

**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.

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

CONSOLIDATED

**MOTION OF THE UTILITY REFORM NETWORK AND THE GREENLINING
INSTITUTE TO STRIKE PORTIONS OF JOINT APPLICANTS' OPENING BRIEF
AND REQUEST FOR EXPEDITED REVIEW**

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**MOTION OF THE UTILITY REFORM NETWORK AND THE GREENLINING
INSTITUTE TO STRIKE PORTIONS OF JOINT APPLICANTS' OPENING BRIEF
AND REQUEST FOR EXPEDITED REVIEW**

I. INTRODUCTION

In accordance with Rule 11.1 of the Commission's Rules of Practice and Procedure, The Utility Reform Network (TURN) and The Greenlining Institute (Greenlining) submit this motion to strike portions of the Joint Applicants' Opening Brief filed on April 26, 2019 in the above referenced proceeding. In their Opening Brief, Joint Applicants discuss a Memorandum of Understanding (MOU) that they entered into with the California Emerging Technology Fund (CETF). This MOU was not part of the Joint Applicants' submitted case, was not discussed in their Application or in the thousands of pages of rebuttal testimony and attachments, nor was it the subject of cross examination during hearings.¹ Because this MOU is not part of the evidentiary record it is an inappropriate element of the Joint Applicants' brief.

In light of the upcoming deadline to file reply briefs and the impact that this Motion may have on parties' ability to properly reply, TURN and Greenlining request expedited responses to this Motion to be due Wednesday May 8, 2019 with a ruling on to this Motion submitted shortly thereafter or, in the alternative an extension for reply briefs by two weeks.

II. DISCUSSION

No party to the proceeding had notice of this MOU until CETF and Joint Applicants filed a Motion on April 8, 2019, requesting permission to "modify positions in the proceeding" to

¹ Indeed, CETF was an active and valuable participant during hearings, questioning witnesses on the very subject matter of this MOU. CETF did not file an opening brief.

reflect this MOU.² Public Advocates, TURN and Greenlining all opposed the Motion on procedural and substantive grounds.³ The Commission has not yet ruled on the Motion. Therefore, this MOU is not in the record of the proceeding. Joint Applicants cannot include this MOU as evidence in its brief, nor can the Commission rely on this MOU to render its decision in this case without further review. Moreover, even if the ALJ approves the Motion and MOU, TURN and Greenlining would continue to request that references to the MOU be stricken from the Joint Applicants' brief as post-hearing, extra-record evidence not appropriate to be included in a post-hearing brief. The Motion and MOU, ideally resubmitted as a Rule 12 Settlement, must stand on its own to demonstrate that the MOU is reasonable "in light of the whole record" and that it is in the public interest.⁴

To attempt to mitigate this violation of the parties' procedural due process rights and Commission's procedures, Joint Applicants' Opening Brief includes a note at footnote five that states that the brief's references to the MOU are merely included for "reference and clarity only."⁵ The Joint Applicants state that they are willing to "voluntarily make the commitments identified above" independent of the MOU.⁶ TURN and Greenlining take no position at this time of whether the referenced "commitments" mitigate the identified harms of this merger, such that the Commission could find that this transaction is in the public interest pursuant to Section

² *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.* (April 8, 2019).

³ *Response of the Joint Consumers to Joint Motion of Joint Applicants and the California Emerging Technology Fund to Reflect Memorandum of Understanding between the California Emerging Technology Fund and T-Mobile USA, Inc.* (April 23, 2019); *Opposition of the Public Advocates Office to Motion of CETF and Joint Applicants to Modify Positions* (April 23, 2019). TURN and Greenlining will not repeat their arguments opposing the Motion and MOU as a violation of the letter and the intent of the Commission's Rules on settlements here.

⁴ Rule 12.1(d)

⁵ Joint Applicants Opening Brief at p. 5, footnote 5.

⁶ *Id.*

854. Indeed, this is the point. TURN and Greenlining have not had sufficient notice or opportunity to review these commitments or conduct cross examination of them to make that determination at this time. However, if the Joint Applicants are willing to make these commitments independent of the MOU, the Applicants should submit a revised Application, revised testimony, revised brief and withdraw the Joint Motion regarding the MOU referenced above. The Commission should then document these commitments in its Final Decision in this docket, if the Commission is inclined to find the transaction in the public interest, at least in part, as a result of these commitments.

Notwithstanding the claim that reference to the MOU is merely for “clarity,” Joint Applicants’ attempt to use these commitments, that are embodied nowhere else but the CETF MOU, to support its claims of public benefits. As a result, the Opening Brief prejudices parties to the proceeding and violates the Commission’s Rules. The Rules of Practice and Procedure require that, “The Commission shall render its decision based on the evidence of record.”⁷ These commitments are not in the record. The Rules also acknowledge that while the technical rules of evidence do not ordinarily need to be applied in hearings, “substantial rights of the parties shall be preserved” when conducting hearings and allowing evidence to be entered into the record.⁸ Part of these “substantial rights” is the ability to object to the inclusion of evidence being entered into the record, limitations on timing and the requirement of notice of adding additional testimony into the record, and the ability to cross examine direct testimony unless parties mutually agree to waive said cross.⁹ The Rules also limit extra-record evidence by only allowing a presiding officer to request that additional evidence is entered into the record “within a fixed

⁷ Rules of Practice and Procedure, Rule 8.2(m) citing, Pub. Util. Code §1701.1(e)(8), “the commission shall render its decisions based on the law and on the evidence in the record.”

⁸ Rule 13.6(a)

⁹ Rule 13.6 (b); 13.8(b); 13.8(c)

time after the hearing is adjourned,” but do not otherwise allow additional evidence into the record after a hearing.¹⁰ Finally, the rules require that any factual statements in a post-hearing brief must “be supported by identified evidence of record.”¹¹ This MOU and its commitments, while perhaps well intentioned and beneficial to this transaction, do not satisfy the Commission’s Rules.

The Joint Applicants’ Opening Brief does not comply with the Commission’s Rules and, as a result, prejudices parties. Prior to the submission of the Joint Motion discussed above, parties had no notice and, therefore, no opportunity to review the MOU in detail and in concert with the Joint Applicants’ entire case of record. Further, parties could not conduct discovery and request further information about the context, background and intent behind the MOU.¹² The MOU and its commitments are not sponsored by a particular witness- from the Joint Applicants or CETF- and, therefore, parties could not cross examine a witness on the Joint Applicants’ factual claims that the MOU will bring benefits to California consumers or the overall impact of the MOU on the transaction. Nor did the parties expect or have notice that the Joint Applicants would include the MOU in their Opening Brief and, therefore, are now limited to addressing issues raised by the Joint Applicants supporting the MOU only in reply briefs.

¹⁰ Rule 13.10

¹¹ Rule 13.11

¹² Rule 10.1 gives parties broad authority to conduct discovery in a proceeding allowing, “any party [to] obtain discovery from any other party regarding any matter, not privileged that is relevant to the subject matter involved in the pending proceeding.”

III. CONCLUSION AND REQUEST FOR EXPEDITED RESPONSES

Therefore, TURN and Greenlining request that the Commission strike those portions of the Joint Applicants' Opening Brief that discuss or rely on the MOU and its commitments¹³ and move forward with consideration of the Joint Motion and MOU as submitted by the Joint Parties and opposed by TURN, Greenlining and Public Advocates.¹⁴ In the alternative, TURN and Greenlining request additional time for parties to submit reply briefs to conduct discovery and review this additional material.

Pursuant to the Rules of Practice and Procedure, parties have 15 days to respond to a motion to strike. TURN and Greenlining request expedited responses to this Motion which is narrowly focused on striking a single issue from Joint Applicants' opening brief. The ruling on this issue will have direct impact on reply briefing which is due on May 10. TURN and Greenlining request that parties submit responses to this Motion on May 8 and that the ALJ issue a ruling shortly thereafter. In the alternative, TURN and Greenlining request an extension of the deadline for reply briefs to May 17 to allow time for an ALJ Ruling on this matter.

¹³ At this time, TURN has identified the following references to the CETF MOU in the Opening Brief and request that the references and discussion regarding the MOU, that are not otherwise supported by testimony or cross examination, be stricken from the Brief:

p. 5 Description of the MOU

p. 6 several bullet points referencing programs that will benefit from the MOU commitments

p. 37-p. 38 Reference to "network buildout commitments in the MOU with CETF and committing to reporting only to CETF and the Commission

p. 49 Reference to LifeLine customers' free handsets

p. 58 reference to Pricing commitments

p. -85 references to CETF MOU re: "specific" lifeline commitments

p. 93-94 CETF MOU references re: network reliability

p. 97-98 references to CETF MOU re: community engagement

¹⁴ TURN and Greenlining requested that the Commission reject the Motion and require the Joint Parties to hold a settlement conference and proceed pursuant to Rule 12. Public Advocates requested the Commission to hold additional hearings or, in the alternative, resubmit the MOU pursuant to Rule 12. This relief would still require that references to the MOU be stricken from the Opening Brief.

*On behalf of
Greenlining and TURN*

Respectfully submitted,

/s/

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- p. 93-94 CETF MOU references re: network reliability
- p. 97-98 references to CETF MOU re: community engagement

Attachment A:

[Proposed Ruling]

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**ADMINISTRATIVE LAW JUDGE’S RULING GRANTING MOTION OF THE
UTILITY REFORM NETWORK AND THE GREENLINING INSTITUTE TO STRIKE
PORTIONS OF JOINT APPLICANTS’ OPENING BRIEF**

On May 3, 2019, The Utility Reform Network and The Greenlining Institute moved to strike portions of Joint Applicants’ Opening Brief referencing a Memorandum of Understanding between Joint Applicants and the California Emerging Technology Fund. The California Public Utilities Commission has considered this motion and all supporting materials and grants The Utility Reform Network and The Greenlining Institute’s motion.

IT IS SO RULED.

Dated _____, 2019, at San Francisco, California.