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Admin. Law Judge:	<u>K. J. Bemesderfer</u>
Cal PA Project Mgr.:	<u>S. Lyser</u>
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PUBLIC ADVOCATES OFFICE



Public Advocates Office

California Public Utilities Commission

**Reply Testimony
Of
Eileen Odell
On the Proposed Transfer of Control
of Sprint to T-Mobile: Impacts on
Low Income Consumers**

- PUBLIC -

San Francisco, California
November 22, 2019

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1 **MEMORANDUM**

2 This report was prepared by Eileen Odell of the Public Advocates Office at the
3 California Public Utilities Commission (Public Advocates Office) under the general
4 supervision of Program & Project Supervisor Shelly Lyser. Attachment A to this
5 testimony is Eileen Odell’s Statement of Qualifications and Experience. The Public
6 Advocates Office is represented in its review of Applications (A.) 18-07-011 and A.18-
7 07-12 by legal counsel, Travis Foss and Michelle Schaefer.

8 This testimony serves as the Public Advocates Office’s reply to the October 24,
9 2019 Assigned Commissioner’s Amended Scoping Ruling (Amended Scoping Ruling)
10 regarding the proposed transfer of control of Sprint Spectrum L.P. and Virgin Mobile
11 USA, L.P. (Virgin Mobile) (collectively Sprint Wireless), and Sprint Communications
12 Company L.P. (Sprint Wireline), to T-Mobile USA, Inc. (T-Mobile USA) (collectively,
13 the Applicants). This report further responds to subsequent new testimony submitted by
14 DISH Networks and supplemental testimony submitted by the Applicants. This reply
15 testimony addresses new issues listed in the Amended Scoping Ruling and in the
16 Applicants’ testimony and focuses on the impact of the proposed transaction on low
17 income customers. This report addresses questions 5 and 7 of the Amended Scoping
18 Ruling, stated as follows:

- 19 5. How does the divestiture of Sprint, Boost and Virgin pre-paid
20 businesses impact California customers who are currently
21 receiving services from one or another of these providers? [...]
- 22 7. In what other ways, if any, could the Department of Justice (US
23 DOJ) and Federal Communications Commission (FCC)
24 commitments change the benefits that applicants have claimed
25 California customers will receive from the proposed transaction?

26 This testimony is comprised of the following chapters:

Chapter	Description
I	Responding to the Assigned Commissioner’s August 24, 2019 Amended Scoping Ruling and subsequent Supplemental Testimony submitted by the Applicants and DISH Networks regarding the effects on the proposed transaction of certain post-hearing commitments made by Sprint and T-Mobile, focusing on the ways in which they particularly impact low income consumers.

1 **I. INTRODUCTION**

2 As described in the Public Advocates Office’s Testimonies submitted in this
3 proceeding on January 7, 2019, the California Public Utilities Commission (Commission)
4 should reject the proposed merger between Sprint and T-Mobile, because “[t]he benefits
5 that the Applicants seek to ascribe to the merger easily pale when compared with the
6 significant risks that the merger will create for California consumers, competitors, and
7 state and local economies.”¹ Commitments made since the completion of evidentiary
8 hearings and closing of the evidentiary record in this proceeding fail to mitigate these
9 risks, and in some cases, increase the risks of the proposed transaction. Applicants made
10 these commitments via (1) a memorandum of understanding with the California
11 Emerging Technology Fund (CETF MOU)² (2) *ex parte* communications with the
12 Federal Communications Commission (FCC Commitments) and (3) a [Proposed] Final
13 Judgment filed by the United States Department of Justice (US DOJ Commitments)
14 (collectively, Post-Hearing Commitments), concurrently with its suit to enjoin the
15 proposed transaction.³

16 The Post-Hearing Commitments fail to protect low income customers from the
17 risks of the proposed transaction. Further, material issues of dispute remain, including:

- 18 1. Whether the Pricing Commitment that currently allows New T-
19 Mobile to retire lower-cost legacy plans at its discretion
20 sufficiently protects consumers from the competitive harms of
21 the merger;
- 22 2. The scope of New T-Mobile’s ability to be granted “relief” from
23 its LifeLine Commitment when material changes to the LifeLine
24 program occur;

¹ Public Advocates Office, Opening Testimony of Dr. Lee L. Selwyn (on the competitive harms of the proposed transaction) at ¶ 62 (Jan. 7, 2019).

² See Amended Joint Application for Review of Wireless Transfer Notification per Commission Decision 95-10-032 (hereinafter Amended Joint Wireless Application) at Confidential Exhibit U, Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc. (Sept. 20, 2019) (hereinafter CETF MOU).

³ See United States of America et al., v. Deutsche Telekom AG, T-Mobile US, Inc., SoftbankGroup Corp., Sprint Corporation, and DISH Network Corporation, DDC, Civil Action No. 1:19-cv-02232-TJK.

- 1 3. Whether New T-Mobile would continue Sprint’s support of low
2 income consumers by offering a transitional service for former
3 LifeLine customers should the transaction be approved;
- 4 4. Whether the customers currently participating in the Boost Pilot
5 Program for LifeLine will be retained by New T-Mobile and
6 whether the Pilot Program itself will continue if the proposed
7 merger is approved.

8 **II. THE POST-HEARING COMMITMENTS FAIL TO**
9 **PROTECT LOW INCOME CONSUMERS FROM THE**
10 **HARMS OF THE PROPOSED TRANSACTION**

11 **A. The Post-Hearing Pricing and Divestiture Commitments**
12 **Fail to Alleviate Risks of Competitive Harms**

13 The Post-Hearing Commitments fail to protect low income customers from the
14 competitive harms that will likely result from the proposed transaction. The Public
15 Advocates Office’s January 7, 2019 Testimony concludes that the elimination of Sprint
16 and the resulting roughly co-equal market positions of New T-Mobile, AT&T and
17 Verizon would result in serious competitive harms and would not be in the public
18 interest.⁴ The effects will be concentrated on low income customers due to the merging
19 entities’ positions in and shares of the prepaid market segment.⁵ These harms include
20 increased risk of parallel conduct between the three remaining Mobile Network Operators
21 (MNOs)⁶ and price increases for former Sprint and T-Mobile customers.⁷

22 Two commitments made by the Applicants in recent months ostensibly claim to
23 address these anti-competitive results of the proposed transaction: a Pricing Commitment⁸

⁴ Opening Testimony of Dr. Lee L. Selwyn at ¶¶ 65.

⁵ Public Advocates Office, Executive Summary of Opening Testimony for the Proposed Transfer of Control of Sprint to T-Mobile at 4 (Jan. 7, 2019); Public Advocates Office, Opening Testimony of Eileen Odell, on the Proposed Transfer of Control of Sprint to T-Mobile: Impacts on Low Income Consumers at 13-22 (Jan. 7, 2019).

⁶ Opening Testimony of Dr. Lee L. Selwyn at ¶¶ 64 et seq.

⁷ Opening Testimony of Dr. Lee L. Selwyn ¶¶ 65-66.

⁸ CETF MOU at 4. The Pricing Commitment found in the FCC *ex parte* materials parallels the Pricing Commitment found in the CETF MOU.

1 and a Divestiture Commitment.² The terms of the Pricing Commitment require New
2 T-Mobile “to make available the same or better rate plans as those offered by T-Mobile or
3 Sprint as of February 4, 2019 for three years following the merger.”¹⁰ The terms of the
4 Divestiture Commitment, in pertinent part, require New T-Mobile to divest certain Sprint
5 assets to DISH, including roughly 9 million Sprint-branded prepaid, Boost-branded
6 prepaid, and Virgin prepaid subscribers, (while excluding Sprint’s LifeLine- only prepaid
7 brand, Assurance Wireless)¹¹ in hopes that DISH will eventually become a fourth
8 nationwide MNO to take Sprint’s place.¹² However, these commitments do not prevent the
9 risk of significant competitive harms noted above.

10 The Pricing Commitment fails to satisfy concerns about the proposed merger’s
11 effect on prices. Behavioral conditions such as price caps ultimately expire, in this case,
12 three years after the close of the transaction. The assumption that underlies this condition
13 is that within three years, another entity will have gained market entry and market share
14 to the extent that it could exert the competitive pressure on prices destroyed by the
15 proposed merger, such that a pricing commitment would no longer be necessary to ensure
16 prices do not increase. As noted in the Public Advocates Office’s Reply Testimony of
17 Dr. Lee Selwyn and discussed further below, the possibility of a new fourth MNO to
18 develop a nationwide network in three years is unlikely, both in the general sense,¹³ as
19 well as with regards to the specific possibility of DISH achieving that market position.¹⁴

² United States of America et al., v. Deutsche Telekom AG et al., Competitive Impact Statement at 8 (hereinafter US DOJ Competitive Impact Statement). The US DOJ’s Competitive Impact Statement describes the competitive harms that would result from the proposed merger. The Proposed Final Judgment submitted by the US DOJ contains the parameters of the commitments made by T-Mobile, Sprint and DISH thought necessary and sufficient by the US DOJ to remedy the harms described in the Competitive Impact Statement.

¹⁰ Motion of the Joint Applicants to Advise the Commission of New FCC Commitments at Exhibit 1 (May 20, 2019), FCC Commitments *ex parte*, Letter to Marlene H. Dortch at 2 (May 20, 2019).

¹¹ Amended Joint Wireless Application at 43, n.113.

¹² US DOJ Competitive Impact Statement at 3.

¹³ Opening Testimony of Dr. Lee L. Selwyn at ¶ 63.

¹⁴ Public Advocates Office, Reply Testimony of Dr. Lee. L Selwyn at ¶ 95 (Nov. 22, 2019).

1 Thus, it is unlikely that there will be a competitive MNO to exert competitive pressure on
2 prices when the Pricing Commitment expires in three years, leaving New T-Mobile free
3 to increase prices. Therefore, this three-year pricing commitment does not mitigate the
4 harms of the proposed permanent merger of the two companies.

5 Further, the wording of the Pricing Commitment highlights one of the central
6 concerns with the proposed merger: the potential for T-Mobile to decrease choice to
7 customers, particularly cost-conscious customers who may value lower prices more than
8 receiving additional data at a higher price. T-Mobile notes that while “the same or
9 better” rate plans will be maintained for three years, “when a better post-merger plan is
10 offered, New T-Mobile may discontinue a less appealing legacy plan.”¹⁵ While New
11 T-Mobile may believe that a plan with a lower dollar per Gigabyte (GB) rate is “better”
12 than its legacy plan, if the price paid for these plans increases and legacy plans are
13 eliminated, cost-conscious consumers would lose the option to choose.¹⁶ The risk of this
14 is stark, given that the Applicants’ own model predicts that absolute dollar price levels
15 for New T-Mobile’s plans will go up following the transaction.¹⁷

16 The Divestiture Commitment also fails to remedy these concerns. The US DOJ
17 notes its Divestiture Commitment is required for the transaction to move forward because
18 without it, “neither [market] entry nor expansion is likely to occur in a timely manner or
19 on a scale sufficient to replace the competitive influence now exerted on the market by
20 Sprint.”¹⁸ The Divestiture Commitment is a direct response to this concern, intrinsic to

¹⁵ Motion of the Joint Applicants to Advise the Commission of New FCC Commitments at Exhibit 1 (May 20, 2019), FCC Commitments *ex parte* Letter to Marlene H. Dortch at 2-3, n.9 (May 20, 2019).

¹⁶ Unfortunately, customers have already lost one prepaid brand choice, however. New T-Mobile has pledged to maintain (or offer “better”) T-Mobile/Sprint plans as of the reference date of February 4, 2019. But customers were notified on Jan. 10, 2019-that Sprint had ceased offering Sprint-branded prepaid plans (Sprint Forward) and will discontinue these plans even for current subscribers on Jan. 10, 2020. Thus, customers will have fewer choices under the CETF MOU and FCC Commitments than was previously assumed. See Sprint Forward Website FAQs, available at <https://prepaid.sprint.com/#!/support/faqs/> (last visited Nov. 20, 2019).

¹⁷ See Public Advocates Office, Supplemental Declaration of Dr. Lee L. Selwyn at ¶ 5 (Apr. 26, 2019).

¹⁸ US DOJ Competitive Impact Statement at 7-8.

1 the US DOJ’s [Proposed] Final Judgement.¹⁹ However, as noted above, despite the
2 potential benefits granted to DISH via the required divestitures, Dr. Selwyn concludes
3 that “there is in fact serious doubt both as to the sufficiency of the proposed divestitures
4 to Dish to enable it to effectively replace Sprint as a fourth national MNO, as well as
5 Dish’s own financial and technical ability to fulfill the competitive role that the
6 Department of Justice has envisioned for it.”²⁰ Thus, should the transaction be approved
7 even under the terms of the Post-Hearing Commitments, it remains likely that consumers
8 will suffer the effects of moving from a four facilities-based MNO market to a three
9 facilities based MNO market.

10 Finally, it is worth noting that with regards to the Applicants’ statements regarding
11 prices, the Divestiture Commitment nullifies T-Mobile’s stated plan to <<BEGIN
12 CONFIDENTIAL>> [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] <<END CONFIDENTIAL>> Thus, nowhere in the record do the Applicants
16 explicitly commit to lowering *any* prices, despite asserting that that’s what the proposed
17 merger will accomplish,²² and despite the overall decreasing trend in retail wireless prices
18

¹⁹ Reply Testimony of Dr. Lee L. Selwyn at ¶ 8.

²⁰ Reply Testimony of Dr. Lee L. Selwyn at ¶ 8. Further, while this issue was not explicitly presented in the Amended Scoping Memo, for this reason it is also unlikely that the competitive harms to the wholesale market will be alleviated by the Divestiture Commitment, again primarily impacting prepaid subscribers of Mobile Virtual Network Operators, or MVNOs, who rely on wholesale access to MNO networks.

²¹ <<BEGIN CONFIDENTIAL>> [REDACTED]
[REDACTED] << END
CONFIDENTIAL>>

²² See, e.g., Hearing Testimony of Sievert, EH Vol 4 at 254. See also Supplemental Testimony of Israel at 1-2: “New T-Mobile’s ability to offer consumers greater value for their money (sometimes referred to as lower quality-adjusted prices) will, in turn, exert competitive pressures on rival service providers to respond, through some combination of lower prices and improved service quality, further benefiting consumers.”

1 in the four-MNO national landscape.²³

2 Because it is unlikely DISH will create a nationwide network sufficient to replace
3 the competitive presence of Sprint, as discussed further in the Reply Testimony of Dr.
4 Selwyn, the Divestiture Commitment and Pricing Commitment leave low income
5 customers without protection from price increases and decreases in plan options.
6 Additionally, as discussed in the Public Advocates Office’s Reply Testimony of Cameron
7 Reed, “[f]urthermore, because DISH has no existing cellular infrastructure or emergency
8 equipment, the negative effects on provider diversity and cell site resiliency would still be
9 present for years following the proposed merger at the least. This will negatively impact
10 all California customers[.]”²⁴

11 **B. The Post-Hearing Commitments Fail to Alleviate Risks to**
12 **the Commission’s LifeLine Efforts**

13 As noted in the Public Advocates Office’s Opening Testimony,²⁵ continuation of
14 Sprint’s current LifeLine program is not a merger-specific benefit. It is instead a
15 commitment necessary to alleviate the harms created by the proposed transaction, in
16 which T-Mobile, whose participation in LifeLine has “never been forthcoming,”²⁶ would
17 replace the carrier that serves the most LifeLine customers in California. Thus, this
18 analysis *begins* with the proposed merger putting the LifeLine program at risk.

19 To address this, T-Mobile made a commitment to “offer LifeLine services . . .
20 indefinitely in California” and “through the end of 2024 at a minimum.”²⁷ This

²³ Opening Testimony of Dr. Lee L. Selwyn at ¶ 16.

²⁴ Public Advocates Office, Reply Testimony of Cameron Reed at 18 (Nov. 22, 2019).

²⁵ Public Advocates Office, Opening Testimony of Eileen Odell at 26 (Jan. 7, 2019).

²⁶ Remarks of Catherine Sandoval, Associate Professor, Santa Clara University School of Law and Former CPUC Commissioner, made at the CPUC Workshop on Proposed Transfer of Sprint Communications, Dec. 10, 2018: “If you were to see this entity merged, I particularly worry [] about the commitment to California LifeLine. I must say with T-Mobile, I talked to T-Mobile many, many, many times, to encourage them to participate in California LifeLine. And their participation was never forthcoming the way Sprint’s was.” *See id.*

²⁷ CETF MOU at 4.

1 commitment is a step in the right direction. However, other language in the CETF MOU
2 undermines the strength of this commitment:

3 Should there be material changes in the LifeLine programs at either the
4 state or federal level, including with respect to eligibility criteria,
5 mandatory service standards, or subsidy amounts, New T-Mobile reserves
6 the right to seek appropriate relief from the LifeLine provisions in this
7 agreement from CETF, the CPUC, and/or FCC after consultation with
8 CETF and the CPUC and/or FCC staff.²⁸

9
10 Thus, “material changes” to the LifeLine program could spur requests for
11 “appropriate relief.” This caveat is vague and ambiguous and does not clearly bind T-
12 Mobile to its LifeLine commitment, even in cases where changes that are here referred to
13 as “material,” but which are required by law. For example, as stated in the MOU, these
14 “material changes” could include statutorily mandated automatic increases to the required
15 minimum service standards carriers must provide to LifeLine customers, such as the
16 recent increase in the minimum data usage allowance, from 2 GB per month to 8.75 GB
17 per month for mobile LifeLine accounts.²⁹ While the FCC ultimately granted CTIA’s
18 petition to delay this increase in minimum data requirements,³⁰ the FCC asserts that such
19 updates are necessary to ensure affordable access to widely-used communications
20 technologies, as such technologies evolve.³¹ While it is unclear what “appropriate relief”
21 refers to, allowing New T-Mobile to avoid fulfilling this commitment when it no longer
22 serves New T-Mobile’s interest is contrary to the public interest.

23 Also, with regards to the CETF MOU LifeLine Commitment, the language refers
24 to New T-Mobile’s continuation of “LifeLine services,” and does not explicitly mention
25 the Assurance brand “transitional” plan. This plan is currently offered to customers who

²⁸ CETF MOU at 7.

²⁹ FCC Public Notice DA 19-704, Wireline Competition Bureau Announces Updated Lifeline Minimum Service Standards and Indexed Budget Amount (Jul. 25, 2019).

³⁰ FCC Order 19-116 at ¶2 (Nov. 19, 2019).

³¹ FCC 16-38, Third Report and Order, Further Report and Order, and Order on Reconsideration (2016 Lifeline Modernization Order) at ¶¶ 73, 77 (Apr. 27, 2016).

1 were formerly enrolled in LifeLine but who no longer satisfy program eligibility
2 criteria.³² Because this plan is not subsidized by California LifeLine, the CETF MOU
3 LifeLine Commitment may not truly commit to continuing Sprint’s role in serving
4 LifeLine customers.

5 The risk to LifeLine extends beyond the CETF MOU and also applies to the
6 Divestiture Commitment. After the close of the February 2019 evidentiary hearings in
7 this proceeding, but before the Applicants’ updates to its Applications, the Commission
8 authorized Sprint’s Boost Mobile to initiate and conduct a pilot program in the California
9 LifeLine Program.³³ Utilizing new eligibility standards, discounts on all retail plans, and
10 a streamlined application and renewal process, the Boost Pilot Program aims to test
11 whether these features will increase enrollment in the California LifeLine program.³⁴
12 However, the Divestiture Commitment calls into question the future of the Boost Pilot
13 Program. Because the customers currently participating in the program are Boost-
14 branded prepaid customers and explicitly are *not* current LifeLine customers according to
15 the Applicants,³⁵ they seem to fall under the US DOJ’s [Proposed] Final Judgment’s
16 definition of a “Prepaid Asset” to be divested to DISH.³⁶ While Applicants state that
17 “New T-Mobile is committed to continu[ing] Sprint Spectrum L.P.’s participation in the
18 Boost Mobile Pilot Program,”³⁷ they do not explain whether or how they will retain these

³² CETF MOU at 6; *see also* Opening Testimony of Eileen Odell at 23.

³³ *See* D.19-04-021, Authorizing Pilot Programs of Boost Mobile Inc. and iFoster, Inc. in the California LifeLine Program (May 3, 2019).

³⁴ D.19-04-021 at 7-8.

³⁵ Supplemental Testimony of Sievert at 7.

³⁶ US DOJ Proposed Final Judgment at 4, defining “Prepaid Asset” as

all tangible and intangible assets primarily used by the Boost Mobile, Sprint-branded prepaid, and Virgin Mobile businesses today, including but not limited to Boost and Virgin Mobile Retail Locations, licenses, personnel, facilities, data, and intellectual property, as well as all relationships and/or contracts with prepaid customers served by Sprint, Boost Mobile, and Virgin Mobile. Prepaid Assets do not include the Assurance Wireless business and the prepaid wireless customers of Shenandoah Telecommunications Company and Swiftel Communications, Inc.

³⁷ Joint Applicants Post-Hearing Reply Brief at Appendix 1. (May 10, 2019).

1 customer accounts that they have seemingly agreed to divest to DISH. T-Mobile has yet
2 to create an integration plan for these customers, considering it “premature,”³⁸ which
3 underscores the uncertainty surrounding what will happen to these customers should the
4 transaction be approved.

5 DISH also has not yet agreed to continue the Commission’s Boost Pilot Program
6 or to offer the LifeLine program in any form.³⁹ Thus, if the proposed transaction is
7 authorized without a firm commitment or condition requiring participation, the
8 Commission may have to shelve a pilot program the CPUC intends to use to gather
9 information regarding the Commission’s goal of increasing participation in LifeLine,
10 contrary to the public interest.

11 **III. CONCLUSION**

12 For the reasons listed above, the Pricing Commitment, the Divestiture
13 Commitment, and the LifeLine Commitment are insufficient to alleviate the risk of harm
14 to low income consumers stemming from the proposed transaction. The elimination of
15 Sprint as a competitor would be harmful for consumers and not in the public interest.
16 The Commission should reject the highly speculative assurances that these commitments
17 represent.

18 As demonstrated through the above analysis, the Commission should require
19 additional evidentiary hearings in this proceeding, as a number of disputed facts remain,
20 including:

- 21 1. Whether the Pricing Commitment that currently allows New T-Mobile
22 to retire lower-cost legacy plans at its discretion sufficiently protects
23 consumers from the competitive harms of the merger;

24

³⁸ Exhibit 1, T-Mobile Response to Communications Division Data Request 48 (June 18, 2019). *See also* Response to DR 49 (c), regarding handsets: “Subject to further clarification, T-Mobile cannot respond further to this subsection as it involves a number of open issues including whether T-Mobile will be allowed to assume the Pilot Program in the first place.”)

³⁹ Exhibit 2, DISH Response to Public Advocates Data Request 1.5 (Sept. 20, 2019).

- 1 2. The scope of New T-Mobile’s ability to be granted “relief” from its
2 LifeLine Commitment when material changes to the LifeLine program
3 occur;
4
- 5 3. Whether New T-Mobile would continue Sprint’s support of low income
6 consumers by offering a transitional service for former LifeLine
7 customers should the transaction be approved;
8
- 9 4. Whether the customers currently participating in the Boost Pilot
10 Program for LifeLine will be retained by New T-Mobile and whether
11 the Pilot Program itself will continue if the merger is approved.

ATTACHMENT A

QUALIFICATION OF WITNESS

1 Q4: What is the scope of your responsibility in this proceeding?

2

3 A4: For this proceeding, I was responsible for submitting testimony on the impacts of
4 the proposed transaction on low income consumers.

5

6 Q5: Does this complete your testimony at this time?

7

8 A5: Yes, it does.

9