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' RESPONSE TO THE PUBLIC ADVOCATES OFFICE, THE GREENLINING INSTITUTE, AND THE UTILITY REFORM NETWORK APPLICATION FOR REHEARING OF DECISION 20-04-008

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

California Public Utilities (PU) Code

California Public Utilities Decisions and General Orders

California Public Utilities Commission Rules

Federal Statutes and Regulations

Federal Communication Comission Decision

Other

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Pursuant to California Public Utilities Commission ("Commission") Rules of Practice and Procedure ("Rules") 16.1, Sprint Communications Company L.P. ("Sprint Wireline"), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C)[1] (together, the "Sprint Wireless CA Entities") and T-Mobile USA, Inc. ("T-Mobile USA") (collectively referred to as the "Joint Applicants"), respectfully submit this Response to the Application for Rehearing of Decision 20-04-008 filed jointly by the Public Advocates Office ("Cal PA"), the Greenlining Institute ("Greenlining") and The Utility Reform Network ("TURN") (together, the "Intervenors") on May 7, 2020 (the "Intervenors' AFR").

[1] 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). As of April 1, 2020, Sprint Wireline and the Sprint Wireless CA Entities are all indirect wholly owned subsidiaries of T-Mobile USA, Inc.

I. INTRODUCTION

The Intervenors' AFR does little more than rehash unsupported arguments that were considered and rejected by the Commission. Intervenors identify no legal or factual issue that comes close to meeting the standard for rehearing, and the Commission should deny the Intervenors' AFR.

To begin with, the Intervenors' AFR is premised on a fundamental error. While Joint Applicants stand by their voluntary commitments made to this Commission,[2] they submit – as they have from the outset of these proceedings – that the Commission has no jurisdiction to approve or deny the transfer of control of the Sprint CA Wireless Entities, or to make its approval contingent on the imposition of mandatory conditions. Thus, the very premise of the Intervenors' AFR, i.e., that the merger could be denied by the Commission but, failing that, should or could be subject to additional Commission-mandated conditions, is fatally flawed because the Commission lacks jurisdiction to do either.

Aside from ignoring these jurisdictional limitations, the Intervenors' AFR does not identify any legal error that the Commission can – or should – correct or that otherwise warrants rehearing. It is important to note that the Intervenors' AFR does not challenge D.20-04-008 (the "Decision")'s ultimate conclusion to close the dockets. Nor do Intervenors suggest that the

[2] As the record in these proceeding makes clear, the Joint Applicants made numerous voluntary commitments relating to benefits post-merger T-Mobile ("New T-Mobile" or "NTM") will bring to California including, but not limited to, rural and low-income Californians in terms of LifeLine offerings, expanded digital inclusion and literacy programs, expanded coverage and capacity in rural areas, 5G deployment and network buildout, network resiliency, public safety, MVNOs, jobs, pricing, privacy, and diversity. *See, e.g.,* 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"); *see also* Decision, Attachment 2 at Exhibit A (Memorandum of Understanding between California Emerging Technology Fund and T-Mobile USA (the "CETF MOU")); *id.* at Attachment 1 (Memorandum of Understanding Between the National Diversity Council and T-Mobile USA (the "NDC MOU"); *id*. at Attachment 3 at Appendix G ("FCC Commitments"); *id*., at Attachment 4, the Proposed Final Judgment with the DOJ, ("PFJ").

Commission exceeded its authority or failed to proceed as required by law. Instead, the Intervenors repeat portions of their prior testimony and briefing, all of which was refuted in the course of this proceeding, and suggest that the rehearing is warranted to "correct inconsistent analysis in the Decision and to adopt [unspecified] additional conditions."[3] Neither provides a basis for rehearing. In brief, the Intervenors' AFR amounts to little more than a final attempt by Intervenors to roll out the same discredited theories they have relied on since the outset and should be rejected in its entirety. In particular, Intervenors:

- Claim that public safety will be harmed as a result of the merger. (*See* Section, III.A, infra.);
- Assert, once again, that New T-Mobile 5G Network will not be a "more robust" 5G network than the standalone companies would have been able to provide. (*See* Section, III.B, infra.);
- Suggest that the merger is anti-competitive. (*See* Section, III.B, infra.);
- Claim that there is insufficient evidence to suggest DISH will be a viable competitor. (*See* Section, III.C.2, infra.);
- Allege that the Decision is internally inconsistent as to Sprint's pre-merger viability. (*See* Section, III.C.2, infra.);
- Insist that the Decision does not contain a sufficient enforcement mechanism as to certain conditions. (*See* Section, III.D, infra.).

As discussed more fully below, none of these assertions constitutes grounds for rehearing as they are little more than complaints that the Decision did not embrace every theory - or reference all of the testimony - the Intervenors attempted to assert during the course of this proceeding.

[3] Intervenors' AFR at 2.

II. BACKGROUND

A. Initial Filings

This proceeding was initiated through two separate and distinct initial filings.

1. Wireline Application

On July 13, 2018, Sprint Wireline, then a certificated competitive local exchange carrier ("CLEC") and non-dominant interexchange carrier ("NDIEC"), and T-Mobile USA,[4] filed a joint application seeking approval of the transfer of Sprint Communications from its parent company, Sprint Corporation, to T-Mobile USA under Section 845(a).[5] The requested transfer of Sprint Communications was an unquestionably straightforward and non-controversial transfer as reflected by the Commission's approval of the transfer of that same entity only a few years ago to Softbank, the third largest telecommunications provider in Japan. Indeed, the Wireline Application is indistinguishable from the transfer of the same Sprint Wireline to Softbank; both acquiring companies clearly had the requisite technical expertise and financial resources, and the transfer was seamless to Sprint Wireline customers in both. No one in this proceeding suggested otherwise.[6]

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[4] T-Mobile USA is a Delaware corporation wholly owned by T-Mobile. T-Mobile USA does not directly provide services in California and is not certificated or registered in the state. Prior to the merger, however, it did have two indirect subsidiaries that are registered wireless providers in the state, T-Mobile West, LLC (U-3056-C) and MetroPCS California, LLC (U-3079-C). The merger, however, does not involve a transfer of control of either entity. *See* A.18-07-012, 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 (July 13, 2018) (the "Wireless Notification") at 1-2 and 6.

[5] *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. Pursuant to California Public Utilities Code Section 854(a) (the "Wireline Application").

[6] *See In re Joint Application of Sprint Communications Co., and Starburst II, Inc. for Approval of an Indirect Transfer of Control,* D.13-05-018, 2013 Cal PUC LEXIS 277 (May 23, 2013).

As of March 30, 2020, at the conclusion of a multi-year transition to Voice over Internet Protocol ("VoIP") services,[7] Sprint Wireline relinquished its CPCN via a Tier 1 Advice Letter and registered with the Commission as a VoIP provider.[8] On that same date, the Joint Applicants filed a motion to withdraw the Wireline Application on the basis that the Commission's approval for the transfer of Sprint Wireline was no longer required under Section 854 as it was no longer a certificated public utility.[9] As discussed more thoroughly below, the Decision (improperly) denied the Motion to Withdraw.[10]

2. Wireless Notification

On July 13, 2018, the Sprint Wireless CA Entities and T-Mobile USA filed a joint *notification* pursuant to D.95-10-032.[11] As discussed below, and per federal preemption principles and the *Wireless Exemption Decision*, wireless changes in ownership are not subject to Commission approval but do require 30 days' notice (often done by letter to the Communications Division, without the benefit of any formal docket).[12] In this instance, the Joint Applicants filed their notification in the form of an application, instead of a letter, specifically in order "to

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[7] At the outset of the Commission proceeding, Joint Applicants advised the Commission of Sprint Communications' "existing plans to discontinue its TDM services and transition customers to Internet Protocol ('IP') services." *See* Wireline Application at 15. During the lengthy pendency of the Commission's review, Sprint Wireline has continued that transition, including for its wireline voice services.

[8] *See* Sprint Communications Advice Letter No. 918 (Mar. 30, 2020).

[9] *See* Joint Applicants' Motion to Withdraw Wireline Application (Mar. 30, 2020) ("Motion to Withdraw") at 2.

[10] *See* Section II.A, *infra*.

[11] *See* Wireless Notification.

[12] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D. 95-10-032, 1995 Cal PUC LEXIS 888 (the "*Wireless Exemption Decision*"). *See also* Section III, *infra*.

promote transparency, encourage public participation [through a formal docket], and expedite the process for the timely review of their notification."[13]

3. The Commission Consolidated the Dockets

On September 11, 2018, the assigned ALJ issued a ruling consolidating the applications. The Joint Applicants made it clear from the outset of these proceedings that consolidation of their Wireless Notification and Wireline Application for procedural purposes did not alter the nature of the underlying submissions or the type of review the Commission was authorized to undertake in each. Each concerned different services and distinct regulatory paradigms and each is subject to different review criteria.[14] Indeed, throughout this proceeding, the Joint Applicants consistently raised the jurisdictional limitations of the Commission over the wireless transaction and reserved their rights.[15] They also ultimately asked the Commission to sever its consideration of the Wireline Application, and immediately approve the Wireline Application, about which

[13] *See* Wireless Notification at 1, n.1. Per the Assigned Commissioner's directive (and over Joint Applicants' objections), on September 19, 2019, Sprint Spectrum L.P. (U-3062-C), Virgin Mobile USA, L.P. (U-4327-C) and T-Mobile USA, filed an Amended Joint Application for Review of Wireless Transfer Notification per Commission Decision 95-10-032 to address various post-February developments including the adoption of the FCC Commitments and the PFJ. *See* Administrative Law Judge's Ruling Re-opening the Record to Take Additional Evidence and Directing Joint Applicants to Amend Application (A.) 18-07-012 (Aug. 27, 2019).

[14] *See* Joint Applicants Prehearing Conference Statement (Sept. 12, 2018).

[15] *See* Wireless Notification at 1, n.1 ("In submitting this Application, the Joint Applicants reserve their rights under federal law, including 47 U.S.C. § 332 in particular and both the Communications Act and the Federal Communications Commission rules in general."); Joint Applicants' Post-Hearing Opening Brief (Apr. 26, 2019) at 14-16 (explaining that the Wireless Transfer Notification application is merely subject to Commission review, not approval); Joint Applicants' Post-Hearing 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 Public Utilities Code section 854); Joint Applicants' Opening Comments on Proposed Decision (Apr. 1, 2020) 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 Proposed Decision (Apr. 9, 2020) at 1 (reasserting that the Commission has ignored its jurisdictional limits over wireless transfers).

there was no controversy.[16] Nevertheless, the Commission continued to consider the wireless and wireline filings on a consolidated basis in what became an unduly long and intensive review focused on the wireless transaction alone.

B. The Joint Applicants Made Extensive Voluntary Commitments

As the Joint Applicants explained in their initial reply brief, "[a]ll told, T-Mobile has made nearly 50 voluntary, enforceable commitments in the context of this proceeding."[17] These voluntary commitments were made in an effort to reinforce the benefits of the merger, address concerns that Intervenors have raised, and encourage the Commission to conclude its proceeding. Later, in its comments on the proposed decision, the Joint Applicants expanded the list of voluntary commitments to include, among others, additional, California-specific build-out and broadband commitments based on state-specific projections that underlay, in part, the corollary FCC commitments (OPs 4a, 4c and 5), service commitments during the customer migration and network transition periods (OP 6), and Educational Broadband Spectrum commitments (OP 27).

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[16] *See, e.g.,* Joint Applicant's Motion for Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (May 6, 2019) at 2 ("The undisputed facts established in the Wireline Approval Application, the parties' written testimony, and the testimony presented at the hearings, as well as the arguments set forth in the parties' opening briefs, demonstrate that the Wireline Approval Application involves a straightforward transfer of a competitive local exchange carrier ("CLEC") and non-dominant interexchange carrier ("NDIEC") to a fully qualified acquiring company that does not currently provide wireline services of any kind in California or elsewhere in the United States."); *see also* Joint Applicant's Post-Hearing Opening Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (Apr. 26, 2019).

[17] *See* Joint Applicants' Post-Hearing Reply Brief (May 10, 2019) at 2-3: Appendix 1 (list of voluntary commitments). Certain of these conditions were expressly designed to address concerns raised by Intervenors or to include conditions they proposed. For instance, the Joint Applicants committed New T-Mobile to honor all of T-Mobile's and Sprint's existing MVNO contracts, consistent with Cal PA's request that New T-Mobile honor all existing wholesale agreements. *Compare* Cal PA Opening Brief (Apr. 26, 2019) at 52 *with* Joint Applicants' Post-Hearing Opening Brief (Apr. 26, 2019) at 6. The Joint Applicants also committed New T-Mobile to various TURN conditions, including establishing "mission critical sites in the rural areas where it extends service following the merger and install standard generators at those sites." *Compare* TURN Opening Brief (Apr. 26, 2019) at 41 *with* Joint Applicants' Post-Hearing Reply Brief (May 10, 2019) at 81.

In addition to the Commission commitments, the Joint Applicants made a number of commitments to various private and governmental entities, including but not limited to:

- NDC MOU (January 29, 2019) – various commitments to support diversity procurement and communities of color, women, and veterans.

- CETF MOU (March 22, 2019) – California-specific commitments that address, among other things, pricing, LifeLine, network/rural buildout, public safety, emergency preparedness, network resiliency, public safety, the digital divide (including digital literacy) and enforceability.

- 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.

- PFJ (July 26, 2019) – negotiated judgment with DOJ providing for the post-merger divestiture of Sprint's prepaid assets (excluding Assurance Wireless) to DISH Network and additional rights to strengthen DISH's ability to compete in the retail mobile wireless network.

- California Attorney General Settlement (March 9, 2020) – commitments with respect to pricing, plans, broadband access plans, jobs and diversity.[18]

C. The Extensive Record Focused Exclusively on Wireless

The Commission and Intervenors focused exclusively on the wireless transaction in the course of these proceedings.[19] Indeed, the Decision contains no substantive discussion of the wireline transfer or substantive reference to Sprint Wireline[20] and no party submitted any

[18] The settlement with the Attorney General was not referenced in the Decision. It is available 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.

[19] The record developed in these proceedings has been extensive. In addition to technical workshops and three public participation hearings, there have been two prehearing conferences, multiple motions, expansive discovery requests, *see* T-Mobile USA's Response to the California Public Advocates Office's to Compel Responses to Data Requests (Mar. 14, 2019) at p. 6, and two separate rounds of hearings (one for four days in February 2019 and one for two days in December 2019). There have been 38 sets of testimony comprising over 5,670 pages of testimony with over 108 exhibits from 20 different witnesses, and approximately 1,690 pages of transcripts.

[20] The Decision only references Sprint Wireline for purposes of identifying the application and the

argument or evidence to oppose the wireline transaction. As Cal PA acknowledged, "[t]he testimony and hearings in this proceeding focused on the wireless application (A. 18-07-012)," rather than the Wireline Application.[21]

D. Commission Decision

The Decision purports to separately "approve" both the Wireline Application and the Wireless Notification and condition each approval on the conditions contained in OPs 2-41 even though all the conditions relate exclusively to wireless service - including a myriad of purported conditions that exceed the Joint Applicants' voluntary commitments. But to reach those conclusions, the Decision ignores the Commission's jurisdictional limitations under federal and California law, disregards and unlawfully departs from Commission precedent exempting wireless transfers of control from Section 854 approval, and unlawfully applies Section 854(b) and (c).

III. THE INTERVENORS' AFR FAILS BECAUSE THE COMMISSION LACKS AUTHORITY TO DENY OR IMPOSE CONDITIONS ON THE WIRELESS TRANSFERS OF CONTROL

The premise of the Intervenors' AFR is wrong as a matter of law. The Intervenors assert that the Commission should have denied approval of the applications and argue that the Commission should now impose additional and unspecified conditions. But the Commission lacks the authority to "approve" (or "deny") the wireless transactions or to otherwise impose mandatory conditions on it. That power is reserved to the FCC under the plain language of the Communications Act and general principles of federal preemption. Thus, the Commission may

Sprint Advice Letter.

[21] *See, e.g.,* Joint Applicants Post-Hearing Opening Brief [for the Wireline Application] Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (Apr. 26, 2019) at 8-9, nn.32 – 33 and 18.

not second-guess the FCC's determination that the merger is in the public interest subject to the conditions it deemed appropriate or otherwise require additional mandatory conditions specific to California.[22] The Intervenors' AFR should be denied on that basis alone.

As Joint Applications have previously explained in detail:

- The FCC Has Exclusive Jurisdiction over Wireless Mergers. In the federal Communications Act, Congress gave the FCC exclusive jurisdiction over national wireless licensing, including decisions about how, where, and through what entities wireless services are provided. As part of that grant of exclusive authority, Section 332(c)(3)(a) of the Act expressly bars states from regulating "the entry of or rates charged by any wireless provider," a provision the Ninth Circuit has expressly held prohibits states from second-guessing the FCC's approval of a wireless merger.[23]

- Section 253 of the Communications Act also Preempts State Regulation of Wireless Transfers. Section 253(a) of the Communications Act preempts any form of state regulation that "ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." As interpreted by the FCC, Section 253(a) forbids both state actions that restrict entry and actions that "materially inhibit[] the introduction of new services or improving existing services."[24] Thus, Section 253(a) bars any attempt by the Commission to deny approval or impose conditions on the wireless transaction.[25]

- Commission Precedent Exempts Wireless Transfers From Section 854 Approval. In the *Wireless Exemption Decision*, the Commission expressly and categorically exempted wireless carriers from seeking "preapproval" of any transfer of control of a

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[22] Decision at 41.

[23] *See* Joint Applicants Opening Comments on Proposed Decision (Apr. 1, 2020) at 2-4. *See also Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1006–10 (9th Cir. 2010); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000); *see also* 47 U.S.C. §§ 201, 301, 303, 307, 310 (establishing broad FCC authority over spectrum licensing).

[24] *See Accelerating Wireless Broadband Deployment*, 33 F.C.C. Rcd. 9088, 9104 (2018) ("Deployment Order").

[25] *See* Joint Applicants Opening Comments on Proposed Decision (Apr. 1, 2020) at 4-5. *See also 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); Deployment Order at 9104-9105.

wireless provider under Sections 851-856.[26] The Wireless Notification was explicitly based on that decision.[27]

- The Wireline Application Does Not Provide the Commission with Jurisdiction to Approve the Wireless Transactions or Impose Mandatory Conditions. Neither the Intervenors, nor the Commission, can leverage the Commission's authority to approve certificated wireline transactions under Section 854(a) to assert jurisdiction over, or impose mandatory conditions on, wireless entity transactions. For example:

    - The conditions contained in the Decision, as well as those referenced by the Intervenors, have no nexus to Sprint Wireline or to the Wireline Application.
    - The Commission lacked jurisdiction over the Wireline Application after Sprint Wireline completed it transition to VoIP services and moved to withdraw the Wireline Application.
    - The denial of the Motion to Withdraw conflicted with Commission precedent.
    - The continued assertion of Commission authority over Sprint Wireline violates federal law, as Sprint Wireline informed the Commission in its Advice Letter and Motion to Withdraw that its communications services provided to California customers are "information services" and/or jurisdictionally interstate.[28]

- Sections 854(b) and (c) are Inapplicable to these Proceedings. Neither T-Mobile West LLC and MetroPCS California, LLC, the wholly-owned subsidiaries of Joint Applicant T-Mobile USA, are "parties to the transaction" or were otherwise "utilized for the purpose of effecting the merger, acquisition, or control" of Sprint Wireline (or the Sprint Wireless CA Entities even if Section 854 were applicable which it is not). Review under these code sections was simply erroneous and unlawful and does not provide any support for the Intervenors' AFR.[29]

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[26] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D. 95-10-032, 1995 Cal PUC LEXIS 888 (the "*Wireless Exemption Decision*").

[27] *See* Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032 at 1, n.1 (citing the legal authority established under CPUC D. 95-10-032).

[28] *Id.* at 6-7; Sprint Communications Advice Letter No. 918 (Mar. 30, 2020) at 1-2; Motion of Joint Applicants to Withdraw Wireline Application (Mar. 30, 2020) at 3.

[29] *See* Joint Applicants' Opening Comments on Proposed Decision (Apr. 1, 2020) at 7-10.

IV. RESPONSE TO INTERVENORS' SPECIFIC ASSERTIONS OF ERROR

Per Commission Rules, "[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[30] The Intervenors' AFR identifies no such errors.

A. The Intervenors' Rehashing of Their Own Testimony on Network Resiliency Does Not Show a Legal Error

Intervenors devote a substantial portion of the AFR to simply repeating their testimony with respect to various network resiliency matters and concluding that it somehow establishes that public safety will be harmed as a result of the merger. They go on to assert that that the Decision did not adequately mitigate those harms and "thus, the record does not support the Decision's conclusion that 'on balance' the merger is in the public interest." The Intervenors are incorrect in every respect.

First, the Intervenors' testimony as to each of the issues raised in the AFR was fully addressed by Joint Applicants' testimony and/or the CETF MOU. For example, the Intervenors:

- Reassert that Sprint's generators reduced the number of outages it experienced[31] but fail to acknowledge the unrefuted testimony regarding T-Mobile's use of generators and Cal PA's misunderstanding of NORS/outage reports.[32]

- Complain about theoretical data limitations of first responder services[33] but fail to acknowledge the Joint Applicants' extensive testimony on network capacity and on first responder services in particular.[34]

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30 *See* Commission Rule of Practice and Procedure 16.1(c); *see also* Pub. Util. Code § 1732.

31 *See* Intervenors' AFR at 6.

32 *See e.g.* Hearing Ex. Jt. Appl. 3-C ("Ray Rebuttal Testimony") at 51:23-29 and 53:23-55:7) (backup generators); 53:9-21 and 55:20-56:15 (NORS reports and outage reporting).

33 Intervenors' AFR at 7.

34 *See, e.g.,* Ray Rebuttal Testimony at 56:29-58-6.

- Allege, once again, that somehow the fact that certain Sprint cell sites will be decommissioned undermines "redundant infrastructure"[35] but neglects to reference the testimony which directly refutes that assertion.[36]

- Criticize the Decision for not imposing a requirement on NTM to retain legacy Sprint's inventory of Cells on Wheels[37] but does not mention that NTM has already committed to do so in the CETF MOU as reiterated in testimony.[38]

The fact that the Decision does not include a detailed accounting of the Intervenors' testimony (or the Joint Applicants testimony for that matter), or did not adopt each of the Intervenors' suggestions, is not a basis for rehearing. Moreover, and setting aside the Commission's lack of authority to impose mandatory conditions on the wireless transaction,[39] the assertion that the "Decision does not adopt sufficient conditions to mitigate the harm to public safety" reflects at most a difference of opinion with the Decision, not a basis to change it. While Intervenors no doubt wish the Decision would have imposed more (unidentified) conditions imposed to address an alleged harm they sought to manufacture through their testimony,[40] the fact that the Commission rejected Intervenors' (repeated) speculative claims of harm is not legal error or a failure by the Commission to act in a manner prescribed by law, and it does not provide any plausible basis for rehearing.

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35 Intervenors' AFR at 7-8.

36 *See, e.g.,* Ray Rebuttal Testimony at 52:19-53:2.

37 *See* Intervenors' AFR at 7.

38 *See* Decision at Attachment 2, CETF MOU, Section VIII.B at 13. Ray Rebuttal Testimony at 52:13-17.

39 *See supra* note 15.

40 In Opening Comments on the Proposed Decision; the Intervenors suggested over 40 additional conditions be imposed on NTM. *See* Joint Applicants' Reply Comments at 1 (Apr. 9, 2020). The Decision, however, did not adopt any of those suggestions. That alone does not warrant rehearing.

In addition, the Intervenors' attempt to use Sections 1705 and 321.1 to justify their AFR should also be rejected.[41] Section 1705 does not require the Commission to make a finding of fact or conclusion of law on every issue addressed during a proceeding; it requires only "separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[42] Likewise, Section 321.1 does not require the Decision to repeat – much less accept – positions taken by the Intervenors during the proceeding. Indeed, the subsection the Intervenors point to, when read in its entirety, provides: "[t]he commission shall take all necessary and appropriate actions to assess the economic effects of its decisions and to assess and mitigate the impacts of its decisions on customer, public, and employee safety."[43] The fact that the Commission imposed 41 conditions[44] in closing these dockets certainly reflects an attempt to "assess and mitigate" what it believed was the impact of its Decision.

Finally, the Intervenors fail to note that network resiliency, including backup power, is a matter that is being specifically addressed in the Commission's ongoing Emergency Disaster Relief Rulemaking, R.18-03-011.[45] In fact, the Decision explicitly references that rulemaking in deleting one of the conditions from the proposed decision.[46] Intervenors' request to prejudge the

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41 *See* Intervenors'AFR at 10.

42 Pub Util. Code § 1705.

43 *Id.* § 321.1(b).

44 Some of these conditions are unlawful and exceed the Commission's jurisdiction to impose conditions beyond those the Joint Applicants voluntarily agreed to as discussed above.

45 *See, e.g.,* R.18-03-011, Assigned Commissioner's Ruling Requesting Information on the Development of the Record in this Proceeding on the Issues of Resiliency and Responsiveness Requirements (Mar. 6, 2020).

46 Decision at 44 ("The revisions remove the specific requirements for back-up power in Section C of the Order, because they are superseded by the Assigned Commissioner's Ruling and Proposal filed March 6, 2020 in R.18-03-011.").

outcome of that industry-wide rulemaking in the context of these proceedings regarding a transfer of control is simply inappropriate.[47]

B. The Intervenors' AFR Recycles False and Discredited Arguments about the Benefits of NTM's 5G Network Deployment.

Intervenors take issue with Finding of Fact 11, which states that that the merger will "result in a 5G network with greater capacity and speed than either company would have on its own," arguing that the Decision "fails to consider substantial evidence in the record that discredits its finding that fifth generation networks will be deployed faster because of the merger."[48] This is yet another attempt to assert the discredited notion that the 5G network that NTM will be able to deploy as a result of the merger will be no better than the 5G network that either standalone company would have been able to create on its own. The Intervenors repeated this assertion at every turn in these proceedings: in their pre-filed testimony,[49] in their post-

[47] The Intervenors also fail to recognize that the Commission does not have the authority or the jurisdiction to mandate how carriers build their networks, the level of service they have to provide, when they have to be provided, the types of services they have to provide, or the "modes and conditions" under which a wireless carrier may "offer[] service" - one of "the very areas reserved to the FCC." *See, e.g., Bastien*, 205 F.3d at 989*; see also id.* at 988 ("The [Communications A]ct makes the FCC responsible for determining the number, placement and operation of the cellular towers and other *infra*structure."); *In re Apple iPhone 3G Prod. Liab. 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).

[48] *See* Intervenors' AFR at 11. The Decision properly found that the national merger will "result in a 5G network with greater capacity and speed than either company would have on its own"; not that the networks will be "deployed faster" as alleged by the Intervenors' AFR. Regardless, the Intervenors' arguments are specious.

[49] Hearing Ex. Pub Adv-2C ("Selwyn Opening Testimony") at 142-167; Hearing Ex. Pub Adv-5C ("Reed 5G Testimony") at 8-22; Hearing Ex. Pub Adv-3C ("Clark Financial Condition Testimony") at 29-32; Hearing Ex. CWA-1 ("Goldman Opening Testimony") at 31-35.

hearing briefs,[50] in their comments on the proposed decision,[51] and in this AFR.[52] Their position is no more credible now than at any prior time. In any event, the Intervenors fail to identify how the Commission's Finding of Fact results in legal error that warrants rehearing.

As an initial matter, the Intervenors suggestion that the Commission "failed to weigh the evidence" is a veiled complaint that the Commission did not adopt their position; that is not a basis for rehearing. Indeed, the evidence supporting the Decision's Finding of Fact with respect to the benefits of the NTM 5G network was overwhelming. For example, the evidence clearly demonstrated, among other things, that:

- NTM's 5G network will massively increase capacity;[53]
- Increased capacity will deliver dramatically improved speeds and user experiences;[54]
- The merger allows NTM to deploy significant amounts of complementary types of spectrum;[55]
- NTM's 5G coverage will be deeper and faster that the either standalone;[56]
- NTM's LTE coverage is far broader than legacy Sprint; [57] and

[50] Cal PA Opening Brief (Apr. 26, 2019) at 20-24, 37-45; CWA Opening Brief (Apr. 26, 2019) at 35-39; TURN Opening Brief (Apr. 26, 2019) at 28-35; Cal PA Reply Brief (May 10, 2019) at 9-12, 18-25; CWA Reply Brief (May 10, 2019) at 22-23; TURN Reply Brief (May 10, 2019) at 12-13.

[51] Cal PA Opening Comments on Proposed Decision at 9-11.

[52] Intervenors' AFR at 11-12.

[53] *See, e.g.*, Sievert Rebuttal Testimony at 12:5-6.

[54] *See, e.g.*, Sievert Rebuttal Testimony at 19:11-18, 22:5-16; Ray Rebuttal Testimony at 31:1-33:13.

[55] *See, e.g.*, Sievert Rebuttal Testimony at 10:21-11:13, 16:11-14, 23:6-13, 28:1-12; Ray Rebuttal Testimony at 4:28-5:2, 7:25-8:10, 13:5-24, 14:17-15:3, 31:3-23, 42:11-14.

[56] *See, e.g.*, Sievert Rebuttal Testimony at 10:21-11:13, 16:11-13, Attach. C (slides 11-13); Ray Rebuttal Testimony at 7:23-8:10, Attach. A (¶¶ 4, 21).

[57] *See, e.g.*, Hearing Ex. Pub Adv 6-C; 12:9-11 ("…[legacy] T-Mobile covers more than double the geographic area of Sprint, including extending coverage to rural and sparsely populated areas.") (Reed Testimony); *see generally id.* at 10-12.

- The merger specifically addresses obstacles each standalone company faced in deploying 5G. [58]

Moreover, as noted above, the Intervenors' AFR essentially repeats the Intervenors' contention that all 5G is equivalent and all 5G networks are the same (i.e. that NTM's 5G network will be no better than either company's standalone 5G network). However, as Joint Applicants have irrefutably demonstrated, this argument has no foundation in fact, no engineering basis, and is untethered from the evidence regarding the network (indeed, no other opponents of the merger in any forum even hinted at such an assertion). Joint Applicants have shown repeatedly throughout the proceeding that the unique combination of T-Mobile's and Sprint's complementary spectrum and sites enable New T-Mobile to deploy a 5G network with capacity and coverage that far eclipses that of the 5G networks that could be deployed by the standalone companies.[59] As T-Mobile's Chief Technology Officer made clear on several occasions,

> Cal PA makes the persistent mistake of assuming that all "5G" is equivalent. It is true that T-Mobile is building a 5G network on its own, but to be clear, it would be a limited deployment compared to New T-Mobile's and would simply not bring the same benefits to Californians.[60]

The fact that the Intervenors restate their unsubstantiated – and discredited –

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[58] *See, e.g.*, Sievert Rebuttal Testimony at 11:15-12:11, 17:15-18:9, 22:18-23:4; Ray Rebuttal Testimony at 3:22-4:28, 29:18-30:14, 35:5-38:6, 43:4-45:8; Hearing Ex. Jt. Appl.-5C ("Draper Rebuttal Testimony") at 4:2-22, 12:6-13:11:, 33:8-34:2, 35:7-22, 36:1-14.

[59] *See, e.g.,* Wireless Reply Brief at 13-15; Sievert Rebuttal Testimony at 10:21-11:13, 16:3-25, 23:11-13, 28:1-12, Attach. C (slides 11-13); Ray Rebuttal Testimony at 4:3-5:2, 7:11-8:10, 14:17-15:3, 31:3-23, 42:11-14.

[60] *See, e.g.,* Ray Rebuttal Testimony at 29:1-4; *see also* Hearing Tr. at 398:5-11 and 407:19-28.

testimony with respect to coverage, [61] capacity,[62] or the impact of site decommissioning,[63] does not indicate that the Commission did not consider that testimony. Indeed, the Decision explicitly suggests otherwise,[64] and the Decision's Findings of Fact reflect that the Commission did not find that testimony credible or compelling. A rehearing is not warranted on this basis.

C. Intervenors' Argument that the Merger Will Harm Competition Has Been Thoroughly Litigated and Ignores Efficiencies and Other Procompetitive Benefits of the Merger

As they did with respect to network issues, the Intervenors hope to use the vehicle of rehearing to reargue their discredited economic theories. Although the Decision clearly does not weigh the evidence in the manner desired by the Intervenors, that is not a ground for rehearing.

In particular, despite the voluminous evidentiary record in this matter, and the explicit findings of the FCC, DOJ, and the U.S. District Court for the Southern District of New York, Intervenors once again claim that the merger will harm competition in California because it will increase concentration in an alleged facilities-based mobile wireless market.[65] This assertion ignores the vast body of documentary and testimonial evidence in the record demonstrating the procompetitive consequences of the merger, including increased output and reduced prices for California consumers.[66] It also ignores the fact that the competitive concerns of both the FCC and the DOJ were resolved by the terms of the Joint Applicants' commitments to the FCC and

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61 *See* Intervenors' AFR at 12.

62 *Id.*

63 *Id*.

64 Decision at 31.

65 *See* Intervenors' AFR at 12–15.

66 *See, e.g.*, Ray Rebuttal Testimony at 3:22–28, 30:4–36:29; 39:3–42:21; Sievert Rebuttal Testimony, Evans Declaration, Section V.C., ¶¶ 220-44; Wireless Notification at 3-4; 17-22.

the PFJ.[67] Undeterred, Intervenors insist that the Commission should ignore this evidence in favor of their expert's superficial calculation of post-merger market shares and unsupported assertion of the potential for collusion in a concentrated market.[68] Intervenors inappropriately ask the Commission to consider only one side of the record.

Intervenors also assert that the Decision's conclusions regarding the relative competitive positions of Sprint and DISH are internally inconsistent.[69] Their argument on this point ignores the extensive record in these proceedings – developed in an additional round of evidentiary hearings in December 2019 – as well as the long-term dynamics of the mobile wireless market that were exhaustively analyzed by the experts at the DOJ and FCC who crafted the remedies upon which federal approval of the merger was conditioned. Intervenors' suggestion that the Decision's public interest determination is logically flawed or lacks foundation in the evidentiary record is incorrect at best and falls far short of meeting the standard for reconsideration.

1. Ample Record Evidence Established that the Merger - and the Corresponding Wireless Transfers of Control - Will Benefit Competition in California.

Intervenors incorrectly argue that the Decision does not account for evidence that the merger will harm competition in California, citing increased market concentration and potential for collusion between competitors.[70] This argument ignores – and asks that the Commission

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[67] *See Shroyer,* 622 F.3d at 1041 (states may not second-guess FCC merger decisions). The California AG's concerns were similarly addressed in its settlement with the Joint Applicants. *See* Settlement Agreement and Release of Claims, *available at* https://oag.ca.gov/system/files/attachments/press-docs/CA%20Settlement%20Agreement%20%283.9%20fully%20executed%29.pdf.

[68] *See* Intervenors' AFR at 13-14 (arguing that the merger is presumptively anticompetitive based on HHI metrics).

[69] *Id.* at 15–18.

[70] *Id.* at 12–15. The Intervenors' statements about the potential post-merger collusion are factually inaccurate and otherwise inconsistent with the record. See Joint Applicants Opening Comments on Proposed Decision § V. Likewise, in relying on the AG Opinion, the Intervenors ignore the AG's March 11, 2020 settlement with T-Mobile and its decision not to appeal the federal court's decision in favor of T-Mobile and Sprint with respect to the lawsuit captioned *State of New York et al. v. Deutsche Telekom AG et al.*, No. 1:19-cv-05434-VM-RWL (S.D.N.Y. filed June 11, 2019) ("*Deutsche Telekom AG*"), (the

ignore – the robust evidence of procompetitive benefits from the merger presented in these proceedings. This evidence is more than sufficient to rebut the concerns raised by Intervenors' calculations of market concentration by reference to the Herfindahl-Hirschman Index (HHI).[71] Indeed, the DOJ's Horizontal Merger Guidelines, which Intervenors cite,[72] clearly state that HHI thresholds are not meant "to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, . . . [but r]ather, they provide one way to identify some mergers . . . for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration."[73] This point was recognized by the FCC,[74] the DOJ,[75] Judge Marrero,[76] and Judge Freeman.[77] The record is replete with evidence demonstrating the procompetitive benefits of the merger noted in the Decision, including the expanded output and lower consumer prices built into T-Mobile's commitments to the DOJ and FCC.[78] And the Decision meticulously weighs the competing

"Lawsuit"), rejecting the AG's claims that the Merger would violate Section 7 of the Clayton Act, and declining to enjoin the Merger. *See* Settlement Agreement and Release of Claims, *supra* note 67.

71 Intervenors' AFR at 13–14.

72 *Id.* at 14–15.

73 Hearing Ex. Jt. Appl.-15 at 19.

74 *Deutsche Telekom AG*, ECF 348, Statement of Interest of the United States, at 7-10 (S.D.N.Y. Dec. 20, 2019) ("Statement of Interest"); Hearing Ex. Jt. Appl.-19 at 4, 11-14, 101.

75 Statement of Interest at 4-6.

76 *See, e.g.*, *Deutsche Telekom AG* at 9-10, 65, 126-27, 155.

77 *Keith Dean Bradt, et al. v. T-Mobile US, Inc., et al.*, No. 1:19-cv-07752-BLF (ECF 52), Order Denying Plaintiffs' Application for Temporary Restraining, at 4 (N.D. Cal. Feb. 28, 2020).

78 *See, e.g.*, Hearing Ex. Jt. Appl.-19 at 233–35 (detailing network and in-home commitments mandating robust 5G network deployment); *id.* at 247 (assuring the same or lower prices for legacy Sprint and T-Mobile rate plans); Jt. App. Ex. 7C, Rebuttal Testimony of Mark A. Israel at 20:16-21:7 (discussing non-network efficiencies resulting from the merger); *id.* at 29:6-12 (discussing network quality enhancements resulting from the merger); *id.* at 36:3-20 (describing consumer welfare benefits resulting from the merger); Ray Rebuttal Testimony at 3:22-25 ("the benefits of New T-Mobile's 5G network in terms of coverage, speed, and capacity – and all the potential consumer uses which depend on those metrics – are simply not possible without the combination of spectrum and other assets created by the merger."); Sievert Rebuttal Testimony at 15:18-20 ("Massively greater capacity and lower costs will

evidence presented before concluding the merger is in the public interest.[79] Intervenors' suggestion to the contrary is baseless.

2. Intervenors' Arguments Relating to the Competitive Positions of DISH and Sprint Ignore the Conditions Imposed by the DOJ and FCC and Wireless Market Dynamics.

Intervenors assert that the Decision is internally inconsistent, claiming that it equivocates about the relative competitive strength of Sprint and DISH.[80] In fact, the supposed inconsistencies in the Decision reflect the Commission's consideration of Intervenors' own evidence (such as it was), alongside the abundant evidentiary record established by Joint Applicants. The Decision fully considered the Intervenors' concerns over the competitive potential of DISH and Sprint in reaching its conclusions. And in any event, the alleged inconsistencies do not support a request for rehearing.

First, Intervenors state that the Decision's acknowledgment that it will take years for DISH to mature into a "true national competitor" is inconsistent with its finding that DISH's entry will mitigate competitive concerns raised by the merger's increasing market concentration.[81] But both can be (and are) true: although DISH may not become a nationwide wireless competitor overnight, it will be both required and empowered by the terms of the FCC Order and the PFJ to use its wireless assets to compete. This is exhaustively covered in the evidentiary record.[82]

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give New T-Mobile the ability and incentive to price aggressively to win new customers and increase usage.").

79 Decision at 34–37.

80 *See* Intervenors' AFR at 15–18.

81 *Id.* at 16–17.

82 *See generally, e.g.*, Jt. Appl. Ex. 20 (PFJ); Jt. Appl. Ex. 19 at ¶¶ 252–64 (describing DISH's FCC commitments and enforcement mechanisms); DISH Ex. 3, Testimony of Jeff Blum at Section III

Similarly, Intervenors allege inconsistency in the fact that the Decision notes both Sprint's *current* competitive strength relative to DISH and the uncertainty over standalone Sprint's *future* competitiveness.[83] Once again, there is no contradiction in noting that Sprint would face a challenging and uncertain future as a standalone company, even while it possesses a functioning wireless business. In support of their argument, Intervenors selectively cite testimony of Sprint's COO, Dow Draper, averring that Sprint was not a failing company at that time.[84] But the record contains far more evidence about Sprint's situation than one passage from one witness.[85] Indeed, immediately after the passage quoted by Intervenors, Mr. Draper tempered his statement that "Sprint is not going bankrupt" with the observation that Sprint faces challenges including "structural disadvantages, as well as technology disadvantages" that have forced Sprint to take "very extreme [cost-cutting measures]."[86]

Intervenors may disagree with the Decision's conclusion that the merger will not harm California consumers, but they cannot plausibly argue that its conclusion is unsupported by, or contrary to the evidentiary record.

D. The Commission Should Reject Intervenors' Requests to Adopt Additional Compliance Mechanisms and Obligations.

(describing DISH's California commitments); Hearing. Tr. at 1677–81 (describing DISH's market entry strategy).

83 *See* Intervenors' AFR at 17–18.

84 *Id.* at 18.

85 *See, e.g.*, Hearing Ex. Jt. Appl.-5C, Draper Rebuttal Testimony at 4 (describing Sprint's challenges "including its lack of low-band spectrum, insufficient scale, limited network coverage, high churn rate, and substantial debt burdens"); *id.* at 8:12–9:2, 12:21–14:3, 19:10–21:6 (describing Sprint's financial, network, and marketing challenges in detail); Jt. Appl. Ex. 19 at 37 & n. 274 (detailing FCC evidentiary record support of the proposition that "[t]here are increasing concerns whether Sprint can effectively deploy 5G, or even remain viable as a standalone company").

86 Hearing. Tr. at 634:14–637:20-22.

The Intervenors assert that the "Ordering Paragraphs simply do not contain adequate enforcement mechanisms, as required by Section 854(c)(7) to support a conclusion that the merger is in the public interest because of the conditions."[87] As a threshold matter, Section 854(c)(7) references the preservation of the Commission's jurisdiction – not the imposition of enforcement mechanisms. Moreover, as explained above, Section 854 is not applicable to wireless transfers of control and the application of Section 854(c) to these proceedings was improper. More fundamentally, Intervenors identify no basis for why the Commission should supplement the already extensive enforcement mechanisms set forth in the Decision.[88]

First, Intervenors incorrectly claim that the Decision lacks the "necessary framework to enforce the conditions" in the Decision.[89] However, the conditions to which the Intervenors refer are not in fact conditions, but Findings of Fact related to the Joint Applicants' divestiture of assets to DISH, as required under DOJ and FCC conditions. Of course, Findings of Fact are not subject to enforcement.[90] In any event, to the best of the Joint Applicants' knowledge, no previous Commission decision regarding a merger in the communications industry (or decision in any other industry) has ordered such an extensive compliance and enforcement mechanism.

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87 Intervenors' AFR at 19-20.

88 *See e.g.,* Decision at 61-64, OPs 38-41 (establishing a detailed compliance program that includes: (i) a compliance monitor, who will provide quarterly reports to the Commission staff, make semi-annual findings on merger compliance, and recommend penalties (OPs 38 and 39); (ii) potential Attorney General enforcement of the Decision (OP 39); (iii) the development of a citation program (OP 39); and (iv) detailed baseline and annual reporting by New T-Mobile (OPs 40 and 41)).

89 Intervenors' AFR at 18.

90 "[F]indings of fact and conclusions of law by the Commission are intended to assist the court in ascertaining the principles relied on by the Commission so that a court may determine whether the Commission acted arbitrarily. . . . Additionally, findings and conclusions are meant to assist the parties in preparing for rehearing or court review." *Dairyman's Div. of Land O'Lakes, Inc., v. Southern Cal. Edison Co.*, D.03-01-086, 2003 Cal. PUC LEXIS 69 at *5-6 (Jan. 30, 2003) (citing *California Mfrs. Ass'n v. Pub. Util. Comm'n*, 24 Cal. 3d 251, 258–59 (1979)).

Second, the Intervenors claim that the Commission has "little control over . . . [the] federal commitments."[91] As Joint Applicants have already pointed, the robust FCC enforcement scheme is backed up by significant penalties for non-compliance.[92] Moreover, the Commission can monitor compliance with federal commitments as the Decision requires New T-Mobile to provide the Commission with "any California specific data in updates documents or reports it provides to the Federal Communication Commission (FCC) or Department of Justice (DOJ) regarding implementation of the conditions within the FCC Order and the Proposed Final Judgment . . . ."[93] In any case, the Commission's lack of enforcement authority over a federal regulatory body's conditions is not legal error.

Third, Intervenors assert that certain conditions in the Decision are unenforceable (i.e., OPs 7, 32 and 35) because they cannot be measured or are otherwise "fundamentally incapable of enforcement, audit, or evaluation."[94] As an initial matter, the assertion, even if it were true (which it is not), does not provide a basis for rehearing. Moreover, the statement is patently untrue because by definition, compliance with a condition can always be measured, evaluated, or audited. At most, this assertion reflects Intervenors' continued discomfort with the merger and perhaps a lack of faith in the staff's ability to monitor compliance with the Decision.[95]

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91 Intervenors' AFR at 18-19.

92 The Intervenors assertion that the FCC commitments lack "related enforcement mechanism" misstates the facts. Intervenors' AFR at 19. The FCC commitments specify clear enforcement mechanisms including "severe, increasing, and continuing voluntary contributions that will make failure prohibitively expensive." FCC Commitments, Exhibit S at 7. For instance, the FCC commitments specify a stringent verification regime under which New T-Mobile must submit annual reports detailing the progress the company is making toward its commitments and submit to 3- and 6-year reporting 5G deployment and subscribership information. FCC Commitments, Exhibit S, Attach. 1 at 3. The FCC commitments also lay out a robust penalty schedule ranging up to $250,000,000 per failed commitment, and a maximum penalty of $2.4 billion at the 6-year post-closing benchmark. *Id.* at 4–5.

93 Decision at 49, OP 2.

94 *See* Intervenors' AFR at 19.

95 As Joint Applicants have explained, the FCC has a robust verification process, which will include a

Specifically, Intervenors criticize the Commission's directives in OP 7 for New T-Mobile to "prioritize rolling out its planned 5G network in 10 unserved or underserved California areas" and in OPs 32 and 35 for New T-Mobile to "strive to achieve" and "strive to increase" certain diversity targets.[96] Intervenors criticisms are simply unfounded. Intervenors' complaints with respect to OP 7 are particularly disingenuous because the Decision includes specific compliance requirements including consulting with Commission staff and obtaining input on the ten unserved/underserved areas;[97] and submitting reports annually on "[p]rogress in designating and building the prioritized facilities in 10 rural areas."[98] Similarly, the directives in OPs 32 and 35 for New T-Mobile to "strive" toward diversity objectives are also measurable. Moreover, including the word, "strive" in its diversity-related conditions, and placing a general emphasis on process and effort rather than result, are consistent with the Commission's approach to supporting its diversity objectives under General Order 156.

specific speed testing methodology for 5G deployment obligations. No further verification mechanisms – much less potentially inconsistent mechanisms adopted by this Commission – are necessary or appropriate. Indeed, additional California-specific verification mechanisms would open the door to federal preemption to the extent they are inconsistent with or undermine the FCC's mechanisms. *See Shroyer*, 622 F.3d 1035 at 1041 (discussing preemption under Section 332 "or by the ordinary principles of conflict preemption"); *Geier v. American Honda Motor Co.*,, 529 U.S. 861 at 875-81 (2000); *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010) ("When Congress charges an agency with balancing competing [statutory] objectives," a state's attempts to re-balance those objectives or "impose a different standard" are preempted).

96 *See* Intervenors' AFR at 19, nn. 89-90.

97 Decision at 51, OP 7.b.

98 *Id.* at 63, OP 41.h.

V. CONCLUSION

The Joint Applicants respectfully request that the Intervenors' Application for Rehearing be denied in its entirety.

Respectfully submitted this 22nd day of May, 2020.

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