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 Matters.	Application 18-07-012

OPPOSITION OF THE PUBLIC ADVOCATES OFFICE TO MOTION BY CETF AND JOINT APPLICANTS TO MODIFY POSITIONS

I. INTRODUCTION

On April 8, 2019, intervenor party the California Emerging Technology Fund (CETF) together with Joint Applicants Sprint Communications Company L.P. (U-5112-C), Sprint Spectrum L.P. (U-3062-C), Virgin Mobile USA, L.P. (U-4327-C), and T-Mobile USA, Inc. (collectively, "Joint Parties") 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).

The Public Advocates Office of the California Public Utilities Commission opposes this request on the grounds that it is procedurally improper and seeks relief that is not allowed by law. The Joint Parties seek to enter into what they themselves alternately refer to as a settlement agreement[1] or MOU (hereafter, the Agreement), but

[1] See CETF Press Release dated April 8, 2019. http://www.cetfund.org/files/190408_CETF_MediaRelease_T-Mobile%20FINAL.pdf

which is in effect a settlement agreement, without following any of the procedural requirements of Article 12 (Settlements) of the California Public Utilities Commission's Rules of Practice and Procedure (Rules). Specifically, the Joint Parties seek to skirt the Article 12 requirements related to notice of the agreement, public settlement conferences, reasonableness requirements, and the requirement that the Commission find the settlement to be in the public interest.[2] In doing so, the Joint Parties would deprive other parties of the opportunity to comment on the agreement,[3] and deprive the Commission of the opportunity to fulfill its legal obligation to assess the Agreement's reasonableness and potential to provide public benefits.[4] At the same time, the Joint Parties want the Commission to maintain jurisdiction and responsibility for enforcing the Agreement.

The Public Advocates Office hereby requests that the Commission hold additional evidentiary hearings prior to consideration of the Agreement to, among other things, determine whether there is any basis for the facts and figures and dollar amounts listed in the Agreement. Alternately, the Commission should reject the Motion and order the Joint Parties to follow the Commission's rules and submit the Agreement as a proper settlement. This will allow the other parties to file comments on the settlement and the Commission to review it under the established parameters for settlements; that is, whether it is reasonable in the light of the record, consistent with applicable law, and in the public interest.

II. DISCUSSION

A. The Motion Is Procedurally Improper

In the Motion, Joint Parties request that the Commission take note of CETF's changed position with regards to this proceeding, in light of Joint Applicants' commitments set forth in the Agreement, which is attached to the Motion. CETF now supports the proposed merger. Although styled as an MOU, the Agreement is in fact a

[2] Rule 12.1(a)-(d).

[3] Rule 12.2.

[4] Rule 12.4.

settlement because CETF is receiving money and other commitments in return for their support of the Application.

The Motion is procedurally improper because Joint Parties did not follow the Commission's Rules regarding settlements. Parties are not required to amicably settle their differences, but if they do, they must follow the Commission's Rules. Article 12 (Settlements) provides that parties proposing a settlement are subject to the following requirements:

- Rule 12.1(a): If a settlement is proposed that resolves any material issue of law or fact or on a mutually agreeable outcome to the proceeding, it must be submitted by written motion any time after the first prehearing conference and within 30 days after the last day of hearing.[5]
- Rule 12.1(a): The motion must contain a statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged.
- Rule 12.1(b): Prior to signing any settlement, the settling parties shall convene at least one conference with notice and opportunity to participate provided to all parties. Notice must be 7 days in advance.
- Rule 12.1(d): The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.
- Rule 12.2: Parties may file comments contesting the settlement within 30 days.
- Rule 12.2: Parties are allowed to (in fact, required to) state the legal basis of their opposition, and the factual issues that they contest, in their comments.
- Rule 12.3: If the ALJ wishes, they may set hearings or they may decline to do so, if it is necessary to resolve material contested issues of fact or contested issues of law not addressed by the settlement. If hearings are set, parties must provide witnesses to testify concerning the contested issues.

[5] More than 30 days has elapsed since the last day of evidentiary hearings, although the Public Advocates Office believes the ALJ has flexibility to accept proposed settlements beyond this window, for good cause.

- Rule 12.4: If the Commission determines that the settlement is not in the public interest, the Commission may: 1) deny the settlement; 2) hold hearings on the underlying issues, in which case the parties to the settlement may either withdraw it or offer it as joint testimony; 3) allow the parties to renegotiate; or 4) allow the parties to propose alternative terms to the parties to the settlement which are acceptable to the Commission.

The requirements of the rules are mandatory. The joint parties cannot skirt these provisions of Article 12 by sometimes calling the Agreement an MOU rather than a settlement agreement. Similarly, the Commission cannot approve the Agreement and determine to enforce its terms simply because the Agreement is sometimes called an MOU rather than a settlement agreement. Finally, other parties cannot be denied the opportunity to file comments, state the legal basis of their opposition, and identify factual issues that they contest merely because the Agreement is sometimes called an MOU rather than a settlement agreement. These settlement rules exist to ensure and safeguard the public interest, which is not possible if the Commission cannot review it.

The Agreement also seeks to rely on the Commission to enforce its provisions. Among other things, the Motion provides that parties may seek relief from the Commission in the event of a non-cured breach,[6] and the Agreement purports to invoke the Commission's confidentiality provisions (without complying with General Order 66-D). The Agreement also requires that the Commission provide ongoing monitoring of the annual reporting requirements for an additional 5 years, without even providing the Commission the ability to opine on the reasonableness of these reporting requirements.[7] Thus, the Joint Parties seek to rely on the auspices of the Commission to create and enforce the Agreement, despite the fact that they do not allow the Commission or the other parties to review the Agreement.

Finally, the Joint Parties ask the Commission to accept their modified positions in this proceeding on the grounds that, in light of the Agreement, the merger would now be

[6] Motion, Attachment A (MOU) at 15.

[7] Motion, Attachment A (MOU) at 14.

an unqualified public good.[8] However, the Agreement does not provide any means for the Commission to review, modify, supplement, or investigate this claim. As discussed below, on its face, the Agreement is NOT in the public interest and does not remedy the harms that will be created by the proposed merger if it is approved. Here again, by not following the proper procedures, the Joint Parties have attempted to avoid such a determination.

Therefore, consistent with the above, the Public Advocates Office respectfully requests that the Motion be rejected and the Joint Parties be ordered to comply with Article 12 and submit their Agreement using the required procedures.

B. The Agreement Is Not In The Public Interest

Had proper settlement procedures been followed, the Public Advocates Office would have provided a thorough analysis that demonstrates that the Agreement 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.

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

Under this agreement CETF receives $13 million (roughly 27% of the entire settlement amount) for its "ongoing operations."[9] This amount exceeds any Commission approved 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.

[8] Motion at 4. The Motion states that the "proposed New T-Mobile will provide numerous consumer benefits which will serve the public interest here in California."

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

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 Agreement does not provide a concrete, verifiable benefit and yet leaves enforcement to the Commission.[10] Same or Better are subjective terms but the Agreement provides no parameters as to what those terms mean. For example, it is likely that New T-Mobile would offer more expensive rate plans with slightly better speeds and call that a "Better Rate Plan."

3. New T-Mobile's Commitment to Increased LifeLine Support Is Not Supported by the Record

With regards to LifeLine the Agreement appears to misstate the number of existing Sprint LifeLine customers, and therefore overstates the number of new customers needed to meet the goal.[11] Further, the Agreement states that the additional subscribership goal can be satisfied with either new LifeLine customers or new subscribers to plans that cost $20.00 or less to the subscriber, so the Agreement 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 Agreement 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 Agreement 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

[10] Motion at Attachment A (MOU) at 4.

[11] Motion at Attachment A (MOU) at 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.

digital divide, as described above, additional hearings are necessary to investigate 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 about them.

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

The Agreement 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 Agreement 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 Agreement, 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.[12] 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 population and greater than 300 Mbps to 93 percent of the population.'[13] But in the Agreement 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 is less than the previously promised 150 Mbps. Thus, the Agreement 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 Agreement purports to determine what dollar amount of investment in emergency preparedness is appropriate, as well as the number and locations of 5G

[12] Motion at Attachment A (MOU) at 9.

[13] Rebuttal Testimony of Neville Ray at 33.

emergency deployments, without any basis in the record and without reference to the Commission's ongoing emergency preparedness proceeding.[14] For example, the Agreement 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 Agreement 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.[15] Instead, New T-Mobile commits to "prioritize" 10 rural areas in consultation with Rural Regional Consortia, without any concrete commitments as to time or verifiable investment amounts.[16] [17]

C. Further Hearings Are Necessary

Rule 12.2 and 12.3 authorize parties to request hearings on proposed settlements where they are contested.[18] Therefore, pursuant to Rule 12, the Public Advocates Office requests evidentiary hearings to determine the factual basis for the Agreement to determine whether it is reasonable in light of the record. Specifically, hearings are necessary to examine measures the Agreement would implement using data that are not part of the record. For example, the Confidential version of the Agreement lists capital

[14] Rulemaking 15-06-009.

[15] Motion, Attachment A (MOU) at 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.

[16] Motion at Attachment A (MOU) at 6.

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

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

expenditures in an amount that appears to be inconsistent with the record;[19] it lists 5G cell sites that are identified in aggregate without any specificity as to location or speed tier[20]; it dedicates $35 million to "Digital Inclusion Policy and Programs" that are not described in the record.[21] 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.[22] Hearings are necessary to determine whether these items are in the public interest.

III. CONCLUSION

For the reasons set forth above, the Public Advocates Office hereby requests that the Commission hold additional evidentiary hearings prior to consideration of the Agreement to, among other things, determine whether there is any basis for the facts and figures and dollar amounts listed in the Agreement. Alternately, the Commission should reject the Motion and order the Joint Parties to follow the Commission's rules and submit the Agreement as a proper settlement.

Respectfully submitted,

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[19] Motion, Attachment A (MOU) at 9.

[20] Motion, Attachment A (MOU) at 10.

[21] Motion, Attachment A (MOU) at 8.

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