASUCA Reply Comments at 1-2.

⁸⁰ 47 C.F.R. § 54.401. See Virgin Mobile Reply Comments at 6-7.

⁸¹ *Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8305, para. 1 and Appendix K at Table 1.B (2004).

⁸² *Id.* at 8305, para 1.

⁸³ *FCC and NARUC Launch "Lifeline Across America" to Raise Awareness of Lifeline and Link-Up Programs*, News Release (July 26, 2005).

⁸⁴ *Universal Service First Report and Order*, 12 FCC Rcd at 8972, para. 370.

⁸⁵ USTelecom Comments at 2.

Forbearance Order, we find it appropriate to exercise our forbearance authority under section 10(a)(1) of the Act to separate low-income support from high-cost for Virgin Mobile because the forbearance test is satisfied and grant of forbearance will benefit low-income consumers. USTelecom also states that the Forbearance Petition should be addressed in a broader docket that focuses on stabilizing and modernizing the universal service fund. Again, we disagree with this assertion. As discussed above, Lifeline support has been underutilized, and Virgin Mobile will not receive any high-cost support, which has been the primary source of concern in the growth of the universal service fund.⁸⁶

B. ETC Designation

1. Commission Authority to Perform the ETC Designation

32. Virgin Mobile has demonstrated that, except for the Pennsylvania Public Utility Commission, the relevant state commissions lack authority to perform the requested limited ETC designations, and the Commission has authority to consider Virgin Mobile's petitions under section 214(e)(6) of the Act. Each petition includes an affirmative statement from the relevant state commission providing that ETC designation should be sought from the Commission.⁸⁷ Accordingly, we find the relevant state commissions lack jurisdiction to designate Virgin Mobile as an ETC and that this Commission therefore has authority to perform the requested limited ETC designations under section 214(e)(6).⁸⁸

33. On February 26, 2009, the Pennsylvania Public Utility Commission announced that, effective as of that date, it will exercise jurisdiction to designate wireless carriers as ETCs pursuant to section 214(e)(2) of the Act.⁸⁹ In light of this development, and because section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations, we dismiss without prejudice the petition filed by Virgin Mobile seeking designation as an ETC in Pennsylvania. Virgin Mobile may re-file its petition with the Pennsylvania Public Utility Commission.

2. Analysis of the Eligibility Requirements

34. Offering the Services Designated for Support. Virgin Mobile has demonstrated, through the required certifications and related filings, that it now offers or will offer upon designation as a limited ETC the services supported by the Lifeline program.⁹⁰ We disagree with NASUCA/PULP who argue that Virgin Mobile cannot offer toll limitation service.⁹¹ As discussed above, we find that the prepaid nature of Virgin Mobile's service offering works as an effective toll control.⁹²

⁸⁶ See NASUCA Reply Comments at 2; Virgin Mobile Reply Comments at 4.

⁸⁷ New York Petition at 5-6 and Exh.1; Virginia Petition at 5-6 and Exh.1; North Carolina Petition at 5-6 and Exh.1; Tennessee Petition at 5-6 and Exh.1.

⁸⁸ 47 U.S.C. § 214(e)(6).

⁸⁹ See Letter from Joseph K. Witmer, Assistant Counsel, Pennsylvania Public Utility Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed Feb. 26, 2009) (attaching February 26, 2009 Pennsylvania Commission decision); 47 U.S.C. § 214(e)(2).

⁹⁰ 47 C.F.R. §§ 54.410(a), 54.101(a)(1)-(a)(9); see New York Petition at 9-11; Virginia Petition at 9-11; North Carolina Petition at 10-12; Tennessee Petition at 10-12.

⁹¹ See NASUCA/PULP Comments at 5 and n.14.

⁹² See *supra* para. 21; see also *TracFone ETC Order*, 23 FCC Rcd at 6212, para. 15.

35. Offering the Supported Services Using a Carrier's Own Facilities. As discussed above, we conditionally grant Virgin Mobile forbearance from the facilities requirement for purposes of this limited ETC designation, permitting Virgin Mobile to offer the supported services via resale only.⁹³

36. Advertising the Supported Services. Virgin Mobile has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the related charges "using media of general distribution."⁹⁴ Virgin Mobile has also stated that, in compliance with the Commission's Lifeline rules, it will advertise the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for those services.⁹⁵

37. Additional Eligibility Requirements. Virgin Mobile satisfies the applicable eligibility requirements set forth in the *ETC Designation Order*, described above.⁹⁶

3. Public Interest Analysis

38. We find that Virgin Mobile's universal service Lifeline offering will provide a variety of benefits to Lifeline-eligible consumers including increased consumer choice,⁹⁷ high-quality service offerings,⁹⁸ and mobility.⁹⁹ In addition, the prepaid feature, which essentially functions as a toll control feature, may be an attractive alternative to Lifeline-eligible consumers who are concerned about usage charges or long-term contracts.

39. As in the *TracFone ETC Order*, we condition Virgin Mobile's ETC designation for Lifeline support in New York, Virginia, North Carolina and Tennessee on Virgin Mobile's certification that it is in full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, and support, of 911 and E911 service.¹⁰⁰ Subject to this condition, we find, on balance, that the

⁹³ See *supra* para. 12.

⁹⁴ 47 U.S.C. § 214(e)(1)(B); see New York Petition at 12; Virginia Petition at 11; North Carolina Petition at 13; Tennessee Petition at 13.

⁹⁵ 47 C.F.R. § 54.405(b); see New York Petition at 12; Virginia Petition at 11; North Carolina Petition at 13; Tennessee Petition at 13.

⁹⁶ See *supra* para. 10; *ETC Designation Order*, 20 FCC Rcd at 6380, para. 20; 47 C.F.R. §§ 54.202(a), 54.209. For example, Virgin Mobile has committed to provide high-quality service, as demonstrated by committing to comply with the Consumer Code for Wireless Service of the Cellular Telecommunications Industry Association (CTIA), and to serve the designated areas within a reasonable time. Letter from Peter Lurie, Virgin Mobile USA L.P., to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-45, at 1-2 (filed Feb. 11, 2009) (February 11 *Ex Parte* Letter). Because Virgin Mobile is a pure reseller eligible for Lifeline support only, we do not require Virgin Mobile to demonstrate that it satisfies the network build-out and improvement requirements in section 54.202(a)(1)(ii) or to provide a certification that it acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other ETC is providing equal access within the service area pursuant to section 54.202(a)(5). 47 C.F.R. §§ 54.202(a)(1)(ii) and (a)(5).

⁹⁷ See New York Petition at 14; Virginia Petition at 13; North Carolina Petition at 15; Tennessee Petition at 15.

⁹⁸ For example, Virgin Mobile committed that it will comply with the Consumer Code for Wireless Service of the CTIA. February 11 *Ex Parte* Letter at 2.

⁹⁹ See, e.g., New York Amendment at 4-5; Virginia Amendment at 4-5. As noted in the *PSC Alabama Order*, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other locations. *PSC Alabama ETC Designation Order*, 20 FCC Rcd at 6861, para. 25. Moreover, the availability of a wireless universal service offering also provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. *Id.*

¹⁰⁰ See *TracFone ETC Order*, 23 FCC Rcd at 6206, 6213, para. 16. See NASUCA/PULP Comments at 4 (concerns about Virgin Mobile's 911 capabilities are assuaged by imposing TracFone conditions).

advantages of designating Virgin Mobile as a limited ETC in the designated service areas outweigh any potential disadvantages.¹⁰¹

4. Designated Service Areas

40. Based on the foregoing, we hereby designate Virgin Mobile as a limited ETC, eligible only for Lifeline support, in its licensed service areas in New York, Virginia, North Carolina, and Tennessee.¹⁰² In designating Virgin Mobile as a limited ETC, we clarify that Virgin Mobile's designated service areas do not encompass federally-recognized tribally-owned lands.¹⁰³

5. Regulatory Oversight and Compliance Plan

41. Under section 254(e) of the Act, Virgin Mobile is required to use the specific universal service support it receives "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."¹⁰⁴ An ETC receiving Lifeline support uses that support as intended when it reduces the price of its telecommunications services by the amount of the support for the eligible consumer.¹⁰⁵ Lifeline assistance shall be made available to qualifying low-income consumers after Virgin Mobile's compliance plan has been approved by the Wireline Competition Bureau as discussed below,¹⁰⁶ and the Universal Service Administrative Company (USAC) confirms that Virgin Mobile's Lifeline service offering satisfies the criteria in our rules and complies with the conditions imposed in this order.¹⁰⁷ In addition, Virgin Mobile must report certain information to the Commission and to USAC pursuant to section 54.209 of the Commission's rules.¹⁰⁸

42. We find that reliance on Virgin Mobile's commitments to meet these requirements is reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in *Texas*

¹⁰¹ As discussed above, we find that any effect on the universal service fund would be minimal, limited to the Lifeline program, and outweighed by the benefit of increasing eligible participation in the Lifeline program. See *supra* para. 23. See also *TracFone Forbearance Order*, 20 FCC Rcd 15103-04, para. 17. In addition, we need not perform a creamskimming analysis because Virgin Mobile is seeking eligibility for Lifeline support only.

¹⁰² Under this limited ETC designation, Virgin Mobile will not be eligible for support for Link Up or toll-limitation service under the low-income program, nor will it be eligible for high-cost support, or for schools and libraries and rural health care support as an ETC. Non-ETCs, however, may participate in certain aspects of the schools and libraries or rural health care programs. See *supra* n.10. See also *TracFone Forbearance Order*, 20 FCC Rcd at 15097, para. 3 & n.12.

¹⁰³ Virgin Mobile states that it does not request ETC designation for tribal lands. See February 11 *Ex Parte Letter* at n.4.

¹⁰⁴ 47 U.S.C. § 254(e). Because Virgin Mobile is not eligible to receive high-cost support, we do not require it to provide high-cost certifications under §§ 54.313 and 54.314 of our rules. See 47 C.F.R. §§ 54.313, 54.314.

¹⁰⁵ See *TracFone Forbearance Order*, 20 FCC Rcd at 15105-06, para. 26.

¹⁰⁶ See *infra* para. 44.

¹⁰⁷ See 47 C.F.R. § 54.401(d). As noted above, we find that Virgin Mobile's service offering meets the criteria for service and functionality contained in our rules. See *supra* III(B)(2).

¹⁰⁸ See 47 C.F.R. § 54.209(a) (specifying the information to be included in the annual reports submitted by ETCs): *ETC Designation Order*, 20 FCC Rcd at 6400-6402, paras. 68-69; see also *Virginia Cellular Order*, 19 FCC Rcd at 1584, para. 46 & n.140 (anticipating that annual submissions will encompass only the ETC's designated service areas). As noted above, as a pure reseller eligible for Lifeline support only, we do not require Virgin Mobile to report on network build-out and improvements or to certify that it acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area. See *supra* n. 33.

Office of Public Utility Counsel v. FCC.¹⁰⁹ These requirements will further the Commission's goal of ensuring that Virgin Mobile satisfies its obligation under section 214(e) of the Act to provide the services supported by the Lifeline program throughout its designated service areas.

43. Finally, we note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the universal service support an ETC receives is being used for the purpose for which it was intended.¹¹⁰ Virgin Mobile will be required to provide such records and documentation to the Commission and USAC upon request. If Virgin Mobile fails to fulfill the requirements of the Act, our rules, or the terms of this order after it begins receiving universal service Lifeline support, the Commission may revoke its limited ETC designation.¹¹¹ The Commission may also assess forfeitures for violations of its rules and orders.¹¹²

44. Within thirty days of the release of this order, we require that Virgin Mobile file with the Commission a plan outlining the measures it will take to implement the conditions in this order. This plan will be placed on public notice and comments will be sought on the plan. Virgin Mobile's ETC designations granted in this order will not be effective until the Wireline Competition Bureau has approved the compliance plan.

IV. ANTI-DRUG ABUSE ACT CERTIFICATION

45. Under section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued under section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits.¹¹³ Virgin Mobile has provided certifications consistent with the requirements of the Anti-Drug Abuse Act of 1988.¹¹⁴ We find that Virgin Mobile has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.¹¹⁵

¹⁰⁹ In *TOPUC*, the Fifth Circuit held that nothing in section 214(e)(2) of the Act prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) (*TOPUC*). Consistent with this holding, we find that nothing in section 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.

¹¹⁰ 47 U.S.C. §§ 220, 403.

¹¹¹ See *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15174, para. 15 (2000); 47 U.S.C. § 254(e); see also *TracFone Forbearance Order*, 20 FCC Rcd at 15099, para. 6, n.25.

¹¹² See 47 U.S.C. § 503(b).

¹¹³ 21 U.S.C. § 862; 47 C.F.R. § 1.2002(a)-(b). Section 1.2002(b) provides that a "party to the application" shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting and/or nonvoting) of the petitioner; and (3) If the application is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b). See *Section 214(e)(6) Public Notice*, 12 FCC Rcd at 22949.

¹¹⁴ See New York Petition at 15 and Exh. 2; Virginia Petition at 15 and Exh. 2; North Carolina Petition at 16 and Exh. 2; Tennessee Petition at 16 and Exh. 2.

¹¹⁵ 47 C.F.R. §§ 1.2001-2003.

V. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 10, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 160, 214, and 254, the petition for forbearance filed by Virgin Mobile USA, L.P. on December 5, 2007, IS GRANTED subject to the conditions set forth above and, on our own motion, we forbear from enforcing section 54.201(1)(d) of the Commission's rules, 47 C.F.R. § 54.201(1)(d), as discussed above.

47. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(e)(6), Virgin Mobile USA, L.P. IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER eligible only for Lifeline support in its licensed service areas in New York, Virginia, North Carolina, and Tennessee to the extent described in this order and subject to the conditions set forth herein, effective upon approval by the Wireline Competition Bureau of Virgin Mobile's compliance plan.

48. IT IS FURTHER ORDERED that, pursuant to section 214(e) of the Communications Act, 47 U.S.C. § 214(e), Virgin Mobile USA, L.P.'s petition for eligible telecommunications carrier designation in the commonwealth of Pennsylvania IS DISMISSED WITHOUT PREJUDICE to the extent described herein.

49. IT IS FURTHER ORDERED that Virgin Mobile USA, L.P. SHALL SUBMIT a compliance plan within 30 days of the release date of this order.

50. IT IS FURTHER ORDERED that Virgin Mobile USA, L.P. SHALL SUBMIT additional information pursuant to section 54.209 of the Commission's rules, 47 C.F.R. § 54.209, no later than October 1, 2009, as part of its annual reporting requirements.

51. IT IS FURTHER ORDERED that, pursuant to sections 1.103(a) and 1.4(b)(2) of the Commission's rules, 47 C.F.R. §§ 1.103(a) and 1.4(b)(2), this order SHALL BE effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary