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 OF THE COMMUNICATIONS WORKERS OF AMERICA DISTRICT 9 TO STRIKE EXHIBIT JT. APPL-16 AND THE PORTION OF THE EVIDENTIARY HEARING TRANSCRIPT RELATED TO EXHIBIT JT. APPL-16 (PUBLIC VERSION)

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Dated: April 26, 2019

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Pursuant to Rule 11.1(e) of the Commission's Rules of Practice and Procedure ("Rules"), 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"), and T-Mobile USA, Inc. ("T-Mobile USA") (collectively, the "Joint Applicants") respectfully submit this Response to Communications Workers of America District 9 ("CWA") Motion to Strike Exhibit Jt. Appl-16 and the portion of the evidentiary hearing transcript related to exhibit Jt. Appl-16 filed on April 11, 2019 in the captioned proceeding. As explained below, CWA's Motion to Strike has no merit, and the Commission should deny it in its entirety.[1]

[1] Per CWA's request, as a courtesy, Joint Applicants have marked as confidential portions of this Response that discuss the substance of Jt. Appl-16. However, Joint Applicants do so without conceding that any portion of Jt. Appl-16 is confidential and reserving all rights. *See* CWA Motion to Strike, at 3 ("Until ALJ Bemesderfer has had an opportunity to rule on this motion, CWA requests that briefing related to Exhibit Jt Appl-16 be redacted.")

I. CWA'S MOTION TO STRIKE OR FOR CONFIDENTIAL TREATMENT IN THE ALTERNATIVE SHOULD BE DENIED BECAUSE THE AGREEMENT EXCERPTED IN THE JOINT APPLICANTS' EXHIBIT WAS PUBLICLY AVAILABLE AND IS NOT PRIVILEGED

CWA contends that the excerpts featured in Exhibit Jt. Appl-16 of the AT&T Mobility/CWA Districts 1, 2-13, 4, 7, 9, Company Package Proposal – Final, 2017 Regional Labor Agreement, dated December 13, 2017 (the "Agreement"), memorializing CWA's obligation in a section entitled **[Begin Confidential (BC)]** "REDACTED REDACTED **[End Confidential (EC)]** should be stricken from the record along with the portion of the hearing transcript related to the Agreement, or, in the alternative, be marked confidential.[3] Additionally, CWA claims that Joint Applicants committed an ethical violation by not notifying CWA that the Agreement was available online and citing to the Agreement at the evidentiary hearing.[4] CWA's attempt to "un-ring" the bell and now hide their contractual obligations to AT&T from the Commission and Californians is unavailing.

The Commission should deny CWA's motion in its entirety. As an initial matter, CWA's motion to strike must be denied because the Agreement was the subject of testimony at the hearing, is clearly relevant, and is not privileged. CWA's alternative request for confidential treatment must similarly be denied because the Agreement was publicly available on CWA's

[2] Jt. Appl-16 at 4 **[BC]** **[EC]**

[3] *See* CWA Motion to Strike, at 3.

[4] *Id*.

website for an extended period of time (even after CWA learned of its publication at the hearing) and the Agreement has been discussed and/or quoted in various publicly available articles and commentary, which make confidential treatment inappropriate. Moreover, the identical provision which is the subject of the CWA motion is still available — and has been available — on various other CWA websites which seem to regularly post their various agreements with AT&T. Finally, Joint Applicants had no ethical or other duty to notify CWA about the public availability of the Agreement or refrain from discussing it at the hearing because the Agreement is not privileged.

A. It would be Inappropriate to Strike the Agreement Since it is Clearly Relevant and was the Subject of Testimony at the Hearing

As a threshold matter, CWA's Motion to Strike must be denied. CWA has offered no basis for striking the Agreement from the record other than the implication that it is attorney-client privileged — an allegation which, as is explained below — has no merit. Moreover, as ALJ Bemesderfer recognized in deciding to admit Exhibit Jt. Appl-16 at the hearing, "the horse is out of the barn" given that CWA's witness testified to the existence of a specified paragraph within the Agreement, and it therefore would be inappropriate to exclude the Agreement from the record.[5] CWA's motion to strike should also be denied because the provision at issue in the Agreement is clearly relevant to Joint Applicants' case and to the public's interest in this proceeding as it suggests that the motivation behind CWA's testimony in this proceeding may be its affiliation with AT&T, rather than the merits of this transaction. Reinforcing this conclusion is the fact that CWA's motion does not deny much less question that CWA is **[BC]** [redacted] **[EC]** through its participation in this proceeding.

[5] *Id*. at 1227:8-14 and 1235:1-10.

B. It Would be Inappropriate to Afford the Agreement Confidential Treatment Because the Agreement Does Not Meet the Commission's Standards for Confidential Treatment

Under the Commission's rules, information should not be treated as confidential — and thereby excluded from the public record of the agency's proceedings — if that information is already publicly available.[6] Moreover, and critical here, the Commission requires an entity requesting confidential treatment to "make reasonable steps to maintain the information [sic] confidentiality."[7] In this case, the allegedly confidential document was posted on CWA's own website[8] — a location over which CWA clearly had control. Additionally, CWA failed to take any timely and reasonable action to remove the Agreement from its own website after it became aware of the public posting.

Specifically, it appears that the agreement was publicly available for some period of time before the hearing in February (because co-counsel printed the document from the website as part of hearing preparations), was still posted at the time of the hearing, and remained posted and publicly available at least until March 11, 2019 — a month after the conclusion of the hearing.[9] In this regard, it is particularly notable that CWA failed to exercise reasonable diligence in taking action to safeguard confidentiality even after CWA became aware that the document was posted on its website.[10] Clearly, CWA had the ability to take more timely action to remove this

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[6] *See, e.g.*, General Order ("G.O.") No. 66-D, Rule 3.5 Confidential Treatment Unavailable for Public Information ("A request for the Commission to provide confidential treatment of information per Sections 3.2 – 3.4 of this GO, which is already public, will not be granted. …")

[7] *See, e.g.,* G.O. 66-D, Rule 3.5 Confidential Treatment Unavailable for Public Information ("An information submitter requesting confidential treatment must make reasonable steps to maintain the information confidentiality and in the event an information submitter becomes aware that the information is public, the information submitter must so inform the Commission in a timely manner.")

[8] *See* attached Declaration of Emily P. Sangi, at 1-2 (April 26, 2019). The website address to the full Agreement was https://www.cwa-union.org/sites/default/files/attm_signed_orange_ta.pdf, though the document has since been removed from this address.

[9] *Id*.

[10] *Id*. at 2 (¶ 5).

allegedly confidential document from its own website, yet it failed to do so for over a month after the hearing.[11]

Additionally, not only was the Agreement publicly available on CWA's own website, it was referenced and quoted publicly in several news articles and commentary. For example, an article published on February 25, 2019 refers to "a copy of the regional labor agreement negotiated between CWA and AT&T in December 2017" and quotes the full **[BC]** [redacted] **[EC]** provision from the Agreement.[12] Further articles and commentary have similarly cited to and quoted from the Agreement through at least April 11.[13]

Moreover the posting of this CWA/AT&T Agreement at issue in this case is not an isolated instance. To the contrary, it appears that CWA contracts with AT&T are regularly posted online.[14] In fact, there is currently an agreement posted on CWA Local 1298's website between CWA and AT&T East with precisely the same **[BC** [redacted]

[11] CWA states that, at least as of the date of its motion, the Agreement is no longer available on its website. *Supra* note 1, at 2.

[12] Curtis Eichelberger and Jenna Ebersole, MLex Market Insight, "T-Mobile, Sprint merger critic CWA has contract provision calling for union to back AT&T policies" (Feb. 25, 2019), *available at* https://mlexmarketinsight.com/ (subscription required) (stating that [**BC**] [redacted] **[EC]** and quoting the [**BC**] [redacted] **EC]** provision).

[13] *See, e.g.*, Bill McMorris, The Washington Free Beacon Press, "Tlaib Spearheads Anti-Sprint/T-Mobile Merger Campaign," (Mar. 2, 2019) *available at* https://freebeacon.com/issues/tlaib-spearheads-anti-sprint-t-mobile-merger-campaign/ (referencing the "regional labor contract between the union and AT&T signed in Dec. 2017" and quoting from the Agreement's **[BC]** [redacted] **[EC]** provision); Commentary by Ken Blackwell: Union Attacks Threaten T-Mobile-Sprint Merger, Future of 5G Innovation in US (April 11, 2019), *available at* https://www.cnsnews.com/commentary/ken-blackwell/union-attacks-threaten-t-mobile-sprint-merger-future-5g-innovation-us (referencing the "contract between CWA and AT&T [that] requires the union to support AT&T's business objectives, including legislative agenda" and quoting from the Agreement's **[BC]** [redacted] **[EC]** provision).

[14] *See* AT&T Mobility Contracts, https://cwa-union.org/pages/att_mobility_contracts (last visited April 19, 2019) (linking to contracts between AT&T Mobility and CWA).

[redacted] **[EC]** provision that Joint Applicants moved to enter into the record here.[15] Moreover, CWA local organizations have published online multiple settlement agreements between CWA and different units of AT&T containing this [**BC** [redacted] **[EC]** provision, going back as far as 2009.[16] Clearly, this is not the type of agreement that CWA keeps confidential and the history of publication of its labor agreements severely undercuts CWA's claim that disclosure of this provision is inadvertent.

For these reasons, the Commission should deny CWA's alternate request for confidential treatment.[17]

C. Joint Applicants Do Not Have an Ethical Obligation to Refrain from Citing to the Agreement Because the Agreement is Not Privileged Under the Attorney-Client or Attorney Work-Product Doctrines

The Commission should also reject CWA's baseless allegation that Joint Applicants have committed an ethical violation through their "failure to notify CWA when [they] discovered" the

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[15] *See* 2016 Labor Agreement, Communications Workers of America and AT&T East, https://cwa1298.org/sites/default/files/forms/ATT-2016_east_cwa_labor_agreement.pdf at 47-48 (last visited April 19, 2019). [**BC**] [redacted] **EC]**

[16] *See* Terms of the 2017 CWA-AT&T Southwest Settlement Agreement (March 2, 2017) at 108-09, http://www.cwa6201.org/2017_Settlement_Agreement_xfinalx.pdf (last visited April 19, 2019); Terms of the 2013 CWA-AT&T Southwest Settlement Agreement (Feb. 6, 2013) at 106-07, https://unionhall.cwalocals.org/system/files/labor_2013_sw_settlement_agreement.pdf (last visited April 19, 2019); Terms of the 2009 CWA-AT&T Southwest Settlement Agreement (Oct. 12, 2009) at 122-23, http://www.cwa6132.org/wp-content/uploads/2019/01/2009-ATT-SW-Labor-Settlement-Agreement.pdf (last visited April 19, 2019).

[17] Although the ALJ designated the relevant examination of CWA's Witness, Debbie Goldman, as confidential in an attempt to deal with this issue during the hearing itself [Hearing Transcript, at 1227:9-12], that interim ruling should not dictate the final resolution of this matter given the underlying facts about CWA's failure to preserve the Agreement's confidentiality and the publication of similar agreements.

Agreement online and their "use of the confidential agreement in hearings."[18] Significantly, CWA does not cite to a particular law or regulation that imposes such an obligation. Instead, it cites to a single case addressing a lawyer's ethical duty to disclose inadvertently received *privileged* information and to return or destroy such data.[19] However, this ethical duty extends only to documents which are privileged under the attorney-client privilege and work product protections,[20] not to documents which may or may not be confidential.[21]

CWA does not allege that the Agreement is covered by the attorney-client privilege or some form of joint defense privilege, nor could it be. The Agreement was apparently the product of normal course negotiations between an employer, AT&T, and a union, CWA; there is no privilege attached to the product of such negotiations; especially when they are publicly disclosed.[22] Similarly, the attorney work-product privilege does not apply because the

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[18] CWA Motion to Strike, at 3.

[19] *See McDermott Will & Emery LLP v. Super. Crt.*, 10 Cal.App.5th 1083 (2017) (finding that law firm that used an inadvertently disclosed email from a client's attorney violated the ethical obligation to notify the client privilege holder and refrain from use).

[20] *See State Comp. Ins. Fund v. WPS, Inc*., 70 Cal. App. 4th 644, 656-657 (1999):

> When a lawyer who receives materials that obviously appear to be subject to an **attorney-client privilege** or otherwise clearly appear to be confidential **and privileged** and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be **privileged**." (emphases added)

[21] In addition to conflating confidentiality with legal privilege, CWA glosses over another important distinction. The Agreement at issue was not inadvertently provided to Joint Applicants by CWA. Instead, Joint Applicants, through their own diligence and research efforts, found the Agreement publicly available on CWA's website. Thus, the ethical obligations articulated in the case cited by CWA would not be triggered here even if attorney-client privilege and/or the attorney work product doctrine applied — which, for the reasons explained, is patently not the case.

[22] "AT&T Announces CWA-Represented Employees Vote to Ratify Mobility Orange Agreement, January 12, 2018, *available at* https://about.att.com/pages/bargaining ("The four-year contract covers about 20,000 employees in 36 states and the District of Columbia – AT&T's Mobility Orange unit, which encompasses CWA Districts 1, 2-13, 4, 7 and 9. The agreement was reached on Dec. 13.")

Agreement is not a writing reflecting an "attorney's impressions, conclusions, opinions, or legal research or theories."[23]

In short, CWA's arguments rest on a fundamentally mistaken understanding of the law, and its assertions of allegedly unethical conduct by counsel completely lack merit.

For these reasons, Joint Applicants respectfully request that the CWA Motion to Strike be denied.

Respectfully submitted this 26th day of April, 2019.

/s/

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[23] *See* Cal. Code Civ. Proc. § 2018.030 (codifying the attorney work product doctrine).

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

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DECLARATION OF EMILY P. SANGI IN SUPPORT OF RESPONSE OF JOINT APPLICANTS TO MOTION OF THE COMMUNICATIONS WORKERS OF AMERICA DISTRICT 9 TO STRIKE EXHIBIT JT. APPL-16 AND THE PORTION OF THE EVIDENTIARY HEARING TRANSCRIPT RELATED TO EXHIBIT JT. APPL-16

I, Emily P. Sangi, declare:

1. I am an attorney at law. My firm, Davis Wright Tremaine LLP, is legal counsel for T-Mobile USA, Inc. in this matter.
2. I make this declaration in support of *Response of Joint Applicants to Motion of the Communications Workers of America District 9 to Strike Exhibit Jt. App-16 and the portions of the Evidentiary Hearing Transcript Related to Exhibit Jt. Appl-16.*
3. Exhibit Jt. Appl-16 features excerpts of the AT&T Mobility/CWA Districts 1, 2-13, 4, 7, 9, Company Package Proposal – Final, 2017 Regional Labor Agreement, dated December 13, 2017 (the "Agreement").
4. I was informed and believe that my co-counsel had located the Agreement online prior to the February 2019 evidentiary hearings held for this proceeding and made copies of

excerpts of the Agreement to use as a cross-examination exhibit, which was subsequently marked and entered into the record as Jt. Appl-16.[25]

5. I was further informed that, at the conclusion of the hearing on February 8, 2019, my co-counsel represented to the Administrative Law Judge and to counsel for Communications Workers of America District 9 that she was still able to access the Agreement online and did so that day in the courtroom, confirming its public availability.

6. On March 11, 2019, I visited the web address https://www.cwa-union.org/sites/default/files/attm_signed_orange_ta.pdf and observed that the full Agreement excerpted in Jt. App-16 was publicly available on that website.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on April 26, 2019 at San Francisco, California.

/s/
Emily P. Sangi

[25] *See also* Hearing Transcript at 1235:1-10 (February 8, 2019).