

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Application of )  
 )  
T-Mobile US, Inc., and ) WT Docket No. 18-197  
Sprint Corporation )  
 )  
For Consent to Transfer Control of )  
Licenses and Authorizations )

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

Union Telephone Company, dba Union Wireless (“Union”) and Cellular Network Partnership, an Oklahoma Limited Partnership, dba Pioneer Cellular (“Pioneer”) (collectively, the “Petitioners”), by counsel and pursuant to § 1.106(h) of the Commission’s rules (“Rules”), hereby file this reply to the opposition to our petition for reconsideration (“Petition”), filed by T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”) (collectively, the “Applicants”) in the above-captioned proceeding.<sup>1</sup> As shown below, the Applicants fail to rebut Petitioners’ central argument: The Commission has not yet fulfilled its mandate to protect the public interest by ensuring that the Applicants’ commitment to serve rural areas will actually extend to areas that the Commission has traditionally defined as rural.

DISCUSSION

I. THE COMMISSION SHOULD REVISE THE DEFINITION OF “RURAL AREAS.”

In criticizing our proposed definition of “rural areas,” the Opposition fails to address the

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<sup>1</sup> Opposition of T-Mobile US, Inc. and Sprint Corporation to Union Wireless and Pioneer Petition for Reconsideration, WT Docket No. 18-197 (filed Dec. 16, 2019) (“Opposition”).

fact that the *Order*<sup>2</sup> does not analyze whether the rural 5G network conditions will actually result in 5G deployment in rural America.<sup>3</sup> By accepting T-Mobile’s 2010 U.S. Census definition (“Census definition”) of rural areas, the Commission will enable New T-Mobile to minimize its 5G investment in more sparsely populated rural areas where the digital divide has the most serious impact. Because the *Order* lacks any analysis showing that use of the Census definition will require T-Mobile to invest in 5G networks in areas that actually comprise rural America, the Commission should reconsider its reliance on the Census definition.

The Applicants argue that “Petitioners offer no persuasive reason ... for why their preferred definition must be controlling here[,]”<sup>4</sup> that the Commission has provided a reasonable explanation for its use of the Census definition, and that “the Commission reasonably rejected an alternative definition of rural areas similar to the one Petitioners now propose.”<sup>5</sup>

We agree that our definition need not control. It matters not which definition the Commission uses, but it must not use the wrong definition. In light of the Commission’s intent that the rural 5G network conditions should help close the digital divide, it should use a “rural areas” definition that ensures that the Applicants’ 5G network deployments are made where that divide

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<sup>2</sup> *Applications of T-Mobile US, Inc., and Sprint Corporation, for Consent to Transfer Control of Licenses and Authorizations, et al.*, WT Docket No. 18-197, *et al.*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, FCC 19-103 (rel. Nov. 5, 2019) (“*Order*”).

<sup>3</sup> That is, the Commission does not establish that the conditions will produce any significant 5G deployment in more sparsely populated areas with infrastructure gaps and shortcomings, with a lack of wired broadband access, and with greater distances from health care providers and educational opportunities. *See Order* at ¶¶ 268-269.

<sup>4</sup> Opposition at 5 (emphasis in original). The Petitioners suggest that the Commission (as it has done before) should define a “rural area” as one with a population density of 100 people per square mile or less. Petition at 15-16.

<sup>5</sup> Opposition at 6.

actually exists.<sup>6</sup> Applicants' self-definition of that is "rural" raises a substantial and material question of fact:

whether the Applicants, in complying with the rural 5G network conditions imposed in the *Order*, will in fact, and as intended by the Commission, (1) deploy 5G services in a manner that will further the Commission's goal of closing the digital divide; and (2) provide in-home broadband service in sparsely populated rural areas.<sup>7</sup>

The Applicants' suggestion that the Commission made a reasonable choice in using the Census definition of "rural areas" ignores the demonstration made in the Petition that the expansive Census definition would result in New T-Mobile's likely being able to meet the Commission's rural 5G network conditions—either completely or substantially—"without making any significant deployments in more sparsely populated rural areas" that are on the wrong side of the digital divide.<sup>8</sup> Unless the Commission abandons its reliance on the Census definition of "rural areas," the conditions will do little to close the digital divide.<sup>9</sup>

The Applicants incorrectly assert that the Commission has already rejected an alternative definition similar to our proposal,<sup>10</sup> ignoring the fact that there is an unresolved tension in the

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<sup>6</sup> In discussing the digital divide, the Commission points to rural areas in which there are gaps or shortcomings in local broadband infrastructure, there are fewer wired broadband options, and there is a need for telehealth and distance learning services. *Order* at ¶¶ 268-269.

<sup>7</sup> Petition at 6.

<sup>8</sup> *Id.* at 12 (emphasis in original).

<sup>9</sup> The Petitioners explain that the Commission intends the conditions to close the digital divide in more sparsely populated areas with infrastructure gaps and shortcomings, *id.* at 7, but that use of the Census definition would enable the Applicants to comply with the conditions by deploying 5G broadband in more heavily populated areas, thus having little impact on economic development, education and health care facilities located in areas that need investment. *Id.* at 12, 14 & Attachment (showing impact of the Census definition in the Dallas, Texas, area).

<sup>10</sup> Opposition at 6 (citing the Commission's discussion of a letter filed by the Rural Wireless Association ("RWA")). RWA did not propose any specific definition of "rural areas" in its filing, but it did argue that the Applicants, in connection with their rural 5G deployment plans, have overestimated the U.S.

*Order* that warrants reconsideration and further action.<sup>11</sup> Specifically, the Commission explains that it intends the rural 5G network conditions to help close the digital divide,<sup>12</sup> but it adopts a definition of “rural areas” that significantly undermines this intent.<sup>13</sup> The Petition points out this problem, and suggests a solution: The Commission should use a definition of “rural areas,” which it previously has used, that is tailored to ensure that the Applicants will deploy 5G networks in sparsely populated rural areas.<sup>14</sup> Given the Applicants’ failure to address either the problem identified, or the solution proposed, in the Petition, there is no basis for the Opposition’s conclusion that our argument regarding the “rural area” definition “wholly lacks merit.”<sup>15</sup>

There also is no basis for the Applicants’ claim that the Petitioners are raising “speculative concerns” regarding the Commission’s in-home broadband conditions.<sup>16</sup> The Applicants’ reliance on the Commission’s finding that these conditions “will be particularly significant for rural areas”<sup>17</sup> misses the point. As we explain, there is a substantial and material question of fact concerning whether the Commission is correct in assuming that its conditions will bring benefits “to consumers who today have limited choice for broadband access—or no broadband access at all.”<sup>18</sup> We demonstrate that the Commission’s use of the Census definition of “rural areas” will

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rural population. Letter from Caressa D. Bennet, General Counsel, RWA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (filed May 30, 2019), at 3.

<sup>11</sup> *See, e.g.*, Petition at 8-10.

<sup>12</sup> *See Order* at ¶ 269.

<sup>13</sup> *See, e.g.*, Petition at 12.

<sup>14</sup> *See id.* at 14-18.

<sup>15</sup> Opposition at 5.

<sup>16</sup> *Id.* at 6 n.31.

<sup>17</sup> *Order* at ¶ 384, *quoted in* Opposition at 6 n.31.

<sup>18</sup> *Id.* at ¶ 283, *quoted in* Petition at 13.

enable New T-Mobile “to meet the in-home broadband conditions by focusing on deployments in more heavily populated areas that nonetheless are considered ‘rural’ under the definition,”<sup>19</sup> thus undercutting the Commission’s goal of closing the digital divide.

## II. THE COMMISSION SHOULD ADOPT ROAMING-RELATED CONDITIONS.

The Applicants assert that the Petitioners’ advocacy for roaming-related conditions should be rejected because the *Order* explains that the Applicants are already subject to roaming requirements under the Rules.<sup>20</sup> If the Applicants were sitting on the small rural carriers’ side of the table, they would be less confident in asserting that the Commission’s roaming rules will be an effective shield protecting these small carriers’ roaming arrangements in the new world of a mobile wireless market dominated by three nationwide carriers. The Applicants offer no explanation in their Opposition regarding exactly how the Rules will be successful in curbing New T-Mobile’s incentives to exercise its market power to the detriment of small rural roaming partners.

The Applicants also argue that our concerns are blunted by the fact that “the Applicants have committed to maintain or extend roaming agreements with small rural carriers on commercially reasonable terms.”<sup>21</sup> This is another way of saying that a tiger can change its stripes. As we have explained, the reality is that “New T-Mobile will have little if any incentive to maintain or extend roaming agreements with small rural carriers on commercially reasonable terms.”<sup>22</sup>

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<sup>19</sup> Petition at 14.

<sup>20</sup> Opposition at 7 (citing *Order* at ¶ 297).

<sup>21</sup> *Id.* at 7 n.33.

<sup>22</sup> Petition at 20. The Applicants also argue that New T-Mobile’s offering to serve as a preferred roaming partner for small rural carriers will alleviate any concerns that the proposed merger transaction will pose a threat to these carriers’ roaming arrangements. Opposition at 7 n.33. We have previously

Finally, the Applicants argue against reconsideration because of the Commission’s “well-reasoned” conclusion that conditions “proposed by commenters are not narrowly tailored to remedy purported harms arising out of this transaction.”<sup>23</sup> This assertion overlooks our explanation that the merger of T-Mobile and Sprint is not a run-of-the-mill transaction,<sup>24</sup> but rather is a unique event that will significantly impact an existential aspect of small rural carriers’ business.<sup>25</sup> It is not every day that the Commission acts to reduce a nationwide market to three large competitors. The roaming-related conditions we advocate are tailored to ensure that, in the wake of this extraordinary event, there is some degree of protection for rural consumers who depend on small rural carriers to provide a competitive option for mobile voice and broadband services.

The circumstances described above warrant reconsideration, especially since there is strong precedent supporting Commission action, in the context of its review of proposed merger transactions, to help small rural carriers provide roaming to their customers.<sup>26</sup>

### III. PETITIONERS WERE NOT AFFORDED A MEANINGFUL OPPORTUNITY TO PRESENT ARGUMENTS AS REQUIRED BY DUE PROCESS.

The Applicants contend that our Petition should be dismissed by the Commission as defective under § 1.106(c) of the Rules, essentially because we did not take advantage of an opportunity to present our arguments with respect to the so-called “T-Mobile/Sprint May 20, 2019

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documented the flaws in assuming the likelihood that preferred roaming partner arrangements will provide any benefits to small rural carriers. See Petition at 21-22.

<sup>23</sup> Opposition at 7 (footnote omitted).

<sup>24</sup> Petition at 20.

<sup>25</sup> *Id.* at 19 n.54.

<sup>26</sup> See *id.* at 23 n.70 (citing *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd. 17444, 17524 (2008)).

Commitments Letter”<sup>27</sup> prior to the issuance of the *Order*. We submit that the Commission did not afford us the requisite “meaningful opportunity” to respond to the T-Mobile/Sprint Commitments Letter in a timely fashion. *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 632 (D.C. Cir. 1978).

The Applicants’ procedural argument boils down to the following:

Petitioners need not have waited for a special invitation to comment on the May 20 [T-Mobile/Sprint Commitments Letter]. The record was open and the Commission’s rules expressly provide that participants in a permit-but-disclose proceeding, such as this, may supplement the record by providing oral and written *ex parte* Presentations. Indeed, as Petitioners concede, a number of parties did in fact file *ex parte* presentations that specifically addressed the Applicants’ May 20 filing. Petitioners could have presented their argument as well, but did not.<sup>28</sup>

The Applicants ignore that Petitioners were parties in interest that filed a petition to deny the Sprint/T-Mobile merger applications and, therefore, this proceeding was governed by § 309(d) of the Communications Act of 1934, as amended (“Act”). The statutorily prescribed process for the Commission’s factual evaluation of our petition to deny “embodies three separate determination, which ... are quite distinct.” *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (Scalia, J.). The second determination that the Commission must make is

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<sup>27</sup> Opposition at 3 n.12.

<sup>28</sup> Petition at 4 (footnotes omitted). In other words, the Applicants claim that Petitioners should have ignored all the Commission’s procedural rules and simply handed our substantive comments on the T-Mobile/Sprint Commitments Letter to Commission decision-makers during an *ex parte* meeting. That is the only way a written *ex parte* presentation can be made in a permit-but-disclose proceeding. See 47 C.F.R. § 1.1206(b)(2) (“Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and, accordingly must be filed consistent with the provisions of this section”). Had we simply labeled our comments on the T-Mobile/Sprint Commitments Letter as an “*ex parte*,” and submitted them via the ECFS filing system, the written presentation would not have been an *ex parte* presentation since the comments would have been served on the parties to the proceeding. See 47 C.F.R. § 1.1202(b)(1) (a written *ex parte* presentation is a written presentation that “is not served on the parties to the proceeding”).

“whether ‘on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,’ ‘a substantial and material question of fact is presented.’” *Id.* (quoting 47 U.S.C. § 309(d)(2)). The Act does not permit the Commission to make the second statutorily prescribed determination on the basis of *ex parte* presentations.<sup>29</sup>

The Act “expressly permits” the Commission to request further information from an applicant, and the facts generated become part of the application or are facts that the Commission may notice officially. *Bilingual*, 595 F.2d at 630 nn.34, 36. However, if the Commission is to consider the facts it has elicited, it must notify petitioners of the “proper procedures and timing” for responding to the applicant’s submissions. *Id.* The *Bilingual* Court spelled out the notice and opportunity to be heard requirement:

This is not to say, of course, that 15 days is necessarily too brief a span to allow for responsive submissions by petitioners. The point, rather, is that petitioners must be informed as to when subsequent pleadings must be received by the Commission if they are to be considered in its decision. The FCC must, if it has not already done so, adopt procedures that will afford petitioners ... reasonable time in which to comment on or rebut newly submitted evidence as well as reasonable notice of what the applicable deadlines are. Only under such procedures can petitioning groups be assured the meaningful opportunity to participate mandated by our decisions....<sup>30</sup>

Prior to the submission of the T-Mobile/Sprint Commitments Letter, the Commission twice provided the public with the requisite notice for responding to significant additional information

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<sup>29</sup> Under § 1.1208 of the Rules, this proceeding should have been a restricted proceeding in which *ex parte* presentations were prohibited. See 47 C.F.R. § 1.1208(a). Of course, the Commission no longer enforces the prohibition and treats every Title III application as a permit-but-disclose proceeding. See, e.g., *Commission Opens Docket for Proposed Transfer of Control of Sprint Corp. to T-Mobile US, Inc.*, 33 FCC Rcd. 6046, 6046 (WTB 2018).

<sup>30</sup> *Bilingual*, 595 F.2d at 632 (footnote omitted).

submitted by the Applicants.<sup>31</sup> When it announced its deadlines, the Commission stated:

When applicants have made substantial new submissions in support of their transactions after their initial applications, the Commission typically has sought additional comment from the public .... Doing so ensures that the public interest in a speedy review is balanced with the public interest in careful and thorough analysis and the need for third parties to comment on material information submitted by the applicants.<sup>32</sup>

Having announced that it would provide notice of substantial new submissions by the Applicants, and that it would establish deadlines for submitting comments on such submissions, the Commission “created a reasonable expectation in the parties to the proceeding that such notice will be received.” *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Petitioners were entitled to rely on the Commission’s assurance that, if it determined that the T-Mobile/Sprint Commitments Letter was significant and would be considered, we would be notified of the deadline by which we could submit comments on the letter. *See id.* (“there appears no compelling reason why a party ought not to rely on this assurance of notice”).

The Commission obviously found the T-Mobile/Sprint Commitments Letter to be decisionally significant, and it considered the merits of the Applicants’ commitments in reaching its decision on our petition to deny. *See, e.g., Order* at ¶¶ 25-32. By arbitrarily failing to adhere to its announced procedure of notifying the public that it considered the Applicants’ commitments to be significant and establishing a deadline for comments, the Commission denied us our due

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<sup>31</sup> *See Commission Announces Receipt of Supplemental Analysis from T-Mobile; Establishes Comment Deadline*, 33 FCC Rcd. 11157, 11157-58 (WTB 2018) (“*Comment Deadline PN I*”); *Commission Announces Receipt of Additional Analysis and Information from T-Mobile and Sprint; Establishes Comment Deadline*, 34 FCC Rcd. 1122, 1122-23 (WTB 2019) (“*Comment Deadline PN II*”).

<sup>32</sup> *Comment Deadline PN I*, 33 FCC Rcd. at 11158 (footnote omitted); *Comment Deadline PN II*, 34 FCC Rcd. at 1123 (footnote omitted).

process right to a meaningful “opportunity to present” our comments on the commitments prior to the issuance of the *Order*. 47 C.F.R. § 1.106(b)(2)(ii). The Commission’s failure to provide us with the requisite opportunity to present our arguments arbitrarily departed from its past practice in this very proceeding. It would be an abuse of discretion for the Commission to reject our petition for reconsideration on the ground of untimeliness under § 1.106(c) of the Rules. *See Gardner*, 530 F.2d at 1091-92.

### CONCLUSION

The Petitioners respectfully request the Commission to reject the Applicants’ arguments, grant the Petition for Reconsideration, take the actions advocated in the Petition, and either resolve the substantial and material questions of fact presented in the Petition or hold an evidentiary hearing.

Respectfully submitted,

By: 

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December 23, 2019

**CERTIFICATE OF SERVICE**

## CERTIFICATE OF SERVICE

I, David A. LaFuria, certify that on December 23, 2019, a copy of the Reply to Opposition to Petition for Reconsideration attached hereto was sent via US Postal Service mail to the following:

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