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-C) 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)	)	Application No. 18-07-011
In the Matter of the Joint Application of Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C) and T-Mobile USA, Inc., a Delaware Corporation for Review of Wireless Transfer Notification per Commission Decision 95-10-032	)	Application No. 18-07-012

JOINT APPLICANTS' PREHEARING CONFERENCE STATEMENT REGARDING THE CONSOLIDATED APPLICATIONS FOR APPROVAL OF WIRELINE TRANSFER OF CONTROL PURSUANT TO PUBLIC UTILITIES CODE SECTION 854(a) AND FOR REVIEW OF A WIRELESS TRANSFER NOTIFICATION PER COMMISSION DECISION 95-10-032

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Dated: September 12, 2018

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I. INTRODUCTION

Pursuant to ALJ Bemesderfer's Ruling Consolidating Applications dated September 11, 2018, his emails dated September 5 and September 6, 2018 and consistent with Rule 7.2 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), Sprint Communications Company L.P. (U-5112-C) ("Sprint Wireline"), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C) (collectively referred to as "Sprint Wireless") and T-Mobile USA, Inc. ("T-Mobile") (collectively referred to as the "Joint Applicants"), respectfully submit this Prehearing Conference Statement regarding the consolidated Application for Approval of the Transfer of Control of Sprint Wireline to T-Mobile USA (the "Wireline Application") and Application for Review of the Wireless Transfer Notification (the "Wireless Application") in the above-captioned matters.

II. SCOPE OF CONSOLIDATED PROCEEDINGS

As discussed previously in the respective Applications, as well as in the Joint Applicants' Consolidated Replies to the protests filed by the Public Advocates Office (formerly known as "the Office of Ratepayer Advocates") and TURN and The Greenlining Institute ("the Joint Consumers"), the issues raised by the Wireline and the Wireless Applications are substantively and legally distinct.

The issue raised by the Wireline Application is whether the indirect transfer of control of Sprint Wireline to T-Mobile USA meets the standards required by the Commission under Section 854(a); *i.e.*, whether the transfer is adverse to the public interest and whether T-Mobile USA meets the qualifications to obtain a Certificate of Public Convenience and Necessity ("CPCN").

In contrast, the issue raised by the Wireless Application is whether the Commission requires any further information to complete its review of the Notification of Transfer of Control of Sprint Wireless to T-Mobile USA "to ensure that the participants in an ownership transfer have complied fully with [the Commission's] rules and regulations."[1]

The Joint Applicants further note that the Public Advocates Office has also suggested that the Commission share the record developed in this proceeding with the Department of Justice ("DOJ") and the Federal Communications Commission ("FCC"). The Joint Applicants have no objection to that suggestion provided any confidential materials are appropriately protected.

[1] *See In re Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D. 95-10-032, 1995 Cal. PUC LEXIS 888 at *31 (the "*Exemption Decision*").

III. THE PRIMARY QUESTION RAISED BY THE WIRELINE APPLICATION IS WHETHER THE INDIRECT TRANSFER IS ADVERSE TO THE PUBLIC INTEREST

As previously discussed by the Joint Applicants,[2] Section 854(a) requires prior authorization from the Commission before the finalization of any transaction that results in the merger, acquisition, or a direct or indirect change in control of a public utility. The "primary question" for the Commission to determine in a transfer of control proceeding under Section 854(a) is whether the transaction will be "adverse to the public interest."[3] The Commission has consistently approved transfers of control under Section 854(a) in similar instances in which the proposed transfer involves a change of control of a competitive carrier through the transfer of equity interests in the corporate parent of that carrier. This is especially the case where the proposed transfer is seamless to customers and does not implicate any changes in day-to-day operations, rates, terms, or conditions of service.[4] Indeed, the Commission has explicitly recognized that it is in the public interest to promote "a business climate that is hospitable to utilities" and that Section 854(a) transactions should be approved "absent a compelling reason to the contrary."[5]

Moreover, neither Section 854(b) nor 854(c) is applicable to this Wireline Application. Section 854(b) applies to transactions where one of the *utilities* has gross annual intrastate revenues exceeding $500 million and Section 854(c) applies to transactions where any of the *parties* to the transaction have gross intrastate revenues exceeding $500 million. In this instance,

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2 *See, e.g.,* Wireline Application at Section VII.

3 *Id.* at p. 12 (and case law cited in n. 30).

4 *Id.* at p. 4 (and case law cited in n. 6).

5 *Id.* at p. 13 (and case law cited in n. 32).

Sprint Wireline's gross annual intrastate revenues in California are only a *fraction* of that threshold.[6] Further, the Commission's long- standing policy has been to exempt transactions involving Competitive Local Exchange Carriers ("CLEC") and Non-Dominant Incumbent Exchange Carriers ("NDIEC") such as Sprint Wireline from the requirements of Section 854(b) and (c).[7]

IV. THE WIRELESS TRANSFER NOTIFICATION IS SUBJECT TO COMMISSION REVIEW UNDER D.95-10-032 – NOT SECTION 854 APPROVAL

As acknowledged by all parties, in 1995 the Commission exempted wireless transactions from pre-approval under Public Utilities Code Section 854 while also establishing alternate notice requirements for certain limited scenarios including the transfer of ownership of a wireless provider.[8] For such transfers, the Commission required 30-day advance notice to the Communications Division because it "wish[ed] to retain the ability [a] to ensure that the participants in an ownership transfer have complied fully with our rules and regulations", and if necessary, [b] to seek additional information in that specific regard.[9] That decision is still dispositive and binding notwithstanding the Protestors' suggestions that its dictates should be ignored in this case.[10]

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[6] The Joint Applicants further note that the 2013 transfer of Sprint Wireline to Softbank was approved under Section 854(a). *See* D.13-05-018. *See also*, Joint Application at p. 13 (and case law cited in n. 33).

[7] Joint Application at p. 14 (and case law cited in n. 34).

[8] *See e.g.*, ORA Protest to Wireless Application at pp. 2-3 and Joint Consumers' Protest at pp. 6-8; *see also Exemption Decision, supra,* D. 95-10-032, 1995 Cal. PUC LEXIS 888 at **25, 30 and 46.

[9] *Exemption Decision, supra,* 1995 Cal. PUC LEXIS 888 at *31.

[10] *See* Consolidated Reply to Protests at p. 3, n. 2.

While the Public Advocates Office explicitly recognizes that Sections 854(b) and (c) do not apply to the Wireless Application, it nevertheless submits a list of proposed review criteria that would effectively apply the same analysis as required by Sections 854(b) and (c).[11] The Joint Consumers implicitly acknowledge that Sections 854(b) and (c) do not apply, yet they promote the use of those criteria as a framework as well.[12]

The criteria suggested by the Protestors, however, are neither mandated nor warranted by the Wireless Application. As noted above, review of a wireless transfer notification is designed "to ensure that the participants in an ownership transfer have complied fully with our rules and regulations." In this case, there is no suggestion that Sprint Wireless and T-Mobile (through its operating subsidiaries) have not complied with the Commission's rules and regulations.[13] Moreover, the exemptions provided in D.95-10-032 were predicated on the explicit finding that subjecting wireless transfers to the requirements of Article 6 of the Public Utilities Code, including Section 854, was "not necessary in the public interest."[14] In contrast, the criteria proposed by the Protestors are predicated on just the opposite concept – that subjecting such transfers to a full Section 854 review is necessary to protect the public interest.

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[11] *See* ORA Protest to Wireless Application at pp. 3, 5-6; *see* also Section III, *infra*.

[12] *See* Joint Consumers' Protest at p. 8. The Joint Consumers suggest that exhaustive review is *required* "pursuant to the Commission's exercise of its clear and broad authority to protect California wireless consumers." *Id.* at p. 7 (*see also* citations in n. 21). Although the Joint Applicants do not take issue with the view that the Commission has broad authority to protect consumers from identified harm, that does not translate to imposing the criteria required under Section 854(b) and (c) on the review of a wireless transfer notification.

[13] *See e.g.*, Joint Application at Confidential Exhibit A and Exhibits K & L.

[14] *See e.g., Exemption Decision, supra,* 1995 Cal. PUC LEXIS 888 at *43, COL 18 ("Subject to the exceptions contained in O.P. 3 below, CMRS providers should be exempt from the provisions of Article 6 of Chapter 4 of the Public Utilities Code in order to further streamline regulation and promote competition and because the application of these provisions to CMRS providers is not necessary in the public interest.").

Moreover, as discussed at length in the Consolidated Reply to the Wireless Application Protests, the Public Advocates Office's suggestion that the Commission should essentially duplicate the process used to manage the proposed AT&T/T-Mobile transaction in this proceeding is inappropriate and fails to account for fundamental differences between the AT&T/T-Mobile merger and the proposed transaction now before the Commission.[15] For example, AT&T, the acquiring company in that proceeding, was the major Incumbent Local Exchange Carrier ("ILEC") in the state, the largest, or at a minimum, one of the two largest providers of wireless service in the state, and a significant provider of backhaul services to wireless carriers at the time of the proposed merger. None of those descriptions applies to T-Mobile or to Sprint Wireless (or to Sprint Communications Company L.P. ("Sprint Wireline"), a Joint Applicant in A.18-07-011). Furthermore, the proposed combination of AT&T and T-Mobile would have created, according to the Order Instituting Investigation ("OII"), a wireless carrier with over 47% of the California marketplace – by far the largest carrier in the state at the time – while leaving Sprint Wireless as a distant third provider with a limited market share of approximately 15%.

In contrast, the combination of T-Mobile and Sprint Wireless will create a wireless company that is at most comparable in size to AT&T and Verizon Wireless in terms of market share,[16] but significantly smaller than either by any other measure. For example, Verizon and

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[15] *See* Consolidated Reply to Wireless Application Protests at Section III. In addition, unlike the process which preceded the AT&T/T-Mobile OII, the Joint Applicants have already submitted a detailed Application (with confidential attachments), a 676-page PIS statement (with executive and expert declarations) and, with this filing, provided a link to the public-redacted versions of their responses to the FCC data requests from the federal review. In other words, the Joint Applicants have attempted to provide the Commission with all available information from the outset to facilitate the review process.

[16] *See* PIS at p. 85 (Per the FCC's 20th Mobile Wireless Competition Report, on a national basis Verizon has a 36.8% market share, AT&T has a 32.8% market share, and T-Mobile and Sprint Wireless combined

AT&T each have market capitalizations that are more than double the market capitalizations of T-Mobile and Sprint combined, significantly greater cash flow, and much higher earnings before interest, taxes, and depreciation.[17] Verizon's and AT&T's LTE networks each also cover more area than either T-Mobile's or Sprint's networks,[18] which puts the two smaller carriers at a significant disadvantage when trying to compete for customers. Greater scale and access to capital provide Verizon and AT&T with greater capacity to invest in critical wireless business inputs, including spectrum and network infrastructure.[19] These investments themselves compound to further reinforce Verizon's and AT&T's leading positions. In other words, unlike in AT&T/T-Mobile, here there are no grounds for scrutiny based on a concern that the merged entity will dominate the marketplace.[20] Rather, one of the principal benefits of the transaction is that the combined company will be able to develop the scale and a superior network to compete more effectively with the market leaders, enabling consumers to pay less and gain more value.

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would have a 28.8% market share).

[17] *See id.* at pp. 86-87 (With respect to market capitalization, and per the FCC's 20th Mobile Wireless Competition Report, Verizon's stands at $198.58 billion and AT&T's at $203.57 billion. T-Mobile's and Sprint's market capitalizations of $50.82 billion and $22.02 billion, respectively, are small by comparison. Verizon and AT&T finished 2017 with adjusted free cash flow of $8.1 billion and $17.6 billion, respectively. For the same period, T-Mobile and Sprint had adjusted free cash flow of $2.7 billion and $945 million, respectively. In 2017, Verizon and AT&T had adjusted EBITDA of $45.1 billion and $45.3 billion, respectively. T-Mobile and Sprint finished 2017 with adjusted EBITDA of $11.7 billion and $11.1 billion, respectively, which is one-fourth that of the larger companies.).

[18] *Id.* at p. 86.

[19] *Id.* at pp. 87-88.

[20] The Joint Applicants further note that the manner in which the Commission proceeded in its review of the AT&T/T-Mobile transaction, namely, through an Order Instituting Investigation ("OII") was never subjected to legal or practical scrutiny as the transaction was withdrawn before the OII reached any significant procedural milestones. In any event, regardless of whether the process utilized in that OII was appropriate for that transaction, the Joint Applicants submit that it does not provide a useful or a practical template for the instant proceeding.

V. CONSOLIDATION DOES NOT TRANSFORM THE NATURE OF THE UNDERLYING APPLICATIONS OR THE REVIEW TO BE UNDERTAKEN BY THE COMMISSION

The ALJ's September 11, 2018 Ruling Consolidating Applications provides that "[a]lthough the two filings address different requirements of California law, the underlying transaction that gives rise to each of them is the proposed Sprint-T-Mobile Merger and the underlying factual and legal issues are effectively identical. In this circumstance, consolidation of the applications is appropriate and desirable and preferable to considering each application in a separate docket." Joint Applicants do not object to consolidation for procedural purposes, *i.e.*, for filing purposes and for purposes of creating a joint record (to the extent necessary), or – as proposed by the Public Advocates Office – for sharing that record with the DOJ and the FCC. Such a consolidation would not, for instance, impede the timely consideration of each application on its own merits or, if appropriate, their consideration on different schedules.

However, consolidation of the proceedings does not alter the nature of the underlying Applications discussed above or the type of review the Commission should undertake in reviewing those applications. Although the transfer of Sprint Wireline and Sprint Wireless are undoubtedly the result of the same transaction, these entities offer wholly different services that are subject to legally and functionally distinct regulatory paradigms. As a result, and as noted above, the pending applications raise different issues subject to distinctly different legal precedents and review criteria. Consolidation of the dockets should not alter that reality in any way.

VI. HEARINGS & DISCOVERY

The Joint Applicants submit that no evidentiary or public participation hearings are either necessary or appropriate in the context of either Application.[21]

In the context of the Wireline Application, the Joint Applicants have endeavored to submit all the information necessary to enable the Commission to address all required criteria when evaluating a Section 854(a) application.[22] To that end, the record contains the following undisputed facts:

- Sprint Wireline does not have a dominant market position in any CLEC/NDIEC/broadband or other market in California;
- Sprint Wireline, a non-tariffed CLEC/NDIEC, will continue to honor all of its contractual commitments to its (exclusively) business and wholesale customers,[23];
- The Commission's jurisdiction of Sprint Wireline will remain unchanged;
- There will be no credible concern with respect to California's CLEC/NDIEC marketplace or competition resulting from this transfer;
- Sprint Wireline will continue to assess, collect and remit surcharges on intrastate revenue associated with its services either as CLEC/NDIEC and/or as an unregulated VoIP provider pursuant to California law and the Commission's rules; and
- The transfer of control is exempt from environmental review under CEQA.

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[21] *See*, *e.g.,* ORA Protest to Wireless Application at p. 14 (the Public Advocates Office suggests that the Commission conduct public participation hearings "throughout the service territories of Sprint Wireline, Sprint Wireless and T-Mobile in California to receive feedback from the public on this Proposed Transaction."); *see also* Joint Consumers' Protest at p. 25 (the Joint Consumers suggest that after a "fact-finding phase," the Commission seek comments from the parties as to the need for hearings to "clarify or decide disputed issues of fact.").

[22] Application of Comcast Business Comm'cns, Inc. for Approval of the Change of Control of Comcast Business Comm'cns, Inc., D.02-11-025 at p. 36 (Nov. 7, 2002) (In approving the acquisition of AT&T Broadband by Comcast, the Commission further explained its denial of request by protesting parties that hearings were necessary stating "the structure of this decision, which addresses each provision of the guiding and controlling statutes, demonstrates that there is no need for hearings . . . .").

[23] The Joint Applicants note that none of Sprint Wireline's customers have protested this Application.

Moreover, the Joint Applicants have been unable to identify any Section 854(a) transfers in which the Commission determined that evidentiary or public participation hearings were warranted.

In the context of the Wireless Application, the Joint Applicants have also endeavored to provide the information necessary for the Commission to review the Wireless Transfer Notification and ensure that the Applicants "have complied fully with our rules and regulations." The information provided is also intended to support the Commission's and stakeholders' understanding of the attendant benefits of the transfers and the underlying Transaction. To that end, the Joint Applicants have provided the Commission and the Protestors with confidential network and company specific metrics in the Application as well as the PIS (including its attached detailed declarations). As noted in their Reply to the Protests, the Joint Applicants are providing a link to the public-redacted version of their responses to the FCC's exhaustive data requests, which were submitted to the FCC on September 5, 2018.[24]

To the extent the Commission determines that further information or discovery is needed to address either Application, the Joint Applicants are committed to working cooperatively with all parties to address those issues as quickly as possible. The Joint Applicants also note that on September 10, 2018, the Commission executed an Acknowledgement of Confidentiality in the FCC proceeding so that it will now have access to all the confidential materials submitted by the Joint Applicants in that review as well. This will soon include highly confidential and granular information regarding, among other things, New T-Mobile's cell sites, deployment, offered

[24] Sprint's redacted responses can be found at: https://ecfsapi.fcc.gov/file/1090592111878/Sprint%208.15.2018%20RFI%20Response%20%20-%20REDACTED%20-%20AS%20FILED.pdf. T-Mobile's redacted responses can be found at https://ecfsapi.fcc.gov/file/1090587489537/2018-09-05%20FCC%20Information%20Request%20vFINAL--REDACTED.pdf.

capacity, traffic demand, costs, retail locations, service plans, customers, wholesale customers, porting, and device sales. The Commission will also have access to the detailed breakdown of the expected synergies anticipated as a result of the Transaction.[25]

In addition, as noted previously, there is a well-established framework under U.S. antitrust law to evaluate the competitive impact of transactions like this, under which authorities such as the U.S. Department of Justice and the California Attorney General are empowered to conduct a thorough review. Federal antitrust law provides authority to state attorneys general to address state-specific antitrust concerns. The parties are actively cooperating with reviews of the Transaction under this framework.

In sum, the Joint Applicants submit that holding hearings is neither procedurally warranted under the Commission's rules nor substantively necessary to enable the Commission to conduct the required review. In addition, any hearings would require the expenditure of significant resources and otherwise consume valuable time in the coming months.

VII. PROPOSED SCHEDULE

Joint Applicants respectfully request that the Commission approve the Transfer of Control which is the subject of the Wireline Application and complete its review of the Wireless Application on an expedited basis.

As discussed in previous submissions, the proposed Transaction is necessary to accomplish a goal critical to enhancing consumer welfare here in California and throughout the country: the rapid and widespread deployment of a 5G network on a timeframe that neither Applicant could accomplish on their own, if ever. The benefits of this merger, however, do not

[25] The Communications Division (the "CD") propounded data requests on the Joint Applicants on September 10, 2018, the same day the Commission executed the Acknowledgment of Confidentiality at the FCC. The Joint Applicants have only begun to review the CD data requests.

stop at the boundaries of traditional wireless services. The merger will unlock the door to new broadband choices and capabilities for consumers across the country while accelerating the arrival of transformative 5G services that will produce innovation, jobs, and economic growth for our country. To unnecessarily delay the process will deprive *all* consumers – not just T-Mobile and Sprint customers – of these benefits.

Thus, the Joint Applicants request that the consummation of the Transaction not be inadvertently impeded or complicated by the structure and timeframe of these proceedings. Further, the Joint Applicants pledge their cooperation in assisting the Public Advocates Office efforts to share the record in these proceedings in a meaningful way with the FCC and the DOJ. Accordingly, the Joint Applicants respectfully request that the schedule for the Commission's review of these consolidated Applications be completed expeditiously and, in particular, before the federal reviews are complete.

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VII. CONCLUSION

The Joint Applicants respectfully suggest the issuance of a scoping memo consistent with this Prehearing Statement and look forward to discussing these matters at the Prehearing Conference.

Respectfully submitted this 12th day of September, 2018 in San Francisco, California.

/s/

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