

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
(Filed July 13, 2018)

In the Matter of the Joint Application of Sprint Spectrum L.P. (U3062C), and Virgin Mobile USA L.P. (U4327C) and T-Mobile USA, Inc., a Delaware Corporation, for Review of Wireless Transfer Notification per Commission Decision 95-10-032.

Application 18-07-012
(Filed July 13, 2018)

CONSOLIDATED

[PUBLIC] OPENING BRIEF OF THE UTILITY REFORM NETWORK

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Dated: April 26, 2019

**CONTAINS INFORMATION IDENTIFIED AS CONFIDENTIAL AND PROPRIETARY
BY JOINT APPLICANTS**

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. STANDARD OF REVIEW	2
III. Loss of Facilities Based Competitor is Not in the Public Interest.....	6
A. Loss of Competitor in the Prepaid Market.....	6
B. Loss of A Competitor in the Wholesale Market.....	11
C. Rural Deployment Promises Without Competitive Pressure Unsupported.....	13
D. Consumer Practices Red Flags for Market Power	14
IV. Pricing Commitments and Claims of Lower Prices Are Not Sufficient to Meet Public Interest	17
A. Competitive Pressure Will Not Ensure Lower Bills or Attention to Low Income Consumers.....	17
B. LifeLine Commitment is a Critical Element to the Public Interest Analysis and a Harbinger for New T-Mobile’s Commitment to Low Income Californians	20
V. Network Buildout and Coverage Estimates are Unrealistic and not Merger Specific..	28
VI. The Proposed Transaction Does not Adequately Address the Need for Back-up Power Sufficient to Ensure Reliable Service.....	36
A. Approaches Differ to Ensuring Emergency Generator Power is Available During Emergencies.....	36
B. Expansion Into Rural California Brings With it An Obligation to Ensure Powered Facilities in Harsh Conditions and Denergization Events	38
VII. CONCLUSION.....	42

TABLE OF AUTHORITIES

CASES

Northern California Power Agency v. Public Utilities Commission (1971) 5 Cal.3d 370.....	3
<i>Sanchez v. Valencia Holding Company</i> (2015) 61 Cal. 4 th 899	15

STATUTES

Pub. Util Code §854.....	2
--------------------------	---

COMMISSION DECISIONS

D.01-06-007.....	3
D.01-07-030.....	5
D.05-11-029.....	3
D.06-02-003.....	2, 3
D.06-03-013.....	5
D.07-05-061.....	3
D.08-10-016.....	5
D.10-10-017.....	3
D.10-10-034.....	5
D.16-05-007.....	3
D.16-08-021.....	5
D.89-07-019.....	5
D.95-10-032.....	4

I. INTRODUCTION

Pursuant to the Scoping Memo issued on October 4, 2018 and subsequent ALJ Ruling issued on March 25, 2019, The Utility Reform Network (TURN) hereby files this Opening Brief. This is a large and complex merger that would impact every wireless customer in California. Therefore, this merger must be in the public interest. While the Application is replete with promises about benefits to consumers, upon close examination, many are best described as vague assertions with no substantive support or firm commitment. The Applicants' key promises are only as good as the competitive forces that remain in play. For example, while the Joint Applicants testimony and cross examination vaguely commit to retaining current Lifeline offerings, they do not provide sufficient detail to demonstrate that the commitment goes far enough. Likewise, while the Joint Applicants tout the benefits to rural customers, they did not provide evidence regarding rural spending or realistic time frames to directly support its claimed merger benefits and outcomes. The record shows that the potential merger benefits will not mitigate the disproportionate impact on the prepaid wireless market and California's most vulnerable customers from a loss of a facilities based competitor that fully participated in the prepaid market. Finally, in an era where multi-day power outages to mitigate wildfire risk covering extensive areas of the state are the new norm, T-Mobile's planned back-up power measures are vague and wholly insufficient to ensure that the network will continue to function and customers and first responders will not lose service at the most critical times.

The U.S. Department of Justice 's Merger Guidelines state that the purported benefits of a merger should not be considered if they are "vague, speculative, or otherwise cannot be verified by reasonable means." The Commission should reject this merger at this time by determining that the transaction is not in the public interest. However, if the Commission believes the record supports a finding of public interest, TURN has provided some examples of conditions and

further commitments that the Commission should, at a minimum, impose on the transaction if it is to find the transaction in the public interest.

II. STANDARD OF REVIEW

Under Public Utilities Code section 854(a), acquisitions of public utilities must be approved by the Commission. Pursuant to this statutory mandate, “The Commission has broad discretion to determine if it is in the public interest to authorize a proposed transaction pursuant to Public Utilities Code section 854, subdivision (a).”¹ Joint Applicants acknowledge in their Wireline Application that the “primary question” for the Commission’s review of the transaction is whether the transaction is in the public interest and that the Commission “may consider a broad range of criteria” when determining whether a transaction is in the public interest pursuant to Section 854.² This public interest analysis under Section 854(c) occurs where the parties to the transaction meet certain revenue thresholds. However, even if the applicants do not meet that revenue threshold, the Commission has found that under the public interest analysis pursuant to § 854(a), “it is reasonable for the Commission to assess the public interest factors enumerated in § 854(c) and undertake an analysis of antitrust and environmental considerations [under § 854(b)].”³ Indeed, the Commission consistently finds that the public interest criteria set forth

¹ *Decision Granting Conditional Approval of the Acquisition of PacificCorp by MidAmerican Energy Holdings Company*, D.06-02-003 at p. 23 (Feb. 16, 2006).

² *In the Matter of the Joint Application of Sprint Communications Company L.P. and T-Mobile USA, Inc. For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a)*, filed July 13, 2018, A.18-07-011 (“Wireline Application”) at p. 12. See also, *In the Matter of the Joint Application of Sprint Spectrum L.P. and Virgin Mobile USA, L.P. and T-Mobile USA, Inc. for Review of Wireless Transfer Notification per Commission Decision 95-10-032*, filed July 13, 2018 A.18-07-012 (“Wireless Application”) at pp. 13-26 (subsequently consolidated with A.18-07-011 on September 13, 2018) (discussing the “host of compelling benefits to consumers in California” summarizing the benefits pursuant to the criteria in Section 854).

³ Pub. Util Code § 854 (b) and (c); *In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI’s California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon’s Acquisition of MCI*, D.05-11-029 at Conclusion of Law 8 (November 18, 2005).

in Section 854 (b) and (c) serve as a useful framework for a general public interest analysis under Section 854 (a), regardless of the complicated corporate structures and strategic financial reporting that often allows many of these transactions to fall outside of the threshold for strict application of these criteria, as Applicants claim here.⁴

Throughout this proceeding, beginning with the Applicants' decision to file two separate documents- one identified as a "wireline application"⁵ and the other as a "wireless notice"⁶- the Applicants have argued that the Commission has no jurisdiction or authority to approve, or even substantively review, the wireless transaction.⁷ Even as recently as early April, in their Joint Motion with the California Emerging Technologies Fund (CETF), the Applicants continue to argue that the Commission only has authority to approve the wireline transaction and should merely "complete its review" of the wireless transaction as quickly as possible.⁸

Applicants argue that the Commission cannot require approval of the wireless transaction.⁹ They rely on the Commission's 1995 Decision that requires wireless entities only to notify the Commission of their intent to enter into transactions for transfer of ownership

⁴ Wireline Application at p. 12; Wireless Application at p. 1, fn. 1. *See, for example*, Interim 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, (A.06-09-016, et al., filed, September 18, 2006) at p. 24; Decision Granting Conditional Approval of the Acquisition of PacificCorp by MidAmerican Energy Holdings Company, D.06-02-033 at p. 23 (Feb. 16, 2006); Northern California Power Agency v. Public Utilities Commission (1971) 5 Cal.3d 370, 377 ("antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy."); *In the Matter of Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction* D.10-10-017 at p. 15 (October 15, 2010); Charter/TimeWarner D.16-05-007 at p. 20, COLs 2, 3; *In re Joint Application of Citizens and GTE to Sell and Transfer Assets*, D.01-06-007, 2001 Cal. PUC LEXIS 390 at *22.

⁵ See generally, Wireline Application.

⁶ See generally, Wireless Application.

⁷ See Wireless Application at p. 1, fn. 1 arguing that the Commission has no jurisdiction to substantively review the transaction and that the Notice was provided merely to "promote transparency, encourage public participation, and expedite the process for the timely review of the Notice."

⁸ *Joint Motion of Joint Applicants and CETF to Modify Positions*, April 8, 2019 at pp. 2, 7.

⁹ Tr. PHC, 9/13/18 at pp. 12:25-14:20.

involving CMRS carriers.¹⁰ Yet, Joint Applicants have mischaracterized this Decision which must be viewed within the appropriate context. While in that Decision, the Commission found that there was a nascent cellular market in 1995 and consumers did not yet depend on wireless services to carry out almost every aspect of their day to day lives, the 1995 Decision does not limit the Commission's authority nor does it indicate an intent by the Commission to preempt itself entirely from review of wireless transfer transactions.¹¹ In fact, the Decision finds that the Commission is not preempted by federal law to review the transfer of control applications involving wireless entities in California and reaffirms its discretion and authority to review wireless mergers and to impose conditions where "necessary in the public interest."¹² Taking into consideration current market conditions, the Commission uses its discretionary authority under Section 854 (b) to "forebear" from strict merger review requirements as a matter of public policy because it believed that a "standing" merger review obligation could disrupt the development of competition in the cellular industry and was not "necessary" in the public interest at that time.¹³ Therefore, over twenty years later and with the exponential growth in the importance of wireless services to residential customers, D.95-10-032 does not serve as a barrier to a full review of the wireless transaction by the Commission.

Instead, the Commission's statutory mandate pursuant to Section 854 and its reserved authority under D.95-10-032 support the Commission's decision to consolidate the Wireline and Wireless Applications and to conduct a review with sufficient analysis and data to understand the synergies and impacts of this transaction and ensure that the transaction is in the public interest.¹⁴

¹⁰ Wireless Application at p. 1, fn. 1 (see D.95-10-032, COL 15, 16, 18).

¹¹ D.95-10-032 at p. 15-16.

¹² D.95-10-032, reaffirmed in I.11-06-009 (AT&T/T-Mobile).

¹³ D.95-10-032 at p. 16-18.

¹⁴ Scoping Memo at p. 2-3.

Although Joint Applicants continue to argue that two of the biggest facilities-based, national wireless carriers consisting of billions of dollars of wireline and wireless assets and millions of impacted California customers, do not meet the intrastate revenue thresholds or are not otherwise required to submit to a public interest review,¹⁵ this review and analysis of the consolidated cases using a detailed list of criteria is required pursuant to the Commission's exercise of its clear and broad authority to protect California wireless customers.¹⁶ Wireless carriers are "telephone corporations" and therefore public utilities under Public Utilities Code Sections 216, 233 and 234. The operating entities at issue here- Sprint Wireless Entities (including Sprint Spectrum L.P. and Virgin Mobile USA, L.P.) and T-Mobile West, LLC- hold Wireless Registration numbers and some are Eligible Telecommunications Carriers approved by the Commission.¹⁷ Moreover, the wireline and wireless transaction are inextricably linked with the wireless transaction clearly driving the transaction forward, as the Commission acknowledges with consolidation of the two dockets and as both Applications make clear when describing essentially a single "parent level only" transaction.¹⁸

¹⁵ Wireline Application at p. 12-14; Wireless Application at p. 1, fn. 1.

¹⁶ D.89-07-019 (32 CPUC 2d 271, 281) ("Finally, we reiterate that our primary focus in the regulation of the cellular industry is the provision of good service, reasonable rates, and customer convenience"). *See also*, D.01-07-030 (R.00-02-004), (Wireless generally subject to consumer protection statutory provisions and finding wireless customers should be protected from unauthorized charges on their bills); D.06-03-013 (R.00-02-004) (acknowledging authority to impose consumer protection principles on wireless carriers); D.10-10-034 (cramming regulations); D.08-10-016 (R.07-01-021, protections for Limited English Proficiency consumers); D.16-08-021 (R.11-12-001) (G.O. 133-D requiring wireless to report major service outages and acknowledging jurisdiction to do so); and I.11-06-009 (authority to review AT&T/T-Mobile merger as a wireless transaction pursuant to D.95-10-032).

¹⁷ *See*, Wireless Application at pp. 6-7 (describing the operating entities in California including, T-Mobile West, LLC (U-3056-C) and MetroPCS California, LLC (U-3079-C), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C)). Virgin Mobile is also an approved Eligible Telecommunications Carrier (T-17284). Various corporate affiliates and parent companies of these entities will be directly impacted by this transaction.

¹⁸ Wireline Application at p. 3; Wireless Application at p. 10. Joint Consumers note that Joint Applicants have asked the FCC to consider the transfer of Sprint's wireless and wireline assets to T-Mobile as a single transaction. Joint Protest at p. 5, citing FCC Application at pp. 3-8.

When defining the Scope of the docket, the Assigned Commissioner and Administrative Law Judge found that, “a determination of the public interest [pursuant to the statute] requires a consideration of significant factors implicit in the proposed transaction” and, therefore, the scope of this proceeding includes, “all issues that are relevant to evaluating the proposed merger’s impacts on California consumers and determining whether any conditions should be placed upon the merged entity.”¹⁹ As the Commission has recognized in defining the broad scope of this docket and by holding public participation hearings and evidentiary hearings, this transaction will have an impact on millions of California customers. As discussed below, TURN urges the Commission to find that the transaction is not in the public interest and should be rejected, or at a minimum, should be subject to substantial additional merger commitments or requirements to further develop and enforce the commitments made by the companies.

III. LOSS OF FACILITIES BASED COMPETITOR IS NOT IN THE PUBLIC INTEREST

A. Loss of Competitor in the Prepaid Market

Joint Applicants characterize the New T-Mobile as a “strengthened maverick” designed to “take on the market leaders, Verizon and AT&T.”²⁰ The Joint Applicants also claim that cable companies, internet providers, and satellite companies are poised to enter the market thereby ensuring vibrant competition, even after the loss of Sprint as a facilities-based competitor.²¹ TURN supports broad and meaningful competition in the wireless industry that will benefit all Californians, especially if that competition challenges entrenched cable companies, wireline providers, and wireless incumbents to innovate and reduce prices for retail consumers. However,

¹⁹ Scoping Memo at p. 2.

²⁰ Wireless Application at p. 30.

²¹ Wireless Application at p. 30.

the Joint Applicants' claim that it is "implausible that the merger will reduce competition"²² is, itself, implausible.

After years of consolidation in the market, only four facilities based wireless carriers remain standing in California, arguably one of the biggest markets in the country.²³ The Joint Applicants' promises and speculative business plans do not mitigate the fundamental impact that this merger will have on the structure of the current market, giving T-Mobile, already the market leader in prepaid services, control of roughly 59% of the prepaid services market if the merger is approved.²⁴ And these merger promises are only as good as the competitive pressure that must exist to ensure that consumers will see the benefits.²⁵ Today, Sprint and T-Mobile compete with each other in the California wireless market as well as other national and regional facilities based providers and with MVNO providers.²⁶ These two companies, along with their affiliates such as Boost Mobile and Metro, are "maverick" providers that set trends in the market, pushing each other and their larger competitors to adjust their offerings.²⁷ TURN submits that the record demonstrates that it is not in the public interest to allow the loss of a major facilities-based competitor, further consolidating the market into a stronger oligopoly market rife with parallel

²² Wireless Application at p. 30-31.

²³ Pub. Adv. Exh. 2 (Selwyn) at p. 12:9-13 (California represents 10% of the nationwide wireless subscriptions); p. 19:19-21 (HHI increases in California making markets "highly concentrated").

²⁴ Pub. Adv. Exh. 2 (Selwyn) at pp. x; 64:17-20; p. 85:16-18 (T-Mobile will have overwhelming dominance of the prepaid market); CETF Exh. 1 (McPeak) at p. 3:9-12; Pub. Adv. Exh. 4 (Odell) at pp. 13:10-14.

²⁵ Pub. Adv. Exh. 2 (Selwyn) at p. 66:7-9.

²⁶ Pub. Adv. Exh. 2 (Selwyn) at p. x, 9:6-8; p. 71:2-5 (Sprint and T-Mobile have experienced reductions in prices due to pressure from each other, where AT&T and Verizon have not.); p. 65:20-22, 72:13-73:3 (further new entry into the California wireless market is unlikely due to high barriers to entry); p. 77:6-11; CWA Exh. 1 (Goldman) at p. 3.

²⁷ Pub. Adv. Exh. 2 (Selwyn) at p. 13:6-9; CWA Exh. 1 (Goldman) at p. 21-27; Pub. Adv. Exh. 4 (Odell) at p. 19:2-7.

behavior and very little threat of new market entry, driving up prices, and weakening innovation.²⁸

While the Joint Applicants craft a narrative of a vibrant market with multiple new entrants, most of the Joint Applicants' cited examples of current or potential competition rely on one of the four facilities based providers to offer those "competitive" services. Dr. Selwyn notes that cable company entry into the bundled wireless/internet services market looks more like an MVNO service offering that relies on wholesale services from the one of the large wireless carriers and limited wi-fi network capabilities and cannot serve as an independent facilities based challenge to the four current providers.²⁹ CWA witness Goldman demonstrates that Joint Applicant citations to Google as a viable competitor that could challenge the remaining three post-merger facilities based providers is speculative and not supported by the evidence.³⁰ The record demonstrates that the market is structured in such a way to make the claims of significant competitive pressure from other facilities based technologies purely speculative. Moreover, the elimination of a current facilities based provider from the market will create a barrier for the potential for competition from these nontraditional market entrants by increasing the barriers to entry with a stronger third competitor. In cross, Ms. Goldman also noted, as does Mr. Selwyn's testimony, that competition between three equal-sized competitors could "allow them to have the

²⁸ Pub. Adv. Exh. 2 (Selwyn) at p. 9:13-10:2; See also pp. 10:15-11:11, 71:16-18, 74:12-18 (empirical evidence that three competitors are not enough to exert pressure to keep prices down, innovation and service quality up or to pressure T-Mobile to forge profits by lowering prices significantly below AT&T and Verizon). TR Vol 7, p. 1206:21-1207:27; 1209:2:8.

²⁹ Pub. Adv. Exh. 2 (Selwyn) at p. 127:2-10 (Comcast and Charter for example both rely on the Verizon network to offer its services.); CWA Exh. 1 (Goldman) at p. 7.

³⁰ CWA Exh. 1 (Goldman) at p. 10; Wireless Application at p. 31; TR. Vol 7, p. 1207:5-27.

ability and the incentive to raise prices” across the board for retail service plans as well as wholesale inputs to other competitors.³¹

The record shows that this consolidation will have a disproportionate impact on the prepaid market and California’s most vulnerable consumers. Sprint and T-Mobile have disproportionately more low-income customers than AT&T or Verizon as these companies have marketed to diverse and low-income communities in smaller markets throughout the state.³² CETF testimony, citing Joint Consumers’ Protest, notes that that this merger will result in New T-Mobile being the largest facilities based prepaid carrier in the country.³³ Public Advocates’ witness Odell notes that marketing efforts and carrier business models have traditionally treated prepaid and postpaid separately and claims that the loss of a major facilities based carrier will be mitigated by moves to postpaid services supported by AT&T, Verizon and the New T-Mobile, is a disingenuous overstatement.³⁴ The prepaid market services, and targets, customers that have limited budgets, less stable housing, and simpler wireless demands.³⁵ These customers tend to be more price sensitive and yet have fewer choices in the market place because of barriers of affordability, documentation, credit, and billing issues that prevent prepaid customers from moving to postpaid.³⁶ Moreover, choices are limited simply because, even as the market grows, today prepaid is still only one-third of the market.³⁷

³¹ TR Vol. 7, p. 1209:2-8; Pub. Adv. Exh. 2 (Selwyn) at p. xi, 9:13-10:2; CWA Exh. 1 (Goldman) at p. 7-8 (noting that T-Mobile’s CEO referred to Charter’s bundled wireless and internet service as “irrelevant squared” just a few months before the merger was announced). The company’s claims that the excess capacity resulting from the merger will motivate it to lower prices has been refuted. Pub. Adv. Exh. 2, (Selwyn) at p. 101:3-9.

³² Pub. Adv. Exh. 4 (Odell) at p. 8:10-23; 13:1-9; CETF Exh. 1 (McPeak) at pp. 1:22-2:4.

³³ CETF Exh. 1 (McPeak) at p. 3:9-11.

³⁴ Pub. Adv. Exh. 4 (Odell) at p. 9:6-12:3.

³⁵ CWA Exh. 1 (Goldman) at p. 17; CETF Exh. 1 (McPeak) at p. 4:11-13.

³⁶ Pub. Adv. Exh. 2 (Selwyn) at p. x.

³⁷ CETF Exh. 1 (McPeak) at p. 4:9-13.

The record shows that the market is not static and T-Mobile is growing in post-paid phone adds.³⁸ While this statistic supports Joint Applicants' claim that there is movement between the prepaid and postpaid markets, the significance of this movement is rebutted by Dr. Selwyn.³⁹ In addition, the current T-Mobile movement into these postpaid markets, prior to the close of the merger and without the benefit of the merger's purported efficiencies, suggests that such competition in the post-paid space would not be a direct merger benefit. Moreover, allowing T-Mobile to further consolidate market power and grow in *both* the prepaid and postpaid space would not be in the public interest and would not lead to more competition, but in fact, less.

In their Application, testimony and in cross examination, Joint Applicants repeatedly emphasized their plans to compete against AT&T and Verizon and downplayed the competition between Sprint and T-Mobile. For example, during cross examination, when Mr. Keys was asked if Sprint provides competitive pressure on MetroPCS' prepaid offerings, Mr. Keys answered only in the most general terms by stating, "They [Sprint] are part of the universe that provides pressure, the universe being postpaid carriers, MVNOs and large cable companies."⁴⁰ Mr. Sievert proudly noted that traditionally, T-Mobile is the catalyst for a "great deal" of the competitive pressure in the marketplace and discussed "pressure from all directions" and low-cost competitors, except he would not discuss Sprint.⁴¹

³⁸ CETF Exh. 1 (McPeak) at p 3:18-20; Pub. Adv. Exh 4 (Odell) at 11.

³⁹ Pub. Adv. Exh. 2 (Selwyn) at p. x, 59:4-17 (noting that many prepaid customers are *unable* to substitute a postpaid service, but also that many postpaid customers are *unwilling* to take on the inferior services and lower quality handsets often associated with prepaid services limiting fluid and significant movement between the two markets).

⁴⁰ TR Vol. 5, p. 604:2-8.

⁴¹ TR Vol. 4, pp. 266:4-267:8, 272:7-17.

The New T-Mobile may be appealing to investors with promises of high-value marketing and sales, increased revenue per customer and other figures, but these promises to Wall Street will negatively impact Main Street and force the New T-Mobile to lose the current focus of both T-Mobile and Sprint on the prepaid and low-income markets. While the companies suggest that New T-Mobile will also continue to be a robust competitor in existing market segments, as discussed below, the resources and staffing commitments necessary to change network configuration and build out, store distribution, and customer service suggest a trade-off and weaker focus on the current customers and existing marketing channels.

B. Loss of A Competitor in the Wholesale Market

As facilities-based providers, both T-Mobile and Sprint have vibrant wholesale business segments. Both companies offer wholesale access to “mobile virtual network operators” or “MVNOs” to allow these companies to use the Sprint and T-Mobile networks to offer competitive resold wireless services to residential and small business customers, while at the same time receiving a more robust distribution channel and opportunity to increase volume of traffic and charges on their networks.⁴² This increase in sales and distribution strengthens Sprint’s and T-Mobile’s ability to compete with AT&T and Verizon while AT&T and Verizon have not similarly embraced the MVNO market.⁴³

Sprint and T-Mobile are mavericks and disrupters in this wholesale market as well as in the retail space, ultimately benefitting the low income consumers that use these MVNO services.⁴⁴ These resellers enter into contracts with the facilities based carriers to enable the reseller’s traffic to move along the network at terms and conditions that properly compensate the

⁴² Pub. Adv. Exh. 2 (Selwyn) at pp. 88:18-89:23; CWA Exh. 1 (Goldman) at pp. 10-11.

⁴³ Pub. Adv. Exh. 2 (Selwyn) at pp. 89:24-90:23; Pub. Adv. Exh. 4 (Odell) at pp. 20:3-12.

⁴⁴ Pub. Adv. Exh. 4 (Odell) at p. 21:1-10

facilities based carrier but also allow the reseller to make a profit.⁴⁵ The facilities based provider can change the terms of these agreements or end a wholesale relationship at any time.⁴⁶ This reliance is risky for MVNOs when they attempt to negotiate the terms and conditions of their access to these facilities with each of the carriers. Some MVNOs primarily use a single carrier, while others negotiate to get the best deal. Applicants claim that MVNO providers, like retail end user customers, will benefit from merger efficiencies and the additional capacity resulting from the combination of the networks, and the lower resulting prices.⁴⁷ However, far from creating more competition, by narrowing the field down from four to three, the options for these resellers also narrow, giving the remaining three more market power over these smaller carriers that are wholly reliant on the facilities based networks, creating a potential oligopoly market.⁴⁸

While large, national MVNOs like TracFone today represent a competitive challenge at the retail level, with further market consolidation giving New T-Mobile a larger percentage of the prepaid market, the MVNOs may find themselves facing higher prices that may then be passed down the state's most vulnerable customers that cannot afford, or do not have access to, services from Sprint or T-Mobile.⁴⁹ Public Advocate's witness Ms. Odell finds that if MVNO providers were posting significant marketplace pressures as the Joint Applicants suggest, despite commitments to honor wholesale contracts for the remaining term⁵⁰, the merged entity would have an incentive to raise prices for wholesale inputs to limit the competition.⁵¹ Alternatively,

⁴⁵ Pub. Adv. Exh. 2 (Selwyn) at p. 87:10-14

⁴⁶ CWA Exh. 1 (Goldman) at pp. 10-11.

⁴⁷ Wireless Application at p. 30; Jt Appl. Exh. 2 (Sievert) at p. 44:21-22.

⁴⁸ Pub. Adv. Exh. 2 (Selwyn) at p. 91:6-14; Pub. Adv. Exh. 4 (Odell) at pp. 9:24-10:2.

⁴⁹ Pub. Adv. Exh. 2 (Selwyn) at pp. 66:19-27, 94:17-95:11 (inequities in contract negotiations between MVNOs and facilities based carriers with increased market power).

⁵⁰ Jt Appl. Exh. 2 (Sievert) at p. 45:1-5.

⁵¹ Pub. Adv. Exh. 4 (Odell) at p. 21:6-9; CWA Exh. 1 (Goldman) at p. 11 (citing FCC conclusion that MVNOs have limited options in the face of market consolidation).

New T-Mobile may not have the incentive to pass through the purported merger efficiencies, including excess capacity and the resulting price decreases and the MVNO may not, in turn, have the motivation or margins to further pass those benefits down to the end user customer. Therefore, even if these merger benefits impact the contracts for MVNOs, the changes may not outweigh the harm to MVNOs from the loss of a facilities based competitor going “head to head” for MVNO business.⁵²

C. Rural Deployment Promises Without Competitive Pressure Unsupported

Dr. Selwyn finds, and TURN agrees, that the purported merger benefits, “easily pale when compared with the significant risks that the merger will create.”⁵³ Dr. Selwyn calculated post-merger concentration figures at the county level. This level of disaggregation allows the Commission to see that high levels of concentration disproportionately appear in rural communities.⁵⁴ Many of these communities only have access to one of the four facilities-based competitors or, in those areas where the statistics may show all four operating, there are significant pockets where competitive presence varies, making the loss of a competitor even more significant.⁵⁵ Because California has large, diverse geographies and competitive market conditions, the Commission must cautiously and conservatively analyze competitive data and claims of market pressure. Dr. Selwyn finds that it is highly unlikely that the “merger would result in any significant improvement in wireless availability in these unserved and underserved rural communities” primarily because the two parties to the transaction do not overlap

⁵² Pub. Adv. Exh. 4 (Odell) at pp. 12:17-24, 15:16-21.

⁵³ Pub. Adv. Exh. 2 (Selwyn) at p. 72:4-6.

⁵⁴ Pub. Adv. Exh. 2 (Selwyn) at p. 47:12-14.

⁵⁵ Pub. Adv. Exh. 2 (Selwyn) at p. 49:11-13.

significantly in rural areas, suggesting that substantial investment would be necessary to add to or enhance existing capacity and coverage.⁵⁶

Moreover, Sprint and T-Mobile each have sufficient spectrum to serve existing rural territory, including T-Mobile that has more mid-band and low-band spectrum in several rural counties than Sprint.⁵⁷ The economics of rural deployment of telecommunications facilities or technologies- high per customer costs as a result of difficult terrain and weather conditions and low population density- remain in place regardless of the merger and the combination of spectrum holdings.⁵⁸ Indeed, Mr. Sievert discusses how this merger will use technology and new cell towers to create coverage in rural areas and offer services in those areas more “economically,” including promises of increased store openings, but does not talk about why, in the first place, there would be the motivation or the economics of competing for these rural customers except for the reliance on purported excess capacity.⁵⁹ Mr. Ray discusses the network expansion and performance in rural areas, but suggested that he did not have specific data on unserved and underserved communities to understand how well they would cover those areas.⁶⁰ As discussed below, Joint Applicants’ testimony and witness cross examination fails to support its claims of increased rural deployment with detailed descriptions of the resources or timelines necessary to complete such a significant effort.

D. Consumer Practices Red Flags for Market Power

⁵⁶ Pub. Adv. Exh. 2 (Selwyn) at p. 58:10-14.

⁵⁷ Pub. Adv. Exh. 2 (Selwyn) at pp. 159:10-160:5.

⁵⁸ Pub. Adv. Exh. 2 (Selwyn) at pp. 165:15-166:3, 176:9-16; TR Vol. 4, p. 405:11-17 (Ray) (“obviously there are swaths of the state where there is dessert and mountain ranges, and those areas can be problematic to provide coverage in and potentially uneconomic too”).

⁵⁹ TR Vol. 4, p. 307:9-308:24.

⁶⁰ TR Vol. 5, p. 496:3-20. On cross, Mr. Ray could not clearly explain the contradictory commitments to speeds and coverage for small communities and rural areas. Compare Jt Appl. Exh. 3 (Ray) at p. 39:7-20 (download speeds of at least 10 Mbps to 74% of rural customers nationwide) with p. 42:15-21 (rural markets will benefit by 100 Mbps to “most of the state’s population by 2021”).

Public Advocates witness Dr. Selwyn points to the presence of mandatory arbitration clauses and class action waivers within the contracts of the four major facilities based providers as an example of behavior in an oligopolistic market where parties set policies and prices with an eye toward and in parallel with fellow market participants.⁶¹ These types of clauses are particularly onerous for smaller retail customers that have no chance to negotiate these terms out of service agreements but yet may have a small individual claim that will be forced into arbitration and deprived of the chance to bring a possible class actions.⁶² These anti-consumer corporate legal protections could easily be jettisoned by a company feeling competitive pressure to appeal to a broader market segment. And, yet, each of the four carriers impose these agreements on their customers.⁶³

Dr. Selwyn notes that T-Mobile has an option for customers to “opt-out” of these arbitration clauses and yet their business practices make it almost impossible for customers to do so.⁶⁴ Ms. Sylla Dixon introduced testimony confirming that customers can opt out of these clauses but also suggesting that these arbitration provisions are a consumer benefit because they provide a “low cost and speedy alternative” to bringing a legal claim.⁶⁵ Yet, Sylla Dixon’s cross examination supported Public Advocates’ point that these anti-consumer clauses are red flags for the market power that T-Mobile already has. First, her testimony states that customers are either required to navigate through layers of webpages or text messages with links to websites to the actual agreement where the agreement terms are “referenced” although more clicks may be

⁶¹ Pub. Adv. Exh. 2 (Selwyn) at p. 96:1-10.

⁶² See, *Sanchez v. Valencia Holding Company* (2015) 61 Cal. 4th 899 (allows unconscionability defense to move forward despite U.S. Supreme court holding in *Concepcion*, in light of mandatory arbitration and class action waivers to be found overly-harsh and one-sided.). See also, Pub. Adv. Exh. 2 (Selwyn) at p. 98:5-30 (citing Attachment 2, “Arbitration Everywhere, Stacking the Deck of Justice,” October 31, 2015).

⁶³ Pub. Adv. Exh. 2 (Selwyn) at p. 179:9-13.

⁶⁴ Pub. Adv. Exh. 2 (Selwyn) at pp. 99:4-7, 179:13-182:3.

⁶⁵ Jt Appl. Exh. 8 (Sylla Dixon) at p. 18:5-8.

needed to get to the opt out provision itself.⁶⁶ Second, customers signing up on the phone are forced to listen to customer service representatives read the company's service agreement and/or terms and conditions and understand them or required to read the service agreement and/or terms and conditions on a small screen device standing in front of the sale representative.⁶⁷

When asked to clarify and describe the opt out process during cross, she could not clearly do so. For example, when asked how long it would take a customer service representative to read T-Mobile's service agreement as her written testimony described (based on discussion with counsel during the hearing, it was unclear whether this service agreement has the terms and conditions in it), Ms. Sylla Dixon did not know.⁶⁸ If the opt out process requires new customers to sit through the reading of a service agreement over the phone that is of any substantial length, TURN would argue there is effectively no notice of the opt-out clause. There was similar confusion as to the process for people who sign up in the store and whether they must read the terms of service on a small screen during the transaction, which might (or might not) have the terms and conditions and the opt provision embedded in it or require a link to the document.⁶⁹ As the witness for the company on this issue, Ms. Sylla Dixon was unprepared to describe the process or lend any assurance that T-Mobile makes this process friendly for consumers, thus demonstrating that this opt out process is not well-supported by the company and that the process is not consumer friendly.⁷⁰

⁶⁶ Jt Appl. Exh. 8 (Sylla Dixon) at pp. 18:11-19:4.

⁶⁷ Jt Appl. Exh. 8 (Sylla Dixon) at pp. 18:19-19:13.

⁶⁸ TR Vol. 6, p. 934:8-17.

⁶⁹ TR Vol. 6, pp. 935:8-937:5.

⁷⁰ Jt Appl. Exh. 8 (Sylla Dixon) at pp. 18:11-19:31.

Because of the concerns regarding market consolidation in markets that serve low income and vulnerable customers, TURN urges the Commission to find that this transaction is not in the public interest. However, to the extent that the Commission considers the record to support this transaction, at a minimum it must require New T-Mobile to revise customer service practices to more fully support the opt-out of mandatory arbitration and a ban on class action during point of purchase and provide follow up notice within two days of purchase via text, email and phone call. It must report on rural deployment, as defined by the Commission, every 180 days with specific geographic locations of the work being done and it must report on MVNO contract movement and traffic volumes annually.

IV. PRICING COMMITMENTS AND CLAIMS OF LOWER PRICES ARE NOT SUFFICIENT TO MEET PUBLIC INTEREST

A. Competitive Pressure Will Not Ensure Lower Bills or Attention to Low Income Consumers

In the face of long-standing economic theory that market consolidation will rarely, if ever, result in price reductions absent regulatory intervention,⁷¹ the Applicants' argue that excess capacity in the combined network will motivate the company to improve service quality and lower prices for customers. Their claims are not well supported, speculative, and reflect short term and temporary thinking. Therefore, after criticisms that the Applicants' original request did not go far enough to demonstrate that this transaction is in the public interest, the companies have made pricing commitments to maintain pricing plans for three years.⁷² Naturally, to find that the transaction is in the public interest, the Applicants should not have to rely on artificial

⁷¹ Pub. Adv. Exh. 2 (Selwyn) at p. viii (executive summary- strong evidence that prices are higher in wireless markets with fewer than four firms).

⁷² TR Vol. 4, p. 387:11-18.

pricing commitments to maintain rates if the merger efficiencies and competitive pressures were going to benefit retail and wholesale customers. But the record suggests that is not the case here.

Even the three-year pricing commitment does not go far enough to ensure this transaction is in the public interest. First, the artificial commitments merely stabilize plans and prices for three years by placing, essentially, a regulatory freeze on the status quo. But this freeze does not implement systemic change that will protect consumers in the long run. Mr. Sievert claims that the three year commitment is only intended to ensure the company has incentive to keep prices low prior to the realization of the promised merger efficiencies and during the build-out of its 5G network.⁷³ But any potential benefits of this merger are speculative at best and allowing a temporary pricing commitment to assuage concerns about market consolidation would require the Commission to first find that the merger will result in long term merger efficiencies and sufficient competitive pressure to ensure prices will remain competitive, even with the loss of a major facilities based competitor.

Second, this pricing commitment structure will be impossible to monitor and enforce because it requires the Commission to conduct what would essentially be another merger review in three years to ensure the excess capacity and cost savings were realized and passed through to customers before lifting these artificial pricing commitments.

Third, Public Advocates notes that industry wide per unit prices are going down through technologically driven change and that such downward trends will continue apart from the merger, suggesting that customers will benefit from lower prices without the merger and certainly without the consolidation brought by the merger.⁷⁴ Indeed, in the drive to compete with

⁷³ TR Vol. 4, p. 387:22-388:9.

⁷⁴ Pub. Adv. Exh. 2 (Selwyn) at p. 126:1-3.

post-paid carriers like AT&T and Verizon and to generate higher per customer revenues,⁷⁵ it is unclear whether competitive pressure will be sufficient to keep customer bills low, even with the potential for excess capacity created by the merger and spectrum consolidation could keep per unit prices low if passed on to the consumer. The company's excess capacity theory is unproven and speculative and requires the guarantee that there will be sufficient competitive pressure to flow through the savings from the merger down to the individual customer.⁷⁶

The company's claims that it must maintain prices lower than AT&T and Verizon to compete does not provide sufficient evidence regarding the relative impact on current T-Mobile and Sprint customers and whether prices will stay below AT&T and Verizon, but still be higher than Sprint and other prepaid providers. With the change in the market and Wall Street expectations, the record demonstrates that, over time, it is likely that service offerings, data packages, handset choices and other terms and conditions will evolve to meet higher revenue markets, leaving current prepaid, low income and rural customers behind.

Therefore, to truly determine whether this transaction is in the public interest, the Commission will have to determine that this transaction will bring changes in pricing that would not happen but for the merger and that the New T-Mobile will have the incentive to continue to act as a disrupter in the market. Which, as discussed above, is unlikely in the oligopolistic market created by this transaction. If the Commission finds that this transaction is in the public interest, it must only do so with enforceable and verifiable commitments including a reporting requirement every 180 days with pricing for its plans offered in California, including explanations of the available handsets and terms identifying the plan as prepaid or postpaid. The

⁷⁵ TR Vol. 4, p. 265:14-268:22.

⁷⁶ Pub. Adv. Exh. 2 (Selwyn) at pp. 120:16-19, 122:4-12 (no basis to assume T-Mobile will flow 100% of efficiencies from the merger and promised investment directly to customers and not providing shareholders some benefit, without a regulatory requirement or competitive forces).

current three-year pricing commitment must be clarified to include that plans, not just per unit pricing, remain in place. This commitment must be included in the Commission's final decision to ensure enforceability.

B. LifeLine Commitment is a Critical Element to the Public Interest Analysis and a Harbinger for New T-Mobile's Commitment to Low Income Californians

T-Mobile's three-year pricing commitment, even if sufficient to mitigate other customer harms, will only benefit those Californians that can currently afford T-Mobile service. Truly vulnerable customers who struggle to afford even low-cost prepaid plans rely on the state and federal LifeLine programs to stay connected. Therefore, the commitment of New T-Mobile to the LifeLine program as a direct service provider and as a purveyor of wholesale services to reseller LifeLine providers is a critical piece of the public interest finding of this transaction.⁷⁷

California has the strongest state LifeLine program in the country and program offerings provide meaningful discounts that often include free and unlimited basic voice service, a free phone, and 2-3 Gigabytes of data.⁷⁸ Today, Sprint is the only facilities based wireless provider in California to participate in the LifeLine program and it does so through the Sprint affiliate Assurance Wireless.⁷⁹ T-Mobile does not currently participate in any state or federal LifeLine programs, having recently withdrawn from the federal Lifeline program.⁸⁰ Both carriers support MVNO resellers that participate in LifeLine here in California.⁸¹

⁷⁷ Joint Consumers Protest at p. 18-19; CETF Exh. 1 (McPeak) at p. 8:11-14 (CETF "shares the concerns of TURN and Greenlining about the future of New T-Mobile's participation in the LifeLine program in California").

⁷⁸ Pub. Adv. Exh. 4 (Odell) at p. 23:19-26:2.

⁷⁹ Pub. Adv. Exh. 4 (Odell) at p. 23:14-18; Joint Consumer Protest at p. 18.

⁸⁰ Pub. Adv. Exh. 4 (Odell) at p. 26:4-5; Joint Consumer Protest at p. 19.

⁸¹ Jt Appl. Exh. 8 (Sylla Dixon) at pp. 4:28-5:11; Pub. Adv. Exh. 4 (Odell) at p. 20:12-16; Jt Appl. Exh. 9 (Sywenki) at p. 8:1-14.

Joint Consumers' Protest raised concerns that the Application did not fully commit to the LifeLine program and instead, made qualified and vague statements to "continue the Lifeline services currently provided by Virgin Mobile."⁸² Joint Consumers noted that this statement limited the commitment in both time and scope and, more importantly, failed to "corroborate this statement with the move by T-Mobile to eliminate LifeLine plans in seven states in 2017..."⁸³ Generally, Joint Consumers raised concerns that any attempt to limit New T-Mobile's participation in the LifeLine program would harm the program, provide less choice for California customers, and not be in the public interest. Public Advocates raise similar concerns also noting that the continue of participation in LifeLine should be unquestioned and that "continuation of the LifeLine program, post-merger, is not a merger-specific benefit or efficiency- not a but-for positive result of the merger and the Joint Applicants have made no attempt to justify listing it as such."⁸⁴ Ms. Odell also accurately points out that without specific Commission-imposed merger conditions, New T-Mobile participation in LifeLine is voluntary and can be withdrawn upon 30 day's notice to customers, making the merger commitment by a company that has already withdrawn from the LifeLine program, weak at best.⁸⁵

Joint Consumers' initial concerns were not sufficiently addressed by the Joint Applicants' reply to their Protest,⁸⁶ nor in their testimony or cross examination. While the Applicants submitted hundreds, if not thousands, of pages of testimony, only a few pages of that testimony address the merged entity's commitment to LifeLine and other public purpose programs, and the

⁸² Joint Consumer Protest at pp. 18-19.

⁸³ Joint Consumer Protest at p. 19.

⁸⁴ Pub. Adv. Exh. 4 (Odell) at p. 26:13-16.

⁸⁵ Pub. Adv. Exh. 4 (Odell) at p. 26:16-27:2.

⁸⁶ Joint Applicants Reply to the Protests at p. 18 (merely noting that "such commitments" are the subject of "frequent Commission decisions" and therefore are "not required or necessary in the context of reviewing a wireless transfer notification" and that they "stands by" their commitments in the Application).

discussion is high level with vague and unenforceable commitments that do not mitigate the negative impacts of this merger on low income and prepaid customers discussed above.

T-Mobile witness Sylla Dixon is the only witness to substantively address LifeLine.⁸⁷ She commits New T-Mobile to “maintaining the Lifeline services currently provided in California by Sprint’s subsidiary, Virgin Mobile USA, under the Assurance brand” throughout the New T-Mobile footprint in California.⁸⁸ She also commits the company to continue to offer LifeLine services with no interruption in service, “under the rates, terms and conditions no less favorable to eligible consumers than those offered under the Virgin/Assurance brand today.”⁸⁹ While the company appears to be offering that the “status quo” will remain for an indefinite period of time, several questions remain. For example, Ms. Sylla Dixon does not discuss the resources committed by New T-Mobile to market LifeLine or support the program after the merger closes. This is especially critical if New T-Mobile plans to expand the territory coverage of LifeLine as the testimony suggests.⁹⁰ As another example, keeping LifeLine only with the Assurance Wireless brand is not sufficient to ensure that all new eligible customers, especially existing T-Mobile and new New T-Mobile customers are given opportunity to learn about the program and sign up for service for the first time. T-Mobile’s testimony also does not offer to specifically reach out to those existing T-Mobile customers who may be eligible for LifeLine, perhaps by using demographic or sales data, to offer them access to Assurance Wireless

⁸⁷ Jt Appl. Exh. 2 (Sievert) at p. 26:14-19 (repeats Sylla Dixon’s commitment and references her testimony for further discussion. Mr. Keys, the president of MetroPCS and presumably an influential participant in the company’s strategy for reaching out to low income customers makes no mention of the program. Sprint witness Mr. Sywenki describes Sprint’s current participation in the California program but references Mr. Sievert and Ms. Sylla Dixon for New T-Mobile’s commitment to this Program). Jt Appl. Exh. 9 (Sywenki) at p. 6:2-7:16.

⁸⁸ Jt Appl. Exh. 8 (Sylla Dixon) at p. 3:6-8, 18-22.

⁸⁹ Jt Appl. Exh. 8 (Sylla Dixon) at p.3:8-11.

⁹⁰ Sylla Dixon at p. 3:13-28; TR 912:18-913:20

LifeLine. Finally, it is worth noting that New T-Mobile does not commit to using merger efficiencies to make many improvements to the Assurance Wireless participation in LifeLine except through new phones that will be required in light of the network change and upgrades to 5G that would presumably also be required without the merger for Assurance customers. Beyond that, however, there is no commitment to use merger savings to provide better customer service, better terms of service, more marketing and targeted outreach. The company also fails to commit to work with the Commission LifeLine staff to integrate T-Mobile staff and its new processes, as the Sprint personnel know is a significant effort. Sprint testimony only references the vague commitments in the testimony of Mr. Sievert and Ms. Sylla Dixon and does nothing to bolster the claims that New T-Mobile is committed to LifeLine.⁹¹

The witnesses' cross examination does nothing to assuage TURN or further convince TURN of New T-Mobile's commitment. Despite being a 12-year veteran of federal regulatory work for wireless companies, including over 8 years with T-Mobile, Ms. Sylla Dixon appeared unfamiliar with the LifeLine program generally and specifically with T-Mobile's experience with the program.⁹² Her inability to clearly and confidently make future commitments to LifeLine spoke louder than any written word about T-Mobile's commitment to LifeLine and other public purpose programs and community outreach efforts. Yet, she was clear, when asked, that she will not be responsible to "watch over" and help administer LifeLine for the New T-Mobile.⁹³ Asked whether it was her understanding whether T-Mobile had ever participated in either a federal or state LifeLine program she said she was "unaware."⁹⁴ Asked how long the T-

⁹¹ Jt Appl. Exh. 9 (Sywenki) at pp. 6: 3-7:16.

⁹² TR Vol. 6, p. 912:10-13.

⁹³ TR Vol. 6, p. 881:8-140.

⁹⁴ TR Vol. 6, pp. 880:19-23, 914:15-25. But see, Joint Consumers Protest at p. 19 and Pub. Adv. Exh. 4 (Odell) at p. 26:4-5 for confirmation that T-Mobile had been a participant in LifeLine programs in other states but has since withdrawn its participation.

Mobile commitment to participate in LifeLine would last, she could only say she “believed” Mr. Sievert stated “indefinitely” but she clearly had no independent knowledge of the terms of the commitment.⁹⁵ She also had no knowledge of the internal logistics involved in meeting the commitments made in her testimony, including why it would take six months for the New T-Mobile to begin offering LifeLine throughout the entire New T-Mobile territory in California, except to say that it is a “business decision.”⁹⁶ Asked if T-Mobile currently has, or is committed to applying for, its federal Eligible Telecommunications Carrier status in California (something that is required if the company plans to directly receive federal LifeLine subsidy money) she could only say she was “generally” familiar with the designation and that she did not know if the company currently has the designation or plans to apply.⁹⁷ Finally, and more generally, Ms. Sylla Dixon was uncertain and unfamiliar with T-Mobile’s participation with other California-based public purpose programs including the Teleconnect Fund.⁹⁸

Sprint witness Sywenki describes the current Assurance Wireless plans and LifeLine participation but, as a representative of the non-surviving entity, he merely refers to the commitments in Sylla Dixon testimony to vaguely argue that “the merger will improve the provision of Lifeline service in California.”⁹⁹ Noticeably, Mr. Sywenki could not provide details regarding the current proposal of the Sprint affiliate Boost Mobile to participate in the LifeLine program or if the commitment to stay in LifeLine through Assurance Wireless would extend also the Boost pilot program.¹⁰⁰

⁹⁵ TR Vol. 6, p. 882:1-5.

⁹⁶ TR Vol. 6, p. 883:17-28.

⁹⁷ TR Vol. 6, pp. 925:16-926:3.

⁹⁸ TR Vol. 6, p. 930:6-13.

⁹⁹ TR Vol 6, p. 7:10-16.

¹⁰⁰ TR Vol 6, p. 985:21-986:13.

Mr. Sievert's testimony was a similarly high-level commitment to participate that appeared motivated, at least in part because of the economics from the expected excess capacity. He also states that LifeLine will likely only be offered under the Assurance Brand¹⁰¹ and does not commit to offering better terms, more data or lower prices than what Assurance offers today.¹⁰² Nor would Mr. Sievert commit to offering a low income discount on its in-home broadband plans that the company advertises as a benefit of this merger transaction.¹⁰³ Even in response to questions by Commissioner Rechtschaffen, Mr. Sievert hesitated to commit to the Lifeline program "indefinitely" instead suggesting that the commitment is, "indefinite at this point... so we should have a discussion about what that means specifically." Through follow up questions, Mr. Sievert seem to suggest that the commitment only went so far, as long as they "have a plan to and an "economic interest in continuing the programs."¹⁰⁴

Finally, the testimony of Thomas Keys, President of Metro PCS is completely silent about T-Mobile's past, present or future experiences with LifeLine which seems at odds with the fact that MetroPCS is T-Mobile's primary provider of prepaid plans and prides itself as "having a presence in the low-income communities that we serve" including "high and extreme poverty census tracts" and that the merger will not "change our commitment to serving these low income communities."¹⁰⁵ Mr. Keys claims that "low income customers, whether on prepaid or postpaid plans, will also be among the biggest beneficiaries of the merger"¹⁰⁶ but his testimony makes no

¹⁰¹ TR Vol 4, p. 316:8-15.

¹⁰² TR Vol 4, p. 314:14-22 (noting that LifeLine is something offered by one of "his competitors" but that it is "possible" the LifeLine offerings of New T-Mobile will be improved from current Sprint/Assurance offerings).

¹⁰³ TR Vol. 4, pp. 321:13-322:1.

¹⁰⁴ TR Vol. 4, p. 338:18-28.

¹⁰⁵ Jt Appl. Exh. 4 (Keys) at p. 16 :24-28.

¹⁰⁶ Jt Appl. Exh. 4 (Keys) at p. 2:22-23.

mention of LifeLine and he provided no further discussion or clarification of the company's commitment during cross examination.

Another important element of T-Mobile's commitment to the LifeLine program is the support by New T-Mobile for MVNOs that participate in the program using the T-Mobile and Sprint networks. Ms. Sylla Dixon's written testimony states that LifeLine customers will benefit from this merger, in part, as the indirect recipients of the benefits that MVNO will receive from this merger.¹⁰⁷ However, when asked to explain, support or justify this trickle-down theory of LifeLine benefits, Ms. Sylla Dixon could merely point to statements that she "believed" Mr. Sievert said in earlier cross examination.¹⁰⁸ She also had no knowledge of how current developments at the FCC, specifically the FCC's decision to eliminate subsidies for resale MVNOs offering LifeLine in tribal areas would impact New T-Mobile plans to offer wholesale services to MVNOs.¹⁰⁹ The record should not reflect the company's sweeping statements about benefits to LifeLine customers without specific testimony and knowledgeable witnesses to support such statements.

Moreover, as discussed above, Joint Applicants have consistently claimed that the New T-Mobile will specifically target post-paid markets of AT&T and Verizon.¹¹⁰ While their witnesses claim that part of that strategy will be to keep rates low and not abandon their current market strategies, which include focus on prepaid services and, for Sprint at least, LifeLine, the record does not support the claims that the New T-Mobile will be able to dedicate the resources necessary to cover all market segments. As discussed in Dr. Selwyn's testimony and Ms. Odell's

¹⁰⁷ Jt Appl. Exh. 8 (Sylla Dixon) at pp. 4:28- 5:2, 5:10-11 (LifeLine customers will benefit as will all customers of wireless).

¹⁰⁸ TR Vol. 6, p. 927:18-25 (Mr. Sievert makes little mention of LifeLine but does suggest MVNOs and their customers will also benefit from the merger).

¹⁰⁹ TR Vol. 6, p. 929:6-13.

¹¹⁰ TR Vol. 4, pp. 265:14-266:21, 267:9-268:22.

testimony, to the extent the New T-Mobile spends its resources and expected merger efficiencies to compete with AT&T and Verizon, that necessarily will not include LifeLine customers.¹¹¹ AT&T and Verizon do not directly participate in the California LifeLine program. Indeed, if there is any harbinger of the future impact of this transaction on the LifeLine program it is the fact that neither AT&T or its prepaid affiliate Cricket wireless currently participates in the program despite Cricket having participated previously and clear opportunities to do so currently.¹¹²

The company's testimony and cross examination may vaguely commit to the current offerings for LifeLine, but does not contain sufficient detail to ensure that it will dedicate adequate resources into the program so that California LifeLine customers will benefit from this merger. In cross examination of Mr. Sievert, when asked if competition with AT&T and Verizon means that T-Mobile won't have the resources to participate in programs like LifeLine, he disputed the characterization but could only say that they've "evaluated the Lifeline program as best we can being a third party and have decided it would be in the best interest of the company to continue it" and that "the plan would be" to stay in the program "as it is."¹¹³ This tepid support for the program should put the company's commitment in the proper context.

Regardless of the Commission's rejection of this transaction as failing to meet the public interest test, TURN has a strong interest in a robust and meaningful LifeLine program and encourages T-Mobile to participate. Nevertheless, the current commitments do not go far enough and, if the Commission is poised to approve this transaction, the Commission should

¹¹¹ Pub. Adv. Exh. 4 (Odell) at p. 26:1-9.

¹¹² TR Vol. 6, pp. 924:19-925:15.

¹¹³ TR Vol. 4, pp. 269:11-22, 281:6-8 (When later asked again about LifeLine the best Mr. Sievert could say is, "You know, for a company with massive capacity, it's a good program," not exactly a ringing endorsement).

require additional commitments for New T-Mobile to market and participate in LifeLine under the T-Mobile, Boost, Metro, and Assurance Wireless brands. It should be required to train its customer service agents to work with LifeLine participants to meet the participation of other carriers in the program and to commit to a robust consumer education and marketing campaign that is culturally sensitive, in-language and based in the communities they serve. Moreover, T-Mobile and Boost should be required to apply for their eligible telecommunications carrier designation here in California. The carriers should report to the LifeLine staff to demonstrate their participation including plans (as currently required) and customer response rates.

V. NETWORK BUILDOUT AND COVERAGE ESTIMATES ARE UNREALISTIC AND NOT MERGER SPECIFIC

One of the core merger benefits put forth by the Applicants is a commitment to expand and improve network coverage and performance, including commitments to “build a world-leading nationwide 5G network that will deliver unprecedented services to consumers... and to accelerate and deliver a superior 5G network that will be better and more expansive than anything the companies could deliver on their own.”¹¹⁴ The Application and testimony contain descriptions of plans and technical specifications that the company claims will “build-out of a robust, nationwide, world-class 5G network and services,” including “delivery of better services and high-speed broadband for rural areas.”¹¹⁵ New T-Mobile is pledging to provide over a 100 Mbps download speeds to “almost 80% of California customers by 2021” and 90% of customers with 300 Mbps by 2024.”¹¹⁶

¹¹⁴ Wireless Application at p. 3.

¹¹⁵ Wireless Application at p. 4.

¹¹⁶ Jt Appl. Exh. 3 (Ray) at p. 4:11-19 (claims that this will help bridge the digital divide in rural areas as well).

However, the Department of Justice’s Merger Guidelines state that the purported benefits of a merger should not be considered if they are “vague, speculative, or otherwise cannot be verified by reasonable means.”¹¹⁷ Despite the thousands of pages of testimony submitted by Applicants, a large portion of which apply to the issues of network improvements and design, these claims cannot be verified by reasonable means.¹¹⁸ The Applicants attempt to wave away the work that must be done to each and every New T-Mobile facility, and the record does not reflect the cost, investment, timeframe, and uncertainty involved in the scope and scale of build out necessary to accomplish the purported benefits in the promised timeframe.

For example, Public Advocates finds that the Applicant’s focus on spectrum acquisition and the New T-Mobile’s spectrum portfolio to reach these promised speeds and scale, is misplaced and is merely one possible solution to a temporary problem of technology transition that will impact every facilities based wireless carrier moving to 5G.¹¹⁹ Instead, most network performance merger benefits will come from “capital intensive” cell site and network management improvements.¹²⁰ And, specifically in rural areas, the acquisition of mid-band spectrum will require significant capital build out of more cell sites and work on existing towers to farm spectrum, split cells, and upgrade antennas and radios to bring promised 5G performance to help bridge the digital divide.¹²¹

¹¹⁷ CWA Exh. 1 (Goldman) at p. 31 (citing Horizontal Merger Guidelines (2010) at Section 10, retrieved from <https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal>).

¹¹⁸ For example, there was confusion during cross examination on the basic issue of whether New T-Mobile’s promises of speed and coverage were measured using indoor coverage or outdoor coverage assumptions. It appears that much of the discussion throughout the Applicants’ testimony relies on the more forgiving outdoor coverage standard. Assuming customers will want to use their cell phones at home, the testimony must be analyzed and adjusted as necessary to apply indoor coverage standards. TR Vol. 5, pp. 578:20-579:20; 580:22-582:9.

¹¹⁹ Pub. Adv. Exh. 4 (Reed) at p. 16:12-16.

¹²⁰ Pub. Adv. Exh. 4 (Reed) at p. 11:17-19.

¹²¹ Pub. Adv. Exh. 4 (Reed) at p.17:10-16.

T-Mobile witness Mr. Ray acknowledges that “it is the combination of the complementary spectrum, *number of cell sites and spectral efficiency* that will deliver the robust, nationwide 5G....”¹²² Mr. Ray’s testimony also acknowledges that access to more cell sites through the acquisition of Sprint is one of the benefits of the merger precisely because it is one of the necessary inputs to deliver on the network performance promises.¹²³

Yet, Mr. Ray’s testimony and cross examination do not sufficiently account for the level of investment, effort and the uncertainties associated with the cell site and spectral efficiency promises. Indeed, in his testimony Mr. Ray claims that T-Mobile will have “*almost immediate* access to more cell sites than either company would have absent the merger.”¹²⁴ But this is an overstatement at best and potentially misleading, as the record reveals that Mr. Ray downplays the significant work on the network throughout California that must be done before any merger benefits are realized. Indeed, Mr. Ray acknowledges the time consuming, expensive, and uncertain process with new build pole construction in California, but suggests to the Commission that New T-Mobile’s network plans will be different.¹²⁵

When confronted on cross, Mr. Ray attempts to stay optimistic about the fast pace of realizing merger benefits, but has to acknowledge that each of the required steps toward network buildout will require feet on the ground, time consuming, and resource intensive efforts, including “cell splitting by anchoring on the existing T-Mobile cell site infrastructure,”¹²⁶ retaining 11,000 cell sites but decommissioning thousands of others,¹²⁷ installing “multiple new

¹²² Jt Appl. Exh. 3 (Ray) at p.14:23-24.

¹²³ Jt Appl. Exh. 3 (Ray) at p. 8:3-23.

¹²⁴ Jt Appl. Exh. 3 (Ray) at p. 18:6-8.

¹²⁵ Jt Appl. Exh. 3 (Ray) at p. 18:8-19:4

¹²⁶ Jt Appl. Exh. 3 (Ray) at p. 19.

¹²⁷ TR Vol. 4, p. 431:1-27; TR Vol. 5, p.465:8-27, 467:12-17, 468:11-28.

cell sites in a coverage area” and deploying additional spectrum resources.¹²⁸ During cross, Mr. Ray confirms that activities such as cell splitting and refarming both require visits to each pole and, in some cases, building entire new towers or gaining new access to existing poles.¹²⁹ When, as an example, he was asked about the sizable effort to build out the promised coverage in hundreds of sparsely populated miles between Los Angeles and Sacramento by 2021, less than three years away, Mr. Ray had to acknowledge that was the company’s plans, but provided little detail or assurances regarding the resources dedicated to the effort or how it will accomplished.¹³⁰

Mr. Ray was inconsistent when discussing his own experience with the diverse and complicated buildout experiences in California. It seemed that in response to some questions he knew a lot about California and its topography, diversity and barriers, but other times he made sure to preface his remarks that he isn’t very familiar with the state.¹³¹ For example, Mr. Ray repeatedly noted that he was unfamiliar with the California topography and geography and, therefore, the particular barriers unique to each county and area of California that will impact network buildout and expansion.¹³² Yet to demonstrate his experience and expertise to support his cross, he also insisted that he’s “spent much of my career building and operating cell sites, especially in California” and he discussed zoning requirements that may be imposed to conduct this buildout, and how each process may vary by county, pole owner and even related to

¹²⁸ Jt Appl. Exh. 3 (Ray) at p. 19:20-22; TR Vol.5, pp. 536: 3-539:20.

¹²⁹ TR Vol. 5, p. 535:1-20.

¹³⁰ TR Vol. 5, pp. 535:21-536:3.

¹³¹ Compare, TR Vol, 5, p. 512:1-8 (“I mean personally, Ms. Cong, I’ve got a lot of experience [building cell sites in CA]...I spent five years building the first GSM networks here in California.”) with p. 507:19-22 (“we’re very confident on the hundred megabits per second number. Again, I can’t—I don’t have all the [unserved and underserved] geography in my head, Ms. Chong.”)

¹³² TR Vol. 5, pp. 463:8-22, 507:10-22, 544:19-25.

geography and topography.¹³³ He had to acknowledge that building thousands of cell sites from scratch in California would “take us years to go and execute on that type of program” because it is a big number of sites and, thus, why there are not as many new sites in the T-Mobile plans.¹³⁴

In direct testimony, Mr. Ray acknowledged that the siting and building process has its challenges and only if the new equipment does not “increase the amount of physical space or mass” it “*may* only incur limited new lease payments and *may* be able to avoid new zoning approvals” and that in “many cases,” but not all, could T-Mobile avoid “substantial new costs or delays.”¹³⁵ Despite the reality of these challenges and his begrudging acceptance, he continued to claim that these network changes may be implemented “nearly immediately.”¹³⁶

During cross examination, witnesses Sievert stuck to the script and provided responses to questions asking for further clarification and detail regarding the investment, timeline, and processes necessary to carry out these plans and realize the merger benefits as quickly as possible.¹³⁷ However, underlying those responses was the reality that the company has made promises that it likely cannot keep and, therefore, merger benefits for rural customers and low income customers in more isolated communities may not be realized.

For example, Mr. Sievert discussed the merger synergies promised from the transaction and noted that much of the synergies will come from savings through significant network changes and re-design including decommissioning cell towers and stores and also through the addition of more capacity gained from network buildout.¹³⁸ But he promises that customers will

¹³³ TR Vol. 5, pp. 542:28-545:11.

¹³⁴ TR Vol. 5, pp. 479:21-480:2.

¹³⁵ Jt Appl. Exh. 3 (Ray) at p. 20:6-13 (emphasis added).

¹³⁶ Jt Appl. Exh. 3 (Ray) at p. 20:6-13.

¹³⁷ TR Vol. 4, p. 415:4-8 (Ray); 427:16-28 (depth and breadth of the combined Sprint and T-Mobile spectrum).

¹³⁸ TR Vol. 4, pp. 284:5-9, 290:12-16.

receive these benefits - “a massive expansion in capacity, and it’s a total game changer”- when customers go from working with 33 Mbps to “*immediately*” having 450 Mbps availability.¹³⁹ Mr. Sievert admits that when they combine the Sprint and T-Mobile networks, it will be a massive expense of labor and infrastructure costs because thousands of towers must be decommissioned and others must be repurposed and new equipment must be placed on all the poles, something that will take “years to create” and many technicians.¹⁴⁰ But the company has not provided testimony or cross examination of the work effort, permitting, siting, processing and field work that it will take to visit tens of thousands of towers in California and Mr. Sievert (or Mr. Ray) never explains how this massive work effort can corroborate with the promises to provide merger benefits “immediately” or to expand the network with 5G speeds by 2021 to many parts of the state and less densely populated areas.¹⁴¹ This is an especially troubling oversight when California is only one of fifty states where this work is happening.

The timeframe and investment focused on that effort does not seem to align with the promised merger benefits. The network investment numbers are underwhelming considering the task at hand, especially here in California. As Mr. Sievert clarified, while the company is excited about its \$40 billion in network investment nationwide, it has only committed \$2.1 billion of that to rural network investment- which parties agree can be an expensive operation. And this is still a nationwide figure, a smaller portion yet again is committed to the massive effort to touch

¹³⁹ TR Vol. 4, p. 258:7-12. Yet compare Mr. Sievert’s claims to cross by CETF that they’ll bring 100 Mbps service to 99% of California and 300 Mbps to 93% of California through in-home broadband. TR Vol. 4, p. 297:13-18.

¹⁴⁰ TR Vol. 4, pp. 289:22-290:11.

¹⁴¹ TR Vol. 4, pp. 380:14-381:16. In response to a direct question by his own counsel regarding how long it will take for customers to realize the merger benefits, all Mr. Sievert could do was to reference the company’s experience with the Metro PCS merger- a vastly different transaction- and suggest that the company is currently doing planning and that after closing they “intend to get after it immediately and begin building this New T-Mobile network.”

thousands of Sprint and T-Mobile poles in California. Yet, despite the importance of this issue to the overall Application, Mr. Sievert clarified that T-Mobile didn't provide a detail of urban versus rural spending to directly support its purported merger benefits and outcomes.¹⁴² Moreover, while Mr. Ray is quick to calculate the longer term cost savings from decommissioning thousands of cell sites,¹⁴³ he does not provide clear estimates of cost and direct investments in the work to decommission, repurpose, and build new sites. It also should be noted that while Mr. Ray promised that the "vast majority" of the \$40 billion in promised investment is going into the network, Mr. Sievert notes that, "most of [that investment] is labor; workers, technology workers, climbing towers, designing the network and rolling the network out over a period of years."¹⁴⁴

Applicants challenged arguments that the promises of network buildout and 5G deployment within a three and five year time were unrealistic. But Public Advocates witness Mr. Reed states that while T-Mobile can present the benefits of refarming spectrum and spectral efficiencies and tower placement, the Commission cannot look at these individual pieces in a vacuum.¹⁴⁵ Mr. Reed agrees that this merger will have scale efficiencies that may save New T-Mobile operating costs as compared to standalone T-Mobile or Sprint, but Mr. Reed notes that combining cell towers and decommissioning cell towers also has a cost that must be taken into account along with any gains in capacity and efficiencies from the work on the towers.¹⁴⁶ Mr. Reed also notes that any merger will have scale efficiencies, even a combination between market behemoths AT&T and Verizon, but these types of efficiencies do not automatically make a

¹⁴² TR Vol. 4, pp. 328:16-329:10, 330:13-18. Mr. Ray also said that he could not break down the California specific investment number between urban versus rural. TR Vol. 5, p. 522:2-13.

¹⁴³ Jt Appl. Exh. 3 (Ray) at pp. 20:17-21:6.

¹⁴⁴ TR Vol. 4, pp. 288:27-289:4; TR Vol. 5, p. 498:25-28.

¹⁴⁵ TR Vol. 7, p. 1133:13-28.

¹⁴⁶ TR Vol. 7, pp. 1104:28-1105:16.

merger in the public interest.¹⁴⁷ The question should be whether the purported benefits from that technology will outweigh the very real costs to the company that may weaken benefits passed down to ratepayers and wholesale customers and compound the harms from the loss of a significant facilities based competitor.¹⁴⁸ The combined company must be able to accomplish each of these elements of its proposal to provide customers faster access to 5G and accomplish the promised merger benefits.¹⁴⁹

Moreover, as Public Advocates points out in testimony and in cross, the Applicants fail to make the connection between the company's promised plans for 5G deployment supported by purported merger efficiencies and the current market realities that customers are slow to adopt early applications of 5G technology, in part due to the limited availability of handsets and network applications and the deployment plans of other carriers such as AT&T and Verizon. During cross examination, Public Advocates did not agree with counsel that the mere announcement of the merger pushed AT&T and Verizon to change their business plans or that the combination of the networks will suddenly and synergistically bridge the digital divide.¹⁵⁰ Mr. Reed later noted that the mere promise to deploy 5G, even if motivated on a faster time frame as a result of the merger, in no way guarantees retail or wholesale customers benefits or that those benefits will be passed through to end user customers, or that it will result in competitive pressure on other mobile providers.¹⁵¹ All of these puzzle pieces must fit together and that is where the Applicant fails to meet its burden.

¹⁴⁷ TR Vol. 7, p. 1181:2-9.

¹⁴⁸ TR Vol. 7, pp. 1110:25-1111:3. See also, Pub. Adv. Exh. 2 (Selwyn) at p. 65:7-13 (merger benefits and cost savings only as good as the competitive pressure required to pass those benefits through to end user consumers).

¹⁴⁹ TR Vol. 7, p. 1141:8-11.

¹⁵⁰ TR Vol. 7, pp. 1178:21-1179:17.

¹⁵¹ TR Vol. 7, p. 1172:9-22.

Here again, if the Commission is ready to approve this application, it must require a detailed plan for network enhancements and timeframes plus reporting to allow the Commission to monitor this progress, especially in rural areas.

VI. THE PROPOSED TRANSACTION DOES NOT ADEQUATELY ADDRESS THE NEED FOR BACK-UP POWER SUFFICIENT TO ENSURE RELIABLE SERVICE

A. Approaches Differ to Ensuring Emergency Generator Power is Available During Emergencies

The Applicants do not adequately address the need for back-up power to ensure reliable service during power outages. If the Commission finds this merger to be in the public interest, it must include specific, enforceable requirements to bolster back-up power to cell sites and backhaul facilities owned or under the control of T-Mobile.

Sprint and T-Mobile have different practices with respect to providing back-up power to support their networks in the event of a commercial power outage. Sprint has a "general policy" of designing cell sites with back-up batteries with have a life between 4-8 hours in the event of a commercial power outage.¹⁵² T-Mobile battery back-up at cell cites has an average life of

BEGIN CONFIDENTIAL *** [REDACTED] *****END CONFIDENTIAL**¹⁵³ While both

companies have deployed battery-backup at cell sites, Sprint's **BEGIN CONFIDENTIAL *****

[REDACTED] * END CONFIDENTIAL** and Sprint has

utilized a much more robust deployment of generators, including a significantly higher number of portable generators and fixed generators at key cell sites and switch facilities that can provide power for between 2-5 days.¹⁵⁴ Sprint has a nationwide fleet of 1800 portable generators

¹⁵² Pub. Adv. Exh. 6-C (Reed) at p. 37:9-10, fn. 75 (citing Exhibit C-26, Cal Advocate Data Request 1, Question 1-45).

¹⁵³ Pub. Adv. Exh. 6-C (Reed) at p. 37:19-22.

¹⁵⁴ Pub. Adv. Exh. 6-C (Reed) at p. 37:15-17.

available within 2-4 hours of 90 percent of its cell sites.¹⁵⁵ Of these, **BEGIN CONFIDENTIAL *** [REDACTED] *** END CONFIDENTIAL**, are located in California, while **BEGIN CONFIDENTIAL *** [REDACTED] *** END CONFIDENTIAL** additional portable generators are in states close to California.¹⁵⁶ In contrast, T-Mobile has far fewer portable generators in California **BEGIN CONFIDENTIAL *** [REDACTED] *** END CONFIDENTIAL *****.¹⁵⁷ Further, while T-Mobile has additional portable generators that can be redeployed to California, T-Mobile has a much longer time frame for redeploying portable generators located in other states to California **BEGIN CONFIDENTIAL *** [REDACTED] *****, **END CONFIDENTIAL**, compared to 2-4 hours for Sprint.¹⁵⁸

T-Mobile's rebuttal testimony does not indicate how many portable generators are located in states close to California, so the Commission has no way of knowing how long it would take T-Mobile to relocate additional power to California. Another concern is that more than one state near to California may simultaneously face an emergency (such as a wildfire) that also requires the use of T-Mobile's fleet of generators, calling into question whether the additional back-up power for California would be further delayed. Further, getting out-of-state generators to California - or even moving them from one general part of the state to another - is one thing. It is another thing to haul the additional generators along often poorly maintained back roads in sparsely populated, mountainous areas, particularly when there is an on-going emergency involving a power outage necessitating the need for the back-up power. Two frequently experienced situations causing power outages are wildfires and damage from severe weather, both of which make transporting generators during emergencies very difficult. The vagueness of

¹⁵⁵ Pub. Adv. Exh. 6-C (Reed) at p. 37:10-12.

¹⁵⁶ Pub. Adv. Exh. 6-C (Reed) at p. 37:12-15.

¹⁵⁷ Pub. Adv. Exh. 6-C (Reed) at p. 37:23-25.

¹⁵⁸ Jt Appl. Exh. 3-C (Ray) at p. 51:25-26; Pub. Adv. Exh. 6-C (Reed) at pp. 37:23-25, 38:1.

T-Mobile's approach to ensuring its network continues to function during power outages is cause for concern.

While T-Mobile has committed to retaining Sprint's generators, the different approaches to back-up power are problematic. T-Mobile's approach results in less robust back-up power than Sprint and this does not bode well for the provision of back-up power in newly served territory, especially in isolated rural areas of the state.

When asked whether T-Mobile plans to have eight hours of backup on their cell sites, T-Mobile's witness (Ray) provided a vague response, stating that the company continues "to improve both factory backup and deployment of generators to our cell sites. We have plans to advance on both fronts." But Mr. Ray did not commit to providing 8 hours of backup battery life or generators at cell sites. He noted that often jurisdictional issues affect placement of generators and they are tough to "deploy these in certain environments."¹⁵⁹

B. Expansion Into Rural California Brings With it An Obligation to Ensure Powered Facilities in Harsh Conditions and Denergization Events

The applicants assert that a major benefit of the merger is expanded service to rural areas of California, many of which are not currently served by either carrier. This expansion will involve, in part, the installation of additional cell sites throughout the U.S., "many" of which will be located in California,¹⁶⁰ including large sparsely populated territories, with difficult terrain, including mountaintops.¹⁶¹ T-Mobile's witnesses did not provide a specific number of newly constructed cell sites (as distinct from cell sites created by additional deployment of radio bands across existing T-Mobile and Sprint cell sites in California) or specific locations.¹⁶² Joint

¹⁵⁹ TR Vol. 5, p. 523:4-13 (Ray).

¹⁶⁰ TR Vol. 5, p. 307:4-8, p. 307: 25 - p. 308: 8 (Sievert).

¹⁶¹ TR Vol. 5, p. 510:2-511:18, p. 516: 8-13 (Ray).

¹⁶² TR Vol. 5, p. 538:19-27, 539:17-20 (Ray).

Applicant's witness admittedly was not familiar with the topography, terrain and specific locations of the population in rural Alpine County,¹⁶³ and stated that he did not "have all the data for California and the population" and therefore could not commit to putting generators at locations necessary to ensure continued communication for isolated communities.¹⁶⁴ This is not reassuring.

T-Mobile has cell sites that it deems "mission critical" and which its chief technology officer described as "a specific number of low-band cell sites [that have] helped us provide at least a base coverage layer across the geography."¹⁶⁵ Back-up power at mission critical cell sites is provided by batteries at some sites, and standard generators at others.¹⁶⁶ Back-up power at 99 percent of the cell sites not deemed mission critical is provided by batteries, with some being powered by generators.¹⁶⁷ T-Mobile's witness was asked about the provision of service to isolated communities in rural areas in large geographic areas - which is the situation for the rural areas where T-Mobile intends to extend its service. T-Mobile's witness hedged when asked if the company would designate cell sites in isolated communities as mission critical to ensure that the customers would have service during an emergency. He responded that the company would "potentially" designate some sites as mission critical. He refused to confirm that for planning purposes it is T-Mobile's policy to designate cell sites as mission critical to ensure that isolated communities can be reached during an emergency.¹⁶⁸

¹⁶³ TR Vol. 5, p. 463:9-14, 463:17-19 (Ray).

¹⁶⁴ TR Vol. 5, p. 552:17-18 (Ray).

¹⁶⁵ TR Vol. 5, p. 550:8-20 (Ray).

¹⁶⁶ TR Vol. 5, p. 550:27-551:4 (Ray).

¹⁶⁷ TR Vol. 5, p. 551:5-7 (Ray).

¹⁶⁸ TR Vol. 5, p. 552:6-553:11 (Ray).

T-Mobile's witness acknowledged that without back-up power the network will not function during a major power outages,¹⁶⁹ citing major earthquakes as an example. The need to provide robust back-up power is heightened by the new environmental reality in California, and the Commission-sanctioned policy of electric utilities to de-energize power lines during times of fire danger.¹⁷⁰ In Rebuttal testimony addressing the NORS outage reporting system, T-Mobile's witness responded noted that the root cause of major T-Mobile outages associated with the Camp and Woolsey fires was "a broader issue with the entire power and telecommunications ecosystem."¹⁷¹ Mr. Ray was unfamiliar with the fact that de-energization of power lines over a widespread area is a practice in California.¹⁷² These power outages can last for several days, as was the experience for customers of San Diego Gas and Electric in December, 2018:

Cutting off electricity when fire risks flare up can be controversial, as when San Diego Gas & Electric Co. shut off power to 19,000 customers for about four days last December as a precaution during the wind-blown Southern California wildfire.¹⁷³

Pacific Gas & Electric (PG&E) warns its customers served by lines running through high fire threat areas to prepare for multi-day outages.¹⁷⁴

The rural areas where T-Mobile is planning to extend service, including the construction of new cell sites, are precisely the areas prone to wildfires. T-Mobile's vague commitments to "potentially" establishing mission critical cell sites in these areas, and the uncertain availability of additional generators are not sufficient to ensure that T-Mobile will provide a functioning

¹⁶⁹ Jt Appl. Exh. 3-C (Ray) at p. 55:13.

¹⁷⁰ TURN Exh.1, December 13, 2018, CPUC press release re Docket No. R. 18-12-005.

¹⁷¹ Jt Appl. Exh. 3-C (Ray) at p. 56:6-13.

¹⁷² TR Vol. 5, p. 555:3-11, 557:9-15 (Ray).

¹⁷³ TURN Exh. 2 (Ray), Sacramento Bee, "*Northern California utility says it will turn the lights off when fire risk spikes*," March 22, 2018.

¹⁷⁴ TURN Exh. 3 (Ray), PG&E Public Safety Power Shutoff Policies and Procedures, September 2018.

network during emergencies, when it is most needed. T-Mobile's network will be one key means of providing emergency alerts and for customers to contact first responders.

T-Mobile's witness points out that if there is a widespread power outage, back-up power at cell sites may not be sufficient because it is a broader issue with the "entire power and telecommunications ecosystem."¹⁷⁵ Presumably, this refers to the need for power to support the middle mile facilities that transport calls from T-Mobile cell sites to other areas. But T-Mobile is able to bolster power to support network transport. T-Mobile's witness stated that in "really tough environments" characterized by difficult terrain - i.e., sparsely populated rural areas - they build their own microwave towers to support middle mile and backhaul.¹⁷⁶ T-Mobile is certainly capable of deploying robust back-up power at their microwave towers. Urban and suburban areas where transport is provided via leased fiber are also at risk of wildfires and subject to de-energization. For these areas, T-Mobile should have the ability to negotiate with the owners of that transport to bolster the back-up power available to support its network.

T-Mobile's service may mean the difference between life and death for customers facing an emergency. In a situation where there is either high fire danger or a major wildland fire, customers and first responders must count on a functioning network to communicate and receive emergency alerts. A few hours of back-up power and a vague commitment that generators can be imported from out-of-state are not sufficient when customers can realistically expect power outages to last several days.

The Commission should *require* T-Mobile to establish mission critical sites in the rural areas where it would be extending service following a merger, and to install standard generators at those sites. Further, the Commission should require T-Mobile to install standard generators at

¹⁷⁵ Jt Appl. Exh. 3-C (Ray) at p. 56:6-13.

¹⁷⁶ TR Vol. 5, p. 515:17-20, 515:26-516:13 (Ray).

any microwave towers that it constructs to provide backhaul and middle mile transport. Finally, the Commission should require T-Mobile to negotiate with the providers from whom it leases middle mile and backhaul to ensure that those facilities have sufficient back-up power to provide continuous service to mission critical sites. T-Mobile should report to the Commission about the status of back-up power in areas deemed high fire risk. T-Mobile should include in these reports instances where a fiber middle-mile or backhaul provider refuses to consider increasing the back-up power to a level sufficient to ensure uninterrupted service to mission critical sites.

VII. CONCLUSION

TURN urges the Commission to find that this transaction, as currently structured, is not in the public interest. The market cannot support the loss of a major facilities based competitor. Public safety, rural deployment, low income communities, prepaid innovations and industry wide pricing will all be negatively impacted by the merger of these two large and influential companies. As discussed above, to the extent the Commission finds that this transaction may meet detailed public interest standards, it must impose certain conditions on the merger transaction and the promises of New T-Mobile.

Dated: April 26, 2019

Respectfully submitted,

/S/

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