

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

And Related Matter.

Application 18-07-012

**OPPOSITION OF THE PUBLIC ADVOCATES OFFICE
AND THE COMMUNICATIONS WORKERS OF AMERICA DISTRICT 9
(JOINT CONSUMERS) TO MOTION BY JOINT APPLICANTS
TO ADVISE COMMISSION OF DEPARTMENT OF JUSTICE
PROPOSED FINAL JUDGMENT**

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July 31, 2019

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I. INTRODUCTION

The Public Advocates Office and the Communications Workers of America District 9 (CWA) (jointly, “Joint Consumers”) oppose the motion of Joint Applicants Sprint Communications Company L.P. (U-5112-C), Sprint Spectrum L.P. (U-3062-C), Virgin Mobile USA, L.P. (U-4327-C), and T-Mobile USA, Inc. (collectively, “Joint Applicants”) to advise the Commission of the terms of a proposed Final Judgment (Proposed Final Judgment) and related Stipulation and Order (Stipulation & Order) filed by the U.S. Department of Justice (DOJ) on July 26, 2019 in the U.S. District Court for the District of Columbia. This Proposed Final Judgment was created long after the close of evidentiary hearings in this proceeding, is not part of the evidentiary record, and should not be considered by the Commission.

In addition to being outside the record, the Proposed Final Judgment includes many provisions and commitments that did not exist at the time the Joint Applicants filed

this Application.¹ Essentially, the Joint Applicants have reached a settlement with the DOJ that fundamentally changes the nature of the request made in this Application. The provisions of the settlement change the public interest analysis the Commission must do in this proceeding. For example, pursuant to the settlement the Joint Applicants are attempting to form a fourth wireless carrier under the Dish Network name (among other things), by divesting of Sprint's brands Boost and Virgin Mobile, in order to satisfy anti-trust concerns by the states and the DOJ. This change in the nature of the proposed merger should cause the Commission to reconsider this Application with the full facts of the proposed divestiture in the record before it makes a decision. The Commission should not take this fundamental change "under advisement" as if it has no effect on the analysis that it is required to do. Moreover, due process requires that parties be provided an opportunity to fully investigate and consider the provisions of the settlement, in order to determine its impact on this Application.

Additionally, this Motion would be denied had it been properly framed as a motion to take official notice, because the record is closed. The Joint Applicants are attempting to circumvent the fact that the record is closed by calling this a "Motion to Advise" rather than to call it what it is, which is a request to take official notice of facts. Moreover, the Proposed Final Judgment is not a final judgment. Under California Evidence Code Section 451, *decisional* law may be officially noticed, but there is no provision to take notice of a non-final pleading filed by a party. This is not a document that can be properly noticed (or considered) by the Commission.²

The Commission should also deny this Motion on the grounds that the requested relief (i.e., that the Commission be "advised") is vague and ambiguous and does not state a recognizable action under the Commission's Rules of Practice and Procedure, and

¹ *Motion Of Joint Applicants To Advise The Commission Of Doj Proposed Final Judgment*, (Motion) filed July 26, 2019; at pp. 3-5.

² If this is not a request to take official notice, then the settlement is not in the record and under no circumstances may it be considered by the Commission in its final decision on this matter.

appears to be no more than an inappropriate attempt to have the Commission consider materials outside the record.

II. DISCUSSION

Pursuant to Public Utilities Code Section 1701.1, the Commission must base its decision on the evidence in the record. Joint Applicants' settlement with the DOJ is not part of the record, but Joint Applicants nevertheless want the Commission to issue a decision based on the new information contained in the settlement, which violates Section 1701.1(e)(8).

If the Commission takes notice of the Joint Applicants' filings as they request, parties will be deprived of their due process rights to challenge and test information that is considered in this proceeding. It will become impossible to make a decision on what is actually part of the evidentiary record if we take "advisement" of Joint Applicants' settlement with the DOJ.

Additionally, this Motion is an attempt to circumvent Article 13 of the Commission's Rules of Practice and Procedure, which prescribes rules for hearings, taking of evidence, and the submission of proceedings. The Motion is nothing more than an attempt to circumvent Rules 13.9 (Official Notice of Facts) and 13.14 (Submission and Reopening of Record). A request pursuant to Rule 13.9 to take Official Notice of Facts must be done before the record is closed. Pursuant to Rule 13.14(a), after the hearings and briefing are completed the case is deemed submitted and the record closed. If the Joint Applicants want to introduce new facts, they are required to reopen the record pursuant to Rule 13.14(b). Essentially, through this Motion Joint Applicants are attempting to supplement the evidentiary record without following the rules and not allowing the other parties to comment on the new evidence. Granting this Motion violates these rules because the nature of the Joint Applicants' proposed merger has fundamentally changed,³ while the evidentiary record is entirely devoid of these

³ The Proposed Final Judgement is attached to the Joint Applicants' Motion and summarized at pp. 3-5.

significant changes and parties have had no opportunity to investigate the new proposal or comment on it.

Furthermore, Rule 13.9 provides that the Commission may take notice of matters permitted to be noticed under California Evidence Code Section 450 *et seq.* Evidence Code Section 451 requires official notice of decisional law by state and federal courts – i.e., final decisions or rulings – but not “proposed” non-final pleadings by the parties. The Proposed Final Judgment in this case is non-final, and not a document that can be properly noticed.

Finally, this Motion asks the Commission to do something that is not provided for anywhere in the rules – to take “advisement” of new facts, after the case has been submitted and the record closed. The Motion’s request to have the Commission take the settlement under “advisement” is vague and ambiguous because the request does not state a cognizable, permissible action under the Rules. The Rules do not allow for Joint Applicants to include new evidence in the record in this way. There are no legitimate grounds on which to grant this request, which is impermissibly vague and ambiguous as to what it wants the Commission to do.

The proposed merger as set forth in this proceeding is solely between Sprint and T-Mobile; however, it appears that Dish Network now has a crucial role in the transaction; namely, to acquire some of Sprint’s assets in order to become a fourth major wireless carrier and allegedly alleviate antitrust concerns. Obviously, Dish’s role in this was not part of the Application because it had not occurred yet; thus, no party has had the opportunity to investigate or analyze the current proposal.

If (as seems to be the case), the Joint Applicants want the Commission to base its decision on their just-announced plan to divest Sprint of Boost and Virgin Mobile and create Dish Network as a fourth wireless carrier, Joint Applicants should amend their Application and give parties the opportunity to fully understand the details of the newly proposed transaction and the effect on the public interest. The Commission should consider whether the deal that is *actually being proposed* is in the public interest.

The Joint Consumers respectfully urge the Commission to delay issuing any proposed decision in this proceeding based on the existing Application, in order to allow the parties to investigate and comment on the new arrangement and ensure the evidentiary record is complete. The Joint Consumers intend to file a motion in the near future that would require Joint Applicants to *properly* supplement the record (not via a vague and ambiguous motion to “advise”) with the new information and to allow the parties to conduct further discovery.

III. CONCLUSION

For the reasons set forth above, the Joint Consumers respectfully request that the Commission deny Joint Applicants’ Motion.

Respectfully submitted,

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