

Decision 20-11-025 November 19, 2020

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Sprint Communications Company L.P. (U5112) 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

**DECISION GRANTING IN PART AND DENYING IN PART PETITION FOR MODIFICATION OF DECISION 20-04-008**

**Summary**

We grant Joint Applicants’ request for an extension of time to comply with network deployment and performance conditions in Decision (D.) 20-04-008 and deny the other requests in the Petition for Modification.

**1. Background**

On June 23, 2020, Sprint Communications Company L.P. (Sprint) and T-Mobile USA, Inc. (T-Mobile) (collectively, Joint Applicants) filed a Petition for Modification (PFM) of D.20-04-008. In that decision, the Commission approved with conditions the acquisition of Sprint by T-Mobile. On July 22, 2020,

Communications Workers of America (CWA), The Utility Reform Network (TURN), the Public Advocates Office of the California Public Utilities Commission (Cal Advocates) and the California Emerging Technology fund (CETF) filed responses to the PFM. On August 3, 2020, with the permission of the assigned Administrative Law Judge (ALJ), Joint Applicants filed a reply to the responses. The Petition for Modification (PFM) requests the following changes to the conditions imposed on the merger by D.20-04-008:

1. The compliance date for providing 5G wireless service coverage with at least 300 Megabits per second (Mbps) download speeds to 93% of Californians in Ordering Paragraphs 4.b and 30 should be changed from "2024" to "2026".
2. Ordering Paragraph 25 should be modified to eliminate the mandate for T-Mobile to increase the number of full-time T-Mobile employees.
3. The FCC drive tests should be used to confirm that T-Mobile has met its network build obligations.

For reasons set out below, we grant request 1 and reject requests 2 and 3.

## **2. Discussion**

### **Request No. 2**

The Commission's Rules of Practice and Procedure provide two avenues by which a final decision of the Commission may be challenged, based on the type of error alleged. If a party claims that the Commission committed legal error in a decision, the appropriate path for having such an allegation considered is the filing of an Application for Rehearing (AFR).<sup>1</sup> Claims of factual error or

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<sup>1</sup> Rule 16.1(c) states in relevant part - "The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.....an application for rehearing ... is the vehicle to request rehearing and preserve a party's appellate rights."

changed circumstances may be brought forward by means of a PFM.<sup>2</sup>

Request Number 2, that the Commission rescind its order to T-Mobile to hire an additional 1,000 employees, is clearly premised on a claim of legal error, to wit, that the commission lacks the legal authority to enter such an order.<sup>3</sup> As a claim of legal error, it should have been raised in an AFR. The last date for filing an AFR was May 7, 2020. Joint Applicants did not file an AFR. Accordingly, Request No. 2 is rejected as improperly filed.<sup>4</sup>

### **Request No. 1**

We turn now to the properly filed requests for modification. Request No. 1 asks that we move the deadline for providing 300 Mbps service to at least 93% of Californians from 2024 to 2026. In support of that request, Joint Applicants state that the 2024 date was a proxy used at the beginning of the application for a date six years after completion of the merger. The merger took place in 2020; hence the request for a 2026 roll-out date.<sup>5</sup> However, as pointed out by Cal Advocates and TURN in their Response to the PFM, Joint Applicants' witnesses and exhibits filed in support of their testimony stated multiple times that T-Mobile intended to deliver the merger benefits, including the 5G rollout,

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<sup>2</sup> Rule 16.4(b) states - "A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit."

<sup>3</sup> "A requirement mandating the creation of new jobs is well outside the Commission's jurisdiction and established policy goals and is clearly premised on a "basic misconception of law."" *Joint Applicants Petition for Modification of Decision 20-04-008* at 14.

<sup>4</sup> Because we reject the request as improperly filed we do not address the comments of Communications Workers of America.

<sup>5</sup> *Ibid.* p. 7

by 2024<sup>6</sup>. In its Response to the PFM, CETF supported the request for a two-year extension of the deadline, agreeing with Joint Applicants that the 2024 date was a proxy for a date six years after closing.<sup>7</sup>

In their Reply to intervenors' comments, Joint Applicants stress that the 2024 compliance date was a last-minute addition to the Proposed Decision, appearing for the first time in the version of the Proposed Decision published one day before the Commission meeting at which D.20-04-008 was adopted by the Commission.<sup>8</sup> They state that establishing a 2026 compliance date will not slow down the rollout of T-Mobile's 5G network, it will simply conform the requirement to the six year timetable that T-Mobile has repeatedly referenced during the proceeding.<sup>9</sup>

On balance we find that T-Mobile has presented and planned for a six-year rollout of its 5G network that includes providing 300 Mbps service to at least 93% of Californians by 2026 and we will modify D.20-04-008 accordingly.

### **Request No. 3**

As part of its agreements with the Federal Communications Commission (FCC) and CETF, T-Mobile is required to verify its speed and coverage claims

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<sup>6</sup> *Response of the Public Advocates Office and The Utility Reform Network to Joint Applicants Petition for Modification of Decision 20-04-008* at 10. See also *Joint Applicants Post-Hearing Opening Brief on the Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032*, filed April 26, 2019 at 35 and *Joint Applicants Post-December 2019 Hearing Brief on the Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032*, filed December 20, 2019 at 30 "the combined network will... nearly triple 5G monthly capacity by 2024 when compared to the combined 5G capacities of the standalone networks."

<sup>7</sup> *Response of the California Emerging Technology Fund to Joint Applicants Petition for Modification of Decision 20-04-008* at 2.

<sup>8</sup> *Joint Applicants' Reply to Intervenors' Responses to Petition for Modification of Decision 20-04-008*, at 3.

<sup>9</sup> *Ibid.* at 2-6.

using the FCC drive test and to submit its data for independent third-party testing. Joint Applicants argue that adding a third, Commission-developed test (CalSPEED), is unnecessarily burdensome and redundant.<sup>10</sup> Intervenors argue that a California-specific test is appropriate to evaluate T-Mobile's compliance with California-specific conditions.<sup>11</sup>

Because the various tests use different approaches to measuring speed and coverage, it is likely that they could reach conflicting results. For example, T-Mobile might comply with the speed and coverage conditions of the decision according to the FCC drive test but fail to comply according to CalSPEED. On the other hand, as Cal Advocates and TURN point out, the Commission would only be able to compare T-Mobile's future performance with its past performance by using CalSPEED.

On balance, while we recognize that there is a possibility of conflict between state and federal performance standards, we find that the benefits of measuring T-Mobile's compliance with California-specific conditions with the CalSPEED test outweigh the possible inconvenience of having the same activity measured two different ways. While Joint Applicants raise the possibility of federal pre-emption, we see no indication in the federal proceedings of an

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<sup>10</sup> "The Decision's imposition of a new testing methodology for commitments already subject to compliance verification under the FCC Commitments is not supported by the record, is duplicative and unnecessary, and will inevitably result in regulatory uncertainty and potentially inconsistent testing results (which would raise federal preemption concerns)." *Petition for Modification* at 16.

<sup>11</sup> "It is reasonable for the Commission to use a testing methodology it developed, which is specific to California, to verify compliance with conditions that are specific to California. Furthermore, the Commission can use previous CalSPEED tests of the T-Mobile and Sprint networks to evaluate the improvements of New T-Mobile's network following the merger." *Response of the Public Advocates Office and The Utility Reform Network* at 15.

intention on the part of federal regulators to pre-empt state action in this area. Accordingly, Request No. 3 is declined.

### **3. Comments on Proposed Decision**

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Pub. Util. Code section 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were received. No reply comments were received.

### **4. Assignment of Proceeding**

Clifford Rechtschaffen is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. D.20-04-008, approving T-Mobile's acquisition of Sprint, was issued on April 16, 2020.
2. The Petition for Modification was filed within one year of the issuance of D.20-04-008.
3. The last date for filing an Application for Rehearing was May 7, 2020.
4. Joint Applicants did not file an Application for Rehearing.
5. T-Mobile has pledged to complete roll-out of its 5G network in California within six years of the date of the Commission's final approval of the merger.
6. CalSPEED testing provides Commission staff with unique information that is useful in measuring T-Mobile's compliance with its speed and coverage commitments.

### **Conclusions of Law**

1. Allegations that the Commission has committed legal error are appropriately raised in an Application for Rehearing rather than in a Petition for Modification.

2. The allegation that the Commission lacks legal authority to order T-Mobile to hire people is a claim of legal error.

**O R D E R**

**IT IS ORDERED** that:

1. T-Mobile's request to modify Decision 20-04-008 by removing therefrom the order that T-Mobile hire an additional 1,000 employees is denied as a claim of legal error that is inappropriately raised in a Petition for Modification.

2. T-Mobile's request to modify Decision 20-04-008 by removing therefrom the requirement that T-Mobile's compliance with its speed and coverage commitments shall be measured using the Commission's CalSPEED tool is denied.

3. T-Mobile's request to modify Decision 20-04-008 by extending the date for full compliance with its speed and coverage commitments to year-end 2026 is granted

4. This decision is effective immediately.

This order is effective today.

Dated November 19, 2020, at San Francisco, California.

MARYBEL BATJER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners