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).	A.18-07-011
And Related Matter.	A.18-07-012

REPLY COMMENTS OF THE PUBLIC ADVOCATES OFFICE ON THE PROPOSED DECISION

MICHELLE SCHAEFER
Attorney

Public Advocates Office
California Public Utilities Commission
505 Van Ness Ave
San Francisco, CA 94012
Telephone: 415-703-2722
Email: michelle.schaefer@cpuc.ca.gov

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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office) submits these reply comments on the Proposed Decision (PD) in the above captioned proceedings. On April 3, 2020, Administrative Law Judge Bemesderfer issued an email ruling that allows the reply comments on the PD to be up to 10 pages and extended the filing date for reply comments to April 9, 2020. Therefore, these reply comments are timely.

T-Mobile USA, Inc. (T-Mobile) and Sprint Communications Company L.P. (Sprint), together herein referred to as the Joint Applicants, make several factual and/or legal errors in their opening comments filed on April 1, 2020.[1] The Joint Applicants assert that the Commission lacks the authority and jurisdiction to require approval of the proposed transaction or to impose and enforce conditions on the Joint Applicants, if the Commission approves the transaction.[2] The Joint Applicants' actions immediately preceding their filing of comments on the PD, which the Joint Applicants rely on to make their arguments in their comments, defy the Commission's authority and jurisdiction.[3] The Joint Applicants' statements and actions are further proof and a red flag that compliance with any merger decision or conditions will be taken lightly and ignored or challenged by the companies if the merger is approved or totally ignored if the merger is rejected; ultimately harming California consumers.

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[1] Joint Applicants' Opening Comments on Proposed Decision, Application (A.) 18-07-001 et al., filed Apr. 1, 2020 (Joint Applicants' Comments).

[2] *See* Joint Applicants' Comments at 2-6 ("The PD's assertion of authority to require approval for, or to impose conditions on, the wireless transaction constitutes legal error.")

[3] *See* Sprint Communications Company L.P.'s ("Sprint") Advice Letter 918, filed Mar. 30, 2020 (Sprint's Tier 1 AL); Motion of Joint Applicants to Withdraw Wireline Application, A.18-07-011 et al, filed Mar. 30, 2020 (Motion to Withdraw); *See* Letter from Michael Sievert, President and Chief Operating Officer of T-Mobile, to the Honorable Clifford Rechtschaffen, Commissioner at the California Public Utilities Commission, and the Honorable Karl Bemesderfer, Administrative Law Judge at the California Public Utilities Commission, re: Application Nos. 18-07-011 and 18-07-012, filed Mar. 31, 2020. (March 31 T-Mobile Letter).

I. THE COMMISSION HAS JURISDICTION OVER WIRELESS TRANSACTIONS.

The Joint Applicants commit legal error by claiming that Section 332(c)(3)(A) of the Federal Communications Act prohibits the Commission from requiring preapproval of the transfer of ownership and control of Sprint to T-Mobile.[4] In Decision (D.) 95-10-032, the Commission affirmed it had jurisdiction over the transfer of ownership of a wireless retail provider within California and concluded that "the transfer of ownership interests in a CMRS [Commercial Mobile Radio Service] entity is not tantamount to [market] entry, and Commission jurisdiction over such transfers is not preempted under the" federal regulation.[5] The Commission found that "[t]he legislative history of the Budget Act explicitly includes transfers of ownership as an example of 'other terms and conditions' over which states still retain the authority to regulate."[6] In 1998, the Commission again declared that Section 332(c)(3)(A) of the Federal Communications Act "does not prohibit state regulation of transfers of control" and "specifically reserves to the States the authority to regulate 'the other terms and conditions of'"[7] wireless retail service.

The Joint Applicants focus entirely on Ordering Paragraph No. 3 of D.95-10-032[8] and ignore the Commission's declaration that its decision "to grant exemptions for transactions under [Article] 6 of the PU Code [Section 851-857] may be revisited if any. . . ownership transfers that may be adverse to the public interest come to light."[9] This PD

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[4] Joint Applicants' Comments at 5.

[5] D.95-10-032 at Conclusion of Law (COL) 9 ("The transfer of ownership interests in a CMRS entity is not tantamount to entry, and Commission jurisdiction over such transfers is not preempted under the federal legislation.").

[6] D.95-10-032 (under the section "Stock and Security Issuances/Ownership and Asset Transfers or Encumbrances").

[7] D.98-07-037 at 8.

[8] *See* Joint Applicants' Comments at 5, fn.35.

[9] D.95-10-032 (immediately prior to the discussion on Facilities Siting).

expressly finds that there will be very high market concentration in a majority of California Cellular Market Areas (CMA), which suggests an adverse effect on California's public interest.[10]

The Joint Applicants wrongly claim that this Commission's review is preempted by the Federal Communications Commission's (FCC).[11] *Shroyer* does not address the issue of whether this Commission has authority to review transfers of control. *Shroyer* preempts a party under Federal Communications Act Section 332 from making an unfair competition claim that depends on the assessment of the public benefit of the merger when that the assessment has already been made by the FCC.[12] The Commission is assessing the impact that this proposed merger could have on competition, public safety, and the public interest in California, which differs from the FCC's finding that the merger benefits the public interest based on a nationwide review.[13] This Commission has an obligation to protect and assert its jurisdiction over the transfer of control of wireless retail providers in California and the impact it has on California consumers.

The Joint Applicants incorrectly rely on Sprint's Advice Letter and the Motion to Withdraw Sprint's Wireline Application, both filed two days before the initial comments on the PD were due, to contend that the Commission has no authority over this transaction.[14] The Commission's authority over Voice over Internet Protocol (VoIP) and Internet Protocol (IP) enabled services shifted dramatically on January 1, 2020, with the expiration of Public Utilities Code section 710.[15] With the expiration of Section 710, the

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[10] *See* PD at FOF 12; Comments of the Public Advocates Office on the Proposed Decision, A.18-07-011 et al, filed Apr. 1, 2020, at 5-8 (Public Advocates Office's Comments on PD). *See also* Jt. Appl.-15, Horizontal Merger Guidelines; PD at Attachment 5 at 12 (AG Advisory Opinion).

[11] Joint Applicants' Comments at 3 (citing to *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (*Shroyer*)).

[12] *Shroyer*, 622 F.3d at 1041.

[13] *See* PD at Attachment 3, para. 384 (The public benefits analysis is on a nationwide basis.)

[14] *See* Joint Applicants' Comments at 2, 6-7, 10, Finding of Fact (FOF) 23, 24, Conclusion of Law (COL) 1.

[15] Protest of The Utility Reform Network of Sprint Communications Company L.P. (U-5112-C) Tier 1

Commission is *not* prohibited by state statute from regulating VoIP or IP-enabled services. Further, Tier 1 ALs are for ministerial matters and not for the automatic, whole-cloth creation of Commission policy by filers.[16] The Commission must take a holistic approach when reviewing Sprint's Motion to Withdraw and its Tier 1 AL because the motion to withdraw relies on the Tier 1 AL. As such, review of Sprint's Motion to Withdraw its Wireline Application and its Tier 1 AL should be suspended by the Commission immediately and the Commission should order Sprint to file a formal application and request for hearing that incorporates the record of the current merger proceeding.[17]

II. THE PROPOSED DECISION'S PUBLIC INTEREST REVIEW WAS PROPER.

The Joint Applicants incorrectly claim that the Commission erred in concluding that the Commission has the authority to approve the merger under Public Utilities Code Section 854.[18] The Commission appropriately reviewed the Transaction under Section 854(a) to determine whether the merger is in the public interest; the applicable Section 854(b) to determine whether the merger would not adversely affect competition; and, Section 854(c) by weighing eight criteria to determine if the Application benefits the public interest. Even if Sections 854(b) and 854(c) are not expressly applicable, the Commission has the express authority to use the criteria set forth in those statutes where it is in the public interest to do so.[19] Furthermore, the California Supreme Court has not only clearly articulated the Commission's authority to review transactions for

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Advice Letter 918, filed Apr. 1, 2020, at 2-3 (Protest).

[16] General Order 96-B.

[17] Protest at 2.

[18] Joint Applicants Comments at 7-10.

[19] Opinion Approving, with Conditions, Transfer of Indirect Control and Authorizing, With Conditions, Exemption from Public Utilities Code Section 852 For Some Investors in Knight Holdco (D.07-05-061), at p. 24. See also, D.02-12-068, 2002 Cal. PUC LEXIS 909, concerning the change of control of California-American Water Company.

anticompetitive and public interest impacts in California but directed it to make such a review whether or not requested by a party.[20]

Despite the review being procedurally correct, the Public Advocates Office maintains that the PD erred in approving the merger.[21] The Joint Applicants' recent actions of March 30th and April 1st indicate that the Joint Applicants will challenge any authority the Commission attempts to assert over this transaction and over Sprint's remaining VoIP assets, which provide further proof that the merger should be denied.

III. THE PERFORMANCE BOND OR ESCROW ACCOUNT REQUIREMENT IS NECESSARY.

A performance bond and/or an escrow account remains necessary,[22] particularly considering the recent actions by the Joint Applicants to undermine the Commission's authority.[23] The Joint Applicants' recent actions demonstrate that any attempt by the Commission to enforce any imposed conditions will be challenged, and a performance bond and/or escrow account will be needed to provide significant collateral if the Joint Applicants fail to meet the conditions.

IV. IF APPROVED, AN ADDITIONAL CONDITION PROTECTING THE COMMISSION'S AUTHORITY MUST BE ORDERED.

The Commission needs to place an additional condition upon the Joint Applicants to enjoin them from challenging the Commission's authority and jurisdiction over the merger and to enforce conditions adopted to protect California consumers and the public

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[20] *Northern California Power Agency v. Public Utilities Com.*, 5 Cal. 3d 370, 377 (1971) (*NCPA*). "The principle that regulatory commissions should take antitrust considerations into account in determining whether a contemplated project will advance the public interest has been reiterated on numerous occasions by federal courts." *NCPA*, 5 Cal. 3d at 377.

[21] *See generally* Public Advocates Office's Comments on PD.

[22] *See* Public Advocates Office's Comments on PD at Appendix A, OP 41.

[23] *See* Sprint's Tier 1 AL; Motion of Joint Applicants to Withdraw Wireline Application, A.18-07-011 et al, filed Mar. 30, 2020. *See also* Joint Applicants' Comments at 6-7 (stating that the Commission no longer has authority because of Sprint's Tier 1 AL and the motion to withdraw Sprint's wireline application).

interest if the merger is approved. The following Ordering Paragraph (OP) should be added immediately after the current OP 1 approving the merger:[24]

> OP 2: Within five (5) days from Commission Approval, the Joint Applicants must submit to the Commission a letter agreeing that New T-Mobile waives its right to challenge the Commission's authority and jurisdiction over enforcing the Ordering Paragraphs of this approval decision. If New T-Mobile fails to submit such letter, this merger is denied and not approved in California.

Without this additional OP, the Commission has no assurance that T-Mobile waives the ability to challenge the authority of the Commission to enforce the conditions imposed upon approval.

V. THE JOINT APPLICANTS' COMMENTS DENY THE COMMISSION AUTHORITY TO PROTECT PUBLIC SAFETY.

Given the huge public safety implications of this merger due to the resulting market concentration, the Joint Applicants' attacks on conditions regarding deployment, network speeds, backup power, and the independent monitor for compliance raise serious concerns.[25] Network capacity directly impacts the ability to deliver fast and reliable speeds, but an "analysis of maximum potential capacity [demonstrates that the Joint Applicants] have overstated the increases in capacity that [will be] a direct result" of the merger.[26] The strength of a network's capacity relies on cellular infrastructure. The Commission must "be very mindful of the effect that decreasing the presence of cellular infrastructure, which is vital to emergency response efforts, could have on California's

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[24] OP 1 should be modified to state: The Joint Application of Sprint Communications Company L.P. (U5112C) 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) is approved, subject to the conditions in OPs 3-49.

[25] *See* Joint Applicants' Comments, which critique OPs 4- 6 (broadband expansion and maintenance), OPs 8-9 (ensuring 72-hour backup power during outages), OPs 28-31 (speed testing requirements), OPs 38-39.

[26] Public Advocates Office's Comments on PD at 11 (citing Opening Brief of the Public Advocates Office [Public], 18-07-011 et all, filed Apr. 26, 2019, Attachment B at 29-39 Reed at 36, lns. 2-5).

resiliency to disasters. . . .”[27] The Public Advocates Office’s expert testimony explains that “the merger could potentially be detrimental to service reliability because two thirds of Sprint’s cell sites will be decommissioned” if the merger is approved.[28] Yet the Joint Applicants boldly state that conditions directly impacting public safety are “unsupported by the record, unlawful, inappropriate[,] and discriminatory.”[29] The Joint Applicants’ comments suggest that any Commission directive to meet certain public safety standards or to suspend certain terms and conditions during emergencies to ensure Californians have access to this states’ communications networks will be challenged.

Recent public health emergency events highlight the need to ensure New T-Mobile complies with Commission directives to ensure public safety. If the Commission has no authority to approve the merger or to enforce conditions that it imposes, as the Joint Applicants claim,[30] there is nothing to ensure that New T-Mobile will not challenge the Commission’s attempts to hold New T-Mobile to its “numerous California-specific commitments made by the Joint Applicants in this proceeding” that “reinforce the transformative benefits for California consumers associated with the merger and the buildout of New T-Mobile’s . . . 5G Network.”[31] This creates great cause for concern for how New T-Mobile will respond to the Commission’s directives to protect California consumers in emergency events and questions the Joint Applicants’ commitments to public safety.

VI. CONCLUSION

The proposed merger is anti-competitive, will adversely affect competition, and is not in the public interest. The Joint Applicants’ most recent actions are further proof and

[27] *See* Exhibit Pub. Adv.-06 at 39, lns. 11-13.

[28] Exhibit Pub. Adv.06 at 33, lns. 21-24.

[29] Joint Applicants’ Comment at 14.

[30] *See* Joint Applicants’ Comments at 2-6.

[31] Joint Applicants’ Comments at 1.

a red flag that compliance with any merger condition set forth in a Commission Decision recommending approval of the merger will be taken lightly and challenged by the companies; ultimately harming California consumers. The Commission must modify the PD to address the concerns in the Public Advocates Office's opening and reply comments. The Public Advocates Office's proposed modifications to findings of fact, conclusions of law, and ordering paragraphs in Appendix A in our opening comments must be adopted along with the condition requiring Joint Applicants to file a letter with the Commission stating that it will not challenge the Commission's authority or jurisdiction over this merger and enforcement of the conditions ordered by the Commission.[32]

Respectfully submitted,

/s/ MICHELLE SCHAEFER
Michelle Schaefer
Attorney for the

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2722
Email: Michelle.Schaefer@cpuc.ca.gov

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[32] *See supra*, Section V.