BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112-C) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).	Application 18-07-011
In the Matter of the Joint Application of Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C) and T-Mobile USA, Inc., a Delaware Corporation for Review of Wireless Transfer Notification per Commission Decision 95-10-032	Application 18-07-012

JOINT APPLICANTS' OPENING COMMENTS ON PROPOSED DECISION

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JOINT APPLICANTS' OPENING COMMENTS ON PROPOSED DECISION

Pursuant to California Public Utilities Commission ("Commission") Rules of Practice and Procedure ("Rules") 14.3, Sprint Communications Company L.P. ("Sprint Wireline"), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C)[2] (together, the "Sprint Wireless CA Entities") and T-Mobile USA, Inc. ("T-Mobile USA") (collectively referred to as the "Joint Applicants"), respectfully submit these Joint Opening Comments on the March 11, 2020 Proposed Decision in the above-referenced matter (the "PD").[3]

I. INTRODUCTION

The PD correctly finds that "the merger will create a new company that is well-positioned to provide a robust 5G service network that can compete with the two larger carriers [AT&T and Verizon]"[4] and reaches the correct conclusion that the merger is in the public interest. To that end, the PD acknowledges the numerous California-specific commitments made by the Joint Applicants in this proceeding,[5] the nationwide FCC commitments,[6] and T-Mobile's DOJ commitments;[7] all of which reinforce the transformative benefits for California consumers associated with the merger and the buildout of New T-Mobile's ("NTM") 5G Network. In particular, the almost 50 California-specific voluntary commitments made by T-Mobile[8] go to the very core values of the merger by highlighting, among other things, the benefits New T-Mobile will bring to rural and low-income Californians in terms of LifeLine offerings, expanded digital inclusion and literacy programs, as well as expanded coverage and capacity in rural areas. Moreover, those commitments also address such matters as 5G deployment and network buildout, network resiliency, public safety, MVNOs, jobs, pricing, privacy, and diversity.

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2 Virgin Mobile USA, L.P. changed its entity name to Assurance Wireless USA, L.P. as of March 16, 2020. *See* Virgin Mobile Advice Letter 36 (Mar. 16, 2020).

3 The Joint Applicants acknowledge that earlier today the parties to the Business Combination Agreement closed the transaction for various reasons set forth in a letter from Michael Sievert, the President and Chief Operating Officer for T-Mobile. A copy of that letter is included as Attachment A. The Joint Applicants urge the Commission to modify the PD as described in these Comments and to adopt a revised PD at its April 16, 2020 Meeting as scheduled.

4 PD at 39.

5 *See* PD at 13-14, 20-23, 28, 33-39; see also Joint Applicants' Post-Hearing Reply Brief on the Joint Application for Review of the Wireless Transfer Notification per Commission Decision 95-10-032 (May 10, 2019) at Appendix 1 (list of voluntary commitments) ("Joint Applicants' Post-Hearing Reply Brief").

6 *See* PD at 13-14, 21, 23- 26, 30, 33-39.

7 *See* PD at 13-14, 20, 21, 25-28, 30-31, 33-39.

8 *See, e.g.*, Joint Applicants' Post-Hearing Reply Brief at Appendix 1.

However, as discussed below, the Commission fails to recognize the limitations on its jurisdiction over wireless transfers of control and, in addition, contrary to the findings of the FCC, the DOJ, and the federal district courts, incorrectly asserts "that additional conditions specific to California [beyond the almost 50 voluntary commitments made by T-Mobile in this proceeding referenced above] are needed to guarantee that this Merger, on balance, will be in the public interest of the citizens of this state and avoid any potential adverse impacts from reduced competition."[9] The PD is incorrect factually, legally and technically as described in these comments, and the Joint Applicants respectfully urge the Commission to revise the PD to correct those errors. The Joint Applicants have included a redline of the Findings of Fact, Conclusions of Law and Ordering Paragraphs in the PD which are intended to address these serious deficiencies.[10]

II. THE PD'S CONCLUSIONS REGARDING THE COMMISSION'S JURISDICTION CONSTITUTE LEGAL ERROR

The PD erroneously asserts that the Commission has the authority to "approve the Merger"[11] and impose conditions as a prerequisite to granting such approval.[12] Both assertions conflict with federal law and the Commission's own precedent. Moreover, as discussed below, due to changes to Sprint Wireline's business during the lengthy pendency of this proceeding, it has now filed an advice letter to surrender its CPCN in the State of California effective March 30, 2020 and has moved to withdraw the Wireline Application. The Commission thus no longer has jurisdiction over the transfer of Sprint Wireline. For these reasons, the PD should be revised to delete any statements that the Commission's approval is required or that the Commission may *mandate* conditions.

A. The PD's Assertion of Authority to Require Approval For, or to Impose Conditions On, the Wireless Transaction Constitutes Legal Error.

1. *Section 332(c)(3)(A)*. As Joint Applicants have previously explained, Section 332(c)(3)(A) of the federal Communications Act expressly prohibits state regulatory commissions such as the Commission from "regulat[ing]" either "the entry of" of wireless carriers or "the rates charged by" those carriers.[13] Congress gave *the FCC*—not this Commission—exclusive jurisdiction over national wireless

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9 PD at 38.
10 *See* Attachment B.
11 PD at 2.
12 *See id*. at 42-55 (OP 1-41).
13 47 U.S.C. § 332(c)(3)(A).

licensing, including decisions about how, where, through which entity wireless services are provided.[14] Moreover, the Ninth Circuit has specifically held that express preemption under Section 332(c)(3)(A) prohibits states from second-guessing the FCC's approval of a wireless merger.[15] Here, the PD's purported "approval" of the merger subject to the imposition of mandatory conditions is just the type of "second guessing" that Section 332 prohibits.[16] In fact, that "reexamination"[17] of the same issue determined by the FCC—whether a wireless merger is in the public interest—is clearly preempted by Section 332(c)(3)(A) and ordinary principles of conflict preemption.[18]

The PD's contention that the Commission has jurisdiction over the wireless merger based on Section 332(c)(3)(A)'s narrow exception for state regulation of "the other terms and conditions" of wireless service is unavailing, as it contradicts the plain text of the statute. Under no reasonable reading of Section 332(c)(3)(A) can a wireless merger be considered a "term and condition" of wireless service. Were that so, the exception would swallow the rule as the Commission could effectively regulate entry by the imposition of unbearable terms and conditions, and otherwise open the door to a patchwork of inconsistent state regulation of wireless services, undermining the FCC's exclusive authority over national wireless licensing policy. The PD's reliance on a single phrase in the legislative history[19] to support its assertion of jurisdiction is equally unavailing given the plain statutory text and intent of Congress to vest broad powers in the FCC.[20] In short, the PD's expansive reading of the "terms and conditions" exception "would

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[14] *See* 47 U.S.C. §§ 201, 301, 303, 307, 310 (establishing broad FCC authority over spectrum licensing); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008 (9th Cir. 2010) (spectrum licensing is the "FCC's core tool in the regulation of market entry"); *Havens v. Mobex Network Servs., LLC*, 2009 WL 3067046, at *13 (Cal. Ct. App. Sept. 25, 2009) (unpublished) (FCC's approval of a change in license ownership "necessarily is … an issue of market entry" because it "determines access of the holder … to a license" permitting the provision of wireless service).

[15] *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010); *Telesaurus*, 623 F.3d at 1006-10; *see also* 47 U.S.C. §§ 201, 301, 303, 307, 310 (establishing broad FCC authority over spectrum licensing).

[16] *See, e.g., Shroyer*, 622 F.3d at 1041 (state law cannot be invoked to second-guess the FCC's wireless merger determinations); *Telesaurus*, 623 F.3d at 1006; *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

[17] *Shroyer*, *supra* n.14.

[18] The Commission was free to file substantive comments in the FCC merger proceeding, but (beyond an initial filing indicating that the CPUC intended to provide further input) chose not to do so. *See* Comments of the California Public Utilities Commission, WT Docket No. 18-197 (filed Aug. 27, 2018) at 3 ("The CPUC plans to share its data with the FCC").

[19] PD at 2 n.2 (quoting excerpt of H.R. Rep. No. 103-111, at 251 ("House Report")).

[20] *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("We will not … allow[] ambiguous legislative history to muddy clear statutory language."); *see also supra* n. 12.

abrogate the very federal regulation of mobile telephone providers that the [Communications] [A]ct was intended to create."[21]

To the extent the PD's theory is that there can be no "entry" regulation where a transfer of control involves an existing wireless provider,[22] that is also simply incorrect. The plain text of Section 332(c)(3)(A) does not limit "entry" to the regulation of entities that had no prior presence in the state; instead, it refers to "entry of … *any* commercial mobile *service* or *any* private mobile service"—not a "new" market entrant.[23] Indeed, the PD's unduly narrow concept of entry is incompatible with Ninth Circuit precedent.[24] In any event, even the PD's flawed conception of market entry under Section 332(c)(3)(A) ignores the fact that the FCC approved this transaction to permit DISH to enter the market as a new wireless provider.[25] There can be no question that this transaction squarely implicates market entry under Section 332, and thus preempts Commission jurisdiction.

2. *Section 253(a)*. Section 253(a) of the Communications Act also independently preempts the Commission's claimed authority to approve the wireless transfer.[26] Together with other provisions of the 1996 amendments to the Communications Act (the "1996 Act"), Section 253(a) was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[27] As the FCC has noted, "the purpose of the 1996 Act is to 'provide for a pro-competitive, deregulatory national policy framework ... by opening all telecommunications markets to competition.'"[28] Consistent with that focus on promoting competition and the deployment of new technologies, the FCC has held that Section 253(a) prohibits not only state actions that "render[] a service provider unable to provide

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21 *Bastien*, *supra* n.15 at 987.

22 *See* PD at 2-3 n.3.

23 47 U.S.C. § 332(c)(3)(A) (emphasis added).

24 *See, e.g.*, *Shroyer*, *supra* n.13 at 1041 (finding preemption where AT&T was *already* providing wireless service in California before acquiring Cingular).

25 Prior to this transaction, DISH was not a participant in the market for wireless services. Under the DOJ consent decree, DISH must begin offering postpaid wireless service within one year of its acquisition of Boost. Proposed Final Judgment ("PFJ") at 17, *United States v. Deutsche Telekom AG*, No. 1:19-cv-2232-TJK (D.D.C. July 26, 2019), ECF No. 2-2.

26 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

27 Preamble, Telecommunications Act of 1996, § 101, Pub. L. No. 104-104, 110 Stat. 56, 70 (codified at 47 U.S.C. § 253).

28 *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure*, 33 FCC Rcd. 9088, 9092 ¶ 14 (2018), *petitions for review filed*, Nos. 19-70123 *et al.* (9th Cir. 2019).

an existing service in a new geographic area" or that "restrict[] the entry of a new provider in providing service in a particular area," but also state requirements that "materially inhibit[] the introduction of new services or the improvement of existing services."[29] The PD's asserted approval authority—based on its own public interest determination and/or conditions that exceed those that the FCC and DOJ found sufficient to advance the public interest—runs afoul of that prohibition: It "materially inhibit[s]" New-T-Mobile's (and DISH's) provision of new or improved wireless services, such as 5G wireless services.[30] As discussed below, many of the specific individual conditions in the PD exacerbate these concerns.[31]

Finally, the Commission may not attempt to leverage its jurisdiction over wireline transfers of control—which, in any event, no longer exists given the withdrawal of the Wireline Application (*see* Section II.B, *infra*)—to exercise jurisdiction over or impose mandatory conditions on the wireless transfer. The Joint Applicants repeatedly urged the Commission to consider the Wireline Application on a separate track from its review of the Wireless Notification and grant that Application based on the fact it was uncontested on the merits and that the exclusive focus of these proceedings (including the two sets of hearings) was on the separate wireless transaction.[32] In addition, the Wireline Application is now moot – only further underscoring that it would be unlawful for the Commission to attempt to condition the *wireless* transfer of control on the basis of the *wireline* control.[33]

3. The 1995 Decision. The PD cites the Commission's *1995 Decision*[34] to suggest that the Commission may require approval for wireless mergers. That assertion of approval authority not only directly conflicts with Section 332(c)(3)(A) for the reasons discussed above; it also ignores the Commission's express *exemption of* wireless carriers from seeking "preapproval" of any transfer of control of a wireless provider or its assets under Public Utilities Code sections 851-856.[35] While the *1995 Decision*

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[29] *Id.* at 9104 ¶¶ 37-38.

[30] *See id.* at 9091-93 ¶¶ 10-16; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705, 7780-82, ¶¶ 149-152 (2018), *petitions for review filed*, Nos. 19-70123 *et al.* (9th Cir. 2019).

[31] *See* Section VI, *infra* (discussing conditions listed in OPs).

[32] *See* Joint Applicants' Post-Hearing Opening Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (Apr. 26, 2019); *see also* Joint Applicants' Post-Hearing Reply Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (May 10, 2019).

[33] *See also* Section II and III, *supra*.

[34] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications* (1995) D. 95-10-032 ("*1995 Decision*").

[35] *See 1995 Decision* at *45 (Ordering Paragraph 3); *Lynch Telephone Corp. XI et al* (2005) D.05-05-014 at 5 n.7 ("[I]n [D.95-10-032], Ordering Paragraph (OP) 3, the Commission held that § 854 *should not apply to wireless entities*.") (emphasis added).

required wireless carriers to merely provide *advance notice* to the Commission,[36] Joint Applicants met that requirement here by filing the Wireless Notification. As a result, the PD's assertion of approval authority (including an approval subject to mandatory conditions) departs from established Commission precedent without following the requisite procedures[37] and, was asserted so late in this proceeding and without appropriate procedure, violating basic principles of due process.[38]

B. Given Intervening Developments Since this Proceeding Commenced, the Commission No Longer Has Jurisdiction Over the Wireline Transfer.

At the outset of the Commission proceeding, Joint Applicants advised the Commission of Sprint Wireline's "existing plans to discontinue TDM services and transition customers to Internet Protocol ("IP") services."[39] During the lengthy pendency of the Commission's review, Sprint Wireline has continued that transition, including for its wireline voice services.

As a result, on March 30, 2020, Sprint Wireline filed a Tier 1 Advice Letter advising the Commission that it had recently completed the transition of "its regulated wireline services—including wireline voice services previously provided in traditional Time-Division Multiplexing ("TDM") format—to newer Internet Protocol ("IP") formats, including Voice over Internet Protocol ("VoIP") service,"[40] and advised the Commission that "the remaining wireline services that Sprint Wireline provides to customers in California - including broadband services and other IP-based services with enhanced information-processing, storage and/or retrieval capabilities - are exclusively information services and/or jurisdictionally interstate services."[41] Accordingly, Sprint Wireline advised that it was "relinquishing" its

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[36] *1995 Decision* at *46 (Ordering Paragraph 3(c)).

[37] It would be unlawful for the Commission to eliminate the wireless exemption in this proceeding. Doing so would effect a major change in regulatory policy that, at minimum, would require a reversal of (or at least a material amendment to) the *1995 Decision*. *See, e.g.*, Pub. Util. Code §§ 1708, 1708.5.

[38] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The PD also conflicts with other Commission precedent. For example, the Commission asserted no such approval authority over wireless transactions in considering the transfer of control of these same Sprint entities only a few years ago. *See In re Application for Transfer of Control of Sprint Communications L.P. to SoftBank Corp.* (2013) D.13-05-018 at 9.

[39] Wireline Application at 15.

[40] Sprint Communications Advice Letter 918 (Mar. 30, 2020) at 1.

[41] *Id.* at 2 and nn. 4 & 5 (citing *e.g.,* 47 U.S.C. § 153(24); *Restoring Internet Freedom*, 33 FCC Rcd. 311, 320-22, 335-38 ¶¶ 26-28, 30, 45-49 (2018); *Order Instituting Rulemaking to Consider Modifications to the California Advanced Services Fund*, R.12-10-012, at 17 (Cal. P.U.C. Oct. 25, 2012)).

CPCN, effective as of the date of filing (i.e., March 30, 2020).[42] Sprint Wireline (joined by T-Mobile) also moved to withdraw the Wireline Application as moot.[43]

As a result, Commission approval for the wireline transaction is no longer required under Public Utilities Code section 854(a),[44] and the PD should be modified accordingly. Moreover, such public utility regulation of information services and/or services that are jurisdictionally interstate is foreclosed by federal law.[45]

III. THE PD'S FINDINGS REGARDING SECTIONS 854 (b), (c) AND (f) CONSTITUTE LEGAL ERROR

The PD's conclusion that the Commission must approve the Transaction pursuant to Public Utilities Code sections 854(b) and (c)[46] constitutes legal error. As an initial matter, Application No. 18-07-012 *notified* the Commission of the wireless transaction in accordance with D.95-10-032; it is *not* an "application for approval of the merger of Sprint with T-Mobile" as erroneously characterized in the PD.[47] Moreover, as explained above, the Commission has expressly exempted wireless carriers from seeking

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42 *Id.*at 1.

43 *See* Joint Applicants' Motion to Withdraw Wireline Application (filed March 30, 2020) ("Motion to Withdraw") at 2.

44 Subject to the exemption for wireless transfers discussed above, Section 854 requires approval only for transfers of "any *public utility* organized and doing business in this state." (Emphasis added.) For the reasons stated above, however, Sprint Wireline has filed an Advice Letter to surrender its CPCN and is currently providing only services that are information services and/or interstate services. It therefore is not providing service as a public utility subject to Section 854. *See* Joint Motion to Withdraw at 2; *see also Alisal Water Corp*. (1994) D. 94-01-046; *American Satellite Co. d/b/a Contel ASC* (1991) D. 91-05-038.

45 *See* Motion to Withdraw at 4; *see also Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715 at 717-20 (8th Cir. 2018) (preemption of state PUC regulation of VoIP, an information service); *Restoring Internet Freedom*, 33 FCC Rcd. 311, 349, 431 ¶¶ 61, 202 (2018) (deregulatory policy toward information services, including broadband), *vacated in part on other grounds*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 74 (D.C. Cir. 2019); *Pacific Bell v. Pac West Telecomms., Inc*., 325 F.3d 1114, 1125 (9th Cir. 2003) (no state PUC authority over interstate services).

46 PD at 4-6 and 42 (Conclusion of Law 1). The PD's conclusion at page 42 that "T-Mobile USA's wireless affiliates T-Mobile West LLC (U3056C) and Metro PCS, California LLC (U3070C) are parties to the Transaction" is both legally and factually incorrect. PD at 42 (Conclusion of Law 2). Neither of these wireless affiliates are parties to the Business Combination Agreement that forms the basis of the Transaction. The parties to the Transaction are T-Mobile US, Inc., Huron Merger Sub LLC, Superior Merger Sub Corporation, Sprint Corporation, Starburst I, Inc., Galaxy Investment Holdings, Inc., and for the limited purposes of that agreement, Deutsche Telekom AG, Deutsche Telekom Holding B.V., and Softbank Group Corp. *See* Business Combination Agreement (executed Apr. 29, 2018) located at https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444_1ex2d1.htm. The Business Combination Agreement is referenced in the Amended Joint Application for Review of a Wireless Transfer Notification Per Commission Decision 95-10-032 (Sept. 19, 2019) at n.9.

47 PD at 3.

"preapproval" of any transfer of control of a wireless provider or its assets under Sections 851-856[48] and has left that precedent intact for the past 25 years.

In tacit recognition of the wireless exemption from Section 854, the PD attempts to transform its review of the *wireline* transfer of control under Section 854(a), a straightforward analysis of whether this transfer is "adverse to the public interest" based on years of Commission precedent, into a sweeping review of the entire national *wireless* merger.[49] This not only conflicts with federal law for the reasons stated above, but also violates California law by incorrectly applying Public Utilities Code sections 854(b) and (c). As Applicants have noted from the outset, neither Section 854(b) nor 854(c) applies to the Commission's review of the Wireline Application because neither T-Mobile USA nor Sprint Corporation nor any of the other entities that are the parties to the transaction, are certificated entities in California and the intrastate revenues of their respective wireless utility affiliates are not germane for these purposes.[50]

The PD attempts to circumvent the statutory language by relying on Section 854(f) and finding that T-Mobile USA's wireless affiliates in California are now parties to the Transaction[51] and that their revenues should be attributed to T-Mobile USA for purposes of considering gross annual California revenues. This is both factually and legally unsupportable. Indeed, in this context, Section 854 expressly prohibits the Commission from considering the gross annual revenues of an acquiring entity's *affiliates* in determining whether the $500 million threshold in Sections 854(b) and (c) is exceeded.[52] The sole exception to that prohibition is where an "affiliate was *utilized for the purpose of effecting* the merger, acquisition, or control."[53] The PD erroneously concludes that this exception applies because T-Mobile's

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48 *See 1995 Decision*; *see also Lynch Telephone Corp. XI et al.*, D.05-05-014, *supra* n.34.

49 The PD's reliance on the application of Sections 854(b) and (c) to its analysis of the wireline approval is particularly inappropriate given that the Commission no longer has jurisdiction over the wireline transfer of control. *See* Section II.B., *supra*.

50 *See* A.18-07-011 at 13-14. In addition, the Commission's long standing policy has been "uniformly" to exempt transactions involving CLECs and NDIECs such as Sprint Wireline from the requirements of Section 854(b) and (c). *See Joint Application of SBC and AT&T et al.*, D.05-11-028, 2005 Cal. PUC LEXIS 516, at *33 (Nov. 18, 2005). Indeed, CA PA explicitly acknowledged that that 854(b) and (c) were inapplicable to these proceedings. *See* A.18-07-012, Protest of the Office of Ratepayer Advocates to Wireless Notification at 3 (Aug. 16, 2018) ("Section 854 (b) and (c) do not expressly apply to this transaction...").

51 PD at 4 and 42 (COL 2). T-Mobile is unaware of any statutory authority or business practice which would allow the Commission to unilaterally add new parties to a privately negotiated business agreement. In addition, the transfer of control does not apply to either T-Mobile West or MetroPCS California and neither have appeared in these proceedings to date.

52 *See, e.g.*, Pub. Util. Code § 854(f). *See also Joint Application of Citizens and GTE to Sell and Transfer Assets* (2001) D.01-06-007 at 14.

53 *Id.* (emphasis added).

wireless affiliates are "key" or "central" to the merger because they are "integral" to the claimed merger benefits.[54] Not so. The plain meaning of the word "effecting" is "to cause to come into being."[55] T-Mobile's wireless affiliates in California did not "cause the merger to come into being" nor were they created for purposes of effectuating the merger.[56] As a result, the Section 854(f) exception does not apply, and the PD's asserted review under Sections 854(b) and (c) is improper.[57]

The PD's reliance on the Commission's decision in the Pacific Telesis – SBC merger is misplaced. Contrary to the PD's bald assertion, the Commission *did not* discuss Section 854(f) in that decision.[58] Instead, the Commission employed a particularly expansive interpretation of Section 854(b) to ensure that its analysis of the merger would include Pacific Bell, [59] its largest affiliate (representing 90% of Pacific Telesis assets)[60] and the largest incumbent local exchange company ("ILEC") in the state, serving 75% of California's residents.[61] Thus, even with the expansive interpretation employed by the Commission in the Pacific Telesis case, it is wholly inapplicable to the pending wireless transaction.[62] T-Mobile's wireless affiliates are not ILECs; they do not represent 90% of T-Mobile's nationwide assets; they are not rate-regulated;[63] they operate in highly competitive markets; and they provide service in a number of other states in addition to California. In sum, the decision in the Pacific Telesis case is completely inapposite.

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54 *See* PD at 5-6 (quoting D.97-03-067 at 11-12).

55 *Effecting*, Merriam-Webster.com Dictionary (Mar. 22, 2020), at https://www.merriam-webster.com/dictionary/effecting.

56 By way of contrast, some of the other parties to the transaction, that are also T-Mobile subsidiaries, were created for the express purpose of facilitating this transaction. That is the clear intent of Section 854(f). *See*, *e.g.*, Amended Wireless Notification at 14 ("T-Mobile has formed two indirect subsidiaries, Huron Merger Sub LLC ("Huron") and Superior Merger Sub Corporation ("Superior"), in anticipation of the transaction.").

57 The PD's suggestion that it can rewrite statutes to manufacture jurisdiction over the Wireless Notification (see PD at 6) would undermine the very statutory paradigm created by the legislature and should not be condoned or ratified in any way. There is no rationale to support this "ends justifies the means" reasoning.[58] PD at 4 ("The Commission discussed Section 854(f) in D.97-03-067 . . . .").

58 PD at 4 ("The Commission discussed Section 854(f) in D.97-03-067 . . . .").

59 *In re Joint Application of Pacific Telesis Group and SBC Communications, Inc.* (1997) D.97-03-067 at 9-14. Notably, Pacific Telesis was the company being acquired, not the acquiring company. Section 854(f) concerns whether to consider affiliates of the *acquiring* entity, not the *acquired* entity. *See Joint Application of Citizens and GTE to Sell and Transfer Assets* (2001) D.01-06-007 at 14.

60 *In re Joint Application of Pacific Telesis Group and SBC Communications, Inc.* (1997) D.97-03-067 at 11-12.

61 *Id.* at 46, 52.

62 *Id.* at 9 ("The Commission examines mergers, acquisition or control activities on a case-by-case basis to determine the applicability of §854.").

63 The Legislature did not intend to require the Commission to apply Section 854(b) to mergers involving non-rate-regulated utilities. "Mergers and changes of control will be an increasingly common occurrence in a deregulated utility world. Some of these mergers will deal with utilities for which rates are not regulated, either by choice or by federal preemption. Under these circumstances it may not be possible for any benefits to be flowed back to

Finally, and perhaps most strikingly, even if Sections 854(b) and (c) were triggered by the Wireline Application, which they are not, the Applicants have moved to withdraw that Application and Sprint Wireline has filed an advice letter surrendering its CPCN.[64]

IV. THE PD ERRS IN RELYING ON THE CALIFORNIA AG'S OPINION LETTER

The PD errs in relying on an Opinion offered by the California AG that attempts to contest the legal and factual findings of the U.S. District Court for the Southern District of New York (SDNY), which rejected the AG's arguments in a final decision the AG did not appeal. Neither the Commission nor the AG can now use this proceeding to relitigate—or reassert—claims the SDNY rejected, and the AG has now relinquished. In any event, the AG Opinion mischaracterizes the SDNY decision in a number of key respects. For example, the AG's Opinion claims that Judge Marrero "made no evidentiary findings with respect to rebuttal of the presumption [of anticompetitive effects] in local markets."[65] This is incorrect. Judge Marrero found: "[h]aving been tasked with predicting the future state of the national *and local* [retail wireless] Markets both with and without the merger, and relying on both the evidence at trial and the various judicial tools available, the Court concludes that the Proposed Merger is not reasonably likely to substantially lessen competition in the [retail wireless] Markets . . . a variety of considerations raised at trial have persuaded the Court that a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry."[66]

In addition, the Joint Applicants note that the last-minute insertion of the AG Opinion in this docket is at best highly irregular if not improper. There was no indication that the Commission had determined that such an opinion was required or otherwise desired prior to the issuance of the PD.[67] Moreover, in other proceedings where an AG opinion was requested, the document was filed in the docket and parties had an opportunity to comment on the opinion.[68] That was not the case here. Indeed, prior to seeing the AG

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ratepayers. If rates are not regulated because the industry is competitive, it may not be appropriate to require any sharing of benefits [per Sections 854(b)]." CA B. An., A.B. 119 Sen., 7/11/1995 at 2.

64 *See* Section II.B., *supra.*

65 PD, Attachment 5, CA AG Opinion at 15.

66 *New York v. Deutsche Telekom AG*, --- F. Supp. 3d ----, 2020 WL 635499, at *51 (S.D.N.Y. Feb. 11, 2020).

67 To the extent the untimely – and inappropriate - submission of the AG Opinion was deemed necessary to complete, and otherwise attempt to bolster, the PD's analysis that Sections 854(b) and (c) were applicable to the Wireline Application (because such an opinion would be required under Section 854(b)), it does no such thing. If anything, it confirms that the PD's theory was a last-minute attempt to try and justify the imposition of conditions on NTM.

68 *See, e.g.,* A.05-04-020, *In re Verizon Communications, Inc. and MCI, Inc.*; A.05-02-027, *In re SBC Communications Inc. and AT&T Corp.*; A.98-12-005, *In re GTE Corporation and Bell Atlantic Corporation*; A.96-04-038, *In re Pacific Bell Telesis Group and SBC Communications, Inc.*; A.88-12-035, *In re SCE Corp et al.,* D.91-

Opinion as an attachment to the PD, there was no indication that such a document had been filed with the Commission, and it has not yet been filed or docketed to date. This is entirely inconsistent with even the most basic principles of due process and is inconsistent with Commission practice; it should not be condoned.

V. THE PD ERRS IN FINDING EVIDENCE OF LIKELIHOOD OF COLLUSION

The PD asserts that T-Mobile's "own witness admitted on the stand . . . [T-Mobile] could be tempted to collude with Verizon and AT&T," citing the testimony of Professor Bresnahan.[69] This statement is simply incorrect. To the contrary, Professor Bresnahan testified that while there may be an incentive in *any* industry to cartelize, "[t]here are a number of features about this *industry which make cartelization unlikely*."[70] Professor Bresnahan explained that wide variations in individual service quality would make it difficult to collude in the wireless telephone industry.[71] He also testified that the procompetitive efficiencies of the proposed merger will allow NTM to significantly increase its quality relative to AT&T and Verizon. Professor Bresnahan explained that this "big change" will enable NTM to compete for a large number of AT&T and Verizon customers for whom T-Mobile and Sprint cannot effectively compete today. This gives NTM a powerful incentive to compete with AT&T and Verizon not collude with them.[72]

VI. A NUMBER OF THE PROPOSED CONDITIONS CONSTITUTE LEGAL, TECHNICAL OR FACTUAL ERRORS AND MUST BE ELIMINATED OR REVISED

As explained above in Section II, the Commission has no jurisdiction to impose any mandatory conditions on the Transaction because it has no jurisdiction to approve or deny wireless transfers of control. Moreover, Sprint Wireline is no longer providing service as a certificated public utility, and Joint Applicants have moved to withdraw the Wireline Application. As such, the parties oppose each mandatory condition on the grounds of lack of jurisdiction.

However, to the extent the Commission determines that it has some level of jurisdiction or authority over the wireless transfer justifying any conditions (which the Joint Applicants submit it does not as discussed above), the conditions identified in the PD must at a minimum be revised as reflected in

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05-028 at n.16 *(*ALJ explicitly allowed parties to brief how the facts developed in the evidentiary record may or may not be at odds with the assumptions underlying the Advisory Opinion of the Attorney General.).

69 PD at 34.

70 Hearing Tr. 6 at 794:10-14 (Bresnahan Cross) (emphasis added).

71 *Id.* at 795:15-796:20 (Bresnahan Cross).

72 *Id.* at 796:14-20 (Bresnahan Cross).

Attachment B because they otherwise rely on legal, technical or factual errors, or are jurisdictionally barred on other grounds. For example, several of the proposed conditions impermissibly seek to regulate wireless service quality[73] or rates[74] - areas reserved exclusively for the FCC. Additionally, the vast majority of the conditions listed below are neither supported by findings in the decision nor by substantial record evidence, or in many instances, any record evidence.[75] Moreover, rather than "avoid[ing] any potential adverse impacts from reduced competition," as the PD claims,[76] many of the conditions will have the exact opposite effect by imposing onerous obligations on NTM that are not imposed on its competitors.[77] This asymmetrical regulation is an abuse of discretion and presents serious equal protection concerns.[78] The remainder of this section describes the most significant errors in the proposed conditions; Attachment B shows (in redline format) the changes necessary to eliminate these errors in the conditions set forth in the Ordering Paragraphs.

A. OP 4: Extension of Buildout Requirements to 2030.

The proposed 5G network build conditions set forth in OP 4 (a) & (b) are consistent with the California projections used to create the corollary FCC commitments (which are subject to the FCC speed testing requirements) and are based on record evidence. However, OP 4 (c) & (d) – extending buildout commitments to 2030 and maintaining 5G obligations until 2031 – are not based on any record evidence in this proceeding and in fact these topics were not even raised during the course of this proceeding.[79] Nor do any of the FCC commitments extend this far. Moreover, these conditions violate Section 332 of the Communications Act by regulating the "modes and conditions" under which a wireless carrier may "offer[]

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[73] *See, e.g.,* OP 4 (5G/rural buildout); OP 5 (broadband buildout); and OPs 8-9 (backup power).

[74] *See, e.g.,* OP 5 (broadband rates); OP 15 (LifeLine discounts).

[75] *See* Pub. Util. Code § 1757 specifying the grounds for legal error under California law. *See also Utility Reform Network v. Pub. Utils. Comm'n*, 223 Cal. App. 4th 945 (2014) (annulling CPUC decision for lack of substantial evidence from the record); *SFPP, L.P. v. Pub. Utils. Comm'n*, 217 Cal. App. 4th 784, 794 (2013) ("Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.") (citing *Eden Hosp. Dist. v. Belshé*, 65 Cal. App. 4th 908, 915 (1998); *Zuehlsdorf v. Simi Valley Unified Sch. Dist.*, 148 Cal. App. 4th 249, 256 (2007)) (actions that are "not supported by a fair or substantial reason" are also arbitrary and capricious).

[76] PD at 38.

[77] *See, e.g.,* OP 6 (LTE Network) and OPs 8 and 9 (backup power).

[78] *See Woodbury v. Brown-Dempsey,* 108 Cal. App. 4th 421, 438 (2003) (arbitrary and capricious actions constitute an "abuse of discretion"); *see also Purdy and Fitzpatrick v. State*, 71 Cal.2d 566, 578 (1969) ("The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.").

[79] As a result, the percentages contained in OP 4(c) are necessarily arbitrary and capricious as they have no basis in any record evidence.

service"—one of "the very areas reserved to the FCC."[80] They also impermissibly purport to regulate service quality and coverage,[81] when it is clear that the Commission does not "have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network."[82] Thus, these proposed conditions should be deleted in their entirety.

B. OP 5: In-Home Broadband.

OP 5 provides that NTM "shall offer in-home broadband service wherever 5G service is available." As an initial matter, Joint Applicants suspect this is a drafting error as the second sentence of the OP only requires in home broadband to be made available to a limited subset of households in the state.

Moreover, the OP is incompatible with NTM's unrefuted testimony that in-home broadband would be provided only where there is sufficient network capacity (sometimes referred to as "excess" capacity) not being used for the provision of mobile service.[83] In other words, the proposed condition is not technically feasible, and there is no evidence to suggest otherwise. Finally, as noted above, the Commission is preempted from regulating the provision of broadband services as they are inherently interstate services and thus within the exclusive jurisdiction of the FCC.[84]

The OP also stipulates that "[t]here will be an affordable plan offering that is substantially less than other available in-home broadband service, with no contract, no equipment charges, no installation charges, and no surprises." This requirement constitutes clear rate regulation that is preempted by Section 332.[85]

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80 *Bastien*, *supra* n.15 at 989; s*ee generally* 47 U.S.C. §§ 301, 303, 307, 308, 319, and 332.

81 *See In re Apple iPhone 3G Prod. Liability Litig.*, 728 F. Supp.2d 1065, 1071 (N.D. Cal. 2010) ("where the relief sought would 'alter the federal regulation of,'" among other things, "location and coverage," the claims are preempted under *Bastien*'s standard).

82 *See Accelerating Wireless Broadband Deployment Order*, 33 FCC Rcd. at 9103 n.84.

83 *See, e.g.*, Hearing Ex. Jt Appl. 28 ("Ray Supplemental Testimony") at Attach. D at 6 ("With respect to the California-specific in-home broadband figures, T-Mobile extends the same ground-up approach that it uses to determine 5G network coverage to determine coverage and capacity for in-home broadband. This approach begins with determining network coverage using a slightly adapted link-budget analysis (to account for the higher signal quality required for in-home broadband service) determining and then aggregating California cell coverages, and then using the network model to determine, for each sector of the network in California, those areas in which there would be adequate *excess capacity* to offer in-home broadband.") (emphasis added).

84 *See Restoring Internet Freedom*, 33 FCC Rcd. at 349, 431 ¶¶ 61, 202 (discussing "the deregulatory approach to information services embodied in … the 1996 Act" and "the longstanding federal policy of nonregulation for information services") (citations omitted); *see also Accelerating Wireless Broadband Order*, 33 FCC Rcd. at 9104 n.84.

85 47 U.S.C. § 332(c)(3)(A); *see Ball v. GTE Mobilnet of Cal.*, 81 Cal. App. 4th 529, 540 (2000); *see also Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 11 FCC Rcd. 796 (1995) (denying California's request to extend state regulatory authority over cellular rates).

Moreover, while Joint Applicants testified that they planned to offer in-home broadband at prices below current in-home fixed services,[86] the proposed condition injects "affordable" and "substantially less" mandates that are ambiguous, subject to widely varying interpretations, not derived from the record, and not consistent with NTM's proposed in-home broadband offering. These conditions must be stricken.

C. OP 6: Maintain LTE Speeds/Coverage until LTE Network Decommissioned.

OP 6 requires that "[u]ntil New T-Mobile's LTE network is decommissioned, New T-Mobile shall maintain LTE speeds and coverage areas in California at no less than the speeds and coverage reported to the [FCC] on Form 477 by New T-Mobile and Sprint for their respective LTE services as of December 31, 2019." This condition is preempted for the same reasons as OP 4 (c) & (d).[87]

Moreover, no record evidence supports this requirement – which in effect mandates a technically infeasible flash cut to 5G – and the requirement rests on a misunderstanding of technical issues. Over the next several years, NTM (and the rest of the industry) will be migrating customers from LTE to 5G. Carriers will have every incentive to maintain robust LTE service during the transition in order to maintain and serve their customer base. However, as consumers make the transition, the need to maintain the current level of LTE service represented in Form 477 will diminish. Moreover, this condition would seriously impair the ability of NTM to fully deploy 5G as spectrum and other resources could be artificially dedicated to LTE in spite of consumer demands, and goes against every basic principle wireless carriers employ while transitioning from one technology to the next with a legacy subscriber base and limited spectrum inputs.[88]

D. OPs 8-9: 72 Hour Backup.

OP 8 would require T-Mobile to "deploy, maintain and operate its network in such a fashion" as to guarantee a certain specified level of broadband service "for at least 72 hours following an emergency event or Public Safety Power Shutoff" and to do so by October 1, 2020. In other words, the OP would require backup power and other resiliency measures necessary to maintain such service. Such a requirement is unsupported by the record, unlawful, inappropriate and discriminatory.

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[86] Hearing Tr. Jt Appl. 2C at 29:23-25 (Sievert cross) (describing lower costs of anticipated New T-Mobile in-home broadband offering).

[87] *See* Section VI.A, *supra* (discussing OP 4).

[88] *See* PD, Attachment 3, FCC Merger Order, ¶ 339 (noting in discussion of customer migration to new technology that "We [the FCC] find that it is not in the public interest to require a company to devote their limited resources to maintaining an outdated technology when those resources could instead be directed to bringing to American consumers faster, higher-quality and more reliable services.").

As an initial matter, the record is wholly devoid of any discussion of the need for such a requirement or the technical feasibility of the proposed requirement. In addition, the issue of backup power, including specifically the 72-hour requirement, is explicitly being addressed at this exact same time in R.18-03-011 (as tacitly acknowledged in OP 9) and in proposed legislation (SB 431). The issue is complex and controversial; yet the PD would impose this requirement on NTM alone while the precise issue is being considered with respect to the entire communications industry, with no formal direction from either the Commission or the Legislature at this time. To unilaterally impose this obligation on a single competitor—NTM—at this time before the rulemaking process is complete, and without the full consideration of comments from all interested parties including NTM, would constitute a denial of due process, and would otherwise be fundamentally unfair, anti-competitive, and discriminatory.

Moreover, although it is not entirely clear, if this condition is read to require that the specified level of service reflected in the FCC Form 477 has to be maintained at all times – even in the midst of an emergency – such a requirement would be both impracticable and infeasible. This is in part because such an obligation could require the installation of permanent generators at every site—something which is not even possible for a variety of reasons and borders on the absurd with respect to the October 2020 deadline.[89] There is simply no record evidence on the feasibility of such a proposal in this docket and to the extent one is being developed, it is being developed in R.18-03-011.

Finally, although the Commission can encourage wireless carriers to provide service during emergencies and PSPS events, the Commission does not have the jurisdiction to mandate it. These are matters within the exclusive jurisdiction of the FCC pursuant to Section 332 and other federal law.[90] Moreover, the Commission also does not have jurisdiction over broadband services as discussed more thoroughly above in Section II.[91] Accordingly, these OPs should be deleted in their entirety from the PD.

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[89] *See, e.g.,* November 7, 2019 Prehearing Transcript in R.18-03-011 at 77:16-23("Nor is hardening all sites practical due to access, landlord issues, local jurisdictional restrictions, structural issues on the site, et cetera. So even if we wanted to harden every site, there would be a limit to our ability to do that. But as I stated earlier, I don't think it's necessary.") (Statement of David Gallacher, T-Mobile Sr. Vice-President, West Region).

[90] *See* Section VI.A above, discussing OP 4; *see also Telesaurus*, 623 F.3d at 1010-11 (agreeing with *Bastien* that preemption under Section 332(c)(3)(A) is to be read broadly and the Communications Act's savings clause for state jurisdiction narrowly and finding that "determinations of public interest, safety, efficiency, and adequate competition, [are] all inquiries specially within the expertise of the FCC.").

[91] *See* Section VI.B, *supra* (discussing OP 5).

E. OPs 11-12: Fairgrounds.

As a threshold matter as discussed above, the Commission has no jurisdiction to impose buildout requirements on a wireless provider.[92] Moreover, although T-Mobile agreed to provide wireless 5G service to fairgrounds in the CETF MOU, the conditions included in OPs 10-12 exceed the scope of CETF MOU in several key respects, are unsupported by the record, and must be modified.

First, it appears that OP 11 requires that connectivity be adequate to support capacity and speed needs *when the fairground is acting as an emergency response and evacuation center*. However, the CETF MOU (the only substantive evidence in the record about network deployment at fairgrounds) does not include any such requirement and, in fact clarifies that no additional cell sites beyond the 5G cell sites in NTM's plan need to be added to fulfill this requirement.

Second, OP 12 proposes a new list of fairgrounds from which NTM must select ten fairgrounds to serve. However, there is nothing to support the use of this new list in the record. More importantly, it may not be technically feasible for NTM to serve ten fairgrounds on the new list, and it is impossible for T-Mobile to assess feasibility of doing so now because this new requirement was not proposed in the record, and Applicants have not been provided with the list. Importantly, before agreeing to the CETF MOU list (which came from the California Department of Food and Agriculture),[93] T-Mobile carefully reviewed each fairground to ensure that it had sufficient facilities/spectrum to achieve the level of service specified. In fact, T-Mobile removed two of the fairgrounds from the initial list where it did not have sufficient facilities/spectrum to provide the requisite "robust connectivity."[94] OP 12 must be modified to tie NTM's obligation to the list of fairgrounds attached to the CETF MOU.

F. OPs 15 and 20: LifeLine.

Although the conditions listed in OPs 15-24 are generally consistent with NTM's commitments to continue Assurance's participation in the Commission's LifeLine program (OPs 15-21)[95] and to have Metro PCS assume responsibility for the Boost Pilot (OPs 22-24),[96] certain aspects of those conditions which

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92 *See* Section VI.A, *supra* (discussing OP 4).

93 *See Joint Motion of Joint Applicants and CETF to Modify Positions in Proceeding to Reflect MOU Between the CETF and T-Mobile USA, Inc.*, Attachment D (Apr. 8, 2019); *see also Reply of Joint Applicants and the California Emerging Technology Fund to Responses to Modify Positions in Proceeding to Reflect Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc.* at 17 (May 3, 2019).

94 Amended Joint Application at Ex. U, *CETF MOU*, Attach. D.

95 *Id.* at §§ II- VI.

96 *See* Hearing Ex. Jt Appl. 34 ("Sievert Supplemental Testimony") at 7; *see also* Hearing Tr. at 1525:15-27, 1548:19-1549:7, 1556:5-20 (Sievert Cross).

exceed the scope of NTM's commitments constitute legal, technical and/or factual error and must be eliminated or revised.

- **OP 15**'s requirement that NTM and all of its subsidiaries make all retail service plans eligible for LifeLine program discounts: (i) constitutes impermissible rate regulation;[97] (ii) is not supported by the record;(iii) is inconsistent with Commission's LifeLine regulations which permit, but do not require, wireless providers to be LifeLine providers;[98] (iv) is inconsistent with the current terms of the Boost pilot (which authorize only Sprint Spectrum to be a pilot participant);[99] and (v) may—to the extent that the Boost pilot expires and no future pilot program is adopted (or the pilot has unfavorable terms)—leave the company without any viable alternatives for complying with the OP.

For these reasons, OP 15 should be revised to track T-Mobile CETF MOU commitments to continue providing traditional LifeLine service through Assurance. Applicants wish to emphasize however that the company is very interested in exploring the expansion of the Boost pilot (or a similar program) that would allow provide subsidized discounts on all of NTM's brands and retail plans and will diligently work with staff to explore such opportunities.

- **OP 20** was apparently intended to largely track T-Mobile's commitment in section II.B of the CETF MOU. Joint Applicants added the new sentence at the beginning of the paragraph (*see* Attachment B) to align the condition with the MOU and clarify that the timing of the handset transition for the legacy Assurance LifeLine customers is the same as for other legacy Sprint customers.

G. OPs 25-26: Jobs

The directive that NTM must increase, within three years, its net full-time jobs in California by a thousand jobs greater than the current full-time jobs of Sprint, Assurance Wireless and T-Mobile in California is well outside the Commission's jurisdiction as a matter of California law and is completely unsupported by the record. Under Public Utilities Code section 701, the Commission "may supervise and regulate every public utility in the State and may do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction." However, as discussed above, Sprint Wireline is no longer

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97 *See* Section VI.B, *supra* (discussing OP 5).

98 *See* Pub. Util. Code § 871 *et seq*.; *see also OIR Regarding Revisions to the California Universal Telephone Service (LifeLine) Program* (2014) D.14-01-036 (allowing, but not requiring wireless service providers to offer LifeLine).

99 *See OIR Regarding Revisions to the California Universal Telephone Service (LifeLine) Program* (2019) D.19-04-021 at 55 (OP 1) ("IT IS ORDERED that. . . Sprint Corporation, through its wholly owned subsidiary, Sprint Spectrum L.P., is authorized to implement the Boost Mobile pilot program as set forth in this Decision.").

operating as a public utility. Moreover, this jurisdictional grant is limited in any event.[100] Any exercise of the Commission's jurisdiction "'must be cognate and germane to the regulation of public utilities[.]'"[101]

A requirement to hire a certain number or employees is, under no circumstances, "cognate and germane" to the Commission's jurisdiction in general and certainly not in the context of reviewing a wireless transfer.[102] Those decisions are within the exclusive province of the employer, and the PD does not assert any basis to support its directive in this matter. Accordingly, the requirement that NTM increase jobs in California by one thousand is well outside the Commission's authority.[103]

H. OPs 28-31: Speed Testing.

The PD's attempt to impose a third set of speed tests on the NTM network and to use that test as the means to measure compliance with the buildout requirements in OP 4 is not supported by the record, is duplicative and wholly unnecessary at best and extremely problematic at worst. There already are two major speed test requirements that will be used to verify the commitments made by T-Mobile with respect to the build-out of its 5G network. First, NTM must confirm that it has satisfied its FCC 5G network requirements through a nationwide drive test with added oversight by an independent third party and the DOJ.[104] The results of these drive tests and other extensive verification data and information[105] must be provided to the FCC and DOJ within nine (9) months of the third (3rd) and sixth (6th) anniversaries of the

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[100] *See Assembly of State of Cal. v. Pub. Utils. Comm'n*, 12 Cal. 4th 87, 103 (1995) (Section 701 is not an "open-ended grant of authority"; rather, the Commission's exercise of its authority must not be "contrary to other legislative directives, or to express restrictions placed upon the Commission's authority by the Public Utilities Code.").

[101] *See Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n*, 25 Cal. 3d 891, 905-06 (1979) (quoting *Morel v. R.R. Comm'n*, 11 Cal. 2d 488, 492 (1938)).

[102] *See, e.g., Camp Meeker Water Sys., Inc. v. Pub. Utils. Com.*, 51 Cal. 3d 845, 861 (1990); *see also Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 34 Cal. 2d 822, 827 (1950) (Public Utilities Act does not "specifically grant to the commission power to regulate the contracts by which the utility secures the labor, materials, and services necessary for the conduct of its business"); *see also Hempy v. Pub. Utils. Comm'n*, 56 Cal. 2d 214, 217 (1961) (Commission had no jurisdiction, as a condition for approval of transfer of highway rights, to prioritize certain credit rights of creditors of transferring corporations).

[103] As explained above in Section III, section 854(c) does not apply to this transaction. However, even if it did, the statute identifies whether the transfer is "fair and reasonable to affected public utility employees, including both union and nonunion employees" as a criteria under section 854(c)(4); there is nothing in section 854 which permits the Commission to dictate the hiring of additional employees.

[104] *See* Amended Joint Application at Ex. S, *FCC Commitments Ex Parte (May 20, 2019)*, Attach. 1 at 1-3.

[105] *Id.* at 3 (Required verification data and information includes ten (10) separate elements including but not limited to (1) drive test results; (2) polygon shapefiles showing NTM's Low-band 5G Coverage Area and Mid-band 5G Coverage Area as of the 3-year or 6-year date (whichever is applicable); (3) a statement quantifying the U.S. Population and Rural Population covered by each of the Low-band 5G Coverage Area and Mid-band 5G Coverage Area as of the 3-year or 6-year date (whichever is applicable); etc.).

merger closing.[106] The proposed condition does not provide any methodology to resolve inconsistencies between the FCC speed testing and the Commission's speed testing even though they are verifying the same network build. The potential for inconsistent results could, among other things, undermine NTM's national commitments in this regard. In addition, the CETF MOU requires that NTM provide speed testing for each California site conducted by an independent third party.[107] There is no record support to suggest the need, practicality or feasibility of now imposing a third and different speed test condition, conducted at different (and more frequent) times, with a third testing methodology.[108]

I. OPs 38-39 Independent Monitor and OPs 40-41 Additional Reporting.

In the normal course, and as it has done in other merger proceedings as well as in many other contexts, the Commission has the ability to effectively monitor and enforce compliance with its decisions. In addition, to the extent the PD is revised consistent with Attachment B, the Commission will have the benefit of a robust set of reports (including California-specific data it is already obligated to create for the FCC,[109] DOJ,[110] and CETF[111]) pursuant to OPs 2-3. Moreover, subject to the adoption of a modified PD as discussed above, T-Mobile will provide the Commission with an additional annual report on its compliance with the revised OPs in Attachment B.[112] These reports will provide an unprecedented amount of detailed information to allow Commission Staff to assess NTM's compliance with any final decision. The

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[106] *See id.* at 1.

[107] *See* Joint Applicants and CETF Motion to Modify Positions in Proceeding, at 12 (filed Apr. 8, 2019) ("CETF MOU").

[108] OP 28-30. The requirement that NTM not only fund the test of its own speeds and coverage but that of DISH as well, is wholly unreasonable and without support in the record.

[109] NTM committed to the FCC to annually file a report regarding its progress in meeting its nationwide 5G, rural 5G, and in-home commitments. *See* Amended Joint Application at Ex. S, *FCC Commitments Ex Parte (May 20, 2019)*. NTM also committed to submitting a comprehensive report regarding its three-year and six-year commitment dates, which will include data from drive tests, polygon coverage shapefiles, population and household coverage figures, site lists, marketing figures, and executive certifications. *See id.*

[110] NTM committed to the U.S. DOJ and the Plaintiff States to submit to them on the first day of the first quarter following the entry of the final judgment of their federal case, and every 180 days thereafter an update on the status of its wireless network deployment. This update will include a description of NTM's deployment efforts since its last report, including, among other things: (a) the number of towers and small cells deployed by the Acquiring Defendant; (b) the spectrum bands over which Acquiring Defendant has deployed equipment; (c) acquiring defendant's progress in obtaining subscriber devices that operate on each of its licensed spectrum bands; (d) the percentage of the population of the United States covered by Acquiring Defendant's wireless network; etc. *See* Amended Joint Application at Ex. P, *DOJ Commitments – [Proposed] Final Judgment, filed in Case 1:19-cv-02232 in the District Court of the District of Columbia (July 26, 2019)*.

[111] Amended Joint Application at Ex. U, *CETF MOU.*

[112] *See* Attachment B at 55, Ordering Paragraph 40.

Commission also has the ability to seek additional information from NTM if the staff believes there is some deficiency in the material to be provided.

Thus, there is no justification for the creation of an Independent Monitor[113] or for any additional mandatory reporting, all of which would be unnecessary, potentially duplicative or conflicting and would otherwise divert valuable resources from the task of finally integrating Sprint and T-Mobile and their resources to bring the many benefits of this merger to consumers in California and across the nation.

J. Additional Modifications Are Need to Correct Errors in the PD

- ***OP 22(a)* "Secure" Approval**: OP 22(a) constitutes legal and factual error and must be eliminated as reflected in Attachment B. Although T-Mobile and DISH both committed to *request* approval from the FCC and DOJ to return Boost Pilot customers to NTM[114] and will work diligently to secure such approvals, Joint Applicants do not have control over those agencies and thus should not be—and cannot be—mandated to secure approval.

- **OP 27 EBS:** OP 27 constitutes legal and factual error and must be eliminated as reflected in Attachment B. As is explained above[115] the FCC has exclusive jurisdiction over wireless spectrum. Moreover, there is nothing in the record regarding EBS.

- **OP 37 Supplier Diversity:** OP 37 constitutes legal error and must be eliminated as reflected in Attachment B. It is well-established that the Commission's supplier diversity spending targets are voluntary and that mandatory quotas would violate the state constitution.[116] Consistent with that, the supplier diversity metrics in the NDC MOU are aspirational goals.[117]

VII. CONCLUSION

The Joint Applicants respectfully suggest that the PD be revised consistent with these comments and the redline of the Findings of Fact, Conclusions of Law and Ordering Paragraphs found in Attachment B and that the Wireless Notification be closed accordingly.

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[113] The Commission has not ordered compliance monitors in any previous merger proceedings. *See*, *e.g.*, A.15-03-005, *Frontier/Verizon Transfer of Control*; A.15-07-009, *Charter/Time Warner Transfer of Control*; A.05-02-027, *SBC/AT&T Merger*. Furthermore, having a separate California monitor could create the risk of conflicting with the role of DOJ monitor.

[114] *See* Hearing Tr. at 1553:23-25 (Sievert Cross); *id.* at 1658:18-22 (Blum Cross).

[115] *See* Section VI.1, above, discussing OP 4.

[116] General Order 156, §1.3.16 (defining "Goal" as "neither a requirement nor a quota").

[117] Hearing Ex. Jt Appl. 8 ("Sylla Dixon Rebuttal Testimony") at Attachment B, section 5.i (NDC MOU).

Respectfully submitted this 1st day of April, 2020.

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ATTACHMENT A

T-MOBILE LETTER

12920 SE 38th Street
Bellevue, WA 98006

March 31, 2020

Commissioner Clifford Rechtschaffen
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94111

Administrative Law Judge Karl Bemesderfer
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94111

Re: Application Nos. 18-07-011 and 18-07-012

Commissioner Rechtschaffen and ALJ Bemesderfer:

I am writing to you on behalf of T-Mobile and Sprint (Joint Applicants) to inform you that we plan to close our merger transaction tomorrow morning, April 1, 2020. Joint Applicants appreciate the efforts that you have made to issue a proposed decision earlier this month and to oversee this process over the last 20 months.

The companies, however, cannot take the risk of waiting any longer to consummate the merger. The COVID-19 crisis has created unprecedented uncertainty and risk in the financial markets, including the debt markets that are critical for us to secure the required financing for the merger and our 5G network build-out. The market for investment grade long-term debt financing, upon which our longstanding plans relied, has witnessed unprecedented upheaval in recent weeks. As a result, we are forced to rely on short-term bridge financing that was secured from a group of lenders under an existing conditional commitment. Right now, as I write this, we are fortunate that the banks are still prepared to provide bridge financing for an April 1 close. With the continuing turmoil in the financial markets, however, there are no assurances that the banks will continue to be able to fund the transaction if the closing is delayed any further. In short, if we do not close the transaction on April 1, it is conceivable that we may never be able to do so.

Moreover, closing the merger now will also provide much needed certainty to both companies' customers and employees, enable us to begin the important work of integrating our networks and rolling out New T-Mobile's 5G network, and allow New T-Mobile immediately to begin delivering the massive benefits that the transaction will

bring to California consumers—particularly under-connected, low-income and rural consumers.

Finally, as we have explained to the Commission previously,[1] an April 1 close is critical to the parties, as accounting and financial reporting needs, and the imperative for accuracy of such reporting, significantly limit the available closing dates for the merger, and delaying beyond April 1 would result in substantial—and ever-increasing—harm and risks to Joint Applicants.

Notwithstanding our abiding view that the Commission lacks jurisdiction over this transaction,[2] we have fully cooperated in the CPUC's 20-month review process. T-Mobile stands ready to honor the nearly 50 voluntary California-specific commitments it has made in connection with the deal. However, notwithstanding our appreciation of the proposed decision's recognition of the many benefits of the merger, it contains a number of obligations that in addition to exceeding the CPUC's jurisdiction are not supported by the record, are practically impossible, are unfair and discriminatory to T-Mobile vs our competitors—including the entrenched incumbents, and/or are anti-competitive. Accordingly, Joint Applicants urge you to revise the proposed decision to address those deficiencies and to proceed with a vote on the modified proposed decision to close the proceedings at the Commission's April 16 meeting as scheduled.

We hope that you are able to understand and appreciate our action to close the merger tomorrow in light of these extraordinary circumstances and critical considerations.

Respectfully,

G. Michael Sievert
President and Chief Operating Officer

cc:
President Marybel Batjer
Commissioner Liane M. Randolph
Commissioner Martha Guzman Aceves

---

[1] *See* Email from Suzanne Toller to Commissioner Rechtschaffen and ALJ Bemesderfer (February 11, 2020), copying service list for A.18-07-011/A.18-07-012; Notice of Ex Parte Communication of Joint Applicants (February 24, 2020); Motion of Joint Applicants for Reconsideration of the Presiding Officer's Ruling Revising Schedule (March 3, 2020).

[2] As we have noted throughout these proceedings, we believe that the FCC has the exclusive authority to approve wireless transactions; and Sprint has recently filed an advice letter relinquishing its wireline certificate of public convenience and necessity.

Commissioner Genevieve Shiroma
Service List

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

Proceeding: A1807011 - SPRINT COMMUNICATION
Filer: Sprint Communications Company L.P.
List Name: LIST
Last changed: March 17, 2020

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ATTACHMENT B

PROPOSED REVISIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS

Findings of Fact

1. Voice and data are transmitted wirelessly using discrete portions of the electromagnetic spectrum.

2. T-Mobile owns a substantial amount of low-band spectrum, a small amount of mid-band spectrum; and limited amounts of high-band, mmWave spectrum in certain geographic areas.

3. Sprint owns very little low-band spectrum, large amounts of mid-band spectrum, and no high-band spectrum.

4. High-band spectrum carries large amounts of data over short distances.

5. Mid-band spectrum carries moderate amounts of data over moderate distances.

6. Low-band spectrum carries small amounts of data over long distances.

7. Efficient operation of a 5G wireless network covering both urban and rural areas requires a combination of low-, medium-, and high-band spectrum.

8. A statewide wireless network requires ~~tens of~~ thousands of widely distributed cell towers.

~~9. Sprint owns thousands of towers whose coverage does not overlap the coverage of T-Mobile cell towers.~~

10. By combining Sprint's spectrum and non-overlapping cell towers with T-Mobile's spectrum and non-overlapping cell towers, New T-Mobile will be able to offer 5G wireless service to 99 percent of Californians.

11. The Transaction will increase market concentration throughout California.

12. ~~In 18 California cellular market areas, including Los Angeles, San Diego, San Jose, San Francisco-Oakland, and Sacramento, post-Merger HHI levels will exceed 2,500, a level that is presumptively anti-competitive~~.

Commented [JA1]: No record support for "tens of thousands."

Commented [JA2]: No record support for statement. T-Mobile identified number of Sprint cell sites it intends to maintain. Hearing Ex. 3-C at 19:7-10 (Ray Rebuttal).

Commented [JA3]: *See* Joint Comments at Section IV.

13. Wireless service is offered on both a pre-paid and post-paid basis.

14. T-Mobile and Sprint will transfer their prepaid businesses, other than Assurance, to DISH.

15. New T-Mobile ~~Assurance~~ will continue to offer LifeLine service on the same terms and conditions as it has been heretofore offered by Assurance, pursuant to the terms of the Memorandum of Understanding between T-Mobile and the California Emerging Technology Fund.

16. T-Mobile agreed to use good faith efforts to increase the number of LifeLine customers pursuant to the terms of the Memorandum of Understanding between New T-Mobile and CETF.

17. DISH may ~~will~~ acquire towers, radios, spectrum and other assets from New T-Mobile ~~Sprint~~ to enable it to become a wireless network provider.

18. T-Mobile will carry DISH traffic over its network while DISH is building out its own wireless network.

19. New T-Mobile has made significant commitments to the California Emerging Technology Fund to prioritize the delivery of 5G technology to unserved and underserved communities throughout the state.

20. New T-Mobile has made significant commitment to the Federal Communications Commission regarding the price and availability of wireless service to unserved and underserved communities nationally following the Merger.

21. The Department of Justice has imposed significant conditions on its approval of the Merger including, among other things, partial divestiture of Sprint's prepaid business to DISH and the requirement that New T-Mobile allow DISH access to its network as an MVNO pending and during DISH's creation of its own national network.

Commented [JA4]: Consistent with CETF MOU; Assurance is the current LL brand.

Commented [JA5]: Consistent with the terms of the CETF MOU, Section III. *See* PD at Attachment 2.

Commented [JA6]: The PFJ does not require DISH to acquire these assets; provides them with the option. *See e.g.*, PFJ § C.1; *see also* PD at Attachment 4.

Commented [JA7]: Consistent with PFJ; the divestiture is post-closing so any assets will come from NTM.

Commented [JA8]: Consistent with PFJ.

22. New T-Mobile has represented to federal agencies, the federal district court and this Commission that it intends to compete aggressively with Verizon and AT&T following the Merger.

23. Per a Tier 1 Advice Letter dated March 30, 2020, Sprint Wireline relinquished its Certificate of Public Safety and Convenience ("CPCN") on the basis that it had transitioned all of its voice customers to VoIP and that all of its remaining services offered in California were exclusively information services and/or jurisdictionally interstate service.

Commented [JA9]: *See* Joint Comments at Section II.B.

24. On March 30, 2020, Sprint Wireline and T-Mobile filed a joint Motion to Withdraw the Application for Transfer of Control of Sprint Communications to T-Mobile under Public Utilities Code Section 854(a).

Commented [JA10]: *See* Joint Comments at Section II.B.

Conclusions of Law

1. The Joint Application of Sprint Communications Company L.P. (U5112C) and T-Mobile USA, Inc., a Delaware Corporation, for Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California ~~Transaction is subject to review~~ under Public Utilities Code Section 854(a) is moot and no longer required as Sprint Wireline is no longer subject to Section 854. ~~, (b) and (c) and D.95-10-032.~~

Commented [JA11]: *See* Joint Comments at Section II.B.

2. The Commission's review of the transfer of control of the Sprint Wireless Entities is complete ~~T-Mobile USA's wireless affiliates T-Mobile West LLC (U3056C) and Metro PCS, California LLC (U3070C) are parties to the Transaction~~.

Commented [JA12]: *See* Joint Comments at Section I and II.A.

3. ~~The benefits of the Transaction, as modified by the conditions imposed herein, outweigh its detriments~~.

Commented [JA13]: *See* Joint Comments at Section I and II.A.

4. With the conditions enumerated in the ordering paragraphs hereof, the consolidated proceeding is closed. ~~Transaction should be approved.~~

Commented [JA14]: *See* Joint comments at Section I and II.A.

O R D E R

IT IS ORDERED that:

1. The Motion to Withdraw the Joint Application of Sprint Communications Company L.P. (U5112C) and T-Mobile USA, Inc., a Delaware Corporation, for Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a) is granted; ~~approved,~~ and the Joint Application of Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C) and T-Mobile USA, Inc., a Delaware Corporation, for Review of Wireless Transfer Notification per Commission Decision 95-10-032 is completed, subject to the conditions in the Ordering Paragraphs below.

Commented [JA15]: *See* Joint Comments at Sections I-III.

A. FEDERAL and OTHER COMMITMENTS

2. New T-Mobile shall provide to California Public Utilities Commission any California specific data in updates documents or reports it provides to the Federal Communication Commission (FCC) or Department of Justice (DOJ) implementation of the conditions within the FCC Order and the Proposed Final Judgment simultaneously with the provision of such material to the FCC or DOJ.

3. New T-Mobile shall simultaneously provide to Communications Division staff (Staff) all updates, data, documents or reports it provides to the California Emerging Technology Fund (CETF) or other party to whom such information is provided pursuant to the Memorandum of Understanding Between CETF and T-Mobile USA Inc. (CETF MOU).

B. 5G and LTE NETWORKS

4. New T-Mobile shall achieve the following 5G network milestones:

a. By year end 2023, New T-Mobile shall provide 5G service to at least the percentage of California population indicated below:

i. 91.0% with access to service with download speeds of at least 50 Mbps;

ii. 86.0% with access to service with download speeds of at least 100 Mbps;

iii. 81.0% of rural population with access to service with download speeds of at least 50 Mbps; and

iv. 79.0% of rural population with access to service with download speeds of at least 100 Mbps.

b. By year end 2026, New T-Mobile shall provide:

i. 99.0% of California population with access to service with download speeds of at least 100 Mbps;

ii. 94.0% of California rural population with access to service with download speeds of at least 50 Mbps; and

iii. 85.0% of California rural population with access to service with download speeds of at least 100 Mbps.

~~c. By year end 2030, New T-Mobile shall provide:~~

~~i. 96.0% of California rural population with access to service with download speeds of at least 50 Mbps; and~~

~~ii. 90.0% of California rural population with access to service with download speeds of at least 100 Mbps.~~

~~d. Such coverage shall be maintained at least until year end 2031.~~

Commented [JA16]: *See* Joint Comments at Section VI.A.

5. ~~New T-Mobile shall offer in-home broadband service wherever 5G service is available.~~ Within 3 years of the close of the merger, T-Mobile shall have in-home broadband service available to at least 912,000 California households, of which at least 58,000 shall be rural. Within 6 years of the close of the merger, T-Mobile shall have in-home broadband service available to at least 2.3 million California households, of which at least 123,000 shall be rural. ~~There will be an affordable plan offering that is priced substantially less than other available in-home broadband service, with no contract, no equipment charges, no installation charges, and no surprises.~~

6. ~~Until New T-Mobile's LTE network is decommissioned, New T-Mobile shall maintain LTE speeds and coverage areas in California at no less than the speeds and coverage areas reported to the Federal Communications Commission on Form 477 by T-Mobile and Sprint for their respective LTE services as of December 31, 2019.~~

7. In California, New T-Mobile shall prioritize rolling out its planned 5G network in 10 unserved or underserved California areas. The 10 unserved or underserved areas for prioritization shall be selected by New T-Mobile after consultation with Staff, California Emerging Technology Fund (CETF) and the Rural Regional Consortia. New T-Mobile shall meet jointly with staff, the Rural Regional Consortia and CETF within 180 days of the close of the Transaction to:

   a. Provide an overview of planned 5G network improvements and capital expenditures in California; and
   b. Obtain input from and consult with Staff, CETF and the Rural Regional Consortia to identify the 10 unserved/underserved areas that New T-Mobile shall prioritize as specified above.

Commented [JA17]: *See* Joint Comments at Section VI.B.

Commented [JA18]: *See* Joint Comments at Section VI.B.

Commented [JA19]: *See* Joint Comments at Section VI.C.

The California Advanced Services Fund shall not reimburse the Rural Regional Consortia for any expenses relating to meeting and consulting with New T-Mobile, CETF or Staff in connection with this condition.

C. NETWORK RELIABILITY AND EMERGENCY PREPAREDNESS

~~8. No later than October 1, 2020, New T-Mobile shall deploy, maintain and operate its network in such a fashion as to enable its broadband service (at levels at least as fast as the minimum advertised downstream and upstream speeds T-Mobile reflected in its then most recent Federal Communications Commission (FCC) Form 477 submission (or in each future reporting method as the FCC may adopt), voice and text services to continue to be available to users in its coverage area (as reflected in the same FCC data submission) for at least 72 hours following an emergency event or Public Safety Power Shutoff.~~

~~9. This requirement will remain in place until any future backup power requirements are developed by CPUC in Rulemaking 18-03-011, or any subsequent proceeding, on the timetable and subject to the other requirements developed in that proceeding.~~

D. ~~PERMANENT~~ OPERATIONS AT FAIRGROUNDS

10. Within 5 years of the close of the Transaction, New T-Mobile shall deploy ~~permanent~~ 5G wireless service that supports continuous service at 10 County Fairgrounds in rural counties, at least 3 of which shall be installed in the first 3 years.

11. The wireless networks shall provide robust connectivity for Fairground users and administrators, provided that New T-Mobile shall not be required to add cell sites in addition to those specified in the CETF MOU. ~~adequate to support the capacity and speed needed during an emergency by a response and evacuation center.~~

Commented [JA20]: *See* Joint Comments at Section VI.D.

Commented [JA21]: *See* Joint Comments at Section VI.D.

Commented [JA22]: No record support for "permanent"; based on CETF Commitment.

Commented [JA23]: *See* Joint Comments at Section VI.E.

12. The fairgrounds will be selected from the ones on the list attached to the CETF MOU ~~that currently have~~ with coverage below 25 Mbps~~, as determined by the California Office of Emergency Services (OES)~~. Priority consideration shall be given to the rural Fairgrounds most frequently used in the last decade to stage wildfire, flooding, and other emergency responses, and support recovery activities. Priority consideration also shall be given to rural Fairgrounds for which the County Fair Board (in consultation with OES, County Board of Supervisors and other local stakeholders) has developed a plan for digital inclusion and other economic development activities when the site is not being used for emergency response and recovery.

13. The 10 Fairgrounds shall be selected by New T-Mobile after consultation with CETF, the Rural Regional Consortia, OES and Staff.

14. The California Advanced Services Fund shall not reimburse the Rural Regional Consortia for any expenses relating to meeting and consulting with New T-Mobile, CETF, the Office of Emergency Services or Staff concerning this condition.

E. CALIFORNIA LIFELINE

15. New T-Mobile (through the Assurance brand it will acquire through this merger or any other authorized subsidiary ~~and all its subsidiaries~~), shall participate in the California LifeLine program indefinitely and at least through 2024, on terms that are at least as good as those currently offered by Assurance. ~~for as long as they operate in California and offer service plans to consumers, shall make all their retail service plans eligible for the California LifeLine Program's discounts. New T-Mobile can accomplish this objective by utilizing the existing Virgin Mobile USA, L.P. (Virgin) model, the Boost (or Metro) Mobile~~

Commented [JA24]: *See* Joint Comments at Section VI.E.

Commented [JA25]: *See* Joint Comments at Section VI.F.

~~pilot model, and/or any future models authorized by the Program in a Commission Decision.~~

16. New T-Mobile shall use good faith efforts to add at least 300,000 new LifeLine customers over the next five years. These customers will be in addition to those already participating in LifeLine through an existing pilot,

a. New T-Mobile shall enroll LifeLine customers that were not enrolled in the California LifeLine program in the previous month.
b. New T-Mobile shall train and monitor employees adequately to ensure they only enroll new LifeLine customers who are eligible.
c. ~~New T-Mobile shall offer LifeLine sign-ups at all New T-Mobile (and subsidiaries) physical stores.~~

17. New T-Mobile shall submit an Implementation Plan to the Communications Division's Director within 60 days of the effective date of the Commission Decision ~~approving the merger~~. This Implementation Plan shall include components including by way of example but not limitation the following:

a. network transition.
b. handset distribution.
c. consumer education.
d. applicable changes in consumers' accounts.
e. applicable advice letter considerations.
f. applicable activities related to the California LifeLine Administrator.
g. draft content for the consumer education materials.

18. New T-Mobile (and its subsidiaries) shall conduct outreach to inform consumers about the California LifeLine Program consistent with the Strategic Plan provided for in the CETF MOU at Section III.B. and could include, among other ~~via the following~~ methods, the following ~~at a minimum~~:

Commented [JA26]: Modified to track CETF MOU.

Commented [JA27]: *See* Joint Comments at Sections II-III.

Commented [JA28]: Consistent with CETF MOU

a. Sales scripts (for phone, online, and in-store sales);

b. Text messages;

c. Blurb on post-paid phone bills; and

d. Web sites

19. New T-Mobile shall submit to CPUC for review and approval all California LifeLine related outreach materials.

20. New T-Mobile shall provide documentation of the outreach required above ~~a sample of customer bills (to show the required outreach message), submit screenshots of Web pages that include the required content, include an approved CPUC number on its text message distribution list~~, and permit the CPUC to send staff to audit compliance into California stores~~/call centers~~ at any time while the stores~~/call centers~~ are open to the public.

21. All Assurance LifeLine customers with incompatible handsets will be migrated on the same timeframe as the non-LifeLine legacy Sprint customers to the New T-Mobile network. New T-Mobile shall distribute handsets that are compatible with the New T-Mobile network, and comparable to the consumer's existing handset such that the consumer does not experience a loss in service, to all active California LifeLine participants receiving cell phone services from Virgin, through Assurance, whose handsets belong to either of the following categories, at the time of migration:

a. The consumer's handset was previously provided by Virgin but is incompatible with the New T-Mobile network;

b. the consumer's "Bring Your Own Device" handset is incompatible with the New T-Mobile network

Commented [JA29]: To conform to OP 15 and the fact that call centers are not open to the public.

Commented [JA30]: *See* Joint Comments at Section VI.F.

22. With respect to the Pilot Programs approved in Decision 19-04-021, New T-Mobile shall:

a. Seek ~~Secure~~ any necessary approvals from the Federal Communications Commission and Department of Justice to maintain ~~transfer~~ the Boost customer base currently receiving service under the California LifeLine Pilot Program and avoid their transfer to DISH under the terms of the divestiture ~~its existing participants from Sprint Spectrum to New T-Mobile~~.

b. Within 60 days of the effective date of the Commission Decision ~~approving the merger~~, submit an Advice Letter to the Commission requesting transfer of the California LifeLine Pilot Program from Sprint Spectrum to New T-Mobile or a different T-Mobile brand.

c. Assume operation of the California LifeLine Pilot Program (whether with the MetroPCS brand or a different New T-Mobile brand) for as long as the CPUC continues to add and maintain Project Members within the Pilot Program, under the same terms and conditions approved in Decision 19-04-021.

d. Work with the California LifeLine team and Boost's existing Pilot team to transition the California LifeLine Pilot Program from Sprint to New T-Mobile as soon as the ~~Merger d~~Decision is adopted ~~approved~~, maintaining continuity with the processes and procedures developed by the existing pilots.

e. Provide new handsets to all existing and active pilot participants whose current handsets will not be compatible with New T-Mobile's network, at no cost to the consumer or the California LifeLine Program.

f. Seek approval from the CPUC of the handset models that it would like to provide to iFoster pilot participants, to ensure that the new handsets are comparable to the pilot participants' existing handsets.

Commented [JA31]: *See* Joint Comments at Section VI.J.

Commented [JA32]: *See* Joint Comments at Sections II-III.

Commented [JA33]: *See* Joint Comments at Sections II-III.

Commented [JA34]: iFoster program participants receive a phone subsidized by the CPUC—not the case for other current Pilot program (Boost Pilot CARE program), where customers bring their own devices.

23. New T-Mobile shall submit an information-only filing to the Communications Division's Director of any changes to service plans available in the pilot program. (see examples of California LifeLine related information-only filings at https://www.cpuc.ca.gov/General.aspx?id=1100)

24. Within 90 days of the effective date of this ~~the Commission~~ Decision ~~approving the merger~~, Metro PCS (or whichever T-Mobile brand will replace Boost in the pilot program) shall provide staff with an example of the notice it intends to provide to existing Boost Pilot customers regarding the transition to MetroPCS ~~a sample of customer bills (to show the required message), submit screenshots of Web pages that include the required content, include an approved CPUC number on its text message distribution list,~~ and permit the CPUC to send staff to audit compliance with Boost Pilot program into California stores~~/call centers~~ at any time while the stores~~/call centers~~ are open to the public.

F. JOB CREATION

25. New T-Mobile shall have ~~a net increase in jobs in California, such that~~ at least the same number of full time and full-time equivalent New T-Mobile employees in the State of California at three years after the close of the transaction ~~shall be at least 1,000 greater than the total number of full-time and full-time equivalent employees of~~ as Sprint, Assurance Wireless and T-Mobile have in the State of California as of the date of the Transaction closing.

26. New T-Mobile shall hire approximately ~~at least~~ 1,000 new employees at its planned Kingsburg customer experience center in Fresno County.

G. ~~EDUCATIONAL BROADBAND SPECTRUM (EBS)~~

~~27. Within 90 days of the effective date of the Commission Decision~~

Commented [JA35]: *See* Joint Comments at Section II.A.

Commented [JA36]: As written, this appears to be a copy of OP 19. Modified to make it more applicable to Boost Pilot.

Commented [JA37]: *See* Joint Comments at Section VI.G.

Commented [JA38]: *See* Joint Comments at Section VI.G.

Commented [JA39]: *See* Joint Comments at Section VI.J.

~~approving the merger, New T-Mobile shall establish a single point of contact for California tribes and educational entities interested in gaining access to New T-Mobile spectrum holdings and/or leases. This contact will be accessible to California tribes and educational entities that would like to acquire EBS from New T-Mobile, partner with New T-Mobile to utilize EBS, or discuss opportunities for cooperation with New T-Mobile.~~

H. ~~CAL~~SPEED TESTING

28. ~~Unless otherwise agreed to by Staff, interpolated CalSPEED drive tests results of LTE and 5G service created by CPUC Staff or its contractors~~ The California portion of the FCC drive test provided per OP 31 below shall provide the basis upon which compliance with the minimum speeds required in these conditions is determined.

Commented [JA40]: *See* Joint Comments at Section VI.H.

29. ~~Annually or at such other frequency as Staff determines appropriate, CPUC may perform CalSPEED drive tests of the New T-Mobile and Dish networks from 2020 through 2030. New T-Mobile's shall reimburse CPUC for the costs of such drive tests.~~

Commented [JA41]: *See* Joint Comments at Section VI.H.

a. ~~Staff shall determine New T-Mobile costs by allocating pro-rata the costs of CalSPEED testing and analysis that the T-Mobile and Dish networks bear to the total number of networks tested, plus the cost of mobile devices and service subscriptions deemed necessary by Staff.~~
b. ~~Testing shall be performed at 4000 locations (including those in urban, rural and tribal areas), or such other number of test locations that Staff deems appropriate. Staff shall consult with New T-Mobile on the distribution of these test locations.~~
c. ~~Staff shall review its test code/methodology with New T-Mobile prior to commencing its testing~~

30. ~~CPUC shall provide New T-Mobile with statewide mapping of the test point results and interpolations of up/down speeds and latency and perform geographic coverage analysis of areas and population with available download speeds at or above 50 Mbps and 100 Mbps for both urban and rural areas. New T-Mobile shall reimburse CPUC for the cost of such mapping data.~~

Commented [JA42]: *See* Joint Comments at Section VI.H.

31. As New T-Mobile is required by the FCC to submit drive test results within nine months of the third and sixth anniversaries of the closing date of the merger, New T-Mobile shall ~~meet with Staff to consult regarding the drive test methods and specification it proposes to use prior to concluding its consultation with the FCC on design of the drive test and~~, within 30 days of the submission to the FCC, provide the Staff ~~CPUC~~ with the California portion of this data when submitted to the FCC, as well as any testing data provided by New T-Mobile to California Emerging Technology Fund.

Commented [JA43]: *See* Joint Comments at Section VI.H.

I. DIVERSITY

32. New T-Mobile shall strive to achieve and maintain a diverse board of directors that includes substantial representation by people of color. New T-Mobile shall evaluate the makeup of its Board on an ongoing basis, encourage its stockholders to select diverse candidates to fill Board vacancies, and propose a diverse pool of candidates for its stockholders to consider when filling vacancies.

33. New T-Mobile shall continue to have a Diversity and Inclusion Office led by a Vice President with budgetary and decision-making authority to ensure that diversity is integrated into all aspects of the company and is among the company's core values.

34. New T-Mobile shall continue to have a Vice-President of Governmental Affairs who works with community organizations on policy matters, technology needs, and investment.

35. New T-Mobile shall strive to increase the diversity of its workforce in California at all levels to reflect the diversity of communities where it operates. It shall conduct (and enhance existing) mentoring, outreach, recruiting, development and training programs that provide meaningful opportunities for employment and advancement.

36. New T-Mobile shall support and partner with local trade schools and other community and civic organizations in California to train and/or certify individuals for employment in the wireless, telecommunications, or technology industries. New T-Mobile shall invest in local community programs designed to prepare people of color and other diverse individuals to succeed in the workplace, including mentoring programs to enhance opportunities for upward mobility from entry-level to mid-level and senior management.

37. New T-Mobile shall strive to ~~substantially~~ increase, over the next three years, its diverse supplier spending in California. It shall establish specific goals in this area, including goals for the use of minority-owned banking, accounting, other financial, and legal services companies. New T-Mobile's goal for five years following the merger shall be to meet or exceed the CPUC's General Order 156 goal of 21.5% annual diversity spending.

Commented [JA44]: *See* Joint Comments at Section VI.J.

J. ENSURING COMPLIANCE

~~38. Compliance Monitor and Enforcement. Within 120 days of the effective date of the Commission decision approving the merger, CPUC shall hire, at New T-Mobile's expense, an independent monitor to review New T-Mobile's compliance with all its commitments herein. The compliance monitor shall meet initially with Staff within 30 days of being hired and at least quarterly thereafter to report on New T-Mobile's adherence to the conditions imposed by this decision.~~

Commented [JA45]: *See* Joint Comments at Section VI.I.

39. ~~The Compliance Monitor will make semi-annual findings on merger compliance and/or lack of compliance. For the instances where the New T-Mobile is out of compliance, the Compliance Monitor will recommend a penalty to bring T-Mobile into compliance and forward his findings and recommendation to the Director of the Commission's Communications Division and the Attorney General. The Attorney General may enforce this Order either pursuant to Public Utilities Code Sections 702 and 2101, or under its independent authority, and such enforcement actions would not interfere with the Commission's authority but would be complimentary. The CPUC shall develop a citation program that can be utilized to impose penalties on New T-Mobile for violations of the terms of this decision.~~

40. ~~Baseline~~ Annual Report. Following completion of the Merger, New T-Mobile shall provide an annual report on its compliance with the Ordering Paragraphs in this Decision. ~~the following information to CPUC annually in the 4th calendar quarter of each year or on such other timetable as New T-Mobile and CPUC shall agree on:~~

~~a. Current full time and full-time equivalent employee headcount.~~

~~b. Transfer of LifeLine customers from Sprint to New T-Mobile.~~

~~41. ll MVNO agreements and their status Annual Compliance Reports. New T-Mobile shall submit annual compliance reports to CPUC within thirty (30) days of the end of every calendar year. These reports shall include:~~

~~a. Capital expenditures in California – totals and by project.~~

~~b. Year-end shapefiles showing where in-home broadband is offered and including the following information:~~

Commented [JA46]: *See* Joint Comments at Section VI.I.

Commented [JA47]: *See* Joint Comments at Section VI.I.

~~(i) Speeds offered.~~
(ii) ~~New T-Mobile pricing.~~
(iii) ~~Competitor pricing.~~

~~c. Upcoming buildout plans.~~

~~d. Detailed reports on network enhancements and timeframes. For rural areas, identify specific locations where work is being done.~~

~~e. Inventory of EBS spectrum leases, including the licensee, whether the spectrum is currently in use and whether there have been requests by the educations institutions or any California tribal organizations to utilize the spectrum, including documentations of meeting or partnerships, and discussions of additional buildout. Identification and progress on the 10 Homework Gap pilots.~~

~~f. New T-Mobile capacity limitations including reporting on how DISH's network use may be impacting capacity.~~

~~g. Pricing for its mobile phone plans offered in California, including explanations of the available handsets and terms identifying the plan as prepaid or postpaid.~~

~~h. Progress in designating and building the prioritized facilities in 10 rural areas.~~

~~i. Price structures and number of subscribers by price tier/plan reported and pricing for its plans offered in California, including explanations of the available handsets and terms identifying the plan as prepaid or postpaid~~

~~j. Price schedules for all in-home broadband services~~

~~k. Progress in implementing the DoJ condition to honor existing California MVNO agreements on their existing terms, and to extend these MVNO agreements for seven years unless having demonstrated to the DoJ Monitoring Trustee that doing so will result in a material adverse effect, other than as a result of competition, on New T-Mobile's ongoing business.~~

~~l. Total full time and full time equivalent employees by business unit in the State.~~

~~m. For California LifeLine Program:~~

~~(iv) New T-Mobile shall report on its progress according to the Implementation Plan submitted according to Condition E3 above. New T-Mobile shall include information about which elements of the Implementation Plan have been implemented and the results.~~

~~(v) New T-Mobile shall report on its participation in the pilot program (under Metro by T-Mobile or whichever T-Mobile brand replaces Boost in the pilot program).~~

42. Application~~s~~ (A.) 18-07-011 is withdrawn and A.18-07-012 is ~~are~~ closed. This order is effective today.

Dated , at San Francisco, California.

Commented [JA48]: *See* Joint Comments at Section II.B.