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
And Related Matter.	Application 18-07-012

REPLY BRIEF OF THE PUBLIC ADVOCATES OFFICE [PUBLIC]

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I. INTRODUCTION

Pursuant to the California Public Utilities Commission (Commission) Rules of Practice and Procedure 13.11 and the schedule set by Administrative Law Judge (ALJ) Karl Bemesderfer, the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office) submits this reply to the Opening Brief by Joint Applicants Sprint Communications Company L.P., Sprint Spectrum L.P, Virgin Mobile USA, L. P. and T-Mobile USA, Inc (Joint Applicants).

As discussed more below, Joint Applicants incorrectly argue that the Commission must approve the merger but may not review it to evaluate whether it is in the public interest.[1] However, the law is clear that the Commission must evaluate whether this proposed merger is in the public interest.[2] The Commission's evaluation is guided by factors set forth in the United States Department of Justice/Federal Trade Commission's Horizontal Merger Guidelines (HMG).[3] The HMG provide that any claims of efficiency gains from proposed mergers must not be vague or speculative, and must be viewed with skepticism.[4] Importantly, the HMG state that any gains derived from a merger should be *merger-driven*; that is, Joint Applicants must show that the benefits of the merger would not happen but for the merger.[5] However, the claims made by the Joint Applicants are vague and will occur without the merger, if at all. The evidence demonstrates that this proposed merger is not in the public interest and should be denied.[6]

The Public Advocates Office opposes the proposed merger because it is *not* in the public interest. Reducing the number of wireless carriers in California from 4 to 3 will

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[1] Joint Applicants' Opening Brief (Opening Brief) at p. 14.

[2] Public Utilities Code Section 854(a); October 4, 2019, Amended Assigned Commissioner's Scoping Memo And Ruling (Scoping Ruling) at p. 2.

[3] Exhibit Pub Adv-002C, Testimony of Dr. Lee Selwyn (Selwyn) at p.viii.

[4] Selwyn at p. 134.

[5] Ibid.

[6] Public Utilities Code Section 854(d).

result in higher prices and less innovation, service quality, privacy; and will likely lead to the elimination of many low-income services and poorer rural coverage.

The Joint Applicants' Opening Brief touts many alleged benefits that they claim will come about as a result of the proposed merger. However, the alleged benefits are not unique to this merger, because they will come about as a result of 5G deployment, and the record conclusively shows that the standalone Sprint and standalone T-Mobile will build their own 5G networks without the proposed merger. Joint Applicants' claims that standalone T-Mobile lacks necessary spectrum or capital to build a 5G network that meets the defined parameters for 5G speeds have been shown to be false. Claims that faster speeds and greater capacity will enable such innovations as In-Home Broadband are false because the standalone companies will build *two* 5G networks, each capable of providing In-Home Broadband and other innovations. Vague claims that the 5G network will somehow be "broader" and "deeper" as a result of the proposed merger are so vague and speculative that they should be dismissed. Those terms have no defined meaning in this context. A 5G network will allow for all of the benefits of 5G, and the proposed merger is not necessary to provide those benefits. In fact, California would benefit far more from the two companies building their own 5G networks and continuing to innovate and compete separately. California would have *two* excellent 5G networks rather than only one to compete with AT&T and Verizon, if the proposed merger is rejected.

The Joint Applicants' "promises" are not specific, measurable, verifiable, and enforceable. For example, claims of better rural coverage are vague, and contrary to the evidence that shows that New T-Mobile plans to decommission rural cell sites and reduce infrastructure spending.[7] Claims that innovation and investment will somehow improve as a result of the proposed merger are also either speculative or proven to be false. The alleged benefits touted by Joint Applicants derive from simply having a 5G network,

[7] Pub Adv 003, Testimony of Adam Clark (Clark) at p. 29.

which will be built without the proposed merger. Joint Applicants' Opening Brief does not cite to a single benefit that will come about directly as a result of this proposed merger.

The Public Advocates Office's Reply Brief presents its reply in the order in which the arguments appear in Joint Applicants' Opening Brief. The Public Advocates Office's silence on any given issue does not indicate support.

II. JOINT APPLICANTS' WIRELESS APPLICATION IS SUBJECT TO COMMISSION REVIEW AND APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 854

Applications (A.) 18-07-011 and 18-07-012 were submitted pursuant to Public Utilities Code Section 854(a), which requires prior authorization from the Commission before the finalization of any transaction that results in the merger, acquisition, or a direct or indirect change in control of a public utility. Section 854(a) requires the Commission to determine that an acquisition/merger is in the public interest.[8]

However, Joint Applicants argue that their Application "does not require prior approval from the Commission."[9] This is in direct contradiction of statutory law (Section 854),[10] which requires the Commission to provide prior approval of all mergers between regulated entities. In fact, Section 854(a) states that any merger without prior approval is "void." Joint Applicants neglect to address the applicability of this provision of Section 854.

Instead, Joint Applicants rely on a misrepresentation of Commission precedent. Joint Applicants state that Commission precedent establishes that the Commission is not permitted to review proposed mergers between wireless providers.[11] They further argue that Commission precedent "erroneously suggests that this approach [forbearance from

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[8] October 4, 2018, Amended Scoping Ruling at p. 2.

[9] Opening Brief at p. 14.

[10] It should be emphasized that Joint Applicants submitted this Application "Pursuant to California Public Utilities Code Section 854(a)" which requires Commission approval.

[11] Opening Brief at p. 15.

review] lies within the Commission's discretion."[12] In other words, confusingly, Joint Applicants argue that the Commission was correct to forbear in the past from reviewing wireless mergers, but that the Commission was wrong to suggest that such review was within its discretion.

Notably, no court has ever held that California Public Utilities Code Section 854 is preempted by federal law. The Commission decision in *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D. 95-10-032, 1995 Cal. PUC LEXIS 888 (the 1995 Decision), noted that Article 3, Section 3.5 of the California Constitution prohibits the Commission from declaring any state statute unenforceable due to federal preemption unless an appellate court has determined that enforcement of the statute is prohibited by federal law or federal regulations.[13]

Instead, Joint Applicants argue that the 1995 Decision states that the Commission's review of wireless mergers is somehow preempted.[14] This is a misrepresentation of that decision, which decided it was in the public interest to exercise "forbearance" from state regulation, not that California is preempted by federal law.

The 1995 Decision specifically faced two questions: first, what rules remain within the Commission's jurisdiction in light of federal law that preempts states from denying wireless providers authority to operate in the state;[15] and second, whether it is appropriate to forbear from regulating wireless providers "in the interests of promoting a more competitive market."[16]

Joint Applicants confusingly argue that in the 1995 Decision "the Commission expressly exempted wireless carriers from seeking "preapproval" of any transfer of

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[12] Ibid.

[13] 1995 Cal. LEXIS 888, *17.

[14] Opening Brief at p. 15.

[15] 1995 Cal. LEXIS 888, *18.

[16] Ibid.

control of a wireless provider."[17] They incorrectly attempt to represent the 1995 Decision as somehow preempting the Commission from exercising its jurisdiction over wireless providers here.

The Commission recognized in 1995, and it is still the case, that "entry" by new wireless providers in the wireless market is preempted by federal law but the states retain jurisdiction over "terms and conditions" of wireless service. In the 1995 Decision, the Commission found that "[w]here property transfers or securities transactions described under Articles 5 and 6 are made in the ongoing course of business with no change in service territory boundaries, there is no basis to conclude that regulation of such transactions would have anything to do with entry."[18] Moreover, the Commission noted that the Federal Communications Commission (FCC) had expressly found that "other terms and conditions" of wireless service explicitly contemplates review by states of contractual arrangements relating to "transfers of control."[19] Thus, the Commission found that "the regulation of such transactions is not preempted."[20]

Here, T-Mobile would be acquiring Sprint, but the New T-Mobile would not be a new entrant in the California market and would cover the same service territory and have the same rights and obligations as the merging entities. Thus, regulation under Section 854 is not preempted.

As to the second question, the Commission stated that the issue was "whether public policy considerations warrant our forbearance from active regulation, aside from questions of preemption."[21] The Commission noted that, pursuant to Section 829, if it is

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[17] Opening Brief at p. 14.

[18] The 1995 Decision, 1995 Cal. PUC LEXIS 888, *18.

[19] Id. at *20.

[20] Id. at *18.

[21] Id. at *22.

in the public interest the Commission may exempt a regulated entity from the provisions of Section 854.[22]

The 1995 Decision went on to discuss past examples, finding ultimately that forbearance would "promote competition."[23] In its conclusions of law, the Commission stated that forbearance is appropriate because "[t]he public interest will be served by the rapid development of competition in the CMRS field."[24] However, the Commission found that future circumstances might warrant a thorough review of a proposed merger. The Commission stated: "Our decision to grant exemptions for transactions under Articles 5 and 6 of the PU Code may be revisited if any security issuances, asset transfers, encumbrances, or ownership transfers that may be adverse to the public interest come to light."[25]

Clearly, the circumstances have greatly changed since 1995. Back then, there were many new entrants in the marketplace and competition was improved by allowing the "rapid development" of competitive carriers in the market. But the situation could not be more different today, where 4 wireless carriers dominate the market and there are no new competitors on the horizon.

The fact that the Commission's approach is different now is readily apparent from the manner in which the proposed merger of AT&T and T-Mobile was handled at the Commission in 2011. In 2011, similar to here, AT&T and T-Mobile submitted an "initial notice of the proposed transfer." Instead of granting the "notice" and exempting that proposed merger from review, the Commission opened Investigation 11-06-009 "to investigate, gather, and analyze information relevant to the proposed purchase and acquisition of T-Mobile by AT&T."[26] The purpose of that investigation was "to

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[22] Ibid.

[23] Id. at *27.

[24] Id. at *42.

[25] Id. at *31-32. (Emphasis added.)

[26] D.12-08-025 at p.2.

determine the specific impact of the merger on California."[27] Late in 2011 the FCC determined administrative hearings were necessary for the AT&T and T-Mobile proposed merger, and released a staff report critical of the proposed transaction, after which AT&T and T-Mobile withdrew their FCC application for approval of the merger. The Commission subsequently dismissed I.11-06-009 in D.12-08-025, citing the companies' FCC withdrawal.

Here, on October 4, 2018, the Commission issued the *Amended Assigned Commissioner's Scoping Memo And Ruling* essentially following the process set forth in the AT&T and T-Mobile merger, finding that a more detailed and exhaustive review of this proposed merger is in the public interest.

In the October 4, 2018, Scoping Ruling, the Commission determined that this proposed merger should be given a thorough review and that it should not be exempted from a public interest examination. Joint Applicants' argument that the Commission "does not and may not require prior approval for a wireless transfer of control" is not supported by past precedent or federal law. In the current wireless market, forbearance from Commission review of this proposed merger is not in the public interest.

III. DISCUSSION

A. The Joint Applicants Falsely Claim That An Excellent 5G Network Will Not Be Built Without The Proposed Merger

Joint Applicants strongly suggest that a 5G network will not be built by either standalone company unless the proposed merger is approved, which is very misleading.

The evidence clearly demonstrates that California will have *two* **excellent** 5G networks built by each company, rather than one, if the proposed merger is denied. But Joint Applicants seem to suggest that but for the proposed merger neither applicant will build a 5G network. For example, Mr. Michael Sievert, T-Mobile's President and Chief Operating Officer and chief witness, stated that "impeding" the merger "will prevent a

[27] Ibid.

world-leading 5G network from being built in California."[28] In their Opening Brief, Joint Applicants state that "*whether*, and to what degree, those benefits [of a 5G network] will actually be enjoyed by consumers depends entirely on whether his or her carrier's network can effectively deliver those benefits."[29]

To be clear, as stated in the Public Advocates Office's Opening Brief it is undisputed that Sprint and T-Mobile will build their own 5G networks if the proposed merger does not happen. Joint Applicants have stated repeatedly that "each company will deploy 5G" if the proposed merger is not approved.[30] A 5G network is not a unique benefit of the merger – without the merger, each company will build a 5G network capable of providing all of the benefits described in Joint Applicants' Opening Brief.

There are no unique benefits of the proposed merger. However, Joint Applicants ascribe many benefits *as if* they were unique to the merger. For example, Joint Applicants describe a "plethora" of benefits, including "smart home and buildings, virtual reality applications, remote medical surgery, industry automation, and smart farming."[31] But each one of these benefits will be enabled by a 5G network, independent of the merger. Joint Applicants have not demonstrated that any of these benefits are uniquely derived from the 5G network proposed by the Joint Applicants.

Instead of acknowledging that standalone Sprint and standalone T-Mobile have both committed to building a 5G network, Joint Applicants argue that the New T-Mobile will be able to build a 5G network that is "broader" and "deeper," but these words have no meaning in this context. At no point do Joint Applicants specifically define what they mean when they say "broader" and "deeper." The HMG provide that vague promises should be discounted.

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[28] Joint Applicants Ex. 2, Testimony of G. Michael Sievert (Sievert) at p. 9.

[29] Opening Brief at p. 17. (Emphasis added.)

[30] Joint Applicants Ex. 3, Testimony of Neville Ray (Ray) at p. 7.

[31] Opening Brief at p. 17.

If by "broad" they are referring to coverage in rural areas, the evidence suggests that the New T-Mobile would spend *less* money on infrastructure than the standalone companies.[32] New T-Mobile would *reduce* the number of cell sites, which would likely decrease rural coverage.[33]

If by "deep" they are referring to upload and download speeds by the 5G network, Joint Applicants have failed to show that they lack the necessary amount of capacity, or spectrum, to provide 5G speeds to all of their customers. The standalone companies have promised to each build a 5G network, which means average broadband speeds of 100 Megabits per second (Mbps) and 20 Gigabit per second (Gbps) peak broadband speeds.[34] The evidence suggests that 5G speeds would be the same regardless of the proposed merger.

Joint Applicants' arguments regarding spectrum and the number of cell sites are addressed in more detail below.

1. Joint Applicants Do Not Currently Lack The Spectrum To Build Their Own 5G Networks

The first argument about 5G networks set forth by Joint Applicants is that the proposed merger "will uniquely enable New T-Mobile to deploy significant amounts of three complementary types of spectrum," low-band, mid-band, and high band.[35] However, Joint Applicants have not shown that there is anything "unique" about this transaction that will enable it to somehow "deploy" all three types of spectrum. Both companies have sufficient spectrum to deploy 5G networks; also, both companies could deploy a 5G network on the types of spectrum they currently have.

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[32] Clark at pp. 29-30. Mr. Clark found that, in fact, New T-Mobile's planned capital expenditures for investments in California over the next five years are less than the combined planned investments of Sprint and T-Mobile as standalone companies.

[33] Supplemental Declaration of Cameron Reed at p. 5.

[34] Reed 5G at p. 10.

[35] Opening Brief at p. 19.

Instead of explaining how the proposed merger provides unique benefits, Joint Applicants claim that "neither company has the combination of spectrum to deliver the performance that New T-Mobile will provide."[36] Notably, Joint Applicants are not saying that they do not have enough spectrum to create 5G networks; instead, they appear to be saying that New T-Mobile will provide better performance than the standalone companies. Would performance really be better? What metrics would that be based on? If true, are the "better" speeds sufficient to justify higher prices from the elimination of competition? Joint Applicants provide no basis to answer those questions.

Joint Applicants have engaged in bait-and-switch tactics. While they appear to be saying that without the proposed merger there will be no 5G network, in actuality they are saying is that the New T-Mobile network will be "better", but without explaining or quantifying what that means.

With regards to spectrum, it is undisputed that the amount of available spectrum is a critical component of providing broadband service. However, there are two major misunderstandings set forth by Joint Applicants, that require clarification.

First, Joint Applicants disingenuously suggest that only certain kinds of spectrum are capable of providing 5G speeds, which T-Mobile and Sprint lack.[37] Upload and download speeds that meet the definition of 5G can be provided by low-band spectrum, mid-band spectrum, and high-band spectrum.[38] Thus, Joint Applicants are not prevented from offering 5G service because all spectrum is the "right" kind of spectrum for 5G. County maps presented by Mr. Ray show that standalone T-Mobile plans to deliver 5G service to most of California without the merger using existing spectrum and mid- to low-band spectrum.[39]

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[36] Opening Brief at p. 20.

[37] Opening Brief at p. 20.

[38] cite

[39] Ray, Attachment D.

As Mr. Ray stated during cross examination: "You can deploy 5G on any frequency, and in the future, all spectrum will be 5G spectrum. 2G, 3G and 4G are available across low, mid and high-band. Why would 5G be any different? It won't."[40]

The second misunderstanding (or misrepresentation) is that somehow Sprint and T-Mobile are "running out" of spectrum necessary to offer 5G service. Joint Applicants suggest that only "a massive increase in capacity" will allow for 5G service, strongly suggesting that T-Mobile does not have enough spectrum to offer 5G service.[41]

Yet, as discussed more thoroughly in the Public Advocates Office's Opening Brief[42], T-Mobile has a good deal of unused spectrum. For instance, T-Mobile currently projects that by the year 2021 it will serve 90% of Los Angeles County with 5G service, using only 10 Mhz out of the 70 Mhz of available spectrum available there.[43] If T-Mobile can cover 9 million people with only 10 Mhz of spectrum, it will be years before it runs into its 70 Mhz limit.

For comparison, T-Mobile also has 70 Mhz of spectrum in Fresno County, which has far fewer people than Los Angeles.[44] T-Mobile has similar amounts of spectrum in other rural counties in California.[45] If it can cover 9 million people in Los Angeles with 10 Mhz, clearly 70 Mhz in Fresno is sufficient spectrum to provide 5G service.

What is really going on? The answer is simple – providing 5G service is uneconomical in less densely populated areas. Therefore, T-Mobile makes a business decision to prioritize 5G service in more densely populated areas.[46] T-Mobile makes

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[40] Transcripts at p. 421:3-11.

[41] Opening Brief at p. 21.

[42] The Public Advocates Office Opening Brief at p. 46.

[43] At p. 457: 2-7.

[44] Selwyn at p. 159.

[45] At p. 462: 18-23.

[46] At p. 448:6-10.

more money by providing 5G service to urban areas than rural areas. The allegedly pressing lack of spectrum is just a smokescreen.

In other words, T-Mobile does not lack spectrum to bring 5G service to densely populated areas like Los Angeles County, and lack of spectrum has no relation to 5G network deployment in rural counties – the T-Mobile standalone company has plenty of spectrum. Moreover, both Sprint and T-Mobile have enough low- and mid-band spectrum to provide 5G service. The proposed merger will allow Sprint to access more high-band spectrum in rural areas; but as discussed below, high-band spectrum is not necessary or optimal to provide rural 5G coverage.

2. Fewer Cell Sites Will Result In Poorer Rural Coverage

Joint Applicants argue that the proposed merger will somehow allow them to "deploy many more cell sites on a much more economical basis" than without the merger.[47] They claim that New T-Mobile will have << **Begin Confidential** >> [redacted] << **End Confidential** >> additional sites retained from the legacy Sprint network."[48] This statement is particularly misleading.

In fact, New T-Mobile plans to eliminate many of Sprint's current and future cell sites, which means that the proposed merger will significantly reduce cell site infrastructure and redundancy in all of California.[49] T-Mobile has stated that it will decommission many cell sites and also discontinue Sprint's plans to construct new cell sites.[50]

Why would New T-Mobile reduce the number of cell sites in California? Because it makes no financial sense to build and maintain more cell sites in rural areas. Sparsely populated rural areas do not have enough customers to justify the substantial expense of

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[47] Opening Brief at p. 21.

[48] Ibid.

[49] Supplemental Declaration of Cameron Reed at p. 5.

[50] *Ibid*.

building new cell sites or keeping redundant cell sites in operation. Covering rural areas will require significant capital build-outs of more cell sites, which the New T-Mobile would have no economic incentive to do.[51]

New T-Mobile would use T-Mobile's existing low-band or mid-band spectrum in rural areas because high-band spectrum has a small "footprint" and does not easily propagate through walls or across long distances.[52] Joint Applicants themselves state that low-band spectrum "allows for better coverage indoors and can easily propagate over relatively large distances to provide broad coverage, which is particularly important in order to serve rural areas."[53] Moreover, the county maps provided by Mr. Ray show that T-Mobile plans to cover most rural areas with 5G coverage by 2021-2024 with low- to mid-band spectrum even without the proposed merger.[54] Clearly, 5G service in rural areas is better and more efficiently provided by low- and mid-band spectrum, which T-Mobile already has.

Building more cell sites would be required to bring high-band spectrum to rural areas, because of high-band's small footprint. This would be an investment-heavy undertaking, and would make no financial sense and is not needed.[55] The Commission should understand that the new cell sites which Joint Applicants promise to build are not new cell sites, but new radios deployed on existing cell sites.[56] But since high-band 5G has a smaller footprint than 4G and mid-band 5G has the same footprint as 4G, adding new radios will not extend the range of the network.[57]

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[51] *Ibid*. See also Supplemental Declaration of Lee Selwyn at pp. 54-58. Data obtained from T-Mobile demonstrates that their network plans would result in net operating losses.

[52] Opening Brief at p. 19. See also Supplemental Declaration of Lee Selwyn at 51. Data obtained from T-Mobile shows that many of the cell sites that are not being decommissioned will be along the Interstate 5 corridor, and will not propagate to most rural areas.

[53] Opening Brief at p. 20.

[54] Ray, Attachment D.

[55] Reed 5G at p. 17.

[56] Supplemental Declaration of Cameron Reed at pp. 36-37.

[57] Reed 5G at p. 17.

The Public Advocates Office obtained detailed cell site data from Joint Applicants. The data shows that only **<<Begin Confidential>>** [redacted] **<<End Confidential>>** of the additional California cell sites New T-Mobile will gain from this merger are from new construction. However, **<<Begin Confidential>>** [redacted] **<<End Confidential>>** are retained cell sites from Sprint. Only **<<Begin Confidential>>** [redacted] **<<End Confidential>>** out of the newly constructed cell sites and **<<Begin Confidential>>** [redacted] **<<End Confidential>>** out of the retained Sprint cell sites will be in rural areas.[58]

But according to data submitted by the Joint Applicants, the proposed merger would result in New T-Mobile decommissioning approximately <<**Begin Confidential**>> [redacted] <<**End Confidential**>> of Sprint's California cell sites, and New T-Mobile will eliminate Sprint's plans to construct <<**Begin Confidential**>> [redacted] <<**End Confidential**>> new macro cell sites and <<**Begin Confidential**>> [redacted] <<**End Confidential**>> new small cell sites in California. This would result in a net loss of at least <<**Begin Confidential**>> [redacted] <<**End Confidential**>> new California small cell and cell tower sites post-merger.

To bring better coverage to rural areas, New T-Mobile would have to invest more heavily in constructing new cell sites in rural areas. Joint Applicants have not demonstrated a specific, measurable, verifiable, and enforceable commitment to make such an investment, nor have they demonstrated that standalone T-Mobile could not make the investment without the proposed merger.[59] The economics of building small cell sites in order to provide high-band 5G service in rural areas do not make financial sense. Both Sprint and T-Mobile have sufficient low- and mid-band spectrum to provide 5G service to rural areas, and it is simply not credible that New T-Mobile will be

[58] Supplemental Declaration of Cameron Reed at pp. 4, 36-37. At pp. 64-67 contain a detailed breakdown of the cell site data obtained from Joint Applicants.

[59] Supplemental Declaration of Reed at pp. 37-38.

incentivized to build additional small cells necessary to provide high-band 5G in rural areas. Thus, the merger will not significantly expand mid-band coverage in rural California.[60]

3. Spectral Efficiency Will Improve Independently Of The Merger

Finally, Joint Applicants claim that "spectral efficiency" will increase as a result of the proposed merger.[61] This is false. Spectral efficiency is a function of a 5G network.[62] Spectrum will be used more efficiently by any 5G network, independently of the proposed merger.

B. Joint Applicants' Network Model is a Litigation Tool Designed to Create a Sense of False Urgency

T-Mobile used a technical model to develop its plans for a 5G network, which it claims it has "long done" in the "ordinary course of business."[63] This is demonstrably false. The 5G network model was developed as part of a litigation strategy to show high demand for broadband speed and capacity.[64]

Joint Applicants claim that the 5G network engineering model is the "same underlying engineering model" as its 4G LTE network model which it uses in the ordinary course of business.[65] However, in response to an inquiry from the United Stated Department of Justice Antitrust Division, on January 4, 2019, Joint Applicants[66] stated that << **Begin Confidential** >> [redacted]

[60] Supplemental Declaration of Reed at p. 6.

[61] Opening Brief at p. 22.

[62] cite

[63] Opening Brief at p. 25.

[64] Supplemental Declaration of Reed at p. 22.

[65] Opening Brief at p. 25.

[66] Attachment 7 of Reed Supp Declaration. T-Mobile uses the law firm of Cleary Gottlieb Steen & Hamilton for FCC matters.

[redacted]

[redacted] << **End Confidential** >>

C. The Commission Should Be Skeptical Of Joint Applicants' 5G Network Model

Joint Applicants argue that any criticism of their 5G network model is "unfounded."[69] However, in light of the fact that the model was not prepared in the ordinary course of business, the Commission should view the 5G network model as a litigation tool intended to persuade opinion, not a concrete and verifiable projection of demand, costs, and performance of the proposed 5G network.

In fact, Joint Applicants' 5G network model was hastily constructed in 2018 (and revised several times) for use in FCC litigation before any actual 5G loading data existed.[70] This resulted in serious flaws in the 5G network model's abilities.[71]

The Public Advocates Office's skepticism is therefore well-founded. As discussed more thoroughly in the Public Advocates Office's Testimony of Cameron Reed,[72] Joint Applicants overstate the demand for 5G service, in order to create a false sense of urgency.

1. 5G Handset Adoption Projections Are Overstated

The Public Advocates Office does not dispute that customers will want to buy 5G capable cell phones in the near future as the 5G network is deployed. However, Joint Applicants overstate consumer demand in order to justify the proposed merger.

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[67] Attachment 7, Supp Dec of Reed.

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[69] Opening Brief at p. 26.

[70] Supplemental Declaration of Cameron Reed at p. 23.

[71] Ibid.

[72] Pub Adv-005C, Testimony of Cameron Reed on 5G (Reed 5G) at p. 11.

Joint Applicants criticize Mr. Reed, stating that he relied on only one source for his conclusion that 5G handset adoption will be about 50% by 2025.[73] However, Joint Applicants' claim that somehow "New T-Mobile will be able to deploy 5G much faster than the standalone companies" and that this will drive greater consumer demand for 5G service.[74] Without explaining how, Joint Applicants argue that the proposed merger will cause faster deployment of 5G. However, Joint Applicants' plans for infrastructure investment are the same as the standalone entities combined – in other words, New T-Mobile will not increase spending above the level currently planned by the standalone companies.[75] Nor will New T-Mobile add to the number of cell sites currently in operation for the standalone companies.[76] Joint Applicants offer no hard evidence to support their argument that 5G deployment will be faster as a result of the proposed merger; in fact, it appears the merger would have no effect on the rate of deployment. Thus, it is difficult to see how consumer demand will increase as a result of the proposed merger.

2. T-Mobile Manipulated Projections Of Customer Data Use

Joint Applicants criticize Mr. Reed's finding that T-Mobile's projections of customer data usage are unreasonably inflated, arguing that it was incorrect "to include industry projections of average usage for all subscribers, including both those on 4G and on 5G."[77] T-Mobile claims that its "assessment of future data usage was, if anything, conservative."[78] However, Mr. Reed's Supplemental Declaration finds that T-Mobile continues to manipulate the projections of customer data usage.

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[73] Opening Brief at p. 28.

[74] Ibid.

[75] The Public Advocates Office Opening Brief at p. 40.

[76] Supp Declaration of Reed at p. 37.

[77] Opening Brief at p. 28.

[78] Opening Brief at p. 29.

Joint Applicants argue that their projections of customer data usage show 10.1 GB of data on average per customer, per month.[79] However, the Public Advocates Office analyzed that number and found that it is not the monthly network usage for all of T-Mobile's network users, but just a subset of T-Mobile's network users.[80] T-Mobile excluded the network data usage for other customers that use T-Mobile's network, like MetroPCS and other resellers, manipulating the data for the purpose of inflating the apparent demand.

When the data is corrected for ALL of T-Mobile's network users, the actual number is 8.7 GB of data per month,[81] far lower than T-Mobile's projections. The Commission should evaluate the total demand for data on the network in order to gain a full picture of projected consumer demand. The Public Advocates Office's use of demand across ALL customers that use T-Mobile's network is a more accurate reflection of the future. Again, it is important to note that healthy skepticism of T-Mobile's data is warranted, because the data was prepared for litigation purposes, in order to play up the alleged benefits of this proposed merger.

IV. INCREASED CAPACITY, SPEED, AND COVERAGE WILL OCCUR AS A RESULT OF 5G, REGARDLESS OF THE MERGER

Joint Applicants have stated that the merger will provide "robust capacity, faster speed, and expanded coverage."[82] This contention is vague, misattributes 5G benefits to the merger, and misrepresents the impact of integrating Sprint and T-Mobile's networks. As discussed further below, the merger specific increases in capacity and speed may not occur at all, or would be smaller than Joint Applicants claim.[83]

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[79] Opening Brief at fn. 72.

[80] Supp Declaration of Reed at p. 45.

[81] Supp Declaration of Reed at p.47.

[82] Opening Brief at p.31.

[83] Public Advocates Office Opening Brief at p. 34.

A. Joint Applicants Overstate The Amount of Capacity Generated By The Merger

Joint Applicants characterize New T-Mobile's network as having "approximately twice" the combined capacity of the stand-alone companies by 2024.[84] However, Joint Applicants have no firm commitments to infrastructure deployment or cell site buildouts that support this assertion.[85] Furthermore, the actual capacity improvements from combining Sprint and T-Mobile's assets is smaller than Joint Applicants claim.[86]

Specifically, Joint Applicants have not demonstrated that they will commit the necessary capital investment to provide mid-band 5G coverage in rural California.[87] Joint Applicants have not demonstrated that these increases in capacity provide any benefit in rural areas over the 5G low-band coverage that T-Mobile would provide as a stand-alone company.[88] Furthermore, Joint Applicants have not attempted to demonstrate that New T-Mobile has a business case to provide higher capacity mid-band service in rural areas of California.[89] This is because there is no economical business case to provide complete mid-band coverage in rural California and the merger will not change that.[90] Simply put, there is no guarantee that New T-Mobile's capacity increases over the combined stand-alone Sprint and T-Mobile networks will ever occur.

B. 5G Will Improve Speed Independently Of The Merger

Joint Applicants claim that as New T-Mobile's 5G network comes online, New T-Mobile would provide faster network speeds than the stand-alone companies would.[91] Joint Applicants have also characterized network speed as being directly related to

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[84] Opening Brief at p. 31.

[85] Supplemental Declaration of Reed at p. 37.

[86] *Id* at p. 35.

[87] Supplemental Declaration of Selwyn at pp. 47-49.

[88] *Id* at p. 36.

[89] *Id* at p. 50.

[90] *Id* at pp. 61-62.

[91] Opening Brief at p. 35.

network utilization.[92] However, New T-Mobile's 5G network will likely not realize the purported increases in network capacity, and Joint Applicant's claims of increased network speeds over the stand-alone companies are equally unlikely to come about above levels that a 5G network will accomplish independent of the merger.[93]

Joint Applicants have relied on T-Mobile's 5G network model to make these network speed and capacity projections, but the 5G model is not an ordinary course of business tool.[94] Joint Applicants admitted that to the United States Department of Justice stating: <<**Begin Confidential**>> [redacted] <<**End Confidential**>>.[95]

More importantly, the Joint Applicant's commitments in its Opening Brief are worse than their projections in rebuttal testimony.[96] For example, in the rebuttal testimony, Mr. Ray states that New T-Mobile will deploy << **Begin Confidential** >> [redacted] << **End Confidential** >> "Unique 5G Site Overlays" in total.[97] However, in the MOU with CETF, and repeated in Joint Applicants' Opening Brief, New T-Mobile will only commit in the future to deploy 5G at 90% of the total <<**Begin Confidential**>> [redacted] <<**End Confidential**>> California cell sites, which is <<**Begin Confidential**>>

[92] Opening Brief at p. 30.

[93] Reed 5G at p. 10.

[94] Supplemental Declaration of Reed at p.22.

[95] Supplemental Declaration of Reed, Attachment 7 at p.2. (Emphasis added; internal citations omitted.)

[96] Ray Rebuttal Testimony at 18.

[97] Ibid., see Table entitled "5G Site Count".

[redacted] **<<End Confidential>>** cell sites.[98] Standalone T-Mobile currently plans **<<Begin Confidential>>** [redacted] **<<End Confidential>>** unique 5G cell sites, which means New T-Mobile would have only **<<Begin Confidential>>** [redacted] **<<End Confidential>>** more 5G sites than stand-alone T-Mobile would, while California would lose all of Sprint's future 5G sites.[99] As discussed previously, New T-Mobile plans to eliminate Sprint's plans to construct <<**Begin Confidential**>> [redacted] <<**End Confidential**>> new macro cell sites and <<**Begin Confidential**>> [redacted] <<**End Confidential**>> new small cell sites in California.[100]

Furthermore, Joint Applicants commit to building new 5G cell sites that will only meet 80% of a speed tier of either 100 Megabits per second (Mbps) or 300 Mbps.[101] Both speed tiers are lower than the Joint Applicants' projections set forth in which is <<**Begin Confidential**>> [redacted] <<**End Confidential**>> average data speeds.[102] Furthermore, Joint Applicants mistakenly focus only on 5G speed and neglect to mention that Sprint's customers would have **<<Begin Confidential>>** [redacted] **<<End Confidential>>** 4G LTE speeds if the merger is approved.[103]

Joint Applicant lack a business case justification for investment and specific commitments to serve rural areas which indicates that the merger will do little to increase speeds for rural California.[104] Similarly, by decommissioning thousands of Sprint's cell sites New T-Mobile would only minimally increase urban capacity compared to the two

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[98] Opening Brief at 38.

[99] Ray Rebuttal Testimony at 18.

[100] Reed 5G at 4.

[101] Opening Brief at 38. Joint Applicants description of what 80% of a speed tier means is vague. This could mean either sites would only need to produce 80 Mbps/240 Mbps respectively to count as meeting a speed tier or that only 80% of the 90% of sites need to meet a speed tier at all. Either scenario is a worse commitment than the benefits purported in Joint Applicant's Rebuttal Testimony.

[102] Ray Rebuttal at 28.

[103] Supplemental Declaration of Reed at 49-51.

[104] Supplemental Declaration of Selwyn at p. 62.

stand-alone companies and thus urban speeds would not increase significantly.[105] Thus, the merger will not significantly increase speeds for any Californians above what 5G would do independently of the merger.

C. New T-Mobile and T-Mobile Would Have Similar Coverage Post-Merger, And The Merger Will Harm Consumer Choice

Joint Applicants claim that customers will experience expanded coverage as a result of the merger.[106] Joint Applicants include maps that purport to show New T-Mobile's coverage by 2021.[107] Joint Applicant's claims of improved coverage are vague, lack specific business case justifications,[108] and misrepresent stand-alone T-Mobile's capabilities.[109] If a Sprint customer values coverage over price, they could already switch networks, but the proposed merger would reduce their available choices.[110] Furthermore, Sprint standalone is currently planning significant network investments in California which would improve Sprint's coverage independent of the merger.[111] For example, the purported expansion of Sprint's Lifeline is not a merger specific benefit because
T-Mobile could start offering Lifeline service today, independently of the merger. The merger will do little to improve coverage options that exist for California customers today and reduce overall customer choice.

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[105] Supplemental Declaration of Reed at pp. 35-36.

[106] Opening Brief at p. 39.

[107] *Id* at p. 33.

[108] Supplemental Declaration of Selwyn at p. 43.

[109] Supplemental Declaration of Reed at p. 33.

[110] Public Advocates Office Opening Brief at p. 21.

[111] Supplemental Declaration of Reed at p. 27.

D. New T-Mobile's In-Home Broadband Service Is Speculative And Not Merger Specific

Joint Applicants claim that New T-Mobile will create a wireless alternative to traditional home broadband, referred to as In-Home Broadband.[112] Despite what Joint Applicants claim, they have provided no evidence that this benefit is a merger specific benefit. For example, Joint Applicants have not proven New T-Mobile's in-home broadband service would be capable of meeting the standards set forth by the Commission in Decision 16-12-025 for determining whether 5G would be a substitute for in-home broadband service.[113] Furthermore, Joint Applicants "illustrative" customer cost saving figures are based on speculation and may not materialize.[114] Joint Applicants have also overstated the number of households New T-Mobile could actually serve.[115] Joint Applicants have only provided vague pricing information which does not demonstrate what existing in-home broadband providers New T-Mobile would compete with.[116] Finally, Joint Applicant's in-home broadband service is not merger specific, because stand-alone T-Mobile is already planning to launch an "in-home broadband service" and has adequate spectrum to serve rural areas.[117] New T-Mobile's vague and speculative in-home broadband offering fail to satisfy the HMG's requirements of a verifiable, unique merger benefit.

E. Mobile Virtual Network Operators Face Increased Risk Of Price Increases As A Result Of The Merger

Joint Applicants claim that Mobile Virtual Network Operators (MVNOs) will benefit from the merger because there will be a mobile network operator (MNO) with a

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[112] Opening Brief at p.40.

[113] Supplemental Declaration of Reed at p. 14.

[114] *Id* at p.7.

[115] *Id* at p. 9.

[116] *Id* at p. 11.

[117] *Id* at p. 16.

new 5G network.[118] This claim overly simplifies the reality of the situation. Aside from the fact that without the merger there would be *two* 5G MNOs competing to offer MVNO's wholesale service, the merger would give New T-Mobile more market power to increase prices on wholesale rates.[119] The record does not support the assumption that MVNOs would benefit from New T-Mobile's increased scale and market power.[120]

F. 5G Will Improve Internet Of Things Service Independent Of The Merger.

Joint Applicants claim that New T-Mobile's 5G network will enable it to improve existing Internet of Things (IoT) and facilitate new IoT products.[121] This is a good example of Joint Applicants inappropriately attributing the benefits of 5G (without the merger) to the benefits post-merger. 5G will improve IoT service regardless of the merger.[122] A core part of 5G's specifications and standards design to enable massive machine type communications.[123] Stand-alone T-Mobile and Sprint have sufficient spectrum to deploy 5G and thus have sufficient spectrum to enhance IoT service in California.[124] Furthermore, because the merger will reduce competition and raise prices,[125] 5G IoT services may be inhibited by the merger rather than improved.[126] Joint Applicants' claim that the merger will uniquely enable IoT service is not credible.

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[118] Opening Brief at p. 44.

[119] Public Advocates Office Opening Brief at p. 28.

[120] *Ibid.*

[121] Opening Brief at p. 46.

[122] Reed 5G at p. 8.

[123] *Id* at p. 28.

[124] Supplemental Declaration of Reed at p. 23.

[125] Supplemental Declaration of Selwyn at p. 63.

[126] Supplemental Declaration of Reed at p. 39.

G. Joint Applicants Assume T-Mobile and Sprint's Network Integrations Will Happen Without Issues

Joint Applicants state that the Sprint customer migration will be smooth and that service to Sprint customers will not be degraded during the transition.[127] However, Joint Applicant's do not document the amount of work that New T-Mobile would need to do to integrate Sprint's customers and network into T-Mobile's network. There are reasons to be concerned that Joint Applicants have not addressed. For example, Sprint has nearly six times the number of customers that MetroPCS had when T-Mobile integrated those customers onto its network.[128] New T-Mobile would need to decommission thousands of Sprint's cell towers and upgrade thousands more of T-Mobile's existing towers[129] and some of the third-party cell towers might not have space to support new equipment.[130] These are significant challenges that would impair or prevent the realization of any claimed merger synergies.[131] It is not credible that network and customer integrations of this scale would occur without issues, which Joint Applicants fail to address.

V. THE PROPOSED MERGER IS ANTI-COMPETITIVE AND WILL RESULT IN HIGHER PRICES FOR CONSUMERS AND DECREASED SERVICE QUALITY

Joint Applicants claim that the economic analysis performed on the proposed merger demonstrates that prices will be lower as a result of the merger.[132] This is highly misleading, because the analysis prepared by Mark A. Israel, Michael Katz and Bryan Keating (IKK) actually shows that prices will be higher than the prices that the two standalone firms will charge if there is no merger.[133] In fact, the IKK analysis was created in rebuttal to a different economic analysis that showed that prices will be higher

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[127] Opening Brief at p. 48.

[128] DISH Network Opening Brief at p. 4.

[129] Supplemental Declaration of Reed at p. 38.

[130] *Ibid.*

[131] Supplemental Declaration of Reed at p. 50.

[132] Opening Brief at p. 51.

[133] Supp Dec of Selwyn at p. 2.

as a direct result of the merger, but it found the same thing – that prices will be higher. It should be noted that the IKK analysis, similar to T-Mobile engineering model, was created, bought, and paid for in this litigation in order to persuade the FCC and the CPUC; it is not an independent analysis. The Commission should be highly skeptical of vague benefits that an in-house report alleges will occur as a result of this proposed merger.

A. Actual Prices For Consumers Will Be Higher

Joint Applicants argue that lower marginal costs as a result of the proposed merger will be passed along to customers in the form of lower prices. Joint Applicants state that it would be "economically irrational for New T-Mobile to raise prices."[134] However, nothing could be farther from the truth. To pay for the substantial costs and expenses arising from the merger, New T-Mobile would have to find a way to raise prices, reduce workforce, lower service quality, or some other means to increase profitability, so that this merger makes economic sense. Joint Applicants' promises to maintain the "same" or "better" prices[135], have no net job losses, increase service quality, and expand coverage and investment in infrastructure, are totally irrational from an economic perspective.

Something else must be going on. A review of the evidence shows that many of Joint Applicants' "commitments" are really just non-enforceable promises. It is extremely probable that Joint Applicants' commitments will evaporate within a short time frame after the merger, once it becomes obvious that New T-Mobile cannot be profitable if keeps its promises.

For example, the economic analysis (discussed below) shows that prices will go up if the merger is approved, because it makes no financial sense for New T-Mobile to keep prices the same or lower. Joint Applicants claim that they will pass along "lower marginal costs" that will result from the merger, because it will need to compete with

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[134] Opening Brief at p. 56.

[135] "Same" or "better" prices is a commitment set forth in Joint Applicants and CETF's MOU.

AT&T and Verizon.[136] However, lack of competition will allow New T-Mobile to keep its customers without lowering its prices, because AT&T and Verizon already have substantially higher prices.

The IKK analysis discussed above is a rebuttal to a report by Joseph Harrington, Coleman Bazelon, Jeremy Verlinda and William Zarakas (HBVZ) submitted in the Sprint/T-Mobile FCC merger proceeding by DISH Network Corporation (DISH).[137] HBVZ present an econometric merger simulation model that indicated that post-merger New T-Mobile will charge higher prices for both postpaid and prepaid services than those that the two companies standing alone would charge.[138] The IKK report, while questioning HBVZ's methodology, did not refute any the key HBVZ conclusions.[139]

B. The IKK Analysis

Joint Applicants rely on the IKK analysis mentioned above for the argument that prices will decrease as a result of the merger.[140] However, the IKK report and Joint Applicants' arguments are misleading. In fact, the IKK report finds that real prices will increase.

As discussed more thoroughly in the Public Advocates Office's Opening Brief, the IKK analysis actually states that "quality-adjusted prices" will decrease, but real prices will increase.[141] As explained in the Opening Brief, the Public Advocates Office notes that the IKK report relies on speculative customer surveys to assign a dollar value to the improvement's customers will purportedly get, and adds that to the value of the services the consumer will receive.[142] By this methodology, Joint Applicants artificially inflate

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[136] Opening Brief at p. 26.

[137] Supp Declaration of Selwyn at p. 3.

[138] Ibid.

[139] Ibid.

[140] Opening Brief at p. 59.

[141] The Public Advocates Office Opening Brief at p. 31.

[142] Ibid.

the value of the service, manipulating the data in order to claim that prices are relatively lower compared to the increased value of the allegedly improved service.

But the value of the alleged improvements in service were assigned by IKK using customer service surveys, not the actual costs to T-Mobile for those improvements.[143] In other words, Joint Applicants think that customer perceptions result in lower prices, which of course makes no sense. In reality, the prices will be higher.

In his rebuttal testimony, Dr. Israel concedes that the proposed merger will "eliminate a competitor" and that this "may result in less intense competition with respect to price and quality, potentially resulting in higher quality-adjusted prices."[144] He explains that "the merger will bring T-Mobile and Sprint into common ownership, and, therefore, will internalize the value of sales diverted from one to the other that otherwise would have been viewed as lost sales by each separate firm, putting upward pressure on prices"[145] However, Dr. Israel claims that *upward* pressure on prices will "lower the combined firm's marginal costs," which makes no sense. This is another example of vague and speculative benefits that the HMG recommend should be discounted.

There is no doubt that advancements in wireless technology have led to innovations that increased the value of cell service to consumers. However, translating changes in "quality" into quantifiable changes in terms of pricing is a complex undertaking.[146] Wireless functionality has improved, and the costs of providing that service has decreased. It is fair to say that the "value" of wireless service is better than it was 20 or 30 years ago, but not as a result of this merger.

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[143] Ibid.

[144] Testimony of Israel at p. 2.

[145] Ibid.

[146] Id. at p. 7.

C. Pricing "Coordination", or Parallel Pricing Conduct, is Likely

Joint Applicants argue that "this industry is not vulnerable to coordinated conduct" and that this proposed merger will not lead to such conduct.[147] They claim that the wireless products that AT&T, Verizon, Sprint, and T-Mobile offer are so different that they are not susceptible to pricing coordination. However, the 4 wireless carriers clearly offer the same wireless service in terms of functionality. The parallel pricing conduct that Dr. Selwyn refers to is not to other products such as wired broadband or television, which AT&T and Verizon may bundle with wireless.[148]

The evidence already exists – AT&T and Verizon have been successful in maintaining prices above the industry average, higher than the prices of their smaller rivals, because they do not compete with other carriers.[149] For years, T-Mobile has called itself the "uncarrier" and has brought innovation and lower prices to the wireless market.[150] If the proposed merger is approved, a major competitor in Sprint will be eliminated and T-Mobile will have no incentive to keep prices substantially lower than AT&T and Verizon's prices.

D. The Public Advocates Office's Analysis of Economic Models is Sound

Joint Applicants criticize the Public Advocates Office's economic analysis because they believe it is unsound. Joint Applicants argue that the Public Advocates Office focused too much on the high market concentration as demonstrated by the Herfindahl-Hirschman Index (HHI), a widely-accepted measure of market concentration that has been adopted by the United States Department of Justice and Federal Trade Commission.[151] However, the HHI is an important factor in merger reviews, according to

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[147] Opening Brief at p.64.

[148] Selwyn at p.74.

[149] *Ibid.*

[150] The Public Advocates Office Opening Brief at p. 22.

[151] *Ibid.*

the HMG. And the HHI shows that this proposed merger will result in astronomically high concentration levels.

Joint Applicants further criticize the Public Advocates Office witness Mr. Cameron Reed because he "has no independent basis for this economic conclusion" that the harms from the merger would outweigh the benefits.[152] However, Mr. Reed stated that he based his conclusion on Dr. Selwyn's economic analysis. That he was asked the question on cross-examination does not mean that he somehow overstated his analysis.

In criticizing the Public Advocates Office, Joint Applicants fail to address the fundamental flaw in their own analysis – that the IKK analysis shows that prices will actually increase as a result of the proposed merger.

E. Impact on Prepaid Services for Low Income California Consumers

Joint Applicants argue that the impact on low income California consumers will actually be beneficial, because "New T-Mobile will take their needs and interests to heart in designing and pricing its services."[153] These are the kinds of vague and unenforceable commitments by Joint Applicants that the HMG warns against, and they should be discounted. Even if T-Mobile really cares about low income consumers, there is no guarantee that they will not take advantage of their dominant position in marketplace by raising prices.

F. The Prepaid Market Will Be Highly Concentrated

As discussed more thoroughly in the Public Advocates Office's Opening Brief, after the merger, New T-Mobile would control roughly 59% of the prepaid market, and the prepaid market HHI will jump by 1468 points – more than seven times the HMG's 200-point threshold. A post-merger New T-Mobile will have overwhelming dominance

[152] Opening Brief at p. 72.

[153] Opening Brief at p. 73.

of the prepaid services market, which will likely diminish its support for MVNOs that offer prepaid services, and encourage it to raise prices for those services.[154]

G. The Standalone Companies Will Be Competitive Without The Proposed Merger

The Joint Applicants indicate that Sprint will not be able to compete effectively without the merger, attempting to dismiss the improvements in financial performance found by the Public Advocates Office witness Adam Clark.[155] Specifically, they dismiss the improving financial metrics as "one-time tax treatments" and claim that compensating for this anomalous tax benefit will change the picture of Sprint's finances. However, analysis presented by Sprint's own witness clearly shows that Sprint's financial condition is positive and improving. In Attachment C to the Rebuttal Testimony of Mr. Brandon Dow Draper from Sprint, the chart of free cash flow shows net positive results in 2017 and continuous improvements since 2015. This demonstrates that even when changes in tax treatment are factored into the analysis, Sprint remains in a viable financial condition.

The Joint Applicants also claim that Sprint's recent heavy spending on promotions to retain customers will reduce its access to free cash flow necessary to compete in the wireless market.[156] However, Sprint's witness Mr. Draper acknowledged in hearings that Sprint's current plan is to borrow further cash by leveraging their spectrum assets.[157] This approach will allow them to continue investing in their network and maintain competitiveness.

Finally, the Joint Applicants argue that "the key question for merger analysis is not simply whether Sprint or T-Mobile would continue to exist in the absence of the merger, but how effective a standalone competitor each is likely to be going forward."[158]

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[154] The Public Advocates Office Opening Brief at p.29.

[155] Opening Brief at p. 78.

[156] Opening Brief at p. 79.

[157] Transcripts at p. 633:10-13.

[158] Opening Brief at p. 81.

This is not correct. The Commission's standard of review for whether the merger is in the public interest is whether the merger would maintain or increase public welfare. Since neither Sprint or T-Mobile are at risk of bankruptcy today,[159] there are no specific harms to the public interest that would occur if the merger does not go through. Increasing Sprint's competitiveness and requisite market share is not required for the Commission to show that the merger is or is not in the public interest.

VI. THE HARMS FROM THE PROPOSED MERGER WILL OUTWEIGH THE ALLEGED "ADDITIONAL BENEFITS"

A. LifeLine

Joint Applicants tout their commitment to "offer LifeLine indefinitely" as an additional benefit of the proposed merger.[160] However, T-Mobile can choose to start offering LifeLine today, whether the merger is approved or not. Offering LifeLine is not a merger-specific benefit and should be discounted.

T-Mobile could immediately benefit their own customers by offering them LifeLine, as well as all other LifeLine customers that would enjoy increased choice in the wireless LifeLine market. In fact, Sprint already offers LifeLine "indefinitely." There is no disagreement that working to help more customers access affordable phone service through the LifeLine program is laudable. However, the Commission should "credit only those efficiencies . . . unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects[,]" per the HMG.[161] The public interest is not improved by this "commitment."

Further, and with respect to rates, terms, and conditions, Joint Applicants' proposed commitment does not *improve* upon the program currently offered by Sprint, except to the extent that existing customers will be automatically upgraded to 3GB of

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[159] Mr. Draper stated in hearings "…my testimony is not that Sprint is going bankrupt….". Transcripts at p. 649:18-25.

[160] Opening Brief at p. 81.

[161] HMG at p. 30, see Pub Adv-004, Testimony of Eileen Odell (Odell) at p. 26.

data, rather than having to request an upgrade.[162] Clearly, this would be good for consumers regardless of the proposed merger. However, Joint Applicants do not provide any evidence that this benefit is unlikely to occur without the proposed transaction, as required by the HMG.

In addition, New T-Mobile's commitment to "strive to increase LifeLine adoption"[163] could effectively be satisfied by the addition of 332,500 customers at rate plans of less than $20, with zero increase to LifeLine participation. There is no evidence in the record that supports the contention that this condition will advance the LifeLine program, that these as-yet undescribed-in-the-record $20 rate plans will benefit low-income consumers, or that the Commission would have any enforcement power or effective recourse to address the totality of harms of the proposed transaction, should New T-Mobile's LifeLine plan fail to achieve significant public interest benefits.

1. Existing and New California LifeLine Customers Could Reap the Benefits of 5G Networks without the Merger

As noted at length above and in the record, the alleged network benefits of the proposed transaction are simply the benefits of a 5G network[164] that the Joint Applicants have admitted they will build, regardless of whether the merger in approved.[165] This is true of the benefits LifeLine customers can receive through Sprint's proposed standalone 5G network. For the reasons stated above, T-Mobile's refusal to participate in California LifeLine up to the present is the only impediment to its offering its LifeLine customers access to T-Mobile's network and casts doubt on New T-Mobile's level of commitment.

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[162] *Compare* Opening Brief at p. 82 with Sywenki Rebuttal Testimony at p. 6.

[163] See Opening Brief at p. 82.

[164] The Public Advocates Office Opening Brief at 19; Reed Opening Testimony at p. 10.

[165]

2. Existing and New California LifeLine Customers, including those of MVNOs, Could Reap the Benefits of 5G Networks without the Merger and Joint Applicants Have Made No Commitments to Lower Costs for Wholesale Customers

While Joint Applicants allege that "LifeLine customers will benefit from the New T-Mobile Network directly and through MVNOs[,]"[166] for the same reasons listed above, such benefits would come about simply by virtue of connection to a 5G network, which will occur regardless of the merger.

Joint Applicants contend that "New T-Mobile will be able to better compete with AT&T and Verizon, the dominant providers of wholesale services, which *should* inure to the benefit of consumers and MVNOs alike."[167] However, they fail to explain why AT&T and Verizon would respond to this alleged competition by lowering prices, when they have not done so to date.[168] In one way, Joint Applicants are correct: increased competition "should" inure to the benefit of consumers. However, this is not a "commitment" and would be difficult to enforce "indefinitely" should New T-Mobile find that LifeLine (or other low-income programs) are no longer economical. In light of the fact that this transaction would *decrease* competition,[169] Joint Applicants have not made a compelling case that prices will be lower for wholesale MVNO LifeLine customers.

B. Other Benefits

Other benefits claimed by Joint Applicants are tied to the acceptance into the record of a Memorandum of Understanding (MOU) between the California Emerging Technology Fund (CETF) and Joint Applicants. The Public Advocates Office opposes the MOU because the terms of the MOU are worse for California than the prior

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[166] Opening Brief at p.86.

[167] Opening Brief at p. 86. (Emphasis Added.)

[168] The Public Advocates Office Opening Brief at p. 14; Selwyn Opening Testimony at p. 68.

[169] The Public Advocates Office Opening Brief at p. 24.

commitments made by Joint Applicants in their case-in-chief. A more detailed analysis of the other benefits, which are largely tied to the MOU, are discussed more thoroughly below. Those benefits include job retention, service quality, and disaster preparedness.

VII. THE COMMISSION SHOULD VIEW THE CETF AND JOINT APPLICANTS' MOU WITH SKEPTICISM, BECAUSE IT IS NOT IN THE PUBLIC INTEREST

A. The MOU Was Submitted in a Procedurally Unsound Manner

On April 8, 2019, CETF and Joint Applicants submitted a Joint Motion to modify their respective positions in this proceeding to reflect the terms of a recently-executed Memorandum of Understanding (MOU) between CETF and the Joint Applicants (Joint Motion).

On April 23, 2019, the Public Advocates Office and other intervenors submitted oppositions to the Joint Motion, on the grounds that the request is procedurally improper and seeks relief that is not allowed by law.

On May 8, 2019, the ALJ issued a ruling that refers to the MOU as a "side agreement" and allows it to become part of the record. It is unclear if the Commission can adopt/approve the MOU since it was not submitted pursuant to Rule 12, or somehow incorporate the MOU into the final decision in this proceeding. The ALJ Ruling points out that "[g]ranting the motion does not pre-judge the question of whether the merger is in the public interest."[170]

Although the ALJ Ruling is not entirely clear, the Public Advocates Office understands that the ALJ Ruling allows the MOU to be entered into the evidentiary record in this proceeding. However, the Commission is not bound by its terms and is free to conclude that the proposed merger is not in the public interest and to deny the merger, in which case by its own terms the MOU is void.

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[170] May 8, 2019, ALJ 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.*

The Commission should be skeptical because it is a "side agreement" on which the parties have not been given full due process rights to comment on. Because it is an MOU and not a "settlement," pursuant to the ALJ Ruling the Commission cannot review it to determine if it meets the requirements of Rule 12 – that is, is it reasonable in light of the whole record, is it consistent with applicable law, and is it in the public interest.

Also, most of its provisions have already been publicly committed to by the Joint Applicants so it essentially adds nothing. With regards to infrastructure investments, the provisions of the MOU are actually *worse* for California.

Given that the parties are not given any opportunity to fully vet this "side agreement", the Commission should act cautiously before considering the MOU, which had not been proposed prior to the evidentiary hearings and, therefore, is not subject to testing or scrutiny that would exist for a settlement subject to the Commission's Rules. Therefore, the Public Advocates Office here repeats its objections to the MOU made previously in the Public Advocates Office's opposition to the MOU. The objections were set forth in the April 23, 2019, Public Advocates Office's Opposition to the Joint Motion, below.

B. The MOU Is Not In The Public Interest

Had proper settlement procedures been followed, the Public Advocates Office would have been able to conduct a thorough analysis that demonstrates that the MOU is not in the public interest and should not be adopted. Based on the limited information currently available, the Public Advocates Office has determined that the agreement is not in the public interest or reasonable on its face, as set forth below.

1. CETF Receives a Disproportional Amount of Funding Which Is Not Supported by the Record

Under this MOU CETF receives $13 million (roughly 27% of the entire settlement amount) for its "ongoing operations."[171] This amount exceeds any Commission approved

[171] Joint Motion at p. 6 and Attachment A (MOU) at p. 8. The MOU dedicates $35 million for "Digital Inclusion" projects, and an additional $13 million for CETF's "ongoing operations."

operating costs percentage and would equal an hourly rate that would far exceed any reasonable intervenor compensation award. Under the Commission's Rules, the parties could oppose this payment and the Commission could deny or modify it.

2. New T-Mobile's Commitment to "Better Rate Plans" is Vague and Unenforceable

With regards to "Same Rate Plans" or "Better Rate Plans", the MOU does not provide a concrete, verifiable benefit and yet leaves enforcement to the Commission.[172] "Same" or "Better" are subjective terms but the MOU provides no parameters as to what those terms mean. For example, New T-Mobile could offer more expensive rate plans with slightly better speeds and call that a "Better Rate Plan." Furthermore, the temporary pricing commitment of three years falls short of including the time when 5G services will be deployed; risking high prices for California consumers when 5G services becomes available. Temporary pricing commitments do not remedy the harms of removing a competitor and customer choice.

3. New T-Mobile's General Goal to Increase LifeLine Support Is Not Supported by the Record

With regards to LifeLine, the MOU's goal of new adoptions contrasts to the rest of the terms of the MOU in that it is not a commitment, but rather a "general goal" that New T-Mobile will make efforts to achieve.[173] This unenforceable goal should be discounted in the record as not providing any additional benefit to Californians as a result of the merger.

In addition, the MOU appears to misstate the number of existing Sprint LifeLine customers, and therefore overstates the number of new customers needed to meet the goal.[174] The MOU states that the additional subscribership goal can be satisfied with

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[172] Joint Motion at Attachment A (MOU) at p. 4.

[173] Joint Motion at Attachment A (MOU) at p. 5.

[174] Joint Motion at Attachment A (MOU) at p. 5. The record does not support that adding 332,500 new (additional) low-income households will come to a total of "no less than 675,000 enrolled LifeLine / low-income households" in California. In fact, the existing number of Sprint LifeLine customers is roughly 500,000, thus New T-Mobile will only have to add roughly 175,000 new households to meet this goal.

either new LifeLine customers or new subscribers to plans that cost $20.00 or less to the subscriber, so the MOU does not actually add new LifeLine customers, but a combination of both. However, evidence that increasing subscribership to plans that cost $20.00 or less helps low income customers is absent from the record. The MOU therefore appears to be more favorable towards LifeLine than it really is.

4. The Record Does Not Establish that a $35 Million Grant to CETF's Programs is in the Public Interest

The MOU requires New T-Mobile to provide $35 million over 5 years to CETF's "Digital Inclusion Policy and Programs" projects without any basis in the record to evaluate, verify, and monitor these programs to ensure that the amount of $35 million is appropriate. While the Public Advocates Office strongly supports efforts to close the digital divide, additional hearings are necessary to allow the Commission to evaluate these proposals. The record does not sufficiently describe what these programs do, the amount of money necessary to properly fund them, who operates them, or any other details.

5. Infrastructure Expenditures are Unsupported by the Record, and May Lead to Less Infrastructure than If There Was No Agreement

The MOU purports to determine the amount of investment in infrastructure that New T-Mobile will make in California after the merger without any discussion of whether that amount is reasonable. However, it appears that the MOU may actually implement a lower commitment than Joint Applicants' position in testimony. For example, in their testimony Joint Applicants commit to infrastructure investments by 2024; but in the MOU, New T-Mobile increases the investment period for another year with the option to extend it another year, which has the effect of lowering the amount of investment per year.[175] Also, the Joint Applicants state that 'By 2024, Californians will receive from New T-Mobile data rates greater than 150 Mbps to 97 percent of the

[175] Joint Motion at Attachment A (MOU) at p.9.

population and greater than 300 Mbps to 93 percent of the population.'[176] But in the MOU the Joint Applicants only commit to 5G technology at 90% of their total cell sites, of which only 80% are required to meet the promised speed tiers. This means only 72% of New T-Mobile's total towers would need to meet the 5G speed tiers. Also, the speed tier of 100 Mbps in the MOU is less than the previously promised 150 Mbps. Thus, the MOU offers commitments that are worse than what the Applicants are promising in their testimony.

6. There is No Basis to Determine if the Investment in Emergency Preparedness is Reasonable

The MOU purports to determine what dollar amount of investment in emergency preparedness is appropriate, as well as the number and locations of 5G emergency deployments, without any basis in the record and without reference to the Commission's ongoing emergency preparedness proceeding.[177] For example, the MOU requires New T-Mobile to expand the number of emergency mobile cell sites by 50%, without a basis in the record to determine what that number would be or whether it is a reasonable number considering the state's emergency needs.

7. Infrastructure Spending In Rural Areas May Result in Less Investment Than If There Was No Merger

The MOU does not specify the dollar amounts that New T-Mobile will spend on infrastructure in rural areas; in fact, it appears that under the Agreement New T-Mobile will build fewer cell sites in rural areas than it committed to in its testimony.[178] Instead, New T-Mobile commits to "prioritize" 10 rural areas in consultation with Rural Regional

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[176] Rebuttal Testimony of Neville Ray at p. 33.

[177] Rulemaking 15-06-009.

[178] Joint Motion, Attachment A (MOU) at p. 10. For example, in the MOU New T-Mobile commits to deploy 5G technology at 90% of the California cell site locations specified in T-Mobile's network plan, which is less than the 100% commitment in its testimony. Ray at p. 38.

Consortia, without any concrete commitments as to time or verifiable investment amounts.[179] [180]

C. Further Hearings Are Necessary

Rule 12.2 and 12.3 authorize parties to request hearings on proposed settlements where they are contested.[181] Therefore, pursuant to Rule 12, the Public Advocates Office requests evidentiary hearings to determine the factual basis for the MOU to determine whether it is reasonable in light of the record. Specifically, hearings are necessary to examine measures the MOU would implement using data that are not part of the record. For example, the Confidential version of the MOU lists capital expenditures in an amount that appears to be inconsistent with the record;[182] it lists 5G cell sites that are identified in aggregate without any specificity as to location or speed tier;[183] it dedicates $35 million to "Digital Inclusion Policy and Programs" that are not described in the record.[184] In addition, the Joint Motion and CETF's Press Release dated April 8, 2019, both state that CETF will receive $13 million for its "core mission" and "ongoing operations" which appears to be compensation directly to CETF.[185] Hearings are necessary to determine whether these items are in the public interest.

VIII. CONCLUSION

Joint Applicants' Opening Brief makes vague and unenforceable promises, and alleges benefits that are difficult to define and speculative. Moreover, the alleged benefits are not merger-specific because they derive from 5G networks that both

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[179] Joint Motion at Attachment A (MOU) at p. 6.

[180] The Public Advocates Office's silence on any specific issue in the MOU reflects the limited amount of time to prepare this opposition, and does not necessarily indicate opposition or support for that issue.

[181] Rule 12.4(a) authorizes the Commission to either grant such a request or order further hearings on its own initiative.

[182] Joint Motion, Attachment A (MOU) at p. 9.

[183] Joint Motion, Attachment A (MOU) at p. 10.

[184] Joint Motion, Attachment A (MOU) at p. 8.

[185] Motion at p. 6; see CETF Press Release at http://www.cetfund.org/files/190408_CETF_MediaRelease_T-Mobile%20FINAL.pdf

companies will build if the proposed merger is denied. Benefits that are vague and speculative should be discounted and ignored. Also, benefits that are not a result of the proposed merger should not be given any weight, because they will occur even without the merger. The harms to competition that will occur by eliminating an important market participant clearly outweigh the vague and merger-independent benefits touted by Joint Applicants. California consumers will benefit far more by having each company building an excellent 5G network, and the continued existence of 4 competitors in the wireless market rather than just 3. For the reasons stated herein, the Public Advocates Office respectfully requests that the Commission deny the proposed merger and reject the MOU between the Joint Applicants and CETF.

Respectfully submitted,

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