

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Sprint
Communications Company, L.P. (U-5112) and T-Mobile
USA, Inc. a Delaware Corporation, For Approval of
Transfer of Control of Sprint Communications Company
L.P. Pursuant to California Public Utilities Code Section
854(a)

A.18-07-011
(Filed July 13, 2018)

And Related Matter.

A.18-07-012

**THE GREENLINING INSTITUTE'S OPENING COMMENTS ON MARCH 11, 2020
PROPOSED DECISION GRANTING APPLICATION AND APPROVING WIRELESS
TRANSFER SUBJECT TO CONDITIONS**

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April 1, 2020

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D.15-12-005, *In the Matter of the Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications* (Mar. 18, 2015). 5

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In accordance with Rule 14 of the Commission’s Rules of Practice and Procedure, the The Greenlining Institute (Greenlining) files these comments on the Proposed Decision issued March 11, 2020. The Proposed Decision fails to acknowledge that the proposed transaction would harm competition. The Proposed Decision artificially and unnecessarily restricts the commission’s authority to ensure that the proposed transaction is in the public interest, and incorrectly concludes that the agreements in the CETF MOU constitute cognizable benefits. Finally, the Proposed Decision creates contradictory conditions regarding the combined company’s supplier diversity requirements.

I. THE PROPOSED DECISION ERRS BY FAILING TO ACKNOWLEDGE THAT THE PROPOSED TRANSACTION WOULD HARM COMPETITION.

Public Utilities Code section 854, subdivision (b)(3) requires that the Commission make a finding that a transaction will not harm competition.¹ As part of that finding, the Commission must request an advisory opinion from the California Attorney General.² The Commission did so in this proceeding, and the Proposed Decision notes that the Attorney General’s analysis “concluded that within the State of California, the anti-competitive effects of the Merger outweighed its potential benefits.”³ The Attorney General’s Office found that “T-Mobile’s acquisition of Sprint will likely harm competition in 18 specific California markets for retail mobile wireless telecommunications services (“RMWTS”), resulting in higher prices and fewer choices for California consumers.”⁴

The Proposed Decision observed that “[i]n 18 California cellular market areas, including Los Angeles, San Diego, San Jose, San Francisco-Oakland, and Sacramento, post-Merger HHI levels will exceed 2,500, a level that is presumptively anti-competitive.”⁵ Many of those areas are areas with high percentages of households of color.⁶ Additionally, the Proposed Decision acknowledges that even with the conditions set by the Department of Justice (DOJ) and the Federal Communications Commission (FCC), as well as the commitments Joint Applicants made in Memoranda of Understanding (MOUs) with the California Emerging Technology Fund

¹ Pub. Util. Code §854, subd. (b) states, in pertinent part, that the Commission’s review must include a finding that the transaction will “[n]ot adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.” Cal. Pub. Util. Code §854, subd. (b)(3).

² *Id.*

³ Proposed Decision at pp. 15-16.

⁴ Proposed Decision, Attachment 5, p. 1.

⁵ Proposed Decision at p. 50, Finding of Fact 12.

⁶ United States Census, 2018 ACS 1-Year Estimates Detailed Tables, available at <https://cutt.ly/XtUe6o5> (last accessed April 1, 2020).

(CETF) and the National Diversity Coalition (NDC), it is necessary for the Commission to impose additional conditions in order to ensure that the proposed transaction serves the public interest.⁷ Despite this analysis, the Proposed Decision declines to make a specific finding of competitive harm, stating only that “[t]he Transaction will increase market concentration throughout California.”⁸ While that finding is accurate, it omits the critical information that the proposed transaction creates a serious risk of competitive harms. Greenlining respectfully requests that the Commission modify the Proposed Decision to include an explicit finding that the proposed transaction will harm competition throughout California.⁹

II. THE PROPOSED DECISION ERRS BY ARTIFICIALLY RESTRICTING THE COMMISSION’S AUTHORITY TO ENSURE THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST.

The Proposed Transaction notes that conditions set by the Federal Communications Commission,¹⁰ the United States Department of Justice (DOJ),¹¹ the California Emerging Technology Fund (CETF),¹² and the National Diversity Coalition (NDC)¹³ are necessary, albeit not sufficient, conditions for approval of the proposed transaction: “[T-Mobile’s representations], along with the FCC commitments, and the CETF and NDC MOUs, taken together establish a framework for ensuring that the Transaction will significantly benefit those Californians most in need of reliable, affordable access to modern telecommunications technology”¹⁴ However, while the Proposed Decision’s analysis states that the Commission will “require New T-Mobile’s

⁷ Proposed Decision at p. 38.

⁸ *Id.* at p. 40, Finding of Fact 11,

⁹ Greenlining’s appendix setting forth proposed findings of fact and conclusions of law is attached as Appendix A.

¹⁰ Proposed Decision at p. 41, note 20.

¹¹ *Id.* at p. 41, note 21.

¹² *Id.* at p. 41, note 19.

¹³ *Id.* at p. 37.

¹⁴ PD at p. 37.

continuing compliance with the FCC commitments and the DOJ proposed final judgement” and “will adopt, as conditions of approval, the commitments made by T-Mobile in the CETF and NDC MOUs that directly benefit rural and underserved communities in California,”¹⁵ that language is not reflected in the Commission’s Order.

For example, the Order does not require that the combined company comply with the FCC or DOJ commitments. Rather, it requires only that the combined company provide the Commission with any documents or reports provided to the FCC and/or DOJ.¹⁶ The Order similarly requires the combined company to provide documents and reports regarding its progress toward fulfilling the conditions in the CETF MOUs.¹⁷ However, the Order contains no explicit reporting requirements regarding the NDC MOU, which is puzzling, given that the NDC MOU is the only set of conditions that expressly provides benefits for communities of color.¹⁸

The Proposed Decision’s omission of any ordering paragraphs requiring that the combined company comply with conditions set by another agency or an MOU with a third party is unusual, and appears to differ substantially from the Commission’s past practice, including the

¹⁵ *Id.*

¹⁶ *Id.* at p. 42, Ordering Paragraph 2.

¹⁷ *Id.* at p. 42, Ordering Paragraph 3.

¹⁸ While not reflected in the Order, The Proposed Decision’s analysis states that the Commission “will require New T-Mobile to file a baseline report shortly after completion of the Merger and annual reports for the following five years detailing its progress toward fulfilling the conditions imposed on the Transaction by this decision, including the conditions adopted from the commitments made in the CETF and NDC MOUs.”

CenturyLink/Level 3,¹⁹ Charter/Time Warner Cable,²⁰ and Frontier/Verizon proceedings.²¹ This omission could be interpreted as prohibiting the Commission from enforcing the FCC, DOJ, CETF and NDC commitments, despite language in the analysis to the contrary. In fact, this interpretation is consistent with certain representations in the Proposed Decision:

This decision adopts certain features of the CETF MOU as conditions of approval and these are enforceable by the CPUC. CETF must look to the Superior Court for enforcement of the balance of the agreement, should that necessity arise.²²

While we will not adjudicate disputes between the contracting parties, leaving that matter to the Superior Court, we will adopt, as conditions of approval, the commitments made by T-Mobile in the CETF and NDC MOUs that directly benefit rural and underserved communities in California. To that end, we will require New T-Mobile to file a baseline

¹⁹ “[T]he terms and conditions set forth in the Settlement are enforceable by the Commission pursuant to its general jurisdictional authority over the public utilities that are subject to the proposed transfer of control.” D. 17-10-003, In the Matter of the Joint Applications of Broadwing Communications, LLC (U5525C); Global Crossing Local Services, Inc. (U5685C); Global Crossing Telecommunications, Inc. (U5005C); IP Networks, Inc. (U6362C); Level 3 Communications, LLC (U5941C); Level 3 Telecom of California, LP (U5358C); WilTel Communications, LLC (U6146C); and Level 3 Communications, Inc., a Delaware Corporation; and CenturyLink, Inc., a Louisiana Corporation, for Approval of Transfer of Control of the Level 3 Operating Entities Pursuant to California Public Utilities Code Section 854(a) p. 37, Ordering Paragraph 7 (October 18, 2017).

²⁰ “New Charter, and its regulated entities operating in California, shall abide by all the terms and conditions of the Memoranda of Understanding (MOUs) with the National Diversity Council and CETF.” D.16-05-007 at p. 70, Ordering Paragraph (2)(a), In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C) (July 2, 2015).

²¹ “Frontier Communications Corporation (Frontier) shall perform, in a faithful and timely manner, all agreements made by it in the Settlements and the Memorandum of Understanding (MOU). Any party to a Settlement or an MOU may, at any time during the duration of the Settlement or the MOU, as the case may be, apply to this Commission for an order directing Frontier to perform one or more agreements contained in the Settlement or the MOU. Frontier consents to the jurisdiction of this Commission to enter an order enforcing the Settlements or the MOU.” D.15-12-005 at p. 82, Ordering Paragraph 13, In the Matter of the Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications (Mar. 18, 2015).

²² Proposed Decision at p. 21, note 53.

report shortly after completion of the Merger and annual reports for the following five years detailing its progress toward fulfilling the conditions imposed on the Transaction by this decision...²³

The Proposed Decision appears to announce that New T-Mobile must comply with the conditions set by the FCC and DOJ as well as the CETF and NDC MOUs, but that the Commission will not enforce those conditions.

The Proposed Decision assumes that the FCC and the DOJ will move to enforce some protections, 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. The Commission certainly did not create this problem. However, as currently drafted, the Proposed Decision severely limits the ability of Greenlining, and other advocates, to seek redress should the combined company fail to meet the merger requirements. Accordingly, Greenlining respectfully requests that the Commission modify the Order to require that the combined company comply with the conditions set by the FCC and DOJ and the CETF and NDC MOUs as a condition of approval.

III. THE PROPOSED DECISION ERRS IN CONCLUDING THAT THE AGREEMENTS IN THE CETF MOU ARE SIGNIFICANT.

A. The CETF MOU Fails to Protect Communities of Color.

Apparently, neither T-Mobile nor CETF thought it was important to specifically address merger benefits for communities of color, as the CETF MOU does not address communities of color specifically, nor does it even **contain** the terms “diverse,” “minority,” or “communities of color.” There is nothing in the MOU specifying that the combined company deliver the benefits of low-income programs, network improvements, or increased emergency preparedness and

²³ Proposed Decision at p. 39.

response to communities of color. This is especially disappointing considering that Greenlining was responsible for creating CETF as a condition of approval of the SBC-AT&T and Verizon-MCI mergers with the express purpose of improving broadband deployment to low-income households, disabled citizens, seniors, and communities of color.²⁴

Greenlining acknowledges that CETF has worked to improve broadband deployment to communities of color, and that the terms “unserved and underserved areas”²⁵ and “other disadvantaged communities” in the MOU likely refer to, among other communities, communities of color. However, as Greenlining has noted in this proceeding, when companies fail to specifically address the needs of communities of color, those communities are often left behind.²⁶ The failure of the CETF MOU to intentionally address the needs of communities of color, creates a substantial risk that communities of color will be left behind.

B. The CETF MOU Contains Substantial Flaws Which Render the MOU Unenforceable.

As discussed above, the Proposed Decision appears to state that, unlike previous proceedings, the Commission will not enforce the terms of the CETF MOU.²⁷ The Proposed Decision further notes that if the combined company fails to comply, CETF has the ability to

²⁴ D.05-11-028 at 78, In the Matter of the Joint Application of SBC Communications, Inc. (“SBC”) and AT&T Corp. Inc. (“AT&T”) for Authorization to Transfer Control of AT&T’s Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a AT&T’s Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation (November 18, 2005); D.05-11-029 at 3, 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 (Nov. 18, 2005).

²⁵ CETF MOU at p. 6.

²⁶ See Greenlining Exhibit 1 p. 3:15-4:2.

²⁷ *Id.* at p. 38.

bring an enforcement action in court.²⁸ However, the Proposed Decision fails to acknowledge substantial flaws in the CETF MOU which would render it unenforceable.

As Greenlining has previously noted, the CETF MOU is “deficient because it (1) gives nearly unilateral control to the combined company over determining how to meet its obligations, (2) lacks any meaningful transparency measures, and (3) contains commitments that do not actually bind the combined company to closing the digital divide.”²⁹ The Attorney General’s competitive analysis shared these concerns, noting that “[b]ased on a preliminary review of the conditions agreed to by CETF, we believe those conditions alone are inadequate to remedy the harms, in part because the terms give a great deal of latitude to T-Mobile in terms of compliance, and the enforcement mechanism appears weak.”³⁰ The Attorney General further noted that “the inability of CETF to meaningfully enforce the terms of the agreement renders many of these benefits illusory.”³¹ The Proposed Decision’s conclusion that the CETF MOU creates cognizable benefits contradicts the conclusion of the Attorney General and the record in this proceeding.

²⁸ *Id.*

²⁹ Greenlining May 10, 2019 Reply Brief at p. 11. Perhaps the best example of the weakness of the CETF MOU is in the language regarding the urgency of bringing high-speed broadband to unserved households:

CETF and T-Mobile agree that Californians without broadband access or the ability to afford high-speed Internet service at home are being left behind at an accelerating pace. Therefore, these commitments shall be implemented **with all deliberate speed** consistent with appropriate planning and prudent business practices to ensure success.²⁹

The phrase “with all deliberate speed” was most famously used in a Supreme Court case that delayed meaningful desegregation of American schools for *seventeen years*. Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 *Law & Ineq.* 1,3 (2006), Available at: <http://scholarship.law.umn.edu/lawineq/vol24/iss1/1> (last accessed March 31, 2020). “With all deliberate speed” was an instruction to lower courts to *slow down* desegregation. *Id.* Greenlining does not believe that CETF’s intent was to delay deployment of home broadband to unserved Californians. However, this language is emblematic of the inadequacy of the terms of the CETF MOU. It goes without saying that the use of this phrase in the CETF MOU, intentional or not, is a slap in the face to communities of color.

³⁰ Proposed Decision, Attachment 1, p. 30.

³¹ *Id.*

Additionally, recent actions by Joint Applicants may eliminate the CETF MOU altogether. On March 30, 2020, Joint Applicants filed a motion to withdraw the wireline application.³² The CETF MOU expressly states that “[a]ll 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.”³³ Greenlining does not intend to address the merits of that motion in these Comments. However, it is worth noting that if the Commission grants the motion to withdraw, the CETF MOU will be void and accordingly, T-Mobile will no longer be bound to the terms of that MOU. Additionally, On March 31, 2020, Joint Applicants delivered a letter to the Assigned Commissioner and the Administrative Law Judge stating that Joint Applicants would close the merger without Commission approval, citing concerns that the COVID-19 pandemic, which has almost 400,000 confirmed cases in the United States, has caused over 4,000 deaths, and is projected to kill up to 240,000 people in the United States, will create financing problems for Joint Applicants.³⁴ This action similarly creates a risk that the CETF MOU will be void.

C. The Proposed Decision Errs in Finding that the Commitments in the CETF MOU Are Significant.

The Proposed Decision’s Finding of Fact 19 states that “New T-Mobile has made significant commitments to the California Emerging Technology Fund to prioritize the delivery of 5G technology to unserved and underserved communities throughout the state.” The failure of the CETF MOU to intentionally address the needs of communities of color, together with the

³² Motion of Joint Applicants to Withdraw Wireline Application (March 30, 2020), *available at* <http://efile.cpuc.ca.gov/FPSS/0000147759/1.pdf>.

³³ Proposed Decision, Attachment 2, Exhibit A, at p. 9 (emphasis added).

³⁴ Letter from G. Michael Sievert, President and Chief Operating Officer, T-Mobile, to Assigned Commissioner Rechtschaffen and Assigned Administrative Law Judge Bemserderfer (March 31, 2020).

combined company's nearly unilateral power to decide what communities will receive the benefits of the MOU, render the purported conditions in the CETF MOU meaningless and create a substantial risk that communities of color will be left behind. Accordingly, Greenlining respectfully requests that the Commission amend the Proposed Decision by deleting Finding of Fact 19 in its entirety.

IV. THE PROPOSED DECISION ERRS BY CREATING CONTRADICTIONARY CONDITIONS REGARDING SUPPLIER DIVERSITY.

The Proposed Decision's analysis (although not, as discussed above, the Proposed Decision's Order) erroneously describes the commitments in the NDC MOU as "presumptively beneficial."³⁵ Greenlining will not repeat its analysis of the shortcomings of the NDC MOU in detail, as those shortcomings are the subject of Greenlining's April 25, 2019 Opening Brief:

While T-Mobile has committed to creating a diversity council to advise the combined company, that council has extremely limited authority and would be too easily influenced by the combined company. While T-Mobile has committed to sharing diversity and inclusion data with the diversity council, that information will not be available to any other stakeholders. Additionally, T-Mobile's diversity commitments are written in vague and overly-complicated language, concealing the fact that those commitments do not bind the combined company to actually increasing diversity and inclusion at the combined company.³⁶

The Proposed Decision includes specific conditions related to supplier diversity, found in Ordering Paragraph 37:

New T-Mobile shall **substantially increase**, over the next three years, its diverse supplier spending in California. It shall establish specific goals in this area, including goals for the use of minority-owned banking, accounting, other financial and legal services companies. New T-Mobile's goal for five years following the merger shall be to meet or exceed the CPUC's General Order 156 goal of **21.5%** annual diversity spending (emphasis added).³⁷

³⁵ Proposed Decision at p. 38.

³⁶ Greenlining April 25, 2019 Opening Brief at p. 5.

³⁷ Proposed Decision, p. 52, Ordering Paragraph 37.

This condition is puzzling, given that Sprint and T-Mobile’s combined diverse spending in 2018 was **28.23 percent**:

2018 Supplier Diversity Spending³⁸

	Sprint	T-Mobile	Combined
Diverse Spending	\$898,286,560.00	\$740,715,007.00	\$1,639,001,567.00
Overall Spending	\$2,312,145,515.00	\$3,494,585,895.00	\$5,806,731,410.00
Percentage	38.85%	21.20%	28.23%

It is worth noting that if the Sprint and T-Mobile had only spent 21.5 percent of their spending with diverse companies in 2018, this would have resulted in a reduction in diverse business investment of over **390 million** dollars.

The Proposed Decision directs the combined companies to “substantially increase” supplier diversity spending, but then sets a five-year spending goal this is **25 percent lower** than the spending Sprint and T-Mobile achieved in 2018. These statements appear contradictory, because they order New T-Mobile to increase spending on diverse companies to meet goals that are lower than its current supplier diversity efforts. It may be that the Commission intends that the combined company’s spending with diverse businesses in the next five years exceed 28.23 percent. However, as currently written, the ordering paragraph is confusing and appears to permit the combined company’s spending less on diverse businesses post-merger.

³⁸ See Sprint, *Procurement Activities with Diverse Suppliers* (March 1, 2019), available at https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/About_Us/BusinessCommunityOutreach/GO156ProcurementPlans/2018/Sprint%20CPUC%202019%20March%20Report.pdf (last accessed April 1, 2020); See also, T-Mobile, 2018 Annual Report and 2019 plan (March 1, 2019), available at https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/About_Us/BusinessCommunityOutreach/GO156ProcurementPlans/2018/T-Mobile.MetroPCS.GO156.Report.Final.w.Attachments.030119.pdf (last accessed April 1, 2020).

Greenlining appreciates the intent behind the Commission's conditions related to supplier diversity. However, as currently written, the ordering paragraph reads as a tacit approval of the combined companies' reducing their diverse spending. Greenlining is very concerned that Ordering Paragraph 37 sends the message that the Commission will approve transactions that result in decreased investment in communities of color and other unrepresented and underrepresented communities. The combined company should be, at a minimum, required to set goals substantially higher than 21.5 percent, and in any event, no lower than Sprint's 2018 supplier diversity spending. Accordingly, Greenlining respectfully requests that Ordering Paragraph 37 be amended to require that T-Mobile increase its supplier diversity spend to no less than 38.85 percent within five years of the merger's closing.

V. CONCLUSION

T-Mobile has consistently demonstrated that it does not believe that it needs to be responsive to communities of color, and the Proposed Decision does nothing to disabuse the company of that notion. In order to ensure that the proposed transaction does not harm Communities of Color, the Commission should amend the Proposed Decision to acknowledge that the proposed transaction would harm competition and that the commitments in the CETF MOU are too weak to be meaningful. The Commission should further amend the Proposed Decision to ensure that it can effectively enforce merger conditions set by third parties and eliminate contradictory language regarding supplier diversity requirements.

Dated: April 1, 2020

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Appendix A

Proposed Findings of Fact and Conclusions of Law

- Finding of Fact 11:

11. The Transaction will increase market concentration **and harm competition** throughout California.

- Finding of Fact 19:

~~19. New T-Mobile has made significant commitments to the California Emerging Technology Fund to prioritize the delivery of 5G technology to unserved and underserved communities throughout the state.~~

- Ordering Paragraph 37:

37. New T-Mobile shall substantially increase, over the next three years, its diverse supplier spending in California. It shall establish specific goals in this area, including goals for the use of minority-owned banking, accounting, other financial, and legal services companies. New T-Mobile's goal for five years following the merger shall be to meet or exceed ~~the CPUC's General Order 156 goal of 21.5%~~ **28.85%** annual diversity spending.

- New Ordering Paragraph:

XX. New T-Mobile shall abide by all the terms and conditions of the Memoranda of Understanding (MOUs) with the National Diversity Council and California Emerging Technology Fund.

- New Ordering Paragraph:

XX. New T-Mobile shall abide by all the terms and conditions imposed by the United States Department of Justice, the Federal Communications Commission, and the California Attorney General.