

**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

**JOINT APPLICANTS' SUR-REPLY IN RESPONSE TO THE REPLY OF PUBLIC  
ADVOCATES OFFICE IN SUPPORT OF ITS MOTION TO AMEND AND  
SUPPLEMENT TESTIMONY AND ADD HEARINGS**

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**I. Introduction**

Pursuant to the February 25, 2019 E-mail ruling of Administrative Law Judge Bemederfer, Sprint Communications Company L.P. (U-5112-C), Sprint Spectrum L.P. (U-3062-C), Virgin Mobile USA, L.P. (U-4327-C) (collectively "Sprint Wireless"), and T-Mobile USA, Inc. ("T-Mobile USA") (collectively, the "Joint Applicants") submit this Sur-reply in response to the Reply filed by the Public Advocates Office ("Cal PA") in further support of its motion to amend its testimony, provide supplemental testimony, and conduct further hearings.

**II. Response**

**A. Cal PA's New Request for Alternative Relief is Improper, and Cal PA Does Not Address the Prejudice to Joint Applicants Caused by Delay.**

For the first time, and on reply, Cal PA introduces a new, fallback request for relief. If the Commission denies its motion, Cal PA asks in the alternative for a three-week delay of briefing to allow Cal PA to introduce new testimony in its opening brief. This request is

improper: It was not raised in the opening motion,<sup>1</sup> nor did Cal PA present any such request to the Joint Applicants in order to determine whether they were amenable to such an extension, as is required by the Commission’s rules.<sup>2</sup> Had Cal PA done so, Joint Applicants would have explained why they oppose this request. The Commission established the operative schedule over four months ago,<sup>3</sup> and Joint Applicants have planned their witness preparation, submission of testimony, and preparation of post-hearing briefs in reliance on that schedule. Cal PA has presented no valid justification for delaying the proceedings by three weeks—much less the minimum of six weeks of delay that would be caused by reopening testimony and hearings.<sup>4</sup> Moreover, allowing Cal PA to introduce new testimony that Joint Applicants have not had the opportunity to respond to and test on cross-examination would further prejudice Joint Applicants, conflict with the Commission’s rules, and create serious due process concerns.<sup>5</sup>

Indeed, Cal PA entirely fails to respond to Joint Applicants’ concern that if testimony were reopened at this late stage of the proceedings, it would cause substantial prejudicial delay—and even greater delay if further hearings were added.<sup>6</sup> Cal PA’s failure to address this significant prejudice to Joint Applicants is sufficient reason to deny Cal PA’s motion and new request for alternative relief.

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<sup>1</sup> Commission Rule 11.1(d) states that “[a] motion must concisely state ... the specific relief or ruling requested.” Cal PA’s Motion failed to do this: It did not state the relief that it has now elected to seek, for the first time, in its Reply. Without the permission to file this Sur-reply, Joint Applicants would not have been able to respond to the new request from Cal PA. Cal PA’s violation of Rule 11.1(d) gives ample cause to deny its Motion.

<sup>2</sup> See Commission Rule 11.6.

<sup>3</sup> See Amended Scoping Memo at 4.

<sup>4</sup> See Joint Applicants’ Response at 7-8.

<sup>5</sup> See, e.g., Commission Rule 13.4 (“[i]n hearings on complaints, applications and petitions, *the complainant, applicant, or petitioner shall open and close.*”) (emphasis added); see also Rule 13.6(a) (“substantial rights of the parties shall be preserved”).

<sup>6</sup> See Joint Applicants’ Response at 7-8.

**B. Cal PA’s Reply Rests on Misrepresentations and Misleading Descriptions of Testimony and Discovery.**

Cal PA’s Reply also relies on misrepresentations and misleading descriptions of evidence produced in discovery. As one of the most striking examples, Cal PA asserts that Joint Applicants urged the Commission to allow Cal PA to “put its responsive evidence and testimony in the briefs ....”<sup>7</sup> Joint Applicants said no such thing. Rather, Joint Applicants clearly stated that the opening briefs and reply briefs (due on March 1 and March 15, respectively) will allow Cal PA and other parties “to *comment on* any of the testimony introduced in these proceedings to date.”<sup>8</sup> There is an obvious difference between providing new sur-rebuttal *testimony or evidence* and *commenting on* the evidence already introduced. Cal PA’s suggestion that Joint Applicants welcomed the submission of new evidence in opening briefs is simply inaccurate.<sup>9</sup>

Equally misleading is Cal PA’s claim that Joint Applicants produced “4000 pages of new information and testimony ..., delivered [to Cal PA] 4 business days before the hearing.”<sup>10</sup> Cal PA does not mention that Joint Applicants submitted *fewer* pages of written testimony than Cal PA and other intervenors combined.<sup>11</sup> The vast majority of the “thousands of pages” referenced by Cal PA consisted of FCC filings attached as exhibits to the testimony that Cal PA has already had in its possession for many months.<sup>12</sup> Indeed, *all but 36 of the approximately 3,600 pages* of

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<sup>7</sup> Cal PA Reply at 2.

<sup>8</sup> Joint Applicants’ Response at 2 (emphasis added); *see also id.* at 8.

<sup>9</sup> Cal PA Reply at 2.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *See* Joint Applicants’ Response at 5 (Intervenors submitted over 400 total pages of testimony, excluding exhibits, while Joint Applicants submitted 312 pages of rebuttal testimony, excluding exhibits).

<sup>12</sup> *See* Joint Applicants’ Appendix at 3-4 (Section B). Almost 3,100 pages of Joint Applicants’ submissions consisted of the Public Interest Statement (“PIS”) that T-Mobile and Sprint filed at the FCC and the Reply to the Joint Opposition, confidential copies of which were provided to Cal PA on October 10, 2018. Public versions of those filings had been available since June 18, 2018 and September 18, 2018, when they were submitted to the FCC.

exhibits to the rebuttal testimony were produced to Cal PA in discovery well in advance of the hearings, and none of those 36 pages are the subject of the instant Cal PA motion.<sup>13</sup>

**C. The Reply Rests on an Overarching Flawed Premise, and Cal PA Fails to Identify New Evidence or Arguments in the Rebuttal Testimony.**

The Reply also underscores how Cal PA’s request to reopen testimony and hearings relies on a fundamental and overarching flaw: Cal PA continues to incorrectly assert that all evidence introduced by Joint Applicants should have been included in the original Wireless Notification and/or Wireline Approval Application. But Cal PA does not contest that the Amended Scoping Memo, which expressly provided for rebuttal testimony, was closely based on Cal PA’s own proposed schedule and sequence for testimony.<sup>14</sup> There is no merit to Cal PA’s suggestion that any rebuttal testimony that was not already included in the initial filings giving rise to these proceedings was somehow improper.

The Reply’s discussion of the allegedly “new” evidence or arguments raised by Joint Applicants’ rebuttal testimony is equally unavailing in each of the following areas:

➤ *In-Home Broadband*: Cal PA concedes, as it must, that the Wireless Notification itself addressed in-home broadband, and Cal PA ignores the extensive information provided about that subject during discovery.<sup>15</sup> Insofar as Cal PA complains that Mr. Sievert’s rebuttal testimony provided some additional details about in-home broadband, that ignores the fact that the testimony elaborated on points raised in the Wireless Notification and responded to Cal PA’s opening testimony—in other words, it was standard rebuttal testimony.

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<sup>13</sup> The remainder of the 36 pages included a list of third-party supporters of the merger, public maps of the current Sprint and T-Mobile coverage areas, the NDC MOU that was executed on January 29, 2019, Dr. Israel’s CV, and a copy of Sprint’s recently filed Advice Letter 30 regarding LifeLine offerings.

<sup>14</sup> Joint Applicants’ Response at 6-7 (citing Cal PA Prehearing Conference Statement at 6).

<sup>15</sup> Compare Cal PA Reply at 3-4, with Joint Applicants’ Appendix at 1 (Section A).

➤ *FCC Filings*: Cal PA misleadingly asserts that “Joint Applicants do not deny that they did not include 563 pages of the company’s reply to the joint opposition filed at the FCC with their Application.”<sup>16</sup> The Reply to the Joint Opposition could not have been included with the Wireless Notification, however, because it *did not exist at the time*.<sup>17</sup> In addition, Cal PA’s assertion that “Joint Applicants ... only included a link to the Executive Summary of their Public Interest Statement filed at the FCC,”<sup>18</sup> is demonstrably incorrect given that the Wireless Notification cited the entire PIS, which was also produced in discovery.<sup>19</sup>

➤ *Network Model*: Cal PA argues that it had no “reasonable foreknowledge that Joint Applicants would attempt to enter evidence of network modeling....”<sup>20</sup> But that assertion ignores the extensive discussions of network modeling—including in meetings with Cal PA.<sup>21</sup>

➤ *Coverage Maps*: Cal PA concedes that a full set of maps for all 58 California counties was made available to it more than two weeks before Cal PA’s testimony was due and almost eight weeks before the hearings.<sup>22</sup> The notion that Cal PA had no inkling that “these maps would be included with Joint Applicants’ rebuttal testimony”<sup>23</sup> overlooks the consistent emphasis on coverage issues from the inception of these proceedings.<sup>24</sup>

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<sup>16</sup> Cal PA Reply at 4.

<sup>17</sup> Cal PA also does not mention that it received a confidential copy of the Reply to the Joint Opposition during discovery. Compare Cal PA Reply 4, with Joint Applicants’ Appendix at 3 (Section B).

<sup>18</sup> Cal PA Reply at 4.

<sup>19</sup> See Wireless Notification at 2 n.4 (providing link to entire PIS at [https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-J%20\(Public%20Redacted\)%20.pdf](https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-J%20(Public%20Redacted)%20.pdf)); see also Joint Applicants’ Appendix at 3-4 (Section B).

<sup>20</sup> Cal PA Reply at 4-5.

<sup>21</sup> See Joint Applicants’ Appendix at 5-6 (Section C).

<sup>22</sup> Cal PA Reply at 5.

<sup>23</sup> *Id.*

<sup>24</sup> See Joint Applicants’ Appendix at 7-8 (Section D).

➤ *Customer Migration:* Cal PA attempts to shore up its reliance on customer migration—an issue indisputably discussed from the outset<sup>25</sup>—by now claiming that Joint Applicants submitted new information about customer migration from MetroPCS to T-Mobile, rather than from Sprint to New T-Mobile.<sup>26</sup> But the Wireless Notification expressly addressed the MetroPCS migration,<sup>27</sup> and that migration was discussed in detail in the PIS and the Joint Opposition—both of which have been long been available to Cal PA.<sup>28</sup>

➤ *Privacy:* Cal PA concedes that it “propounded data requests relating to privacy, and prepared testimony on this subject.”<sup>29</sup> It does not seriously dispute that Joint Intervenors responded directly to that testimony—another standard example of rebuttal testimony. Instead, Cal PA again relies only on the flawed premise that all such testimony should have been included in the original filings commencing these proceedings.

➤ *IKK Model:* Cal PA does not dispute that the IKK model and all supporting data were made available to it and to its testifying expert (Dr. Selwyn) more than two weeks before Cal PA’s opening testimony was due.<sup>30</sup> Nor does Cal PA dispute that it had ample opportunities to learn more about the IKK model much earlier through publicly available sources, just as it had opportunities to request the model itself earlier in discovery.<sup>31</sup>

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<sup>25</sup> See Joint Applicants’ Appendix at 9 (Section E).

<sup>26</sup> See Cal PA Reply at 5-6.

<sup>27</sup> See, e.g., Wireless Notification at 19 (noting, in section captioned “Consumer Migration,” that “[s]imilar to what T-Mobile did in the MetroPCS migration, New T-Mobile will use the existing T-Mobile USA network as its anchor”).

<sup>28</sup> See PIS at 39-41; Declaration of Neville Ray in Support of PIS at 36-37; Joint Opposition at 50-52, and Declaration of Neville Ray in Support of Joint Opposition at 23-25.

<sup>29</sup> Cal PA Reply at 6.

<sup>30</sup> See Cal PA Reply at 7.

<sup>31</sup> For example, Cal PA had the opportunity to review the Joint Opposition filed with the FCC on September 17, 2018, the confidential version of the declaration describing the IKK model provided to Cal PA on October 10, 2018, or the FCC ex parte presentation concerning the IKK model that was made available to Cal PA in early November 2018. See Joint Applicants’ Appendix at 11-12 (Section G).

➤ *Wholesale Services*: Finally, Cal PA concedes that it provided opening testimony regarding wholesale services and acknowledges that Mr. Keys responded to that testimony.<sup>32</sup> Cal PA nevertheless asserts that Mr. Keys’ testimony regarding TracFone’s primary reliance on Verizon’s and AT&T’s networks “goes beyond” Cal PA’s opening testimony,<sup>33</sup> yet Cal PA fails to explain how that is so. Moreover, extensive information about MVNO network usage—including how many subscribers TracFone has on T-Mobile’s and Sprint’s networks—in fact was provided to Cal PA in discovery.<sup>34</sup>

### III. Conclusion

For the reasons stated above and in the Joint Applicants’ Response, the Commission should deny Cal PA’s motion, including both alternative requests for relief presented in Cal PA’s Reply.

Respectfully submitted this 26<sup>th</sup> day of February, 2019.

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/s/  
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<sup>32</sup> Cal PA Reply at 7-8.

<sup>33</sup> *Id.*

<sup>34</sup> In T-Mobile’s Response to Cal PA DR 2-18 and Sprint Response to Cal PA DR 1-20, Joint Applicants provided Cal PA with specific data concerning the number of TracFone subscribers that were using their respective networks. Given the publicly available information disclosing TracFone’s overall customer base of approximately 22 million subscribers, the customer counts identified in the data produced to Cal PA leave no doubt that TracFone principally uses the Verizon and AT&T networks to provide service to its customers.

<sup>35</sup> Pursuant to Rule 1.8(d), this document is signed on behalf of Joint Applicants.