

**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-C) 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)

And Related Matter.

Application 18-07-012

CONSOLIDATED

**OPPOSITION OF THE UTILITY REFORM NETWORK AND THE GREENLINING  
INSTITUTE TO THE MOTION OF THE JOINT APPLICANTS TO ADVISE THE  
COMMISSION OF DOJ PROPOSED FINAL JUDGMENT**

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Dated: August 5, 2019

## **I. INTRODUCTION**

Pursuant to Rule 11.1 of the Rules of Practice and Procedure, The Utility Reform Network (TURN) and the Greenlining Institute (Greenlining) submit this opposition to the *Motion of Joint Applicants to Advise the Commission of DOJ Proposed Final Judgment* (“Motion”) filed July 26, 2019. Similar to the Joint Applicants’ previous Motion to Advise, this Motion should have no procedural effect and cannot be used to enter this material into the evidentiary record. Moreover, the Proposed Final Judgment was issued long after the close of evidentiary hearings in this proceeding, and thus is not part of the record and should not be considered by the Commission.

It is clear from this Motion that the terms of the transaction set forth in the Application and addressed during evidentiary hearings and briefing are radically different than the current proposed merger revised by the separate agreements involving the DOJ and the Federal Communications Commission. The Joint Applicants are attempting to convince the Commission to approve a deal that is not in the record, for which the parties to the proceeding have had no opportunity to review and offer responsive evidence, and for which the Commission does not have sufficient evidence to determine the impact on Californians. The Commission should, therefore, reject this Motion, acknowledge that the Commission does not have an adequate record to approve the transaction, and deny the Application or, in the alternative, request further evidence and briefing on the impact of these new terms.

## **II. DISCUSSION**

### **A. The Motion is Procedurally Improper**

#### **1. The Motion Has No Legal Effect.**

In the Motion, Joint Applicants purport to “advise” the Commission of facts that occurred long after the close of evidentiary hearings in this proceeding. As TURN and Greenlining noted

in response to the Joint Applicants' first Motion to Advise,<sup>1</sup> this type of motion should have no legal effect or procedural significance. The Commission can be "advised" about this settlement through public media means and *ex parte* discussions. Merely moving to advise does not put the material in the evidentiary record for further consideration by the Commission.<sup>2</sup> Under Commission Rules of Practice and Procedure, Rule 13.4, subdivision (a), because the record in this proceeding closed at the conclusion of the evidentiary hearings, the closest appropriate avenue for bringing this information to the Commission's attention may be to file a Motion for Official Notice and to Reopen the Record for additional comment on the new material.<sup>3</sup> As crafted, this Motion to Advise should be rejected.

Even if the Joint Applicants were to reframe their Motion to be more procedurally sound, the Commission should still reject the request. Joint Applicants' request to "advise" the Commission of their FCC filings raises many of the same issues as DISH Network's January 29, 2019, Motion to Take Official Notice of Supplemental Authority, which requested that DISH's FCC filings be considered in this proceeding. In response to DISH's Motion, Joint Applicants argued that it "would cause prejudice to the Joint Applicants by enabling DISH to belatedly introduce arguments long after the relevant deadlines have passed, to which the Joint Applicants could have responded had the arguments been timely made."<sup>4</sup> On February 5, 2019, the ALJ denied DISH's request, stating "...introducing what amounts to a legal pleading at this [point] is

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<sup>1</sup> Opposition of the Joint Consumers to Motion by Joint Applicants to Advise Commission of Federal Communications Commission Conditions, (June 4, 2019).

<sup>2</sup> *See*, Public Utilities Code Section 1701.1, subd. (b) (material must be in the record to be considered).

<sup>3</sup> Commission Rules of Practice and Procedure, Rule 13.4. TURN and Greenlining note that Public Advocate's and CWA's response to the Motion further argues that it would be inappropriate for the Commission to take "official notice" of the material included in the Motion because it does not qualify as a "final" decision.

<sup>4</sup> Joint Applicants' Response to Motion of Dish Network Corporation for the Commission to Take Official Notice (January 31, 2019) at p. 2.

simply prejudicial to the applicants and so that motion is denied.”<sup>5</sup> The arguments regarding prejudice and timeliness are equally applicable here; therefore, the Motion should be denied.

At most, the information attached to the Motion,<sup>6</sup> should be considered an *ex parte* communication and be given no weight in the evidentiary record. If the Commission intends to give this material, or the additional FCC conditions attached to the Joint Applicants’ previous Motion to Advise,<sup>7</sup> any weight or significance, due process requires that all parties be given a meaningful opportunity to review and comment on the impact of this material on the record of this proceeding and impact of the changes to the transaction on the public interest analysis.<sup>8</sup>

**2. The Commission Should Reject Joint Applicants’ Continued Attempts to Pretend that the Commission’s Review of the Wireless Transaction has No Legal Affect.**

While this is the second time that Joint Applicants have filed a “Motion to Advise” the Commission regarding facts that are not part of the record,<sup>9</sup> in this Motion to Advise, Joint Applicants ask for the specific relief that the Commission “promptly conclude its review of the wireless transfers.”<sup>10</sup> While not stated explicitly, the parties and the Commission are left to presume that the Joint Applicants expect the Commission to either incorporate the changes to the terms of the transaction brought about by the FCC Conditions in May and this DOJ Judgment into its public interest analysis of both the wireline and wireless transactions under Section 854 or not rely on the record to “review” the wireless transaction. Not only would either of these outcomes be procedurally improper and a violation of parties’ due process rights, this Motion

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<sup>5</sup> Hearing Transcript, 237:19-25.

<sup>6</sup> TURN and Greenlining note that the same DOJ Proposed Final Judgment is attached to the, Motion of DISH Network Corporation to Withdraw Opposition to the Transaction (filed July 29, 2019).

<sup>7</sup> Motion of Joint Applicants to Advise the Commission of New FCC Commitments, Exhibit 1 (filed May 20, 2019).

<sup>8</sup> See, e.g., *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (“The fundamental requisite of due process of law is the opportunity to be heard.”) (citation omitted).

<sup>9</sup> Motion of Joint Applicants to Advise the Commission of New FCC Commitments.

<sup>10</sup> Motion at p. 5. The Joint Applicants’ previous motion to advise did not call for specific action by the Commission other than to be “advised.”

appears to demonstrate yet another attempt to manipulate the Commission’s Rules of Practice and Procedure to suit the Joint Applicants’ own legal theory. The Joint Applicants have continued to dismiss the need for a Commission review and public interest determination of its wireless transaction, instead operating under the presumption that the Commission’s review of the wireless transaction has no legal effect and, therefore, Commission rules and due process rights need not apply here.<sup>11</sup> The Commission should reject these attempts.

**B. The DOJ Proposed Judgment Makes Major Changes to the Proposed Merger, Which are not in the Public Interest.**

As discussed above and in the response filed by Public Advocates and CWA, Joint Applicants’ Motion is a procedurally improper attempt to introduce new facts and evidence into a closed record.<sup>12</sup> TURN and Greenlining agree with Public Advocates and CWA that the Motion should be rejected<sup>13</sup> or, if the Commission takes this Proposed Judgment “under advisement” that the Commission should clarify that the Commission will treat this document merely as an *ex parte* filing.

Joint Applicants should not be allowed to rely on their legal fiction that the Commission can do no more than “review” the wireless transaction and, therefore, these new federal developments need only be acknowledged, but not accepted, by the Commission.<sup>14</sup> The FCC Conditions and the DOJ Judgment are not fiction and, if both items are incorporated into the approval of this transaction at the federal level, they will radically change the transaction and

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<sup>11</sup> See, e.g., Joint Applicants’ Motion for Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA Inc. at p. 4 (May 6, 2019); Joint Motion of Joint Applicants and the California Emerging Technology Fund to Modify Positions in Proceeding to Reflect Memorandum of Understanding between the California Emerging Technology Fund and T-Mobile USA Inc. at p. 7 (April 8, 2019); Motion of Joint Applicants to Advise the Commission of New FCC Commitments (May 20, 2019).

<sup>12</sup> Opposition of the Public Advocates Office and the Communication Workers of America District 9 (Joint Consumers) to Motion by Joint Applicants to Advise Commission of Department of Justice Proposed Final Judgment at p. 4 (July 31, 2019).

<sup>13</sup> Public Advocates and CWA Opposition to Motion, p. 2.

<sup>14</sup> See, *infra*, footnote 11.

will have a direct impact on California consumers. It appears from the procedural contortions conducted by the Joint Applicants to date that the companies are crafting these motions to avoid a critical and detailed analysis of the resulting changes to the proposed transaction and the impact on the pending Application and the Commission’s public interest analysis pursuant to Section 854.

Stepping back from the headlines about the changes to this proposed transaction, and reading the Proposed Judgment itself, reveals several issue areas that must be further explored to satisfy the Commission’s statutory obligations to determine whether this transaction meets certain standards before it can be approved as in the public interest:

- Neither the Motion nor the Proposed Judgment appears to require that DISH offer prepaid phone service or Lifeline service after DISH accepts the prepaid assets. While DISH will inherit existing prepaid customers and the Proposed Judgment places obligations on New T-Mobile to facilitate the transfer, the Proposed Judgment only references requirements for DISH to offer “retail mobile services” and, in some places, the Proposed Judgment explicitly references “postpaid” service.<sup>15</sup> But the Proposed Judgment contains no explicit references to prepaid services offered by DISH.
- Much of the commitments in the Proposed Judgment merely provide DISH a “right” to purchase spectrum, decommissioned towers, decommissioned stores, wholesale access, and ancillary services, but the agreement does not appear to bind DISH to purchase or use these “assets” to offer service.<sup>16</sup> Even with these assets, there is no evidence in the record here that DISH will actually be in a position to cobble together the fourth national cellular carrier envisioned by the DOJ.
- This Proposed Judgment includes very few enforceable build-out requirements for DISH. For example, the agreement requires that DISH merely to use its “best efforts” to serve subscribers on its own wireless network.<sup>17</sup> Otherwise, DISH only is held to buildout

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<sup>15</sup> Motion at p. 2 (“acquire” Sprint prepaid business but commit only to offer “retail mobile wireless services”.) DOJ Proposed Judgment, Stipulation and Order Section II. C (states that “central” to the relief offered is that DISH must offer nationwide postpaid retail mobile wireless service within one year, but no mention of prepaid.), Section IV.F. (only requiring DISH to use Divestiture Assets to offer “retail mobile wireless services” including “postpaid.”).

<sup>16</sup> DOJ Proposed Judgment, Section IV.A.4., IV.B.1-2, IV.C., IV.D., IV.E. (subsection E. allows DISH to decline to “purchase” certain decommissioned assets.)

<sup>17</sup> DOJ Proposed Judgment, Section VIII. B.

commitments it already has pursuant to FCC spectrum licensing requirements and which it has missed current deadlines for facility deployment.<sup>18</sup>

- Nothing in this Judgment imposes California-specific commitments, but instead allows the parties to the Judgment to determine where and when (within a 7 year timeline and with some other general restrictions) to carry out these commitments.
- The merging companies’ informal “commitment” in its Motion (that does not appear in the DOJ Judgment) to use remaining assets to participate in the LifeLine pilot project started by Boost Mobile<sup>19</sup> is just one of many examples of commitments that must be further formalized and explored by parties to understand the extent of the commitment.
- It is unlikely, and should be determined with further Commission review, that the DOJ Judgment addresses all of the concerns raised by DISH in their filings before the CPUC prior to this settlement agreement.<sup>20</sup>
- The main focus appears to be on offering a 7-year term MVNO contract to DISH, along with honoring all existing MVNO agreements for a 7 term, with only modest conditions and requirements<sup>21</sup>- a far cry from the robust facilities-based competitor we have today and only a modest improvement on an existing commitment by the Joint Applicants. And even the condition to honor the existing contacts can be shortened if T-Mobile demonstrates to the Trustee that doing so presents an “material adverse affect” on their ongoing business.<sup>22</sup>

### III. CONCLUSION

To support the parties’ due process and to ensure an adequate and full record, the Commission should reject the Motion of Joint Applicants to Advise the Commission of the DOJ Proposed Final Judgment.

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<sup>18</sup> DOJ Proposed Judgment, Section VIII. *See also*, Section IV.B.3, requirement by DISH to use 800Mhz Spectrum Licenses it chooses to purchase within seven years. *See*, DISH July 30, 2019 *ex parte* presentation to the FCC referencing DISH July 26, 2019 request for extension of existing spectrum license construction deadlines.

<sup>19</sup> Motion at p. 3.

<sup>20</sup> *See*, DISH Motion for Party Status (filed January 29, 2019); DISH Motion for the Commission to Take Official Notice of Supplementary Authority (filed January 29, 2019); and, Opening Brief of DISH Network, April 29, 2019.

<sup>21</sup> DOJ Proposed Judgement, Sections VI, VII.

<sup>22</sup> DOJ Proposed Judgment, Section VII.A.

Dated August 5, 2019

Respectfully submitted,

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