

Decision 20-08-022

August 6, 2020

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) 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

And Related Matter.

Application 18-07-012

**ORDER MODIFYING DECISION (D.) 20-04-008
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

This Order disposes of the application for rehearing of Decision (D.) 20-04-008 (or “Decision”) filed by the Public Advocates Office, the Greenlining Institute and The Utility Reform Network (collectively “Consumer Groups”).¹ In D.20-04-008, the California Public Utilities Commission (“the Commission” or “the CPUC”) approved the applications of T-Mobile USA, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”) for approval of transfer of control of Sprint Communications Company L.P. (U5112C) (“Sprint Wireline”) and Sprint’s wireless affiliates in California (collectively “Sprint Wireless”), subject to several mitigating conditions.

On July 13, 2018, T-Mobile and Sprint (collectively “Joint Applicants”) filed the *Joint Application For Approval Of Transfer Of Control Of Sprint*

¹ Unless otherwise noted, all citations to Commission decisions are to the official pdf versions, which are available at <http://docs.cpuc.ca.gov/DecisionSearchForm.aspx>

Communications Company L.P. (U-5112-C) Pursuant To Public Utilities Code Section 854(a) (A.18-07-011). On this same date, Joint Applicants filed the *Joint Application For Review Of Wireless Transfer Notification Per Commission Decision 95-10-032* (A.18-07-012). On September 11, 2018, the assigned Administrative Law Judge (ALJ) issued a ruling consolidating the two above applications.

T-Mobile entered two Memoranda of Understanding (MOUs) during the proceeding. The first MOU, with the National Diversity Council (NDC), was executed on January 29, 2019.² *See* D.20-04-008, p. 14. The second MOU, with the California Emerging Technology Fund (CETF) was executed on March 22, 2019.³ *See id.*

On May 20, 2019, Joint Applicants filed a Motion to Advise the Commission of New FCC Commitments, describing specific nationwide commitments adopted by T-Mobile and Sprint in advancement of Federal Communications Commission (FCC) approval of the Transaction. *See id.* The Joint Applicant's commitments to the FCC are described in the FCC's order approving the transaction, adopted on October 16, 2019.⁴

On July 26, 2019, Joint Applicants filed a "Motion to Advise the Commission of DOJ Proposed Final Judgment." Under the United States Department of Justice's (DOJ) Proposed Final Judgment, DISH Network Corporation (DISH) will acquire Sprint's prepaid wireless business (excluding the Assurance Wireless LifeLine business) and obtain additional rights that will strengthen DISH's ability to compete in the retail mobile wireless services market.⁵ *See id.*, p. 15.

On June 11, 2019, ten states, headed by New York and California, filed suit in the federal District Court for the Southern District of New York, seeking to block the Merger (the State Lawsuit). On February 11, 2020, the District Court issued a decision in

² The NDC MOU is attached to D.20-04-008 as Attachment 1.

³ The CETF MOU is attached to D.20-04-008 as Attachment 2.

⁴ The FCC order approving the transaction is attached to D.20-04-008 as Attachment 3.

⁵ The DOJ Proposed Final Judgment is attached to D.20-04-008 as Attachment 4.

favor of defendants T-Mobile and Sprint.⁶ While the court found that both at the national level and in many regions, the states had made a prima facie showing that the merger was anti-competitive, the states had not proved their contention that competitive harm would follow from the merger. *See id.*, p. 16.

On March 2, 2020, the Commission received an advisory opinion from the California Office of the Attorney General (AG Opinion) regarding the proposed transaction.⁷ The AG Opinion found that the proposed merger would harm competition in 18 California markets for wireless services, even considering the various commitments made in the CETF MOU and to the FCC and DOJ. *See* AG Opinion, p. 33. However, the AG Opinion also found that the harms to competition could be partially ameliorated by additional conditions. *See id.*

On April 16, 2020, the Commission adopted D.20-04-008, which approved the applications for transfer of control of Sprint Wireline and Sprint Wireless, subject to several conditions. The Commission issued D.20-04-008 on April 27, 2020.

On May 7, 2020, Consumer Groups timely filed an application for rehearing of D.20-04-008 (“Rehearing Application”).⁸ The Rehearing Application alleges that the Commission’s finding that the benefits of the transaction outweighed its detriments was not supported by the evidentiary record. *See* Rehearing Application, p. 5. In support of this general allegation, the Rehearing Application claimed that: the Commission ignored substantial evidence that the merger would harm public safety (*see id.*, pp. 5-10); that 5G service would have been deployed irrespective of the merger (*see id.*, pp. 11-12); and the merger would harm competition in California. *See id.*, p. 12-15. Consumer Groups claim D.20-04-008 was internally inconsistent in that it identified

⁶ The District Court decision may be found at <https://www.courtlistener.com/recap/gov.uscourts.nysd.517350/gov.uscourts.nysd.517350.409.0.pdf>

⁷ The Opinion of the Attorney General on Competitive Effects of Proposed Merger of T-Mobile USA, Inc. and Sprint Communications Company L.P. (“AG Opinion”) is attached to D.20-04-008 as Attachment 5.

⁸ Available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M336/K533/336533733.PDF>

limitations of DISH in the wireless communications market, but still relied on DISH as a viable competitor. *See id.*, pp. 16-17. Consumer Groups also claim inconsistency regarding the continued viability of Sprint. *See id.*, pp. 17-18. Finally, the Rehearing Application claimed that the Decision was deficient as many conditions lacked sufficient enforcement mechanisms. *See id.*, pp. 18-19.

On May 22, 2020, Joint Applicants timely filed a response (“Response”) to the Rehearing Application.² Among other arguments, Joint Applicants extensively argued the claim, that they made throughout the proceeding, that the Commission lacked authority over wireless mergers. *See Response*, pp. 9-11.

II. DISCUSSION

A. Substantial Evidence Supported the Commission’s Finding that the Benefits of the Transaction, as Modified by the Conditions, Outweighed Its Detriments

The Commission did not commit legal error in finding that “the benefits of the Transaction, as modified by the conditions imposed herein, outweigh its detriments.”

D.20-04-008, Conclusion of Law 3. Consumer Groups state:

The Decision approves the merger by stating that the benefits outweigh the potential harm to the public interest. This conclusion, however, is unsupported by substantial evidence in the record showing that the merger will harm public safety, that the merger is unnecessary to deploy robust Fifth Generation (5G) networks, and that the merger will irreversibly harm competition in California.

Rehearing Application, p. 5, citing D.20-04-008, p. 42. Consumer Groups present evidence in the record that supports the view that the transaction would harm the public interest. *See Rehearing Application*, pp. 6-15. However, as will be discussed below, there is also evidence in the record that supports the opposite view.

The Commission often has proceedings where there is extensive conflicting evidence regarding an issue. In such cases:

² Available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M338/K277/338277409.PDF>

The fact that there may be evidence in the record that conflicts with the findings of the Decision does not constitute legal error. . . . Where there is conflicting evidence in the record, it necessarily holds true that some of the evidence in the record will conflict with whatever conclusion the Commission reaches. It is for the Commission to weigh the evidence and come to a reasonable determination based on evidence in the record. There is no legal error where there is substantial evidence supporting the Commission's determinations.

D.09-07-024, p. 29 (citing Section 1757(a)(4); other citations omitted). In D.20-04-008, the Commission weighed the conflicting evidence in the record and made the reasonable determination that the benefits of the transaction, as modified by the Commission's conditions, outweighed the detriments.

1. The Commission is not required to make specific findings on each public interest criterion.

Section 854(c) governs the Commission's public interest determination in merger proceedings, requiring the Commission consider the eight listed criteria, "and find, on balance, that the merger, acquisition, or control proposal is in the public interest." "Section 854(c) does not require us to make an affirmative finding regarding each of its sub-sections; rather it requires us to find, on balance, that the Transaction, as measured by the specific criteria enumerated in the sub-sections, is in the public interest." *See* D.16-05-007, p. 65. Two issues highlighted by Consumer Groups – public safety and the deployment of 5G service – are not specifically named in the criteria of Section 854(c). They are sub-issues within the criteria of Section 854(c)(2) (quality of service to ratepayers) and Section 854(c)(6) (beneficial on an overall basis to communities). In any case, Section 854(c) does not require a finding for each criterion, much less for sub-issues within each criterion.

The other issue Consumer Groups identify, harm to competition, is discussed in Section II.B below.

2. The Decision should be modified to add a finding of fact clarifying the Commission’s review of public safety issues.

Consumer Groups claim that “[t]he Decision does not address the compelling evidence that this Transaction will create statewide harms to public safety.” Rehearing Application, p. 5. Consumer Groups claim that the Decision did not adequately address backup power (*see id.*, pp.6-7), whether first responders will have access to communications free of throttling (*see id.*, p. 7), the impact of decommissioning cell towers (*see id.*, p. 7-8) and the impact on public safety of the elimination of Sprint as a facilities-based competitor. *See id.*, pp. 8-9.

As an initial matter, “[t]here is no legal requirement that every piece of evidence in the record be mentioned in the Decision.” D.09-07-024, p. 29 (citation omitted). In a proceeding like this one, with several rounds of extensive and conflicting testimony from dozens of witnesses, a decision that mentioned every piece of evidence would be unwieldy.

In any case, the Commission addressed some of the public safety issues that Consumer Groups identified. The Commission addressed resiliency and backup power, deciding that New T-Mobile must comply with backup power requirements imposed in the Commission Rulemaking 18-03-011 or any subsequent proceeding. *See* D.20-04-008, Ordering Paragraph (OP) 8. Consumer Groups claim Sprint’s provision of backup power was more robust than T-Mobile’s (*see* Rehearing Application, p. 6) and therefore claim that OP 8 is inadequate, “as it merely imposes an obligation that will be generally applicable to all wireless network providers.” Rehearing Application, p. 9. However, there is no requirement that the Commission ensure that there be no degradation at all in a merged utility’s provision of service; rather, the Commission must determine that the merger is, on balance, in the public interest.

The Decision included several findings regarding the decommissioning of cell sites. *See id.*, Findings of Fact (FOF) 8-10. The Commission did not discuss the specific issues of whether first responders will have access to communications free of

throttling¹⁰ or the impact on public safety of the elimination of Sprint as a facilities-based competitor. However, again, there is no requirement that the Commission discuss every sub-issue or piece of evidence in a proceeding.

Consumer Groups claim that the Commission violated Section 1705 “by making no Findings of Fact or Conclusions of Law specifically regarding public safety.” Rehearing Application, p. 10. They further claim that “failing to discuss the implications that this transaction has on public safety violates Section 321.1, which directs the Commission “to assess and mitigate the impacts of its decisions on customer, public, and employee safety.” *Id.* We note here that Section 321.1 does not require specific findings regarding public safety.

Section 1705 requires the Commission make “findings of fact and conclusions of law . . . on all issues material to the order or decision. While the Decision’s finding and conclusions of law do not explicitly address “public safety,” which is an important issue to the Commission, some of the ordering paragraphs address issues of public safety, even if the term “public safety” is not used. *See* D.20-04-008, OP 8 (“Network Reliability and Emergency Preparedness”), OP 9-12 (ordering 5G service in county fairgrounds, partially for use in emergency response). Moreover, the Commission’s conditions requiring deployment of 5G mobile service throughout California, including in rural and unserved areas, will benefit public safety. *See id.*, OP 4, 7. The Commission requirements that New T-Mobile participate in the California LifeLine Program and add at least 300,000 new LifeLine customers within five years will also benefit public safety. *See id.*, OP 13, 14; *see also* Section 871.7(c)(3), finding that access to high-speed communications may benefit access to public health and safety resources. Thus, the Commission adequately considered and addressed the issue of public safety.

¹⁰ Note that Section 2898, chaptered on October 2, 2019, prohibits mobile internet service providers from throttling first responders, upon request, during emergencies.

To clarify that the Commission in fact considered the issue of public safety, we will modify D.20-04-008 to add Finding of Fact 26, as set forth below.

3. Substantial evidence supports the Decision’s finding that 5G will be deployed more extensively because of the merger.

Consumer Groups claim that the Decision ignored their evidence in reaching the finding that the merger “will result in a 5G network with greater capacity and speed than either company would have on its own.” Rehearing Application, p. 11-12, citing D.20-04-008, FOF 11. In proceedings with conflicting evidence, the Commission must determine on which evidence it will rely; the Commission has not committed legal error so long as there is substantial evidence supporting its determinations. *See* D.09-07-024, p. 29 (citing Section 1757(a)(4)). It is not legal error for the Commission to rely on evidence not to Consumer Groups’ liking in its findings regarding 5G service.

Consumer Groups also claim that the Decision made an “incorrect interpretation” of some of their testimony. Rehearing Application, p. 11, citing D.20-04-008, p. 31. The Commission weighs and interprets the evidence in the record. It is not legal error if the Commission interprets evidence in a manner with which the sponsor does not agree. There is substantial evidence in the record supporting the Commission’s finding that 5G will be deployed more extensively due to the merger. *See e.g.*, D.20-04-008, pp. 17-19, 25-26.

B. The Decision Should Be Modified to Add a Finding of Fact Clarifying that the Commission’s Conditions Offset the Proposed Merger’s Adverse Effect on Competition and the Merger Is, On Balance, in the Public Interest.

Section 854(b)(3) requires that, before authorizing a transaction involving large utilities, the Commission must find that the proposal does “[n]ot adversely affect competition.” Section 854(b)(3) further states “[i]n making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to

avoid this result.” Thus, the Commission could approve a merger if mitigation measures counteract the adverse impacts on competition.

Consumer Groups claim that Section 854(b)(3) requires a specific finding of fact that the merger does not adversely affect competition. *See* Rehearing Application, p.15, n.71. However, Section 854(b)(3) does not require a formal finding of fact. The Decision does not have such a formal finding of fact. However, the Decision states:

Notwithstanding the presumptively beneficial effects of implementing the DOJ conditions, the FCC commitments and the CETF and NDC MOUs, we believe that additional conditions specific to California are needed to guarantee that this Merger, on balance, will be in the public interest of the citizens of this state and *avoid any potential adverse impacts from reduced competition*. Those conditions are spelled out in the ordering paragraphs of this decision . . . In light of the above analysis and adoption of these conditions ensuring New T-Mobile’s provision of 5G service to rural CA customers, offering In-Home Broadband, LifeLine, and maintaining current LTE service price and quality (or better) during transition to 5G, we do not agree with opposing parties’ assertion that the *benefits of the merger are outweighed by the potential reduction in competition*.

D.20-04-008, p. 41 (emphasis added). Thus, the Commission finds that the additional conditions that it imposes, on top of Joint Applicants’ commitments to NDC, CETF, the FCC and the DOJ, mitigate and avoid the merger’s adverse impact on competition in California. This finding, in the text of the Decision, fulfills the requirement of Section 854(b)(3). However, to clarify the Commission’s consideration of the merger’s effects on competition and that its conditions role in mitigating these effects, we will modify D.20-04-008 to add Finding of Fact 27, as set forth below.

Consumer Groups correctly state that the Decision identified evidence (including the AG Opinion) and made findings that the *proposed* merger would have adversely affected competition in California. *See* Rehearing Application, pp. 13, citing D.20-04-008, FOF 12, 13. Consumer Groups then incorrectly claim, “[b]ased on the evidence in the record, the Commission errs in concluding that the proposed merger is

not anti-competitive under Section 854.” Rehearing Application, p. 15. Consumer Groups ignore the role of the Commission’s conditions in offsetting the adverse effects on competition. The Commission recognized that the proposed merger, even after the NDC, CETF, FCC and DOJ commitments, would adversely affect competition in California. The Commission held that its additional conditions would avoid this result. *See* D.20-04-008, p. 41. Thus, we find that Consumer Groups’ claim on error in this regard lacks merit.

1. The Commission considered conflicting evidence and circumstances; the Decision was internally consistent.

Consumer Groups claim that the “Decision is internally inconsistent with respect to many of its findings and conclusions, and thus commits further legal error, by failing to support its findings with record evidence analyzed in the text of the Decision.” Rehearing Application, p. 15. As will be further discussed below, the Commission considered extensive evidence in the record, including evidence that weighed against its ultimate determinations. This does not indicate “internal inconsistency,” but rather indicates a thorough and thoughtful decision-making process. The Decision does not commit legal error if its findings are supported by substantial evidence, even if there is conflicting evidence. *See* Section 1757(a)(4).

Consumer Groups claim that the Decision is inconsistent because it finds that the *proposed* merger is anti-competitive, yet concludes that the merger, with the imposed conditions, will not adversely affect competition. *See* Rehearing Application, p. 15. However, these two positions are consistent; the Commission’s conditions are designed to offset the *proposed* merger’s adverse effects on competition. *See* Section II.B above.

Consumer Groups claim that the Decision is inconsistent in its characterization of DISH as a viable competitor in the wireless market. *See* Rehearing Application, pp. 16-17, citing D.20-04-008, pp. 36-37. The Commission considered the conflicting evidence regarding DISH as a competitor and concluded that “[i]t will be

years before DISH can become a true national competitor of the three other companies.” D.20-04-008, p. 37. There is substantial evidence in the record, including the DOJ’s conclusion and the decision of a district court, supporting the Commission’s reliance on DISH to, over time, ameliorate the loss of competition from the merger and thus Consumer Groups’ claim in this regard lacks merit. *See id.*, pp. 36-37.

Consumer Groups also claim that the Commission’s finding that “[w]ithout the merger, there is substantial uncertainty whether Sprint could continue to play an effective role as a fourth nationwide competitor,” is inconsistent with other evidence in the record. *Id.*, p. 17, citing D.20-04-008, FOF 25. The Commission considered conflicting evidence regarding the continued viability of Sprint as a competitor. *See* D.20-04-008, pp. 40. Substantial evidence supports the Commission’s finding that it is uncertain if Sprint could continue to play an effective role as a fourth nationwide competitor. *See id.*, citing the Southern District of New York’s opinion. Thus, Consumer Groups’ claim as to inconsistent record evidence undermining the Commission’s finding lacks merit.

2. The Commission’s enforcement mechanisms are not legally deficient.

Consumer Groups claim that the Decision is legally deficient because “the Commission fails to establish the necessary framework to enforce the conditions that the Decision imposes.” Rehearing Application, p. 18. Consumer Groups are wrong. Among other things, Consumer Groups claim that the Commission “relies heavily” on conditions imposed nationally by the FCC and/or the DOJ and that it lacks enforcement authority within California over these conditions. *See id.*, pp. 18-19. Consumer Groups analysis is flawed in several ways. First, the Commission recognized that, even after considering the FCC and DOJ commitments, the proposed merger would still adversely affect competition in California. *See* D.20-04-008, p. 41. Thus, the Commission recognized it must impose its own conditions to avoid adverse impact in California. *See id.*; *see also* OP 4, 6, 7, 13, 14, 28. Second, the Commission does not “rely heavily” on the FCC and

DOJ conditions. The Commission merely recognized in its findings several conditions involving DISH that the FCC and DOJ impose. *See id.*, FOF 15, 18, 19, 22.

Finally, Consumer Groups point out that the Commission stated that the “FCC commitments . . . have no related enforcement mechanism,” and claim that this undercuts any reliance on them. *See Rehearing Application*, p. 19, citing D.20-04-008, p. 41. However, in the cited text of the Decision, the Commission found that the DOJ had an enforcement mechanism for its conditions involving DISH, and that the FCC did not necessarily have a redundant enforcement mechanism. *See D.20-04-008*, p. 41. Thus, the lack of FCC enforcement mechanisms does not undercut the Commission’s findings in reliance on the conditions over which the DOJ has an enforcement mechanism. *See id.*, FOF 15, 18, 19, 22.

Consumer Groups also claim that the decision is legally deficient because some conditions lack specific criteria for measurement and enforcement or have long timelines. *See Rehearing Application*, p.19. Consumer Groups claim that the Decision’s order that the Commission implement a citation program with penalties for non-compliance is deficient because it does not define the penalties. *See id.* Consumer Groups cite no authority demonstrating that these enforcement mechanisms are legally deficient. The Decision’s enforcement mechanisms are not legally deficient.

In their response, Joint Applicants argue that Consumer Groups’ call for stronger conditions and enforcement must fail, because the Commission lacks authority to impose any conditions over wireless mergers. *See Response*, pp. 9-11. This legal argument should have been raised in an application for rehearing; however, Joint Applicants did not file one. In any case, we strongly disagree that we lack authority to impose conditions in approving wireless mergers. The Decision clearly articulated the Commission’s authority to review and impose conditions on wireless mergers. *See D.20-04-008*, pp. 2-7.

III. CONCLUSION

We modify D.20-04-008 to add additional findings to clarify our decision for the reasons discussed in Sections II.A.2 and II.B above. Otherwise, good cause has

not been shown to grant Consumer Groups' application for rehearing, as legal error has not been established. Therefore, we deny rehearing of D.20-04-008, as modified.

THEREFORE, IT IS ORDERED:

1. D.20-04-008 is modified by adding Finding of Fact 26, which will read:
“T-Mobile’s commitments to expand 5G service throughout California, including to rural and unserved areas and to rural fairgrounds, to offer LifeLine service and add 300,000 LifeLine customers, and to comply with backup power requirements imposed by the Commission in Rulemaking 18-03-011 or other proceedings all benefit public safety.”
2. D.20-04-008 is modified by adding Finding of Fact 27, which will read:
“The Commission’s additional conditions ordered in this decision, along with the commitments T-Mobile made to the Federal Communications Commission, the Department of Justice and the California Emergency Technology Fund, avoid the potential adverse impacts of the merger on competition and the merger, on balance, is in the public interest.”
3. Rehearing of D.20-04-008, as modified, is denied.
4. Applications (A.) 18-07-011 and A.18-07-012 are closed.

This order is effective today.

Dated August 6, 2020 at San Francisco, California.

MARYBEL BATJER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
Commissioners