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by

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I. Introduction and Summary

On April 1, T-Mobile USA officially completed its acquisition of Sprint Corporation. The milestone marked the end of a two-year regulatory review process that included settlement deals with two federal agencies, negotiations with myriad state regulators, and a trial court victory in a case brought by several state attorneys general who alleged the merger violated antitrust law.

But this final chapter was not without last-minute drama. California, which played a leading role in last year's antitrust suit, had not approved the merger by the companies' self-appointed deadline. Instead, the California Public Utilities Commission (CPUC) released a proposed decision approving the merger with significant conditions, and announced it would discuss the proposal in its own time, at its April 16 meeting.[1] Rather than waiting around, the companies took action to sidestep the Commission's jurisdiction. Defying an explicit Commission order, they proceeded to complete the transaction without California's blessing.

This article assesses the strength of the companies' claims to proceed without waiting for the California Commission's decision, and it concludes that the Commission may face an uphill battle in light of Ninth Circuit precedent. If California loses a confrontation with T-Mobile and Sprint in court over the extent of the CPUC's merger review authority, the state likely will have overplayed its hand, jeopardizing its future review of wireless mergers. And, significantly, such a decision may well impact the extent of other states' merger review authority as well.

On the wireline side, Sprint shifted from traditional telephone service to Voice-over-Internet-Protocol (VoIP) and other IP-enabled services. Although the regulatory status of VoIP service in California is uncertain, the companies are likely correct that they do not require Commission oversight to merge their IP-based wireline operations. If so, this IP transition has denied the Commission its strongest jurisdictional hook upon which to review the Sprint/T-Mobile merger.

The resulting showdown raises an important question that courts have not yet definitively answered: to what extent has Congress preempted state regulation of wireless mergers? Section 332 of the Communications Act prohibits states from regulating wireless rates or entry, though it preserves state regulatory authority over "other terms and conditions." For over a quarter-century, state public utility regulators and wireless companies have bargained in the shadow of the law, negotiating merger approvals subject to conditions rather than testing the limit of state authority.

This article argues that if California presses the issue, courts are likely to find state review of wireless mergers constitutes improper regulation of entry. "Licensing has long been recognized as the FCC's core tool in the regulation of market entry."[2] By evaluating the public benefits of the merger, the Commission purports to reassess the FCC's conclusion that the transfer of Sprint's licenses to T-Mobile, under the conditions established by federal authorities, serves the public interest. In other circumstances, the Ninth Circuit has explained that a re-examination of this conclusion "under state law is preempted either by § 332 or by the ordinary principles of conflict preemption."[3] This is especially true here, where the California Commission's proposed conditions include explicit mandates regarding 5G buildout and rates, which improperly invade the exclusive province of the federal government.

California remains free to apply consumer protection and other measures to New T-Mobile, just as it can to other wireless providers in the state. But it may not dictate the terms upon which New T-Mobile may begin offering services in the California market.

II. The Sprint/T-Mobile Merger's Journey Through the California Public Utilities Commission

Like most states, California regulates mergers between telecommunications providers operating within the state. Section 854 of the California Public Utilities Code provides that "[n]o person or corporation…shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the [California Public Utilities C]ommission."[4] This includes telephone corporations, meaning any company owning a telephone line for profit in the state.[5] For mergers involving companies with over $500 million in annual gross revenue, the law lays out specific findings the Commission must make to approve a transaction, including that the merger provides short-term and long-term benefits to ratepayers, does not adversely affect competition, and serves the public interest as defined in the statute.[6] Any merger or acquisition completed without the Commission's "prior authorization shall be void and of no effect."[7]

Pursuant to that law, the companies filed an application seeking Commission approval of T-Mobile's acquisition of Sprint's wireline assets in California. Sprint holds a certificate of public convenience and necessity to provide CLEC and interexchange service to enterprise and carrier customers, and it conceded the need for Commission approval to transfer these assets to T-Mobile.[8] The companies also filed a Notification of Transfer of Control of Sprint's wireless assets, which they argued was not subject to formal Commission approval.[9] Over the companies' objection, the Commission consolidated the two applications into a single proceeding.

After nearly two years of hearings, an administrative law judge issued a proposed decision on March 11, 2020, approving the transaction subject to numerous conditions.[10] These conditions, which go above and beyond the significant concessions included in the companies' settlement with the Justice Department and the Federal Communications Commission, include:

- 5G buildout requirements with milestones for 2023, 2026, and 2030, with the goal of providing 99% of California residents and 90% of California rural residents with at least 100 Mbps download speeds;
- In-home broadband service obligations wherever 5G service is available, including buildout milestones and a requirement that such service be "priced substantially less than other available in-home broadband service, with no contract, no equipment charges, no installation charges, and no surprises";
- A requirement to provide permanent 5G service to ten county fairgrounds in rural areas;
- Significant in-state Lifeline commitments;
- A net increase of at least 1,000 full-time or full-time equivalent employees in California in three years; and
- Diversity requirements for the company's board of directors, continuation of the company's VP-level Diversity and Inclusion Office, and increases in diverse supplier spending (such as use of minority-owned banks, accounting, financial, and legal service firms).

Despite the companies' repeated goal of completing the transaction by April 1, the Commission announced it would not vote on the Proposed Decision until its April 16 meeting.

To avoid delaying the transaction—and to dodge conditions to which they did not voluntarily consent—the companies took what some have described as the "nuclear" option of sidestepping Commission jurisdiction entirely.[11] On March 30, Sprint relinquished the certificate of public convenience and necessity regarding its California wireline assets. The company explained that it its wireline business has transitioned from traditional TDM telephone service to unregulated VoIP service, meaning it is no longer a public utility subject to Section 854. The companies then withdrew their application to approve the transfer of Sprint's wireline assets on March 31,[12] announcing their intent to merge the following day.

The California Commission ordered T-Mobile and Sprint not to complete the transaction before the Commission rules on the proposed decision.[13] Despite this admonition, the companies closed the merger on time, although in a subsequent ex parte communication they agreed to refrain from combining their California operations until after the Commission's April 16 meeting.

III. **Sprint's VoIP Wireline Gambit**

The transition of Sprint's wireline assets to VoIP service undercuts the California Commission's strongest jurisdictional claim over the merger. Unlike traditional telephone providers, California VoIP providers are not required to hold a certificate of public convenience and necessity. Because the company is no longer a public utility, Sprint argues, Commission review is no longer required under California law. In a similar situation last year involving the transfer of a company that converted to VoIP service while its merger application was pending, the Commission granted the applicant's request to withdraw its CPCN, and then dismissed the application because the company no longer held a license for local exchange or interexchange service in California.[14]

In Sprint's case, this argument is muddied by the uncertain regulatory status of California VoIP providers. Section 710 of the California Public Utilities Code prevents the Commission from regulating VoIP or IP-enabled services.[15] Instead, the Commission requires VoIP providers simply to register with the agency (primarily to enforce VoIP universal service obligations).[16] While this provision would presumably preclude Commission review of VoIP mergers, this argument is complicated by the fact that Section 710 contained a sunset provision effective January 1, 2020. A bill to extend the sunset date failed to pass the California legislature last year, leaving California VoIP providers in regulatory limbo.

To bolster its position, Sprint also argues that federal law preempts the California Commission's review. The FCC has long held that mixed-use special access lines fall under federal, not state, jurisdiction if at least 10% of their traffic is interstate.[17] The California Public Utilities Commission has agreed, noting that "[i]f a special access line has over 10% interstate traffic, it is considered an interstate facility, and therefore falls under federal jurisdiction. At present, most special access lines in California are so classified."[18] Sprint's wireline data services are offered primarily to national or global customers, and the company represents that its wireline assets meet the 10 percent threshold. The company also argues that VoIP and its other data services are "information services" that the FCC has preempted from state regulation. Sprint is correct that an Eighth Circuit decision recently held that fixed-VoIP service is preempted from state regulation,[19] though it is worth noting that the D.C. Circuit's recent decision in the net neutrality case may have undermined that conclusion.[20] Overall, however, the weight of both federal and state authority suggest that the transition to IP-based services, including VoIP, likely places the wireline transaction beyond the state commission's purview.

IV. **The Wireless Question: Can the Commission Regulate Wireless Mergers?**

Of course, Sprint's wireline assets were always ancillary, serving primarily as a convenient jurisdictional hook for the Commission to review the merger's impact on wireless markets. The bulk of the Commission's proposed decision, and virtually all of its conditions, address the companies' wireless operations. By combining the two proceedings, the Commission could use its clear authority over Sprint's wireline assets to compel changes to New T-Mobile's wireless business. The companies consistently argued that this was improper, that it was obligated only to notify the Commission of the wireless transaction, and that federal law preempted the Commission from imposing any wireless conditions to which the company did not voluntarily agree. With the wireline approval now moot, the question is cleanly presented: what authority, if any, does the Commission have to review wireless mergers?

Since 1993, the Communications Act has circumscribed state regulation of wireless telephony to a greater extent than traditional wireline service. With few exceptions, state regulators are prohibited from regulating "the entry of or the rates charged by any…mobile service."[21] But this restriction does not preempt states from regulating "other terms and conditions" of mobile service.[22] When read together, these two clauses "create separate spheres of responsibility, one exclusively federal and the other allowing concurrent state and federal regulation."[23]

The CPUC's Proposed Decision asserts that merger authority is within the sphere of concurrent authority. To support his argument, it relies on a 1995 California Public Utilities Commission decision, D. 95-10-032.[24] That 1995 decision found as a conclusion of law that "[t]he transfer of ownership interests in a CMRS entity is not tantamount to entry, and Commission jurisdiction over such transactions is not preempted under the federal legislation."[25] The 1995 decision, in turn, cited a 1993 House Budget Committee report listing "transfers of control" among the "other terms and conditions" that Congress intended the bill to preserve from federal preemption.[26]

Sprint and T-Mobile argue, credibly, that the current Proposed Decision misinterprets its 1995 precedent. The 1995 decision goes on to conclude that "Even though the Commission's jurisdiction over …transfers of ownership…is not preempted, the Commission should forbear from exercising such authority" over wireless providers, in order to "promote a more competitive marketplace."[27] Therefore it ordered that "[a]ll [wireless] providers are hereby exempted from compliance with … §§ 851-856 relating to transfers of ownership and transfer or encumbrance of [wireless] assets," except that certain transactions may require "advance notice" to the Commission.[28] A 2005 decision reiterated that "in D.95-10-032…the Commission held that § 854 should not apply to wireless entities."[29] As a matter of state law, therefore, wireless transactions are exempt from review, which is why Sprint and T-Mobile styled their wireless filing as simply a Notification rather than an Application for Approval.

But assuming for the sake of argument that the CPUC Proposed Decision correctly interpreted state law, the California Commission's review of wireless mergers is likely preempted by Section 332. The preemption clause sweeps broadly: it provides that "*no* State or local government shall have *any* authority to regulate the entry of or the rates charged" by wireless providers.[30] The "other terms and conditions" savings clause must be interpreted in the context of this preemption clause: whatever state authority the savings clause preserves, it cannot allow states to regulate entry or rates, which remain the exclusive province of the FCC.

By claiming the power to prohibit the transfer of wireless licenses, the Commission is plainly interfering with federal regulation of entry. As the Ninth Circuit has explained, ""[l]icensing has long been recognized as the FCC's core tool in the regulation of market entry."[31] "Such licensing directly involves agency determinations of public interest, safety, efficiency, and adequate competition, all inquiries specially within the expertise of the FCC."[32] This includes the FCC's authority to review and approve license transfers in connection with a merger application. Under Section 310(d), no wireless license may be transferred unless the FCC finds that the public interest, convenience, and necessity will be served thereby.[33]

The FCC conducted a thorough review of the Sprint/T-Mobile merger and attached several conditions before it was satisfied that the combination served the public interest.[34] In its Proposed Decision, the California Public Utilities Commission purports to reexamine that conclusion, weighing the arguments for and against the merger to determine *de novo* whether there is a "net public benefit to the proposed transaction."[35] Facing a similar state law challenge to a wireless merger in *Shroyer v. New Cingular Wireless*, the Ninth Circuit explained that state law cannot mandate a second "assessment of the public benefit of the merger. That determination has already been made by the FCC, and reexamination of that issue under state law is preempted either by § 332 or by the ordinary principles of conflict preemption."[36]

That does not mean state regulators have no voice in the merger approval process. Federal and state regulators have different perspectives. It is possible that a merger may serve the public interest of the nation as a whole, and yet might prove a net burden on Californians. But the proper vehicle for these concerns is for the Commission to file comments in the FCC proceeding, so the FCC can factor them into its own public interest calculus. But ultimately, Section 332 should be understood to prohibit states from enacting their own veto gates in national wireless mergers. Otherwise a state can hold the national public interest hostage to its own parochial interests.

A brief glance at the conditions the Commission has attached to its Proposed Decision illustrates the ways it is attempting to regulate *both* wireless rates and entry. As noted above, these conditions include specific milestones for deployment of New T-Mobile's next-generation 5G network, including buildout requirements for both the state as a whole and rural areas in particular. The Proposed Decision also requires the new company to provide in-home broadband service wherever 5G service is deployed. In *Bastien v AT&T Wireless Services*, the Seventh Circuit has held that whatever else "entry" might mean under Section 332, it includes state laws that affect "the modes and conditions under which" a wireless service "may begin offering services in the…market."[37]

Moreover, the Proposed Decision explicitly requires New T-Mobile to include among its in-home broadband offerings "an affordable plan offering that is priced substantially less than other available in-home broadband service, with no contract, no equipment charges, no installation charges, and no surprises."[38] The Commission would be hard-pressed to argue this condition is not an impermissible regulation of a wireless service rate.

Given this clear statutory language, the scant legislative history upon which the California Commission relies cannot support the state's position. Rejecting the House Report's explication of "other terms and conditions" in a similar context, the *Bastien* court noted that "the legislative history regarding the meaning of this phrase was unnecessary and not particularly authoritative since it reflected only the views of one chamber of Congress."[39] Admittedly, both the FCC and federal courts have relied on other portions of this passage to define "other terms and conditions" in cases where jurisdictional boundary was less clear. But "even so reliable a source as the

Conference Committee Report may be used only when there is a genuine ambiguity in the statute."[40] As in *Bastien*, one need not rely on the legislative history of the ambiguous phrase "other terms and conditions" because the clear meaning of "entry" adequately resolves the issue here.

Nor can the Commission lean on the argument that reviewing the Sprint/T-Mobile merger does not impermissibly regulate "entry" because both companies already offer wireless service in California.[41] As an initial matter, this argument ignores the role of DISH Network, which will enter the wireless market as a result of the merger. More generally, Section 332 does not parse preemption so finely. As noted above, the statute sweeps broadly, prohibiting any state regulation of entry of *any* wireless provider—not just those wireless providers who are new to the state. Notably, the Ninth Circuit's *Shroyer* case, referenced above, found that Section 332 preempted a state claim that would have impermissibly regulated entry, in a case involving the merger of two wireless companies already doing business in the state.[42]

V. Conclusion

Of course, the analysis above does not mean that the California Public Utilities Commission lacks jurisdiction to regulate New T-Mobile. Under Section 332, the Commission remains free to apply consumer protection and other measures to New T-Mobile, just as it can to other wireless providers in the state, as long as those measures do not impermissibly have the effect of regulating rates or entry.

But Section 332 likely prohibits the Commission from reexamining whether the merger serves the public interest. By passing judgment on the merits of the merger, the Commission impermissibly regulates the entry of both New T-Mobile and DISH Network and treads on regulatory decisions that are the exclusive province of the FCC. This is especially true where, as here, the Commission seeks to use merger review as leverage to impose 5G entry conditions and rate regulations that it could not directly impose under its residual Section 332 authority to regulate "other terms and conditions."

Ultimately, the present dispute may prove little more than a tempest in a teapot that could dissipate at the California Commission's April 16 meeting. T-Mobile has agreed to numerous voluntary concessions that, taken together, come close to meeting the conditions demanded in the Proposed Decision. And given the difficulty of unwinding a completed transaction, California may choose not to sue to vindicate the review authority that it claims. But if it does, the analysis above suggests the Commission may face an uphill battle in light of Ninth Circuit precedent.

T-Mobile called the Commission's bluff. Whether California backs down or takes T-Mobile to court, the state likely overplayed its hand, jeopardizing future review of wireless mergers – not just for itself, but all other states as well. And of all the twists and turns in the two-year T-Mobile/Sprint merger saga, this last might prove to be its most significant.

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[1] See Proposed Decision of ALJ Bemesderfer, A 18-07-011 (Cal. Pub. Util. Comm'n, issued March 11, 2020) (hereafter "Proposed Decision"), available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M329/K143/329143336.PDF.
[2] Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1008 (9th Cir. 2010).
[3] Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035, 1041 (9th Cir 2010).
[4] Cal. Pub. Util. § 854.
[5] Id. §§ 216, 234(a).
[6] Id. § 854.
[7] Id.
[8] See 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, filed 7/13/18, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M217/K974/217974028.PDF.
[9] See Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032, A. 18-07-012, filed 7/13/18, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M217/K574/217574855.PDF.
[10] Proposed Decision, supra note 1.
[11] Credit here goes to Steve Blum of Tellus Venture Associates, who described the companies' gambit as going nuclear, and who has chronicled the Commission's deliberations in depth throughout the case. See *T-Mobile Goes Nuclear in California, Preps to Close Sprint Deal Without CPUC's Blessing*, Mar. 31, 2020, available at https://www.tellusventure.com/blog/t-mobile-goes-nuclear-in-california-preps-to-close-sprint-deal-without-cpucs-blessing/.
[12] See Motion of Joint Applicants to Withdraw Wireline Application, A. 18-07-011, filed 3/31/20, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M330/K052/330052508.PDF.
[13] See Assigned Commissioner's Ruling, A. 18-07-011, dated 4/1/20, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M331/K082/331082151.PDF.
[14] See Decision Dismissing Transfer of Control Application and Assessing Penalties, D. 19-12-088 (Dec. 13, 2019), available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M322/K156/322156895.PDF. Notably, the Commission assessed a penalty on the companies for completing the transaction before the Commission's review was complete.
[15] Cal. Pub. Util. Code § 710.
[16] See id. § 285.
[17] See, e.g., MTS and WATS Market Structure, Amendment of Part 36 of the Communications Rules and Establishment of a Joint Board, 4 FCC Rcd. 5660, 5660-61 ¶ 1 (1989); Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 9173 ¶ 778 (1997); Federal-State Joint Board on Universal Service et al., 32 FCC Rcd. 2140, 2141–42, 2145 ¶¶ 4, 11-13 (FCC Wireline Comp. Bur. 2017).
[18] Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, & to Consider & Resolve Questions raised in the Ltd. Rehearing of Decision 08-09-042, D. 16-12-025, at 159 n.409 (Dec. 1, 2016).
[19] Charter Advanced Servs. (MN), LLC v. Lange, 903 F.3d 715, 717-20 (8th Cir. 2018).
[20] Specifically, the Eighth Circuit in *Charter* found that because VoIP is an information service, state VoIP regulation is preempted by the Federal Communications Commission's long-time policy of nonregulation of information services. See *Charter*, 903 F.3d at 719. In *Mozilla v. FCC*, the D.C. Circuit found that this federal policy is insufficient to support the FCC's express preemption of all broadband network management practices inconsistent with its Restoring Internet Freedom Order. Mozilla v. Federal Communications Commission, 940 F.3d 1, 78 (2019). Justice Thomas noted this potential problem in an opinion concurring with denial of certiorari in the *Charter* case. See Lipschultz v. Charter Advanced Services (MN), LLC, 140 S.Ct. 6, 7 (2019) (Thomas, J., concurring in denial of certiorari).
[21] 47 U.S.C. § 332(c)(3)(A).

[22] Id.
[23] Bastien v. AT&T Wireless Services, Inc, 205 F.3d 983,988 (7th Cir. 2000).
[24] Investigation into Mobile Telephone Service, D. 95-10-032.
[25] Proposed Decision, supra note 1, at 3 n.3 (quoting *Investigation into Mobile Telephone Service*, D. 95-10-032, conclusions of law no. 9).
[26] Investigation into Mobile Telephone Service, D. 95-10-032 ("The legislative history of the Budget Act explicitly includes transfers of ownership as an example of 'other terms and conditions' over which states still retain the authority to regulate."; see also Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications (D. 98-07-037) (same).
[27] Investigation into Mobile Telephone Service, D. 95-10-032 (conclusions of law 15, 16).
[28] Id. (ordering paragraph 3).
[29] In re Lynch Telephone Corp. XI, D. 05-05-014, at 5 n.7; see also id. at 5 ("The transfer of COTC's other assets and operations, including its wireless assets and operations, is not subject to § 854(a).").
[30] 47 U.S.C. § 332(a)(1)(C) (emphasis added).
[31] Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1008 (9th Cir. 2010).
[32] Id.
[33] 47 U.S.C. § 310(d).
[34] In re Applications of T-Mobile U.S. Inc. and Sprint Corporation, FCC 19-103 (Nov. 5, 2019), available at https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf.
[35] Proposed Decision at 31.
[36] Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035, 1041 (9th Cir 2010).
[37] Bastien, 205 F.3d at 989.
[38] Proposed Decision at 44.
[39] Bastien, 205 F.3d at 989.
[40] Id.
[41] See Investigation on the Commission’s Own Motion into Mobile Telephone Service and Wireless Communications, D. 98-07-037 ("It appears to us that a transfer of ownership (or "transfer of control") over an existing firm, by definition, occurs after entry, after there is an already established right to provide service. Therefore, limitations on transfers of control are not intended to limit the number of market entrants.")
[42] *Shroyer*, 622 F.3d at 1041.