

NEW YORK PUBLIC SERVICE COMMISSION

Joint Petition of T-Mobile USA, Inc. and Sprint)
Communications Company L.P. Concerning an) Case No. 18-C-0396
Indirect Transfer of Control)
_____)

**INITIAL COMMENTS OF
COMMUNICATION WORKERS OF AMERICA, DISTRICT 1**

Background

This Proceeding was commenced by the July 6, 2018 filing of a Joint Petition¹ (the "Petition" or the "Application") by T-Mobile USA, Inc. ("T-Mobile") and Sprint Communications Company L.P. ("Sprint") (collectively the "Joint Applicants" or "JAs") seeking Commission approval of the acquisition of Sprint by T-Mobile. The Petition was subsequently amended on July 26, 2018 to seek approval of the proposed transfer of certain assets, including franchises.² The Petition concedes that the transaction and the Proceeding are governed by applicable New York State laws and the rules of the Commission.

On October 19, 2018 the Commission filed a Notice Inviting Comments.³ These Initial Comments are filed pursuant to that Notice.

On November 1, 2018 the Communication Workers of America, District 1 ("CWA") was granted Party status.

Applicable Law

The Petition concedes that PSL Section 99 (2) and 100, inter alia, govern the Proceeding. Among other things, these laws require the Commission to inquire into and rule on the impact of the transactions on the public interest, with the burden of proving that the public will benefit placed on the

¹ Case No. 18-C-0396, Public Docket, Item 1

² Case 0396, Public Docket, Item 2

³ Case 0396, Public Docket, Item 4

applicant.⁴

This public interest requirement has been subject to Commission interpretation. The Commission, in its' Order in Case 15-M-0388 concerning the merger of Charter and Time Warner set forth guidelines⁵.

First, the contour of the public interest will inevitably vary from case to case. "Our analysis will be tailored to the specific transaction under review to determine whether there are benefits related to the transaction and whether the benefits outweigh the harms depends on the specifics of the industry and facts of the case....we have broad discretion to choose the scope of review that best fits the transaction at hand..."⁶

The Order then goes through an extensive discussion of the particulars of the public interest inquiry and concludes with the following elements of a public service analysis: "the impacts of the merger on universal access to services (both in terms of geographic availability and affordability), network investment and modernization, service quality and economic development."⁷

CWA emphasizes the Commissions' determination on the importance of economic concerns: "...the Commission is concerned about the economic development effects of the merger, including how the proposed transaction will impact existing and new employment opportunities."⁸ The public interest requirement for "economic development...including employment" is of particular relevance in this case, as appears below. CWA notes the Commission's recent policy of including guarantees of maintenance of consumer-facing jobs as a condition of approval in merger applications, including telecommunications.⁹

CWA notes that the Applicants have the burden of proving that any purported public benefits are directly caused by the merger and "...would not have been made in the absence of the proposed merger."¹⁰ The JAs may not offer as a public benefit for the purposes of this proceeding any action or

⁴ New York State Public Service Law, Section 100 (3) "No consent shall be given by the commission to the acquisition of any stock in accordance with this section unless the applicant has shown that the acquisition is in the public interest."

⁵ Case 15-M-0388, Public Docket, Item 96

⁶ Order, Case 0388, electronic page 17.

⁷ Order, Case 0388, electronic page 71

⁸ Order, Case 0388, electronic page 31.

⁹ See, inter alia, the Commission Order in Case 17-C-0050; CWA projects the loss of over 1,700 New York jobs if the merger is approved. See below, page 5.

¹⁰ Order, Case 0388, electronic page 36.

policy instituted by Sprint prior to the filing of the Application.¹¹

CWA notes that the Commission has correctly stated that its public interest analyses must consider both purported benefits and detriments. "Initially, we note that the proposal may have detriments for some or all of the Petitioners' New York customers. If these detriments are significant, they cannot be disregarded or omitted from our public interest analysis."¹²

Finally, CWA notes that it has been common practice for merger JA's to negotiate with the Commission a mitigation package, in which particular public interest concerns are addressed in hope that an otherwise insufficient Application will be approved. CWA requests that it be informed of and given the opportunity to participate in any mitigation discussions.

The Application

The Application is eight pages long. The first three and a half pages are preliminary verbiage and descriptions of the parties to the merger. The next two pages are a description of the corporate transactions creating the merger. The purported public interest issues are described in the next one and a half pages, followed by a brief conclusion.

The services currently provided by Sprint in New York are referenced in a footnote on page 2 of the Application.¹³ The Application further states Sprint "will continue to provide the services that it currently provides to customers in this State, subject to Sprint Communications' existing plans to discontinue its TDM services and transition customers to Internet Protocol ("IP") services. All existing Sprint Communications contracts will be honored, including transitioning customers to IP services...."¹⁴

No evidence is provided in support of any of these statements. No assertion is made that such services will be enhanced as a result of the merger. No assertion is made that there is a public interest benefit resulting from the continuation of these services. No assertion is made that the merger will result in a public interest benefit to the users of such services in New York.

The Application makes a single public interest claim. "The Merger Transaction will accomplish a goal critical to enhancing consumer welfare

¹¹ "Any assessment of the benefits should also be reduced to the extent the actions producing those benefits could or would have occurred even in the absence of the proposed transaction." Order, electronic page 16

¹² *ibid*

¹³ Petition, footnote 4, page 2

¹⁴ Petition, electronic page 6.

throughout this country, including in this State: the rapid and widespread deployment of 5G networks.... (and will) unlock synergies in order to build a world leading nationwide 5G network.... T-Mobile's increased investment and rapid growth—and resultant accelerated roll-out of 5G services—will stimulate thousands of additional jobs throughout the U.S. economy."¹⁵

The characteristics of such a 5G network, the "synergies" and the ways the public will share in and benefit from them are not described. The putative job gains in New York are not described.

In sum, the Application lacks any assertion of public interest benefits other than those that may accrue nationally from the creation of a national 5G wireless network by the Applicants.

The Public Interest Impacts of the Proposed Merger In New York

As set forth above, the law requires the Commission to make a determination that the proposed merger is in the public interest based on evidence provided by the JAs.

The only discussion of the public interest in the record is contained in the Application, as summarized above.

The lack of specific public interest assertions or evidence renders the Application facially insufficient. The Commission may not approve the merger based upon the record as it stands.¹⁶

CWA offers the following additional Initial Comments on public interest issues.

A. The Public Interest Impacts On Services Currently Provided By Sprint

The Application does not make clear the nature of the services Sprint currently provides in New York. The Application does not make clear the number of customers Sprint currently serves in New York. The Application does not state the number of employees now working in New York. The

¹⁵ Application, electronic page 6.

¹⁶ "...the Joint Petition contains no specific, concrete actionable items related to broadband expansion or upgrades that the Commission deems to be a measurable net public benefit." Case 17-C-0050, Public Docket, Item No. 8, page 16; "... no substantial reason whatever appears in the record to sustain the order and determination under review." Brooklyn Union Gas Company v. PSC, Third Department, 34 A.D.2d 71 (1970) at 74, Herlihy, J. concurring

Application does not discuss the economic impacts of the merger. The Application makes no claim that such services, employees or customers of the state economy will benefit from the merger, except insofar as they may benefit from enhanced wireless systems, as discussed below.

To further illuminate these defects, CWA propounds questions that, if put forward and answered, would provide a basis in the record for Commission action:

- 1) What services of any kind has Sprint provided to New York customers in any of the last five years?
- 2) How many customers, by service category, are or have been served?
- 3) How many persons are currently employed in New York by the JAs?
- 4) What impact will the merger have on such services, employees, and customers, and/or on the economy of the state?
- 5) Which services and customers are considered important to vulnerable populations?
- 6) What actions will the merged companies take to mitigate any detriments or enhance public benefits ensuing from the merger?

The Application's cursory and desultory treatment of these and other critical public interest issue render it legally insufficient as a basis for Commission approval.

B. Other Public Interest Impacts Of The Merger

The sole public interest assertion explicitly made by the JA's concern an unspecified expansion of a 5G national wireless system. CWA disputes the significance of the stated public interest benefits of the merger in New York and brings to the attention of the Commission significant public interest detriments which the JAs have failed to acknowledge.

1) The Merger Will Reduce Employment In New York By Over 1,700 Jobs

Using publicly available data and expert analysis CWA has analyzed the impact of the proposed merger on JAs employment practices and policies in New York. Summarized, the JAs, including their authorized dealers, currently operate 1,642 retail locations across New York divided between pre-paid and post-paid customer service and sales stores. Elimination of purported duplicative retail outlets will likely result in the closure of 443 of these stores, with a jobs reduction of 1,705.¹⁷ Such job losses are a significant

¹⁷ CWA will provide to the Commission, either publicly or confidentially, the sources of this

detriment to the economy of the state and are an essential element of the public interest analysis required by law.

2) The Merger Will Reduce Competition And Raise Rates, Especially For Vulnerable Populations

The merger will eliminate the substantial competition now occurring between Sprint and T-Mobile.¹⁸ This will be felt particularly in regions throughout New York where there is local head-to-head competition.¹⁹ As previously noted the JAs compete in two markets, post-paid and pre-paid services. Post-paid services tend to benefit higher income consumers, while pre-paid services are heavily used by low-income New Yorkers. The increased costs and onerous conditions that are likely if the merger is approved will disproportionately affect this population. This is a significant public interest detriment affecting a vulnerable population.

3) The Merger Will Unduly Concentrate Ownership And Control Of Wireless Spectrum In New York

Overconcentration of spectrum ownership and control is widely recognized as a public interest detriment. The FCC has created a "screen" that measures such overconcentration. That screen would be exceeded in 54 of the 62 counties in New York, where 97.5 percent of the New York population live.²⁰ Such concentration of ownership and control in New York is a clear public interest detriment.

4) The JAs Vague Assertions About The Future Benefits Of A 5G System Are Contradicted By Their Own Statements

As previously shown, the Application's reliance on New York public benefits from a future 5G system are legally insufficient, unreliable and impermissibly vague. A close examination of statements made by the JAs show repeated admissions and inconsistent statements that highlight the Application's misleading and insufficient claims.

data, the expert analysis used, and other supportive information if so requested. CWA will also provide information on the persistent and repeated violation of workers' rights and of outsourcing of American jobs by the JAs.

¹⁸ CWA will provide to the Commission, either publicly or confidentially, the sources of this data, the expert analysis used, and other supportive information if so requested.

¹⁹ Some regions of the state have more intense Sprint/TMUS competition than others.

²⁰ The prime source of this data is Appendix L-1 of the Applicants' FCC Public Interest Statement. CWA will provide to the Commission, either publicly or confidentially, the sources of this data, the expert analysis used, and other supportive information if so requested.

The Commission has repeatedly ruled that public interest benefits must be a consequence of the proposed merger, not of pre-existing policies and decisions. To that end it is notable that both T-Mobile and Sprint have announced commitments to 5G buildout prior to and unrelated to the merger.

T-Mobile: "T-Mobile is building out 5G in six of the Top 10 markets, including New York and Los Angeles, and hundreds of cities across the U.S. in 2018. The network will be ready for the introduction of the first 5G smartphones in 2019."²¹

T-Mobile: "Today's move is most certainly in anticipation of T-Mobile's plans to be the first to have nationwide 5G. These new 5G capabilities will bring about a converged marketplace at an even more rapid pace and we will be ready. Because we've been getting ready for this for years."²²

Sprint: "We are also preparing to launch our mobile 5G network in the first half of 2019. Our Massive MIMO radios are software upgradable to 5G NR, as you know, allowing us to fully utilize our spectrum for both LTE and 5G simultaneously while we enhance capacity even further with 5G and begin to support new 5G use cases."²³

The admission that 5G rollout has been a prior, long-term, well-planned and financed commitment of the JAs renders the inconsistent statements in the Application even more specious and unreliable.

For these reasons, the JAs assertions about New York 5G public interest benefits must be rejected, and the public interest detriments asserted here must be considered as parts of the Commission's required public interest inquiry.

Conclusion

CWA asserts that the Petition, and the record upon which the Commission must base its decision, are legally insufficient to justify approval of the merger. The JAs do not assert any net public benefit to New York, or any evidence of such. General assertion of benefits flowing from a putative

²¹ T-Mobile Press Release, "T-Mobile Delivers Its Best Financials Ever and Strong Customer Growth in Q3," at 5, Oct. 30, 2018.

²² Transcript, T-Mobile – Layer3 M&A Call, Dec. 13, 2017, p. 3.

²³ Transcript, Sprint Corp., Q2 2018 Earnings Call, S&P Global, Oct. 31, 2018.

national 5G network do not meet the legal requirements of the Public Service Law for an affirmative showing of public benefits. Evidence contained in these and other Initial Comments establish that there are significant and provable detriments to the public interest that the Petition ignores.

On that basis CWA respectfully requests that the Petition be denied.

CWA notes that the Commission has the authority to convene an evidentiary proceeding in which parties are able to adduce evidence and argument. This would create an evidentiary record upon which the Commission could rely. The Commission may also convene a Public Hearing to solicit public comments for inclusion in the record.²⁴ CWA also respectfully requests that the Commission convene one or the other of such proceedings.

Respectfully submitted,

/s/

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²⁴ The Commission has used both methods of assuring the adequacy of the record in merger proceedings.