ATTACHMENT 5

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, for Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).	**Application 18-07-011** **(Filed July 13, 2018)**
And Related Matters.	**Application 18-07-012**

OPINION OF THE ATTORNEY GENERAL ON COMPETITIVE EFFECTS OF PROPOSED MERGER OF T-MOBILE USA, INC. AND SPRINT COMMUNICATIONS COMPANY L.P.

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I. INTRODUCTION

The California Public Utilities Commission ("CPUC") requested the Attorney General's analysis of the competitive impact of T-Mobile U.S.A. Inc.'s ("T-Mobile's") proposed acquisition of Sprint Communications L.P. ("Sprint") pursuant to section 854(b)(3) of the California Public Utilities Code. For this advisory opinion, we apply the standard referred to under the 1989 Amendments to section 854, that the merger "[n]ot adversely affect competition".[1] Although this opinion does not control the CPUC's ultimate finding and only addresses the merger's effects on competition, it is entitled to the weight commonly accorded an Attorney General's opinion.[2]

We find that T-Mobile's acquisition of Sprint will likely harm competition in 18 specific California markets for retail mobile wireless telecommunications services ("RMWTS"), resulting in higher prices and fewer choices for California consumers. However, certain conditions could be developed with the potential to alleviate in part some of the harms.

II. THIS ADVISORY OPINION

Application No. 18-07-011[3] and Application No. 18-07-012[4] (the "Applications" or "the proceeding")[5] concern T-Mobile's proposed acquisition of its closest competitor, Sprint. The companies are two of only four nationwide facilities-based wireless providers (with Verizon and AT&T). As originally proposed, the acquisition will reduce the number of competitors from four to three, and will likely result in less competition, higher prices, and fewer choices for millions of California consumers.

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[1] Cal. Pub. Util. Code § 854(b)(3).

[2] See, e.g., *Thorpe v. Long Beach Community College District*, 83 Cal.App.4th 655, 662-63 (2000) ("While the Attorney General's views do not bind us, they are entitled to considerable weight.") (quoting *Freedom Newspapers, Inc. v. Orange County Employees Retirement System*, 6 Cal.4th 821, 829 (1993).); *Moore v. Panish*, 32 Cal.3d 535, 544 (1982) ("Attorney General opinions are generally accorded great weight"); *Farron v. City and County of San Francisco*, 216 Cal.App.3d 1071(1989).

[3] *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).*

[4] *In the Matter of the Joint Application of Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C), and T-Mobile USA, Inc., a Delaware Corporation.*

[5] Both Applications were consolidated, and any reference to one of the Applications herein includes the other. See Administrative Law Judge's Ruling Consolidating Applications, *Applications* (Sept. 11, 2018), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M226/K773/226773915.PDF.

In this proceeding, the Commission's Public Advocates Office, The Utility Reform Network, the Greenlining Institute, and the Communications Workers of America maintain that the merger is not in the public interest and thus should be prohibited. The California Emerging Technology Fund ("CETF") and Dish Networks, Inc. ("DISH") previously opposed the merger, but reversed their positions based on agreements and settlements reached with the Applicants and/or the Antitrust Division of the United States Department of Justice ("USDOJ").

In preparing this opinion, we primarily considered testimony and evidence presented in a bench trial, *State of New York et al. v. Deutsche Telekom AG et al.,* Case Number 1:19-cv-05434-VM-RWL (S.D.N.Y.) (the "SDNY Action"), in which 15 attorneys general asserted that the merger is anticompetitive, as well as that Court's Decision and Order, discussed in more detail below.[6] We also considered testimony and transcripts from the CPUC evidentiary hearings, along with various materials filed in the parallel matters before the Federal Communications Commission ("FCC") and USDOJ. Additional information was obtained from public sources.

Although the Applicants negotiated nationwide remedies with the FCC[7] and USDOJ,[8] it is our opinion that the Applicants' commitments impacting California consumers—including the agreement with CETF—are insufficient to address the substantial anticompetitive harms resulting from the merger. We have not seen sufficient evidence of California-specific, enforceable commitments in numerous local California relevant markets in which there is an unrebutted presumption of anticompetitive effects.

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[6] References to testimony or exhibits from the SDNY Action are provided within this document as follows: trial transcript citations are cited by witness testimony (e.g., Trial Tr. 637:12-21 (Shapiro) is Prof. Carl Shapiro's trial testimony on page 637, lines 12 through 21) and by trial exhibit (e.g., PX1 is Plaintiff's Exhibit No. 1).

[7] *See generally,* Memorandum Opinion and Order, *In the Matter of Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations*, WT Docket 18-197, FCC 19-103, 34 FCC Rcd 10578 (13) (Nov. 5, 2019).

[8] *See generally*, Proposed Final Judgment, *United States, et al. v. Deutsche Telekom, et al.*, Case No. 1:19-cv-02232-TJK (D.C. Cir. filed July 26, 2019). USDOJ, however, agreed that the merger was anticompetitive and the efficiencies generated by the merger would be unlikely to be sufficient to alleviate harm to competition, particularly in the short term, absent additional relief. Complaint at 8, *United States, et al. v. Deutsche Telekom, et al.*, Case No. 1:19-cv-02232-TJK (D.C. Cir. filed July 26, 2019).

III. THE TRANSACTION

The merger between T-Mobile and Sprint is expected to be accomplished through a stock transfer, with Sprint becoming a wholly-owned subsidiary of T-Mobile USA, Inc.[9] The original agreement called for current Sprint shareholders to receive one share of T-Mobile for every 9.75 shares of Sprint.[10] Under the original agreement, T-Mobile's parent company, Deutsche Telekom AG ("Deutsche Telekom"), would own approximately 42% of T-Mobile and Sprint's parent company, SoftBank Group Corp. ("SoftBank"), would own approximately 27% of T-Mobile, with the remaining shares held by public shareholders.[11]

The original merger agreement is believed to have expired in November 2019.[12] On February 21, 2020, Deutsche Telekom announced a revised merger agreement that would increase the "effective exchange ratio" to one share of T-Mobile for 11 shares of Sprint.[13] Under the revised agreement, Deutsche Telekom would own approximately 43% of T-Mobile and SoftBank would own approximately 24% of T-Mobile, with the remaining 33% owned by public shareholders.[14] Deutsche Telekom would remain the single largest shareholder and control 9 of 14 seats on the Board of Directors and effectively exercise control over the new company.[15]

This is the third time T-Mobile has tried to merge with one of the other national carriers. In 2014, Sprint and T-Mobile abandoned their proposed merger when government regulators

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[9] Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032, *Applications* (Jul. 13, 2018) ("Joint Application") at 10-11, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M217/K574/217574855.PDF.

[10] *Id.* at 11.

[11] *Id.* at 12.

[12] Lily Lieberman, *Lack of Sprint/T-Mobile Merger Extension Gives an Opening for Renegotiation*, KANSAS CITY BUSINESS JOURNAL (Nov. 4, 2019, 1:14 PM), https://www.bizjournals.com/kansascity/news/2019/11/04/sprint-tmobile-merger-extension-deadline-passes.html.

[13] Deutsche Telekom, Investor Relations, *T-Mobile US, Inc. and Sprint Corp. Announce Amendment to Business Combination Agreement*, https://www.telekom.com/en/investor-relations/investor-relations/deutsche-telekom-t-mobile-us-inc-and-sprint-corp-announce-amendment-to-business-combination-agreement-594948 (Feb. 20, 2020).

[14] *Id.*

[15] *Id.*; Press Conference on the 2019 Financial Year, Timotheus Höttges, CEO Deutsche Telekom AG, Feb. 19, 2020, p. 4, https://www.telekom.com/resource/blob/592998/dfd2b2fdef4bc44e1512363407772f5c/dl-speech-hoettges-ar-2019-data.pdf ("a voting rights agreement with Softbank entitles us to 67 percent of the voting rights and 9 of the 14 Board seats. This means we can continue to fully consolidate T-Mobile US in the Deutsche Telekom Group.").

made it clear that they would sue to block the merger.[16] In 2011 T-Mobile and AT&T sought to merge, and we joined USDOJ and six other states in suing to block that transaction.[17]

This time, T-Mobile and Sprint argue that the merger will allow New T-Mobile to deliver a 5G network better than either company could do alone.[18] They argue that their merger will benefit consumers by providing increased capacity, lower prices, increased coverage in rural areas, faster 5G deployment, and the opening up of new product markets such as fixed wireless broadband services.

IV. BACKGROUND

A. CPUC Proceeding and CETF Agreement

After submitting the Applications, T-Mobile and Sprint participated in evidentiary hearings before the CPUC on February 5-8, 2019. The parties filed a Memorandum of Understanding with CETF on April 8, 2019.[19] After post-hearing briefing concluded, on May 20, 2019, the Applicants announced new commitments to the FCC, and on July 26, 2019 they announced a proposed settlement with USDOJ that they claimed would address existing competitive concerns.[20] The CPUC conducted additional evidentiary hearings on December 5-6, 2019 for the purpose of addressing these "agreements and commitments that significantly altered the original proposed transaction."[21] The parties submitted post-hearing briefing on December 20, 2019.

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[16] Michael de la Merced and Brian Chen, *No Merger of Sprint and T-Mobile US, but Plenty of Taunts*, NY TIMES (Aug. 6, 2014), https://dealbook.nytimes.com/2014/08/06/no-takeover-but-plenty-of-taunts/.
[17] Amended Complaint, *United States and Plaintiff States v. AT&T, T-Mobile, and Deutsche Telekom AG*, Case 1:11-cv-01560 (Sept. 16, 2011). That merger was also abandoned. Stipulation of Dismissal, *United States and Plaintiff States v. AT&T and T-Mobile*, Case 1:11-cv-01560 (Dec. 20, 2011).
[18] Joint Application at 6, 13.
[19] *See* Joint Motion of Joint Applicants and the California Emerging Technology Fund to Modify Positions in Proceeding to Reflect Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc., *Applications*, Exh. A (Filed April 8, 2019) ("CETF Agreement"), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M288/K303/288303364.PDF.
[20] *See* CPUC Exhs. JA 19 (FCC Memorandum Opinion and Order dated Nov. 5, 2019), JA 20 (Proposed Final Judgment, Case 1:19-ev-02232-TJK (July 26, 2019)) and JA 24 (C) (Letter from Nancy J. Victory, Counsel for T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-197 (May 20, 2019)).
[21] Assigned Commissioner's Amended Scoping Ruling, *Applications* (Oct. 24, 2019) at 2, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M318/K595/318595531.PDF.

The CETF commitments include adherence to the FCC pricing commitments, continuing and expanding LifeLine service in California, providing free Internet-enabled devices to certain low income California families, providing grants to California schools, libraries, and local governments, deploying—by 2025—5G technology at 90% of California cell site locations in T-Mobile's network plan, and enhancing emergency preparedness equipment in California. T-Mobile will also make a $13 million payment to CETF.[22]

B. FCC and USDOJ Commitments

The Applicants describe their commitments to the FCC and USDOJ as falling into two categories: non-network, and network/spectrum-related. The non-network commitments are as follows: "[T]he FCC Commitments include commitments relating to pricing, divestiture of the Boost business, and the Altice MVNO [Mobile Virtual Network Operator] agreement.[] The DOJ commitments address the (i) divestiture of the Sprint prepaid customers (excluding Assurance Wireless) to DISH; (ii) hiring of Sprint prepaid personnel by DISH; (iii) divestiture of certain retail store locations to DISH; and (iv) an MVNO agreement for DISH and continuation of existing T-Mobile and Sprint MVNO agreements."[23]

The key network and spectrum commitments are described as follows:

"● DISH's option to acquire Sprint's 800 MHz spectrum;[]

● If DISH exercises its option to purchase the 800 MHz spectrum, New T-Mobile's option to lease back from DISH up to 4 MHz of the 800 MHz spectrum band for up to two (2) years following its divestiture;[]

● New T-Mobile's option to lease some of DISH's 600 MHz spectrum;[]

● New T-Mobile's obligation to make available to DISH all T-Mobile USA and Sprint cell sites that are decommissioned within 5 years of closing nationwide (at least 20,000);[]

● DISH and New T-Mobile's obligation to enter into a 7-year [MVNO] agreement;[] and

● New T-Mobile's obligation to honor all existing T-Mobile and Sprint MVNO agreements and agree to certain extensions of such agreements."[24]

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[22] CETF Agreement at 4-7.
[23] CPUC Exh. JA 34 (Sievert Supplemental Testimony) at 4:24-5:2.
[24] CPUC Exh. JA 28 (Ray Supplemental Testimony) at 7:28-8:18; *see generally* Amended Joint

The network/spectrum related commitments are not self-executing and will require future FCC approval in some form. The FCC's prior authorization is required to transfer spectrum licenses, lease spectrum, modify any FCC license terms, or revoke licenses.[25]

C. SDNY Action

This Office, with the State of New York, co-led a group of 15 attorneys general challenging this merger in federal court in *State of New York et al. v. Deutsche Telekom AG et al.,* Case Number 1:19-cv-05434-VM-RWL (S.D.N.Y.) (the "SDNY Action"). The bench trial occurred from December 9-20, 2019, and closing arguments were heard on January 15, 2020. On February 11, 2020, Judge Victor Marrero issued a Decision and Order denying Plaintiff States' request for an injunction under Section 7 of the Clayton Act.[26] Some of the evidence and findings in the SDNY Action are relevant to this opinion. But to the extent the decision in the SDNY Action is focused nationwide or dependent on credibility determinations made by that Court, it is of less import to this proceeding.

The SDNY Court agreed that the plaintiffs had met their prima facie burden—both for a national market as well as in certain local markets— "to establish a presumption that the Proposed Merger would be anticompetitive."[27] In particular, the Court agreed that Cellular Market Areas ("CMAs") as defined by the FCC could constitute local markets for the purpose of antitrust analysis, and the Court identified the local CMA corresponding to Los Angeles County post-merger as having market share as high as 57%.[28] One of our economic experts, Professor Carl Shapiro, identified 17 additional California CMAs with post-merger market shares and concentration levels that also satisfied the presumption of anticompetitive effects.[29]

While the Court found local CMAs to be relevant geographic markets, the remainder of its analysis was at a purely national level. The Court did not consider whether the defendants

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Application for Review of Wireless Transfer Notification per Commission Decision 95-10-032, *Applications,* (Sept. 19, 2019) at § XVI ("POST-HEARING COMMITMENTS"), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M313/K974/313974062.PDF.

[25] 47 U.S.C. §151.

[26] *State of New York et al v. Deutsche Telekom AG et al,* Case Number 1:19-cv-05434-VM-RWL, Dkt. No. 409 (S.D.N.Y. Feb. 11, 2020) (the "SDNY Decision").

[27] SDNY Decision at 52.

[28] *Id.*at 53.

[29] PX1258 at 7. Under the seminal case of *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364-66 (1963), "a merger will be presumptively anticompetitive if the merged firm would have more than a 30 percent market share." SDNY Decision at 52. *See also*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010).

were able to rebut the presumption that the merger "may be substantially to lessen competition in any line of commerce in any section of the country"[30] as to any of the local market CMAs. The Court did not base its decision on the expert economic analysis, but instead largely relied upon its evaluation of party executives' credibility on the witness stand. The Court based its ultimate decision on a national geographic market, and found that under a totality of the circumstances analysis, where no one factor was determinative, the defendants had rebutted the presumption with sufficient efficiencies, that Sprint was a weakened competitor, and that DISH could essentially replace Sprint as a competitive factor in the national market.[31]

V. THE RELEVANT MARKETS

In analyzing the competitive effects of this merger, we follow the approach generally used in antitrust law, including the Horizontal Merger Guidelines (the "Guidelines") promulgated by USDOJ and the Federal Trade Commission. Following traditional analysis, the Guidelines analyze the effect of a consolidation upon the "relevant markets" within which the parties do business. "Determination of the relevant product and geographic markets is a

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[30] SDNY Decision at 34 (quoting *Phila. Nat'l Bank*, 374 U.S. at 355).

[31] *See generally* SDNY Decision at 167-69. The SDNY Decision is highly controversial. *See, e.g.,* Nicholas Economides, John Kwoka, et al., *5 reasons the T-Mobile-Sprint merger should've been rejected—and will raise your phone bill*, FORTUNE (Feb. 20, 2020), https://fortune.com/2020/02/20/t-mobile-sprint-merger-dish/ ("The bottom line is that this decision, to a large extent, disregards the interests of consumers."); The Capitol Forum, *T-Mobile/Sprint: District Court's Weakened Competitor, Efficiencies, Remedy Treatment Could Strengthen Appeal Case*, THE CAPITOL FORUM Vol. 8 No. 69 (Feb. 26, 2020) ("by finding that the carriers successfully rebutted the states' prima facie case through efficiencies, weakened competitor, and remedies arguments that courts have generally disfavored, the decision may provide fertile ground for appeal."); AAI Announcements, *District Court Opinion in State' Challenge to Sprint –T-Mobile Marks New Low in Weak Merger Control; Consumers Will Bear the Burden* (Feb. 11, 2020) (quoting Vice President of Legal Advocacy Randy Stutz, AAI Vice President of Legal Advocacy saying that "[t]he opinion barely applies the burden-shifting framework that is supposed to govern merger cases, conflating efficiency and remedial considerations with the government's strong prima facie case."), https://www.antitrustinstitute.org/district-court-opinion-in-states-challenge-to-sprint-t-mobile-marks-new-low-in-weak-merger-control-consumers-will-bear-the-burden/; Sandeep Vaheesan, *How the T-Mobile-Sprint Merger Legitimizes Monopoly,* WASHINGTON MONTHLY (Feb. 11, 2020), https://washingtonmonthly.com/2020/02/11/how-the-t-mobile-sprint-merger-legitimizes-monopoly/ ("decision subverts the Clayton Act, the principal federal anti-merger statute."); *see also*, Karl Bode, *US Antitrust Enforcement Clearly Broken As Court Rubber Stamps T-Mobile Merger*, TECHDIRT (Feb. 11, 2020), https://www.techdirt.com/articles/20200211/07412443900/us-antitrust-enforcement-clearly-broken-as-court-rubber-stamps-t-mobile-merger.shtml; Nilay Patel, *The Court Let T-Mobile Buy Sprint Because Sprint Completely Sucks: Judge Victor Marrero thinks John Legere is just the coolest*, THE VERGE (Feb. 12, 2020), https://www.theverge.com/2020/2/12/21134278/sprint-tmobile-merger-court-ruling-opinion-decision-explainer-carriers-antitrust.

necessary predicate to deciding whether a merger contravenes the Clayton Act" and thus whether the merger may substantially lessen competition.[32]

A. Product Market: Retail Mobile Wireless Telecommunications Services

The product market refers to the range of products or services that are or could easily be made relatively interchangeable, so that pricing decisions by one firm are influenced by the range of alternative suppliers available to the purchaser. In the SDNY Action, the States demonstrated—and the Applicants did not contest at trial—that retail mobile wireless telecommunications services ("RMWTS") is the relevant product market.[33]

The Applicants, however, disagreed whether MVNOs should be considered independent competitors. They argued that the MVNOs— which do not own or operate nationwide mobile networks, but rather resell the networks of the big four— were competitors in their own right that should be considered separately for purposes of calculating market shares.[34] TracFone is the largest MVNO.

The Court ultimately agreed with the States in the SDNY Decision that RMWTS is the relevant product market, and that market shares held by MVNOs should be attributed to the Mobile Network Operator ("MNO") "from which the MVNOs lease network access."[35] Thus, the relevant product market is dominated by AT&T, Verizon, T-Mobile, and Sprint, and any market shares from MVNOs that operate on those networks are attributed to one of those four.

B. Geographic Markets: National and Local

The relevant geographic market is the "area of effective competition where buyers can turn for alternate sources of supply."[36] Where firms compete on a regional and national basis

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[32] *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015), citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974).

[33] Trial Tr. 625:21–630:25 (Shapiro). While an argument can be made that prepaid services should be a separate product market, at present the main difference between pre- and post-paid is simply when the consumer pays: at the beginning of the month or the end. The Court in the SDNY Action acknowledged that in addition to whether customers "pay in arrears ('postpaid' customers) or in advance of receiving services ('prepaid' customers)" that "prepaid customers form a distinct segment of the RMWTS Market because they tend to be relatively price-conscious; prepaid subscribers' household incomes range from approximately $20,000 to $45,000, and prepaid subscribers are more likely to have subprime credit or be more cash-constrained than postpaid subscribers." SDNY Decision at 24-25.

[34] *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 17, *State of New York et al. v. Deutsche Telekom AG et al.*, Case Number 1:19-cv-05434-VM-RWL (S.D.N.Y. filed Jan. 8, 2020) ECF No. 357.

[35] SDNY Decision at 38.

[36] *Saint Alphonsus Med. Ctr.,* 778 F.3d at 784 (citations omitted).

there may be "more than one relevant geographic market."[37] A showing that a merger may substantially lessen competition in any geographic market establishes a Clayton Act violation.[38] In the SDNY Action, the Applicants conceded that—at least—the nation is a relevant geographic market for assessing the effects of this merger.[39] The Applicants disputed whether there were local relevant antitrust markets.[40] Accordingly, they generally did not present evidence rebutting the presumption in local markets.

Geographic "markets need not—indeed cannot—be defined with scientific precision."[41] A "rough approximation,"[42] or a "workable compromise" is sufficient.[43] In *United States v. Anthem,* 236 F.Supp.3d 171, 254 (D.D.C. 2017), for example, the court used "Core-Based Statistical Areas," "aggregations of zipcodes . . . developed by the Office of Management and Budget," to evaluate a merger.

The States argued that CMAs, which correspond to the original FCC licenses areas for spectrum are also relevant geographic markets.[44] CMAs include Metropolitan Statistical Areas and Rural Statistical Areas defined by the Office of Management and Budget.[45]

The use of CMAs is consistent with the Guidelines' "hypothetical monopolist test" ("HMT"), which evaluates whether a hypothetical monopolist acting within the proposed market would be substantially constrained from increasing prices by the ability of customers to switch to other producers. In the SDNY Action, one of the States' economic experts, Professor Carl Shapiro, explained that the use of CMAs as a relevant geographic market satisfies the HMT.[46]

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[37] *United States v. Marine Bancorporation Inc*., 418 U.S. 602, 621 (1974); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549, 551-52 (1966) (nation, state, and tristate).
[38] *Pabst*, 384 U.S. at 549; *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 179, 193, 254-59 (D.D.C. 2017).
[39] Trial Tr. 1797:21-25 (Katz); Trial Tr. 624:10-14, 631:18–632:1 (Shapiro).
[40] Trial Tr. 1977:13-1978:10 (Katz); *see also* Defendants' Proposed Findings of Fact and Conclusions of Law at 19, *State of New York et al v. Deutsche Telekom AG et al.,* Case Number 1:19-cv-05434-VM-RWL, (S.D.N.Y. filed Jan. 8, 2020), ECF No. 357 ("Cellular Market Areas ("CMAs") are not relevant geographic markets.").
[41] *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.C. Cir. 2015) (quoting *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974)); *Pabst*, 384 U.S. at 549.
[42] *Conn. Nat'l Bank*, 418 U.S. at 669.
[43] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 361 (1963).
[44] Trial Tr. 624:17-22 (Shapiro).
[45] 47 CFR § 22.909; Trial Tr. 643:1-4 (Shapiro).
[46] Trial Tr. 637:23-25 (Shapiro). One of the Applicants' economic experts, Prof. Michael Katz, did not dispute that CMAs satisfy the HMT. Trial Tr. 1994:24–1995:2 (Katz).

CMAs have been used before to evaluate competition issues. The FCC and USDOJ have both used CMAs to assess competition in the wireless industry.[47] Sprint has previously claimed that competition for wireless services can be assessed in national and local markets.[48] T-Mobile previously asserted that competition in the wireless industry takes place locally and should be assessed in CMAs.[49] And CMAs are used as relevant local markets by network operators.[50]

The evidence in the SDNY Action confirms that key aspects of competition in this industry are local. First, network performance and, thus, quality-adjusted prices, vary locally.[51] The Applicants also believe that local network quality impacts consumers' selection between carriers, and advertise based on their respective networks' local characteristics.[52] Second, they both offer local promotions and compete to expand the number and quality of their retail stores.[53]

The Court in the SDNY Action agreed with the States' analysis as to CMAs constituting relevant local markets.[54] Thus, in addition to a national market, there are multiple relevant local geographic markets within the State of California. Of the 31 CMAs in California, the merger will lead to excessive concentration in 18 CMAs.

VI. COMPETITIVE EFFECTS ANALYSIS

Under the Clayton Act, "[t]o show that a merger is unlawful, a plaintiff need only prove that its effect '*may* be substantially to lessen competition.'"[55] These words reflect Congress's "concern . . . with probabilities, not certainties."[56] Section 7 of the Clayton Act thus "does not require proof that a merger or other acquisition will cause" anticompetitive effects.[57] Rather, "a section 7 violation is proven upon a showing of reasonable probability of anticompetitive

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[47] PX1211 p. 29; Trial Tr. 637:12–21 (Shapiro).
[48] Trial Tr. 638:14–642:9 (Shapiro); PX655 pp. 17, 163-64.
[49] PX1242 p. 25; PX1042 p. 11.
[50] PX155 p. 3 n.2 (network claim measured in relevant MSA); PX160-161 p. 2 n.2; PX92 p. 7 (expansion in MSAs); PX908 p. 24; PX911 p. 19; PX1235 p. 30; DX7057 pp. 7, 53.
[51] Trial Tr. 1980:6–1982:2 (Katz); Trial Tr. 97:3–97:19 (Sole); Trial Tr. 992:1-20 (Legere).
[52] PX155; PX159-161; PX410 p. 222; PX959.
[53] Staneff Dep. 169:5-7, 173:2-175:18, 194:25-201:20; PX1074 pp. 51, 67; PX1111 p. 14; PX911 pp. 32-34, PX949 p. 10, PX967 p. 1.
[54] SDNY Decision at 52 ("Accordingly, the Court concludes that the national RMWTS Market and the CMAs defined by the FCC constitute the relevant geographic markets in this case.").
[55] *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18).
[56] *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962).
[57] *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 192 (D.D.C. 2017) (quotation omitted).

effect."[58] Any "doubts are to be resolved against the transaction."[59] As the SDNY Decision explained, courts typically employ a burden-shifting analysis when assessing the potential competitive effects of a merger under Section 7. The plaintiff must first establish a prima facie case of harm through evidence of increased market concentration. Once established, defendants may rebut the presumption of anticompetitive effects by producing evidence casting doubt on the likelihood of harm. Finally, if the presumption is successfully rebutted, then the burden shifts back to the plaintiff who bears the ultimate burden of persuasion to show that the transaction is likely to substantially lessen competition.[60] This balancing approach is used in each relevant antitrust market.[61]

A. Presumption of Anticompetitive Effects

The Guidelines recognize that mergers may have unlawful effects if they either (1) facilitate coordinated interactions among competitors or (2) enable the surviving entity to unilaterally raise prices or suppress output. These anticompetitive effects are more likely to occur in highly concentrated markets (i.e., few market participants) and there are two commonly accepted methods to measure the increase in market concentration post-merger, and thus the likelihood of harm to competition: market shares and the Herfindahl-Hirschman Index ("HHI").[62]

Where a large enough percentage of market share is shown to result from a merger there is a presumption of anticompetitive effects. "Specifically . . . a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger

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[58] *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984); *Brown Shoe*, 370 U.S. at 325.
[59] *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).
[60] *See* SDNY Decision at 35 (quoting *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)).
[61] *See, e.g.*, *Anthem*, 236 F. Supp. 3d 171 (applying burden-shifting framework separately to both national and local markets).
[62] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. It gives proportionately greater weight to the larger market shares and thus a more concentrated market has higher HHIs. For example, for a market consisting of four firms with shares of 30%, 30%, 20%, and 20%, the HHI is 2,600 (30*30 + 30*30 + 20*20 + 20*20 = 2,600). Guidelines § 5.3.

is not likely to have such anticompetitive effects."[63] A merger resulting in a company with a market share of 30% or more is presumptively illegal.[64]

Mergers that result "in highly concentrated markets that involve an increase in the [HHI] of more than 200 points" are also presumptively anticompetitive.[65] "[A] post-merger market is highly-concentrated" if the post-merger "HHI is 2,500 or greater."[66] "The extremely high HHI on its own establishes the prima facie case."[67]

1. National Presumption

As a result of this merger, New T-Mobile will have a market share of 37.8% in the national market when measured by subscribers and 34.4% when measured by revenue.[68] As of December 2018, national retail subscriber numbers are as follows: T-Mobile is the third largest provider with 72.6 million; Sprint is the fourth largest provider with 54.58 million.; Verizon is the largest provider with 93.8 million; and AT&T is second largest with 78.7 million.[69]

In the national market, the merger would result in an HHI of 3,186—an increase of 679 points.[70] In fact, one of the Applicants' economists in the SDNY Action (Prof. Michael Katz) produced calculations demonstrating that even after using his preferred metric of revenue shares—assigning separate market shares to MVNOs—and accounting for the Boost divestiture, that the post-merger HHI in the national market is 2,611, and the HHI increase is 313, also demonstrating a presumption of anticompetitive effects.[71]

Thus, based on both market shares and HHIs, the national market is presumptively anticompetitive.

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[63] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).
[64] *Consol. Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 260 (2d Cir. 1989).
[65] Guidelines § 5.3; *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001).
[66] *Anthem*, 236 F. Supp. 3d at 207; Guidelines § 5.3.
[67] *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015). *See also*, *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) (prima facie case established by high market concentration based on HHI numbers).
[68] Trial Tr. 647:11-16 (Shapiro); PX1258, sl. 1.
[69] *Id.* The Applicants' market shares are different because we believe their customer figures include enterprise/wholesale customers, as well as other connected devices–such as autonomous vehicles and Internet of Things sensors–that are outside of the relevant product market. Joint Application at 5, 8.
[70] Trial Tr. 647:17-23, 653:1-10 (Shapiro); PX1258, sl. 1.
[71] PX1320 p. 10; Trial Tr. 2276:11–2278:21 (Shapiro).

2. Local Presumption

In some CMAs, New T-Mobile will have a market share of over 50%, and in many it will approach this figure.[72] In 106 local CMAs within the SDNY Action's Plaintiff States, the HHI would increase by 200 points or more and would exceed 2,500, often dramatically so.[73]

The SDNY Court found that total ". . . HHIs for the local CMAs corresponding to Los Angeles and New York would be as high as 4158 and 4284 respectively, and market share in Los Angeles would be as high as 57 percent."[74] The Court noted that "[t]hese figures are more than enough to establish a presumption that the Proposed Merger would be anticompetitive."[75]

New T-Mobile would dominate many California markets, including not only the Los Angeles CMA—the second largest CMA in the United States by subscribers—but also markets like the California 7 – Imperial CMA, which will have a combined market share of 63%.[76]

As shown below, Prof. Shapiro identified 18 CMAs within California that are highly concentrated, and satisfy the presumption of anticompetitive effects based on both market shares and increases in HHI post-merger.[77]

CMA name	Combined share	Increase in HHI	HHI with merger
California 7 – Imperial	63%	1,602	4,627
Los Angeles-Long Beach	57%	1,281	4,158
San Diego	48%	923	3,637
Stockton	47%	956	3,697
San Jose	46%	830	3,601
Sacramento	45%	882	3,543
Bakersfield	45%	864	3,616
San Francisco, Oakland	44%	795	3,554
Vallejo-Fairfield-Napa	43%	845	3,479

[72] Trial Tr. 656:20–657:4 (Shapiro); PX1258, sl. 7-11.
[73] Trial Tr. 653:20–656:9 (Shapiro); PX1258, sl. 7-11.
[74] SDNY Decision at 53.
[75] *Id.*
[76] PX1258 p. 7.
[77] *Id.*

Yuba City	43%	913	3,481
Modesto	39%	695	3,597
Salina-Seaside-Monterey	39%	604	3.406
Fresno	35%	544	3,710
Oxnard-Simi Valley-Ventura	35%	583	3,338
California 4 Madera	33%	469	3,490
Santa Barbara-Santa Maria	33%	506	3,483
Santa Rosa-Petaluma	31%	447	3,341
Chico	31%	462	3,391

As the Court in the SDNY Action found, each of these local markets is a relevant antitrust market and is highly concentrated, sufficient to establish a presumption of anticompetitive effects under the *Philadelphia National Bank* presumption and the Guidelines.[78] And a higher market share concentration means that the presumption of anticompetitive effects is stronger.[79] This presumption of anticompetitive effects can be rebutted, but any rebuttal needs to be commensurate with the degree of harm; a stronger presumption requires a stronger rebuttal.[80]

B. Applicants' Rebuttal Case

In the SDNY Action, the Court characterized the Applicants' rebuttal evidence as falling into the following three categories: "(1) evidence that the efficiencies arising from the Proposed Merger will cause New T-Mobile to compete more vigorously with its rivals in the RMWTS

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[78] SDNY Decision at 53.

[79] *Phila. Nat. Bank*, 374 U.S. at 365 fn. 42 ("if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great"); *FTC v. H.J. Heinz Co*., 246 F.3d 708, 716 (D.C. Cir. 2001) (proposed merger that would increase HHI by 510 points "creates, *by a wide margin*, a presumption that the merger will lessen competition") (emphasis added).

[80] *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015) (quoting *United States v. Baker Hughes*, 908 F.2d 981, 991 (D.C. Cir. 1990) ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."). *See also United States v. Anthem, Inc.*, 855 F.3d 345, 349-50 (D.C. Cir. 2017); *accord, FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019) ("where the plaintiffs presented strong evidence, it was necessary for the defendants to make a strong presentation in rebuttal.").

Markets; (2) evidence that Sprint is a weakened competitor that is not likely to continue competing vigorously in the RMWTS Markets; and (3) evidence that USDOJ and FCC review of and remedies to the Proposed Merger, and particularly their collective efforts to establish DISH as a new vigorous competitor in the RMWTS Markets, ameliorate any remaining concerns of anticompetitive effect."[81]

The Court concluded that "while no category serves as the sole basis to rebut Plaintiff States' prime facie case, Defendants have satisfied their burden of rebuttal under the totality of the circumstances."[82] Although the Court agreed with the Plaintiff States that there are relevant local markets (as defined by CMA) for assessing the effects of the proposed transaction, the Court's review of the Applicants' rebuttal evidence—in the face of a strong presumption of harm—was done at the national level. As discussed below, the Applicants did not argue at trial that they had presented evidence relating to the specific local markets identified by Plaintiff States (including the California markets) sufficient to counter the strong presumption of anticompetitive effects.

1. The Necessity of Factual Findings in Local Markets

The Court in the SDNY Action found that local markets are relevant geographic markets and thus the Plaintiff States were entitled to the market-specific presumptions of anticompetitive harm as shown in the table above. As dictated by the burden-shifting framework in Section 7 cases, the Applicants were required to present evidence rebutting the Plaintiff States' presumption in each individual CMA.[83] But, because Applicants' based their rebuttal case on a national market, they made no attempt to do so.[84] Without such evidence, the Court understandably made no evidentiary findings with respect to rebuttal of the presumption in local markets.[85]

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[81] SDNY Decision at 56.
[82] SDNY Decision at 57.
[83] For example, in *United States v. Anthem, Inc.*, 236 F. Supp. 3d, 171, 257-58 (D.D.C. 2017), the Court conducted a separate effects analysis for Richmond, Virginia. After finding that the government established a presumption of harm in Richmond, the court concluded that defendants had sufficiently rebutted the presumption, but only after pointing out defendants provided evidence relating specifically to competition in Richmond.
[84] *See generally*, Defendants' Proposed Findings of Fact and Conclusions of Law at 18-19, *State of New York et al v. Deutsche Telekom AG et al.,* Case Number 1:19-cv-05434-VM-RWL, (S.D.N.Y. filed Jan. 8, 2020), ECF No. 357.
[85] *See generally*, SDNY Decision at Section II.B.

Applicants' nation-wide rebuttal evidence falls short of addressing competitive concerns in local markets as a general matter. Anyone with a cell phone understands that network quality varies from market to market and, as the SDNY Decision found, consumers choose providers based on price and network quality. It is primarily because of this quality variance that competitive dynamics differ from one local market to the next. For instance, the Imperial County CMA, where T-Mobile and Sprint control 63% of the market, has the highest market share of all CMAs in the entire nation. Imperial County is a rural area with a population of approximately 179,000.[86] The Applicants' high market share in this local market shows that the two other major firms—AT&T and Verizon—are smaller players. There appears to be little incentive for either of these two companies to aggressively compete with New T-Mobile post-merger.

By contrast, the next-highest concentration in California is the Los Angeles-Long Beach CMA, with a combined market share of 57%, which includes the city of Los Angeles. The second largest city in the nation, Los Angeles has a population of almost four million, a diverse economy, and a gross metropolitan product of approximately $1.0 trillion.[87] While such a densely populated market such as Los Angeles represents a broader customer base for wireless providers, it also presents a network congestion problem for providers lacking the right spectrum and a sufficient number of towers. These two distinct geographic markets, each of which has a strong presumption of anticompetitive harm, present different challenges and incentives for providers in the RMWTS market that simply were not addressed in the SDNY Action.

San Diego and Stockton provide another example. They have almost identical market shares, increases in HHI and post-merger HHI levels.

CMA name	**Combined share**	**Increase in HHI**	**HHI with merger**
San Diego	48%	923	3,637
Stockton	47%	956	3,697

[86] https://www.labormarketinfo.edd.ca.gov/file/Census2017/imperdp2017.pdf.
[87] United States Census Bureau, QuickFacts Los Angeles city, California, https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia,US/PST045218.

Yet, it is obvious that these are very different markets. San Diego CMA 018 had a population in 2012 of 3.095 million,[88] and has a major coastal city with a population of approximately 1.4 million;[89] Stockton CMA 107 is an inland community with a population in 2012 of 685,000,[90] with the City of Stockton (within the Stockton CMA) being the largest city in California (population of 300,000) that filed for bankruptcy in 2012.[91] The required strength of the rebuttal evidence varies with the strength of the presumption. While Imperial Country has a strong presumption with a market share of 63%, the CMA based in Chico, California, has a market share of only 31%, and accordingly a much weaker presumption.

The SDNY Court found each of these areas—Imperial County, Los Angeles, San Diego, Stockton, and Chico—to be independent relevant markets for antitrust purposes. Yet, the Court made no individualized findings regarding the likelihood of anticompetitive effects, despite the dramatic differences in the strength of the presumption and the differences in the characteristics of the markets. Are the proffered T-Mobile efficiencies the same in all these areas? Would Sprint's potential status as a weakened competitor effect each area the same?[92] Will DISH enter each of these specific, relevant geographic markets as a new fourth competitor?[93] These questions must be answered, market-by-market, in order to rebut the presumption of harm in each market.

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[88] 27 FCC Rcd 4725 (6), DA 12-641, Attachment C: Top 100 CMAs by Population, https://www.fcc.gov/document/mobility-fund-auction-procedures-and-filing-requirements.

[89] United States Census Bureau, QuickFacts San Diego city, California, https://www.census.gov/quickfacts/fact/table/sandiegocitycalifornia,US/PST045219 (last visited Mar. 3, 2020) (providing population estimate as of July 1, 2018).

[90] *See supra* note 88.

[91] Jim Christie, *Stockton, California Files for Bankruptcy*, REUTERS (June 28, 2012), https://www.reuters.com/article/us-stockton-bankruptcy/stockton-california-files-for-bankruptcy-idUSBRE85S05120120629.

[92] For instance, under Sprint's contingency plans if the merger failed—described as "Plan B"—even with a more regional focus, Sprint might continue to focus extensively on local markets in California. *See* PX695 at p. 2 (map identifying 25 Core Based Statistical Areas and 17 additional markets—including San Francisco and Los Angeles areas—as being planned priority markets for Sprint's Plan B in case the merger did not go forward); and 5 ("Plan B Financial Impacts"); Trial Tr. 484:10-18 (Bluhm) ("The way we define our markets is different graphical areas that add up to 99 markets over the country. So the starting point was the marketing team saying assuming we can't afford to do the national play anymore compete, let's start with a certain number that we can focus on. That's not finalized though.").

[93] For instance, DISH testified that it intended to focus on large urban markets, which makes Los Angeles a likely beneficiary of any DISH network, but not Imperial County. *See* Trial Tr. 1596:1-9 (Ergen).

2. No Factual Findings of Efficiencies in Local Markets

The United States Supreme Court has yet to recognize efficiencies as a valid defense in a Section 7 case.[94] Certain lower courts, however, have considered evidence of efficiencies to rebut a presumption of anticompetitive conduct. If a court considers an efficiencies defense, where, as here, there is evidence of high market concentration levels in several local markets, the Applicants must present "proof of extraordinary efficiencies" in those markets.[95] Further, any "[c]laimed efficiencies must be verifiable, not merely speculative."[96] While the Applicants argued in the SDNY Action that the transaction would result in nationwide efficiencies, they did not argue that they presented sufficient evidence of specific efficiencies in particular local markets. Without such evidence, the Court in the SDNY Action made no findings in any particular local market that the presumption of anticompetitive effects had been rebutted by efficiencies.

3. No Factual Findings of Sprint as a Weakened Competitor in Local Markets

In rebuttal, the Applicants also argued that Sprint is a weakened competitor. As more recent court opinions have recognized, such a defense requires a "substantial showing that the acquired firm's weakness . . . would cause that firm's market share to reduce to a level that would undermine the government's *prima facie* case."[97] But much like their efficiencies defense, the Applicants did not argue at trial that they presented sufficient evidence of an imminent and drastic decline in Sprint's market share in any particular local market.[98] And the Court likewise made no findings in any particular local market that the presumption of anticompetitive effects was rebutted by Sprint being a weakened competitor.

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[94] *See Anthem*, 236 F. Supp. 3d at 235.

[95] *FTC v. H.J. Heinz Co*., 246 F.3d 708, 720 (D.C. Cir. 2001).

[96] *Saint Alphonsus Med. Ctr.- Nampa Inc. v. St. Luke's Health Sys., Ltd*., 778 F.3d 775, 791 (9th Cir. 2015); *see also H.J. Heinz Co.*, 246 F.3d at 721 (explaining that "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior.").

[97] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) (quotations and citations omitted); *see also U.S. v. Aetna Inc.*, 240 F. Supp. 3d 1, 92 (D.D.C. 2017) (stating same).

[98] In fact, Sprint's own business plan for proceeding without the merger shows a continued presence in some local California markets. *See supra* note 92.

4. No Factual Findings of the Impact of DISH's Entry in Local Markets

Regardless of whether DISH's entry into the RMWTS will be timely, likely or sufficient, as discussed below in Section VI, the Applicants did not present sufficient evidence at trial of DISH's entry in any particular local markets in the SDNY Action, aside from the DISH CEO's testimony that the company intended to focus its initial entry on certain unidentified urban markets.[99] And the Court likewise made no findings in any particular local market that the presumption of anticompetitive effects had been rebutted by DISH's entry.

* * *

In conclusion, we maintain our opinion as presented at trial that the merger is presumptively anticompetitive in 18 specific local California markets, and the Court in the SDNY Action made no findings to the contrary. Because the presumption is unrebutted in local California markets, the presumption of anticompetitive effects alone is sufficient to conclude that the merger will harm competition. Accordingly, there is no need for the Commission to assess the unilateral or coordinated effects evidence. For completeness, a brief discussion of this issue is provided below.

C. Anticompetitive Effects

As explained above, the burden-shifting framework under Section 7 of the Clayton Act requires a plaintiff to present evidence of likely anticompetitive harm if the defendants successfully rebut the presumption of anticompetitive effects. Such evidence typically focuses on the likelihood of unilateral or coordinated effects and, during the SDNY Action, Plaintiff States presented evidence of both types of harm. The Court, however, finding the testimony of executives from the Applicants and DISH highly persuasive, concluded that aggressive competition from New T-Mobile and DISH's presence as an additional competitor in the market were sufficient to preserve competition in the RMWTS Market.

1. Unilateral Effects

Unilateral anticompetitive effects, which "may alone constitute a substantial lessening of competition,"[100] are based solely on the loss of competition from the merger of the two firms,

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[99] *See* Trial Tr. 1596:1-9 (Ergen).
[100] *Anthem*, 236 F. Supp. 3d at 216 (quotations and citations omitted); *see also State of N.Y. v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 (S.D.N.Y. 1995) (explaining that unilateral effects may be used to assess the anticompetitive effects of a transaction).

regardless of other competitors. The risk of unilateral effects is magnified when the merging firms are "close competitors," even if they are not each other's "closest competitor."[101] The danger that a merger will result in unilateral effects—and permit the combined company "to increase prices or otherwise maintain prices at an anti-competitive level"—is particularly acute when the merger would "eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the [] market."[102]

During the SDNY Action, Plaintiff States presented evidence of the unique competition between T-Mobile and Sprint that would be eliminated as a result of the merger, including the fact that Sprint and T-Mobile generally offer lower prices than Verizon and AT&T[103] and other instances of aggressive competition between the two companies.[104] To bolster this evidence, Prof. Shapiro quantified the extent of head-to-head competition between T-Mobile and Sprint and found that the two companies are indeed close competitors: Approximately 40% of the customers who switch away from T-Mobile switch to Sprint, and around 50% of the customers who switch away from Sprint switch to T-Mobile.[105]

2. Coordinated Effects

"Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior. . . [to] achieve profits above competitive levels."[106] Eliminating a "particularly aggressive competitor that plays a disruptive role in the market," can increase the likelihood of coordinated interaction, particularly if that competitor had the "incentive to take the

[101] *Anthem*, 236 F. Supp. 3d at 216; Guidelines § 6.1.
[102] *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1082-83 (D.D.C. 1997).
[103] Trial Tr. 168:21–169:25 (Höttges); 46:8–47:11 (Sole).
[104] There is vigorous head-to-head competition between Sprint and T-Mobile. *See* Trial Tr. 275:10-13; 275:20–280:5, 287:17-288:12 (Langheim); PX410 pp. 8, 156-57, 1227; PX8112 p.14; PX913; PX977; PX837; Trial Tr. 994:24–998:5 (Legere). T-Mobile has planned or provided offers directed at Sprint customers or local markets where Sprint is performing well. *See* PX888; PX907; PX908 pp. 2, 6; PX914; PX967; PX554; PX890 p. 3; Trial Tr. 997:23–999:16 (Legere). And Sprint also competes aggressively with T-Mobile. *See* PX514; PX525 p.4; PX527 p.11; Trial Tr. 24:19–26:8, 62:10–64:24 (Sole); PX770.
[105] Trial Tr. 693:19–695:24, 696:21-24 (Shapiro).
[106] *H.J. Heinz Co*., 246 F.3d at 715 (quotations and citations omitted); *see also Stanley Works v. FTC*, 469 F.2d 498, 507 (2d Cir. 1972) ("[T]he greater the concentration in the market the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge.") (quotations and citations omitted).

lead in price cutting."[107] Evidence that a merger will "enhanc[e] the likelihood of coordinated interaction by competitors" supports a finding that a merger is anticompetitive.[108]

Unlike unilateral effects, there are fewer economic models and quantification tools to assess the potential price increases of coordinated effects. But, as the Guidelines explain, coordination is more likely to occur in markets exhibiting certain characteristics, including: (1) moderate to high concentration; (2) price transparency; (3) the ability of rivals to respond quickly to competitive offerings thus lowering the potential benefit of such offerings; (4) small and frequent sales; (5) few customers willing to switch to a rival firm in response to a price increase; and (6) inelastic product demand.[109]

States presented evidence that there is a significant risk of coordinated effects after the merger because the RMWTS market possesses many of the characteristics that facilitate collusion, such as high barriers to entry, inelastic demand, minimal consumer purchasing power, and price transparency. The market is already highly concentrated, and post-merger there would be only three national operators of mobile networks.[110] Further, the RMWTS market has high barriers to entry.[111] Indeed, the Applicants' own expert, Prof. Katz, conceded this point at trial.[112] Plaintiff States also presented evidence showing that prices in this market are highly transparent.[113] Finally, Applicants have repeatedly attempted to "signal"—or interpret perceived signals from—other MNOs regarding their competitive intentions.[114] These "signals," which are meant to facilitate coordinated interactions among the MNOs, demonstrate the MNOs' awareness of the market's susceptibility to coordination.[115]

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[107] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011) (citing Guidelines) (quotations omitted).
[108] *Kraft Gen. Foods, Inc*., 926 F. Supp. at 359; *see also Anthem*, 236 F. Supp. 3d at 215-16.
[109] *See generally* Guidelines § 7.2.
[110] Trial Tr. 200:2-201:9 (Höttges); 979:4-980:18 (Legere); 1696:22-1697:10 (Ergen).
[111] Trial Tr. 703:21-704:10 (Shapiro) (noting that "no new nationwide carriers have [entered] for years").
[112] Trial Tr. 1816:2-3 (Katz).
[113] PX184; PX175; Staneff Dep. 53:23–55:3; PX924 pp.8, 36; PX1021 pp.28–31; PX554; PX514; Trial Tr. 31:15–32:4 (Sole); 675:6–676:5 (Shapiro).
[114] SDNY Decision at 134 (despite "multiple T-Mobile and Sprint communications" cited by plaintiffs "for the proposition that and anticompetitive price signaling is already occurring in the RMWTS Market … [t]he Court is not persuaded" that such evidence is credible); Pl. Ex. 410 at 13 (notes of Langheim stating that "[T-Mobile] signaling price increases"); PL Ex. 647 at 1, 2 (Sprint employees stating that a T-Mobile price increase was a "good example of industry 'signaling'"); *see also* PX777; PX856.
[115] PX410 p. 13; PX459; PX647 pp. 1-2; PX777; PX856; PX1318; Trial Tr. 278:22–279:10 (Langheim); 676:9-24 (Shapiro); Roettgering Dep. 44:20–47:22. *See FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 209 (D.D.C. 2018); *see also* Guidelines § 7.2 (prior attempts to coordinate "suggest that successful collusion

3. The Court's Evidentiary Analysis of Anticompetitive Effects and the Role of Intent Evidence

In its assessment of the likelihood of anticompetitive effects resulting from the merger, the Court found the Applicants' evidence persuasive, particularly the trial testimony of corporate executives as to their intentions post-merger. Evidence of the parties' intent can be relevant to an analysis of anticompetitive effects.[116] "The ultimate question [in an antitrust matter] is whether the challenged conduct unreasonably restrains trade"; nevertheless, "motive is a relevant consideration in determining whether concerted actions violate the Sherman Act."[117] Intent aids the determination of whether the challenged conduct will have, or has had, anticompetitive effects.[118] When considering the statements of corporate executives, courts are careful to differentiate between pre-litigation statements made by executives during the ordinary course of business and statements made on the stand during trial, the latter being considered less reliable.[119]

Evidence in the SDNY Action showed that Deutsche Telekom—T-Mobile's controlling shareholder—had anticompetitive motives prior to announcing the proposed merger. Since at least 2010, Deutsche Telekom and T-Mobile have been interested in pursuing a merger with Sprint, and the Applicants have repeatedly engaged in merger negotiations.[120] Throughout this

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was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely").

[116] *See, e.g., H.J. Heinz Co*., 246 F.3d at 717; *FTC. v. Univ. Health, Inc*., 938 F.2d 1206, 1220 n.27 (11th Cir. 1991); *Stanley Works*, 469 F.2d at 504.

[117] *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 239 F. Supp. 2d 180, 189 (D.R.I. 2003), *aff'd*, 373 F.3d 57 (1st Cir. 2004).

[118] *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) ("knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences"), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp*., 467 U.S. 752 (1984); *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *United States v. Brown Univ*., 5 F.3d 658, 672 (3d Cir. 1993) ("courts often look at a party's intent to help it judge the likely effects of challenged conduct").

[119] *See, e.g., United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 U.S. Dist. LEXIS 3284, *52, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) (explaining that arguments in defense of the merger were undermined by pre-acquisition statements made by the parties' executives); *see also Grumman Corp. v. LTV Corp*., 527 F. Supp. 86, 95 (E.D.N.Y. 1981), *aff'd*, 665 F.2d 10 (2d Cir. 1981) (discounting CEO testimony inconsistent with profit maximization); *FTC v. Penn State Hershey Med. Ctr.,* 838 F.3d 327, 350-351 (3d Cir. 2016) (rejecting efficiencies defense based on testimony of defendant's CEO regarding savings); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1235 (C.D. Cal. 1973) ("Subjective evidence of the intentions of corporate management . . . while relevant and entitled to consideration, cannot be determinative in evaluating the legality of the acquisition under § 7.").

[120] Trial Tr. 187:18-25 (Höttges); 1320:13-22 (Claure); PX332; PX339 p. 120.

nine-year span, Deutsche Telekom's reasons for pursuing a merger with Sprint have not materially changed, and include what Deutsche Telekom describes as the "'Rule of 3'—potential to reduce price competition."[121] Indeed, Deutsche Telekom's Mr. Langheim expressed the view that "if [T-Mobile] can't get 4-3 consolidation the industry is headed for commoditization"—that is, that because wireless services would become more of a commodity, prices would fall—"and DT should limit their exposure in the US."[122] And Deutsche Telekom's head of M&A has emphasized that one of the potential benefits of a merger between Sprint and T-Mobile would be "market repair."[123]

Similarly, Sprint's Chief Marketing Officer Roger Solé-Rafols suggested in a pre-litigation text exchange with Sprint's CEO that the merger could result in a consolidated market that would generate a five-dollar increase in average revenue per user for the three remaining firms in the market.[124]

But the Court placed little weight on these documented, pre-merger statements by party executives or on expert witness testimony,[125] choosing instead to rely on the testimony of fact witnesses, which the Court described as a "more traditional judicial method[] of assessing a merged company's likely future behavior."[126] After making several statements regarding its credibility determinations at trial,[127] the Court ascribed a high degree of credibility to T-Mobile executive testimony that any efforts to collude would be thwarted by New T-Mobile's continued aggressive, "un-carrier" strategy.[128] Similarly, DISH executives convinced the Court that DISH would enter the market as a low-cost, maverick provider. [129] For unilateral effects, the Court

[121] Trial Tr. 188:4-7, 197:6–198:9 (Höttges); PX1034 p. 8; Höttges Dep. 101:16-24; Ewens Dep. 20:11–21:22.
[122] PX796, Ewens Dep. 73:7–77:2.
[123] PX382.
[124] PX566 at p. 2 (stating that the merger could "end up accommodating plus $5 ARPU in a three-player scenario [including AT&T and Verizon]" and that this demonstrated "the benefit of a consolidated market").
[125] The Court described the parties' competing economic evidence as a "stalemate leav[ing] the Court lacking sufficiently impartial and objective ground on which to rely . . . ." SDNY Decision at 5.
[126] SDNY Decision at 141.
[127] *See, e.g.*, SDNY Decision at 8 ("During the two-week trial of this action the Court had ample occasion to observe the witnesses and assess their credibility and demeanor on the witness stand . . . ."); *id.* at 136 ("[t]he Court has spent two full weeks assessing the credibility of each witness and their claims regarding whether coordination would be more or less likely in the RMWTS Market.")
[128] *Id.* at 141-42.
[129] *Id.* at 137-38 (noting that the Court "assessed the credibility of DISH's witnesses at trial.").

relied solely on the testimony of T-Mobile's future CEO to establish that New T-Mobile would not take the risk of engaging in a post-merger strategy of raising prices.[130]

In this proceeding, it is our understanding the Commission's ultimate decision must be supported by the findings of fact based on the record developed by the administrative law judge.[131] Credibility is an issue for the fact finder.[132] It is our opinion that the Commission should make its own determinations of credibility and the weight to be given executive testimony. In its evidentiary hearings, the Commission has received testimony from many of these same witnesses and is not only free to, but likely obligated to form its own judgment as to the witnesses' credibility. In making these credibility determinations, we caution against overreliance on statements made after the merger was announced, by Applicant executives who have a vested interest in the merger being approved.

VII. THE DISH REMEDY

When USDOJ reviewed this transaction as originally proposed—and modified by the Applicants' commitments to the FCC—it concluded that it was an anticompetitive 4-to-3 merger that would result in "increased prices and less attractive service offerings for American consumers."[133] USDOJ further concluded that "[a]ny efficiencies generated by this merger are unlikely to be sufficient to offset the likely competitive effects on American consumers in the retail wireless service market . . . ."[134]

Notwithstanding these concerns, USDOJ approved the transaction after facilitating a deal among the Applicants and DISH that would allow DISH to enter the market as a fourth retail wireless provider.[135] As stated by the Court in the SDNY Action, this type of "new market entry may counteract concerns about anticompetitive effects if entry would be 'timely, likely, and sufficient in its magnitude, character, and scope' to address those concerns."[136] Although the Court found that the details of the DISH remedy met each of these criteria, [137] we have serious

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[130] *Id.* at 141-42.
[131] *See* California Public Utilities Code § 1701.2(e).
[132] *See Johnson v. Pratt & Whitney Canada, Inc.*, 28 Cal. App. 4th 613, 622 (1994).
[133] PX1213, ¶ 5.
[134] *Id.* at ¶ 24.
[135] PX5363; PX254 p. 179.
[136] SDNY Decision at 107-08 (*citing* Guidelines § 9 and *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001)).
[137] SDNY Decision at 108-09.

doubts that DISH's anticipated entry will sufficiently offset the likely anticompetitive effects posed by this merger at least in the 18 California CMAs where the presumption is satisfied.

1. The DISH Remedy is Neither Timely, Likely, or Sufficient

We maintain that DISH's entrance into the market will not be timely, likely, or sufficient to replace the competitive significance of Sprint and mitigate the anticompetitive effects of the merger in at least 18 California CMAs.[138] The following evidence presented in the SDNY Action casts doubt on the effectiveness of DISH's entry at the national level:

- DISH is a satellite TV provider with no experience in the retail mobile wireless industry, no retail wireless subscribers, no retail wireless network, no retail wireless stores, no brand associated with retail wireless services, and no towers capable of communicating with handsets.[139]
- DISH told the FCC in 2012 that it planned to enter the retail wireless market; now—more than seven years later—DISH still has not built a mobile broadband network for consumers.[140]
- DISH has repeatedly failed to meet FCC-imposed deadlines, even when it has faced harsh consequences for doing so.[141]
- DISH has also found ways to subvert and make an "end-run[]" around certain FCC regulatory regimes, including its decision to "abuse" the FCC's designated entity program.[142]
- Even the Applicants have expressed skepticism about whether DISH seriously intends to build a nationwide network.[143]
- For at least the next seven years, DISH will be paying—and will be reliant on—New T-Mobile to provide mobile wireless service to some, if not all, of its customers, as well as for transition services.[144]

[138] Trial Tr. 2179:25–2180:6, 2221:13–14 (Scott Morton); *see also* Trial Tr. 703:21–704:10, 711:16–712:10 (Shapiro).
[139] Trial Tr. 1566:7-1568:9 (Ergen); Cullen Dep. 31:22-32:6, 32:19-34:4, 35:17-19; 35:22, Oct. 16, 2019.
[140] PX37, 18-24; Trial Tr. 1728:17-1729:10 (Ergen).
[141] Trial Tr. 1681:18–21 (Ergen); PX1303; PX1305; PX1177.
[142] PX1306; *see* PX1308, PX1309, PX1310.
[143] PX346; PX347; PX375; PX401; PX402; PX403; Trial Tr. 1346:4-1348:22 (Claure).
[144] DX5363, pt. VI; DX7207; Trial Tr. 1715:15–24, 1717:2–7 (Ergen). Remedies involving a new entrant must provide for an "independent competitor." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 77 (D.D.C. 2015).

- While DISH and New T-Mobile are contractually obligated to work together, they will also be competing against one another for customers.[145]

Despite this countervailing evidence, the Court concluded that DISH's entry will be timely, likely, and sufficient. In doing so, the Court relied heavily on the commitments and penalties set forth under DISH's deal with the USDOJ and FCC, and gave significant weight to DISH's trial testimony regarding its aspirational business plans. To support its conclusion regarding DISH's entry, the Court cited Charlie Ergen's "expressed [] desire for DISH to enter the RMWTS Market since at least 2012" as well as "his intention to 'compete with the largest wireless operators in the United States . . . from day one.'"[146] But in the absence of a cognizable plan demonstrating how DISH will actually compete in the RMWTS – and in particular, in the 18 California CMAs – such desires and intentions amount to nothing more than mere speculation, not the concrete analysis that is required to ascertain whether DISH's entry will be likely, timely and sufficient.[147]

2. Key Details of the DISH Remedy Remain Unapproved and Uncertain

Certain critical aspects of the remedy negotiated by USDOJ, as well as an extension of DISH's build-out deadlines, require further action by the FCC.[148] Most notably, the FCC Memorandum Opinion and Order, dated November 5, 2019 (the "MO&O"), does not address several outstanding requirements of the proposed remedy. While the MO&O approved Applicants' license transfer applications, the FCC has yet to rule on the following conditions of the proposed USDOJ remedy: (1) the divesture of certain 800 MHz spectrum licenses to DISH;[149] (2) an agreement between DISH and the Applicants regarding the lease of DISH's 600

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[145] Trial Tr. 1719:4–1722:2 (Ergen); Trial Tr. 714:9–715:1 (Shapiro); Trial Tr. 2222:2–2223:6 (Scott Morton).
[146] SDNY Decision at 108.
[147] *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341-42 (S.D.N.Y.), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *and aff'd*, 344 F.3d 229 (2d Cir. 2003), and *aff'd*, 344 F.3d 229 (2d Cir. 2003) (noting that a new card services network is a "'monumental' task involving expenditures and investment of over $1 billion" and that a new "entrant would need to capture a 20 to 25 percent market share to be successful"); *but see United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32 (1973) ("The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.").
[148] Trial Tr. 1709:2-1712:13 (Ergen); PX1211, n.15 & ¶ 395.
[149] *See* Proposed Final Judgment, pp. 11-13.

MHz spectrum;[150] (3) DISH's request "for an extension of time to complete construction of its facilities for its AWS-4, Lower 700 MHz E Block, and AWS H Block licenses";[151] and (4) the network services agreement allowing DISH to use T-Mobile's network for a number of years.[152] The timeline for FCC action on each of these items, as well as the FCC's ultimate determination, remains uncertain. Until the FCC acts, one cannot conclude that the DISH Remedy will even transpire, let alone be adequate to overcome the presumptive anticompetitive effects in the affected 18 California CMAs.

3. Specific Economic Analysis Before the Commission Casts Further Doubt on the Adequacy of the DISH Remedy

In this proceeding, and unlike in the SDNY Action, economic analysis was presented that examines DISH's ability to attract the approximately 40 million customers necessary to replace Sprint as a competitor in the market. The RMWTS market is saturated, i.e., there is a relatively small number of new customers entering the market each year.[153] This market reality presents a serious problem for DISH that was not addressed in the SDNY Action: How will DISH acquire approximately 40 million customers from New T-Mobile, AT&T, and Verizon in the next three to five years? This level of customer migration is unprecedented in the RMWTS industry and DISH has presented no evidence to date for how it will accomplish this remarkable feat.[154]

4. The DISH Remedy Does Not Alleviate Competitive Concerns in California

Even though the Court in the SDNY Action found that DISH's entry would be sufficient nationally, the Court did not evaluate the effect of DISH's entry in any local California markets. In finding DISH's entry to be timely, the Court focused on DISH's national commitment to the

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[150] *See id.* at 18-19.
[151] *See id.* at 23. DISH filed its request for an extension of its build-out deadlines on July 26, 2019, and the FCC has yet to act on the request.
[152] *See id.* at 19-20.
[153] See CPUC Exh. PAO 11 at p. 36 (Reply Testimony of Lee L. Selwyn on behalf of the Public Advocates Office) (Nov. 22, 2019).
[154] On average, there are approximately 3 million postpaid wireless customers in the market for wireless services. Even assuming that DISH were able to attract all of these customers from the three major providers—AT&T, Verizon, and New T-Mobile—it would take over ten years for DISH to achieve the same number of subscribers as Sprint has today. See Supplemental Testimony of Lee L. Selwyn (Nov. 22, 2019) at p. 39.

FCC to provide 5G coverage to 70% of the nation by June 2023.[155] While the limit for timely entry is often considered to be two years, the Court found a three and a half year time span to be sufficiently timely.[156]

In this proceeding, DISH has focused on different aspects of its FCC commitments, and specifically the built-in extension provisions that allow it to extend its deadlines to 2025 on a license-by-license basis.[157] Those provisions state that if DISH is offering service to at least 50% of the national population by June 2023 (in other words, it has failed to meet the 70% commitment relied on by the Court), it receives an automatic extension until June 2025 in each individual license area.[158] According to DISH, this provision thus requires to DISH to provide coverage and service to at least 70% of the population in each license area in California by June 2025.[159]

Assuming without analysis, that DISH's interpretation of its FCC commitments is correct, the specific California coverage commitments by DISH both fail to align with the specific markets where harm was found, and fail to provide a timely remedy. The different license types have different geographic areas: for the 600 MHz licenses it is partial economic areas ("PEAs") and for the AWS-4, Lower 700 MHz and H- Block licenses it is Bureau of Economic Analysis areas ("BEAs"). The BEAs were created in the 1990s and there are 8 BEAs in California.[160] PEAs were created by the FCC specifically for the deployment of the 600 MHz licenses in the Incentive Auction, and for California are the BEA regions with 2 BEAs further subdivided.[161] California contains 11 PEAs. Significantly, 4 California BEAs and 4 California PEAs also include portions of neighboring states. By comparison, CMAs are smaller, more

[155] SDNY Decision at 123-24 ("Considering that DISH has committed to build out an MNO network covering 70 percent of the United States population by 2023, its entry would fit into the three-year timeframe expressed by some courts.").
[156] *Id*. at 124-25 ("Although competition within the two years after the Proposed Merger is undoubtedly relevant, the Court sees no reason why its assessment the probable future effects of the Proposed Merger must be so artificially constrained").
[157] CPUC DISH Exh. 3 (Blum Testimony, Nov. 7 2019) A7, at 5-7.
[158] *Id*.
[159] *Id*. at 6. The commitment is 70% for the AWS-4 licenses and Lower 700 MHz E Block licenses, and 75% for the AWS-H block licenses and 600 MHz licenses.
[160] *See FCC Areas*, Federal Communications Commission, https://www.fcc.gov/oet/maps/areas (last visited Mar. 3, 2020).
[161] *Id.*

localized areas. There are 31 CMAs in California, and none of the California CMAs cross state boundaries.

The Applicants provided no evidence in the proceeding or the SDNY Action showing that 70% coverage for AWS-4, Lower 700 MHz and H- Block licenses or 75% coverage for the 600 MHz licenses in substantially different geographic areas replaces the competition lost in the California local market CMAs where the Court found a presumption of anticompetitive harm. For example, BEA 151/PEA 76 includes not only the underserved rural California counties of Alpine, Inyo, Lassen, Mono, Plumas, and Sierra, but also vast swaths of Nevada, including Washoe County where the city of Reno is located.[162] DISH would be able to satisfy their BEA/PEA-based coverage requirements by building towers in Reno, leaving out countless vulnerable California communities in the Sierra Nevada Mountains. In addition, the license-by-license commitments only require coverage by June 2025, over five years from now, which under any analysis is not timely entry.[163]

DISH's attempt to use its FCC commitments as a proxy for its coverage requirements in California underscores the inadequacy of this remedy. First, DISH's commitments to the FCC can by definition only be enforced by the FCC and not any California entity, and there is evidence that the FCC has in the past either changed or abandoned previously imposed merger conditions.[164] Second, DISH has made clear that it is not an applicant in this proceeding and is participating in the proceedings voluntarily, thus limiting the ability of the Commission to impose conditions on DISH that will ensure that it will provide sufficient and timely coverage in the local California markets adversely effected by the merger. For all of the above reasons, we caution the Commission against reliance on DISH entry.

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[162] *Id.*

[163] *See Sysco*, 113 F. Supp. 3d at 81 (waiting "four to five years for a foldout facility to achieve sales per square foot similar to established broadline facilities" would "not be timely").

[164] *See FCC Resolves Investigation of Comcast-NBCU Broadband-Related Merger Conditions; Ensures Consumer Access to Reasonably Priced Broadband Internt Serv.* (OHMSV June 27, 2012) 2012 WL 2499461, at *1 (FCC negotiated a year-long "extension of the merger condition requiring Comcast to offer a reasonably priced broadband option to consumers who do not receive their cable service from the company."); *see also Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations,* MB Docket No. 15-149, 31 FCC Rcd. 6327, 6544-47, Appendix B, Section V and *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., & Advance/Newhouse P'ship*, 32 FCC Rcd. 3238, 3239, 3242 (2017) (FCC removed original merger conditions for "New Charter" to "overbuild" broadband service in locations that already had existing high-speed broadband access support providers.).

VIII. CONDITIONS THAT MAY PARTIALLY AMELIORATE THE ANTICOMPETITIVE EFFECTS OF THE MERGER IN CALIFORNIA

It is possible that conditions could be crafted that would partially ameliorate the anticompetitive effects of the merger in California. Based on a preliminary review of the conditions agreed to by CETF, we believe those conditions alone are inadequate to remedy the harms, in part because the terms give a great deal of latitude to T-Mobile in terms of compliance, and the enforcement mechanism appears weak.

As discussed *supra*, CETF and T-Mobile executed an MOU in which CETF agreed to withdraw from the CPUC proceedings in exchange for certain pricing, service, and build-out commitments from New T-Mobile.[165] Such commitments included the same rate plans promised to the FCC, the deployment of 5G at 90% of cell site locations by 2025, promised capital expenditures for network development, LifeLine promotions and investment, tablets and internet service for low-income school programs, money to support digital inclusion programs, and resources dedicated to disaster response.[166] With the exception of the rate plans, these commitments are California specific.

While the CETF Agreement could be beneficial to California consumers, the inability of CETF to meaningfully enforce the terms of the agreement renders many of these benefits illusory. T-Mobile and CETF failed to follow any of the procedural requirements of Article 12 (Settlements) of the California Public Utilities Commission's Rules of Practice and Procedure (Rules), which requires notice of the settlement, public settlement conferences, reasonableness requirements, and a finding from the Commission that the settlement is in the public interest.[167] Instead, T-Mobile and CETF structured their agreement as "essentially a common position by certain parties… [who] do not seek to have the Commission adopt or approve the Joint Parties' MOU."[168]

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[165] *See* CETF Agreement.
[166] *Id*., Exhibit A.
[167] *See* Opposition of the Public Advocates Office to Motion by CETF and Joint Applicants to Modify Positions, *Applications* (April 23, 2019), at 1-2, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M288/K341/288341763.PDF.
[168] Reply of Joint Applicants and the California Emerging Technology Fund to Responses to Modify Positions in Proceeding to Reflect Memorandum of Understanding Between the California Emerging Technology Fund and T-Mobile USA, Inc., *Applications* (May 3, 2019), at 3, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M288/K387/288387569.PDF.

Because the CETF Agreement is merely "a common position" by CETF and T-Mobile, it gives CETF minimal ability to find relief if T-Mobile's view of the "common position" turns out to be in dispute. Should CETF accuse T-Mobile of failing to comply with the Agreement, CETF must give T-Mobile notice, an opportunity to meet and confer, and then an opportunity to cure any alleged non-compliance.[169] T-Mobile is allowed "no less than 180 days" to cure for network-related issues and "no less than 90 days" for other issues, with no upper time limit.[170] Should T-Mobile fail to comply with the MOU, then it appears that CETF's only recourse is to seek relief from the CPUC,[171] which is difficult to reconcile with T-Mobile and CETF's express position that they "do not seek to have the Commission adopt or approve the Joint Parties' MOU."[172] In any event, T-Mobile is not subject to any fines or penalties for non-compliance and it does not appear that the CETF is allowed to pursue enforcement through litigation. The MOU is also silent on governing law and lacks a venue provision.

The CETF Agreement terms are also weaker than they might initially appear. For example, the 90% 5G site deployment term is subject to a variety of exceptions and caveats, such as for "events … beyond the reasonable control of T-Mobile" that include not only such things as natural disasters, but the inability to acquire equipment or backhaul, and permitting issues.[173] These terms make it highly likely that T-Mobile will be able to avail itself of various exceptions. If T-Mobile does not meet its yearly cell site construction target, all it has to do is offer "a detailed explanation at a regional level for the variance."[174] T-Mobile's 100 Mbps speed commitment is similarly suspect: the CETF agreement allows T-Mobile to achieve just "80% of the specified speed tier category at each site."[175] The CETF agreement also leaves the test methodology for verifying speed and coverage undefined, and primarily considers tower buildout, disregarding on-the-ground customer experience as measured by drive-by tests.[176]

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[169] CETF Agreement, Exhibit A, Section XV.
[170] *Id*.
[171] *Id*.
[172] Reply of Joint Applicants and the California Emerging Technology Fund to Responses to Modify Positions at 3.
[173] CETF Agreement, Exhibit A, Section VII.C.
[174] *Id.*
[175] *Id.*
[176] *Id.* at Section VII.E.

Moreover, the Lifeline and Low-Income Offer terms conflate LifeLine and low-income customers.[177] LifeLine is a federal and state program for specific low-income wireless customers, but the CETF agreement also defines a T-Mobile-created category of Low-Income customers that utilize "non-LifeLine offers … that are priced at $20.00 per month or less."[178] T-Mobile confusingly treats these customers identically in some provisions and differently in others with respect to equipment provision, promotional spending, and customer targets.[179] T-Mobile also included a provision that allows it to renegotiate the LifeLine provisions if there are ever any "material changes in the LifeLine programs at either the state or federal level."[180]

Other settlements by T-Mobile, while they may have other flaws, have much more robust enforcement and penalty provisions. T-Mobile's commitments to the FCC and proposed final judgment with USDOJ include significantly more robust enforcement provisions. The FCC Order requires annual reports from T-Mobile, with expanded reports at year 3 and year 6. Failure to meet its commitments on-time can subject T-Mobile to FCC penalties of $250 million or more annually for each failed commitment until T-Mobile fulfill its obligations.[181] T-Mobile's settlement with USDOJ includes the appointment of an independent monitor and explicit acknowledgement that USDOJ may enforce that settlement in the U.S. District Court for the District of Columbia.[182]

T-Mobile's settlement with the State of Colorado on October 18, 2019 also contains stronger enforcement provisions.[183] T-Mobile will provide Colorado with a copy of all state-specific information contained in T-Mobile's reports to the FCC, and allow Colorado to recover up to $40 million for each unfilled commitment at year 3 and year 6, subject to a cap after which federal penalties can be used to offset state penalties.[184] The Colorado settlement also specifies that the settlement will be enforceable by the Colorado Attorney General under Colorado law in

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[177] *Id*. at Sections II, III, and IV.
[178] *Id.* at Section III.A.
[179] *Compare Id*. Section II and V *with* Section III and IV; *see* Supplemental Brief of Joint Consumers at 30-33, *Applications* (Dec. 20, 2019), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M326/K933/326933593.PDF.
[180] CETF Agreement, Exhibit A, Section V; *see* Supplemental Brief of Joint Consumers at 33-35.
[181] FCC Memorandum Opinion and Order at 235-37.
[182] Proposed Final Judgment at 34-36.
[183] *Assurance of Voluntary Compliance*, Colorado Attorney General (Oct. 18, 2019), https://coag.gov/app/uploads/2019/10/TMO-Colorado-AG-AVC-Fully-Executed.pdf.
[184] *Id.* at 5-8.

a Denver state court.[185] T-Mobile's settlement with Texas has broadly similar enforcement terms as that of Colorado, with an upwards adjustment in the penalty amounts.[186]

A set of conditions that expand upon the CETF settlement while adding robust enforcement provisions may provide a basis for partially ameliorating the anticompetitive effects of the merger in California.[187] Such conditions may include: coverage and speed requirements as measured via drive-by tests; clear commitments with respect to LifeLine service; enhanced commitments to public safety; commitments to maintain and increase California jobs; monetary penalties for failing to meet these conditions; an independent monitor to evaluate compliance; and the ability for the CPUC and the California Attorney General to enforce compliance in a California court under California law.

IX. CONCLUSION

The Applicants compete directly in a highly concentrated market. T-Mobile's acquisition of Sprint will reduce the number of competitors from four to three, and will likely harm competition in multiple local California market for RMWTS, resulting in higher prices and limited choices for California consumers. As found by the SDNY Court, the merger is presumptively anticompetitive both nationwide and in 18 California markets, which are relevant antitrust markets in their own right. The presumption of anticompetitive effects was not rebutted in the SDNY Action in the local California markets. Accordingly, and for the further reasons stated above, we maintain that the proposed merger of T-Mobile and Sprint is likely to have significant anticompetitive effects in California unless conditions are imposed.

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[185] *Id.* at 2, 6.

[186] *T-Mobile and Sprint Pledged Commitments in Texas*, Courthouse News (Nov. 22, 2019), https://www.courthousenews.com/wp-content/uploads/2019/11/sprint-tmobile-texas.pdf; *AG Paxton Announces Settlement Agreement with T-Mobile on Sprint Merger*, Texas Attorney General (Nov. 25, 2019), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-settlement-agreement-t-mobile-sprint-merger.

[187] We note that the Applicants have made numerous "voluntary commitments" in the course of this proceeding. Because these commitments are voluntary and lack an enforcement mechanism, we have not analyzed them as part of this opinion.

END OF ATTACHMENT 5