

**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 Number 18-07-011

And Related Matter.

Application Number 18-07-012

**REPLY COMMENTS ON PROPOSED DECISION BY
CALIFORNIA EMERGING TECHNOLOGY FUND**

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April 9, 2020

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Pursuant to Rule 14.3(a) of this Commission’s Rules of Practice and Procedure and the email ruling by the Assigned Administrative Law Judge (“ALJ”), dated April 3, 2020, allowing parties extended time until April 9, 2020 to file up to ten pages of Reply Comments, the California Emerging Technology Fund (“CETF”) hereby timely files its Reply Comments on the “Decision Granting Application and Approving Wireless Transfer Subject to Conditions,” mailed March 11, 2020 (“Proposed Decision” or “PD”) in the above-referenced consolidated proceedings.

I. Three Intervenors Agree that the Entire CETF MOU Should Be Included in the PD’s Ordering Paragraphs as a Condition of Approval

The Utility Reform Network (“TURN”)¹ and The Greenlining Institute (“Greenlining”)² are united in agreeing with CETF that all the commitments contained in the T-Mobile - CETF Memorandum of Understanding (“CETF MOU”) should be included in the Ordering Paragraphs

¹ Opening Comments of the Utility Reform Network on the Proposed Decision of Administrative Law Judge Bemserfer, at pp. 7-8, filed April 1, 2020 (“TURN Comments”).

² The Greenlining Institute’s Opening Comments on March 11, 2020 Proposed Decision Granting Application and Approving Wireless Transfer Subject to Conditions, at p. 6, filed April 1, 2020 (“Greenlining Comments”). “Greenlining respectfully requests that the Commission modify the order to require that the combined company comply with the conditions set by the FCC and the DOJ and the CETF and NDC MOUs as a condition of approval.”

(“OPs”) of the PD as a condition of the Commission’s approval of the merger, to ensure Commission enforcement of every aspect of the MOU, as CETF and T-Mobile explicitly agreed to in the MOU. TURN put it well: “The Proposed Decision ignores the fact that the CETF MOU represents that CETF modified its position in the proceeding to remove its opposition, ‘based on’ the full and complete set of conditions and requirements, including the enforcement mechanism, and that CETF agreed to affirmatively endorse and support the transaction only if the commitments within the MOU are included in the ordering paragraphs of the Commission’s Final Decision.”³

PAO similarly requests that the PD include conditions that require New T-Mobile to “live up to the promises made to gain approval from this Commission” including to deploy 5G technology and to meet service quality conditions.⁴ Thus, four intervenors unite in urging this Commission to ensure that every CETF MOU commitment be placed in an Ordering Paragraph of the final decision. None were opposed.

II. Parties Urge that the CETF MOU Should Be Fully Enforceable by the Commission as CETF and Joint Applicants Explicitly Agreed

Parties also shared CETF’s concern over the language in the PD at page 38 that the Commission would only enforce certain aspects of the CETF MOU contained in the current Ordering Paragraphs of the PD and requiring CETF to go to Superior Court to enforce the rest of the CETF MOU commitments which are not included in the OPs. See for example, TURN’s Opening Comments at pages 7-8, criticizing the PD’s “refusal to adopt and enforce the

³ TURN Comments, at pp. 7-8.

⁴ Comments of the Public Advocates Office on the Proposed Decision, at p. 13, filed April 1, 2020 (“PAO Comments”). “The PD fails to provide conditions that will require New T-Mobile’s 5G deployment and service quality conditions to live up to the promises made to gain approval from this Commission. For example, commitments made in the California Emerging Technology Fund’s Memorandum of Understanding (CETF MOU), establish a 100 Mbps speed tier and a 300 Mbps speed tier for the New T-Mobile’s 5G network. In contrast, the PD only requires a highest speed of 100 Mbps for New T-Mobile’s 5G and LTE networks.” (footnotes omitted)

conditions within the CETF MOU” and yet relying on the MOU’s enforcement mechanism involving the Commission to mitigate any competitive harms. Similar to CETF’s expressed concerns about the cost of having to pursue enforcement in two forums -- the Commission and Superior Court -- in our Opening Comments, Greenlining expresses the same worry: “The Proposed Decision assumes that the FCC and the DOJ will move to enforce some protections and that the California Attorney General will move to protect others, and that CETF and NDC have the capacity and funding to enforce their MOUs in court, a “crazy quilt” of remedies and enforcement authority.”⁵ Greenlining is correct that it would stretch CETF’s scarce resources to have to enforce the MOU at both the Commission and in the court system. Given this strong agreement by multiple intervenors that MOU enforcement should be solely at the Commission, CETF urges the Commission to fix this major flaw of the decision.

III. TURN Agrees that Critical Public Benefits Are Left Out of the Ordering Paragraphs, Yet Were Relied Upon to Outweigh Anticompetitive Harms

TURN correctly points out in its Opening Comments that several important CETF MOU provisions are not included in the PD’s Opening Paragraphs, including “school-based programs and digital inclusion programs,” clarifications that there will be free wireless handsets for LifeLine customers that received free handsets from Assurance, and a specific six-month timeline for LifeLine customers to be activated and operational on the T-Mobile network (which is not compatible with the Sprint network).⁶ CETF agrees with TURN that the PD should be revised to include the CETF MOU as enforceable conditions “in their totality, to allow Commission enforcement of these provisions.” *Id.* Other key public benefits negotiated in the CETF MOU that were left out of the OPs include New T-Mobile commitments for affordable

⁵ Greenlining Comments, at p. 6.

⁶ TURN Comments, at p. 10.

rate plans, \$5 million in commitments to fund their marketing in language and in culture to minority, non-English speaking and immigrant communities, emergency response commitments, and important commitments to connect ten rural fairgrounds used for emergency response and evacuation sites with 5G service. No party opposed inclusion.

VI. CETF MOU Conditions Should Not Be Changed, Otherwise It is Legal Error.

TURN shares CETF's deep concerns about changes to some of the CETF MOU terms that are included in the PD's Ordering Paragraphs, which CETF and the Joint Applicants pointed out in our PD Comments. TURN points out that the PD relies heavily on various external commitments T-Mobile has made to mitigate alleged competitive harms, but the "errs by only picking and choosing a subset of the conditions from these external commitments, making additional changes to those conditions, and then paradoxically finding that only the conditions set out in the Ordering Paragraphs are needed to find the merger is in the public interest."⁷ While perhaps well-intended, the changed Ordering Paragraphs do not match the CETF MOU, and leads to confusion by, for example, seeming to refer to some new OES list of county fairgrounds to be connected (a list T-Mobile has never seen to see if its planned 5G facilities will pass those fairgrounds),⁸ or attempting to mandate the LifeLine rate obligation to the point that it is beyond the Commission's "terms and conditions" jurisdiction over wireless carriers.

First, to include changed terms of the MOU does not comport with the official record, and thus weakens the defensibility of the final decision. Second, the CETF MOU was the result of a complex and lengthy negotiation between Joint Applicants and CETF, the most experienced

⁷ TURN Comments, at p. 9.

⁸ During the CETF T-Mobile negotiation process, the fairground list originated from California Department of Food and Agriculture's Fairground Division who collaborated with the Office of Emergency Services. The list was reviewed by the T-Mobile engineering staff in March 2019 to ensure its planned 5G facilities would pass enough of the twenty some fairgrounds to make service to ten of them feasible..

and only non-profit organization in the state specializing in Digital Divide issues. Without question, the public benefits obtained in the MOU are very significant in closing the Digital Divide, bringing 5G service to rural, remote and Tribal areas, enhancing public safety at ten rural fairgrounds, and obtaining favorable rates for low-income and disadvantaged communities. The MOU represents the strongest voluntary commitment from any California communications provider to date. While some may disagree with the final MOU approach, CETF obtained the best deal it could. CETF commits to this Commission to diligently oversee it (with transparency in our Commission Annual Report) to ensure all public benefits are realized, should the Proposed Decision be adopted.

IV. Given Joint Applicants' April 1st Close of the Transaction, It Is More Critical to Approve the Transaction with the CETF MOU as an Enforceable Condition

Finally, Greenlining and TURN express concerns about the enforceability of the CETF MOU in light of two unexpected occurrences: (1) Sprint's March 30, 2020 Advice Letter 918 seeking to surrender its wireline Certificate of Public Convenience and Necessity because it has moved its customers over to Voice Over Internet Protocol, and (2) Joint Applicants' motion to dismiss the wireline application proceeding as moot. In the CETF MOU at page 1, in the pre-Declaration recitals, it states, "All the terms of this MOU are expressly contingent upon the CPUC's approval of the Wireline Application, the CPUC's completion of its review of the Wireless Notification, and the consummation of the Transaction."⁹ In the "words of the contract" section of the MOU, under Section XII at page 15 of the CETF MOU, entitled "CETF Support for Transaction with Public Benefit Commitments," the final sentence reads, "Should this Transaction not be consummated, this MOU shall not take effect." TURN and Greenlining

⁹ 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., dated April 8, 2019, attaching the CETF MOU as Exhibit A. This motion was granted.

have expressed concerns that should the Commission dismiss the wireline application and decline to review the wireless application, the CETF MOU will not become effective.¹⁰ In that scenario, T-Mobile could argue that the CETF MOU never become effective. A key part of the public benefits relied upon in the PD to outweigh anticompetitive benefits would be unenforceable.

In response to this issue, CETF attaches two documents. The first is a letter (Attachment A hereto) from T-Mobile President & COO (now CEO) Michael Sievert, dated March 31, 2020, to the Assigned Commissioner and ALJ in which he states on page 2 that “T-Mobile stands ready to honor the nearly 50 California-specific voluntary commitments it has made in connection with the deal.” This statement clearly includes the CETF MOU commitments.

After reviewing the Sievert letter, CETF contacted T-Mobile’s counsel, seeking explicit reassurance that CETF’s MOU would be honored by T-Mobile even if there was no Commission approval of the Transaction, given Sprint’s request to surrender its wireline Certificate of Public Convenience and Necessity in its Advice Letter 918,¹¹ and the Motion of Joint Applicants to Withdraw Wireline Application¹² as moot.

On April 3, 2020, T-Mobile’s Executive Vice President, General Counsel, and Secretary David A. Miller sent CETF’s President & CEO a letter (Attachment B hereto) that states:

Notwithstanding that our Memorandum of Understanding (“MOU”) is contingent upon the occurrence of several factors, including the California Public Utilities Commission

¹⁰ Protest of The Utility Reform Network of Sprint Communications Company L.P. (U-5112-C) Tier 1 Advice Letter 918, dated April 1, 2020), at 4. “. . . in reviewing this Advice Letter, the Commission must consider that T-Mobile and the California Emerging Technology Fund agreed that their Memorandum of Understanding, entered into as part of the merger review and relied upon by the Proposed Decision to find that the merger benefits customers, is explicitly tied to the approval of the Wireline Application. If the Wireline Application is withdrawn, directly as a result of the relinquishment of Sprint’s CPCN, the status of these MOU conditions would be clearly called into question and must be further analyzed for its impact on the record of the merger review.” (footnotes omitted) See also TURN Comments, at 9.

¹¹ Sprint Advice Letter 918 was filed March 30, 2020, seeking to relinquish its wireline Certificate of Public Convenience and Necessity (CPCN) as a regulated public utility.

¹² Motion of Joint Applicants to Withdraw Wireline Application, filed March 30, 2020.

(“CPUC”) approval of the wireline Application and the CPUC’s completion of its review of the Wireless Notification, T-Mobile fully intends to honor the terms of the MOU based solely upon the consummation of this transaction, provided of course that the CPUC Final Decision or other CPUC action – such as the prolonged duration of the April 1 Assigned Commissioner Ruling – do not substantially impact our ability to meet the commitments in our MOU.”

Given the commitments in the Sievert and the Miller letters, CETF is now confident that the CETF MOU will be honored by T-Mobile as of the Transaction closing date of April 1, 2020.

Having said that, it is critically important that an Ordering Paragraph in the PD specifically include the entire CETF MOU as a condition of any approval of the transaction and allow CETF to come back to the Commission to enforce it.

V. CETF’s MOU Helps Many Disadvantaged Californians Given the Broad Package of Public Benefits

CETF urges the Commission to disregard factually erroneous arguments made by intervenor Greenlining, a longtime advocate of diversity issues at the Commission,¹³ which alleges in its Comments that the CETF MOU “fails to protect communities of color” because the MOU lacks certain words.¹⁴ While Greenlining acknowledges CETF has worked to improve broadband deployment to communities of color, it criticizes the MOU for failure to “intentionally address the needs of communities of color.” *Id* at p. 7.

This surprisingly harsh accusation by Greenlining is disappointing given the commitment and track record of CETF in addressing the digital equity rights and needs of communities of color unlike any other statewide organization. It’s a rather absurd accusation given the data that low-income and digitally-disadvantaged populations are overwhelmingly communities of color.

¹³ CETF agrees that diversity in governance and executive leadership of corporations is vital in institutionalizing digital equity and has deferred to paid intervenors to assert their historical role. However, in the future, CETF can consider negotiating those public benefits in corporate consolidations because this proceeding has revealed the need for new and leadership experienced on the ground and in the trenches to be the voice of both the digitally-disadvantaged and communities of color on Digital Inclusion issues.

¹⁴ These words are “diverse”, “minority” and “communities of color.” Greenlining Comments, at p. 6.

As Greenlining should have acknowledged (and the Commission knows from the CETF annual reports), CETF focuses significant resources on communities and populations that are unconnected and underconnected as identified by the Statewide Survey on Adoption (currently conducted by the University of California Institute of Governmental Studies in five languages). As the record of this proceeding documents, this data was the basis of CETF filing to become a legal party and the rationale for the public benefits in the CETF MOU. The 2019 Berkeley IGS Poll Statewide Survey shows that low-income, Latino (especially Spanish-speaking as primary language), people with disabilities, residents without higher education, and seniors are the most digitally-disadvantaged.¹⁵

Digitally Disadvantaged Populations	Unconnected	Underconnected
Low-Income Less Than \$20,000 Annually	30%	18%
Low-Income Less Than \$40,000 Annually	36%	30%
Latino Households	14%	18%
Latino Spanish-Speaking Households	20%	23%
African-American Households	12%	7%
Asian American Households	22%	6%
White Non-Hispanic Households	6%	5%
People with Disabilities	20%	15%
No High School Diploma	27%	21%
Seniors 75 and Older	33%	5%
Statewide	12%	10%

Further, low-income households are disproportionately people of color (13% of all Californians live in poverty, but that figure is 23.6% for Latinos, 17.6% for African-Americans, 16.4% for Asians and Native Americans according to Public Policy Institute of California) and the reality is worse for households with children (18.1% of all households with children are in poverty, but that figure is 24.2% for Latinos and 28.6% for African-Americans). Thus, the

¹⁵ See Attachment C, showing Statewide Survey poll data in slides. The table data was pulled from this presentation, Tables 4a, 4c, 4d and 4e. More on the 2019 Annual Survey here: <http://www.cetfund.org/progress/annualsurvey>

CETF focus in the MOU on retaining LifeLine rates for poor residents and signing up 332,500 additional low-income households for affordable broadband and expanding school-based technology programs is the way to target benefits to communities of color.¹⁶

CETF further points out that the CETF MOU secures \$12.5 million for implementing School2Home, a CETF program, for 25,000 students. School2Home serves students and parents in lowest-performing schools in low-income communities of color:¹⁷

- 82% Latino
- 10% African American
- 4% White Non-Latino
- 2% Asian
- 1% Filipino
- 1% 2 or more races

Additional data about the focus of School2Home on tackling institutionalized racism is contained in the independent Evaluation Reports on the School2Home website.¹⁸

Greenlining further errs in its allegations the CETF MOU gives NTM control over how to meet its obligations, lacks transparency, and has commitments that do not actually bind the company to close the Digital Divide.¹⁹ The CETF MOU requires New T-Mobile to demonstrate substantial compliance given variables outside its control (i.e. permitting, force majeure) with its promised 5G coverage to 98% of California’s population, consistent with its coverage maps provided to this Commission attached to the Rebuttal Testimony of Joint Applicant Witness

¹⁶ CETF’s MOU commitments benefit in a color-blind manner the following communities: low-income, disadvantaged, minorities, non-English speaking, immigrants, agricultural workers, people with disabilities, seniors, rural/remote/Tribal residents, low-income families with school-aged children, those unconnected to the Internet, and more. Further, since its inception in 2006, CETF has awarded dozens of digital inclusion grants to community-based organizations that are “trusted messengers” to these communities, including communities of color.

¹⁷ This data is from the latest School2Home Evaluation report at the following web link, at p. 4: https://d3n8a8pro7vhmx.cloudfront.net/cetf/pages/184/attachments/original/1584563848/ExecSummary_Evaluation_School2Home_2018-2019.pdf?1584563848

¹⁸ https://www.school2home.org/evaluation_reports Other experts have testified to the remarkable diversity of teachers and the leadership team for School2Home, as well as the leadership of community-based organizations partnering with CETF to increase adoption rates.

¹⁹ Greenlining Comments, at 8.

Neville Ray, CTO. Independent third-party testing by a wireless engineering firm hired by CETF will confirm the 5G upgrade at each California cell site.²⁰ In addition, the FCC will also verify the national infrastructure build. Thus, there will be double verification of the infrastructure build, contrary to the assertions of Greenlining. Finally, there will be transparency because the CETF MOU requires New T-Mobile to report annually to CETF on progress on each aspect of the MOU commitments. The PD extends that reporting to the Commission's staff.²¹ .

WHEREFORE, CETF respectfully requests that its requests in its Opening Comments on the PD and this Reply Comment be implemented into the final decision, and that decision be issued on April 16, 2020 in order for this beneficial Transaction to be effective in California.

Respectfully submitted,

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²⁰ See CETF MOU at Section VII.

²¹ PD at Ordering Paragraph 3, at pp. 42-43.