

**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).

Application 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 18-07-012

**RESPONSE OF JOINT APPLICANTS TO MOTION TO STRIKE OF THE
THE UTILITY REFORM NETWORK AND THE GREENLINING INSTITUTE**

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Pursuant to Rule 11.1(e) of the Commission’s Rules of Practice and Procedure (“Rules”), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C) (collectively “Sprint”), and T-Mobile USA, Inc. (“T-Mobile USA”) (collectively, the “Joint Applicants”)¹ respectfully oppose The Utility Reform Network (“TURN”) and The Greenlining Institute (“Greenlining”) (collectively, “TURN/Greenlining”) Motion to Strike Portions of the Joint Applicants’ Opening Brief, filed on May 3, 2019 (the “Motion”) in the above referenced proceeding. As explained below, TURN/Greenlining’s Motion has no merit, and the Commission should deny it in its entirety.

I. INTRODUCTION

By its Motion, TURN/Greenlining requests that “the Commission strike those portions of the Joint Applicants’ Opening Brief that discuss or rely on the [CETF] MOU” or provide “additional time for parties to submit reply briefs to conduct discovery and review this additional

¹ Joint Applicants and the California Emerging Technology Fund (“CETF”) (are referred to jointly herein as the “Joint Parties”)

material.”² As an initial matter, the central premise of the Motion, that the Memorandum of Understanding (“MOU”) entered into between T-Mobile USA and CETF (the “CETF MOU”) is not part of the record, has been mooted by a recent ruling in this proceeding that entered the CETF MOU into the record.

Further, to insist that the Commission disregard T-Mobile’s commitments in the CETF MOU as it reviews the merger is to ignore a host of promises that will only have a positive impact on the State. The CETF MOU contains numerous voluntary commitments that support the state’s efforts to close the Digital Divide in California; promote digital inclusion; increase access for LifeLine and low-income consumers; expand wireless broadband access throughout California, including in rural and remote areas of the state; and enhance emergency preparedness and response. The commitments are verifiable, enforceable, and will be subject to ongoing monitoring by CETF and the Commission. It is difficult to imagine a legitimate purpose for suggesting that the Commission move forward as if these commitments did not exist.

TURN/Greenlining’s Motion also lacks any legal basis. As to the request to strike references to the CETF MOU from Joint Applicants’ opening brief, TURN/Greenlining’s motion is at odds with longstanding Commission practice and governing rules. Even if CETF MOU was not previously entered into the record, the Commission regularly considers and approves decisions by incorporating new commitments introduced in briefs, and commitments are not *evidence* subject to cross-examination and discovery. Moreover, TURN/Greenlining had ample opportunity to address CETF MOU in either or both its post-hearing briefs - and both TURN and Greenlining did so in their respective reply briefs. Therefore there is no reason to provide “additional time” or process as TURN/Greenlining suggest.

² Motion at 5.

II. JOINT APPLICANTS USED AN APPROPRIATE VEHICLE TO INTRODUCE THE CETF MOU INTO THE RECORD

A. The ALJ Ruling Clarified that the CETF MOU is entered into the Record, so their Motion is Moot.

TURN/Greenlining's central argument for seeking to strike is that the CETF MOU is not part of the record.³ However, that is not the case. On March 23, 2019, Joint Applicants entered into a MOU with CETF. On April 8, 2019, Joint Parties filed a motion reciting the major features of the MOU and notifying the Commission of modified positions in the proceeding ("Joint Parties' Motion"). On May 8, 2019, despite opposition from TURN/Greenlining, the assigned Administrative Law Judge granted Joint Parties' motion and introduced the CETF MOU into the record ("ALJ Ruling").⁴ The ALJ Ruling explains:

[I]n the Frontier case the Commission considered and rejected the approach to dealing with MOUs that is being put forward in this case by Joint Consumers and Cal Advocates. It's also worth pointing out that one of Joint Consumers (The Greenlining Institute) entered into an MOU with Frontier and was granted the same Commission assistance in enforcing the terms of that MOU that it now objects to CETF receiving in this case...the Motion will be granted...[it] permits CETF and Joint Applicants to enter their MOU into the record

Because the Joint Parties' MOU is part of the record, TURN/Greenlining's Motion is now moot and should be dismissed outright.⁵

B. Joint Parties Submitted its MOU into the Record Prior to Opening Briefs, but Even if First Introduced in Opening Briefs, Such an Approach is Consistent with Commission Precedent and TURN/Greenlining's Prior Advocacy.

TURN/Greenlining further asserts that new commitments, like the CETF MOU, may be introduced into the record only if the commitment was previously presented in application or

³ Motion at 1.

⁴ ALJ Ruling at 5.

⁵ Joint Parties' contacted TURN/Greenlining last week to see if they would withdraw the Motion in light of the ALJ Ruling; TURN/Greenlining declined to withdraw.

testimony.⁶ As discussed below, this position lacks legal foundation, and contradicts both Commission precedent and TURN/Greenlining's own legal positions in prior cases. Parties to Commission proceedings follow a variety of approaches for submitting commitments into the record. The approaches include, but are not limited to, including new commitments in settlement or other agreements with third parties, including them in testimony, filing a motion to modify positions to reflect commitments, and presenting them in opening or reply briefs.⁷ Indeed, there is significant Commission precedent for presenting commitments in briefs.

For example, in the *Verizon/MCI* transfer of control proceeding, (A.05-04-020), Greenlining introduced as an exhibit to its opening brief an agreement on certain commitments with applicants.⁸ In the *SBC/AT&T* transfer of control proceeding, (A.05-02-027), the applicant introduced several several FCC merger conditions with its brief and Greenlining introduced an agreement with applicant containing commitments concurrent with filing opening brief and the Commission recognized these commitments in its final decision.⁹ As another example, in the *Charter/TWC* transfer of control proceeding (A.15-07-009), the applicants made a number of commitments in their reply brief in response to demands of parties and intervenors.¹⁰ In that proceeding, neither TURN nor Greenlining opposed applicants' introduction of new commitments in reply briefs. Moreover, Greenlining proactively advocated to include in the

⁶ Motion at 2.

⁷ As described above, On April 8, 2019, Joint Applicants and California Emerging Technology Fund (CETF) filed the *Joint Motion of Joint Applicants and the California Emerging Technology Fund to Reflect Memorandum of Understanding between Joint Applicants and the California Emerging Technology Fund* (Motion). The Motion presented several voluntary commitments for introduction into the record. On May 8, 2019, the assigned Administrative Law Judge granted the motion.

⁸ See *In re Verizon Communications, Inc.* D.05-11-029, mimeo at 26.

⁹ See, e.g., *In re SBC Communications, Inc.* D.05-11-028, Section 2 (Greenlining filed its agreement with applicant outside of the formal settlement process, concurrent with opening briefs).

¹⁰ A.15-07-009, Charter Reply Brief at 93.

final decision certain of the commitments presented in applicants' reply brief,¹¹ and when certain of the new commitments presented in the reply brief were ultimately included in the final decision.¹²

It is good policy for the Commission to recognize new voluntary commitments in this manner. It not only encourages parties to continue to work on issues; it provides a forum to address new developments that inevitably arise during the pendency of a merger proceeding. A ruling otherwise would only entrench parties and put the Commission in a position where it could not recognize the reality of changed circumstances. Accordingly, TURN/Greenlining's argument should be rejected in its entirety.

C. The CETF MOU Does Not Warrant Further Discovery or Other Process.

In its Motion, TURN/Greenlining complains that they were not afforded that opportunity to seek discovery or cross-examine a sponsor with regard to the claims set forth in the CETF MOU.¹³ This assertion misses the mark.

First, with respect to the "claims" set forth in the CETF MOU, there are two straightforward options: either (a) the Joint Applicants made an enforceable voluntary commitment, or (b) they did not. Here, there is no question that the Joint Applicants made such a commitment in their opening brief:

Consistent with the benefits embodied in the New T-Mobile network and its business plan T-Mobile has made a number of voluntary, enforceable commitments in the context of this proceeding, certain of which are memorialized in memoranda of understanding ("MOUs") it has entered into with intervenors, the California Emerging Technology Fund ("CETF") and the National

¹¹ A.15-07-009, *Opening Comments of the Greenlining Institute and Writers Guild of America, West, Inc. on the Proposed Decision Granting Control Subject to Conditions* at 11 (May 2, 2016)

¹² *See In re Charter Communications, Inc., Time Warner Cable Transfer of Control*, D.16-12-070

¹³ *See Motion* at 4.

Diversity Counsel (“NDC”). Those voluntary commitments are summarized below.¹⁴

Moreover, Joint Applicants have affirmed that the commitments it made should be made a condition of the Commission decision issued in this proceeding and be enforceable by the Commission.¹⁵ Further, to the extent the Commission adopts this commitment in its final decision, that commitment may be made enforceable.¹⁶

Second, although parties often do not have the opportunity to respond to commitments which occur later in the process of Commission review, TURN/Greenlining has had significant opportunity to address the CETF MOU in particular. The CETF MOU was first made public in April 8, 2019 (several weeks prior to opening briefs)¹⁷ and was then presented in Joint Applicants’ opening post-hearing brief. Thus, TURN/Greenlining had at least a month to consider the commitment and provide any comments in their opening briefs (which they did not do) and again in their reply briefs. Indeed, both TURN and Greenlining did provide comment on the CETF MOU in their reply briefs.¹⁸

TURN/Greenlining complains that “This MOU was not part of the Joint Applicants’ submitted case, was not discussed in their Application or in the thousands of pages of rebuttal

¹⁴ Joint Applicants’ Opening Brief at 5.

¹⁵ Joint Parties’ Motion at 4 (“The Joint Parties also wish to emphasize that the commitments in the MOU are verifiable, enforceable, and will be subject to ongoing monitoring by CETF and the Commission.”); CETF MOU at 15 (“T-Mobile agrees that the CPUC may enforce these voluntary settlement conditions....”).

¹⁶ *In re Frontier*, D.15-12-005 mimeo at 63-64 (“Although the MOUs were not designated ‘settlements’ by the parties and the parties did not file motions for their approval, they are enforceable contracts and as such have similar practical effects as the Settlements.”).

¹⁷ *See* Joint Parties’ Motion.

¹⁸ TURN Reply Brief at 21; Greenlining Reply Brief at 11-15. They also addressed the merits of the CETF MOU in their response to the Joint Parties’ Motion. *See Response of the Joint Consumers to Joint Motion of Joint Applicants and the CETF to Reflect Memorandum of Understanding Between the CETF and T-Mobile USA, Inc.* at 7-8 (April 23, 2019).

testimony and attachments, nor was it the subject of cross examination during hearings”¹⁹ This argument fares no better. There was no mention of the CETF MOU at those times because the CETF MOU was not executed until after hearings.

TURN further states: “‘The Commission shall render its decision based on the evidence of record.’ [citing Pub. Util. Code § 1701.1(e)(8)] These commitments are not in the record.”²⁰ First, as discussed above, the commitments are now on the record. Second, sub-part “(e)” of Pub. Util. Code § 1701.1 focuses on *ex parte* meetings, and its language in § 1701.1(e)(8)²¹ provides that *ex parte* communications are not part of the evidentiary record. As a result, nothing in this statute supports TURN/Greenlining’s request to strike portions of Joint Applicants’ opening brief.²² In fact, other provisions of the Public Utilities Code *undercut* TURN/Greenlining’s arguments. For example, Pub. Util. Code § 1757.1(a) addresses what information the Commission may consider in rendering a decision, which consists of “the entire record” of the proceeding²³ which clearly includes information in briefs.

Finally, as discussed above, the Commission frequently has considered commitments made by applicants in briefs (or after briefs) in prior merger proceedings. Thus, there is ample precedent for the Commission’s consideration of commitments made by applicants near the end of proceedings, as it has done in prior merger proceedings, and TURN/Greenlining has provided no precedent to the contrary.

¹⁹ Motion at 1.

²⁰ Motion at 3

²¹ The statute provides in full: “The commission shall render its decisions based on the law and on the evidence in the record. *Ex parte* communications shall not be a part of the evidentiary record of the proceedings.”

²² Moreover, that statute does not expressly preclude consideration of items in the record beyond just evidence.

²³ Pub. Util. Code § 1757.1(a) provides: “In any proceeding ... review by the court shall not extend further than to determine, on the basis of *the entire record* which shall be certified by the commission, whether any of the following occurred” (Emphasis added.)

