

Docket:	<u>A.18-07-011 and</u> <u>A.18-07-012</u>
Exhibit Number:	<u>Cal Advocates-</u>
Commissioner:	<u>C. Rechtschaffen</u>
Admin. Law Judge:	<u>K. J. Bemederfer</u>
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## **Public Advocates Office**

**California Public Utilities Commission**

# **Public Advocates Office Executive Summary of Testimony for the Proposed Transfer of Control of Sprint to T-Mobile**

**- PUBLIC -**

San Francisco, California  
January 7, 2019

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## **BACKGROUND**

On July 13, 2018, Sprint Spectrum L.P. and Virgin Mobile USA, L.P. (Virgin Mobile) (collectively Sprint Wireless), Sprint Communications Company L.P. (Sprint Wireline), and T-Mobile USA, Inc. (T-Mobile USA) (collectively, the Joint Applicants) filed Applications (A.)18-07-011 and A.18-07-012. The assigned Administrative Law Judge consolidated the review of these applications, stating that while the applications “address different requirements of California law, the underlying transaction that gives rise to each of them is the proposed Sprint-T-Mobile Merger and the underlying factual and legal issues are effectively identical.”<sup>1</sup> The entity that would result from the proposed transaction is referred to in this report as “New T-Mobile.”

The October 4, 2018 Amended Assigned Commissioner’s Scoping Memo and Ruling (Scoping Memo), states: “[t]he fundamental issue presented by these applications is whether the proposed merger of two of the four largest national wireless service providers is in the public interest of the residents of California.”<sup>2</sup> The Scoping Memo lists several factors the Commission will consider in making its public interest determination. To inform the Commission’s public interest review, the enclosed Testimonies provide the Public Advocates Office (Public Advocates Office or Cal Advocates) analysis and recommendations. This Executive Summary provides an overview of all recommendations.

## **DISCUSSION**

### **A. The Commission should deny the proposed merger.**

The Public Advocates Office recommends denial of the proposed merger because it is not in the public interest.<sup>3</sup> As described in Testimony submitted by Dr. Lee Selwyn and Public Advocates Office staff, the Commission should deny the proposed transaction because of the

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<sup>1</sup> Administrative Law Judge’s Ruling Consolidating Applications, issued Sep. 11, 2018 at 1.

<sup>2</sup> Amended Assigned Commissioner’s Scoping Memo and Ruling, issued Oct. 4, 2018 at 2 [hereinafter Scoping Memo].

<sup>3</sup> See Table 1 for page references to the Public Advocates Office’s analysis in Testimony of impact to the public interest.

irreparable damage to competition in the wireless market and the low-income customer markets<sup>4</sup> as well as the absence of specific, measurable, and verifiable benefits attributable to the merger.<sup>5</sup> The loss of a competitive player in these markets would create significant risk of parallel conduct and higher pricing for consumers. This pricing risk is demonstrated by the two largest players in the wireless market today, AT&T and Verizon, which generally offer higher-priced plans than T-Mobile and Sprint.<sup>6</sup> New T-Mobile would rival or exceed these companies in market share, creating a strong incentive for oligopolistic behavior.<sup>7</sup> New T-Mobile would also comprise nearly 60 percent of the wireless prepaid market that predominantly serves low-income customers,<sup>8</sup> placing excessive market power under the control of a single company and creating a virtual monopoly over these services. Because the Joint Applicants are not under rate of return regulation, protections cannot be implemented that are adequately enforceable and verifiable to address these risks. The Commission should therefore deny the proposed transaction and conclude that the Joint Applicants should remain separate entities to preserve competition.

Allowing T-Mobile and Sprint to merge would not benefit the public interest and would instead cause increased harm to Californians.<sup>9</sup> The benefits claimed by the Joint Applicants<sup>10</sup> are exaggerated and often do not exceed, or even match, the beneficial outcomes that are expected if the companies remain independent. The independent entities have already announced extensive and detailed plans to offer Fifth Generation (5G) wireless service, and the Joint Applicants' aggressive proposals do not reflect the market demand for this product.<sup>11</sup> Capital investment, including investment in rural areas, will not increase with the merger.<sup>12</sup> The Joint Applicants

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<sup>4</sup> Testimony of Lee Selwyn at 8-96. Testimony of Eileen Odell at 8-27.

<sup>5</sup> See Table 1 for page references to the Public Advocates Office's responses in Testimony to Scoping Memo Question 14: "Would the benefits of the merger likely exceed any detrimental effects?"

<sup>6</sup> Testimony of Lee Selwyn at 77 and 82-84. Testimony of Eileen Odell at 16-18.

<sup>7</sup> Testimony of Lee Selwyn at 9-10 and 91. An oligopoly is defined as a market controlled by a small number of firms.

<sup>8</sup> Testimony of Lee Selwyn at 64-65. Testimony of Eileen Odell at 12-15.

<sup>9</sup> See Table 1 for page references to the Public Advocates Office's responses in Testimony to Scoping Memo Question 14: "Would the benefits of the merger likely exceed any detrimental effects?"

<sup>10</sup> A.18-07-012 at 4. A.18-07-011 at 15-16.

<sup>11</sup> Testimony of Lee Selwyn at 142-166. Testimony of Cameron Reed on 5G at 8-19.

<sup>12</sup> Testimony of Adam Clark at 29-32.

have made no enforceable and verifiable pledge to improve or expand service in rural areas. They have also made no enforceable and verifiable pledge to retain low income plans or to keep prices low. Moreover, Sprint’s financial condition indicates it can remain a viable competitor without merging with T-Mobile.<sup>13</sup> Finally, New T-Mobile would not provide greater protections to customer privacy and instead risk degradation of privacy protections.<sup>14</sup> The proposed merger would cause irreparable harm to Californians with no offsetting benefits, and it therefore fails to serve the public interest.

**B. The recommendation to deny is supported by a thorough analysis of public interest factors.**

The Public Advocates Office staff and its consultant Dr. Selwyn conducted a thorough review and analysis of materials presented by the Joint Applicants in their Application. See below for the page reference in individual testimony addressing the factors outlined in the Scoping Memo.

**Table 1: References to Cal Advocates’ Analysis of Public Interest Factors**

	<b>Public Interest Determination Factor<sup>15</sup></b>	<b>Staff/Consultant Testimony, Location of Analysis</b>
1	How would the merger impact competition for services currently provided by Sprint or T-Mobile in any metropolitan area or other geographically distinct market?	Testimony of Lee Selwyn at 8-27
2	What new services, if any, that are not currently provided by T-Mobile or Sprint, are contemplated to be provided by the merged entity? How would the merger impact competition for such services in any metropolitan area or other geographically distinct market?	Testimony of Lee Selwyn at 142-156 Testimony of Cameron Reed on 5G at 10-22
3	What are the relevant markets to consider?	Testimony of Lee Selwyn at 27-72 Testimony of Eileen Odell at 9-23
4	Would the merger give the merged company monopsony power or increase the tendency to exercise monopsony	N/A

<sup>13</sup> Testimony of Adam Clark at 7-28.

<sup>14</sup> Testimony of Kristina Donnelly at 6-28.

<sup>15</sup> Scoping Memo at 2-3.

	<b>Public Interest Determination Factor<sup>15</sup></b>	<b>Staff/Consultant Testimony, Location of Analysis</b>
	power, including market power over equipment suppliers?	
5	What merger-specific and verifiable efficiencies would be realized by the merger?	Testimony of Lee Selwyn at 132-142
6	How would the merger affect innovation?	Testimony of Adam Clark at 31-35
7	How would the merger affect the market for special access services, including backhaul services?	N/A
8	How would the merger affect the ability of independent competitive wireless carriers to obtain backhaul services?	N/A
9	Would the merger increase the market power of the incumbent local exchange carriers and their wireless affiliates?	Testimony of Lee Selwyn at 72-132
10	How would the merger impact the quality of, and access to, service to California consumers in metropolitan areas, rural areas, or other geographically distinct markets? What services would be affected?	Testimony of Lee Selwyn at 156-167 Testimony of Cameron Reed on 5G at 10-22 Testimony of Cameron Reed on Service Quality and Public Safety at 10-39
11	How would the merger impact the LifeLine program?	Testimony of Eileen Odell at 22-27
12	Which California utilities would operate the merged properties in the state?	N/A
13	Would the merger preserve the jurisdiction of the Commission to effectively regulate those utilities and their operations in California?	Testimony of Lee Selwyn at 167-173
14	Would the benefits of the merger likely exceed any detrimental effects?	Testimony of Lee Selwyn at 173-178 Testimony of Eileen Odell at 8-27 Testimony of Cameron Reed on 5G at 10-22 Testimony of Cameron Reed on Service Quality and Public Safety at 10-39

	<b>Public Interest Determination Factor<sup>15</sup></b>	<b>Staff/Consultant Testimony, Location of Analysis</b>
		Testimony of Adam Clark at 7-36  Testimony of Kristina Donnelly at 6-28
15	Should the Commission impose conditions or mitigation measures to prevent significant adverse consequences and, if so, what should those conditions or measures be?	Testimony of Lee Selwyn at 178-186  Testimony of Eileen Odell at 7, 22, 27  Testimony of Cameron Reed on 5G at 6  Testimony of Cameron Reed on Service Quality and Public Safety 7  Testimony of Adam Clark at 6  Testimony of Kristina Donnelly at 3-4

In addition to the fifteen issues listed above, the Scoping Memo seeks consideration of multiple factual issues including, but not limited to customer privacy and mandatory arbitration clauses.<sup>16</sup> Discussion of these issues is covered in the Testimony of Kristina Donnelly<sup>17</sup> and the Testimony of Lee Selwyn,<sup>18</sup> respectively.

**C. Should the Commission fail to deny the proposed merger, performance-based mitigating measures are necessary.**

If instead the Commission fails to deny the proposed merger despite the harms to competition and the corresponding harms to Californians, it should develop and adopt performance-based mitigating measures that are specific, measurable, enforceable, and easily monitored on an on-going basis to ensure compliance. The specific, measurable, verifiable,

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<sup>16</sup> Scoping Memo at 4.

<sup>17</sup> Testimony of Kristina Donnelly at 6-28.

<sup>18</sup> Testimony of Lee Selwyn at 96-99.

enforceable, and easily monitored performance-based mitigating measures the Commission should develop and adopt must address the following areas:

- a) The Joint Applicants' commitments made related to prepaid pricing, in order to mitigate harm to low income consumers.
- b) Requiring that New T-Mobile honor all existing wholesale agreements and to commit to offering existing wholesale partners the best wholesale terms and conditions that are offered individually by each of the Joint Applicants to their wholesale partners on a non-discriminatory basis.
- c) Requiring that New T-Mobile continue and expand participation in the LifeLine program indefinitely, at terms equal to or better than the terms currently offered by Assurance by Virgin Mobile.
- d) Requiring that New T-Mobile adhere to its commitments to offer in-home broadband services and to expand and improve service in rural California.<sup>19</sup>
- e) Requiring that New T-Mobile adhere to its commitments to provide wireless speeds in excess of 100 Megabits per second by 2021 and 400 Megabits per second by 2024.<sup>20</sup>
- f) Requiring that New T-Mobile retain Sprint's customer complaint database, portable generator inventory, and back-up battery policy to help maintain quality of service.
- g) Requiring that New T-Mobile report on customer complaints, service outages, broadband speeds and latency following the merger.
- h) Requiring that New T-Mobile work closely and collaboratively with the California Office of Emergency Services (CalOES) to implement wireless Next Generation 9-1-1 services across its service territory and notify the Commission, CalOES and the Public Advocates Office of 9-1-1 outages.
- i) Requiring that New T-Mobile construct a dedicated first responder communications network to mitigate the harms of reduced redundancy in cellular infrastructure.
- j) Requiring that New T-Mobile complete the California-specific capital investments that the Joint Applicants claim the merger will produce.
- k) Requiring that New T-Mobile submit annual reports on its capital investments in California and include detailed information.
- l) Requiring that New T-Mobile create an inventory of all third-party suppliers and subcontractors who have or will have access to New T-Mobile customer data. New T-Mobile should use this inventory to conduct regular, periodic reviews of suppliers' and subcontractors' data security and risk management policies and programs. New T-Mobile should require third parties notify and receive approval from New T-Mobile when providing subcontractors access to customer data.

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<sup>19</sup> Application at 4.

<sup>20</sup> *Id* at 15.

- m) Requiring that New T-Mobile ensure that third party risk management is a company-wide priority. New T-Mobile should ensure the Board of Directors and other senior leadership receive periodic updates from staff about the status of the company's third-party risk management programs. New T-Mobile should require staff to report to the board and senior leadership whenever a data breach occurs. The Commission and the Public Advocates Office should be notified when a breach occurs, with subsequent notification of the root cause analysis and remediation actions.
- n) Requiring that New T-Mobile should require third parties to notify New T-Mobile staff within 24 hours of a data breach or suspected breach, whether the breach originates with the third party or their subcontractor. Supplier contracts should clearly state how suppliers must notify New T-Mobile in the event of a data breach and should require suppliers provide periodic reports and updates describing the breach investigation and all corrective or remedial actions taken.
- o) Requiring that New T-Mobile allow customers to identify devices that belong to children and establish a program that would give primary account holders increased control over the data generated by devices that belong to children. This increased control should include the ability for the primary account holder to control what data are collected and to have New T-Mobile delete the data that are collected. In addition, New T-Mobile should not collect or store any information from these devices, beyond what is necessary to provide service. New T-Mobile should also not use the data, even if the data are de-identified, for any purpose other than providing service to that device. New T-Mobile should automatically preclude children's devices from inclusion in any interest-based advertising program, even if other types of customers must "opt-out."
- p) Requiring that New T-Mobile employ an independent consultant to conduct a customer satisfaction survey on their respective company's data privacy policies including customer notice and understanding of those privacy standards, customer ability and accessibility to opt-in/opt-out of carriers' data collection, and customer notification and recourse when data are compromised or breached. The independent consultant should work with the Public Advocates Office and other consumer groups that are parties in this proceeding on the survey methodology and design, and it should share the results of the survey with them and the Commission.
- q) Requiring that New T-Mobile delete all mandatory arbitration/class action waiver provisions from the post-merger New T-Mobile's customer service adhesion contracts, both for new as well as for pre-existing customers.

Further details must be developed to translate these areas into specific, measurable, verifiable, enforceable, and easily monitored performance-based mitigating measures. See further discussion of these potential performance-based mitigating measures in the individual testimony of Dr. Lee Selwyn and Public Advocates Office staff. Page references to this individual Testimony covering these measures can be found in Table 1, above, in response to Scoping Memo Question 15.



## **ATTACHMENT A**

### **Statement of Qualifications and Experience**

My name is Shelly Lyser. I am currently employed by the CPUC as a Program and Project Supervisor, assigned to the Public Advocates Office's Communications and Water Policy Branch. For this proceeding, I was the oversight Supervisor responsible for overseeing the analysis and testimony produced by the policy analysts, engineer, and expert consultant.

I graduated from University of California, Berkeley with a Bachelor of Science in Environmental Sciences. I took coursework in economics, physics, and policy. I earned my Master of Public Affairs from Princeton University, with a certificate in Science, Technology, and Environmental Policy. At Princeton, I took advanced coursework in micro and macro economics, econometrics, finance, and policy.

I have worked for several government oversight agencies and branches including the US Department of Energy, the Environmental Protection Agency, the New Jersey Office of Management and Budget, and the US House of Representatives. I also have extensive utility experience, having worked for PSE&G in Newark, NJ and Con Edison in New York City. At Con Edison, I represented the company at multiple rate proceedings at the Federal Energy Regulatory Commission. These proceedings involved oversight of hundreds of millions of dollars in utility revenues and sometimes billions of dollars in capital investment.

At the Public Advocates Office, I have served in the position of Senior Public Utility Regulatory Analyst and provided written and oral testimony in a \$650 million utility budget application proceeding. I led advocacy and oversaw teams on several rulemakings and application proceedings covering millions of dollars in ratepayer funds. As a Program and Project Supervisor, I oversee work of the analysts and engineer in the Policy Section of the Communications and Water Policy Branch. I have supervised team activity in numerous telecommunications proceedings.