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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).

Application 18-07-011

And Related Matter.

Application 18-07-012

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING THE JOINT MOTION OF JOINT APPLICANTS AND THE CALIFORNIA EMERGING TECHNOLOGY FUND TO REFLECT MEMORANDUM OF UNDERSTANDING BETWEEN JOINT APPLICANTS AND THE CALIFORNIA EMERGING TECHNOLOGY FUND

1. Procedural Background

On April 8, 2019, Sprint Communications Company L.P., Sprint Spectrum L.P., T-Mobile USA, Inc., Virgin Mobile USA, L.P., (Joint Applicants) and California Emerging Technology Fund (CETF) filed the *Joint Motion of Joint Applicants and the California Emerging Technology Fund to Reflect Memorandum of Understanding between Joint Applicants and the California Emerging Technology Fund* (Motion). The Motion recites the major features of a Memorandum of Understanding (MOU) between the moving parties regarding various matters at issue in this proceeding. The Motion is not presented as a settlement nor does the Motion ask the Commission to approve the MOU, though the Motion indicates that the MOU resolves all issues raised by the CETF protest.

On April 23, 2019, The Greenlining Institute and The Utility Reform Network (Joint Consumers) filed a joint response to the Motion asking that it be denied. On the same day, the Commission's Public Advocates Office (Cal Advocates) filed a similar response asking that the Motion be denied. With the permission of the Administrative Law Judge (ALJ), on May 3, 2019, Joint Applicants and CETF filed a reply.

2. Discussion

It is common practice in cases such as this for applicants and protesters to settle the issues raised in the protests through one-on-one negotiation. The parties' agreement may be embodied in an MOU or other contract for which no Commission approval is sought; or it may form the basis of a formal settlement under the Commission's Rules and be submitted to the Commission for approval. In the latter case, it must meet the Commission's requirements for approval of settlements.

Joint Consumers' response succinctly summarizes those requirements:

Rule 12.1, subdivision (a) of the Commission's Rules of Practice and Procedure states that "Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding." Settling parties must convene a settlement conference before signing a settlement, providing at least seven days' notice in advance to all parties. Parties have 30 days after a motion for adoption of settlement to contest all or part of that settlement. These procedural steps are critical to ensure that partial settlements do not put other parties to the proceeding at a disadvantage or create an unworkable record for further litigation and decision making in the proceeding....[For a Rule 12 settlement to be approved], the parties to the settlement must demonstrate that it is "reasonable in light of

the whole record, consistent with law, and in the public interest.”¹

Joint Consumers argue that the MOU is a settlement in all but name and as such must comply with the requirements of Rule 12. Because it does not do so, they urge us to deny the Motion.

Cal Advocates argues that the Motion is procedurally improper both for its alleged non-compliance with Rule 12 but also because:

The Agreement also seeks to rely on the Commission to enforce its provisions. Among other things, the Motion provides that parties may seek relief from the Commission in the event of a non-cured breach, and the Agreement purports to invoke the Commission’s confidentiality provisions (without complying with General Order 66-D). The Agreement also requires that the Commission provide ongoing monitoring of the annual reporting requirements for an additional 5 years, without even providing the Commission the ability to opine on the reasonableness of these reporting requirements. Thus, the Joint Parties seek to rely on the auspices of the Commission to create and enforce the Agreement, despite the fact that they do not allow the Commission or the other parties to review the Agreement.²

In their reply to these arguments, Joint Applicants and CETF point out that nothing in the Commission’s Rules prohibits applicants and protesters from reaching side agreements such as the current MOU without designating them as settlements and seeking Commission approval:

Contrary to Cal PA’s characterization, Article 12 processes are not mandatory for all agreements between parties in a proceeding. As the text of the Rule makes clear, filing a motion for proposed settlement is optional: “parties...*may*

¹ *Joint Consumers Response* at 2-4.

² *Cal Advocates Response* at 4.

propose settlements on the resolution of any material issues of law or fact.” (Italics supplied.) Significantly, the Rule does not use the compulsory terms “shall” or “must” in connection with the obligation to file a motion to adopt settlement, but does use these terms elsewhere in Rule 12.1, indicating that the Commission was intentional in designating the Rule 12.1 settlement adoption process as permissive.³

The reply goes on to point out that in Application 15-03-005, CETF and Frontier Communications entered into an MOU similar in scope and purpose to the MOU entered in this proceeding and filed a nearly identical motion to have their pleadings reflect their agreement. In that case, the Commission recognized that the MOU was not a formal settlement but granted CETF enforcement powers with respect to the promises made by Frontier in the MOU, a process that Joint Applicants and CETF seek to replicate here.

In explaining why it was willing to enforce the CETF-Frontier MOU and several other MOUs entered into by Frontier and other protesters even though they were not submitted as formal settlements, the Commission stated:

Although the MOUs were not designated “settlements” by the parties and the parties did not file motions for their approval, they are enforceable contracts and as such have similar practical effects as the Settlements. While they were not provided to other parties for review and comment as were the Settlements, they nonetheless commit Frontier to courses of action that we determine to be necessary in order to render the granting of the application in the public interest. Accordingly, though we will not formally approve the MOUs, we will provide the signatories to the MOUs other than Frontier the same recourse to Commission assistance to enforce the terms of the MOUs as we will provide to the

³ *Joint Applicants Reply* at 4.

settling parties other than Frontier with respect to enforcing the terms of the Settlements.⁴

As the quoted language indicates, in the Frontier case the Commission considered and rejected the approach to dealing with MOUs that is being put forward in this case by Joint Consumers and Cal Advocates. It's also worth pointing out that one of Joint Consumers (The Greenlining Institute) entered into an MOU with Frontier and was granted the same Commission assistance in enforcing the terms of that MOU that it now objects to CETF receiving in this case.

For the reasons stated above, the Motion will be granted. However, all parties should be aware that granting the Motion merely permits CETF and Joint Applicants to enter their MOU into the record of this proceeding and changes the litigation position of CETF from opposing the Sprint-T-Mobile merger to supporting it. Granting the motion does not pre-judge the question of whether the merger is in the public interest though it adds weight to the argument of Joint Applicants for that conclusion.

IT IS RULED that the Joint Motion of Joint Applicants and the California Emerging Technology Fund to Reflect Memorandum of Understanding between Joint Applicants and the California Emerging Technology Fund is granted.

Dated May 8, 2019, at San Francisco, California.

/s/ KARL J. BEMESDERFER

Karl J. Bemesderfer
Administrative Law Judge

⁴ *Ibid.* at 6.