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).	A.18-07-011
And Related Matter.	A.18-07-012

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

PAUL GOODMAN
Technology Equity Director

The Greenlining Institute
320 14th Street, 2nd Floor
Oakland, CA 94612
Telephone: (510) 898-2053
Email: paulg@greenlining.org

MICHELLE SCHAEFER
Attorney

California Public Utilities Commission
505 Van Ness Ave
San Francisco, CA 94102
Telephone: (415) 703-2722
Email: michelle.schaefer@cpuc.ca.gov

CHRISTINE MAILLOUX
Managing Director

The Utility Reform Network
1620 Fifth Ave, Suite 810
San Diego, CA 92101
Telephone: (619) 398-3680
Email: cmailloux@turn.org

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I. INTRODUCTION

Pursuant to Rule 16.1 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules) and California Public Utilities Code Section 1731(b),[1] the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office), The Greenlining Institute (Greenlining), and The Utility Reform Network (TURN) submit this Application for Rehearing of Decision (D.) 20-04-008 (hereinafter Decision).[2] The Decision grants the joint applications of Sprint Communications Company L.P., Sprint Spectrum L.P., Virgin Mobile USA, L.P., and T-Mobile USA, Inc., together herein referred to as the Joint Applicants, for approval of transfer of control of Sprint Communications Company L.P. and its affiliates to T-Mobile and places conditions upon the merged entity, New T-Mobile.

[1] All references to code sections hereafter will refer to the Public Utilities Code unless otherwise expressly noted.

[2] *Decision Granting Application and Approving Wireless Transfer Subject to Conditions.*

As discussed below, the Decision violates Section 854 because it ignores substantial evidence in the record that the merger will harm public safety in California, is unnecessary to deploy robust Fifth Generation (5G) networks and will harm competition in California. Furthermore, the Decision contains numerous inconsistent and contradictory statements and analysis that fail to support its Findings of Fact and Conclusions of Law, in violation of Section 1705. Review of the record evidence leads to the undeniable conclusion that the harms from this Transaction substantially outweigh the benefits to consumers and, pursuant to Section 854, the Commission must deny the Applications.

The Public Advocates Office, Greenlining and TURN acknowledge that the Joint Applicants have closed their merger transaction and likely have begun the transition process. Because it is unlikely that the transaction can be unwound, and in order to remedy the significant legal errors in the Decision, the Public Advocates Office, Greenlining, and TURN urge the Commission to grant rehearing to correct inconsistent analysis in the Decision and to adopt additional conditions to mitigate significant harm to consumers from the merger, including additional consumer protection rules to enforce new T-Mobile's compliance with the terms of the Decision.

II. BACKGROUND AND PROCEDURAL HISTORY

On July 13, 2018, Joint Applicants filed a *Joint Application For Review Of Wireless Transfer Notification Per Commission Decision 95-10-032 (A.18-07-012)* and a *Joint Application For Approval Of Transfer Of Control Of Sprint Communications Company L.P. (U-5112-C) Pursuant To Public Utilities Code Section 854(a) (A.18-07-011)* (Applications). On August 16, 2018, the Public Advocates Office, TURN and Greenlining protested these Applications. On September 11, 2018, Administrative Law Judge (ALJ) Bemesderfer determined that the two applications arise from the same transaction and that the public interest required a consolidated review of both transactions. The Commission held evidentiary hearings on the Applications over four days in February 2019. Briefs were filed in April and May 2019.

Over the next several months, significant actions by the Joint Applicants resulted in major changes to the terms of the Transaction and changes to the course of this proceeding. On May 8, 2019, the ALJ granted the *Joint Motion* of the Joint Applicants and the California Emerging Technologies Fund (CETF) permitting those parties to enter their Memorandum of Understanding into the record.[3] On May 20, 2019, and again on July 26, 2019, the Joint Applicants filed motions to "advise" the Commission of external agreements they had entered into with federal regulators that made revisions and additional commitments to the terms of their merger agreement. These included commitments made to the FCC through the ex parte process and the terms of a proposed consent decree (the Proposed Final Judgment or PFJ) and related Stipulation and Order that had been filed by the United States Department of Justice (DOJ) that same day in the US District Court for the District of Columbia. Having concluded that "the merger of T-Mobile and Sprint likely would substantially lessen competition for retail mobile wireless service,"[4] the federal DOJ asked the Court to "permanently enjoin the proposed transaction"[5] while also presenting the proposed consent decree and stipulation for approval by the Court to mitigate the harms of the proposed Transaction.

In light of the significant changes to the Transaction agreed upon by the Joint Applicants and federal regulators, along with the CETF MOU, on August 27, 2019, the ALJ reopened the record of this proceeding.[6,7] The ALJ determined that the PFJ and accompanying documents "appear to fundamentally change the Transaction" and that the record was incomplete in light of the PFJ.[8]

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[3] Parties addressed substantive issues raised by the Memorandum of Understanding in their reply briefs filed on May 10, 2019.

[4] DOJ Complaint at 3, para. 6.

[5] DOJ Complaint at 10, para. 31(b).

[6] *See* Administrative Law Judge's Ruling Re-Opening Record to Take Additional Evidence and Directing Joint Applicants to Amend Application 18-07-012, filed in A.18-07-011 and A.18-07-012, at 5 (Motion Reopening Record).

[7] Motion Reopening Record at 2.

[8] Motion Reopening Record at 5.

On October 24, 2019, the Assigned Commissioner issued an Amended Scoping Ruling (Amended Scoping Memo).[9] The Amended Scoping Memo expanded the scope of the proceeding to include a detailed examination of how the PFJ's inclusion of DISH's acquisition of assets from the Joint Applicants impacted California and directed parties to submit additional testimony and briefs.[10] On November 26, 2019, the ALJ issued a ruling confirming evidentiary hearings and their scope.[11] Evidentiary hearings were held on December 5, 2019 and December 6, 2019. Per the Amended Scoping Memo, concurrent briefs were filed December 20, 2019.

On March 11, 2020, the ALJ issued a Proposed Decision in this matter. Parties filed opening comments on April 1, 2020 and reply comments on April 9, 2020. On March 30, 2020 and March 31, 2020, the Joint Applicants engaged in a flurry of procedural actions arguing that the Commission no longer had jurisdiction to review the merger.[12] The Public Advocates Office, TURN, and Greenlining opposed the requests in each filing. On April 16, 2020, the Commission denied the Joint Applicants' multiple requests and adopted the Decision at issue here. The final Decision was formally issued on April 27, 2020.

[9] *See* Amended Scoping Memo.

[10] *See* Amended Scoping Memo at 3.

[11] *See* Administrative Law Judge's Ruling Confirming Evidentiary Hearings and Establishing Their Scope, A.18-07-11 *et al*. (Hearing Memo).

[12] *See* Sprint Communications Company L.P. Tier 1 AL 918 and related Motion of Joint Applicants to Withdraw Wireline Application, A.18-07-011 et al, filed Mar. 30, 2020 (notifying the Commission of the intent to withdraw the CPCN of Sprint's wireline operations and seeking to withdraw the joint application regarding the wireline elements of the subject merger). It is relevant to note that Joint Applicants continued to dispute the Commission's jurisdiction to approve the wireless elements of the transaction and on the evening of March 31, 2020, T-Mobile sent a letter via email to the service list for A.18-07-011 et al stating that it planned to close the Joint Applicants' merger on the morning of April 1, 2020, despite the fact that this Commission has not yet issued a final decision on the status of the merger in California. On April 1, 20220, Commissioner Rechtschaffen issued an Assigned Commissioner's Ruling directing the companies to retain separate operations in California until the Commission votes on the Transaction request.

III. DISCUSSION

A. The Decision's Findings That the Benefits of The Transaction Outweigh Its Detriments Are Not Supported by The Evidentiary Record.

The Commission may grant an application for rehearing where "the applicant considers the decision or order to be unlawful"[13] and "the findings in the decision of the commission are not supported by substantial evidence in light of the whole record."[14] The Decision approves the merger by stating that the benefits outweigh the potential harm to the public interest.[15] 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. The Decision's erroneous conclusions regarding the benefits of the merger constitute reversible error under Section 854(c)(2), which requires that a merger "[m]aintain or improve the quality of service to public utility ratepayers in the state."

1. The Decision Ignores Substantial Evidence in The Record Showing That Public Safety Will Be Harmed by This Transaction.

The Decision does not address the compelling evidence that this Transaction will create statewide harms to public safety. The failure to proactively protect the safety of Californians is contrary to the public interest, and the Commission errs by approving the Transaction. The Decision ultimately discards certain public safety protections that were in the Proposed Decision,[16] and instead, attempts to mitigate the Transaction's harm to public safety solely by requiring New T-Mobile to provide service to ten fairgrounds, as agreed to in the MOU with CETF and the Decision's Ordering Paragraphs (OP), within

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[13] Pub. Util. Code § 1732.

[14] Pub. Util. Code § 1757(a)(4).

[15] Decision at 42.

[16] *See* Proposed Decision OP 8 requiring 72 hours of back-up power to maintain voice and broadband service consistent with its most recent form 477 data. In the final decision, this OP is removed. Decision at 51, OP 8.

five years of the close of the transaction.[17] The text of the Decision does not include any rationale for how New T-Mobile's provision of service to ten fairgrounds will address the public safety needs of residents served by these fairgrounds, much less all Californians who do not have access to transportation, have medical issues, or other disabilities that limit their ability to travel, or people trapped in their homes.

Public safety is critical as both first responders and the public rely on wireless networks to communicate, especially during emergency situations.[18] The Decision fails to address the evidence in the record on critical safety issues: 1) That New T-Mobile will not have an adequate number of generators to provide service in the event of outages;[19] 2) That first responders may not have unrestricted access to wireless service from the Joint Applicants that is free from throttling or limits on data usage;[20] and, 3) That the merger will reduce redundant cellular infrastructure in California and, thus, reduce geographic redundancy and diversity of the wireless network.[21]

First, the text of the Decision fails to address the outstanding issues with New T-Mobile's back up power. Sprint had a large fleet of generators that helped Sprint reduce its rate of network outages, especially compared to T-Mobile.[22] The Public Advocates Office presented evidence regarding the disparity between the two companies regarding back up power and recommended that the Commission require New T-Mobile to retain Sprint's existing inventory of portable generators and adopt its back-up power policies to avoid weakening the emergency readiness and public safety of two of the

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[17] *See* Decision at OP 9-12. Ordering Paragraph 8 requires New T-Mobile to comply with any future orders regarding back up power adopted in its emergency relief docket; yet, this Ordering Paragraph cannot be considered a condition that will mitigate harms to public safety as it is not merger specific, the effect of this condition on public safety is speculative and, and it merely states the a basic conclusion that a telephone corporation operating in California must comply with a Commission order.

[18] *See*, Exhibit Pub Adv-06 at 36, lns. 4-5.

[19] The Public Advocates Office identified this issue in Exhibit Pub Adv-06 at 36, lns. 9-11.

[20] *Id*.

[21] *Id*. at 38, lns. 23-25.

[22] Exhibit Pub Adv-06 at 37-38. *See also* Exhibit Pub Adv-06 at 23-27 (providing evidence showing that Sprint had fewer outages than T-Mobile in California).

largest facilities based wireless networks in the state.[23] Instead, the Decision removed the backup power requirements initially provided in the Proposed Decision, leaving these concerns, clearly set out in the record, unaddressed but for vague reference to a related Commission proceeding.[24]

Second, the Decision fails to address whether first responders will have access to adequate emergency communications services without throttling or data speed reduction, either as part of the terms and conditions of service with New T-Mobile or as a result of outages and damage to the infrastructure during emergencies that may limit network capacity.[25] Additionally, the Decision fails to guard against the potential that New T-Mobile will fail to provide adequate network capacity during emergencies to public safety personnel and does not address whether New T-Mobile will replace Sprint's inventory of cell of wheels (CoWs) to mitigate the reduction of necessary deployable infrastructure to accommodate emergencies.[26] As such, the Decision ignores the record evidence that the merger creates increased risk that first responders will experience inadequate service during an emergency.

Third, the Decision fails to address the impact of New T-Mobile's plan to decommission thousands of Sprint's cell towers.[27] The reduction in the Joint Applicants' cellular infrastructure is especially harmful because, as T-Mobile's expert Mr. Ray testified, T-Mobile prioritizes investment in certain critical cell sites to provide a footprint of wide range but limited capacity low-band spectrum coverage in an emergency, thus risking outages and blocking of network traffic in emergency situations.[28] Today, the overlap of Sprint's and T-Mobile's infrastructure ensures that

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[23] Exhibit Pub Adv-06 at 37-38.

[24] Decision at OP 8.

[25] Decision at OPs 9-12 (Decision only requires "robust connectivity" to ensure that the ten identified fairgrounds receive adequate capacity and speed during emergencies.)

[26] Exhibit Pub Adv-06 at 37, lns. 7-8.

[27] Exhibit Pub Adv-06 at 38, lns. 17-25.

[28] Hearing Transcripts Vol. 5 at 550, lns. 8-20.

emergency services agencies have access to diverse routing and redundant networks that can serve as an alternate route for emergency communications network traffic in the event of a natural disaster, power outage or damage to one of the networks. As the record demonstrates, New T-Mobile plans to decommission approximately two-thirds of Sprint's national cell sites,[29] which will significantly reduce "the amount of redundant cellular infrastructure in California."[30] Reducing "the availability of geographically diverse cell towers and cellular switching infrastructure [makes] it more difficult for first responders to attain diverse and redundant cellular service."[31] The lack of diverse routing will reduce cellular service quality, such as data speeds and latency, by forcing cell traffic to consolidate onto fewer cellular baseline infrastructure. Requiring service provision to ten fairgrounds will hardly mitigate the impact of the loss of thousands of redundant towers and limited capacity of the remaining New T-Mobile network, especially in rural areas.

Furthermore, the Decision also fails to address how removing Sprint as a facilities-based competitor from the marketplace[32] will impact public safety in California. To maintain a resilient communications grid, a cellular provider should design networks with both redundancy, the practice of having additional infrastructure to maintain service in case some equipment fails, and diversity, having redundant equipment in a separate location so a single event does not disrupt all infrastructure. Removing Sprint from the wireless market will not only change the fundamental configuration of the wireless network in California as discussed above, but will also reduce the competitive pressure on the remaining facilities based carriers to innovate and invest in a reliant network that gives both consumers and first responders the ability to obtain cellular service from diverse sources with distinct networks,[33] thereby denigrating the reliability of wireless

[29] *See* Exhibit Pub Adv-06 at 27, lns. 17-18.

[30] Exhibit Pub Adv-06 at 38, lns. 23-24.

[31] Exhibit Pub Adv-06 at 38-39.

[32] *See* Decision at 37 (describing how Sprint owns infrastructure whereas DISH does not).

[33] Exhibit Pub Adv-06 at 39, lns. 7-11.

service in the event of overloaded and damaged networks. Mr. Ray states that providers focus on providing a baseline level of coverage during an emergency,[34] and, with this Decision's approval of the merger, one less facilities-based wireless provider exists to provide that basic layer of coverage. The impact of the reduction in competition is amplified by the fact that pre-merger T-Mobile and New T-Mobile will have similar cell tower coverage across California, and the merger removes much of Sprint's wireless infrastructure and back-up power, resulting in a reduction in the overall amount of cellular infrastructure in California and failing to realize any enhancement of coverage by approving this merger.[35] In fact, by removing Sprint as a wireless carrier, the merger removes one provider that is building and maintaining critical cell sites and competing with robust and innovative products and plans to emergency services personnel.[36]

The Decision does not adopt sufficient conditions to mitigate the harm to public safety from a loss of a facilities-based provider and its redundant network. Adoption of the requirement for New T-Mobile to serve fairgrounds does not adequately mitigate the harm of outages due to loss of power[37] and the reduction in emergency provider network redundancy.[38] It will leave the rest of the state with fewer options for cellular service thus putting California consumers' public safety at risk. Additionally, the condition in OP 8, requiring New T-Mobile to comply with a Commission order in R.18-03-011, does nothing to correct the Commission's error here as it merely imposes an obligation that will be generally applicable to all wireless network providers. Finally, the Commission cannot rely on DISH as the fourth facilities based competitor to help mitigate the harm to network redundancy and public safety because, as the Decision itself notes, it will be

[34] *See* Hearing Transcripts Vol. 5 at 550, lns. 8-20.

[35] Opening Brief of the Public Advocates Office [Public], 18-07-011 et all, filed Apr. 26, 2019, Attachment B at 33, lns. 15-16 (Supplemental Declaration of Cameron Reed).

[36] Pub. Adv. 06 at 39, lns 1-2.

[37] Exhibit Pub Adv-06 at 37, lns. 1-3.

[38] Exhibit Pub Adv-06 at 38, lns. 23-24.

years before DISH's[39] network is operational, if it actually ever achieves full, facilities-based status. This means that the vulnerability caused in the elimination of wireless network redundancy and diversity will remain for years.[40] Therefore, the Decision failed to consider a key component, public safety, to determine if, on balance, the merger benefits the public interest.[41]

The Decision also violates Section 1705 by making no Findings of Fact or Conclusions of Law specifically regarding public safety. 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."[42] Moreover, the Decision's Ordering Paragraphs wholly fail to address the merger's negative impact on public safety and to condition the merger to create more network redundancy and diversity, thus making findings that are unsupported by the evidence in the record. For example, the Public Advocates Office expressly stated that "[i]f it fails to deny the merger, the Commission should direct New T-Mobile to construct a dedicated public safety network to improve the wireless markets for first responders to provide redundant infrastructure to the First Responder Network Authority and Verizon's competitor service."[43] The failure by the Decision to order a meaningful condition requiring New T-Mobile to increase redundancy and network diversity and design service offerings to public safety agencies that support low cost, innovative and reliable services, is contrary to the record evidence and harms public safety and first responders. The failure to properly address and mitigate the harms to public safety through adequate conditions means that the record does not support the Decision's conclusion that "on balance" the merger is in the public interest. The

[39] Decision at 37.

[40] Exhibit Pub Adv-020 at 16, lns. 13-17.

[41] Pub. Util. Code § 854(c).

[42] *See* Pub. Util. Code § 321.1(b).

[43] Exhibit Pub Adv-06 at 39, lns. 2-5.

Commission erred when it concluded that the adopted conditions shift the merger to favor the public interest instead of harming it.[44]

2. 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.

The Decision finds that the "combination of Sprint and T-Mobile's complementary spectrum will result in a 5G network with greater capacity and speed than either company would have on its own."[45] Yet, the Decision has to ignore evidence in the record to find that the Joint Applicants' promises of increased 5G deployment is a merger-specific benefit that successfully mitigates merger-related harm from the loss of competition and consolidation of the networks. The Decision states that "Intervenors do not directly contest"[46] the Applicant's argument that the multiplicative effect results in greater 5G coverage and more reliable service; yet, this is an incorrect interpretation of the record. The Public Advocates Office demonstrated that the Joint Applicants did not need to rely on the "multiplicative" impact of the merger to reach the forecasted growth in speed and capacity of their individual networks.

The Decision acknowledges, but fails to properly address, evidence by the Public Advocates Office and Intervenors that increased deployment of 5G technology and services is already happening and would not be a merger-specific benefit.[47] Indeed, the Public Advocates Office submitted testimony of Mr. Cameron Reed and also discussed the evidence in detail in Attachment B of its Opening Brief filed in April 2019 to directly contest the claims that the merger was necessary to accomplish increased deployment of 5G.[48] Mr. Reed's analysis shows that, due to Sprint's limited coverage, the former T-Mobile and the New T-Mobile will have similar cell tower coverage across California,

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[44] Decision at 48, COL 6.

[45] Decision at 46, Finding of Fact (FOF) 11.

[46] Decision at 36.

[47] Decision at 36.

[48] *See* Supplemental Declaration of Cameron Reed at 29-38.

making T-Mobile's wireless coverage similar before and after the merger.[49] The Public Advocates Office showed that the mid-band spectrum 5G coverage illustrated in T-Mobile's maps will not materialize as promised and the promised low-band coverage is not specifically the result of the merger.[50] The Public Advocates Office's testimony further states that "analysis of maximum potential capacity [demonstrates that] the [Joint] Applicants have overstated the increases in capacity that is a direct result of combing Sprint and T-Mobile assets as a result of the merger."[51] The Public Advocates Office also presented evidence demonstrating that wireless network redundancy will be reduced, as discussed above, which makes the post-merger network less reliable and increases the harm to public safety.[52] The Decision fails to consider any of this evidence that discredits Joint Applicants' claims that the merger will deploy 5G networks to Californians more quickly and broadly than in the absence of the merger. The failure of the Decision to weigh all the evidence of the record when making its findings constitutes legal error, as a reasonable person would likely make the determination, based on the evidence provided by the Public Advocates Office, that the merger will not necessarily result in a more robust 5G network than would exist absent the merger.[53]

3. The Decision Ignores Substantial Evidence That the Merger Will Harm Competition in California.

The Decision grants the merger based on its finding that "approval of the merger, as conditioned, is in the public interest."[54] To make this finding, the Decision relies

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[49] Supplemental Declaration of Cameron Reed at 29, lns. 1-2.

[50] Supplemental Testimony of Cameron Reed at 33, lns. 15-16. Mid-band spectrum does not propagate as far as low-band spectrum, thus covering less area per cell tower. Typically, there is more volume of mid-band spectrum available than low-band, allowing mid-band spectrum to transmit more data than low-band spectrum.

[51] Supplemental Testimony of Cameron Reed at 36, lns. 2-5.

[52] Exhibit Pub Adv-06 at 38, lns. 8-9.

[53] *See McMillan v. American Gen. Fin. Corp.*, 60 Cal.App.3d 175, 186 (1976) ("Courts may reverse an agency's decision only if, [b]ased on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.") (*McMillan*).

[54] Decision at 42.

heavily on the findings and conditions adopted by the DOJ, Federal Communications Commission (FCC), and the federal court for Southern District of New York to try to limit the impact of competitive harms in this merger.[55] However, the Commission's public interest analysis must include a consideration of the competitive implications of a merger on the consumers of California,[56] which is not the focus of the federal courts and federal executive agencies. The Decision acknowledges its duty to consider California-specific impacts,[57] and does discuss these impacts at a high level, but it fails to make findings about these impacts that are supported by the evidence. Findings of Fact (FOF) 12 and 13 imply that the merger is presumptively anti-competitive, and the evidence shows that the merger will adversely affect competition in California, and yet the Decision approves the merger and adopts insufficient conditions to mitigate these harms.[58]

The Decision's Conclusion of Law finding the merger "on balance" is in the public interest (COL 6) is contradicted by the Decision's FOF 12 and 13 on competition and the substantial evidence in the record showing that the merger is anti-competitive and not in the public interest. The Decision finds that the merger "will increase market concentration throughout California."[59] It further finds that 18 cellular market areas (CMA), covering 94% of the population[60] in California, in cities like Los Angeles and San Diego, and most of the San Francisco Bay Area, will have post-merger concentration levels of over 2500, which is presumptively anti-competitive per the Herfindahl-Hirschman Index (HHI).[61] In each of the 18 CMAs referenced in FOF 12 and 13, New

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[55] Decision at 38.

[56] *Northern California Power Agency v. Public Utilities Commission* (1971) 6 Cal. 3d 370, 377.

[57] Decision at 37.

[58] Pub. Util. Code § 854(b)(3) requires that the Commission make a finding that a merger will *not* adversely affect competition.

[59] Decision at 46, FOF 12.

[60] *See* Comments of the Public Advocates Office on the Proposed Decision, A.18-07-011 et al, at 5-6 (filed Apr. 1, 2020).

[61] Decision at 46, FOF 13.

T-Mobile will have more than 30% of the total market share for wireless retail services, more than a 450 point increase in the HHI index, and more than 3390 points in the HHI index post-merger.[62] With such high levels of market concentration the proposed merger is, on its face, anti-competitive.[63] The Public Advocates Office's expert economist, Dr. Lee Selwyn, found that "[t]he increase in HHI that will result from the merger is in excess of the 200 point threshold specified in the [Horizontal Merger Guidelines] HMG in all but some of the least populated rural California counties, where only Sprint or T-Mobile, *but not both*, currently has a presences in most census blocks."[64] Furthermore, evidence shows that "[t]here is no county in California where the HHI covering all categories of wireless service currently falls below the [HMG's] 'highly concentrated' threshold of 2500."[65]

In addition to the anti-competitive increases in market concentration, the evidentiary record shows that the merger adversely affects competition in several other ways. The Decision even quotes T-Mobile's expert witness who acknowledges that New T-Mobile "could be tempted to collude with Verizon and AT&T."[66] The California Attorney General's (AG) Advisory Opinion also warns that the Joint "Applicants have repeatedly attempted to 'signal' – or interpret perceived signals from – other [Mobile Network Operators] MNOs regarding their competitive intentions" that are "meant to facilitate coordinated interactions among the MNOs [demonstrating their] awareness of the market's susceptibility to coordination."[67] The DOJ's Horizontal Merger Guidelines

[62] Decision at Attachment 5 at 13-14 (AG Advisory Opinion).

[63] PD at 40, FOF 12. *See also* Exhibit Pub Adv-11C at 80, lns. 18-19.

[64] Exhibit Pub Adv-011 at 47, lns. 8-10 (emphasis added). Table 5 of Dr. Selwyn's Reply Testimony shows the changes in HHI resulting from the merger by county and population. Exhibit Pub Adv-011 at 46. The Table is included as Attachment A to this Application for Rehearing.

[65] Exhibit Pub Adv-011 at 47, lns. 3-5.

[66] Decision at 37.

[67] AG Advisory Opinion at 21 (internal citations removed).

(HMG) explicitly warn against such coordinated effects when assessing potential mergers.[68]

Based on the evidence in the record, the Commission errs in concluding that the proposed merger is not anti-competitive under Section 854. The Decision ignores its own analysis, the AG's opinion, and the evidentiary record to determine that the proposed merger's purported benefits of a more robust 5G network rollout, the existence of which is also not supported by the evidentiary record, as described above, outweigh the anti-competitive effects of the merger. The Decision attempts to wave away the anti-competitive harms by saying they will be overcome by DISH's entrance into the market as a potential fourth carrier[69] and by the fact that Sprint may have exited the market on its own accord because it is a failing firm, still leaving only three facilities based market participants.[70] However, the Decision does not explain how these findings, which, as described below, are internally inconsistent with other findings and discussion in the Decision, outweigh the anti-competitive harms caused by this merger. Failure to do so constitutes reversible legal error.

B. The Decision Is Internally Inconsistent And, Thus, Legally Flawed.

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. The Decision concludes that the merger, with the imposed conditions, will not adversely affect competition pursuant to Section 854(b)(3),[71] yet also finds that the merger is presumptively anti-competitive and will result in high levels of concentration in many important California markets.[72] The

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[68] *See* Jt. Appl.-015, Section 7.2.

[69] Decision at 36.

[70] Decision at 47, FOF 25.

[71] *See* Decision at 48, COL 5. The Decision does not affirmatively make a finding that the merger will not adversely affect competition as required by Public Utilities Code § 854(b)(3).

[72] *See* Decision at 46, FOF 12-13.

inconsistencies do not end there. The Decision approves the merger largely based on the assumption, created by the DOJ that DISH will remedy the competitive harm from having only three national carriers while at the same time finding that it "will be years before DISH can become a true national competitor of the three other companies."[73] It also attempts to paint Sprint as a failing firm, but also states that Sprint "is a far stronger competitor than DISH."[74] These inconsistencies weaken the Decision's analysis and result in legal error by not supporting the ultimate findings and conclusions that lead to approval of the merger, as required by Section 1705.

1. The Decision Implies That DISH Will Be A Viable Competitor to Remedy Any Anti-Competitive Harm, Yet the Record and Decision Demonstrate Otherwise.

The Decision is internally inconsistent with its characterization of DISH. It acknowledges that DISH will be dependent on the PFJ that grants DISH significant assets from Sprint, while at the same time concluding that DISH will be a viable fourth facilities based carrier putting pressure on the nation's three largest wireless carriers.[75] While the Decision accepts the DOJ's and the District Court's finding that DISH will become a fourth viable wireless network operator and mitigate anti-competitive harm caused by the removal of Sprint,[76] the Decision also acknowledges the evidentiary record in this proceeding that exposes the lack of DISH's technical and financial capacity to become a fourth carrier and supports a finding that "it will be years before DISH can become a true national competitor of the three other companies."[77] The Decision errs by leaving California consumers to fend for themselves while DISH builds an entire wireless network from left over piece parts. The Decision's inconsistency with respect to DISH's viability creates a legal error that cannot be overcome, and the Decision's conclusions

[73] Decision at 36, 37.

[74] Decision at 37, 47, FOF 25.

[75] Decision at 36.

[76] Decision at 36-37.

[77] Decision at 37 (also noting that DISH is a much weaker competitor than Sprint).

that rely on the finding that DISH is a suitable replacement for Sprint must be removed or revised due to these inconsistencies.[78]

Furthermore, the Public Advocates Office provided evidence showing that even if DISH were to become a meaningful competitor in the many years to come, "the entry of DISH will not be sufficient to overcome the large increase in market concentration [per the HHI] that will surely emerge if the [proposed] merger is allowed to go forward."[79] The likelihood of DISH becoming an actual competitor to New T-Mobile, AT&T, and Verizon is uncertain at best. Therefore, even if DISH is successful at becoming a fourth national carrier, the HHI for DISH would not weaken the anti-competitive effects of this merger and the elimination of Sprint as an entrenched competitor with nationwide facilities, name recognition and a diverse customer base. The Decision fails to consider any of this evidence when accepting the conclusion by the DOJ and the District Court that DISH's presence in the market remedies the absence of a fourth national competitor.

2. The Decision Is Internally Inconsistent Regarding Sprint's Viability Pre-Merger, Particularly Considering the Statements Made By Sprint's Executive.

The Decision makes a finding that "[w]ithout the merger, there is substantial uncertainty whether Sprint could continue to play an effective role as a fourth nationwide competitor."[80] However, this finding is not consistent with the Decision's analysis that "however weak Sprint might be relative to the three other companies, it is far stronger than DISH."[81] The Decision also acknowledges that Sprint has a nationwide facilities-based network and substantial spectrum in place and that it will take "massive spending"

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[78] See *California Portland Cement Co. v. Public Utilities Com.*, 49 Cal. 2d 171, 176 (1957) ("the commission . . . has made inconsistent findings with respect to [a] principal issue involved and . . . has followed an erroneous view of the law. The orders based on these findings must therefore be annulled.").

[79] Exhibit Pub Adv-11C at 12, lns. 4-6.

[80] Decision at 47, FOF 25.

[81] Decision at 37.

by DISH to build a comparable network.[82] Either DISH is a viable competitor to the national carriers or it is not, and either Sprint is a weakened competitor or it is not. The Decision cannot have it both ways. The evidentiary record supports a finding that Sprint will continue to be viable, including a confirmation by Sprint's own Chief Operating Officer (COO) during the February 2019 evidentiary hearings, that, "We are a stable company. Sprint is not going bankrupt. We are not a failing firm."[83]

The Decision relies heavily on its assumption that Sprint is not a viable competitor, despite the powerful statement from Sprint's COO that Sprint is not failing and acknowledgement that Sprint has a substantial facilities-based network in place, making it much stronger than DISH.[84] This unsupported assumption makes the Decision "so inconsistent and uncertain in material respect that [it] cannot and do[es] not support the" finding that Sprint is not viable, thus committing legal error.[85]

C. The Decision's Ordering Paragraphs Are Fatally Deficient Due to Lack of Enforcement Mechanisms And Cannot Be Found To Remedy The Harms To The Public Interest That This Merger Will Likely Cause.

The Decision concludes that approving the merger is in the public interest because of the conditions it imposes upon New T-Mobile.[86] However, the Commission fails to establish the necessary framework to enforce the conditions that the Decision imposes.[87] For example, the Decision relies heavily on the conditions imposed by the DOJ and FCC; however, these federal commitments are crafted to address national concerns and not concerns specific to California as is required by Section 854. This gives the Commission little control over future changes, amendments, and enforceability of these federal

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[82] Decision at 37.

[83] Hearing Transcript Vol. 5 at 635, lns. 14-17 (Witness Draper).

[84] *See* Decision at 40.

[85] *See Stiefel v. McKee*, 1 Cal.App.3d 263, 265 (1965).

[86] Decision at 48, COL 6.

[87] The Decision's Findings of Facts 15, 18, 19, and 22 all rely on New T-Mobile and/or DISH fulfilling the conditions set out by the FCC and DOJ.

commitments. Moreover, the Decision itself states that the "FCC commitments . . . have no related enforcement mechanism."[88] Accordingly, the Decision **itself** questions whether the FCC's conditions on New T-Mobile will have any effect despite relying specifically on those conditions in the Findings of Fact. It is not only error for the Commission to rely on conditions that have no method of enforcement, it is also another example of an internal inconsistency in the Decision that undermines its determination that the merger is in the public interest.

Even many of the conditions unique to this Decision do not contain sufficient, if any, criteria for measuring performance or confirming whether or when New T-Mobile has met the condition,[89] while other conditions are drafted to be fundamentally incapable of enforcement, audit, or evaluation.[90] Some conditions have long timeframes for compliance, reducing the already small likelihood that the purported benefit will, in fact, come to fruition. The Decision requires the Commission to develop a citation program that "can be utilized to impose penalties on New T-Mobile for violations of the terms of this decision."[91] The Decision requires the Commission to hire a Compliance Monitor that will "review New T-Mobile's compliance with all its commitments" to the Commission, and "[recommend] a penalty to bring T-Mobile into compliance."[92] However, the Decision fails to define the penalties or to create a citation program that will impose penalties in proportion to the hundreds of millions of dollars at stake in this merger. The Ordering Paragraphs simply do not contain adequate enforcement

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[88] Decision at 41.

[89] *See*, *e.g.*, Decision at OP 7. OP 7 requires New T-Mobile to "prioritize" deploying 5G networks in 10 unserved or underserved California areas. However, the OP fails to specific the meaning of "prioritize" or establish a deadline for deploying to those 10 areas. OP 7 also fails to require New T-Mobile to report to the Commission which areas it has selected after deployment is completed.

[90] *See*, *e.g.*, Decision at 60, OP 32 and OP 35. Both OP 32 and 35 require New T-Mobile to "strive" to achieve or increase diversity of its board and workforce. However, no actual requirement to implement such diversity of its board and workforce exists. The nonexistent requirement for diversity coupled with the absence of metrics or reporting requirements in these two OPs make the conditions effectively unenforceable.

[91] Decision at 61-62, OP 39.

[92] *Id*.

mechanisms, as required by Section 854(c)(7), to support a conclusion that the merger is in the public interest because of the conditions.

IV. CONCLUSION

The Decision is legally flawed by failing to support its conclusions and findings with evidence from the record and cannot stand for the reasons described above. Accordingly, the Public Advocates, TURN and Greenlining respectfully request that the Commission grant this application for rehearing and revise the Decision to strengthen the adopted conditions and enforcement thereof for this merger to be in the public interest.

Respectfully submitted,

/s/ MICHELLE SCHAEFER
Michelle Schaefer
Attorney for the

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2722
Email: Michelle.Schaefer@cpuc.ca.gov

/s/ PAUL GOODMAN
Paul Goodman
Technology Equity Director

The Greenlining Institute
320 14th Street, 2nd Floor
Oakland, CA 94612
Telephone: (510) 898-2053
Email: paulg@greenlining.org

/s/ CHRISTINE MAILLOUX
Christine Mailloux
Managing Director

The Utility Reform Network
1620 Fifth Ave, Suite 810
San Diego, CA 92101
Telephone: (619) 398-3680
Email: cmailloux@turn.org

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ATTACHMENT A

Table 5

**CHANGES IN HHI THAT WOULD RESULT FROM SPRINT/T-MOBILE MERGER
BASED UPON FCC WIRELESS CARRIER AVAILABILITY DATA
WEIGHTED BY POPULATION AND LICENSED BANDWIDTHS**

		All			4G_LTE		
County	Population	Current	Combined	Change	Current	Combined	Change
Alameda	1,663,190	2751	3358	608	2750	3358	608
Alpine	1,120	3167	3304	137	3906	4104	198
Amador	38,626	3066	3344	278	3184	3361	177
Butte	229,294	2981	3372	391	2979	3385	406
Calaveras	45,670	3197	3337	140	3204	3368	165
Colusa	21,805	3066	3381	315	3069	3383	314
Contra Costa	1,147,439	2750	3358	608	2753	3356	604
Del Norte	27,470	3117	3146	28	3100	3130	30
El Dorado	188,987	2976	3362	386	2992	3369	378
Fresno	989,255	2810	3329	519	2850	3328	479
Glenn	28,094	3139	3437	298	3130	3433	303
Humboldt	136,754	2576	2958	382	2577	2959	383
Imperial	182,830	2916	3341	425	3011	3377	366
Inyo	18,026	3005	3255	250	3202	3351	149
Kern	893,119	2878	3327	450	2973	3360	387
Kings	150,101	2896	3343	448	2961	3364	403
Lake	64,246	2791	2911	120	2969	3030	61
Lassen	31,163	2975	3041	66	3279	3286	7
Los Angeles	10,163,507	2788	3333	545	2794	3333	538
Madera	156,890	2976	3466	490	2929	3424	495
Marin	260,955	2774	3345	571	2799	3347	548
Mariposa	17,569	3366	3422	56	3171	3250	78
Mendocino	88,018	3016	3016	0	3024	3024	0
Merced	272,673	2856	3440	584	2856	3432	576
Modoc	8,859	4011	4163	152	4319	4449	130
Mono	14,168	2979	3232	253	2942	3211	269
Monterey	437,907	3006	3368	362	2966	3352	386
Napa	140,973	2804	3328	524	2799	3342	543
Nevada	99,814	2995	3371	376	3093	3402	309
Orange	3,190,400	2782	3333	551	2787	3333	546
Placer	386,166	2973	3363	390	2983	3366	382
Plumas	18,742	3115	3115	0	3130	3130	0
Riverside	2,423,266	2813	3330	517	2833	3333	500
Sacramento	1,530,615	2965	3363	398	2965	3363	398
San Benito	60,310	2791	3347	555	2672	3354	682
San Bernardino	2,157,404	2837	3330	493	2835	3339	504
San Diego	3,337,685	2708	3332	624	2706	3335	629
San Francisco	884,363	2745	3360	615	2745	3360	615
San Joaquin	745,424	2750	3344	595	2750	3344	595
San Luis Obispo	283,405	2904	3356	452	2899	3335	435
San Mateo	771,410	2763	3354	590	2768	3358	590
Santa Barbara	448,150	2812	3336	524	2867	3346	480
Santa Clara	1,938,153	2681	3371	690	2682	3372	690
Santa Cruz	275,897	2760	3327	567	2739	3328	589
Shasta	179,921	3264	3487	223	3286	3519	233
Sierra	2,999	3426	3443	17	3664	3680	16
Siskiyou	43,853	3159	3268	109	3382	3493	111
Solano	445,458	2753	3358	605	2768	3358	589
Sonoma	504,217	2768	3314	547	2774	3315	541
Stanislaus	547,899	2846	3358	512	2850	3358	508
Sutter	96,648	2932	3364	432	2931	3364	432
Tehama	63,926	3316	3531	215	3322	3548	226
Trinity	12,709	4822	4822	0	5508	5508	0
Tulare	464,493	2928	3351	423	2956	3363	407
Tuolumne	54,248	3867	3869	2	3797	3797	0
Ventura	854,223	2782	3347	565	2797	3348	551
Yolo	219,116	2978	3357	379	2985	3359	374
Yuba	77,031	2983	3362	378	3002	3379	377

technology weighted by FCC availability data, then aggregated to county levels weighted by

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