

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Sprint
Communications Company, L.P. (U-5112) and T-Mobile
USA, Inc. a Delaware Corporation, For Approval of
Transfer of Control of Sprint Communications Company
L.P. Pursuant to California Public Utilities Code Section
854(a)

A.18-07-011
(Filed July 13, 2018)

And Related Matter.

A.18-07-012

OPENING BRIEF OF THE GREENLINING INSTITUTE

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Pursuant to Rule 13.11 of the Commission’s Rules of Practice and Procedure and the February 26, 2019 Administrative Law Judge’s Ruling Denying in Part and Granting in Part the Motion of the Public Advocates Office to Amend and Supplement Testimony and for Additional Hearings; and Revising the Schedule of this Proceeding, The Greenlining Institute (“Greenlining”) respectfully submits this opening brief in opposition to the application in the above-captioned proceeding.

I. INTRODUCTION

This brief addresses the narrow but critical issue of the potential impacts of the proposed transaction on the combined company’s diversity and inclusion efforts. Applicants have not made any greater commitment to substantially improve T-Mobile’s efforts to diversify its board, workforce, or suppliers, and therefore the overall economic development of California’s diverse communities. In fact, in some instances, T-Mobile’s commitments represent a step **backwards**. Accordingly, those commitments are insufficient to constitute a public interest benefit. Greenlining feels that the risk that T-Mobile’s will not make any meaningful efforts to improve diversity, absent any other public interest benefits or harms, would by itself be sufficient to require the Commission to deny the proposed transaction.

Additionally, even if the Commission found that the diversity commitments constituted a public interest benefit that determination alone would be insufficient for the Commission to find that the proposed transaction is in the public interest. For example, other parties have raised issues of the transaction’s effects on pricing, service quality, privacy, low-income programs, and public safety. The potential harms raised by those parties would be equally harmful, if not more harmful, to communities of color. If the Commission cannot determine that, on balance, the

transaction's public interest benefits outweigh the public interest harms, it should deny the Application.

II. T-MOBILE'S DIVERSITY COMMITMENTS

T-Mobile's testimony discussing diversity, consisting of a scant few pages, simply repeats Applicants' claims that post-transaction, T-Mobile will "attempt to adopt Sprint's best practices on supplier diversity."¹ T-Mobile's only other commitments on diversity are memorialized in a Memorandum of Understanding between T-Mobile and The National Diversity Coalition (NDC).² The commitments in the MOUs can be roughly divided into four post-transaction initiatives: (1) the creation of an external diversity and inclusion council, (2) the creation of an internal workplace diversity and inclusion plan, and (3) the creation of a supplier diversity program, and (4) the creation of a program to increase philanthropy to communities of color.³ Unfortunately, the initiatives are insufficiently robust and insufficiently detailed to provide any assurance that T-Mobile will make any real commitment to diversity.

III. APPLICANTS BEAR THE BURDEN OF SHOWING THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST.

In an application for transfer of control, the applicants bear the burden of proving that the Commission should approve the application and any ancillary agreements.⁴ Under Public Utilities Code section 854(a), the Commission must approve acquisitions of public utilities.⁵ "The Commission has broad discretion to determine if it is in the public interest to authorize a

¹ Joint Applicant Exhibit 8-C at p. 9:17-18.

² *Id.*, Attachment B ("MOU").

³ *Id.*

⁴ *Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction*, D.10-10-01, Oct. 14, 2010 at 16.

⁵ *Decision Granting Conditional Approval of the Acquisition of PacificCorp by MidAmerican Energy Holdings Company 23*, D.06-02-003 (Feb. 16, 2006).

proposed transaction pursuant to Public Utilities Code section 854, subdivision (a).”⁶

Additionally, if a transaction involves a utility with gross annual California revenues in excess of \$500 million, the transaction is subject to review under section 854, subdivisions (b) and (c).⁷

When evaluating a proposed transaction under § 854(a), “[t]ypically the Commission has required an applicant to show that a proposed transfer is ‘not adverse to the public interest’ though occasionally the Commission has articulated the standard as requiring a showing that the transfer is ‘in the public interest.’”⁸ Under all three sections, if a proposed transaction is adverse to the public interest, applicants do not meet the burden of proof.

IV. APPLICANTS DIVERSITY AND INCLUSION COMMITMENTS ARE NOT IN THE PUBLIC INTEREST.

Throughout this proceeding, T-Mobile has acted like a company that does not take diversity and inclusion seriously. T-Mobile’s diversity and inclusion commitments are illusory, and do not bind T-Mobile to improving diversity and inclusion at the combined company. Additionally, T-Mobile’s current diversity commitments do not benefit the public interest.

A. T-Mobile Has Demonstrated its Disregard for Diversity and Inclusion.

The only T-Mobile witness to offer substantial testimony regarding the combined company’s diversity and inclusion efforts was Marie R. Sylla Dixon, T-Mobile’s Vice President of Government and External Affairs.⁹ During the cross-examination of Ms. Sylla Dixon, she appeared unprepared and unfamiliar not only with T-Mobile’s diversity initiatives, but with her testimony itself.¹⁰ Ms. Sylla Dixon testified that although she began working for T-Mobile in

⁶ *Id.*

⁷ Pub. Util. Code § 854.

⁸ *Id.* at 11.

⁹ TR Vol. 6 pp. 877-955.

¹⁰ *Id.* at pp. 897:4-955:8.

2005 she had never worked directly on supplier diversity issues.¹¹ Ms. Dixon appeared unfamiliar with common components of diversity issues, including T-Mobile's annual supplier diversity report to the Commission and whether T-Mobile currently has a supplier diversity tracking system.¹² Additionally, Ms. Sylla Dixon appeared unfamiliar with the MOU.¹³

It is important to note that Ms. Sylla-Dixon testified that she was not familiar with Sprint's supplier diversity efforts.¹⁴ Admittedly, if Ms. Sylla Dixon had obtained **actual** knowledge of Sprint's supplier diversity efforts, that action would likely rise to the level of an antitrust violation.¹⁵ However, Ms. Sylla Dixon did not appear to have any indirect knowledge of Sprint's supplier diversity efforts, and could only repeat Applicant's claims that "new T-Mobile will **attempt** to adopt Sprint's best practices on supplier diversity and to learn from [presumably Sprint's] experiences and success."¹⁶ Accordingly, Ms. Sylla Dixon's testimony consisted of unsupported, and at times apparently uninformed, claims about T-Mobile's diversity commitments.

T-Mobile does have a Vice President of Diversity and Inclusion, but T-Mobile did not call her as a witness, and she was not present at the evidentiary hearing.¹⁷ T-Mobile could have produced her, but instead chose to produce a witness who seemed to have no meaningful knowledge of T-Mobile's existing of future supplier diversity plans, and appeared to be

¹¹ TR Vol. 6 p. 897:15-24.

¹² *Id.* at pp. 904:23-905:1-4.

¹³ *Id.*

¹⁴ Joint Applicant Exhibit 8-C at p. 9:14-15.

¹⁵ *See* Bosley, Inc., a Corporation, and Aderans America Holdings, Inc., a Corporation, and Aderans Co., Ltd., a Corporation; Analysis to Agreement Containing Consent Order To Aid Public Comment, 78 FR 21950 (Apr. 12, 2013).

¹⁶ Joint Applicant Exhibit 8-C at p. 9:17-18.

¹⁷ TR Vol. 6, pp.897:25-898:6.

unprepared to testify. However, when Greenlining’s counsel characterized T-Mobile as dissatisfied with Ms. Sylla Dixon’s testimony, counsel for T-Mobile disagreed with that characterization.¹⁸ Greenlining will not speculate on T-Mobile’s motivations for calling Ms. Sylla Dixon. However, Greenlining can only interpret T-Mobile’s sending a witness without knowledge or expertise about T-Mobile’s current and future diversity commitments as a sign that T-Mobile does not take supplier diversity seriously, and accordingly that the combined company’s commitment to diversity will be lackluster at best.

B. T-Mobile’s Diversity Commitments are Illusory.

While T-Mobile has committed to creating a diversity council to advise the combined company, that council has extremely limited authority and would be too easily influenced by the combined company. While T-Mobile has committed to sharing diversity and inclusion data with the diversity council, that information will not be available to any other stakeholders. Additionally, T-Mobile’s diversity commitments are written in vague and overly-complicated language, concealing the fact that those commitments do not bind the combined company to actually increasing diversity and inclusion at the combined company.

1. The MOU Creates an Ineffective Diversity Council that is Too Easily Influenced by the Combined Company.

The MOU creates a national diversity and inclusion council (“the Council”).¹⁹ The Council’s purpose, to provide advice on diversity and inclusion to T-Mobile, and to assist with the creation of a “Diversity Strategic Plan,”²⁰ is promising. However, the details of the MOU demonstrate that the Council’s role is symbolic. Under the MOU, the External Diversity Council

¹⁸ TR Vol. 7, pp. 1244:18-28-1245:1-3.

¹⁹ Joint Applicant Exhibit 8-C, Attachment B, p. 2.

²⁰ *Id.* at p. 3.

will exist for only three years.²¹ T-Mobile would have an extreme amount of control over the Council: for example, T-Mobile is the only entity that can appoint Council members.²² Making T-Mobile the **only** entity that can choose Council members would be a poor mechanism for receiving a breadth of community input, and would create the very real risk of making the Council an echo chamber or rubber stamp for whatever action the company wanted to take, no matter how ineffective or misdirected that action might be. Furthermore, it appears that the Council will meet with only one other individual at T-Mobile, the Vice President of Government and External Affairs.²³ Accordingly, the Council will only be effective if T-Mobile has a meaningful commitment to diversity. If T-Mobile decides that diversity is not a priority, it could intentionally restrict the Council from performing its role or could simply ignore it altogether.

2. The MOU Lacks Any Meaningful Transparency Measures.

While the Council would have the ability to ask for annual reports and data regarding T-Mobile's diversity efforts, it may only review that information "subject to non-disclosure agreement and only for internal discussions and progress reports related to the company's diversity initiatives and efforts in California," and that "NDC, and the members of the Council, will keep confidential all communications with New T-Mobile and all information provided by New T-Mobile, unless the [Vice President of Diversity and Inclusion] agrees in writing that such information can be communicated externally"²⁴ This includes information about workforce

²¹ Joint Applicant Exhibit 8-C, Attachment B, p. 3. While the MOU states that after three years, the parties to the MOU will "jointly discuss the desirability of extending the agreement for an additional three-year term (MOU at p. 8), nothing in the MOU requires T-Mobile to agree to such an extension.

²² *Id.* at p. 2.

²³ *Id.* at p. 2.

²⁴ *Id.* at p. 5.

recruitment and retention,²⁵ procurement,²⁶ and philanthropy.²⁷ Accordingly, the Council would not be able to share its concerns with the Commission or any stakeholders. This fact, coupled with the combined company's singular control over the Council, could result in an ineffective External Diversity Council that had no real input or influence.

3. The MOU Contains No Meaningful Commitments.

When reviewing proposed transaction, the Commission does not consider the purported benefits of that transaction if those purported benefits are “vague, speculative, or otherwise cannot be verified by reasonable means.”²⁸ While the MOU purports to contain agreements regarding the combined company's diversity and inclusion efforts, a careful reading reveals that this is not the case. Rather, virtually every agreement is couched in aspirational language, the practical effect being that T-Mobile is not required to **actually** take steps to improve diversity and inclusion. The MOU makes clear that T-Mobile has absolute discretion in deciding whether to improve diversity and inclusion: “Nothing in this MOU is intended to imply or otherwise suggest that NDC has any authority or discretion over the Focus Areas enumerated herein, which shall remain within the full discretion of T-Mobile.”²⁹

Additionally, the only actions T-Mobile must take under the terms of the MOU is to **try** to increase diversity and inclusion. For example, the MOU states that T-Mobile and NDC will “work to create” a monitoring and oversight mechanism,³⁰ and that T-Mobile “commits to work”

²⁵ Joint Applicant Exhibit 8-C, Attachment B, p. 4.

²⁶ *Id.* at p. 6.

²⁷ *Id.* at p. 8.

²⁸ Horizontal Merger Guidelines, U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, Aug. 19, 2010, available at http://www.ftc.gov/sites/default/files/attachments/merger-review/100819_hmg.pdf.

²⁹ Joint Applicant Exhibit 8-C, Attachment B, p. 9.

³⁰ *Id.* at p. 8.

with NDC to develop a Community Wireless Initiative to promote digital adoption and education.³¹ The MOU constantly focuses on efforts, not results, stating that the combined company "shall strive to increase the diversity of its workforce in California at all levels to reflect the diversity of the communities in which it operates," and that "New T-Mobile shall strive to increase the diversity of its workforce in California at all levels to reflect the diversity of the communities in which it operates."³² In some cases, the language in the MOU is so abstract as to be meaningless, stating that "New T-Mobile **commits to strive to expand** its utilization of minority-owned law firms and accounting firms,"³³ and that "New T-Mobile **commits to strive to engage** at least one minority-owned advertising agency"³⁴ T-Mobile could completely abandon its diversity and inclusion efforts, claim that it tried its best, and arguably not be in breach of the MOU. The MOU contains no meaningful commitments regarding diversity and inclusion, and the Commission should reject Applicants' assertions otherwise.

C. T-Mobile's Diversity Commitments Do Not Benefit the Public Interest.

Even if the MOU did bind T-Mobile to the goals sets forth in the agreement, those goals are insufficient to be considered public interest benefits. T-Mobile's commitments to increase diversity on its board and on its workforce are too weak to constitute public interest benefits. T-Mobile's supplier diversity commitments set goals that are actually **lower** than goals it set in 2017, or are goals that T-Mobile has already achieved.

³¹ Joint Applicant Exhibit 8-C, Attachment B, p. 6.

³² *Id.* at p. 4 (emphasis added).

³³ *Id.* at p. 6 (emphasis added).

³⁴ *Id.* (emphasis added).

1. T-Mobile's Board Diversity Commitments Do Not Benefit the Public Interest.

The MOU states that “New T-Mobile is committed to the diversity of its board of directors.”³⁵ However, the MOU commitments regarding board diversity are too weak to ensure that the combined company's board will, in fact, be diverse. For example, in discussing the diversity of the combined company's board, the MOU states that “it is currently contemplated” that at least two board members will come from minority communities.³⁶ This language indicates no more than that T-Mobile is thinking about having two board members of color. Accordingly, the combined company could change its mind at any time in the future. Similarly, the MOU states that “New T-Mobile will continue to evaluate the makeup of its Board on an ongoing basis and encourage its stockholders to **consider** a diverse pool of candidates to fill vacancies as they occur.”³⁷ While shareholders generally have the sole responsibility of selecting board members, the MOU's use of “consider,” rather than “elect,” suggests that the combined company's efforts to increase board diversity will be less than robust. The MOU's commitments regarding board diversity are unlikely to actually increase board diversity; accordingly, the Commission should not consider those commitments to be public interest benefits.

2. T-Mobile's Board Diversity Commitments Do Not Benefit the Public Interest.

Applicants' proposed workplace diversity and inclusion measures suffer from similar flaws. Again, the MOU commitments regarding workforce diversity are purely aspirational, including language such as “New T-Mobile shall **strive** to increase the diversity of its workforce

³⁵ Joint Applicant Exhibit 8-C, Attachment B, p. 2.

³⁶ *Id.* at p. 2. It is worth noting that this language is so vague that T-Mobile could interpret it to mean that those two board members need not be people of color, as long as they were from a community that primarily consisted of households of color.

³⁷ *Id.* (emphasis added).

in California at all levels to reflect the diversity of the communities in which it operates.”³⁸ The MOU does contain a pledge that that the combined company will “establish or improve upon existing workplace diversity and inclusion program [sic], which would include:

(1) a comprehensive policy describing New T-Mobile’s commitment to a diverse employee population and creation of an inclusive culture; (2) dissemination and communication of New T-Mobile’s diversity policy via its Intranet and Internet sites, Employee Handbook, Code of Conduct, New Employee Orientation Program, and Careers web page; (3) encouraging and supporting the expansion of employee affinity groups; and (4) training all leaders concerning their role in creating and maintaining an inclusive work environment and diverse workplace.³⁹

All of these goals are positive in the abstract. However, the MOU does not contain sufficient details or metrics regarding those goals. For example, while the MOU notes that T-Mobile would communicate the importance of diversity to its employees and train its leaders regarding the importance of diversity,⁴⁰ the MOU does not indicate when or how often those events would take place. In fact, it appears that T-Mobile could comply with the MOU by performing those actions once, and only once. Similarly, while T-Mobile would encourage and support “the expansion of employee affinity groups,”⁴¹ the MOU does not contain any detail

³⁸ Joint Applicant Exhibit 8-C, Attachment B, p. 4 (emphasis added).

³⁹ *Id.* at p.4. Interestingly, this language is virtually identical to the language used in a 2016 MOU between NDC and Charter Communications. Presiding Officer’s Ruling Granting Joint Motion of Charter Communications, Inc. and Charter Fiberlink CA-COO, LLC (U6878C) and The National Diversity Coalition to Modify Positions in Proceedings to Reflect Memorandum of Understanding Between the Parties, Attachment A, Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CC0, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and and Bright House Networks Information Services (California), LLC (U6955C) for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C), to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C), A.15-07-009 (July 2, 2015). The Charter-NDC MOU included the requirement that executives’ compensation “depend in part on their success in furthering diversity and inclusion.” The MOU between NDC and T-Mobile contains no such requirement, making the commitments weaker than those in the Charter-Time Warner Cable proceeding.

⁴⁰ *Id.* at p. 4.

⁴¹ *Id.*

regarding how it plans to do so, commit any specific resources to that goal, or address the potential need to create additional affinity groups. Like the MOU's executive diversity commitments, the MOU's workplace diversity commitments are far too weak, and the Commission should not consider those commitments public interest benefits.

3. T-Mobile's Supplier Diversity Commitments Do Not Benefit the Public Interest.

The MOU's supplier diversity commitments are similarly too weak to be considered public interest benefits. In fact, the specific supplier diversity goals set forth in the MOU indicates a **reduction** in T-Mobile's previously stated supplier diversity goals. For example, T-Mobile's 2017 supplier diversity report to the Commission, which was completed on March 1, 2018, sets a goal of 21.99% spending with Diverse Business Enterprises by 2023.⁴² The MOU, which was executed on January 29, 2019, states that "[w]ithin five (5) years following the close of the Transaction, New T-Mobile's aspirational goal for all annual diverse spend in California will be the CPUC's General Order 156 goal of 21.5%."⁴³ While the supplier diversity report sets a goal of 21.99% diverse spend by 2023, the MOU sets a lower goal (21.5%), with a target date of, at the earliest, mid-2024. Not only is the diverse spending goal in the MOU lower than the goal set in T-Mobile's 2017 supplier diversity report, it is far below Greenlining's recommended best practice of achieving 30% Minority Business Enterprise spending across all industrial categories.⁴⁴

⁴² Greenlining Exhibit 2, Attachment 6; TR Vol. 6:908:11-19 T-Mobile defines Diverse Business Enterprises as "Women, Minority, Disabled Veteran, and Lesbian, Gay, Bisexual and Transgender-owned Business Enterprises." Greenlining Exhibit 2, p. 1.

⁴³ Joint Applicant Exhibit 8-C, Attachment B, p. 6.

⁴⁴ Greenlining Exhibit 1 p. 1:21-22.

The MOU contains an additional commitment that “[w]ithin three (3) years of the close of the Transaction, New T-Mobile’s aspirational goal for annual diverse spend in California excluding spend with handset and network OEMs will be 40%.”⁴⁵ That goal might be impressive, but for the fact that T-Mobile’s Vice President of Corporate and External Affairs testified that “[i]n 2017, if handset and network OEM spend was excluded from net procurement, T-Mobile’s Diverse Business Enterprise procurement percentage would have been almost 40 percent.”⁴⁶ At best, the MOU commitment represents an incremental increase of T-Mobile’s diverse spend over the next three years. Such incremental progress is insufficient to constitute a public interest benefit.

⁴⁵ Joint Applicant Exhibit 8-C, Attachment B, p. 6.

⁴⁶ Joint Applicant Exhibit 8-C p. 10:17-19.

V. CONCLUSION

Throughout this proceeding, Greenlining has argued that for the proposed transaction to be in the public interest, Applicants would need to commit to being responsive to communities of color and by making strong, meaningful commitments to increase diversity and inclusion at the combined company. Unfortunately, T-Mobile's current commitments are far too vague and watered-down to provide any assurance that the combined company will be committed to diversity and inclusion, or that the combined company will take active steps to increase diversity and inclusion. Accordingly, the Commission should reject Applicants' claims that those commitments as public interest benefits. If the Commission cannot determine that, on balance, the transaction's public interest benefits outweigh the public interest harms, it should deny the Application.

Respectfully submitted,

Dated: April 25, 2019

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