

**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 THE
MOTION TO STRIKE OF THE PUBLIC ADVOCATES OFFICE**

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**RESPONSE OF JOINT APPLICANTS TO THE
MOTION TO STRIKE OF THE PUBLIC ADVOCATES OFFICE**

Pursuant to Rule 11.1(e) of the Commission’s Rules of Practice and Procedure (“Rules”), Sprint Spectrum L.P. (U-3062-C), Virgin Mobile USA, L.P. (U-4327-C) (collectively “Sprint”), and T-Mobile USA, Inc. (“T-Mobile USA”) (collectively, the “Joint Applicants”) respectfully oppose the Public Advocates Office’s (“Cal PA”) Motion to Strike Portions of the Joint Applicants’ Opening Brief and Confidential Attachment to Joint Applicants’ Ex Parte, filed on May 2, 2019 (the “Motion”), in the above-referenced proceeding.

I. INTRODUCTION

Cal PA seeks an order that “all references to a proposed call center . . . be stricken from Joint Applicants’ Opening Brief and ex parte materials, and that Joint Applicants be directed to cease from mentioning it in filings”¹ There is no valid basis for Cal PA’s request, and to insist that the Commission disregard this information as it reviews the merger is to ignore a promise that will have a positive impact on the State. New T-Mobile has committed to build a Customer Experience Center (“CEC”) in the Kingsburg area of the Central Valley, upon the

¹ Cal PA Motion at 4.

successful closure of the transaction (“Call Center Commitment”). The CEC will directly create a *thousand new* jobs for people in the Central Valley, providing the opportunity for those employees to become part of New T-Mobile’s Team of Experts (“TEX”) that utilize a personalized approach to support New T-Mobile’s California customers.² CEC employees can expect to have careers that offer a meaningful path for advancement, and will benefit from significant management preparation experience, as well as qualify for college tuition reimbursement.³ This is a significant and welcome development and one that has been widely applauded – particularly by community leaders in the Central Valley where its impact will be most immediate.⁴ It is difficult to imagine a legitimate purpose for suggesting that the Commission move forward as if this commitment did not exist.

Cal PA’s Motion also lacks legal basis. As to the request to strike references to the Call Center Commitment from Joint Applicants’ opening brief, Cal PA’s motion is at odds with longstanding Commission practice and governing rules. 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, Cal PA had ample opportunity to address New T-Mobile’s Call Center Commitment in its post-hearing reply brief if it wanted to suggest that the benefits it will generate are not in the public interest.

As to the relief requested in regards to ex parte materials, Cal PA appears to present a controversy where none exists. Joint Applicants have never argued that the ex parte communication is itself record evidence, nor does Cal PA cite any statute, Commission rule, or precedent that limits what is discussed in ex parte meetings to only items that are in the record.

² See Joint Applicants’ Opening Brief at 86-87, 96.

³ *Id.* at 87.

⁴ See, e.g., Letter of Support of County of Fresno Board of Supervisors (served May 13, 2019) (“In addition to expanding critically-needed internet access, this merger will provide economic benefits for the Central Valley by locating a new Customer Experience Center in the Kingsburg area.”).

To the contrary, Rule 8.4 requires only that what is discussed in a ratesetting proceeding is reported. Accordingly, the Commission should deny Cal PA's Motion in its entirety.

II. JOINT APPLICANTS USED AN APPROPRIATE VEHICLE TO INTRODUCE THE CALL CENTER COMMITMENT INTO THE RECORD

A. Introduction of the Call Center Commitment in Opening Briefs is Consistent with Commission Precedent and Cal PA's Own Advocacy in a Recent Commission Proceeding.

Cal PA asserts that new commitments, like the Call Center Commitment, may be introduced into the record only if the commitment was previously submitted into evidence.⁵ As discussed below, this position lacks legal foundation, and contradicts both Commission precedent and Cal PA'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.⁶ Indeed, there is significant Commission precedent for presenting commitments in briefs.⁷

⁵ Cal PA Motion at 2 ("In their Opening Brief, Joint Applicants make a commitment to build a call center in California's Central Valley... any mention of building a call center in California is completely missing from the evidentiary record....")

⁶ For example, 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 Modify Positions in Proceeding to Reflect Memorandum of Understanding between the California Emerging Technology Fund and T-Mobile USA, Inc.* ("Joint Motion"). The Joint Motion presented several voluntary commitments for introduction into the record. On May 8, 2019, the assigned Administrative Law Judge granted the Joint Motion.

⁷ See *In re Verizon Communications, Inc.* D.05-11-029, mimeo at 26 (intervenor introduced, as an exhibit to opening brief, the agreement with applicant, which contained several commitments by applicant); *id.* (in its opening brief, applicant introduced several FCC merger conditions, which the Commission recognized in its final decision); *In re SBC Communications, Inc.* D.05-11-028, Section 2 (intervenor filed its agreement with applicant outside of the formal settlement process, concurrent with opening briefs).

For 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.⁸ In that proceeding, Cal PA did *not* oppose applicants' introduction of new commitments in reply briefs. Moreover, when certain of the new commitments presented in the reply brief were not included in the final decision, Cal PA filed an application for rehearing to ensure that the new commitments were included in the final decision.⁹ For Cal PA to now suggest that it is improper to introduce a commitment in an opening brief is at odds with Commission practice and contrary to positions Cal PA has advocated for in other merger proceedings.

Other Commission precedent further confirms that parties are not confined to introducing voluntary commitments in an application or testimony. In 2007, the Commission reviewed an application for transfer of indirect control of Knight Holdco. In that proceeding, applicant made certain concessions on both future rates and future access to books and records in their reply briefs, and the Commission adopted certain of these concessions as conditions to approval.¹⁰ As another example, in the 2015 transaction between Frontier and Verizon (A.15-03-005), the Commission considered several commitments made by Frontier *after* it filed its opening brief.¹¹ The Commission considered these commitments when it rendered its decision approving the transaction with conditions.¹² With good reason, it is good policy for the Commission to recognize new voluntary commitments in this manner. It not only encourages parties to continue

⁸ See A.15-07-009, Charter Reply Brief at 93 (March 11, 2016).

⁹ See *In re Charter Communications, Inc., Time Warner Cable Transfer of Control*, D.16-12-070.

¹⁰ *In re SFPP, L.P.*, D.07-05-061.

¹¹ See *In re Frontier*, D.15-12-005, mimeo at 7. Frontier introduced: (1) a Memorandum of Understanding with the California Emerging Technology Fund, which was added to the record through a Joint Motion to Modify Positions on Oct. 23, 2015 and (2) a partial settlement agreement with Cal PA (then ORA), The Utility Reform Network, and Center for Accessible Technology, which was added to the record through a joint motion filed on Oct. 30, 2015.

¹² See *id.* at 83 (Ordering Paragraph 16).

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, Cal PA's argument should be rejected in its entirety.

B. The Call Center Commitment Is Not Evidence Regarding a Fact in Dispute—No Further Discovery or Other Process is Warranted.

In its Motion, Cal PA asserts that “[a]llowing the Joint Applicants to include references to this alleged call center in their Opening Brief prejudices the Public Advocates Office because there was no notice or opportunity to question the factual details of the commitment or the veracity of the claim.”¹³ This assertion misses the mark.

First, with respect to the “veracity” – *i.e.*, accuracy – of the Joint Applicants’ commitment to establish a call center, 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:

T-Mobile has made a number of voluntary, enforceable commitments in the context of this proceeding... Those voluntary commitments are summarized below... *Create New Jobs / New Customer Experience Center in California*: New T-Mobile will create new jobs including approximately one thousand new jobs at a new Customer Experience Center located in California’s Central Valley.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

¹³ Cal PA Motion at 2.

¹⁴ Joint Applicants’ Opening Brief at 6.

Commission.¹⁵ Further, to the extent the Commission adopts this commitment in its final decision, that commitment may be made enforceable, as Cal PA knows very well.¹⁶

Second, although parties often do not have the opportunity to respond to commitments which occur later in the process of Commission review, Cal PA has had significant opportunity to address the Call Center Commitment in particular. The Call Center Commitment was first made public in April 3, 2019 (several weeks prior to opening briefs)¹⁷ and was then presented in Joint Applicants’ opening post-hearing brief. Thus, Cal PA had at least two weeks to consider the commitment and provide any comments in its reply briefs. However, whether for strategic reasons or not, Cal PA neglected to direct any comment on this topic in its reply brief. In short, it could have done so – it chose not to.

Cal PA further argues that “[P]ursuant to Public Utilities Code Section 1701.1[(e)(8)], the Commission must base its decision on the evidence in the record....There is no mention of it [the Call Center Commitment] in the Joint Applicants’ Application, testimony, or at the evidentiary hearings.”¹⁸ This argument fares no better.

¹⁵ See Joint Applicants’ Reply Brief at 2-3.

¹⁶ As described above, in 2017 Cal PA filed a rehearing application to ensure that commitments presented in reply briefs by applicants were included as conditions to the merger, and that rehearing application was granted. See D.16-12-070. More recently, Cal PA submitted a motion to compel to obtain certain documents in conjunction with enforcement of certain of those conditions, and the assigned Administrative Law Judge granted the motion. See A.15-07-009, *Administrative Law Judge’s Ruling Granting Motion of Public Advocate’s Office for an Order Directing Directing Response to a Data Request* (April 2, 2019).

¹⁷ See <https://www.t-mobile.com/news/customer-experience-center-kingsburg-california#> (press release on Kingsburg Customer Experience Center)

¹⁸ Cal PA Motion at 2.

There was no mention of the commitment at those times because the commitment to establish a call center had not been publicly announced at that time.¹⁹ In addition, sub-part “(e)” of Pub. Util. Code § 1701.1 focuses on ex parte meetings, and its language in § 1701.1(e)(8)²⁰ provides that ex parte communications are not part of the evidentiary record. Joint Applicants have not contended that their ex parte communication regarding the Call Center Commitment was part of the evidentiary record. As a result, nothing in this statute supports Cal PA’s request to strike portions of Joint Applicants’ opening brief.²¹ In fact, other provisions of the Public Utilities Code directly *undercut* Cal PA’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 proceeding.²² The “entire record” of this proceeding obviously does not preclude consideration of information, such as the Call Center Commitment at issue here, provided in opening briefs.

Cal PA also makes the broad assertion that “[c]onsidering evidence that is not in the record deprives the parties of their due process rights to discover more about the evidence and to test the veracity of the claim.”²³ This assertion, however, misunderstands the nature of the post-hearing commitment set forth in the MOU. There can be no dispute about the veracity of the commitment to create a new CEC in Kingsburg; it has been publicly announced, offered as an enforceable voluntary commitment in briefing, and as noted above, broadly applauded for the

¹⁹ See *supra* n.17 (citing to press release).

²⁰ 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.”

²¹ Moreover, that statute does not expressly preclude consideration of items in the record beyond just evidence.

²² 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.)

²³ Cal PA Motion at 4.

benefits it will bring to the Central Valley including the creation of new jobs. The commitment may warrant comment in briefing or in comments but, like any other commitment, does not require discovery or otherwise require additional process. Moreover, if Cal PA is concerned about performance on that commitment, there are forums in which those issues can be addressed.

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 Cal PA has provided no precedent to the contrary.

III. JOINT APPLICANTS' APPROPRIATELY PRESENTED EX PARTE MATERIALS, AND ACKNOWLEDGE THAT THOSE MATERIALS WERE NOT ENTERED INTO THE RECORD

Even though it is well established that ex parte communications are not part of the evidentiary record, *see* Pub. Util. Code § 1701.1, Cal PA requests that all references to Call Center Commitment presented in those communications be stricken from Joint Applicants' ex parte materials. This is certainly a novel, if not also extraordinary, request. Remarkably, Cal PA also asks the Commission to direct Joint Applicants to refrain from any further mention of the commitment in ex parte communications – in effect, a ban on any First Amendment-protected “speech” describing the significant public interest benefits that the CEC will bring to this State – benefits of which the Commission would presumably wish to be aware.²⁴ Joint Applicants reiterate that they do not contend, and have never contended, that communications made during ex parte meetings are part of the evidentiary record. Thus, Cal PA's requested relief is both unnecessary and far overbroad.

²⁴ *See* Cal PA Motion at 4.

Cal PA asserts that “[i]t is inappropriate during ex parte meetings for the Joint Applicants to make reference to ‘facts’ that are not in record,”²⁵ but cites to no authority or that proposition. Cal PA further asserts that “[m]aterials provided at ex parte meetings must also be in the evidentiary record of the proceeding,”²⁶ citing to Pub. Util. Code § 1701.1(e)(8). However, this is simply not what the referenced statute says or means, nor is it consistent with Commission practice. Section 1701.8(e)(8) states: “Ex parte communications shall not be a part of the evidentiary record of the proceedings.” By its plain language, the statute demonstrates that ex parte communications will not be included in the evidentiary record. Nothing in the statute says that the content presented in ex parte communications must be in the evidentiary record; such a rule would obviate the need for the statutory language. Moreover, any such rule would conflict with common Commission practice.²⁷

While Pub. Util. Code § 1701.1 does not address ex parte written materials, Article 8, which implements the statute, does address written materials. Article 8 describes the process to report and/or serve ex parte written materials, and importantly, it contains no limitation or requirement that such materials must be in the evidentiary record. Thus, Cal PA’s request should be denied.

IV. CONCLUSION

Cal PA urges the Commission to ignore that the Call Center Commitment will bring enormous benefits to Californians. Because Cal PA’s request has no basis in law or sound policy, its Motion should be denied in its entirety.

²⁵ *Id.* at 3.

²⁶ Cal PA Motion at 2.

²⁷ *See, e.g.,* Michael J. Strumwasser, et. al, *Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices* at 156 (June 22, 2015) (describing the common practice before the Commission of including information outside of the record in ex parte communications).

Respectfully submitted this 17th day of May, 2019.

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²⁸ Pursuant to Rule 1.8(d), this document is signed on behalf of Joint Applicants.