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' RESPONSE TO MOTION OF PUBLIC ADVOCATES OFFICE TO AMEND AND SUPPLEMENT TESTIMONY AND ADD HEARINGS

(PUBLIC VERSION)

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(PUBLIC VERSION)

Pursuant to Rule 11.1 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, and the ruling by Administrative Law Judge Bemesderfer on February 5, 2019, 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") oppose the motion of the California Public Advocates Office ("Cal PA") seeking leave to amend its testimony, provide supplemental testimony, and conduct further hearings in late March 2019.[1]

Cal PA's last-minute request to reopen testimony and hearings is baseless, would substantially disrupt the schedule established by the Commission months ago – including causing *at least six weeks of unjustifiable delay* – and should be denied. Cal PA had ample opportunity

[1] *See* Motion of the Public Advocates Office To Amend and Supplement Testimony and For Additional Hearings (filed Feb. 4, 2019) ("Cal PA Motion"). Cal PA proposes to serve amended and supplemental testimony by March 5, 2019 and add hearing dates at least 21 days thereafter (i.e., by March 26 or later).

at last week's hearings to cross-examine Joint Applicants' witnesses on all of their testimony, including the eight topics listed in Attachment A to Cal PA's motion. Moreover, to the extent that Cal PA and other parties wish to comment on any of the testimony introduced in these proceedings to date, including the Joint Applicants' rebuttal testimony, they will be free to do so in their opening and reply briefs (due on March 1 and March 15, respectively). Cal PA has presented no colorable justification for disrupting the schedule on which Joint Applicants and other parties have relied for several months. Indeed, Cal PA conspicuously fails to acknowledge that the current schedule adopted by the Commission is almost identical to the one Cal PA itself proposed and about which it has raised no concerns – at least until filing its present motion on the eve of the evidentiary hearings.

A. Joint Applicants Have Not Introduced "New" Arguments or Information

Cal PA's motion rests on the unsupported premise that the Joint Applicants produced "new arguments and new information" in their rebuttal testimony that Cal PA could not reasonably have anticipated and therefore was unprepared to address during its cross-examination of the Joint Applicants' witnesses at the now-concluded evidentiary hearings.[2] This premise is demonstrably false. As shown in Joint Applicants' Appendix (attached), each of the supposedly "new" *arguments* identified by Cal PA (a) responded to intervenors' testimony – including Cal PA's own testimony – which is, of course, the very purpose of rebuttal testimony, and (b) elaborated on points previously raised in the Joint Applicants' Wireless Notification,[3] or

[2] *See, e.g.*, Cal PA Motion at 4.

[3] *See* Joint Application for Review of a Wireless Transfer Notification, No. A.18-07-012 (the "Wireless Notification"). The Joint Applicants also filed a separate Joint Application for Approval of Transfer of Control of Sprint Communications Company L.P., No. A-18-07-011 (the "Wireline Approval Application"). Although the Commission has consolidated its consideration of both proceedings, the Joint Applicants continue to respectfully maintain that the Wireline Approval Application and Wireless Notification raise distinct factual and legal issues, including different limits on the Commission's jurisdiction, and should be considered separately.

otherwise explored in discovery over the past few months.[4] To pick just one example, Cal PA asserts, without any basis, that "Mr. Sievert provides new information and new arguments related to New T-Mobile's In-Home Broadband."[5] Mr. Sievert's testimony, however, directly and explicitly responded to the testimony of Cal PA's witnesses, including Mr. Reed's assertions that New T-Mobile's in-home broadband offering had not been adequately explained.[6] Moreover, and contrary to Cal PA's assertions, the information Joint Applicants provided about in-home broadband was produced to Cal PA in October and November of 2018 – long before the January 7, 2019 deadline for filing intervenors' opening testimony.[7] In short, like the other examples cited by Cal PA (and Joint Applicants' written testimony more generally), Mr. Sievert's testimony was well within the legitimate scope of rebuttal testimony.[8]

Furthermore, the supposedly new arguments identified by Cal PA were front and center in these proceedings from the outset. These topics were extensively addressed in discovery,[9] as well as the Joint Applicants' Wireless Notification[10] and the Commission's Amended Scoping

[4] *See* Joint Applicants' Appendix (Sections A – H).

[5] Cal PA Motion, Attachment A at 1 (first Cal PA example of allegedly new issues).

[6] Ex. Pub. Adv.-004 (Reed) at 18-21; *see also* Joint Applicants' Appendix (Section A) (demonstrating that Mr. Sievert's testimony also responded to testimony from Communications Workers of America).

[7] *See* Joint Applicants' Appendix (Section A).

[8] In offering only "partial support" for Cal PA's motion, intervenor Media Alliance vaguely alludes to its "perception that a significant amount of additional material was introduced via reply testimony." Reply of Media Alliance to Motion of the Public Advocates Office to Amend and Supplement Testimony and for Additional Hearings (filed Feb. 6, 2019) ("Media Alliance Reply") at 1. But Media Alliance makes no effort to substantiate this "perception" with any specific examples or other support in the record – and Joint Applicants' Appendix shows that Media Alliance's perception is unfounded. Media Alliance acknowledges that it "did not choose to participate in the testimony portion of the proceeding to date," *id*., nor did it issue its own discovery requests or seek copies of discovery provided to Cal PA or any other party. Media Alliance has been a party to these proceedings since August 2018, and has simply chosen not to actively participate. It has presented no valid reason for disrupting the orderly progress of the proceedings now.

[9] *See* Joint Applicants' Appendix (Sections A – H); *see also infra* at p. 4.

[10] *See* Joint Applicants' Appendix (Sections A, B, C, D, E, G, H).

Memo.[11] Indeed, the topics of interest identified in the Amended Scoping Memo were closely modeled on Cal PA's own suggestions.[12]

As to allegedly "new" *information or evidence*, Cal PA's assertion that the Joint Applicants "with[eld]" such information "until just days before the evidentiary hearings"[13] is equally unfounded. As Joint Applicants' Appendix shows, all allegedly "new" information included as part of Joint Applicants' rebuttal testimony was previously produced to Cal PA in discovery or addressed in responses to Cal PA's Data Requests.[14] Indeed, the Joint Applicants have gone to great lengths to *accommodate* Cal PA, including supplying a laptop for Cal PA's exclusive use to run the economic model that Cal PA falsely claims was not timely produced,[15] and producing tens of thousands of pages of documents in response to voluminous discovery demands (including more than 300 individual requests).

The Joint Applicants also held two meetings with Cal PA representatives to further explain their merger plans and the anticipated New T-Mobile 5G network. The first meeting was held on October 18, 2018 and included a face-to-face discussion between (a) Cal PA (and other intervenors) and (b) John Legere (T-Mobile's CEO) and Mike Sievert (T-Mobile's President and

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[11] *See* Joint Applicants' Appendix (Sections A, B, C, D, E, G, H); Amended Assigned Commissioner's Scoping Memo and Ruling, dated Oct. 4, 2018 ("Amended Scoping Memo") at 2-4 (identifying topics of interest). The Commission has held that it is even proper to introduce new information – though, as discussed above, the information here was not "new" – where that information is within the Scoping Memo's delineation of the scope of the proceeding. *In re Pac. Gas & Elec. Co*., D.08-11-032, at 105 (Nov. 6, 2008).

[12] Cal PA asked the Commission to focus its review on topics that closely parallel those identified in the Amended Scoping Memo. *See* Protest of the Office of Ratepayer Advocates, Application 18-07-012 (filed Aug. 16, 2018) at 6-7; Tr. of Prehearing Conference on Sept. 13, 2018 at 6 (statement of Cal PA counsel identifying "issues that we think should be handled in this proceeding."); *id*. at 8-9 (Cal PA counsel, urging the Commission to "develop a record along the lines of what ORA is proposing"); *cf.* Amended Scoping Memo at 2-4.

[13] Cal PA Motion at 2.

[14] *See generally* Joint Applicants' Appendix (Sections A – H).

[15] *See* Joint Applicants' Appendix (Section G, discussing production of economic model by Dr. Israel and his colleagues (the "IKK" model)).

COO). The meeting touched on a host of issues, including many of the allegedly "new" issues, such as the in-home broadband topics addressed by Mr. Sievert. The Joint Applicants met again with representatives of Cal PA on December 4, 2018 to explain New T-Mobile's 5G network plans and model. As documented in the PowerPoint presentations that Joint Applicants provided at both meetings, these issues were not only brought to Cal PA's attention; they were also extensively discussed long before the evidentiary hearings (and before Cal PA's opening testimony was due).[16]

Nor is there any basis for Cal PA's complaint about the length of Joint Applicants' written testimony.[17] Aside from the lengthy documents filed at the FCC,[18] the volume of testimony and supporting exhibits submitted by Joint Applicants is actually smaller than the corresponding volume submitted by Cal PA and other intervenors. For example, Joint Applicants submitted a total of 312 pages of testimony – *less than* the 441 pages of testimony filed by the intervenors.

B. Cal PA's Motion Rests on a Misunderstanding of the Commission's Rules

Apart from resting on the false premise that the Joint Applicants somehow interjected "new" and unexpected issues, Cal PA's motion suffers from a second and equally fundamental flaw: Cal PA is simply wrong when it argues that the Joint Applicants should have filed an "amended application" rather than addressing the relevant issues in their rebuttal testimony.[19] To the contrary, a Commission rule provides that "[a]n amendment to an application, protest,

[16] *See* Presentation to Public Advocates Office, TURN and Greenlining, dated October 18, 2018 (provided in Joint Applicants' Second Supplemental Response to Cal PA DRs 1-6 and 1-30, beginning with Bates no. TMUS-CPUC-PA-10000113, and attached as Exhibit B to Joint Applicants' Appendix); Presentation – T-Mobile/Sprint Merger Network Meeting with Public Advocates Office, dated Dec. 4, 2018.
[17] *See* Cal PA Motion at 4.
[18] This includes the T-Mobile/Sprint Public Interest Statement ("PIS"), Joint Opposition, and Reply to the Joint Opposition. *See* Joint Applicants' Appendix (Section B, discussing FCC filings).
[19] Cal PA Motion at 2.

complaint, or answer *must be filed prior to* the issuance of the scoping memo."[20] Accordingly, the Joint Applicants could not have amended their Wireline Approval Application or Wireless Notification after the original Scoping Memo was issued in September 2018,[21] nor was there any reason to do so. As the above discussion shows, Joint Applicants' written testimony was quintessential rebuttal testimony – which is precisely what the Amended Scoping Memo called for.[22]

Nor can Cal PA plausibly complain about the process the Joint Applicants followed here. The sequence of testimony established in the Amended Scoping Memo – whereby Cal PA and other intervenors would first submit their opening testimony, Joint Applicants would then respond with rebuttal testimony, and evidentiary hearings would follow within a week[23] – was based on *Cal PA's own proposal*.[24] Cal PA's proposal did not provide for sur-rebuttal testimony from Cal PA or any other intervenor – and the Amended Scoping Memo makes no provision for such testimony.[25] Now that the window for submitting testimony has closed and the evidentiary hearings have concluded, Cal PA presents no valid reason – much less the good cause required[26]

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[20] Commission Rule 1.12 (emphasis added).

[21] *See* Assigned Commissioner's Scoping Memo and Ruling, dated Sept. 28, 2018 ("Scoping Memo").

[22] *See* Amended Scoping Memo at 4 (setting January 29, 2019 as deadline for service of "[r]ebuttal testimony"). Cal PA's suggestion (Motion at 2, 4) that the Amended Scoping Memo was "necessitated by" the alleged insufficiency of the Joint Applicants' Wireline Approval Application or Wireless Notification is baseless. Nothing in the Amended Scoping Memo suggests that either filing was legally insufficient – nor is there any other basis for Cal PA's unsupported assertion. Indeed, Cal PA is well aware that a rule requires the Commission to issue a Scoping Memo to establish a schedule and identify topics of interest in a given proceeding. *See* Commission Rule 7.3 ("The assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed."). The fact that the Commission followed that rule here does not remotely suggest that either the Wireline Approval Application or Wireless Notification was somehow deficient.

[23] *See* Amended Scoping Memo at 4.

[24] Prehearing Conference Statement of the Public Advocates Office (filed Sept. 12, 2018) at 6.

[25] Amended Scoping Memo at 4.

[26] *See* Commission Rule 13.8(b) ("Direct testimony in addition to the prepared testimony previously served, other than the correction of minor typographical or wording errors that do not alter the substance

– to amend or supplement its written testimony, including by introducing new testimony in further hearings. Cal PA may wish it could have the last word, but it enjoys no such right under the Commission's Amended Scoping Memo, principles of due process,[27] or the Commission's rules.[28]

C. Cal PA Has Presented No Sound Justification for Delay

A further important consideration independently warrants denial of Cal PA's last-minute request to reopen testimony and hearings: Granting Cal PA's motion would substantially disrupt the schedule adopted by the Commission – adding *at least six weeks of unjustified delay*. The Commission established the operative schedule for these proceedings over four months ago,[29] and the Joint Applicants and other intervenors have abided by that schedule. Through careful time-management during the recently concluded evidentiary hearings, moreover, Administrative Law Judge Bemesderfer has helped ensure that these proceedings remain on track. At this late stage, Cal PA's request to add weeks of delay is utterly unjustified and would cause great prejudice to Joint Applicants, who have planned their witness preparation and submission of testimony in reliance on the current schedule and have made every effort to help expedite the Commission's review in these proceedings. Indeed, Media Alliance expresses concern that

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of the prepared testimony, *will not be accepted into evidence unless the sponsoring party shows good cause* why the additional testimony could not have been served with the prepared testimony or should otherwise be admitted.") (emphasis added).

[27] Because Cal PA had the opportunity to be heard on the relevant issues, its rhetoric about alleged "due process violations" (Cal PA Motion at 2) is entirely misplaced. Cal PA has no due process right to have the final word on testimony. *Cf. Littrell v. Crist*, 1992 WL 389262, at *1 (9th Cir. Dec. 28, 1992) (unpublished) (rejecting claim that failure to consider reply brief deprived plaintiff of due process); *In re Wisdom*, 2014 WL 2175148, at *1 n.2 (D. Idaho Bkrtcy. Ct. May 23, 2014) ("Plaintiff's brief asserts he has a 'due process' right to file a reply brief…. He is in error; it is a matter of the Court's discretion, and none was authorized.").

[28] Commission Rule 13.4 clearly provides that, "[i]n hearings on complaints, applications and petitions, *the complainant, applicant, or petitioner* shall open *and close*." (Emphasis added.)

[29] Amended Scoping Memo at 4.

adding evidentiary hearings "would inevitably cause a significant shift in the rest of the schedule as laid out in the scoping memo."[30] Even the submission of supplemental testimony – without further hearings – would cause weeks of delay, as Media Alliance concedes.[31] There is simply no justification for any delay.

To the extent that Cal PA, Media Alliance, or any other party wishes to comment on (or otherwise provide legal argument concerning) any of the testimony introduced in these proceedings to date, the current schedule already provides ample opportunity to do so: Parties may file opening briefs on March 1 and reply briefs on March 15.[32] That gives Cal PA and other parties more than adequate time (specifically, more than a full month from the submission of Joint Applicants' rebuttal testimony on January 29) to formulate and draft their submissions. No adjustment of the process set out in the Amended Scoping Memo is necessary or appropriate.

For the reasons stated above, Cal PA's motion should be denied.

Respectfully submitted this 12th day of February, 2019.

/s/

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[30] Media Alliance Reply at 2 (further noting that "[w]e have concerns that the process in California not significantly lag the process at the Federal Communications Commission in Washington DC in order for the processes to inform each other.").

[31] Media Alliance acknowledges that "even this modification [to the schedule] will *likely delay the decision date by a matter of weeks*." Media Alliance Reply at 2 (emphasis added).

[32] *See* Amended Scoping Memo at 4.

[33] Pursuant to Rule 1.8(d), this document is signed on behalf of Joint Applicants.