

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In the Matter of the Joint Application of  
Sprint Spectrum L.P. (U3062C), and Virgin  
Mobile USA L.P. (U4327C) and T-Mobile  
USA, Inc., a Delaware Corporation, for  
Review of Wireless Transfer Notification per  
Commission Decision 95-10-032.

Application 18-07-012

**PROTEST OF THE OFFICE OF RATEPAYER ADVOCATES**

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## I. INTRODUCTION

Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates ("ORA") files this protest to the Joint Application ("Application") of Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C) (collectively referred to as "Sprint Wireless") and T-Mobile USA, Inc. ("T-Mobile") (collectively referred to as the "Joint Applicants") for review of a wireless transfer notification per Decision ("D.") 95-10-032 (the "Proposed Transaction").<sup>1</sup>

Sprint and T-Mobile US have significant California revenues and customers. T-Mobile US is the third largest mobile wireless carrier in the nation with 72.6 million customers,<sup>2</sup> while Sprint is the fourth largest with 54.6 million customers.<sup>3</sup> We estimate that the T-Mobile US serves approximately 8.8 million customers in California, and Sprint serves approximately 6.6 million customers in California.<sup>4</sup> In 2017, T-Mobile US had revenues of \$40.6 billion, including an estimated \$4.9 billion for California revenues.<sup>5</sup> Meanwhile, Sprint had revenues of \$32.41 billion in 2017, with an estimated \$3.9 billion in California revenues.<sup>6</sup>

The Application is not sufficient for the Commission to ensure that the Proposed Transaction will be in the public interest for California consumers. The Application contains limited or incomplete information and does not include California-specific commitments. The Commission should rigorously investigate the effects of the Proposed Transaction on mobile wireless voice and broadband customers in California, including

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<sup>1</sup> Application at p. 1.

The Application is part of a larger deal in which Sprint Corporation ("Sprint"), and all of Sprint's subsidiaries, will become wholly-owned indirect subsidiaries of T-Mobile US, Inc. ("T-Mobile US"). See Application at p. 2.

<sup>2</sup> Application at p. 5.

<sup>3</sup> Application at p. 8.

<sup>4</sup> Estimate is based on the 12.14% ratio of California's population to the national population.

<sup>5</sup> T-Mobile US, Form 10-K (February 7, 2018) at p. 37. Estimate for California revenue is based on the 12.14% ratio of California's population to the national population.

<sup>6</sup> Sprint, Form 10-K (May 24, 2018) at p. 40. Estimate for California revenue is based on the 12.14% ratio of California's population to the national population.

on: competition, innovation, pricing, service quality, safety, account migration, net neutrality, privacy, and arbitration clauses. The Commission should also assess the financial condition of the companies. As detailed below, the Commission must address these issues and others to determine whether the Proposed Transaction is in the public interest.

## **II. DISCUSSION**

### **A. JURISDICTION TO REVIEW THE PROPOSED MERGER**

In the past, the Commission’s general policy regarding mergers between wireless companies was more “hands off,” due to the nature of the market. When the policy was articulated in the 1990’s, there were far fewer wireless customers and many more wireless providers. However, due to consolidation in the market there are fewer wireless carriers serving far more wireless customers, thus there is a strong public interest in a careful and thorough review of the potential harms of the proposed merger. As discussed below, the most applicable precedent is the AT&T/T-Mobile merger proceeding, where in 2015 two of the largest wireless carriers proposed to merge. In that proceeding, the Commission planned to take a more thorough review (although the application was ultimately abandoned before any final decision could be issued).<sup>7</sup>

In D.95-10-032, the Commission determined that it was prudent at the time to invoke Public Utilities Code Section 829, which provides that the Commission may “from time to time” exempt public utilities from Section 854 if it determines that such exemption is “in the public interest.”<sup>8</sup>

Although the Application recites reasons that the merger will be in the public interest, the Application fails to state that the public interest will be benefited by the Commission’s foregoing *review* of the benefits of the merger. Instead, the Joint Applicants state that “the Commission exempted wireless transactions from pre-

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<sup>7</sup> I.15-11-007.

<sup>8</sup> P.U. Code Sec. 829 and 853(b). See also, D.95-10-032, 1995 Cal. PUC LEXIS 888, \*23.

approval” in the past, and that they have complied with the review process rules by merely providing a “30-day advance notice” letter regarding the proposed merger.<sup>2</sup>

However, the Commission has the authority perform a review of the public interest benefits of the merger and has done so in the past. Section 854 (a) requires the Commission to determine that an acquisition/merger is in the public interest, and where Section 854 (b) and (c) do not expressly apply to this transaction, the Commission has used the criteria set forth in those statutes to provide context for a public interest assessment.

A more detailed review of the public interest is necessary here due to the dominance of the two merging entities. Equally compelling is the fact that this merger would effectively eliminate one of the remaining competitive entities, leaving only three. Especially, the Commission should consider whether this transaction will have an adverse impact on competition in the California marketplace and whether the transaction raises antitrust concerns, because “antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.”<sup>10</sup>

In addition to providing wireless voice service, the Joint Applicants provide bundled broadband service that is inextricably tied to wireless voice service. Both Sprint and T-Mobile offer bundled services that include provision of data via broadband access to the Internet. It is not feasible to discuss mobile wireless voice service without also discussing Joint Applicants’ broadband service. ORA therefore intends to gather data in order to review and analyze Joint Applicant’s provision of broadband service in the context of their provision of wireless services. Here, the public interest is served by gathering data regarding potential impacts of this proposed merger on competition in the broadband market.

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<sup>2</sup> Application at p. 1.

<sup>10</sup> Northern California Power Agency v. Public Utilities Commission (1971) 5 Cal.3d 370, 377.

In the past, the Commission has considered an examination of broadband service to be inextricably linked to an analysis of competition in the wireline and wireless service provider marketplace. In I.15-11-007, the Commission examined competition in the telecommunications market and expressly included broadband, stating that it would look at competition in the “advanced telecommunications services at the new national standard of 25 Mbps down (and 3 Mbps up)?”<sup>11</sup>

California is not preempted from gathering data regarding relating to provision of broadband service.<sup>12</sup> In 2015, the Federal Communications Commission (“FCC”) reaffirmed its longstanding conclusion that broadband Internet access service (“BIAS”) is jurisdictionally interstate for regulatory purposes.<sup>13</sup> However, the FCC noted that notwithstanding the interstate nature of BIAS, states “of course have a role with respect to broadband” and the fact that it is jurisdictionally interstate does not “by itself preclude all possible state requirements regarding that service.”<sup>14</sup> With regards to the state’s role in gathering data about broadband, the FCC stated: “Given the specific federal recognition of a State role in broadband data collection, we anticipate that such State efforts will not necessarily be incompatible with the federal efforts or inevitably stand as an obstacle to the implementation of valid federal policies.”<sup>15</sup> The FCC made clear that its reaffirmation of BIAS as an interstate service for regulatory purposes does not preclude all state commission action in this area, just that which is inconsistent with the federal regulatory regime adopted in the FCC’s *Open Internet Order*.<sup>16</sup> The FCC’s

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<sup>11</sup> I.15-11-007 at 14. Federal statute defines “advanced telecommunications capability” to include “broadband telecommunications capability.” *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014), citing 47 U.S.C. §1302(d)(1).

<sup>12</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, FCC 17-166 (rel. Jan. 4, 2018) at Footnote 732.

<sup>13</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) (*Open Internet Order*) at ¶ 431.

<sup>14</sup> *Id.*, Fn 1276, citing as an example of an explicit role for States in the NARUC Broadband Data Order, 25 FCC Rcd at 5054-55, at ¶ 9.

<sup>15</sup> *Ibid.*

<sup>16</sup> See *Id.*, at Fn 708.

recent *Restoring Internet Freedom* order left this part of the *Open Internet Order* untouched.<sup>17</sup> Thus, there is no federal preemption of the Commission’s attempts to gather data here.

The Commission has gathered data and examined competition regarding broadband providers in the past. The final decision in the Competition OII proceeding (“I.15-11-007”) extensively examined data regarding competition in the broadband market.<sup>18</sup> Moreover, none of the carriers requested rehearing on whether the Commission has the authority to gather data regarding provision of broadband service.<sup>19</sup>

The Commission’s jurisdiction over wireless companies’ terms and conditions was confirmed by the California Court of Appeal.<sup>20</sup> For example, in Investigation (“I.”) 11-06-009, the Commission stated its intent and its jurisdiction to review the proposed merger between AT&T and T-Mobile.<sup>21</sup> In that proceeding, the Commission asserted its authority to review and analyze whether the AT&T/T-Mobile merger is in the public interest,<sup>22</sup> and stated that wireless carriers are “telephone corporations” and thus they are public utilities under Public Utilities Code Sections 216, 233 and 234. Therefore, wireless mergers and acquisitions are potentially subject to review under Section 854.

Even if Section 854 (b) and (c) were not expressly applicable, the Commission has the authority to apply the criteria set forth in those statutes where it is in the public interest

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<sup>17</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, FCC 17-166 (rel. Jan. 4, 2018) at ¶ 196.

<sup>18</sup> D.16-12-025 at 85-97.

<sup>19</sup> The Commission’s decision on rehearing, D.17-07-011, addressed only the applications for rehearing submitted by the Joint Consumers group. No applications for rehearing were filed by the carriers.

<sup>20</sup> *Pacific Bell Wireless (Cingular) v. CPUC*, (2005) 140 Cal.App.4th 718, 738; cf. *MetroPCS v. FCC* (DC Cir. 2011) 2011 U.S. App. LEXIS 9922 (affirming state jurisdiction to resolve CMRS-wireline interconnection disputes).

<sup>21</sup> I.11-06-009. AT&T abandoned its attempted acquisition of T-Mobile and the application was ultimately dismissed at moot.

<sup>22</sup> I.11-06-009, at p. 6.

to do so.<sup>23</sup> Thus, the Commission reviewed the AT&T/T-Mobile merger using some of the following criteria, which would likely be relevant here:<sup>24</sup>

1. Would the merger result in less competition in the California marketplace for wireless telephone customers as compared to wireless telephone customers nationally?
2. How should the relevant market(s) be defined?
3. Would the merger give the resulting entity monopsony power or increase the tendency to monopsony power including market power over equipment suppliers?
4. What merger-specific and verifiable efficiencies would likely be realized by the merger?
5. Would innovation be promoted or constrained by the merger?
6. What impact would the merger have on the market for special access or backhaul services?
7. What alternatives to incumbents' special access backhaul facilities currently exist, and what alternatives would exist after the merger, for independent, competitive wireless carriers?
8. Would the smaller post-merger pool of independent, competitive wireless carriers purchasing special access backhaul from local exchange carriers affect the market power of those special access backhaul customers?
9. Would the merger increase the market power of the local exchange carriers and/or their wireless affiliates with respect to special access backhaul services?
10. Would the merger maintain or improve the quality of service to California consumers?
11. What California utility(ies) would operate the merged properties in California? Would the merger preserve the jurisdiction of the Commission and the capacity of the Commission to effectively regulate those utility operations in the state?

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<sup>23</sup> Opinion Approving, with Conditions, Transfer of Indirect Control and Authorizing, With Conditions, Exemption from Public Utilities Code Section 852 For Some Investors in Knight Holdco (D.07-05-061), at p. 24. See also, D.02-12-068, 2002 Cal. PUC LEXIS 909, concerning the change of control of California-American Water Company.

<sup>24</sup> The list is not exhaustive, and provided for illustrative purposes only. I.11-06-009 contained many more questions designed to assess the public interest impact of the proposed AT&T/T-Mobile merger.



12. How does this merger affect the merging companies' employees, shareholders, subscribers, communities in which they operate, and the State as a whole?
13. Would the benefits of the merger likely exceed any detrimental effects of the merger?
14. Should the Commission consider conditions or mitigation measures to prevent significant adverse consequences which may result from the merger? What, if any, should those conditions or measures be?

Applicants' proposal to limit review to the 30-day advance notice is not sufficient in this case to protect the public interest. This merger involves two of the four main wireless carriers, and could have profound impacts on competition and quality of service. The Commission should perform a detailed analysis of the proposed benefits to the public prior to granting its approval.

**B. THE COMMISSION SHOULD SHARE THE RECORD DEVELOPED IN THIS PROCEEDING WITH THE USDOJ AND THE FCC**

For reasons stated herein, it is in the public interest to perform a thorough review of this proposed merger. In addition, the record developed in this proceeding will be highly relevant and useful to the Federal entities that are simultaneously performing a national review of this merger, the United States Department of Justice ("USDOJ") and the Federal Communications Commission ("FCC"). ORA recommends that the record developed in this proceeding should be proactively shared with both the USDOJ and the FCC, so that those entities have California-specific information relevant to a national review of the proposed transaction. California can, and should, provide California-specific data and analysis that will inform the broader public interest review that the USDOJ and the FCC are undertaking, on the impacts of the merger on both wireless and broadband service in California.

**C. REIMBURSEMENT OF COSTS TO REVIEW THE APPLICATION**

ORA seeks reimbursement of its costs to review this merger Application. ORA reached out to Sprint and T-Mobile seeking an agreement to cover its costs, but the Joint

Applicants stated that they would only do so pursuant to a Commission order. Therefore, ORA seeks a ruling granting its request.

California expressly authorizes the Commission to obtain reimbursement for the costs of considering a proposed merger; in fact, the law requires it. Assembly Bill (“AB”) 96, the 2017 California Budget Bill Act, provides:

The Public Utilities Commission shall require any public utility requesting a merger to reimburse the commission for those necessary expenses that the commission incurs in its consideration of the proposed merger.<sup>25</sup>

ORA’s expenses to retain an expert consultant to review the merger and analyze the alleged public benefits are an integral part of the Commission’s consideration of the proposed merger. Additionally, the Commission has granted ORA’s request to be reimbursed in the past. In Application 15-07-009, the Charter/Time Warner merger application, ORA requested and was granted reimbursement for its expenses to retain a consultant to review and analyze the merger.<sup>26</sup>

**D. THE COMMISSION SHOULD CONSOLIDATE APPLICATION 18-07-012 AND APPLICATION 18-07-011 SINCE BOTH ARE PART OF THE OVERALL MERGER OF SPRINT AND T-MOBILE US**

On July 13, 2018, T-Mobile US and Sprint, through their respective California subsidiaries, filed two Applications to the Commission. The instant Application is for the transfer of control of T-Mobile to acquire Sprint Wireless, and the other (Application 18-07-011) requests the Commission approve the transfer of control of Sprint Wireline, a certificated competitive local exchange carrier (“CLEC”) and non-dominant interexchange carrier (“NDIEC”), to T-Mobile. The Joint Applicants explain that the

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<sup>25</sup> AB 96, California Budget Act of 2017.

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB96](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB96)

The provision for reimbursable merger expenses is not new; it was also contained in the 2014, 2015, and 2016 budget bills.

<sup>26</sup> See Reporter’s Transcript of September 28, 2015 Pre-Hearing Conference in A.15-07-009, at p.50: “ALJ BEMESDERFER: I have a motion before me from ORA for ordering the Applicants to pay for the expenses of ORA’s expert. I’m granting that motion.”

transfers of control are merely components of a larger nationwide merger wherein T-Mobile US will acquire Sprint.<sup>27</sup>

The Commission should take a holistic approach in conducting its review of these applications and consolidate this Application with Application 18-07-011. In addition to increasing efficiency and optimizing the use of Commission resources, combining its review of the Applications will allow the Commission to evaluate the proposed transfers of control in the context of the larger Sprint and T-Mobile US merger. Combining both Applications will more accurately assess whether the merger is in the public interest.

#### **E. COMPETITION AND MARKET CONCENTRATION**

The Commission should carefully consider the effects of the Proposed Transaction on competition in California's mobile wireless voice and broadband markets, both of which are already highly concentrated. The national mobile wireless market is highly concentrated, with a Herfindahl-Hirschman index ("HHI") of over 3,000.<sup>28</sup> California's wireless mobile voice and broadband markets are also highly concentrated oligopolies, with four companies (AT&T, Verizon, Sprint and T-Mobile) directly or indirectly serving the vast majority of customers. The Proposed Transaction would create an even more concentrated oligopoly, and shrink the markets from four to three primary players.

Increased market concentration can produce significant harms to consumers in California. Fewer choices for consumers means less competition, which usually leads to higher prices and less consumer-friendly service offerings. The Commission should

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<sup>27</sup> Application at p. 2.

<sup>28</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Including Commercial Mobile Services*, Twentieth Report, WT Docket No.17-69, FCC 17-126, (rel. Sept. 27, 2017) (hereafter, "20<sup>th</sup> Mobile Wireless Competition Report") at page 22.

The HHI is a commonly accepted measure of market concentration that takes into account the relative size distribution of the firms in a market. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. An HHI below 1,500 indicates a competitive market, an HHI between 1,500 and 2,500 points indicates a moderately concentrated market, and an HHI above 2,500 points indicates a highly concentrated market. *See*, U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-0>.

carefully assess the effects of the proposed merger on the following issues for California's mobile wireless broadband and voice markets:

- **Innovation:** Both Sprint and T-Mobile have reputations for disrupting the mobile wireless markets with innovative service offerings and terms.<sup>29</sup> The merger will increase T-Mobile's market power, which may reduce its incentive to innovate.
- **Service Quality and Customer Satisfaction:** The Application fails to adequately address service quality and customer satisfaction and lacks California-specific commitments to maintain or increase service quality. The Commission should require the Joint Applicants to submit additional data, including but not limited to, information on store coverage, customer service operations, and call center availability. To assess the likely effects on service quality, the Joint Applicants should provide additional data on outages, broadband speeds, network capacity, network management, and other relevant information.
- **Prices:** Both T-Mobile and Sprint Wireless have a reputation for offering competitively priced services.<sup>30</sup> The Joint Applicants' are each about half the size of AT&T and Verizon and their desire to gain market share likely contributes to their willingness to offer unconventionally low prices. If the Proposed Transaction is approved, New T-Mobile<sup>31</sup> will serve approximately as many customers as AT&T and Verizon, with each having near a one-third market share, which will likely allow the company to increase prices. The Commission should assess the effects of the Proposed Transaction on prices for mobile wireless voice and broadband services.
- **Pre-paid Services:** Nationwide, T-Mobile has 38 percent of the pre-paid market, while Sprint has 26 percent.<sup>32</sup> The Proposed Transaction would give the combined company 64 percent of the pre-paid mobile wireless market, nationwide.<sup>33</sup> This creates the dynamic where a single company controls a

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<sup>29</sup> For example, T-Mobile uses its "Uncarrier" marketing platform to introduce novel initiatives to the mobile wireless market, including: no longer requiring two-year service contracts, the unused data reimbursement program "Kickback," the device upgrade program "Jump," making prices inclusive of all taxes and fees, the device try-out program "Test Drive," and paying early termination fees for new customers. For more information, refer to <https://www.t-mobile.com/our-story/un-carrier-history>.

<sup>30</sup> *Poorest U.S. Consumers Seen Hit Hard by T-Mobile, Sprint Merger*. Reuters Business News. May 2, 2018. Available at <https://www.reuters.com/article/us-sprint-corp-m-a-low-income/poorest-u-s-consumers-seen-hit-hard-by-t-mobile-sprint-merger-idUSKBN1I32VX>

<sup>31</sup> "New T-Mobile" refers to the combined company resulting from the proposed merger.

<sup>32</sup> Data is as of the third quarter of 2016. Refer to, *Prepaid Making a Comeback*, SNL Kagan, S&P Global Market Intelligence, December 19, 2016, Available at: <https://www.spglobal.com/marketintelligence/en/news-insights/research/prepaid-making-a-comeback>

<sup>33</sup> *Id.*

majority of the market, and therefore possesses significant market power. The Commission should carefully assess the pre-paid market separately from the more broad mobile wireless markets.

- **Wholesale Markets:** Both T-Mobile and Sprint sell their spectrum to smaller, independent wireless carriers, or Mobile Virtual Network Operators (MVNO), on a wholesale basis. The MVNOs frequently offer lower-priced services and other offerings that are attractive to low income customers and disadvantaged communities. The Commission should consider what impact the Proposed Transaction would have on the prices MVNOs pay to connect with the mobile networks belonging to T-Mobile, Sprint, and the other major wireless network operators (Verizon and AT&T).
- **Limitation of 5G Networks in Rural Areas:** The Joint Applicants claim the deployment of a nationwide 5G network as the primary benefit of the Proposed Transaction. However, there are serious concerns over the viability of 5G technology in rural areas. The technology requires a dense deployment of small cells connected to high-capacity fiber lines, which simply may not be cost-effective for sparsely populated areas.<sup>34</sup> The Commission should carefully assess the effects on the Proposed Transaction in rural markets, since 5G technology may not be a realistic solution for rural customers in California.
- **Migration and Integration:** The Proposed Transaction will require the complicated task of combining mobile networks that largely operate on different bands of spectrum and utilize dissimilar technologies. The Joint Applicants operate on different wireless standards, with Sprint using Code Division Multiple Access (CDMA) and T-Mobile using Global System for Mobiles (GSM). While a number of Sprint customers currently use phones that can operate on both wireless standards, many Sprint customers use phones that cannot operate on a GSM network. The Commission should carefully assess what a migration from CDMA to GSM-capable devices will entail for Sprint customers.
- **Net Neutrality:** The Commission should weigh the Proposed Transactions likely effects on net neutrality, especially considering the FCC's recent reversal of its net neutrality rules.<sup>35</sup> The CPUC recently explained the continuing need for the net neutrality rules adopted in the 2015 Open Internet Order, and unsuccessfully urged the FCC to keep the rules in place.<sup>36</sup> The Commission should be wary of the Joint

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<sup>34</sup> Thompson, Larry and Warren Vande Stadt. *5G is Not the Answer for Rural Broadband*, Broadband Communities Magazine, Broadband Properties, LLC, [http://www.bbcmag.com/2017mags/Mar\\_Apr/BBC\\_Mar17\\_5GNotAnswer.pdf](http://www.bbcmag.com/2017mags/Mar_Apr/BBC_Mar17_5GNotAnswer.pdf)

<sup>35</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, on Declaratory Ruling, Report and Order, and Order, 17 FCC Rcd 166A1 (rel. Jan. 4, 2018) (“2018 Restoring Internet Order”).

<sup>36</sup> Reply Comments of the California Public Utilities Commission to the FCC's *Restoring Internet Freedom* WC Docket No. 17-108, submitted August 22, 2017, at page 1.

Applicants' claim that New T-Mobile's ability to vertically integrate content into its service offerings will benefit consumers.<sup>37</sup> The Commission should also investigate the Joint Applicants practice of zero rating for access to certain content.<sup>38</sup>

- **Consumer Privacy:** Sprint Wireless and T-Mobile have access to their customers' Internet utilization, which amounts to massive quantities of highly sensitive personal information.<sup>39</sup> As mobile wireless service providers, the Joint Applicants also have access to end users' location data. The Application fails to adequately address consumer privacy issues, and does not include any assurances or explanations as to how the company will secure its customers' private data. The Commission should evaluate the Joint Applicants' user privacy policies and require the Joint Applicants to provide additional information on the data they collect from end users, including how they use and protect that data.
- **Mandatory Arbitration Clauses<sup>40</sup>:** The presence of mandatory arbitration clauses and class action waiver provisions in the Joint Applicants' existing consumer contracts is cause for concern.<sup>41</sup> The Commission should assess the Joint Applicants' use of mandatory arbitration clauses, determine if and how New T-Mobile's will utilize these provisions, and determine if the continuation of these provisions will benefit or harm the public interest.

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<sup>37</sup> Michael Sievert, June 18, 2018 FCC Declaration at page 17.

<sup>38</sup> Zero-rating is the practice of providing Internet access to select content for free under certain conditions, such as exempting certain content from an otherwise regularly imposed data-cap.

See, Press Release, Boost Mobile, *Boost Mobile Adds Unlimited Music Streaming* (December 9, 2015), <http://newsroom.boostmobile.com/press-release/products-offers/boost-mobile-adds-unlimited-music-streaming>.

See also, Barbara Van Schiewick, *T-Mobile's Binge On Violates Key Net Neutrality Principles* (2016), <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>.

<sup>39</sup> Wheeler, Tom. *It's Your Data: Empowering Consumers to Protect Their Privacy on Broadband Networks*. Recode, Vox Media, March 10, 2016, [www.recode.net/2016/3/10/11586870/its-your-data-empowering-consumers-to-protect-their-privacy-on](http://www.recode.net/2016/3/10/11586870/its-your-data-empowering-consumers-to-protect-their-privacy-on).

<sup>40</sup> Mandatory arbitration clauses essentially require customers to give up the right to appeal to a court of law to resolve disputes, and instead require the parties seek resolution via binding arbitration. The clauses can allow the Joint Applicants to escape legal oversight on important issues by effectively preventing consumers from seeking recourse against illegal or anticompetitive actions.

<sup>41</sup> See, Sprint Terms and Conditions at <https://www.sprint.com/en/legal/terms-and-conditions.html>. See also, T-Mobile Terms and Conditions at [https://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr\\_Ftr\\_TermsAndConditions](https://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions).

## **F. FINANCIAL CONDITION OF THE COMPANIES**

T-Mobile US and Sprint currently carry large debt balances that may indicate trouble for New T-Mobile. At the end of 2017, T-Mobile US had \$30 billion in debt<sup>42</sup> and Sprint had \$36 billion in debt.<sup>43</sup> The companies estimate that New T-Mobile will have approximately \$76 billion worth of total debt.<sup>44</sup> New T-Mobile's debt may impact its ability to make the investments necessary to provide safe and reliable services in California. The Commission should carefully assess New T-Mobile's financial condition – including anticipated net profit, debt obligations, current ratio, and cash flow, and other pertinent data – to assess the Proposed Transaction's likely effects the company's ability to provide California with safe and reliable service.

## **G. THE JOINT APPLICANTS ARE LIKELY TO DEPLOY 5G NETWORKS IRRESPECTIVE OF THE PROPOSED TRANSACTION**

The Commission should consider whether the Joint Applicants can attribute the purported benefits of a 5G network entirely to the Proposed Transaction, as they suggest in the Application. There is evidence to suggest that Sprint Wireless and T-Mobile will deploy 5G networks even if the proposed merger does not occur.

T-Mobile recently shared its plans to deploy 5G networks in 30 cities by the end of 2018, independent of the proposed merger.<sup>45</sup> T-Mobile also recently signed a \$3.5 billion deal with Nokia to build a 5G network,<sup>46</sup> and will participate<sup>47</sup> in an upcoming

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<sup>42</sup> T-Mobile US, Form 10-K (February 7, 2018) at p. 24 and 33. The \$30 billion includes \$2 billion for tower obligations.

<sup>43</sup> Sprint, Form 10-K (May 24, 2018) at p. F-4.

<sup>44</sup> Refer to slide 19 at <http://investor.t-mobile.com/Cache/1001236130.PDF?O=PDF&T=&Y=&D=&FID=1001236130&iid=4091145>

<sup>45</sup> <https://www.t-mobile.com/news/mwc-2018-5g>.

<sup>46</sup> <https://www.t-mobile.com/news/nokia-5g-agreement>.

<sup>47</sup> <https://ecfsapi.fcc.gov/file/10723916100790/July%2023rd%20Ex%20Parte%20re%20Auctions.pdf>



FCC auction to bid on millimeter wave spectrum.<sup>48</sup> T-Mobile plans to bid on the spectrum by itself and independent from Sprint, according to an ex-parte notification it recently filed with the FCC.<sup>49</sup>

Meanwhile, Sprint has also put forth plans to deploy its own 5G network independent from T-Mobile. Sprint CEO Marcelo Claure recently told investors, “[w]e believe our next-gen network will truly differentiate Sprint over the next couple of years, due to our strong spectrum assets that enables Sprint to be the leader in the true mobile 5G.”<sup>50</sup> Sprint also recently upgraded six “5G-ready” cities (including Los Angeles), where customers “experience the future of wireless as the company prepares to deliver the nation’s first 5G mobile network in the first half of 2019.”<sup>51</sup>

### III. PROCEDURAL MATTERS

The Assigned Commissioner and Administrative Law Judge should hold public participation hearings throughout the combined service territories of Sprint Wireless and T-Mobile in California to receive feedback from the public on this Proposed Transaction. As noted previously, the Joint Applicants should be required to amend the Application to ensure it affirmatively addresses all of the issues required to be addressed including all topics under Section 854(b)(c) and (d).

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<sup>48</sup> Deployment of 5G networks will utilize millimeter wave spectrum, which are bands at the top of the radio spectrum. Today, the bulk of millimeter waves remain largely unused. For more information, see <https://www.engadget.com/2018/07/23/how-5g-makes-use-of-millimeter-waves/>.

The FCC is making millimeter wave spectrum available to carriers to facilitate the advancement of 5G networks. The FCC is holding an auction in the second half of 2019 to distribute 3.4 gigahertz of contiguous millimeter wave spectrum. For more information, see <https://docs.fcc.gov/public/attachments/DOC-353229A2.pdf>.

<sup>49</sup> <https://ecfsapi.fcc.gov/file/10723916100790/July%202023rd%20Ex%20Parte%20re%20Auctions.pdf>

<sup>50</sup> Sprint’s CEP Marcelo Claure on Q3 2017 Results, Sprint Corporation’s Earnings Call Transcript, February 2, 2018. Available at <https://seekingalpha.com/article/4142755-sprints-s-ceo-marcelo-claure-q3-2017-results-earnings-call-transcript?part=single>

<sup>51</sup> <http://newsroom.sprint.com/sprint-unveils-5g-ready-massive-mimo-markets.htm>



The Joint Applicant's proposed expedited schedule of 150 to 180 days is aggressive and unrealistic.<sup>52</sup> ORA continues to work on a proposed modified schedule and looks forward to discussing during the proceeding's prehearing conference.

#### IV. CONCLUSION

The proposed merger would unite potentially two of the largest providers of mobile wireless services in California and likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services. ORA urges the Commission to review the concerns detailed herein to determine if the proposed transaction is in the public interest.

Respectfully submitted,

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<sup>52</sup> Application at p. 34.