

**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  
(Filed July 13, 2018)

And Related Matter.

Application 18-07-012

**OPENING COMMENTS OF THE UTILITY REFORM NETWORK ON THE  
PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE BEMESDERFER**

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Dated: April 1, 2020

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## **I. INTRODUCTION**

Pursuant to Commission Rule of Practice and Procedure 14.3, The Utility Reform Network (“TURN”) hereby files its opening comments on the *Proposed Decision of Administrative Law Judge Bemserfer* (“Proposed Decision.”)

The Proposed Decision relies on the record of this proceeding to find that this proposed transaction has the potential to expand the digital divide that separates the haves from the have-nots of the digital world through anti-competitive behavior by New T-Mobile and the elimination of a fourth competitor in the marketplace in California.<sup>1</sup> However, despite these “serious reservations about the competitive effects of the Merger here in California,”<sup>2</sup> the Proposed Decision eschews its legal obligations pursuant to Public Utilities Code Section 854 by failing to make sufficient findings and failing to adopt sufficient, enforceable conditions that could mitigate the harms from this transaction that threaten to undo much of the Commission’s universal service policies. TURN urges the Commission to revise the Proposed Decision to comply with its obligations pursuant to Section 854 and it proposes redline edits to the text of the Proposed Decision, and the various Findings of Fact (FOF), Conclusions of Law (COL) and Ordering Paragraphs (OP) in Appendix A.

## **II. STANDARD OF REVIEW**

The Proposed Decision finds that the Transaction is subject to review under Public Utilities Code Section 854(a), (b), and (c).<sup>3</sup> To support its finding, the Proposed Decision maps out the regulatory history of this Commission’s exercise of jurisdiction over wireless carriers.<sup>4</sup> As part of the evolution of the Commission’s oversight over wireless carriers, the Proposed Decision correctly finds

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<sup>1</sup> Proposed Decision at p. 8.

<sup>2</sup> Proposed Decision at p. 35.

<sup>3</sup> Proposed Decision at p. 6, 31-33, COL 1.

<sup>4</sup> Proposed Decision at p. 2.

that the Commission retained jurisdiction to review and approve transfers of ownership of entities that offer wireless services within California.<sup>5</sup> Over the objections of Joint Applicants,<sup>6</sup> the Proposed Decision properly finds that this transaction will have significant impacts on millions of California wireless consumers and that the Applicants' wireless affiliates are integral to the Applicants' claimed merger benefits.<sup>7</sup>

Joint Applicants oppose the Commission's exercise of its jurisdiction here and point to previous transfers of wireless entities where the Commission chose to forebear from exercising its authority.<sup>8</sup> Yet, in those cases, the Commission determined that a detailed review was not necessary by taking into consideration the current market conditions and the direct impact of those mergers on California consumers at the time. Here, following the Commission's interpretation of D.95-10-032, and the record in this proceeding, starting with the Joint Applicants' own Application, support the need for a more detailed review.<sup>9</sup> This finding, in turn, requires the Commission to satisfy its statutory obligation pursuant to Section 854, and to find that the wireless affiliates revenues exceed the thresholds in the statute which requires the Commission to conduct a detailed review of the full transaction, applying the criteria in subsection (c), to make a determination whether the entire transaction is, on balance in the public interest.

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<sup>5</sup> Proposed Decision at p. 2-3; See also TURN Opening Brief, April 26, 2019 at p. 2-5; Public Advocates Reply Brief, May 10, 2019, at p. 3-7.

<sup>6</sup> Joint Applicants Application for Review of the Wireless Transaction, A.18-07-012; Joint Applicants Opening Brief, April 26, 2019 at p. 14-16; Joint Applicants Reply Brief, May 10, 2019, at p. 7-13.

<sup>7</sup> Proposed Decision at p. 3, 7 (Commission's role in reviewing the merger "acknowledges the central role that these devices now play in almost every aspect of modern life."); TURN Opening Brief, April 26, 2019, at p. 2-5; CWA Opening Brief, April 26, 2019 at p. 2-3.

<sup>8</sup> Joint Applicants Application for Review of the Wireless Transaction, A.18-07-012; Joint Applicants Reply Brief, May 10, 2019, at p. 9 (citing 2005 Decision re: wireless transfer).

<sup>9</sup> Proposed Decision at p. 31-33; Scoping Memo and Amended Scoping Memo; with the Proposed Decision, the Commission properly rejects the legal fiction continued by the Joint Applicants that the Application 18-07-012 is merely a request for a "review" of the wireless transaction and that the Commission's authority pursuant to Section 854 is limited to approval of the only the wireline transaction.

### **III. PROPOSED DECISION FAILS TO EXPLICITLY FIND THAT MERGER IS NOT IN THE PUBLIC INTEREST WITHOUT ADDITIONAL CONDITIONS**

While the Proposed Decision discusses the detailed procedural history and accounts for the voluminous record created by detailed discovery, multiple sets of protests and comments, and voluminous testimony and briefs, the Proposed Decision applies the record to make findings and conclusions in a haphazard and incomplete manner. On the one hand, the Proposed Decision appropriately describes the many ways in which the record supports a finding that the proposed transaction, will result in market consolidation, consumer harm with regard to the digital divide, anticompetitive impacts and is not in the public interest, even assuming many of the voluntary conditions agreed to by the Joint Applicants. For example, the Proposed Decision acknowledges that the California Attorney General found that the anti-competitive effects outweighed its potential benefits.<sup>10</sup> The Proposed Decision finds that the merger will not be uniformly in the public interest for California without ameliorating conditions and that there will be further concentration in markets where T-Mobile and Sprint currently enjoy a combined majority market share.<sup>11</sup> Further, the Proposed Decision notes that the federal district court of the Southern District of New York found that for “many CMAs” states made a prima facie showing that the merger is anticompetitive.<sup>12</sup> The Proposed Decision also makes the colorful and insightful comment that, “it would be neither surprising nor novel if these three companies [New T-Mobile, AT&T and Verizon] preferred the soft bed of competition to the stony bench of competition.”<sup>13</sup> And further notes that the record raises “serious reservations about the competitive effects of the Merger here in California.”<sup>14</sup>

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<sup>10</sup> Proposed Decision at p. 15-16, Attachment 5.

<sup>11</sup> Proposed Decision at p. 18 (footnote 45); FOF 11, 12.

<sup>12</sup> Proposed Decision at p. 15 (but the Proposed Decision also cites the Court’s finding that states did not meet their burden to show harm in light of additional conditions.)

<sup>13</sup> Proposed Decision at p. 34.

<sup>14</sup> Proposed Decision at p. 35.

Yet, the Proposed Decision fails to make the appropriate findings and conclusions that are supported by this discussion within the Proposed Decision and the record itself. While the Proposed Decision orders conditions on the transaction that it discusses as necessary to mitigate the anticompetitive effects and potential customer harm, especially for low income and those on the wrong side of the digital divide, the Proposed Decision errs by failing to make the necessary clear and determinative finding that the merger will result in anticompetitive impacts and consumer harm in the California marketplace that, in turn, require those ameliorative conditions. Indeed, there are very few specific Findings of Fact regarding the anticompetitive harms discussed on the record and in the voluminous testimony by the Public Advocates and CWA. And only minimal findings regarding necessary conditions, including a weak and vague finding that the company has, “*represented* to federal agencies, and the federal district court that it *intends* to compete aggressively with Verizon and AT&T following the Merger.”<sup>15</sup> The Proposed Decision errs by relying on mere “representations” to federal agencies by New T-Mobile of its “intention” to compete, while ignoring record evidence from expert witnesses of the direct anticompetitive impacts of this merger.

The Proposed Decision also errs by contradicting itself regarding its authority and obligation to develop its own findings and conclusions regarding the competitive and economic impacts of the merger. First, the Proposed Decision inappropriately cedes authority to the federal Department of Justice, suggesting that it is more appropriate to leave it to the DOJ to make findings of national antitrust implications, presumably relegating California-specific considerations to the back seat and accepting the DOJ commitments as addressing antitrust concerns.<sup>16</sup> Yet, it also acknowledges that the Commission is mandated to conduct a review of the competitive implications of the transaction by

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<sup>15</sup> FOF 22, but also see FOF 11 and 12 finding increased market concentration and presumptive anti-competitive concentration in large cellular markets in California.

<sup>16</sup> Proposed Decision p. 18

the California Supreme Court, because, “antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.”<sup>17</sup> As another example, the Proposed Decision also acknowledges that the federal DOJ settlement may “in theory” ameliorate antitrust concerns and accepts the conclusion of the DOJ that “creating a fourth national carrier will over time offset, at the national level, the loss of competition” and, therefore, seems to accept the federal DOJ authority on this point.<sup>18</sup> But the Proposed Decision also finds that the Commission has an obligation to ask what the implications of the DOJ settlement are for California.<sup>19</sup> The Proposed Decision accepts the DOJ’s work and findings, but also contradicts the DOJ to find that, “however weak Sprint might be relative to the other three companies, it is a far stronger competitor than DISH” and that, “it will be years before DISH can become a true national competitor of the three other companies.”<sup>20</sup>

The Proposed Decision also inappropriately relies on some of the Joint Applicants’ assertions beyond just its “intent” to compete with Verizon and AT&T, even in the face of challenges to the evidence. For example, while the Proposed Decision appears to rely on claims from T-Mobile witness Ray that the Sprint cell sites “can easily be outfitted with 5G-capable radios,” to find the merger will bring customer benefits, the Proposed Decision misstates Ray’s testimony and fails to acknowledge his testimony on the stand that such a process will take years and necessarily relies on event out of T-Mobile’s control.<sup>21</sup>

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<sup>17</sup> Proposed Decision at p. 3, *citing* Northern California Power Agency v. Public Utilities Commission (1971) 5 Cal. 3d 370 at 377.

<sup>18</sup> Proposed Decision at p. 20, 33, 34.

<sup>19</sup> Proposed Decision at p. 20.

<sup>20</sup> Proposed Decision at p. 35.

<sup>21</sup> Proposed Decision at p. 16, 36 (rapid expansion and excess capacity will necessitate aggressive competition); But see, TURN Opening Brief at p. 29-30, (citing Pub. Adv. Exh. 4 (Reed) at p. 11:17-19; p. 17:10-16; Jt. Appl. Exh 3 (Ray) at p. 18:8-19-4; TR Vol. 4 p. 431, Vol 5 pp. 465, 467, 468).

This is just one example where the Proposed Decision appears to accept the companies' claims without addressing the record evidence challenging those claims and then relies on those claims as support for approval of the merger.

#### **IV. PROPOSED DECISION ERRS BY RELYING ON UNENFORCEABLE CONDITIONS**

The Proposed Decision relies on the conditions contained in the numerous side-agreements that T-Mobile entered into over the course of the year and a half after it filed its Joint Applications with the Commission. The Proposed Decision includes findings of fact that the company made “significant commitments” to the FCC, DOJ, and California Emerging Technology Fund (CETF) and finds that these commitments, “take together establish a framework for ensuring that the Transaction will significantly benefit those Californians most in need of reliable, affordable access to modern telecommunications technology.”<sup>22</sup> The Proposed Decision calls the FCC commitments “welcomed steps” toward narrowing the digital divide in California and favorably notes that the CETF MOU also addresses similar concerns.<sup>23</sup> The Proposed Decision “finds” that the “economic argument [in favor of the merger] is potentially strengthened as a result of the DOJ Proposed Final Judgment.”<sup>24</sup>

The Proposed Decision further relies on these external conditions by finding that these commitments to external groups will have presumptive benefits for consumers, and that the conditions enumerated in the Ordering Paragraphs are inextricably linked with these external conditions and are intended to “*complement and strengthen* the promises already made by T-Mobile in the other forums.”<sup>25</sup>

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<sup>22</sup> Proposed Decision at p. 37, FOF 19-21.

<sup>23</sup> Proposed Decision at p. 37.

<sup>24</sup> Proposed Decision at p. 20.

<sup>25</sup> Proposed Decision at p. 30, 38 (If the Merger is not approved, then all of the benefits (from these additional agreements) will disappear.

The Proposed Decision’s support for the approval of the merger is based heavily on the existence of these other agreements, yet the Proposed Decision takes no clear action to support or enforce these commitments. The Commission explicitly refuses to enforce the Memoranda of Understanding between T-Mobile and CETF and a separate one with the National Diversity Coalition, relegating their enforcement to actions to enforce private contracts brought in Superior Court.<sup>26</sup> More troubling is the Proposed Decision’s refusal to enforce these agreements even though it is the explicit intention of the parties to the CETF MOU to allow for Commission enforcement.<sup>27</sup>

The Proposed Decision also does not explicitly address the enforcement of the DOJ or FCC conditions, presumably relying on the separate enforcement mechanisms of those commitments. Yet, this is also error because the Commission has no authority or control over those agencies and cannot, therefore, rely on those agencies to do the Commission’s work of imposing conditions to mitigate competitive harm pursuant to Section 854(c).

The Proposed Decision even takes the unusual step of taking “official notice” of a February 2020 ex parte filing wherein the companies describe these “voluntary” commitments, but does not further elaborate on whether it relies on the carriers’ representations of their obligations, set out only in an ex parte notice summary, as necessary it to find the merger is in the public interest and to enable the Commission to independently enforce these conditions.<sup>28</sup>

The Proposed Decision ignores the fact that CETF MOU represents that CETF modified its position in the proceeding to remove its opposition, “based on” the full and complete set of MOU

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<sup>26</sup> Proposed Decision at p. 38.

<sup>27</sup> Proposed Decision at p. 31, Attachment 2 (Joint Motion to Modify Positions and Reflect the MOU between CETF and T-Mobile USA) at p. 4 (CETF emphasized need for conditions that the Commission can fulfill and monitor to show verifiable progress and are enforceable by the Commission.); see also Paragraph XII, XV, of the CETF MOU (acknowledging that the Commission could enforce and monitor the implementation of the conditions in these agreements, but only if they “choose to do so.”)

<sup>28</sup> Proposed Decision at p. 23.

conditions and requirements, including the enforcement mechanism, and that CETF agreed to affirmatively endorse and support the transaction only if the commitments within the MOU are included in the ordering paragraphs of the Commission’s Final Decision.<sup>29</sup>

This refusal to adopt and enforce the conditions within the CETF MOU is not only contradictory to the requirements of Section 854 and the MOU itself, but does not follow the Ruling by the Administrative Law Judge to allow the CETF MOU into the record without requiring the parties to follow a Rule 12 settlement process. Indeed, TURN along with Greenlining and Public Advocates filed oppositions to Joint Applicants’ request that the record “reflect” the MOU without further due process.<sup>30</sup> The ALJ granted the Motion, over Joint Consumers’ opposition, by relying, in part, on the fact that the MOU granted the Commission enforcement powers over the provisions of the MOU as justification for allowing it into the record.<sup>31</sup>

The Proposed Decision refuses to enforce the CETF MOU, or the other commitments, but here again the Proposed Decision internally conflicts itself by also including the rationale from the ALJ’s May 2019 Ruling and relying on the MOU’s enforcement mechanism involving the Commission as justification to find that the MOU mitigates any competitive harms, noting that, “*because the signatories agreed to Commission enforcement of its terms as well as significant incentives for CETF to see that it is fully implement, we will accord it weight in evaluating the overall desirability of the Transaction.*”<sup>32</sup>

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<sup>29</sup> Proposed Decision, Attachment 2, CETF MOU at p. 1, Section XII p. 15.

<sup>30</sup> See, Opposition of the Public Advocates Office to Motion by CETF and Joint Applicants to Modify Positions, April 23, 2019; Response of Joint Consumers to Joint Motion, April 23, 2019.

<sup>31</sup> ALJ Ruling Granting the Joint Motion of Joint Applicants and the California Emerging Technology Fund, May 8, 2019 at p. 5 (discussion of Commission’s prior decision to incorporate a CETF MOU into the Proposed Decision and enforce the MOU’s terms, and agreeing to enter the MOU into this record, in part, because of the enforcement provision allowing the Commission to enforce the provisions.)

<sup>32</sup> Proposed Decision at p. 21, See also Proposed Decision at p. 30-31 (noting New T-Mobile has agreed to allow the Commission to enforce the promises made in the CETF MOU.)

As discussed below, the result of these contradictions in the Proposed Decision is an attempt to pick and choose provisions from the external agreements while revising many of them still further.<sup>33</sup> This approach does not properly reflect the record and is in error and does not satisfy the Commission's obligations under Section 854.

#### **V. PROPOSED DECISION'S CONDITIONS DO NOT GO FAR ENOUGH TO MITIGATE HARMS TO CONSUMERS**

While the Proposed Decision relies heavily on the various external commitments that T-Mobile has made to mitigate the competitive harms of this huge transaction, it also finds 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.”<sup>34</sup>

Therefore, while the Proposed Decision makes clear that it is relying on *both* the external conditions and these additional conditions, as discussed above, it errs by only picking and choosing a subset of the conditions from these external commitments, making additional changes to those conditions, and then paradoxically finding that only the conditions set out in the Ordering Paragraphs are needed to find the merger is in the public interest.<sup>35</sup> This is an error.

The error then creates further in error in that the conditions in the Ordering Paragraphs, by themselves, do not go far enough to rescue this transaction and are not supported by the record as sufficient to find that this merger is in the public interest. For example, notably missing is a

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<sup>33</sup> Proposed Decision at 21; See also, Proposed Decision at p. 38, finding that the MOUs are contracts “for the benefit of rural and underserved communities in California”, and that it will only adopt those parts of the MOU that it believes “directly benefit rural and underserved communities in California” with no responsibility or obligation to uphold the entire agreement as a package.

<sup>34</sup> Proposed Decision at p. 38 (emphasis added)

<sup>35</sup> Proposed Decision at p. 38-30, COL 4 (With the conditions enumerated in the ordering paragraphs hereof, the Transaction should be approved.)

commitment to maintain pricing for plans as of the terms and rates set by the company on February 4<sup>th</sup> 2019 for both retail plans and MVNO contracts. While the pricing commitment is reflected in the FCC commitments and CETF MOU,<sup>36</sup> the structure of the Proposed Decision is such that the Commission could not enforce this condition, and therefore it must be assumed that the Commission is not adopting this condition as necessary to ensure this merger is in the public interest. TURN does not believe that this pricing commitment goes far enough to ameliorate the competitive harms or to prop up the companies' "excess capacity argument" that the Proposed Decision finds useful.<sup>37</sup> However, at a minimum, the failure to include this condition as part of the package of conditions, is in error and not supported by the record.<sup>38</sup>

There are several other provisions that appear in the CETF MOU but are not included in the Proposed Decision's Ordering Paragraphs, for example, the school-based programs and digital inclusion programs,<sup>39</sup> clarification that there will be free handsets for LifeLine customers that received free handsets with Assurance,<sup>40</sup> and a specific 6 month timeline for LifeLine customers to be activated and operational on the T-Mobile network.<sup>41</sup> TURN proposes revisions to the Proposed Decision to include the CETF and NDC MOUs as enforceable conditions in their totality, to allow Commission enforcement of these provisions. In addition, as discussed below, TURN proposes revisions to the Order Paragraphs to reflect the record in the proceeding and support stronger conditions to ameliorate harms to consumers, especially low income and vulnerable populations.

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<sup>36</sup> CETF MOU at p. 4; FCC Commitment Letter, February 4, 2019.

<sup>37</sup> TURN Opening Brief, April 26, 2019 at p. 11-13, 17. Proposed Decision at p. 19, 36-37.

<sup>38</sup> Joint Applicants Opening Brief, April 26, 2019, at 5 (making pricing commitment); TURN Opening Brief, April 26, 2019 at p. 17; TR Vol. 4, p. 387:11-18 (pricing commitments demonstrate that excess capacity does not provide sufficient incentives in the short term).

<sup>39</sup> Proposed Decision, Attachment 2 CETF MOU at p. 7-9.

<sup>40</sup> Proposed Decision, Attachment 2 CETF MOU at p. 5.

<sup>41</sup> Proposed Decision, Attachment 2 CETF MOU at p. 5.

TURN's review reveals little to no conflict between the MOUs and the Ordering Paragraphs as revised, but where there may be conflicts the Commission-approved and enforceable conditions should prevail.

TURN does not suggest that the DOJ and FCC conditions be given similar treatment and made a part of the Commission's enforceable conditions. These conditions have their own enforcement mechanisms and implicate larger, nationwide actions by the carriers. However, because the Proposed Decision relies on these conditions to find that the merger is in the public interest, TURN includes an Ordering Paragraph that goes beyond the current reporting requirements to include a trigger for this Commission to review any enforcement actions by or before the FCC and DOJ and determine if further action must be taken here in California to protect the integrity of its final decision and to protect California consumers.

TURN summarizes additional proposed revisions to the COL, FOF and Ordering Paragraphs below and includes a redline attachment.

- Ordering Paragraph 3- the CETF MOU includes significant investment in digital inclusion projects that begin with millions of dollars being provided directly to CETF over the course of several years.<sup>42</sup> In turn, CETF is required to provide this funding to specific projects as described in the MOU. The MOU requires CETF to report back to T-Mobile regarding various aspects of this commitment. TURN urges the Commission to broaden the reporting requirement in this Ordering Paragraph to require both parties to the CETF MOU and the NDC MOUs to also report their progress, where applicable. TURN also urges the Commission to revise this Ordering Paragraph to require these reports to be publicly available with appropriate redactions for

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<sup>42</sup> Proposed Decision at Attachment 2, CETF MOU at p. 8.

confidential information, and to provide unredacted versions of these reports to parties to the proceeding with appropriate nondisclosure requirements.

- Ordering Paragraph 4- the 5G Network Milestones are less aggressive than **any** of the external commitments made by T-Mobile.<sup>43</sup> The Proposed Decision must find that this merger brings benefits to consumers beyond what the companies could have done separately. While TURN and the Public Advocates challenged the companies' evidence regarding network deployment milestones, the Commission cannot find that weaker milestones still satisfy public interest criteria and ensure that New T-Mobile meets its more aggressive commitments as to support the finding that merger in the public interest as it brings economic benefits to consumers and improves service quality. TURN notes that a revision of this Ordering Paragraph may reveal information that the company considered confidential, and TURN also understands that the Public Advocates office will provide further detail on this issue. Therefore, TURN does not attempt to redline this Ordering Paragraph but reserves its right to make further comments on reply.
- Ordering Paragraph 5- The In-Home Broadband requirement attempts to hold T-Mobile to its commitment to provide competition to other in-home broadband wireline services from incumbent and cable providers. However, the commitment does not accurately reflect the record and company's own commitments, nor does it mitigate the harm from the company's refusal to offer an explicit low income plan with discounts for a robust in-home service.<sup>44</sup> This condition imposes a lower deployment threshold, especially for rural deployment. Perhaps more troubling, this requirement provides no minimum standards for speed, capacity or rates and only vague

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<sup>43</sup> Jt Appl. Exh. 3 Ray Testimony at 27-28, 32-33; Joint Applicants Opening Brief, April 2019 at p.36-37; CETF MOU at p. 9-11 (California Specific Commitments of investment and deployment).

<sup>44</sup> Joint Applicants' Opening Brief at p. 43; Proposed Decision, Attachment 3, FCC Commitments, May 20, 2019 Letter at p. 4-5; TURN Opening Brief, April 26, 2019 at p. 25 citing TR Vol. 4, p. 321-322.

requirements regarding an “affordable” service that is priced “substantially” less than other services with “no surprises.” The Commission must have a more detailed and enforceable condition than this.

- Ordering Paragraph 8 and 9 impose Network Reliability and Emergency Preparedness conditions.

To ensure that this merger is in the public interest and that it will not impact service quality, it is important that the Commission aggressively pursue strong emergency preparedness measures. While TURN supports the 72-hour back up requirement, the conditions otherwise do not go far enough. First, the CETF MOU<sup>45</sup> has specific provisions regarding the generator and portable emergency equipment that these companies deploy in emergency to enable reliable communications. Ensuring that companies have adequate supplies of these pieces of equipment in proper geographic locations and are ready to deploy in an emergency goes beyond the 72-hour battery back-up and should be specifically imposed here. Moreover, the CETF MOU requires T-Mobile to continue its practice of providing community support for victims of disasters. The Proposed Decision cannot be silent on this issue in light of T-Mobile’s challenge of the Commission’s work in this area in the docket that the Proposed Decision defers final adoption of its enforcement and conditions (R.18-03-011).<sup>46</sup> More recent events, including both the PSPS outages in Fall of 2019 and the recent virus pandemic customer protections, highlight the need to impose specific billing relief measures to support victims of disasters or other declarations of

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<sup>45</sup> CETF MOU at p. 13.

<sup>46</sup> See, Application for Rehearing of D.19-08-025 of AT&T Mobility and CTIA, September 23, 2019 (challenging the Commission’s jurisdiction to impose emergency relief requirements on wireless carriers). Both T-Mobile and Sprint are members of CTIA.

emergency.<sup>47</sup> With the merger resulting in increased market concentration, carriers will have even less motivation to voluntarily cooperate with Commission directives.

- Ordering Paragraphs 15-24 appear to attempt to mirror the CETF MOU with commitments to the California LifeLine Program. These conditions are vital, in light of weak commitments to LifeLine by T-Mobile in the past.<sup>48</sup> However the conditions in the Ordering Paragraphs weaken the CETF MOU conditions in several ways. For example, instead of setting a minimum standard for a LifeLine offering that would qualify T-mobile for a subsidy, the Proposed Decision only requires that existing “retail service plans” become eligible for discounts. While this sounds promising, in reality and in the long run, this condition could leave LifeLine customers stuck with small discounts on expensive plans to get the 3GB of data and unlimited calling/texting required by the CETF MOU and offered by most other LifeLine providers including Assurance Wireless at this time.

Also troubling is the language in the commitment that would allow T-Mobile to satisfy this commitment to LifeLine by signing additional customers up for the existing Boost Pilot, which will be adopted by New T-Mobile.<sup>49</sup> But the companies have insisted, and the Commission has agreed, that these are not LifeLine customers and Boost (now T-Mobile) is not a LifeLine provider.<sup>50</sup> Allowing New T-Mobile to use the Pilot to satisfy these commitments undermines the

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<sup>47</sup> See, Letter from the Commission to facilities based wireline and wireless carriers dated November 13, 2019 regarding responses to PSPS outages and subsequent Phase 2 Scoping Memo in R.18-03-011 and, see also, Letter from Commission to facilities based carriers regarding responses for billing mitigation for virus pandemic impacts dated March 20 and 23, 2020.

<sup>48</sup> Proposed Decision at p. 37; TURN Opening Brief, April 26, 2019 at p. 20-28 (citing to testimony by T-Mobile witness Sylla-Dixon Vol. 6 p 880-881, 912

<sup>49</sup> Ordering Paragraph 22; CETF MOU appears to only allow the company to use the pilot participants to count toward the low-income customer category and even then TURN opposed this element of the CETF MOU. TURN Reply Brief, May 10, 2019 at p. 17-18.

<sup>50</sup> D.19-04-021 (R.11-03-013).

Proposed Decision’s commitment to the California LifeLine program and potentially leaves New T-Mobile customers without recourse pursuant to the LifeLine program rules.

TURN notes, however, that the Proposed Decision does not allow New T-Mobile to withdraw from the program based on “substantial changes to the Program” and instead requires the company to offer LifeLine discounts “for as long as they operate in California and offer service plans to consumers.”<sup>51</sup> The record shows that allowing T-Mobile to change or withdraw from its commitment to LifeLine based on changes to the program is too large of a loop hole and should not be adopted or allowed to go into affect.<sup>52</sup> Here, the Commission’s final decision should prevail over the CETF provision.

## **VI. CONCLUSION**

TURN urges the Commission to find that the proposed transaction between Sprint and T-Mobile, relating to both the wireline and wireless transactions are not in the public interest. Further, the Proposed Decision should be revised to more clearly incorporate the external commitments as enforceable conditions that the Proposed Decision relies on to find that the transaction is in the public interest. Finally, TURN urges the Commission to make the changes to the Proposed Decision, especially the Ordering Paragraphs, as proposed in these comments.

Dated: April 1, 2020

Respectfully submitted,  
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<sup>51</sup> Proposed Decision, OP 15.

<sup>52</sup> See, TURN Reply Brief, May 10, 2019 at p. 15-16.

## **APPENDIX A**

### **INDEX OF CHANGES**

## Proposed Revisions to the Proposed Decision

### Text of the Proposed Decision

*Revise Page 16*

T-Mobile witness Ray claims that Existing Sprint cell sites can easily be outfitted with 5G-capable radios that can transmit signals over all the spectrum bands owned by the merged company, yet he also admits that the effort will require visits to thousands of poles and significant time and money to accomplish this task. Once complete, after several years, the effect is multiplicative.....

*Revise Page 18, footnote 45*

~~Although~~ This Commission is ~~not precluded from~~ required to considering the potential economic impacts of the proposed Merger in California while also considering the analysis and findings of the federal Department of Justice (DOJ) regarding the, assessing the national antitrust implications of a Merger between two national wireless companies is primarily the responsibility of the antitrust division of the federal Department of Justice (DOJ).

*Revise: Page 21, footnote 53*

This decision adopts ~~certain features of~~ the CETF MOU as conditions of approval and these are enforceable by the CPUC. ~~CETF must look to the Superior Court for enforcement of the balance of the agreement, should that necessity arise~~

*Revise Page 23, footnote 62*

The Commission takes official notice of the contents of Joint Applicants' Ex Parte Notice that was filed and served on the parties in this proceeding and that contain a summary of the binding and enforceable conditions we adopt to day as mitigating conditions.

*Revise: Page 38*

~~While we will not adjudicate disputes between the contracting parties, leaving that matter to the Superior Court, w~~ We will adopt, as conditions of approval, the commitments made by T-Mobile in the CETF and NDC MOUs that directly benefit rural and underserved communities in California.

### Findings of Fact

#. Combining tens of thousands of widely distributed cell towers to create a statewide wireless network will take significant investment, time and cooperation of multiple stakeholders.

#. The state and federal LifeLine programs are not static and have been consistently updated over past decade to account for changes in consumer demand and technology.

#. Customers currently served by Boost Mobile through the Commission's Pilot Program adopted in D.19-04-021 will be transferred to T-Mobile but will not counted as LifeLine customers pursuant to the Commission's Decision.

#. Market consolidation will also impact the Mobile Virtual Network Operators (MVNOs) and other companies that have agreements with Sprint and T-Mobile to use their networks to resell service to end user customers.

#. The Merger transaction is not in the public interest and will result in consumer harm in California unless the transaction is revised to require specific and enforceable conditions supporting economic and social benefits of the Merger.

### **Conclusions of Law**

#. The conditions and agreements included in the April 23, 2019 Memorandum of Understanding between T-Mobile and CETF are necessary to support a finding that the merger is in the public interest pursuant to Section 854.

#. The conditions and agreements included in the January 29, 2019 Memorandum of Understanding between T-Mobile and NDC are necessary to support a finding that the merger is in the public interest pursuant to Section 854

### **Ordering Paragraphs**

#. The conditions and agreements set forth in the April 23, 2019 Memorandum of Understanding between T-Mobile and the California Emerging Technology Fund attached hereto as Attachment 2, are hereby adopted as enforceable conditions by this Commission. If conditions within this CETF MOU and these Ordering Paragraphs conflict, the conditions set forth in the Ordering Paragraphs prevail.

# The conditions and agreements set forth in the January 29, 2019 Memorandum of Understanding between T-Mobile and the National Diversity Coalition attached hereto as Attachment 1, are hereby adopted as enforceable conditions by this Commission. If conditions within this NDC MOU and these Ordering Paragraphs conflict, the conditions set forth in the Ordering Paragraphs prevail.

# New T-Mobile shall notify the Commission via a Tier 1 Advice Letter of any enforcement actions submitted to the FCC or the DOJ pursuant to the agreements between the FCC or DOJ and New T-Mobile regarding this merger transaction. Such Advice Letter shall be filed within 15 days of the commencement of the enforcement action itself. New T-Mobile shall inform the Commission of the resolution of said enforcement actions within 15 days of the finalization of the enforcement action resolution. Communications Division Staff shall provide a recommendation, within 15 days of the resolution of the federal enforcement action, whether the enforcement action has had a material impact on the enforceable conditions adopted herein.

#. New T-Mobile shall make available the Same Rate Plans or Better Rate Plans offered by T-Mobile and/or Sprint as of the Reference Date of February 4, 2019 for 3 years following the close of the transaction.

# New T-Mobile is required to abide by the terms of its existing MVNO agreements (including Sprint's MVNO agreements) for operations in California, for a period of no less than seven years

3. New T-Mobile and CETF shall simultaneously provide to Communications Division staff (Staff) all updates, data, documents or reports ~~it they~~ provides to each other the California Emerging Technology Fund (CETF) or another party to whom such information is provided pursuant to the Memorandum of Understanding Between CETF and T-Mobile USA Inc. (CETF MOU).

#. New T-Mobile and NDC shall simultaneously provide to Communications Division staff (Staff) all updates, data, documents or reports they provide to each other or another party to whom such information is provided pursuant to the Memorandum of Understanding Between NDC and T-Mobile USA Inc..

5. New T-Mobile shall offer in-home broadband service wherever 5G service is available. Within 3 years of the close of the merger, T-Mobile shall have in-home broadband service available to at least 912,000 California households, of which at least 58,000 shall be rural, or, in the alternative, pursuant to a deployment commitment that is more aggressive than these figures. Within 6 years of the close of the merger, T-Mobile shall have in-home broadband service available to at least 2.3 million California households, of which at least 123,000 shall be rural, or, in the alternative, pursuant to a deployment commitment that is more aggressive than these figures. There will be ~~an affordable~~ a plan offering in-home broadband service at a discount of 50% or more for a plan that offers that is priced substantially less than other available in-home broadband service, with no contract, no equipment charges, no installation charges, and connectivity speeds and data allowances of at least 50% of the highest speeds offered by New T-Mobile for in-home broadband service in the service area. and no surprises.

9. This requirement will remain in place until any future backup power requirements, and additional requirements for network redundancy, resiliency, and outage reporting, are developed by CPUC in Rulemaking 18-03-011, or any subsequent proceeding, on the timetable and subject to the other requirements developed in that proceeding.

#. Additional emergency relief measures shall be implemented by New T-Mobile, including billing relief measures adopted by D.19-08-025 and additional relief measures lifting data caps and suspending disconnections for non-payment, also triggered by a state of emergency where no facilities have been damaged but customers are impacted and must stay connected with emergency personnel, employers and schools.

15. New T-Mobile (and all its subsidiaries), for as long as they operate in California and offer service plans to consumers, shall make the current plans offered by Assurance Wireless to eligible LifeLine customers as of the effective date of this Decision and updated from time to time to provide lower rates, more data, more minutes, and improved handsets, available at their retail service plans eligible for the California LifeLine Program's discounts. ~~New T-Mobile can accomplish this objective by utilizing the existing Virgin Mobile USA, L.P. (Virgin) model, the Boost (or Metro) Mobile pilot model, and/or any future models authorized by the LifeLine Program, subject to the rules adopted for the LifeLine Program in a Commission Decision.~~

16. New T-Mobile shall add at least 300,000 new LifeLine customers over the next five years. These customers will be in addition to those already participating in LifeLine. ~~through an existing pilot,~~

21. Within six months of the close of the transaction, New T-Mobile shall complete its distribution of handsets that are compatible with the New T-Mobile network, and comparable to the consumer's existing handset, at rates and charges comparable for the handsets received from the program, such that the consumer does not experience a loss in service, to all active California LifeLine participants receiving cell phone services from Virgin whose handsets belong to either of the following categories:

- a. The consumer's handset was previously provided by Virgin but is incompatible with the New T-Mobile network;
- b. the consumer's "Bring Your Own Device" handset is incompatible with the New T-Mobile network