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)
And Related Matter.	A.18-07-012

REPLY OF THE PUBLIC ADVOCATES OFFICE TO RESPONSE BY JOINT APPLICANTS TO MOTION TO AMEND AND SUPPLEMENT TESTIMONY AND FOR ADDITIONAL HEARINGS

I. INTRODUCTION

Pursuant to Rule 11.1(f) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), the Public Advocates Office at the California Public Utilities Commission was granted permission by Administrative Law Judge Bemesderfer to submit this reply to the response by Sprint Communications Company L.P., Sprint Spectrum L.P, Virgin Mobile USA, L. P. and T-Mobile USA, Inc (Joint Applicants) to the Public Advocates Office motion to amend its testimony, provide supplemental testimony, and request for additional hearings. ALJ Bemesderfer granted permission to file this reply by e-mail on February 13, 2019, pursuant to Rule 11.1(f) which provides that replies must be filed and served within 10 days of the last day for filing responses to its motion.

Joint Applicants' Response highlights the woefully inadequate nature of the Application[1] and serves to underline the due process violation being perpetrated on the Public Advocates

[1] Joint Applicants filed two merger Applications, one for their wireline businesses and one for their wireless businesses, A.18-07-011 and A.18-07-012. The testimony and hearings in this proceeding focused on the wireless application (A.18-07-012), as does the Public Advocates Office's motion and this reply brief.

Office in this proceeding. Joint Applicants cannot make the argument that their wireless Application contained the necessary information for the Commission to determine whether the merger is in the public interest. Instead, their Response shows that their Application is only sufficient if Joint Applicants are allowed to provide voluminous additional evidence in rebuttal testimony, which they did. But as the Commission has stated: "Providing the basic justification in rebuttal is unfair, since parties are not generally given the opportunity to respond to rebuttal with testimony of their own… When the utility has the evidentiary burden, we caution against the use of rebuttal testimony to provide the basic justification. As a matter of fairness, we must seriously consider either striking such testimony or extending the proceeding, at the utility's risk, to allow for responsive testimony from the other parties."[2]

As described below, Joint Applicants' wireless Application did not include their case-in-chief evidence and arguments. Instead, Joint Applicants included a vast amount of information, including thousands of pages from their FCC filings, in their rebuttal testimony. While some of the information may have been provided in discovery a few weeks prior to the Public Advocates Office's testimony, the narrative descriptions, explanations of benefits, arguments about the new 5G network, and other alleged benefits, were not provided prior to rebuttal testimony.

Joint Applicants state that the Public Advocates Office are "free" to "comment on any of the testimony introduced in these proceedings to date" in opening and reply briefs.[3] However, due process requires that the Public Advocates Office be given a reasonable opportunity to respond to evidence presented by Joint Applicants. Evidence presented in rebuttal testimony gives no meaningful opportunity for response.

Using the briefs to introduce new evidence and arguments in response to the new rebuttal information is not appropriate, but that is what Joint Applicants suggest that the Public Advocates Office should do. If this motion is denied and the Public Advocates Office has no opportunity to provide supplemental testimony, the Commission should take up Joint Applicants' recommendation that the Public Advocates Office should put its responsive evidence and testimony in the briefs, which would clearly require additional time for the briefs. The schedule provides for a mere three weeks to prepare opening briefs. If this motion is denied, the Public

[2] *In the Matter of the Application of Southern California Water Company*, (D.04-03-039). Emphasis added.

[3] Response at 3.

Advocates Office should be granted at least an additional three weeks to prepare opening briefs, in order to do as Joint Applicants recommend and put its sur-rebuttal arguments and evidence in the opening briefs. The Public Advocates Office has continued to propound discovery since the hearings with the hope that the record will be supplemented with the Public Advocates Office' analysis and rebuttal evidence.

Joint Applicants also oppose the motion on the grounds that the current schedule is "almost identical to the one Cal PA itself proposed."[4] This has no merit. Clearly, the Public Advocates Office could only propose and abide by a schedule based on what was contained in the Application itself. The Public Advocates Office could not have foreseen the nature and extent of the evidence and other statements that Joint Applicants placed in their rebuttal testimony.

For these reasons, the Public Advocates Office motion should be granted, or at the very least the Commission should grant additional time to prepare opening briefs in order to include sur-rebuttal arguments, which will be voluminous.

II. DISCUSSION

A. Joint Applicants Incorrectly Assert That They Have Introduced No New Arguments or Information

1. Introduction of New T-Mobile's "In-Home Broadband" in Rebuttal Testimony

Joint Applicants incorrectly claim that their Application adequately describes and explains New T-Mobile's in-home broadband offering.[5] They claim that the Application was sufficient, and the rebuttal testimony only responds to Mr. Reed's assertion that it had not been adequately explained. However, even a cursory review of their Application (page 22) reveals that only a few vague promises about In-Home Broadband were made, without any of the voluminous detail provided by Mr. Sievert in his rebuttal testimony. The explanation and description of the alleged in-home broadband benefits had not been provided previously.

[4] Response at 2.

[5] Response at 3.

For example, the following items appear in Mr. Sievert's testimony but do not appear in Data Request responses or FCC filings provided previously to the Public Advocates Office:

a) **Cost Savings and Subscription Types:** Sievert's Rebuttal Testimony at page 30, lines 7 - 17 provide new California-specific data (e.g. dollar amounts and California households) on cost savings by subscriber type.

b) **Data Plans**: Sievert's Rebuttal Testimony at page 31, lines 5 -9, states, "the New T-Mobile business plan assumes 500 GB of usage per household." A footnote in Sievert's FCC Reply Declaration at p. 54, footnote 90 provides a range of 400 - 500 GB usage per subscriber per month.

c) **Standalone T-Mobile plans:** Sievert's Rebuttal Testimony, page 33, lines 17-19 provide that T-Mobile intends to launch in-home service targeting "a very limited number of DSL- and satellite only service areas."

2. Introduction of 563 pages of Joint Applicant's FCC Filings

Joint Applicants do not deny that they did not include 563 pages of the company's reply to the joint opposition filed at the FCC with their Application.[6] However, Joint Applicants do not dispute that in the Application they only included a link to the Executive Summary of their Public Interest Statement filed at the FCC, and that the bulk of Joint Applicants FCC filings were not included or referenced at all.[7] Merely including a link to one part of the FCC does not put the intervenors on notice that the bulk of the FCC filings would be put into the record in the rebuttal testimony. It was reasonable for the Public Advocates Office to believe that the applicants intended their Application to include only those excerpts and references specifically contained in the Application, and not to assume inclusion of most of the FCC record, which Joint Applicants attached to their rebuttal testimony.

3. No Mention of the "Network Model" In the Application

Joint Applicants claim that the "network model" was not a new issue.[8] However, they do not dispute that there was no mention of the network model in their Application. Instead, Joint Applicants cite vaguely to pages 13-21 of the Application, which discuss a "network", but there is no mention of any network modeling done by the Joint Applicants. The Public Advocates Office had no reasonable foreknowledge that Joint Applicants would attempt to enter evidence of

[6] Response at Appendix B. Joint Applicants attached to their rebuttal testimony the following documents submitted to the FCC: the T-Mobile/Sprint Public Interest Statement ("PIS"), Joint Opposition, and Reply to the Joint Opposition. See Response at 5, footnote 18.

[7] A.18-07-012 at footnote 4.

[8] Response at Appendix C.

network modeling, or indeed which model (there are more than one), would be used in the rebuttal testimony.

Joint Applicants also refer to a network model provided in response to the Public Advocates Office Data Request 1-29, but that model is not mentioned in the Application and not the same as the one provided by Mr. Ray's rebuttal testimony, nor does it contain the narrative description and arguments about quality, coverage, etc., that Mr. Ray includes in his rebuttal testimony.

4. California Specific County Level Maps Not in the Application

The county level maps, showing 5G coverage and spectrum bands for 58 California counties, were not included with the Joint Applicants' Application.[9] Instead, Joint Applicants provided the complete set of county maps on December 21, 2018, providing the Public Advocates Office with insufficient time to analyze the maps. The Public Advocates Office did not have reasonably sufficient time, nor any indication, that these maps would be included with Joint Applicants' rebuttal testimony. Furthermore, it is undisputed that Mr. Ray's rebuttal testimony includes a narrative that describes and explains the alleged benefits the maps attempt to show, which the Public Advocates Office had not seen before.

While the Public Advocates Office did extensive cross-examination of Mr. Ray regarding these county level maps, the Public Advocates Office had a mere 4 business days after receiving the maps to address and explore Mr. Ray's testimony regarding the maps, which it had not seen before it was provided by Joint Applicants in their rebuttal testimony. This is an insufficient amount of time to prepare cross examination on new information.

5. New Arguments and Information Regarding Customer Migration

Joint Applicants argue that the Public Advocates Office was wrong to claim that customer migration from Sprint to T-Mobile was not discussed in the Application.[10] However, this assertion misstates the Public Advocates Office' position. The Public Advocates Office did not claim that customer migration from Sprint to T-Mobile was never discussed previously. Instead, the Public Advocates Office' Motion to Amend and Supplement its Testimony argued

[9] Response at Appendix D.

[10] Response at Appendix E.

that Mr. Ray's explanation and description of customer migration, contained on page 48 Lines 11-30 and page 49 Lines 1-9 of his rebuttal testimony, contained new information and arguments regarding the MetroPCS customer migration to T-Mobile, not Sprint. (Presumably, Joint Applicants included the MetroPCS information for illustrative purposes, since the topic in the Application regarding customer migration was about Sprint's customer migration.)[11] As the Application contained only a one-sentence explanation regarding the MetroPCS customer migration, and none of the details provided by Mr. Ray in his rebuttal testimony, this rebuttal testimony information is completely new.

6. New and Non-Responsive Information Regarding Privacy

Joint Applicants claim that its rebuttal testimony regarding gaps in their privacy policies is solely in response to the Public Advocates Office' testimony on privacy.[12] Again, Joint Applicants do not dispute that they did not mention privacy in their Application.

While it is true that the Public Advocates Office propounded data requests relating to privacy, and prepared testimony on this subject, it is undisputed that the Public Advocates Office had not seen the testimony of Ms. Brye (or any other witness) relating to privacy. Most of the evidence and statements made by Ms. Brye had not been provided to the Public Advocates Office until rebuttal testimony, 4 business days before the hearing.

Furthermore, Joint Applicants argue that "the fact that Cal PA opted not to cross-examine Ms. Brye" serves to "underscore" the alleged "lack any evidentiary or other basis" for the Public Advocates Office' arguments.[13] However, the Public Advocates Office simply did not have the time or resources to conduct cross-examination on a witness whose entire direct testimony was provided (under the guise of rebuttal testimony) a mere 4 business days before the hearings.

Below are examples of new information that appear in Ms. Brye's testimony but do not appear in Data Request responses or FCC filings provided previously to the Public Advocates Office:

- Detailed information about the design of the consultant-created TPRM framework, including the specific risk "domains" and "sub-domains" that T-Mobile now uses to assess risks (Brye Testimony at 5);

[11] A.18-07-012 at 19.

[12] Response at Appendix F.

[13] Response at Appendix F.

- The existence of "residual risk scores" and "inherent risk scores," and how those scores are used to determine the type, scope, and frequency of review (Brye Testimony at pp. 4-6);
- T-Mobile's use of "commercially available" tools, such as Lexis Diligence and BitSight scores, that "inform or confirm the accuracy of the questionnaire responses of the supplier" (Brye Testimony at pp. 4-6);
- T-Mobile's responses to date have ONLY talked about the "Cyber Assessment Questionnaire;" no other questionnaires or assessments had been mentioned until Ms. Brye's testimony said that there are others (Brye Testimony at pp. 3-6).

7. The IKK Model

Joint Applicants wrongly claim that the Israel, Katz and Keating economic model presented to the FCC last fall was analyzed and rebutted by Dr. Selwyn, based on his citation to that model.[14] However, the citation by Dr. Selwyn in his testimony was not to the IKK economic model, but to a statement made in a declaration by Israel, Katz, and Keating to the FCC to the effect that "although there is substitution between postpaid and prepaid products, postpaid products may be closer substitutes for other postpaid products and prepaid products closer substitutes for other prepaid products."[15] Dr. Selwyn in his testimony did not analyze the IKK model, which was not provided in the Application (indeed, was not even created before the Application was filed). Mr. Israel himself states that "Dr. Selwyn never so much as mentions the existence of the IKK model."[16]

Furthermore, the Public Advocates Office's decision not to cross-examine Mr. Israel was due to the fact that it did not have the time or resources to devote to analyzing and preparing cross-examination on voluminous "direct" testimony that was provided only 4 business days before the hearings.

8. Information Regarding Wholesale Services Was Not Responsive to the Public Advocates Office' Testimony

Again, Joint Applicants' wireless Application did not contain any information about its provision of wholesale services to other telecommunications carriers in its Application. Instead, Joint Applicants point to their responses to the Public Advocates Office's data requests regarding

[14] Response at Appendix G; footnote 44 of the Appendix.

[15] Testimony of Dr. Lee Selwyn at pages 63-64.

[16] Testimony of Mark Israel at pages 3-4.

wholesale services.[17] The Public Advocates Office did provide limited testimony regarding wholesale services; however, Mr. Keys' "rebuttal" testimony goes beyond what the Public Advocates Office included in its direct testimony. Mr. Keys testimony includes statements such as "TracFone principally uses Verizon Wireless and also buys services from AT&T and, to a more limited extent, Sprint"[18] which the Public Advocates Office did not have the opportunity to test and conduct discovery on. Joint Applicants selectively chose a few statements made by the Public Advocates Office and used that to provide more information that is not rebuttal testimony. This additional testimony is needed to form their case-in-chief about the benefits of the merger (e.g., addressing harm to Joint Applicants' wholesale customers).

B. Joint Applicants Incorrectly Assert that the Commission's Rules Prohibit Them From Supplementing Their Insufficient Application

Joint Applicants argue that Rule 1.12 prohibits them from amending their Application after the Scoping Ruling was issued.[19] Clearly, this is nonsense. How can it be preferable under the Commission's Rules to supplement a deficient application through rebuttal testimony, instead of amending the application? The Rules are designed to ensure fundamental fairness and due process, which were violated here by what the Joint Applicants did.

If this argument has any merit, it is a compelling reason to exclude the entirety of Joint Applicants' rebuttal testimony, because (according to Joint Applicants) the Rules do not allow substantive changes to an application after the Scoping Ruling is issued.

C. Joint Applicants Incorrectly Assert That They Are Only Following the Schedule Suggested By the Public Advocates Office

As discussed above, the schedule agreed to by the parties was made under the assumption that the intervenors would need to address the evidence and arguments submitted in the Joint Applicants' Application. It was not reasonably foreseeable that Joint Applicants would include 4000 pages of new information and testimony in their rebuttal testimony, delivered 4 business days before the hearing. If so, the Public Advocates Office would certainly not have agreed to this schedule.

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[17] Response at Appendix H.

[18] Testimony of Thomas Keys at 12.

[19] Response at 5.

III. CONCLUSION

For the reasons stated herein, the Public Advocates Office Motion should be granted. If it is denied, the Commission should take up Joint Advocates suggestion to put the Public Advocates Office sur-rebuttal evidence and testimony in its opening brief, which would clearly require additional time. If that is the case, the Public Advocates Office would require at least three additional weeks to prepare opening briefs.

Respectfully submitted,

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