

**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' REPLY TO INTERVENORS' RESPONSES TO PETITION FOR
MODIFICATION OF DECISION 20-04-008**

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August 3, 2020

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I. INTRODUCTION

Pursuant to Rule 16.4 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure (“Rules”) and ALJ Bemserfer’s July 23, 2020 email granting permission to file a reply to the various responses to the Petition for Modification, Sprint Communications Company L.P. (U-5112-C), Sprint Spectrum L.P. (U-3062-C), Assurance Wireless USA, L.P.¹, fka Virgin Mobile USA, L.P. (U-4327-C), and T-Mobile USA, Inc. (“T-Mobile USA”) (collectively, “Joint Applicants”), hereby respectfully submit the following Reply to the Responses filed by the Public Advocates Office (“Cal PA”)/The Utility Reform Network (“TURN”), the Communication Workers of America, District 9 (“CWA”), and the California Emerging Technology Fund (“CETF”) (collectively, the “Intervenors”).

¹ By Advice Letter No. 36 submitted on March 16, 2020, Virgin Mobile USA, L.P. (U-4327-C) notified the Commission of its formal change in name to Assurance Wireless USA, L.P. .

As described more thoroughly in the Petition for Modification, Joint Applicants seek three limited and focused modifications of the Decision’s Ordering Paragraphs (“OPs”):

- **OPs 4.b and 30** – Conform the date for providing 300 Mbps to 93% of Californians from 2024 to 2026 per the Network Model, the record in this proceeding, and OPs 4.a. and 4.c.
- **OP 25** – Eliminate the legal requirement that T-Mobile increase its net number of full-time employees in California by at least 1,000 as of three years from the close of the transaction.
- **OP 30** – Modify the network testing set forth in the Decision to conform to the extensive testing already being established in consultation with the Federal Communications Commission (“FCC”) to monitor those same performance metrics which are otherwise based on the FCC network commitments.

As explained more thoroughly in the Petition for Modification, these modifications are fully warranted as they address the specific issues identified with the OPs in a manner that is consistent with the record and Commission precedent, enhances regulatory certainty and clarity, and – of particular note – does not negatively impact any of the merger’s numerous benefits. Cal PA/TURN and CWA, however, mischaracterize the requested modifications in their respective Responses and otherwise oppose the Petition for Modification.²

II. MODIFYING THE 300 MBPS COMPLIANCE DATE FROM “2024” TO “2026” DOES NOT DELAY THE NETWORK BUILDOUT – IT MERELY CORRECTS THE DATE SO THAT IT IS CONSISTENT WITH THE NETWORK MODEL AND THE OTHER PERFORMANCE METRICS SET FORTH IN THE DECISION.

² Cal PA/TURN and CWA both devote a substantial section of their Responses to the Commission’s purported jurisdiction to require approval for – or to impose any mandatory conditions on – a wireless transfer of control. *See e.g.*, Cal PA/TURN Response at Sections III.A and III.C; *see also* CWA Response at Section I.A. However, those arguments are not the primary basis for the specific and narrow relief sought in Joint Applicants’ Petition for Modification. While Joint Applicants continue to reserve their rights with respect to the Commission’s purported authority, the Petition for Modification should be granted as to the specific and limited issues discussed above independent of Joint Applicants’ objections to the Commission’s authority over wireless mergers.

As set forth in great detail by Joint Applicants in their Petition for Modification, and as recognized by CETF in its Response, modifying the compliance date for providing 93% of Californians with 300 Mbps is not in any way an attempt to “delay deployment of 5G wireless service coverage.”³ Instead, it is an attempt to correct the date of a condition that was added to the Decision just prior to its adoption so that it is consistent with the record, the network model and the other performance metrics adopted by the Commission. Cal PA/TURN’s attempt to suggest that Joint Applicants are somehow trying to back down from the buildout of the network is simply incorrect and misleading.⁴

First, Cal PA/TURN complain that Joint Applicants did not allege in their Opening Comments on the Proposed Decision (“PD”) that the “2024” date associated with 300 Mbps should have been changed to “2026” and that to raise the issue now is inappropriate.⁵ However, what Cal PA/TURN fail to acknowledge is that *there was no such requirement in the initial PD*.⁶ The provision at issue, OP 4.b. (300 Mbps to 93% of Californians), was added for the first time to the revised PD that was released on April 15, 2020; *i.e.*, the day before D.20-04-008 was adopted by the Commission and after all comments were filed.

Similarly, Cal PA/TURN correctly quote Joint Applicants’ statement in their Opening Comments that “[t]he proposed 5G network build conditions set forth in OP 4(a) and (b) are

³ Cal PA/TURN Response at 11.

⁴ The suggestion that the request is an attempt to delay is also contrary to all available information, including the evidence presented during this proceeding and public reports since the close of the merger. *See e.g.*, businesswire, *Independent Report Finds T-Mobile Has Nearly 20x More 5G Cities than Verizon and AT&T Combined* (July 8, 2020), <https://www.businesswire.com/news/home/20200708005347/en/Independent-Report-Finds-T-Mobile-20x-5G-Cities>.

⁵ *See e.g.* Cal PA/TURN Response at 7.

⁶ *See* Initial PD at OP 4 (no reference to 300 Mbps).

consistent with the California projections used to create the corollary FCC commitments.”⁷ Cal PA/TURN nonetheless fail to note that the reference to OP 4(b) in that statement was to the text in the initial PD regarding the requirement to provide 99% of Californians with 100 Mbps by 2026 – a subsection that ultimately became OP 4.c. in D.20-04-008 and which is not the subject of this Petition.⁸ In sum, there was no conceivable way for Joint Applicants to raise this issue until now since the subject OP was a last minute addition to the Decision.

Second, the record is clear that Joint Applicants’ requested modification is consistent with the California-specific network speed benchmarks for 2023 and 2026 reflected in OPs 4.a. (2023; *i.e.*, three years after close) and 4.c. (2026; *i.e.*, six years after close). These benchmarks were directly based on evidence submitted by T-Mobile regarding California-specific speed projections *and* associated dates extrapolated from the nationwide commitments otherwise memorialized in Joint Applicants’ FCC Commitments. Indeed, those are the precise benchmarks referenced in Joint Applicants’ Opening Comments noted above by Cal PA/TURN.

Joint Applicants’ FCC Commitments themselves, which do not include any 300 Mbps target, as well as the California-specific projections derived from those commitments (which were adopted as conditions in OPs 4.a and 4.c.), did not include firm calendar dates. Instead, those benchmarks were directly tied to time periods three and six years after the merger’s close. As expected, the benchmarks associated with the six-year period (2026) reflect a more robust network, as reflected by the increased coverage of California POPs at given speeds. For example, those benchmarks indicate that the network will provide 100 Mbps to 86% of Californians by the end of 2023 but will provide those same speeds to 99% of Californians by

⁷ Cal PA/TURN Response at 7.

⁸ Compare Initial PD (OP 4.b), with Revised PD/D.20-04-008 (OP 4.c).

2026. This is consistent with the testimony during the proceeding which, as would be expected, associated more expansive coverage with the later build-out dates.⁹

Indeed, the testimony regarding the ability to provide 300 Mbps to consumers indicated that the network was expected to provide that type of coverage to 43% of Californians by the first buildout benchmark and 93% of Californians by the second benchmark, when the network would be more fully built out. At the time the testimony was prepared, those buildout dates were 2021 and 2024, respectively, but given the merger's close was delayed until 2020, those dates became – as correctly reflected in in OPs 4.a and 4.c – 2023 and 2026, respectively. This conclusion is only confirmed by the fact that the benchmark of providing 100 Mbps to 99% of Californians is associated with 2024 in the testimony, just like the benchmark of providing 300 Mbps to 86% of Californians, but the Decision appropriately uses 2026 for the 100 Mbps to 99% of Californians condition.¹⁰

Cal PA/TURN is correct that Joint Applicants' testimony about anticipated network performance refers to 2021 and 2024. However, Cal PA/TURN ignores the references to the three- and six-year build out.¹¹ And Cal PA/TURN's reference to other statements using those earlier dates does not establish that they are correct, but rather reinforces that T-Mobile witnesses were using those dates as proxies to reference certain post-closing time periods.¹² No party can credibly assert that this case's record suggests the coverage goals associated with those dates could be accomplished in such short order given the merger's April 2020 closing.

⁹ See *e.g.*, Petition for Modification at 9-10 (testimony and charts discussing 2021 and 2024 buildouts).

¹⁰ See D.20-04-008 at OP 4.c.

¹¹ See, *e.g.*, Petition for Modification at 8, 11.

¹² See Cal PA/TURN Response at 11.

CETF's Response confirms the logic and the need for such a change to the date in OP 4.b. As CETF notes, given that the proceeding took two years to complete, "the target years for the 5G construction benchmarks should be adjusted two years from the proxy dates [2021 and 2024], so that New T-Mobile has the full time period it requested and needs to perform the 5G buildout in California. Implementing state of-of-the-art 5G technology is a complex and time consuming process in a state as large and with as challenging geography as California."¹³ The CETF Memorandum of Understanding ("CETF MOU"), which also initially included the 2024 (and 2021) dates, was amended accordingly.¹⁴

In sum, Joint Applicants' requested modifications to OP 4.b and the corollary requirement in OP 30 are both necessary and appropriate because they would: (i) bring the OP 4.b benchmark in line with T-Mobile's network model, which includes coverage projections for three- and six-year periods from the merger's close; (ii) promote consistency with the other buildout commitments in OP 4 and the corollary FCC commitments; and (iii) avoid anomalous results.¹⁵ Cal PA/TURN's attempt to suggest this is an after-the-fact attempt to delay the buildout is simply unfounded and should be rejected.

III. CAL PA/TURN'S AND CWA'S OBJECTIONS TO JOINT APPLICANTS' REQUEST TO MODIFY OP 25 MISREPRESENT THE LAW, THE FACTS, AND THE NATURE OF THE REQUEST.

¹³ CETF Response at 2. The CETF MOU contemplated just such an extension. *See* Hearing Ex. Jt Appl.-23C (Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc.) at 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.").

¹⁴ *See* CETF Response at 2.

¹⁵ *See* D.02-08-024, 2002 Cal. PUC LEXIS 470 at **3-7 (Aug. 8, 2002) (granting petitioner's request to modify decision's schedule for filing of general rate cases "because the Commission decision on the merger issued later than the scoping memo's target date").

Cal PA/TURN and CWA wrongly assert that Joint Applicants' request to eliminate the unprecedented mandate to add 1,000 net new full-time T-Mobile employees is essentially an effort to backtrack on their prior testimony regarding post-merger jobs. That is simply not the case.¹⁶ As Joint Applicants have repeatedly reaffirmed, T-Mobile has voluntarily committed that there will be *at least* the same number of T-Mobile employees in California three years after the merger's closing as Sprint, Assurance Wireless, and T-Mobile had as of the merger's closing date, and that it will create 1,000 new jobs at the Kingsburg Customer Experience Center.¹⁷ T-Mobile stands behind those commitments – both are memorialized as conditions in the Decision's OPs, and Joint Applicants do not seek to modify either. Instead, Joint Applicants seek to modify OP 25 to eliminate the distinct mandate to increase T-Mobile's total full-time California employees by 1,000, separate from T-Mobile's jobs-creation commitment with respect to the Kingsburg facility. There is no evidence in the record to support imposing such a legal obligation, and Cal PA/TURN's attempt to justify it by pointing to T-Mobile's testimony proffered with respect to anticipated nation-wide job creation should be rejected.¹⁸

Moreover, Intervenors' claims that Commission precedent supports the Commission's authority to mandate an increase in jobs and that the Commission should disregard the uncertainty created by the COVID-19 pandemic both lack merit.

As an initial matter, CWA cites several Commission decisions which it contends establish the Commission's authority to impose a new jobs mandate on Joint Applicants.

¹⁶ See Cal PA/TURN Response at 13-14; CWA Response at 8-9.

¹⁷ See Petition for Modification at 14; *see also* 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; Hearing Ex. Jt. Appl.-2C (Sievert Rebuttal Testimony) at 38:12-15.

¹⁸ See Cal PA/TURN Response at 13-14 & n.60 (citing to Sievert Rebuttal Testimony discussing anticipated national direct internal incremental jobs).

However, CWA misconstrues those decisions. Specifically, with respect to its claim that “the Commission has full legal authority and discretion to condition the merger on a jobs requirement,” CWA cites to D.97-03-067, D.01-06-007, D.02-12-068, and D.15-12-029.¹⁹ Yet the Commission did not itself impose any employment-related conditions in any of those decisions. Instead, in those decisions the Commission adopted employment provisions voluntarily agreed to by the parties via voluntary commitments made by the merging entities, terms of sales agreements entered into by and between the entities subject to the merger transaction, or settlement terms between the merging entities and other interested parties.²⁰ In other words, those cases at best support the Decision’s inclusion of T-Mobile’s voluntary commitment to maintain current employment levels three years after the merger’s close; an obligation that Joint Applicants have not sought to modify in their Petition for Modification.

CWA’s reliance on *General Telephone Co. of California v. Public Utilities Commission*²¹ and *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*²² is also misplaced, for those decisions only authorized Commission authority over certain managerial decisions regarding “the order of substitution of one [telecommunications] equipment for another”²³ and

¹⁹ See CWA Response at 6-7.

²⁰ See D.97-03-067, 1997 Cal. PUC LEXIS 629, *140 (“The California Commitments, as Applicants call them, commit the merged companies to create 1,000 new jobs in California.”); D.01-06-007, 2001 Cal. PUC LEXIS 390, *107 (noting the sales agreement entered into by and between the buyer and seller of 32 telephone exchanges “contains provisions that protect the jobs, pay, and benefits of the affected [seller] employees”); D.02-12-068, 2002 Cal. PUC LEXIS 909, *59 (“[B]y this condition [of the settlement agreement with the Utility Workers Union of America], Thames commits to no layoffs.”); D.15-12-029, 2015 Cal. PUC LEXIS 812, **21-22 (noting the sales agreement entered into by and between the merging entities “assures the ... employees future stability and certainty of employment after consummation of the Transaction”).

²¹ 34 Cal.3d 817 (1983).

²² 24 Cal.3d 458, *superseded by statute on other grounds*.

²³ See *Gen. Tel. Co. of Cal.*, 34 Cal. 3d at 824 (quoting *S. Pac. Co. v. Pub. Utils. Comm’n*, 41 Cal.2d

over discriminatory hiring practices,²⁴ respectively. They did not contemplate or confirm any authority on the part of the Commission to impose a new jobs mandate.²⁵

In addition, Cal PA/TURN and CWA suggest that the Commission should disregard the uncertainty created by the ongoing COVID-19 pandemic – a crisis which, as Cal PA/TURN explicitly admit, is “undoubtedly an unprecedented challenge for all Americans”²⁶ – in assessing the appropriateness of imposing a binding net job growth mandate. Cal PA/TURN and CWA contend that the pandemic is not a “new” development,²⁷ and that Joint Applicants’ request to modify OP 25 is thus improper.²⁸

This argument, however, ignores the fact that, in late March, when Joint Applicants were preparing their Opening comments on the Commission’s PD, understanding of the pandemic was in its infancy in this country and in this state. At that time, the pandemic’s potential duration and far-reaching impacts on society and the economy had not been fully envisioned. Moreover, Cal PA/TURN and CWA fail to even acknowledge that over the past several months the level of uncertainty caused by the pandemic has continued to increase. Joint Applicants therefore submit

354, 367-68 (1953)).

²⁴ See *Gay Law Students Ass’n.*, 24 Cal.3d at 475 (finding telecommunication provider’s alleged employment discrimination against homosexuals “violates the explicit statutory prohibition of discrimination by a public utility embodied in section 453, subdivision (a) of the Public Utilities Code”).

²⁵ Furthermore, to the extent CWA relies on Pub. Utils. Code § 854(c) to support its assertion that the Commission has the authority to impose a new jobs mandate on merger applicants, that authority is also misplaced, as Section 854(c) only permits the Commission to consider whether the proposed transaction is “fair and reasonable to *affected* [*i.e.*, *current*] employees.”

²⁶ Cal PA/TURN Response at 12.

²⁷ See *id.* at 13; see also CWA Response at 7-9.

²⁸ See Cal PA/TURN Response at 12.

that the ever-evolving COVID-19 pandemic is a “new” development, and exactly the type of material change in circumstances that warrants modification of OP 25.²⁹

IV. CAL PA/TURN’S OBJECTIONS TO JOINT APPLICANTS’ REQUEST TO MODIFY OP 30 FAIL TO ADDRESS THE DEARTH OF RECORD EVIDENCE SUPPORTING THE USE OF CALSPEED TESTING TO CONFIRM FCC-RELATED BUILDOUT COMMITMENTS.

Cal PA/TURN asserts that “Joint Applicants are incorrect in asserting that CalSPEED should not be used for verifying California specific merger conditions” and that CalSPEED testing should be employed because the Commission has a history of using CalSPEED to evaluate mobile and broadband speeds to publish its mobile broadband reports.³⁰ However, Cal PA/TURN fails to explain how the Commission’s use of CalSPEED testing in the publication of mobile broadband reports equates to a need to impose such testing pursuant to a telecommunications merger, particularly where any discussion of the use of CalSPEED testing for this purpose was absent from the record and where the imposition of such testing would result in burdensome and inefficient reporting requirements and regulatory uncertainty.

Moreover, Cal PA/TURN’s reference to CalSPEED testing in this proceeding’s underlying record is wholly inapplicable and detached from the condition the Commission wishes to impose. As Cal PA/TURN note, Cal PA’s witness discussed and presented previous CalSPEED reports “to evaluate Joint Applicants’ service quality” and to compare Joint Applicants’ service quality with that of its competitors.³¹ Cal PA did *not*, however, propose that

²⁹ See, e.g., D.17-12-006, 2017 Cal. PUC LEXIS 578, *15 (authorizing modifications where “material changes” in underlying conditions has occurred); 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).

³⁰ Cal PA/TURN Response at 14.

³¹ See *id.* at 15.

CalSPEED testing be used to monitor Joint Applicants' network speed capabilities following the merger's close, nor did any other party make such a suggestion. To the contrary, Cal PA suggested that T-Mobile self-report on service quality metrics after the merger.³²

Moreover, the imposition of CalSPEED testing *in addition to* the FCC drive tests required by Joint Applicants' FCC Commitments is not "reasonable[] and necessary," as Cal PA/TURN contend.³³ To the contrary, such a requirement is wholly *unnecessary* and unreasonable given Joint Applicants' FCC Commitments and the Commission's recognition of those commitments. As Joint Applicants' previously noted, 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 this proceeding.³⁴ Compliance with these two testing regimes will be verified nationwide - including in California³⁵ - the results of which must be provided to Commission Staff in compliance with OP 31.³⁶ Requiring T-Mobile to also comply with CalSPEED testing would thus be overly burdensome, inefficient, and likely lead to regulatory uncertainty. As such, Cal PA/TURN's assertions should be rejected and OP 30 should be modified as requested in Joint Applicants' Petition for Modification.

³² See Hearing Ex. Pub Adv O6-C at 33:27-30 (Reed Service Quality Testimony) ("Further, the Commission should *keep an eye on the level* of service quality of the wireless market and require New T-Mobile to report on service quality metrics biannually as discussed in Attachment D to this testimony [including network speeds] to monitor service quality post-merger.") (emphasis added).

³³ See Cal PA/TURN Response at 15-16.

³⁴ See Petition for Modification at 17.

³⁵ See D.20-04-008 at Attach. 3, App. G (copy of FCC Commitments).

³⁶ See *id.* at 59-60 (OP 31).

V. CONCLUSION

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

Respectfully submitted this 3rd day of August, 2020.

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