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.	Application 18-07-012 (Filed July 13, 2018) CONSOLIDATED

RESPONSE OF THE UTILITY REFORM NETWORK AND THE GREENLINING INSTITUTE IN SUPPORT OF THE MOTION OF THE PUBLIC ADVOCATES OFFICE TO AMEND AND SUPPLEMENT TESTIMONY AND FOR ADDITIONAL HEARINGS

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Rules of Practice and Procedure and the Ruling of Administrative Law Judge Bemesderfer on the record during the February 5, 2019 hearing, The Utility Reform Network (TURN) and the Greenlining Institute (herein after referred to as Joint Consumers) hereby file their response in support of the *Motion of the Public Advocates Office to Amend and Supplement Testimony and for Additional Hearings* (Motion) filed February 4, 2019.

II. DISCUSSION

Joint Consumers support the Motion of the Commission's Public Advocates Office (Public Advocates) for leave to amend testimony, submit additional testimony and for further hearings. As Public Advocates explains, Joint Applicants submitted a large volume of rebuttal testimony, over 4,000 pages including attachments and material from the companies' federal filings, only days before scheduled hearings. Moreover, buried within this material are arguments and evidence presented for the first time and only tangentially related to the testimony submitted by Public Advocates and other intervenors.

To ensure due process and fairness in this complicated and important proceeding, Joint Consumers support Public Advocates' call for the opportunity to submit additional testimony and possible further hearings. Public Advocates filed its Motion only after working diligently to process and conduct a thorough review of the new material prior to the scheduled hearings, while at the same time preparing for the hearings themselves.[1] Other intervenors including Joint Consumers also worked to identify key issues and sort through several hundred pages of additional information and argument as they prepared for the hearings. While the subsequent four days of hearings were productive and elicited useful information for the record, the hearings

[1] Motion at pp. 4-5.

also made it abundantly clear that the record will not be complete without further review and examination of the material presented by the Joint Applicants on January 29, 2019.[2]

Pursuant to statutory mandates and Commission precedent, the Applicants have the clear burden of proof.[3] In their Protest, Joint Consumers set out several areas where the companies' Joint Application is insufficient to meet their burden of proof to demonstrate that the transfer of control between Sprint and T-Mobile is in the public interest.[4] Joint Applicants had months to supplement their Application, including with their reply to the filed protests, but chose not to submit additional supplemental information, supporting declarations, or updates to their Application. Instead, Joint Applicants included significant new information and additional arguments in its rebuttal testimony just a week before hearings.[5] Public Advocates, Joint Consumers, and other intervenors had no opportunity to thoroughly review the material and prepare cross examination questions, much less conduct follow up discovery or request supporting workpapers and materials from the witnesses.

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[2] Indeed, hearings were rushed in part because of the large volume of material and the need for parties to reserve significant cross time to attempt to have new material identified and clarified. For example, TURN had to rush through its cross of Ray on back up power and CWA rushed its cross of Ray because parties could not address new information prior to the time he had to leave.

[3] Public Utilities Code Section 854 (e); *Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction*, D.10-10-01, Oct. 14, 2010 at 16; D.16-05-007 (A.15-07-009, Charter/Time Warner merger), pp. 41-45 (Noting that Applicants did not meet their burden of proof under the statute by failing to submit responsive testimony on labor issues); D.05-11-028 (A.05-02-027, AT&T/SBC merger), pp. 3-5 (Applicants voluntarily amended their Application to provide additional information under Section 854(b) and (c).) This is also a frequent holding in general rate case proceedings, D.09-03-025 (SCE 2009 GRC), p. 8, citing D.06-05-016 (SCE 2006 GRC); *Re San Gabriel Valley Water Company* (2005) CPUC 3d D.05-08-041 at 7-8 *citing Re Application of Southwest Gas Corporation* (2004) D.04-03-034.

[4] Protest of the Joint Consumers to the Joint Application of Sprint et. Al (A.18-07-011/A.18-07-012), filed August 16, 2019, pp. 10-16 (demonstrating that Applicants have failed to provide data or California specific effects of the transaction on value conscious consumers, communities of color and rural residents.)

[5] Motion at p. 4.

Commission precedent states that Applicants cannot make new arguments or provide significant and substantive amendments to their original application in their rebuttal testimony. For example, the Commission's Rate Case Plan, which sets forth the process to ensure due process and an accurate and complete record in electric general rate cases, describes applicant rebuttal evidence solely as "refute[ing] the evidence of other parties."[6] The Rate Case Plan prohibits Applicants from using rebuttal to, "reassert or reargue a party's direct evidence" and further states that, "No bulk or major updating amendments or recorded data shall be allowed in rebuttal evidence. Additional witnesses, cumulative testimony, and unproductive cross-examination shall be minimized."[7] As Public Advocates also notes, the Commission has found cause to strike testimony when rebuttal testimony goes beyond material included in staff and intervenor testimony or attempts to supplement or expand the Applicants' affirmative case.[8]

The Commission has further found that the Applicant's burden of proof must be met in the its direct testimony, and it cannot wait until rebuttal to provide "salient" information supporting its request.[9] The Commission has also found in rate cases that an applicant must provide its affirmative showing in its application, with "percipient witnesses in support of all elements of its application."[10] It is worth noting that the Joint Applicants' did not include supporting testimony in their initial application except for the FCC Public Interest Statement included with its federal filing. Finally, where the Commission finds that "rebuttal" evidence "could have and should have been included with the utility's direct showing," it can deny

[6] D.07-07-004 (Modifying Electric Rate Case Plan), Appendix A, p. 7.
[7] *Id.*
[8] Motion at p. 4.
[9] *Re San Diego Gas and Electric Company*, 46 CPUC 2d 538, 764, n. 17. (D.04-07- 022); See also, D.09-03-025, p. 8 (SCE 2009 GRC); D.04-03-034 (Southwest Gas Corporation GRC) at 7-8.
[10] *Re Southern California Edison Company*, 11 CPUC 2d, 474, 475 (D.83-05-036).

consideration of such evidence even where the failure to include the material in the direct showing is the result of a simple mistake of omission by the utility.[11]

Public Advocates provides several examples of the new information provided by Applicants in their rebuttal testimony, most notably the coverage maps used extensively throughout several witnesses' testimony and economic model expert testimony.[12] In light of the large volume of material presented as rebuttal, including hundreds of pages of attachments from its federal filings and new data, it was difficult to provide a comprehensive list of new material. For example, in addition to the list from Public Advocates, Joint Consumers found that Ms. Sylla Dixon provided additional detailed information about T-Mobile and MetroPCS practices regarding diversity (including the agreement with the National Diversity Coalition) and the opt-out processes for the mandatory arbitration in the companies' terms and conditions.[13] Similarly, Mr. Ray added information about tower buildout and backup power and network resiliency[14] that went beyond rebuttal to Public Advocates, and Mr. Sywenki provided detail on special access and enterprise offerings.[15] While some of this information, in particular about opt-out processes and backup power, was provided in discovery, the level of detail and descriptions of specific processes in place for consumers and planned for back up power is new and should have been laid out more carefully in the companies' Application to demonstrate that the merger will not impact, and in fact will strengthen, consumer protections and safety in California. Further, in light of the large volume of information provided in rebuttal, parties did not have time to

[11] D.04-07-022 (SCE 2003 GRC), p. 158. See also, D.08-01-020 (A.06-02-023, Golden State Water GRC), p. 1, 3-4 (initiating an Order to Show Cause and considering potential fines for the company's decision to, "wait[]until it served its rebuttal testimony to provide the rationale for requesting at least half of the twenty new general office positions.").
[12] Motion at Attachment A.
[13] Sylla Dixon Rebuttal Testimony at p. 10-12; p. 18:19-34- 19:1-4.
[14] Ray Rebuttal Testimony at p. 17:12-19:12; pp.53-54; p. 57:19-29.
[15] Sywenki Rebuttal Testimony at pp. 4-5; pp. 9-13.

properly identify areas where a motion to strike may be appropriate. In the alternative to striking this new material and material outside the scope of rebuttal, Joint Consumers support providing intervenors with additional opportunities to rebut this information.

Therefore, to ensure due process and a full and complete record in this proceeding, Joint Consumers support Public Advocates' request to:

- Conduct additional discovery with a shortened time for responses to 5 days;
- Submit sur-rebuttal testimony on March 5, 2019;
- And, if necessary, schedule additional hearings no sooner than 21 days after the submission of sur-rebuttal testimony.

III. CONCLUSION

To support the parties' due process and to ensure an adequate and full record, the Commission should grant Public Advocates' Motion.

Dated February 11, 2019

Respectfully submitted,

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On behalf of TURN and Greenlining

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