

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of T-Mobile USA, Inc. and Sprint)
Communications Company L.P. Concerning an)
Indirect Transfer of Control)

Case No. 18-C-0396

Comments of the Public Utility Law Project of New York

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On July 6, 2018 T-Mobile USA, Inc. (“T-Mobile”) and Sprint Communications Company L.P. (“Sprint”) submitted a Joint Petition to the Public Service Commission (“PSC” or “Commission”) seeking authorization under section 100 of New York’s Public Service Law (“PSL 100”) to engage in the transfer of certain company assets (the “Merger”).¹ Subsequently on July 26, 2018, T-Mobile and Sprint (“Joint Petitioners”) supplemented the Joint Petition by also requesting the Commission grant authorization under section 99(2) of the Public Service Law (“PSL 99(2)”) for the transfer of Sprint’s wireline telephone company, which operates as a competitive local exchange carrier (“CLEC”) in New York, including but not limited to franchises held by Sprint.²

On September 6, 2018 the Department of Public Service (“DPS”) notified the Joint Petitioners that “[a] preliminary review of the petition indicates that the public interest requires a detailed Commission review of the petition.”³ Consequently, on October 19, 2018, the Commission issued a Notice Inviting Comments on the proposed transaction.⁴

¹ See, Case 18-C-0396, Joint Petition of T-Mobile USA, Inc. and Sprint Communications Company L.P., Joint Application of T-Mobile USA, Inc. and Sprint Communications Company L.P. Concerning an Indirect Transfer of Control, filed July 6, 2018 (“Merger Petition”).

² See, Case 18-C-0396, Letter Amendment by T-Mobile USA, Inc. and Sprint Communications Company L.P., dated July 26, 2018.

³ See, Letter from Debra LaBelle, Director of the DPS Office of Telecommunications to Steven Wilson, Attorney for the Joint Petitioners, dated September 6, 2018, at p.1

⁴ See, Notice Inviting Comments, issued on October 19, 2018.

The Public Utility Law Project of New York (“PULP”) is hereby submitting comments pursuant to the October 19 Notice.

I. Merger Analysis Precedent and Public Interest Determination and Factors

As the Commission instructed in Case 17-C-0050 concerning the proposed merger of Fairpoint Communications, Inc. and several small CLECs and BLECs with Consolidated Communications Holdings, Inc., under PSL sections 99 and 100, “it is necessary for the proposed transaction to be in the public interest for the Commission to grant its approval.”⁵ The Commission further instructed in Case 17-C-0050, that:

“If the proposed transaction is not in the public interest, the Joint Petition can be remedied through modifications or mitigation of detriments and/or enforceable conditions. As stated previously, generally, the telephone industry’s public interest standard is analyzed by reviewing, among other things, the following areas: quality of service at reasonable rates, competition, and financial considerations. In approving a proposed acquisition of the type involving ILECs under PSL §§99 and 100, the Commission must find that the transaction is in the public interest.”⁶

More specifically, the Commission noted in Case 05-C-0237 that its review of proposed transactions under PSL 99(2) require an affirmative public interest determination by the Commission.⁷ Review of proposed transactions under PSL 100 require the Commission’s consent to the acquisition of a telephone corporation’s stock, and PSL 100 bars “the Commission from giving its consent unless the applicant has shown, in the first instance, that the acquisition is in the public interest.”⁸ In summary, as noted above, the Commission has determined in analyzing telecommunications mergers that the proposed transaction must not only be in the public interest, but there is also a legal burden placed upon the applicant(s) to show that the

⁵ See, Case 17-C-0050, Joint Petition of FairPoint Communications, Inc., Berkshire Telephone Corporation d/b/a FairPoint Communications, Chautauqua and Erie Telephone Corporation d/b/a FairPoint Communications, Taconic Telephone Corporation d/b/a FairPoint Communications, FairPoint Business Services LLC, Consolidated Communications, Inc., and Consolidated Communications Holdings, Inc. for Approval of Proposed Transactions Pursuant to Sections 99, 100 and 101 of the New York State Public Service Law, Order Approving Joint Petition Subject to Conditions, Issued and Effective June 15, 2017, at p. 13 (“CCH Order”).

⁶ Id.

⁷ See, Case 05-C-0237, Joint Petition of Verizon Communications et al., Order Asserting Jurisdiction and Approving Merger Subject to Conditions (issued November 22, 2005) n. 46.(“Verizon Merger”), cited in the CCH Order at p. 13.

⁸ See, CCH Order at pp. 13-14.

proposed transaction is in the public interest, or the Commission must withhold its consent to such a transaction.

As the Commission noted in the Verizon Merger, among other cases, if the burdens or potential harms placed upon the public interest are not outweighed by the potential benefits, the Commission may impose modifying or mitigating conditions to outweigh potential detriments or impose other enforceable conditions to the proposed transaction. The “the telephone industry’s public interest standard is analyzed by reviewing, among other things, the following areas: quality of service at reasonable rates, competition, and financial considerations.”⁹ Finally, the Commission’s analysis of cases before it must rely upon the record in the proceeding, and such reliance shall be upon testimonial evidence, or party comments, or evidence placed into the record by DPS staff investigation(s), or potentially through judicial notice by an administrative law judge presiding over a proceeding.¹⁰

II. The Public Interest Factor(s) as presented by the Petition

The Merger Petition is relatively brief -- 34 of 42 pages do not contain arguments or evidence relating to the public interest -- and effectively only does three things: (1) it identifies the parties to the transaction and provides a concise description of the proposed financial transactions; (2) it provides an extremely brief and conclusory citation of what the Joint Petitioners assert is the public interest issue upon which the transaction must be analyzed; and (3) it provides a conclusory statement Sprint will continue to provide the services it provides to New York customers and that all existing contracts of Sprint will be honored.¹¹ It does not, however, address any of the public interest factors that the Commission has repeatedly instructed that it will analyze in telecommunications mergers.¹²

⁹ CCH Order at pp. 1-13, *passim*.

¹⁰ Note that in the Brooklyn Union case, the Court held that “no substantial reason whatever appears in the record to sustain the [PSC’s] order and determination under review,” *Bklyn Union Gas Co. v. PSC*, 3d Dept, 34 A.D.2d 71 (1970), at p. 74.

¹¹ See, Merger Petition at p. 6.

¹² The list of relevant factors provided in the CCH Order and the Verizon Merger cases cited above have been supplemented in the Charter-Time Warner Cable merger, which was analyzed primarily under a different area of the Public Service Law but contained analysis of telecommunications services vital to the State’s public policy and the public interest as, arguably, the underlying merger in this case equally does. See, Order Granting Joint Petition Subject to Conditions, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer

The Merger Petition, for example, does not address through any evidence the Commission's analytical factors of "quality of service at reasonable rates, competition, [or] financial considerations."¹³ Instead it only states in a conclusory manner that no competitive harm will be caused by the merger, and that the CLEC operation of Sprint will have access to greater intellectual and financial capital if the merger is approved, and that existing Sprint wireless customers will be benefitted.¹⁴ The Merger Petition then notes that "the Merger Transaction described herein will bring numerous other public interest benefits to the residents in this State,"¹⁵ and that the Merger Transaction will accomplish a "[critical goal] ... the rapid and widespread deployment of 5G networks in a market structure that spurs rivals to invest in increased capacity, and, correspondingly, to drop the price of data per gigabyte."¹⁶

Given the lack of any citations to evidence, testimonial or otherwise, that would tend to show that the transaction is affirmatively in the public interest, the Commission only has a few options if it chooses to strictly construe and act under PSL sections 99 and 100. That is, the Commission can deny the Merger Petition; or, despite the lack of substantial evidence in the record, it could construct merger conditions and enforcement regimes sufficient to outweigh any potential burdens weighing against the transaction's being in the public interest; or, the Commission could hold an evidentiary proceeding in which it would collect the evidence necessary for it to make a public interest analysis.

It is hard to see how a denial that derives from no evidence in the record furthers the public interest. Instead, the Joint Petitioners should be given an opportunity, or compelled to take advantage of such an opportunity, in which to place evidence in the record that addresses New

of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Case No. 15-M-0388, January 8, 2016, passim ("Charter Merger Order").

¹³ See, CCH Order at pp. 1-13, passim.

¹⁴ See, Merger Petition at p. 6.

¹⁵ Id.

¹⁶ Id. at p. 7. While the Joint Petitioners disclaim the relevance of benefits accruing from the wireless corporations' actions to the public interest, since it states these proposed benefits are critical goals and will bring added public benefits, and it is the only actual citation of some factor in the public interest, the disclaimer appears empty. And, since this proceeding must also arguably be analyzed under PSL 92(h), it is not unreasonable to act upon the presumption that if the Joint Petitioners offered up wireless benefits as their sole significant public interest factor, that they intended to have the Commission analyze wireless activity (which is, arguably allowed under PSL 92(h) and as analyses of consumer protection issues, not forbidden by the PSL.

York's public interest factors in telecommunications cases. The Joint Petitioners are certainly capable of at least putting forward a prima facie case, as they showed through the federal filings in the Federal Communications Commission's ("FCC's") proceeding analyzing the self-same proposed merger.¹⁷

With regard to the Commission's authority to construct merger conditions and/or enforcement regimes directed at balancing the public interest against any potential detriments, there would certainly be room to do so in this proceeding. However, given the lack of evidence or non-conclusory argument in the record, at least in part the Commission would need to rely upon the Joint Petitioners' federal filings, and the filings of active parties/stakeholders in the FCC's docket. Since such an action would reasonably require that one of the active parties in this proceeding introduce such filings as part of its comments, or that the Commission introduce such evidence, PULP argues that it would better buttress the public interest, and provide better and more transparent process, if the Commission hold an evidentiary hearing in this case.

Turning finally to the issue of an evidentiary proceeding, PULP argues that the best way forward for the Commission from this point in the proceeding would be to hold an evidentiary hearing process with one or more ALJs overseeing such process, and to hold public statement hearings in New York City and Buffalo, Rochester, Syracuse, Albany, Poughkeepsie/Newburgh, and White Plains/Mount Vernon. As PULP will discuss below, given the current turmoil in the State's telecommunications markets, and given the turmoil created by the FCC's actions in the telecommunications markets, it is vital that a record upon which a decision in this case is based be as comprehensive as is practicable.

III. The Public Interest Factors That Should Have Been Supplied in the Merger Petition

¹⁷ See, *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Public Interest Statement, WT Docket No. 18-197 (filed June 18, 2018) ("Public Interest Statement").

The Commission's precedence supports use of the public interest requirement when reviewing merger proposals. The Commission went a step further in the merger of Charter and Time Warner and established guidelines in its' Order.⁵ Specifically, the Commission noted that "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

The Commission has also been clear that the burden is placed on the Applicants who have the duty 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 Applicants may not offer as a public benefit for the purposes of this proceeding any action or policy instituted by Sprint prior to the filing of the Application.¹¹

The Merger Petition before the Commission fails to satisfy their burden by providing the elements required and the precedent established for finding a "public benefit." One element included in the Merger Petition that could be considered in a public benefit determination is primarily limited to what services Sprint currently provides in New York, which is found in a footnote on page 2 of the Application.¹³ The Application proceeds by stating that 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...." While this issue is raised, the Merger Petition includes no evidence and no review to support the claim.

The Merger Petition fails to discuss how current and future customers will actually benefit from the merger. There is no mention of any plans to focus on enhancing service or making such services more affordable to low- and fixed-income New Yorkers who are already struggling to

pay their cell phone bills. The Merger Petition's failure to offer such a plan is a lost opportunity by T-Mobile and Sprint to show how the transaction might help some of New York's most vulnerable residents.

Later in the Merger Petition, a public interest element would seem to be possible from the deployment of the 5G network: "The Merger Transaction will accomplish a goal critical to enhancing consumer welfare 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."¹⁴ However, besides the inclusion of this statement, the Merger Petition fails to include any evidence or in-depth discussion relating to how these "synergies" will actually benefit New Yorkers. There are no specifics regarding the number of new jobs expected if the merger were to be approved nor is there any information relating to where these expected new jobs would be located or what these jobs would entail.

The Merger Petition's lack of specifics as they relate to the public interest sets forth a number of questions that should be explored in an evidentiary proceeding, if the Commission were to pursue one. The questions include but should not be limited to:

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

Answers to these questions would provide the public and the Commission with a greater understanding of what the Merger Petition will mean for service and costs in New York State.

PULP encourages the Commission to ask these questions in this proceeding if it determines not to hold an evidentiary proceeding, or more appropriately, in the context of an evidentiary proceeding and public statement hearings.

IV. Potential Core Public Interest Impacts Not Stated in the Merger Petition (*jobs, lessened competition in inner-cities, over concentration of wireless spectrum w/o moderating factors, Lifeline issues, TAF issues b/c of Sprint operating contract for TRS, etc.*)

As noted above, the Commission has over time applied a public interest analysis that looks at quality of service at reasonable rates, competition, financial considerations, retention or creation of jobs, economic development contribution, provision to or protection of Lifeline consumers, service quality and number of households supplied with broadband (or number of new households passed), and market power/effect(s) of lessening of competition. The Merger Petition does not address any of these factors other than in an extremely conclusory manner, which is essentially the converse of meeting their burden to show the transaction is in the public interest.

If the Merger Petition had been legally sufficient to uphold the Joint Petitioners' burden, it could have contained but not been limited to evidence of the following:

- (1) A showing of how many “customer facing jobs” are currently provided by the Joint Petitioners through T-Mobile stores, Sprint stores, Boost Mobile stores (subsidiary of T-Mobile), Metro PCS stores (subsidiary of T-Mobile and Virgin Mobile outlets (subsidiary of Sprint), and how many of such positions might be downsized due to the merger, and whether such downsizing might be concentrated in or near distressed census tracts;
- (2) A showing of how many pre-paid customers are currently served by the Joint Petitioners and their subsidiaries, and whether or not the merger would affect prices charged such customers, whether the ability to pay in person at physical stores rather than payment handling entities (which charge payment fees) would be affected, and whether any of the frequencies currently handling service to vulnerable households via Lifeline or pre-paid might be repurposed to 5G services;¹⁸
- (3) How, if at all, the repurposing of existing frequencies and other infrastructure to 5G services might affect wireless voice service, cost and service quality of non-5G

¹⁸ See, <https://www.bloomberg.com/opinion/articles/2018-10-03/t-mobile-sprint-megadeal-puts-focus-on-overlooked-prepaid-market>.

broadband, and availability, price, speed and “overage” costs for those households that currently only access the Internet through wireless cellular service.

There are also a number of other issues that the Merger Petition should have addressed, including the following: Sprint is the provider of contractual services to the Targeted Accessibility Fund (“TAF”),¹⁹ which is a public-private entity that financially oversees New York’s Lifeline, Universal Service and Telecommunications Relay Service (“TRS”) programs, which are vital to low-income, rural and disabled households. Yet no mention is made of this vitally important service other than to assert that Sprint would maintain contractual services.

Similarly, a subsidiary of Sprint, Virgin Mobile, is not only an important Lifeline telephone provider and wireless broadband provider, it has also sought entry into the TAF to become one of the first wireless Lifeline providers.²⁰ While those factors are important enough on their own, the FCC is in the process of rulemaking proceeding that is aimed at ending the provision of wireless Lifeline service(s) by “non-facilities-based carriers,” which currently provide service to approximately 70% of the national Lifeline market, and a leading provider – Tracfone – is the largest provider of Lifeline in New York.²¹

Additionally, as the Pew Research Center and many of the intervenors in the FCC’s Lifeline NPRM and Order point out, most low-income households are “more dependent upon wireless technology” as their sole provider of telephony and broadband.²² This is particularly true for families that move often (i.e., are “housing unstable”), or have impaired credit, or whose finances are impaired. This is also vital, since the Commission is currently engaged in three

¹⁹ See, Opinion 98-10, OPINION AND ORDER ESTABLISHING ACCESS CHARGES FOR NEW YORK TELEPHONE COMPANY AND INSTITUTING A TARGETED ACCESSIBILITY FUND, issued and effective June 2, 1998 (“Opinion 98-10”).

²⁰ See, Notice of Election of Virgin Mobile USA L.P. Pursuant to Public Service Law 92-h to Participate in New York State Targeted Accessibility Fund and Petition for Establishment of Distribution, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=2ahUKEwiRnZe63NneAhUr64MKHShiB0IQFjAMegQIAxAC&url=http%3A%2F%2Fdocuments.dps.ny.gov%2Fpublic%2FCommon%2FViewDoc.aspx%3FDocRefId%3D%257BF33AF240-02D7-4FD6-8454-15D6D809BAD4%257D&usg=AOvVaw13_VP7wV_IgmSIiBBcwOq4.

²¹ See, FCC proceeding 17-55, dockets WC-17-2827, 11-42, 09-147, collectively the FOURTH REPORT AND ORDER, ORDER ON RECONSIDERATION, MEMORANDUM OPINION AND ORDER, NOTICE OF PROPOSED RULEMAKING, AND NOTICE OF INQUIRY, adopted November 16, 2017 (“Lifeline NPRM & Order”), at pg. 25. And see, Case 18-C-0125, Petition of Tracfone Wireless, Inc. For Approval to Participate in State Lifeline Program and Receive Distributions from the Targeted Accessibility Fund.

²² Id. at pp. 7-8.

proceedings (Tracfone, Virgin Mobile and i-Wireless) aimed at determining how much funding wireless Lifeline providers authorized to join the TAF by PSL 92(h) should receive, and what protective measures to take against the potential effects of the FCC's proposed elimination of non-facilities-based Lifeline carriers. And, as DPS staff noted in its assessment of telecommunications in Case 14-C-0370, wireline Lifeline service peaked in or around 1996 at just short of 800,000 lines but had dropped to only approximately 138,000 lines by 2014.²³ At the same time, wireless Lifeline had grown to approximately 1 million subscribers.²⁴ It is indisputable therefore that by 2014, wireless Lifeline services were a key service for low-income households in New York, and thus the potential impact of the transaction proposed in the Merger Petition must also consider the impact of a PSL 92(h) analysis upon the transaction.

V. Conclusion

As PULP has argued in these Comments, the Joint Petitioners did not meet their legal burden to show the proposed merger transaction is in the public interest. Rather than requesting the Commission to simply deny the transaction, PULP suggests that the Commission should request or require the Joint Petitioners to place evidence in the record that would tend to effectuate their legal burden. Given that no such evidence exists in the New York proceeding 18-C_0396, PULP has suggested that the Commission and/or DPS might take judicial notice of such evidence, which is part of the record in the FCC proceeding analyzing the proposed merger. However, since there is no mechanism to take such notice absent an evidentiary hearing, PULP respectfully requests that the Commission add an evidentiary process to this proceeding, and that it also require the DPS and Joint Petitioners to hold a series of public statement hearings at which active parties, stakeholders and the Joint Petitioners might provide sufficient evidence to create a robust record upon which the Commission might act. PULP furthermore suggests that such public statement hearings be held in the "big 6" cities and in some selected rural areas, and not simply in Albany and New York City.

²³ See, Staff Assessment of Telecommunications Services, in Case 14-C-0370, In the Matter of a Study on the State of Telecommunications in New York State, at pp. 29-30.

²⁴ Id. See, also, Comments of the Public Utility Law Project in Case 14-C-0370, at pp. 14-16. Since 2015 the number of wireless Lifeline subscribers has dropped.

Finally, given the unusual amount of “turmoil” in New York’s (and federal) telecommunications markets, PULP suggests that the Commission should exercise the broadest possible reach of its powers to effectuate the public interest, and analyze this proceeding in the context of the vast changes occurring in New York’s Lifeline, rural/universal service and accessible telephony markets; the likely exit of a major telecommunications, broadband and Lifeline provider – Charter Communications -- from the State’s telecommunications markets;²⁵ the FCC’s likely removal of Tracfone – New York’s largest Lifeline provider – from the market serving vulnerable households.

Respectfully submitted,

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²⁵ See, e.g., 2017 and 2018 PSC enforcement actions in Case 16-M-0388, the Charter Merger proceeding.