

**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' PETITION FOR MODIFICATION OF DECISION 20-04-008

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JOINT APPLICANTS’ PETITION FOR MODIFICATION OF DECISION 20-04-008

I. INTRODUCTION

Pursuant to Rule 16.4 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure (“Rules”), Sprint Communications Company L.P. (U-5112-C) (“Sprint Wireline”), Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C) (collectively “Sprint Wireless CA Entities”) and T-Mobile USA, Inc. (“T-Mobile USA”) (collectively, “Joint Applicants”), hereby respectfully petition the Commission to modify Decision 20-04-008 (the “Decision”). Specifically, through this Petition for Modification (the “Petition”), Joint Applicants seek modification of the Decision’s Ordering Paragraphs (“OPs”) 4.b, 25, and 30 to resolve certain ambiguities, inconsistencies, inequities, and misapplications of well-settled Commission law and policy and, with respect to OP 25 in particular, to take account of the changed circumstances that have developed since the adoption of the Decision.

As explained more thoroughly in this Petition, these modifications are fully warranted, as they address the specific issues identified with OPs in a manner that is consistent with the record

and Commission precedent, enhances regulatory certainty and clarity, and does not negatively impact any of the merger's numerous benefits. Accordingly, the Joint Applicants respectfully request that the Decision be modified as summarized below:

- **OPs 4.b and 30 – Conform Date for 300 Mbps to Network Model.** The record evidence demonstrates that the target date for providing average speeds of 300 Mbps to 93% of California is 2026—i.e., six years after the close—not 2024, as mistakenly noted in the Decision. (*See* Section IV.1, *infra.*)
- **OP 25 – Eliminate the Requirement to Add 1,000 New Employees.** The imposition of a specific hiring mandate is inconsistent with regulatory authority, not supported by the record, and burdensome, especially in light of the economic disruption created by the COVID-19 crisis. (*See* Section IV.2, *infra.*)
- **OP 30 – Modify Network Testing to Conform to Record and Existing Models.** As the record confirms, the buildout of the T-Mobile 5G network is subject to two independent testing programs under the auspices of the Federal Communications Commission (“FCC”) and the California Emerging Technology Fund (“CETF”). OP 30, however, would mandate compliance under CalSPEED, a third program that was not the subject of any part of the almost two-year proceeding. Such an obligation undermines regulatory certainty, clarity, and efficiency and is otherwise unnecessarily duplicative, burdensome, and inconsistent with the record. (*See* Section IV.3, *infra.*)

II. BACKGROUND

The Joint Applicants initiated these proceedings on July 13, 2018, with the filing of the Wireless Notification¹ and the Wireline Application.² A number of entities became parties to the proceeding, including the Public Advocates Office (“Cal PA”), Communications Workers of

¹ *See* A.18-07-012, Joint Application of Sprint Spectrum L.P. (U-3062-C), 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 (July 13, 2018) (the “Wireless Notification”).

² *See* A.18-07-011, 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. (U-5112-C) Pursuant to Public Utilities Code Section 854(a) (July 13, 2018) (the “Wireline Application”).

America District 9 (“CWA”), CETF, The Greenlining Institute (“Greenlining”), and DISH Network Corporation (“DISH”) (collectively referred to as the “Intervenors”).

Prior to the issuance of the Decision, the Commission engaged in an extensive, nearly two-year review process, during which it held public participation hearings, conducted two separate evidentiary hearings,³ and received multiple rounds of testimony,⁴ two sets of post-hearing briefs,⁵ and comments on the Commission’s proposed decision. Additionally, Joint Applicants made nearly 50 voluntary commitments with respect to their operations as a merged entity. These voluntary commitments were made in an effort to reinforce the benefits of the merger, address concerns that Intervenors raised, and encourage the Commission to conclude its proceeding expeditiously.

The Joint Applicants also made a number of commitments to various private and governmental entities, including, but not limited to, the following:

- National Diversity Coalition Memorandum of Understanding (“NDC MOU”) (January 29, 2019) – various commitments to support diversity procurement and communities of color, women, and veterans.⁶
- CETF Memorandum of Understanding (“CETF MOU”) (March 22, 2019) – California-specific commitments that address, among other things, pricing, LifeLine, network/rural buildout, public safety, emergency preparedness,

³ From January 15, 2019, to January 17, 2019, public participation hearings took place in Fresno, Los Angeles, and San Diego. Six days of evidentiary hearings on a variety of topics were held from February 5-8, 2019, and December 5-6, 2019.

⁴ For the February hearings, the Intervenors submitted ten sets of testimony from nine different witnesses, and the Joint Applicants submitted eleven sets of rebuttal testimony from ten different witnesses. For the December hearings, the Intervenors submitted three sets of supplemental testimony and five sets of reply testimony from eight different witnesses; the Joint Applicants submitted seven sets of supplemental testimony from seven different witnesses; and DISH submitted one set of testimony.

⁵ Post-hearing opening briefs were submitted on April 26, 2019, May 10, 2019 (reply briefs), and December 20, 2019.

⁶ See Hearing Ex. Jt Appl.-8C (Sylla Dixon Rebuttal Testimony) at Attachment B and Decision at Attachment 1 (copy of NDC MOU).

network resiliency, public safety, the digital divide (including digital literacy), and enforceability.⁷

- FCC Commitments (May 20, 2019) – commitments to build out 5G network tied to specific metrics; ensure more rural residents will receive 5G broadband service, at dramatically better performance; and provide that in-home broadband competition will be enhanced.⁸
- Proposed Final Judgment (July 26, 2019) – negotiated judgment with the U.S. Department of Justice (“DOJ”) providing for the post-merger divestiture of Sprint’s prepaid assets (excluding Assurance Wireless) to DISH and additional rights to strengthen DISH’s ability to compete in the retail mobile wireless market.⁹
- California Attorney General Settlement (March 9, 2020) – commitments with respect to pricing, plans, broadband access plans, jobs, and diversity.¹⁰

On March 11, 2020, a proposed decision, with numerous proposed conditions, was issued (the “PD”). Joint Applicants and Intervenors were afforded the opportunity to - and did - comment on the PD. On April 15, 2020, a revised proposed decision, with various proposed and some new conditions, was issued (the “Revised PD”). The Revised PD was adopted by the Commission on April 16, 2020, and issued on April 27, 2020.¹¹

⁷ See Decision at Attachment 2 (copy of CETF MOU).

⁸ See *id.* at Attachment 3, App. G (copy of FCC Commitments).

⁹ See *id.* at Attachment 4 (copy of PFJ).

¹⁰ The settlement with the Attorney General was not referenced in the Decision. It is described on the California Attorney General’s website at the following link:

<https://oag.ca.gov/system/files/attachments/press-docs/CA%20Settlement%20Agreement%20%283.9%20fully%20executed%29.pdf>.

¹¹ Consistent with arguments previously raised by Joint Applicants, Joint Applicants maintain that the Commission lacks authority to require approval for – or to impose any mandatory conditions on – the wireless transfer of control. See *e.g.*, Joint Applicants’ Post-Hearing Wireless Opening Brief (Apr. 26, 2019) at 14-16 (explaining that the Wireless Notification is subject to Commission review, not approval); Joint Applicants’ Post-Hearing Wireless Reply Brief (May 10, 2019) at 7-12 (explaining that the transfer of Sprint wireless entities does not require Commission preapproval); Joint Applicants’ Post-December 2019 Hearing Brief (Dec. 20, 2019) at 11-12 (explaining that the Amended Wireless Notification is subject to Commission review, and not approval, under Pub. Util. Code § 854); Joint Applicants’ Opening Comments on Proposed Decision (Apr. 1, 2020) (“Joint Applicants’ Comments on PD”) at 2-10 (explaining the Commission’s legal error in interpreting its Section 854 authority and explaining that the Commission lacks jurisdiction to approve wireless mergers); Joint Applicants’ Reply Comments on

III. STANDARD OF REVIEW

The Commission may “rescind, alter, or amend any order or decision” it has previously made.¹² This authority may be exercised pursuant to a Rule 16.4 petition for modification, which “asks the Commission to make changes to an issued decision.”¹³

The Commission has broad authority to grant a petition for modification,¹⁴ and such petitions should be granted upon a “persuasive indication” that the Commission should “make a different decision” than that previously made.¹⁵ Accordingly, the Commission may modify a decision if, for example: “(1) new facts are brought to the attention of the Commission, (2) conditions have undergone a material change, or (3) the Commission proceeded on a basic misconception of law or fact.”¹⁶ While “changed circumstances” provide one basis for granting petitions for modification,¹⁷ “there is no requirement for new or changed facts before a petition

Proposed Decision (Apr. 9, 2020) at 1 (reasserting that the Commission has ignored its jurisdictional limits over wireless transfers); Joint Applicants’ Response to the Public Advocates Office, the Greenlining Institute, and The Utility Reform Network Application for Rehearing of Decision 20-04-008 (May 22, 2020) at 2, 6, 9-11. Joint Applicants further maintain that the wireline transaction did not provide the Commission with the authority to impose mandatory conditions – especially conditions that go entirely to the separate wireless transaction. *See* Joint Applicants’ Comments on PD at 2-6; *see also* Joint Applicants’ Response to the Public Advocates Office, The Greenlining Institute, and the Utility Reform Network Application for Rehearing of Decision 20-04-008 (May 22, 2020) at 9-11. Accordingly, and consistent with Joint Applicants’ previous statements, Joint Applicants continue to reserve all rights to challenge the Commission’s jurisdiction and imposition of mandatory conditions in this proceeding.

¹² Pub. Util. Code § 1708.

¹³ Rule 16.4(a).

¹⁴ *See In re Application of the Exposition Metro Line Constr. Auth.*, D. 09-02-032, 2009 Cal. PUC LEXIS 74, *13 (Feb. 23, 2009); *see also* Pub. Util. Code § 1708.

¹⁵ *In re Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006*, D. 17-12-006, 2017 Cal. PUC LEXIS 578, *15 (Dec. 14, 2017) (quoting *In re Applications of PG&E Co.*, D. 92058, 1980 Cal. PUC LEXIS 785, *26 (July 29, 1980)).

¹⁶ *Id.* (citing *In re United Parcel Serv., Inc.*, D. 97-04-049, 1997 Cal. PUC LEXIS 427, *15 (Apr. 9, 1997)).

¹⁷ *See In re Application of the Exposition Metro Line Constr. Auth.*, D. 09-02-032, 2009 Cal. PUC LEXIS 74, *12 (Feb. 20, 2009) (noting that, in examining a petition for modification, the Commission “looked at

for modification may be granted.”¹⁸ Petitions for modification may and should also be granted where there exist ambiguities, inconsistencies, or omissions in the underlying decision.¹⁹

Moreover, such petitions may and should be granted where there are fundamental inequities in the decision²⁰ and/or where critical policy considerations went entirely unnoticed.²¹

IV. REQUESTED MODIFICATIONS FOR ORDERING PARAGRAPHS

In this Petition, the Joint Applicants have identified a limited number of OPs that warrant modification. Each of these is discussed below.

whether there were new facts or *changed circumstances* warranting a modification”) (emphasis added); *see also In re Application of Sw. Gas Corp. for the Issuance of Limited Exemptions from the Affiliate Transaction Rules*, D. 99-11-016, 1999 Cal. PUC LEXIS 664, *7 (Nov. 4, 1999) (“If ... any other circumstances change from the information provided ... in this application, [applicant] should file a Petition for Modification of this decision.”).

¹⁸ *In re Application of S. Cal. Edison Co. for Authority to Institute a Rate Stabilization Plan with A Rate Increase and End of Rate Freeze Tariffs*, D. 05-07-047, 2005 Cal. PUC LEXIS 298, *6 (July 21, 2005).

¹⁹ *See, e.g., Application of S. Cal. Edison Co. for Authority to Recover Capital Additions to its Fossil Generating Facilities Made Between Jan. 1, 1996 and Dec. 31, 1996*, D. 99-07-005, 1999 Cal. PUC LEXIS 475, **2-5 (July 8, 1999) (granting petition for modification to correct an omission in the underlying decision related to the amount of costs the petitioner could recover with respect to its participation in a certain CPUC-authorized program); *Investigation on the Commission’s Own Motion and Order to Show Cause to Determine if Pac. Gas. & Elect. Co. Should Be Held In Violation of Gas Tariff Rule 16 for Failure to Provide Trenching at No Cost within the Allowance of 100 Feet*, D. 98-02-003, 1998 Cal. PUC LEXIS 319, **3-4 (Feb. 4, 1998) (granting petition for modification to resolve inconsistencies between a settlement entered into by petitioner and Commission staff and the decision purporting to memorialize the settlement); *In re S. Cal. Edison Co. and San Diego Gas & Elect. Co., for a Certificate of Public Convenience and Necessity*, D. 92-09-071, 1992 Cal. PUC LEXIS 947, **1-2 (Sept. 16, 1992) (granting petition for modification to replace two incorrect maps attached to the underlying decision); *In re Application of San Diego Gas & Elect. Co. for Authority to Increase Its Authorized Level of Rate Base Revenue under the Elect. Revenue Adjustment Mechanism and Steam Revenue Adjustment Mechanism*, D. 92-04-016, 1992 Cal. PUC LEXIS 351, *3 (Apr. 8, 1992) (granting petition for modification to correct underlying decision’s miscalculation of a base rate revenue requirement applicable to petitioner).

²⁰ *See Petition of S. Cal. Edison Co. for Modification of Res. E-3843*, D. 04-09-004, 2004 Cal. PUC LEXIS 444, *1 (Sept. 2, 2004) (granting petition to modify resolution after concluding that the proposed modification would “correct the inadvertent inequities” caused by the underlying decision).

²¹ *See S. Cal. Edison Co. Application for Rehearing of Res. G-3062*, D. 94-01-049, 1994 Cal. PUC LEXIS 57, **2-3 (Jan. 19, 1994) (emphasis omitted) (“SCE’s application for rehearing requests that we make changes in the Resolution on policy grounds. However, the substantive policy questions raised by SCE are before us in a number of proceedings including two petitions to modify the instant Resolution.... [T]he petitions for modification are the proper vehicle to address these substantive policy questions.”).

1. The Commission Should Modify the 300 Mbps Compliance Dates in OPs 4.b and 30 from “2024” to “2026”.

Ordering Paragraph 4 establishes certain benchmarks for speed and population coverage that post-merger T-Mobile is required to meet for 5G deployment across the state and in rural areas by year end 2023 (OP 4.a), 2024 (OP4.b), and 2026 (OP 4.c). The 2024 coverage benchmark established in OP 4.b should be adjusted to 2026, because the 2024 date was a proxy – used at the beginning of the regulatory approval process in 2018 – for the period ending six years after closing (which of course occurred in 2020). Accordingly, Joint Applicants respectfully request that the Commission modify the benchmark date in OP 4.b from 2024 to 2026 and make the corresponding changes to OP 30.

This modification is necessary and appropriate because it: (i) brings the OP 4.b benchmark in line with the company’s network model, which includes coverage projections for three- and six-year periods from close; (ii) promotes consistency with the other buildout commitments in OP 4 and the corollary T-Mobile FCC commitments;²² and (iii) avoids anomalous results.²³ The Commission has modified its decisions in similar circumstances. For example, in *Joint Application of California Water Service Company et al. for Approval of a Plan of Merger*, the Commission modified a petitioner’s deadlines for filing two separate rate cases to account for the Commission’s unanticipated delay in granting the merger that was under

²² See Hearing Ex. Jt Appl.-19 (“FCC Commitments”) at Attachment 1(Network and In-Home Commitments).

²³ As is noted in footnote 11 above, Joint Applicants maintain that the Commission lacks jurisdiction to approve or impose any mandatory conditions on the wireless transfer of control. OP 4.b. also exceeds the Commission’s jurisdiction because OP 4.b would impose an additional metric that directly regulates service coverage and quality. See *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000); see also *In re Apple iPhone 3G Prod. Liab. Litig.*, 728 F. Supp. 2d 1065, 1071 (N.D. Cal. 2010) (“[W]here the relief sought would ‘alter the federal regulation of,’” among other things, “location and coverage,” the claims are preempted under *Bastien*’s standard).

review.²⁴ Thus, modifying the benchmark date in OP 4.b from 2024 to 2026 is fully consistent with Commission precedent.

By way of background, OPs 4.a and 4.c include certain California-specific network speed benchmarks for 2023 and 2026.²⁵ These benchmarks were based on evidence submitted by T-Mobile regarding California-specific projections extrapolated from the nationwide commitments otherwise memorialized in the FCC Commitments.²⁶ These benchmarks in the OPs are identical to the projections:

Ordering Paragraphs	Speed Thresholds	California Pop Coverage per Ordering Paragraphs		California Pop Coverage Projections re FCC Nationwide Commitments ²⁷	
		2023	2026	3 Years	6 Years
4.a.i and 4.c.i	Pops with Speed = 50Mbps	91%	na	91%	99%
4.a.ii and 4.c.ii	Pops with Speed >= 100Mbps	86%	99%	86%	99%
4.a.iii and 4.c.iii	Rural Pops with Speed >= 50Mbps	81%	94%	81%	94%
4.a.iv and 4.c.iv	Rural Pops with Speed >= 100Mbps	79%	85%	79%	85%

²⁴ See *Joint Application of Cal. Water Service Co., et al. for Approval of a Plan of Merger*, D.02-08-024, 2002 Cal. PUC LEXIS 470 at **3-7 (Aug. 8, 2002).

²⁵ See Decision at 49-50 (OP 4). T-Mobile is also in the process of meeting and conferring with CETF to make corresponding changes to the buildout dates in the MOU from 2021/2024 to 2023/2026 as contemplated in the MOU. See CETF MOU Section VII.C (“If the close of the Transaction is delayed until late 2019, CETF will meet and confer with New T-Mobile about *extending the 5G deployment commitment until 2026.*”)

²⁶ See Hearing Ex. Jt Appl.-28C at 23:4-17 (Ray Supplemental Testimony); *id.* at Attachment H (based on the nationwide commitments made to the FCC, T-Mobile and Sprint project that . . . “(A) within three (3) years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with . . . (B) within six (6) years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with . . .”).

²⁷ See Hearing Ex. Jt Appl.-28C at Attachment H.

To demonstrate compliance with the OP 4 benchmarks, OP 31 included corresponding requirements for the submission of drive test results within eight to nine months of the third and sixth anniversary dates of the closing.²⁸ The PD also included speed benchmarks for 2030 that had no basis in the record of this proceeding.²⁹

However, the Revised PD (which, as noted above, is the version of the PD that the Commission adopted on April 16, 2020) replaced the proposed 2030 benchmark (subsequently deleted from the final Decision) with a year-end 2024 requirement to provide “300 Mbps download speeds to 93% of the California population.”³⁰ The 300 Mbps benchmark was not a part of the California projections on which OPs 4.a. or 4.c were based.

In explaining the addition of the 300 Mbps benchmark to OP 4, the Decision cites to testimony from T-Mobile witnesses that the specified benchmark would be reached by 2024.³¹ At the outset, Joint Applicants acknowledge that their witnesses’ testimonies included a number of speed and population targets that were associated, on their face, with the years 2021 and 2024. These included the target identified in OP 4.b (i.e., average speeds of 300 Mbps for 93% of California’s population by 2024).³² For example, the Joint Applicants included two charts to illustrate the projected speed and population targets:

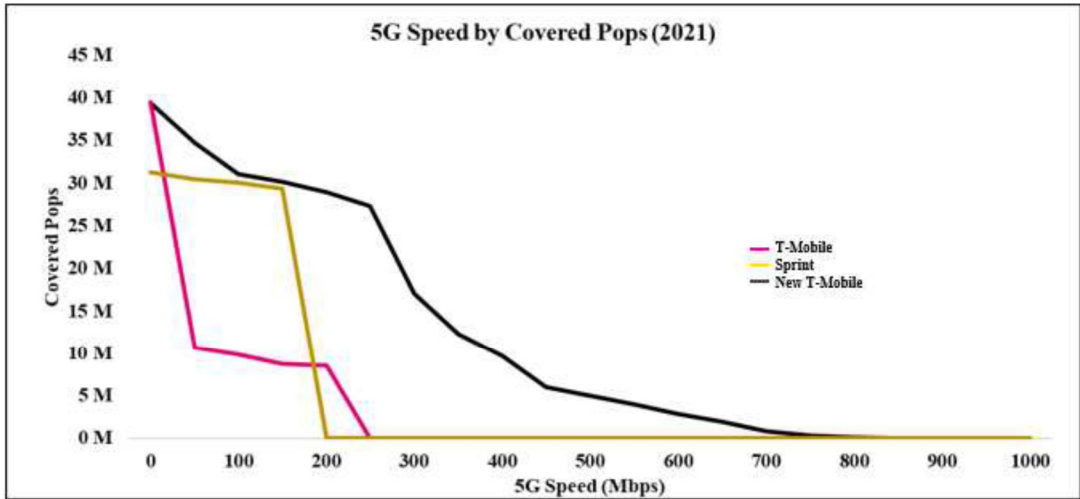
²⁸ See Proposed Decision at 51 (OP 31); *see also* Section IV.3, *infra*.

²⁹ See Joint Applicants Opening Comments on PD at 12-13.

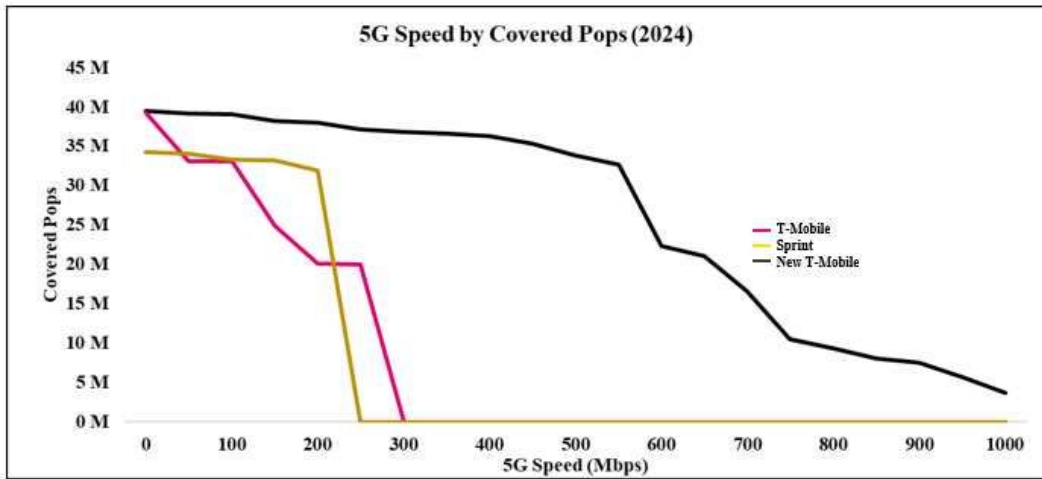
³⁰ Decision at 50 (OP 4.b). OP 31 was revised and renumbered as OP 30 in the adopted decision. A corresponding requirement for the submittal of drive test results verifying the achievement of this benchmark eight to nine months following the fourth anniversary date of the closing was added to OP 30.

³¹ See Decision at 44.

³² See Hearing Tr. at 297:13-18 (Sievert Cross), 373:16-20 (Sievert Direct), 398:19-399:3 (Ray Cross), 505:11-16 (Ray Cross); Hearing Ex. Jt. Appl-3C at 9:12-13, 27:18-24, 33:8-10 (Ray Rebuttal Testimony).



2021	California Covered Pops by Speed			% California Pops		
	T-Mobile	Sprint	New T-Mobile	T-Mobile	Sprint	New T-Mobile
Pops with > 100 Mbps	9.8 M	30.1 M	31.0 M	25%	76%	79%
Pops with > 150 Mbps	8.8 M	29.3 M	30.1 M	22%	74%	76%
Pops with > 300 Mbps			17.0 M			43%
Pops with > 500 Mbps			5.0 M			13%



2024	California Covered Pops by Speed			% California Pops		
	T-Mobile	Sprint	New T-Mobile	T-Mobile	Sprint	New T-Mobile
Pops with > 100 Mbps	33.1 M	33.3 M	39.1 M	84%	84%	99%
Pops with > 150 Mbps	24.9 M	33.2 M	38.2 M	63%	84%	97%
Pops with > 300 Mbps			36.8 M			93%
Pops with > 500 Mbps			33.8 M			83%

However, the Decision fails to recognize that the reference to the year “2024” was taken out of context and was actually a reference – as was the case with all network projections – to a specific time period after closing. The speed and population coverage projections for 2021 and 2024 were based on the company’s network model, which, critically, calculated speed/population

coverage metrics at *three-year and six-year periods after closing*; just as they were with the California projections noted above. The dates in Mr. Ray's testimony were illustrative only; they were not intended to be tied to a particular year. As Mr. Ray explains in his testimony:

Three Years After Close

Q Same amount. Okay. So why is it that you can refarm mid-band spectrum in LA to 10 million people by 2021. But in Fresno, which only has a million people, you can't do so?

A. It's just the case how, you know, we prioritize the work in those early years. *The first three years* here is, you know, building this highly capable 5G network.³³

Six Years After Close

A. On a standalone basis, it is nigh-on impossible for either company to get anywhere near the level of performance and capability that we're talking about with the New T-Mobile especially *over the five- to six-year period that we've modeled* and we've provided testimony and information on.

Q So what is the five to six years that you're talking about? What does that represent?

A. So if you look through the testimony, you will see that we have made multiple statements around what will happen with the combination of these two businesses and the combination of the networks. *We've provided data points for 2021, and we've also provided a set of data points for 2024. So that's kind of the timeframe that we've used to illustrate the capability of the T-Mobile new network*, and we've also provided details on many occasions of the capabilities of the standalone networks in those similar timeframes. And we've provided a lot of charts and data and comparisons of speed and performance. And the two standalones cannot get close to the capabilities of the New T-Mobile *in that five- to six-year period*.³⁴

Thus, the target of being able to provide 93% of Californians with average speeds of 300 Mbps – much like the target of being able to provide 99% of Californians with average speeds of 100 Mbps reflected in the charts above – was tied to the six-year build-out network model, not the specific dates used to illustrate the point in Mr. Ray's testimony. As recognized implicitly by

³³ Hearing Tr. at 448:1-9 (Ray Re-Cross) (emphasis added).

³⁴ Hearing Tr. at 398:5-399:3 (Ray Cross) (emphasis added).

OP 4.c., which establishes the 100 Mbps to 99% of Californians threshold, the appropriate target date based on the April 2020 close for each of these targets is 2026, not 2024.

The proposed modification would also harmonize OP 4.b in general with the compliance timelines in OP 4.a and OP 4.c which are 2023 and 2026, i.e., three years and six years after the close. As noted above, the projections on which these obligations were based, as well as the national buildout commitments to the FCC from which they were extrapolated, were similarly – and explicitly – framed in terms of *three years and six years from close*.³⁵ The Decision recognized that time frame in fashioning OPs 4.a and 4.c and the corresponding parts of OP 30, all of which incorporate these timeframes.

This change to the target date would also align OP 4.b with changes to the CETF MOU that T-Mobile is currently pursuing. In this regard, although the CETF MOU has cell site and speed-specific 5G deployment targets for 2021 and 2024 (including those for achieving the 300 Mbps speed tier), the MOU provides for a change in the deployment deadline if there is delay in the closing of the transaction. Specifically, the CETF MOU states that “[i]f the close of the Transaction is delayed until late 2019, CETF will meet and confer with New T-Mobile about extending the 5G deployment commitment until 2026.”³⁶ Given the close of Joint Applicants’ transaction in 2020, T-Mobile is actively meeting and conferring with CETF to make the contemplated adjustment.

³⁵ See Hearing Ex. Jt Appl.-28C (Ray Supplemental Testimony) at Confidential Attachment H (“(A) within three (3) years of the closing date of the T-Mobile/Sprint merger, new T-Mobile will deploy a 5G network with . . . (B) within six (6) years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with . . .”).

³⁶ Hearing Ex. Jt Appl.-23C (*Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc*) at Section VII.C.

Modifying OP 4.b to 2026 would also avoid anomalous results in OP 4. In its current construction, the speed and POP requirements in OP 4.b are out of sync with OPs 4.a and 4.c. For example, OP 4.a. requires post-merger T-Mobile to achieve at least 86% California population access to service with download speeds of at least 100 Mbps by year-end 2023. Incredibly, OP 4.b would have those speeds jump *three-fold in one year* to 300 Mbps for 93% of the population by year-end 2024. Then two years later, the expected speeds shrink down to 100 Mbps – albeit for a larger percentage (99%) of the POPs by year-end 2026.

Finally, there is no evidence in the record that the achievement of 93% access to 300 Mbps download speeds at a 4-year post-closing timeframe is feasible. To the contrary, Mr. Ray’s testimony is clear that T-Mobile expected to be able to provide 43% of Californians with access to average speeds of 300 Mbps three years after close (reflected in the charts above as the 2021 targets, but now really a 2023 target based on the close) while the target of providing 300 Mbps to 93% of POPs is six years (reflected in Mr. Ray’s charts as 2024, but now 2026 given the actual close date). The latter target is the apparent focus of the OP.

For the reasons state above, Joint Applicants respectfully request that the Commission modify OPs 4.b and 30³⁷ as follows:

OP 4.b. By year end ~~2024~~ **2026**, New T-Mobile shall provide access to service with at least 300 Mbps download speeds to 93% of the California population.

³⁷ In addition, the Joint Applicants note that the timeframe in OP 30 for conducting and sharing the results of the staff’s CalSPEED tests on New T-Mobile’s network, which are tied to the transaction’s *closing date*, are not aligned with the population coverage compliance dates in OP 4. Those dates are tied to *year end*: year end 2023 (OP 4.a) and year end 2026 (OP 4.c). The Commission may wish to revise OP 30 to ensure any CalSPEED drive tests are conducted (and presented to T-Mobile) *after* the corresponding compliance due dates in OP 4.

OP 30: Unless otherwise agreed to by Staff, or by the Commission as a result of a challenge as provided in subparagraph a. of this Ordering Paragraph, interpolated results from CalSPEED drive tests of LTE and 5G service created by CPUC Staff or its contractors performed on or after the third and sixth anniversaries of the closing date of the merger shall be the basis upon which New T-Mobile compliance with the deployment requirements in Ordering Paragraph 4 ~~subparagraphs a. and c.~~ shall be determined, ~~and results from such drive tests performed on or after the fourth anniversary of the closing date of the merger shall be the basis upon which New T-Mobile compliance with the deployment requirements in Ordering Paragraph 4 subparagraph b. shall be determined.~~ Such results shall be presented to New T-Mobile during a period between eight months and nine months following the third, ~~fourth~~ and sixth anniversaries of the closing date of the merger.

2. OP 25 Should be Modified to Eliminate the Mandate for T-Mobile to Increase the Number of Full-Time T-Mobile Employees.

During the course of the underlying proceeding, Joint Applicants took the unprecedented step of voluntarily committing that there would be at least the same number of T-Mobile employees in California three years after the transaction’s closing as Sprint, Assurance Wireless, and T-Mobile had as of the date of the transaction’s closing.³⁸ However, in OP 25, the Commission attempts to mandate that T-Mobile must increase, within three years of the transaction’s closing, its net full-time jobs in California by a *thousand jobs more than* the current full-time jobs of Sprint, Assurance Wireless, and T-Mobile.³⁹ A requirement mandating the creation of new jobs is well outside the Commission’s jurisdiction and established policy goals, and is clearly premised on a “basic misconception of law.”⁴⁰ As discussed below, it is also particularly burdensome and unjustified in light of the current COVID-19 crisis.

³⁸ See Jt Appl. Opening Brief (Apr. 26, 2019) at 87-88; Jt Appl. Post-December 2019 Hearing Reply Brief (May 10, 2019) at App. 1-8 – 1-9; see also Hearing Ex. Jt Appl.-2C (Sievert Rebuttal Testimony) at 38:12-15.

³⁹ See Decision at 57 (OP 25).

⁴⁰ D. 17-12-006, 2017 Cal. PUC LEXIS 578, *15 (Dec. 14, 2017) (quoting *In re United Parcel Service, Inc.*, D.97-04-049, 1997 Cal. PUC LEXIS 427, *15 (July 29, 1980)).

The Commission simply does not have the authority to require a wireless carrier to hire a particular number of employees in a given time period. The legislature has never granted it such authority⁴¹ and, prior to the issuance of the Decision the Commission has not attempted to impose such a mandate on any other communications provider in any context. While the Commission does have the discretion to consider whether a proposed merger is “fair and reasonable to affected public utility employees”⁴² in the context of an application brought under Section 854, the Wireless Notification was not subject to Section 854.⁴³ And even under Section 854, the Commission cannot use – and has not used – that authority to mandate specific hiring levels.⁴⁴ “In the absence of statutory authorization, [] it would hardly be contended that the commission has power to formulate the labor policies of utilities.”⁴⁵ The Commission’s extraordinary attempt to dictate specific employee headcounts clearly warrants modification of OP 25, as proposed by Joint Applicants herein.

Moreover, even if it were permissible for the Commission to impose the jobs condition contained in OP 25, that condition should still be modified because of the major consequences

⁴¹ *Pac. Tel. & Tel. Co. v. Pub. Util. Comm’n*, 34 Cal. 2d 822, 829 (1950) (“In the absence of statutory authorization, [] it would hardly be contended that the commission has power to formulate the labor policies of utilities.”); see also *In re Methodology for Establishing Prevailing Wage Rate Components for Highway Transp.*, D. 91265, 1980 Cal. PUC LEXIS 86, *8 (Jan. 15, 1980) (concluding that the Commission “neither ha[s] nor want[s] jurisdiction” over “requiring carriers to pay the prevailing wage to their employees” because its job is to “act[] in its ratemaking capacity only”).

⁴² Pub. Util. Code § 854(c).

⁴³ Joints Applicants’ Wireless Notification was filed pursuant to Commission Decision 95-10-032, through which the Commission exempted with limited exceptions wireless transactions from pre-approval under Public Utilities Code Section 854, including the transfer of ownership of a wireless provider. See *In re Investigation on the Comm’n’s Own Motion into Mobile Tel. Serv. and Wireless Commc’ns*, D. 95-10-032, 1995 Cal. PUC LEXIS 888, *25 & *30 (Oct. 18, 1995); see also Wireless Notification at 1 n.1.

⁴⁴ See, e.g. *In re Joint Application of SBC Commc’ns, Inc. and AT&T Corp. for Authorization of Transfer of Control*, D. 05-11-028, 2005 Cal. PUC LEXIS 516, **108-09 (Nov. 18, 2005) (declining Office of Ratepayer Advocates request to impose condition related to job losses with respect to proposed merger).

⁴⁵ *Pac. Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 34 Cal. 2d 822, 829 (1950).

the ongoing COVID-19 pandemic has had on the economy and the long-term effects it may have on companies like T-Mobile over the next several years. The current economic crisis makes the imposition of a mandate to create additional jobs infeasible and unwarranted. Such a material change in circumstances clearly warrants modification of the decision.⁴⁶ The Commission should thus modify OP 25 as follows:

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.

3. The FCC Drive Tests Should be Used to Confirm the Network Build Obligations.

The Decision’s imposition of a new testing methodology for commitments already subject to compliance verification under the FCC Commitments is not supported by the record, is duplicative and unnecessary, and will inevitably result in regulatory uncertainty and potentially inconsistent testing results (which would raise federal preemption concerns). The Joint Applicants respectfully request that OP 30 be modified accordingly.

⁴⁶ See, e.g., D. 17-12-006, 2017 Cal. PUC LEXIS 578, *15 (authorizing modifications where “material changes” in underlying conditions has occurred); *In re Implementation of Pub. Util. Code Section 390*, D. 02-01-033, 2002 Cal. PUC LEXIS 37, **4-8 (Jan. 9, 2002) (granting, in part, petition to modify under “changed circumstances” theory where legislature failed to take an action critical to the underlying decision by the date the Commission anticipated the legislature would act when the Commission issued its initial decision).

As an initial matter, the record includes no discussion of CalSPEED as a testing methodology.⁴⁷ Additionally, there is no need for an additional test. T-Mobile’s 5G network build and resulting speeds and coverage are already subject to two different tests conducted or overseen by independent third parties, both of which were part of the record during the proceedings. In particular, the FCC drive test is appropriate for these purposes. As noted above, the speed and population coverage deployment benchmarks set forth in OP 4 are based on the Joint Applicants’ FCC commitments. Compliance with these benchmarks will be verified nationwide – including in California – through drive tests administered by a third party and the FCC.⁴⁸ In fact, OP 31 requires T-Mobile to provide the results of the California drive tests to the staff. OP 28, however, would require separate CalSPEED testing of the same build, on the same schedule, looking at the same metrics, using a different methodology. Such a result would be burdensome, inefficient, and likely to lead to regulatory uncertainty. As such, the requirement should be modified as set forth below:⁴⁹

⁴⁷ The only reference to CalSPEED in the record involved a brief colloquy between Mr. Ray and Ms. Chong (CETF’s counsel) regarding Mr. Ray’s familiarity with the existence of “an app called CalSPEED.” *See* Hearing Tr. at 495:10-18 (Ray Cross).

⁴⁸ *See* Decision at Attach. 3, App. G (copy of FCC Commitments).

⁴⁹ Additionally, the cell site build-out requirements included in the CETF MOU are measured by speed testing to be conducted by an independent third party selected by CETF, adhering to customary professional standards. *See* CETF MOU at 12.

V. CONCLUSION

For the reasons discussed above, the Joint Applicants respectfully request the Commission grant this Petition for Modification and revise the Decision as set forth above.

Respectfully submitted this 22nd day of June, 2020.

/s/
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