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
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 for Review of Wireless Transfer Notification per Commission Decision 95-10-032	Application 18-07-012

JOINT APPLICANTS' POST-DECEMBER 2019 HEARING BRIEF ON THE JOINT APPLICATION FOR REVIEW OF WIRELESS TRANSFER NOTIFICATION PER COMMISSION DECISION 95-10-032

(PUBLIC VERSION)

Dave Conn
Susan Lipper
T-Mobile USA, Inc.
12920 SE 38th St.
Bellevue, WA 98006
Telephone: 425.378.4000
Facsimile: 425.378.4040
Email: dave.conn@t-mobile.com
susan.lipper@t-mobile.com

Stephen H. Kukta
Sprint
900 7th Street, NW, Suite 700
Washington, DC 20001
Telephone: 415.572.8358
Email: stephen.h.kukta@sprint.com

Suzanne Toller
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
Telephone: (415) 276-6536
Facsimile: (415) 276-6599
Email: suzannetoller@dwt.com

Kristin L. Jacobson
Law Offices of Kristin L. Jacobson
491 Gray Court, Suite 1
Benicia, CA 94510
Telephone: 707.742.4248
Email: kristin@kljlegal.com

Leon M. Bloomfield
Law Offices of Leon M. Bloomfield
1901 Harrison St., Suite 1400
Oakland, CA 94612
Telephone: 510.625.1164
Email: lmb@wblaw.net

Attorneys for Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C)

Attorneys for T-Mobile USA, Inc.

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SUMMARY OF JOINT APPLICANTS' RECOMMENDATIONS

Per Commission Rule of Practice and Procedure 13.11, the Joint Applicants respectfully recommend that the Commission complete its review of the Application for Review of the Wireless Transfer Notification without further delay.

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JOINT APPLICANTS' POST-DECEMBER 2019 HEARING BRIEF ON THE JOINT APPLICATION FOR REVIEW OF WIRELESS TRANSFER NOTIFICATION PER COMMISSION DECISION 95-10-032 (PUBLIC VERSION)

Pursuant to the procedural schedule established in the Assigned Commissioner's Amended Scoping Ruling issued on October 24, 2019 (the "October Amended Scoping Ruling"), Sprint Spectrum L.P. (U-3062-C) and Virgin Mobile USA, L.P. (U-4327-C) (collectively referred to as the "Sprint Wireless CA Entities"),[1] and T-Mobile USA, Inc. ("T-Mobile USA")[2] (collectively referred to as the "Joint Applicants"), respectfully submit this joint post-hearing brief with respect to the hearings that took place from December 5 – 6, 2019.[3]

[1] Sprint Spectrum L.P. and Virgin Mobile USA, L.P. are wholly owned subsidiaries of Sprint Corporation ("Sprint").

[2] T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc. ("T-Mobile").

[3] This post-hearing brief is submitted with respect to A.18-07-012, as amended in the Amended Joint Application for Review of Wireless Transfer Notification per Commission Decision 95-10-032 ("Amended Wireless Notification") (September 19, 2019). Joint Applicants are not submitting a post-hearing brief with respect to A.18-07-011, the Joint Application for Approval of Transfer of Control of Sprint Communications Company L.P. ("Sprint Wireline") to T-Mobile USA, Inc., pursuant to California Public Utilities Code Section 854(a) (the "Wireline Approval Application"), as none of the issues addressed in supplemental testimony

I. EXECUTIVE SUMMARY

In light of the proposed post-merger divestiture of Sprint's prepaid assets to Dish Network Corporation ("DISH") per the DOJ Commitments as well as the Asset Purchase Agreement (the "DISH Divestiture"),[4] the Commission reopened the record of this proceeding and recently conducted additional evidentiary hearings on December 5 – 6, 2019.[5] The scope of the testimony submitted in advance of those hearings, as well as the hearings themselves, were dictated by the October Amended Scoping Ruling, and the Administrative Law Judge's Ruling Confirming Evidentiary Hearings and Establishing their Scope released on November 26, 2019 (the "ALJ Hearing Issues Ruling"). The issues identified for supplemental testimony – including the impact of T-Mobile's FCC Commitments[6] on the almost 50 California commitments T-Mobile has made during the course of

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submitted in November or the December hearings had any bearing on the proposed transfer of Sprint Wireline to T-Mobile. Thus, the Joint Applicants respectfully reiterate their request that the Wireline Approval Application be granted without further delay as it is undisputed that such a transfer would not be adverse to the public interest and is otherwise consistent with Section 854(a). *See, e.g.*, Joint Applicants' Post-Hearing Opening Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (April 26, 2019) ("Joint Applicants' Post-Hearing Opening Brief"); *see also* Joint Applicants' Motion for Immediate Approval of the Transfer of Sprint Communications Company L.P. (U-5112) to T-Mobile USA, Inc. (May 6, 2019).

[4] *See* Hearing Ex. Jt Appl. 20, Proposed Final Judgment (the "PFJ"), and the Stipulation & Order filed by the U.S. Department of Justice in the U.S. District Court for the District of Columbia on July 26, 2019 (collectively the "DOJ Commitments"); *see also* Asset Purchase Agreement among T-Mobile, Sprint Corporation and DISH Network Corporation entered on that same date (the "Asset Purchase Agreement"). Each of these documents was officially noticed and admitted into the record of this proceeding. *See* Administrative Law Judge's Ruling Re-opening the Record to Take Additional Evidence and Directing Joint Applicants to Amend Application (A.) 18-07-012 (August 27, 2019) ("ALJ Ruling to Reopen the Record") at 5, Ordering Paragraphs 2 and 3. *See also* Amended Wireless Notification at Exhibit P (PFJ), Exhibit Q (Stipulation and Order) and Exhibit R (Asset Purchase Agreement).

[5] *See* ALJ Ruling to Reopen the Record.

[6] *See* Hearing Ex. Jt Appl. 24-C (Letter from Nancy J. Victory, Counsel, T-Mobile US, Inc., and Regina M. Keeney, Counsel, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (filed May 20, 2019) ("FCC Commitments")). *See also* Hearing Ex. Jt Appl. 19, *In re Application of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations et al*., WT Docket No. 18-197, *Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification*, FCC 19-103 (rel. November 5, 2019) (the "FCC Merger Approval") at Appendix G (redacted copy of FCC Commitments).

this proceeding – are discussed in detail below. For ease of reference, the Joint Applicants have attached a chart which cross-references each of the issues identified in these rulings with the discussion of the evidence in this post-hearing brief. *See* Attachment 1.

In particular, however, as noted by ALJ Bemesderfer at the outset of the recent hearings, the Commission's primary focus in this second phase was on the impact of the DISH Divestiture on the merger, if any:

> This additional evidentiary hearing was scheduled as a result of changes in the transaction brought about by negotiations between the applicants and the United States Department of Justice that resulted in the addition of a new fourth wireless national facilities-based wireless company, DISH Network. Because of the addition of DISH, the original transaction has been modified, and the focus of this hearing is on the implications of that modification for the State of California's assessment of this transaction.[7]

The record developed on the additional issues raised in this second round of hearings is clear: the fundamental underlying transfer of the Sprint Wireless CA Entities to T-Mobile USA, and the transformative benefits for California consumers associated with the merger and buildout of New T-Mobile's 5G Network, all of which have been extensively detailed in the record,[8] remain unchanged. Indeed, if anything, the FCC Commitments and the DISH Divestiture will only further enhance the public-interest benefits that otherwise result from the transfer of Sprint Wireless to T-Mobile.[9]

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[7] *See* Hearing Tr. at 1255:16-28.

[8] T-Mobile has made a number of voluntary, enforceable commitments including those relating to 5G deployment and network buildout, rural expansion, network resiliency, public safety, MVNOs and jobs. T-Mobile has also made other commitments which address concerns that Intervenors have raised about the impact of the merger, including those relating to pricing, LifeLine, privacy, bridging the digital divide and diversity. All told, T-Mobile has made nearly 50 voluntary, enforceable commitments in the context of this proceeding. Moreover, to ensure their enforceability, T-Mobile has requested that these commitments be made conditions of the merger, be embodied in ordering paragraphs of the Commission decision, and be enforceable by the Commission. *See, e.g.*, Joint Applicants' Post-Hearing Reply Brief on the Joint Application for Review of the Wireless Transfer Notification per Commission Decision 95-10-032 (May 10, 2019) at Appendix 1 ("Joint Applicants' Post-Hearing Reply Brief").

[9] The DOJ Commitments also reflect conditions accepted by the DOJ to resolve the potential competition-related question raised by the DOJ in connection with its review of the Transaction.

As an initial matter, the record is unambiguous that neither the proposed DISH Divestiture, nor the FCC Commitments, adversely impact any of the benefits to California consumers created by the merger or T-Mobile's California commitments. For example, the divestiture has no impact on New T-Mobile's pricing commitment or its commitment to LifeLine[10] and the Boost Pilot Program. (*See* Section IV.B, *infra*.) Moreover, the buildout commitments memorialized in the CETF MOU contain enforceable, verifiable metrics which are only enhanced by the national buildout commitments contained in the FCC Commitments and are not impacted at all by the divestiture to DISH. (*See* Section IV.C, *infra*.) Similarly, the proposed DISH Divestiture does not adversely impact the New T-Mobile network. New T-Mobile's post-merger network plan already accounted for aggressive growth in Sprint prepaid customers, and the combined network will have more than sufficient capacity to service MVNO customers including DISH's customers. (*See* Section IV.D, *infra*.) The divestiture of 800 MHz spectrum to DISH contemplated by the DOJ Commitments similarly has no bearing on the deployment of the New T-Mobile 5G network or its ability to provide service to customers during the migration period. (*See* Sections IV.D and E, *infra*.)

Moreover, the record makes clear that DISH has the tools to be a viable competitor in the wireless market. First, the DOJ Commitments, by definition, resolve the potential competition-related questions raised by the DOJ in connection with its review of the transaction. The unrefuted testimony of Mr. Blum, however, added detail to the information already contained in the 4-corners of the PFJ and the Asset Purchase Agreement. Among other things, Mr. Blum established the following:

[10] The DISH Divestiture explicitly excludes Assurance Wireless, the wireless brand currently used by Sprint to provide LifeLine in California, from the divestiture. *See* PFJ § II.L. ("Prepaid Assets do not include the Assurance Wireless business ….").

- DISH has a very favorable MVNO agreement[11] with unlimited capacity, advantageous pricing and seamless roaming to serve its customers as it builds out its network (*see* Section V.A, *infra*);

- DISH has significant spectrum resources (*see* Section V.B, *infra*);

- DISH has plans to build a facilities-based network and has already begun the process by securing tower lease arrangements, issuing RFPs and reaching out to independent retailers (*see* Section V.C, *infra*);

- DISH has the financial ability to finance the network build (*see* Section V.E, *infra*);

- DISH is not dependent on the decommissioned sites that will be available from New T-Mobile under the PFJ to build out its network (*see* Section V.C, *infra*);

- DISH has incentives to honor its commitments to the DOJ and the FCC to build out its network and faces penalties for failing to do so, including the potential forfeiture of spectrum licenses and up to $2.2 billion in voluntary contributions (*see* Section V.C, *infra*);

- The divested Sprint prepaid customers will receive quality service, first on New T-Mobile's network, then on a combination of the DISH and New T-Mobile network, and ultimately on DISH's own 5G network (*see* Section V.A, *infra*);

- DISH has the incentive to migrate Sprint prepaid customers in a timely manner and will receive support from New T-Mobile to meet that goal (*see* Section V.D, *infra*);

- DISH will be subject to the laws applicable to CMRS providers operating in California and already has a team of people working on compliance issues such as consumer protection and privacy laws (*see* Section V.G, *infra*);

- DISH also has experience with emergency preparedness, public safety, and disaster response, and has already begun the process of planning how its 5G network in California will meet all such necessary standards (*see* Section V.G, *infra*); and

- DISH has a long history of being a disruptive force in the marketplace and a low-cost leader (*see* Section V.H, *infra*).

In addition, there is no credible evidence to suggest that the Sprint prepaid divestiture to DISH will be anti-competitive (*see* Section VI, *infra*).

[11] The actual agreement between T-Mobile and DISH is called a Master Network Services Agreement ("MNSA Agreement"); however, for ease of reference, it is generally referred to as a MVNO agreement for purposes of this post-hearing brief.

In sum, the record developed in this proceeding through the February 2019 hearings and now these December 2019 hearings, overwhelmingly demonstrates that the proposed merger will be good for consumers, good for competition, and good for the future of California. It establishes that the proposed merger will result in a world-leading 5G wireless network with capabilities that neither standalone company could build on its own. This network will have greater capacity, better coverage and faster speeds – facts that are indisputable and undisputed here. The record, including economic models submitted by Joint Applicants, confirms that New T-Mobile consumers will enjoy better service and lower prices. In addition, millions of Sprint customers – including roughly half a million LifeLine customers – will obtain vastly better coverage and service than standalone Sprint could ever offer. The record also demonstrates that the proposed merger will produce a host of new employment opportunities and will be jobs positive from day one. Moreover, as noted above and discussed more extensively below, the DISH Divestiture, the FCC Commitments, and the other California-specific commitments made by T-Mobile do not adversely impact those benefits in any way. Instead, they only enhance those benefits and provide verifiable and enforceable mechanisms to ensure that New T-Mobile honors its commitments to California consumers.

The Intervenors' continued and unrelenting attempts to delay or otherwise undermine the merger only serve to deprive California consumers – particularly under-connected, low-income and rural consumers – of the benefits that New T-Mobile will bring. Although the Intervenors' earlier attempts to derail the merger were fully addressed in the initial hearings, they now attempt to suggest that the DISH Divestiture is not viable or is filled with too many "loopholes" to allow DISH to become a competitive force. Their position is simply contradicted by the evidence. In fact, the DISH Divestiture on its face should have addressed Intervenors' previously stated concerns with the alleged concentration of prepaid consumers in New T-Mobile.

Accordingly, based on the evidentiary record, and for the reasons set forth in their various post-hearing briefs, the Joint Applicants respectfully request that the ALJ issue a Proposed Decision as soon as possible, and in any event by January 7, 2020, so as to enable the Commission to issue a final decision at its February 6, 2020 meeting. A final Commission decision no later than the February 6 meeting is critical to mitigate the possibility that the Commission's review in this matter extends beyond the conclusion of the remaining proceedings that are ongoing at the federal level. The trial in the litigation brought by various State Attorneys General challenging the T-Mobile/Sprint merger is already underway and is expected to conclude before the end of 2019, with a decision expected from the U.S. District Court for the Southern District of New York shortly thereafter. And the record is complete in the District Court review of the PFJ under the Tunney Act. Further delay in the present proceeding – one that has already been pending before this Commission for over 17 months, following two sets of evidentiary hearings and voluminous written submissions – would be highly prejudicial to Joint Applicants and cause prolonged uncertainty. Accordingly, the Commission's issuance of a PD in early January is crucial.

II. PROCEDURAL BACKGROUND

A. Initial Wireless Notification

This proceeding was initiated through the Wireless Notification filed on July 13, 2018, by the Sprint Wireless CA Entities and T-Mobile USA.[12] Protests were submitted on August 16, 2018, by Cal PA and jointly by TURN and Greenlining. Joint Applicants provided a reply to the protests on August 27, 2018. On September 11, 2018, the assigned ALJ issued a ruling consolidating the Wireless Notification proceeding with the Wireline Approval Application proceeding.

[12] *See* Joint Application for Review of Wireless Transfer Notification per Commission Decision 95-10-032 (July 13, 2018). On July 13, 2018, Sprint Communications Company L.P. and T-Mobile USA also filed the Wireline Approval Application.

Subsequent and separate motions for party status filed by Media Alliance, CWA, CETF, and DISH Network Corporation ("DISH") have since been granted.

On September 12, 2018, Cal PA and Joint Applicants filed pre-hearing conference ("PHC") statements. A PHC took place in this proceeding on September 13, 2018. Following the PHC, an initial Scoping Memo was issued on September 28, 2018. On October 4, 2018, an Amended Scoping Memo was issued replacing the prior Scoping Memo in its entirety. The Amended Scoping Memo stated that the fundamental issue presented by these applications is whether the proposed transaction is in the public interest of the residents of California and notes that the "scope of this proceeding includes all issues that are relevant to evaluating the proposed merger's impacts on California consumers and determining whether any conditions should be placed upon the merged entity."[13] To that end, the Amended Scoping Memo identified various issues and factors to be considered in the course of this proceeding.[14]

On December 10, 2018, the Commission hosted a technical workshop open to the public. The workshop had two panels: (i) a panel of economists which discussed the impact of the merger on competition; and (ii) a second panel which focused on the impact of the merger on low-income consumers.

From January 15, 2019, to January 18, 2019, transcribed public participation hearings ("PPHs") took place at three different locations in or near Joint Applicants' service territory: Fresno, Los Angeles, and San Diego. During the PPHs, various attendees representing a range of interests and constituencies expressed support for the merger including non-profit groups serving diverse

[13] Amended Scoping Memo at 2. As discussed in greater detail in Section III, *infra*, the Commission may not impose conditions upon the merged entity.

[14] The Joint Applicants note that the Executive Summary of their rebuttal testimony identifies where each of the issues and factors identified in the Amended Scoping Memo are addressed in their rebuttal testimony. *See* Hearing Ex. Jt Appl. 1.

communities, local government officials, diverse chambers of commerce, small business owners, high school and community college representatives, home care workers, and both T-Mobile and Metro employees. Most of the opposition came from CWA and other labor organization-affiliated speakers.[15]

Cal PA, CWA, CETF, and Greenlining submitted nine sets of testimony from eight different witnesses on January 7, 2019. Joint Applicants submitted rebuttal testimony from 10 different witnesses on January 29, 2019. T-Mobile also executed an MOU with NDC on January 29, 2019 that was included as Attachment B to the Rebuttal Testimony of Ms. Sylla Dixon. Four days of hearings were held in this matter on February 5, 6, 7, and 8, 2019. Post-hearing opening briefs were submitted on April 26, 2019 and reply briefs on May 10, 2019.

B. Post-Initial Hearing

Since the conclusion of the briefing schedule for the initial hearings, there have been a number of developments in the merger both in California and nationally including the following:

- As of March 22, 2019, T-Mobile entered into a MOU with the California Emerging Technology Fund (the "CETF MOU") and made a number of California-specific commitments which address pricing, LifeLine, network/rural buildout, public safety, emergency preparedness, network resiliency, the digital divide (including digital literacy) and enforceability.[16]

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[15] Joint Applicants estimate that about 100 people attended the first PPH in Fresno, with 28 expressing support, 11 expressing opposition, and 1 stating a neutral position. At the second PPH in Los Angeles, Joint Applicants estimate that more than 220 people attended, with 50 expressing support, 22 expressing opposition, and 2 stating a neutral position. Finally, at the last PPH in San Diego, Joint Applicants estimate that about 130 people attended, with 28 expressing support and 19 expressing opposition.

[16] *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. (April 8, 2019) (granted May 8, 2019). T-Mobile also made various other commitments to California regarding issues generally addressed in the testimony – but which were subsequently formalized and reflected in subsequent filings – including but not limited to building a Customer Experience Center in Kingsburg, California after the close of the transaction, MVNO (and other) reporting to the Commission, various public safety /emergency disaster enhancements, job commitments, and continued participation in the Boost Mobile Pilot Program. *See* Joint Applicants' Post-Hearing Opening Brief at 96; Joint Applicants' Post-Hearing Reply Brief at Appendix 1.

- As of May 20, 2019, T-Mobile made a number of commitments to the FCC regarding which were memorialize in an ex parte filed with the FCC in connection with that agency's review of the Transaction (the "FCC Commitments").[17]

- As of July 26, 2019, and as noted above, T-Mobile, Sprint and the DOJ agreed to the terms of the DISH Divestiture as reflected in the PFJ, as well as the Asset Purchase Agreement.[18]

- On August 27, 2019, the Assigned Commissioner issued his ruling reopening the record and directing Joint Applicants to amend the Wireline Notification.

C. Amended Wireless Notification

- On September 19, 2019, the Joint Applicants filed their Amended Wireless Notification per the Assigned Commissioner's directive.

- On October 9, 2019, Cal PA, TURN, Greenlining, and CWA filed their protest to the Amended Wireless Notification.

- On October 24, 2019, the Assigned Commissioner issued his October Amended Scoping Ruling setting forth the issues to be addressed in additional testimony.

- On November 5, 2019, the FCC released its decision approving the merger of Sprint and T-Mobile.[19]

- On November 7, 2019, Joint Applicants submitted testimony from 5 different witnesses; DISH submitted testimony from Mr. Blum; and CETF submitted testimony from Ms. McPeak.

- On November 22, 2019, Cal PA, CWA, and Greenlining submitted seven sets of rebuttal testimony.

- On November 26, 2019, the Assigned Administrative Law Judge issued his Scoping Ruling setting forth the issues to be addressed at the December evidentiary hearings.

- On December 5 – 6, 2019, evidentiary hearings were conducted and concluded.

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[17] *See* Motion of Joint Applicants to Advise the Commission of New FCC Commitments (May 20, 2019) (pending).

[18] *See* notes 4 and 6, *supra*.

[19] *See* FCC Merger Approval, *supra*. Moreover, 18 of 19 state regulatory commissions have already concluded their review of transactions associated with the merger.

At this time, the only outstanding proceedings regarding the merger involve (1) this Commission's review of the Wireline Notification, (2) District Court review of the PFJ under the Tunney Act (where the decisional record has been compete since early November),[20] and (3) litigation in the U.S. District Court for the Southern District of New York brought by a group of state attorneys general, including the California AG.[21]

Thus, the Joint Applicants respectfully urge the Commission to continue to take all appropriate steps to ensure issuance of a proposed decision no later than January 7, 2020 so that the Commission can conclude its review at the February 6, 2020 voting meeting.

III. THE AMENDED WIRELESS NOTIFICATION IS SUBJECT TO COMMISSION REVIEW AND NOT APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 854

In filing this post-hearing brief in accordance with the October Amended Scoping Ruling, Joint Applicants expressly preserve all of their previously asserted jurisdictional arguments. In particular, Joint Applicants continue to respectfully maintain that the Commission's approval is not required for the proposed transfer of the Sprint Wireless CA Entities under longstanding Commission precedent and federal law.[22] As to the transfer of Sprint Wireline, the record is, and has been from

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[20] The DOJ Commitments are currently undergoing federal court review in the U.S. District Court for D.C. *See United States v. Deutsche Telekom AG, et al.*, No. 1:19-cv-02232 (D.D.C. 2019) (the "Tunney Act Review"). The complaint and proposed final judgment were filed by the DOJ on July 26, 2019. Notice of the Complaint, the Proposed Final Judgment and the Competitive Impact Statement were published in the *Federal Register* on August 12, 2019, *see* 84 Fed. Reg. 39862-02. The 60-day period for public comment ended on October 11, 2019. On November 6, 2019, the DOJ filed its response to the public comments, and on November 8, 2019, the DOJ filed its motion in support of entry of final judgment. The case now stands submitted for decision by the District Court.

[21] *State of New York v. Deutsche Telekom AG*, No. 1:19-cv-05434-VM-RWL (S.D.N.Y. filed June 11, 2019).

[22] As Joint Applicants have previously explained, the Commission has expressly exempted wireless carriers from any requirement to obtain the Commission's "preapproval" for a wireless transfer of control under Public Utilities Code Section 851-856 and instead requires only that the carrier "provide advance notice" of such a transfer to the Commission – notice that the Joint Applicants provided over 17 months ago. *See Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D. 95-10-032, 1995 Cal. PUC LEXIS 888, at *30-31, 45 (Oct. 18, 1995) ("All CMRS providers are hereby exempted from compliance with the provisions of Public Utilities (PU) Code … §§ 851-856 relating to transfers of

the outset, unrefuted that the Wireline Approval Application readily satisfies the Commission's well-established standard for approving similar wireline transfers under California Public Utilities Code § 854(a) and therefore should be promptly approved.[23] As discussed above, the Commission should also promptly conclude its review of the Amended Wireless Notification by issuing a final decision by no later than the Commission's February 6, 2020 meeting.

IV. NEITHER THE DOJ NOR FCC COMMITMENTS ADVERSELY IMPACT THE MERGER, THE CETF MOU, OR ANY MERGER BENEFITS.

As the evidence confirms, neither the DOJ nor the FCC Commitments alter the fundamental transaction which will result in the transfer of control of Sprint, including the Sprint Wireless CA Entities, to T-Mobile USA nor do they impede in any way the many benefits that the transaction will bring to Californians. Instead, the commitments amplify and confirm the benefits of the Transaction, including the creation of the robust, nationwide and world-class New T-Mobile 5G Network that has been the focus of much of this proceeding.

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ownership.") (Ordering Paragraph 3). Moreover, federal law preempts any attempt by a state PUC to require preapproval for a wireless transfer of control (or to mandate conditions as a prerequisite to approval). *See* 47 U.S.C. §§ 253(a), 332(c)(3)(A); *Shroyer v. New Cingular Wireless Servs., Inc*., 622 F.3d 1035, 1041, 1044 (9th Cir. 2010); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008-09 (9th Cir. 2010); *see also, e.g*., Joint Application for Review of Wireless Notification at n.1; Joint Applicants' Post-Hearing Opening Brief at 14-16; Joint Applicants' Post-Hearing Reply Brief at 7-12.

[23] As Joint Applicants pointed out in their briefing requesting immediate approval of the Wireline Application almost 8 months ago, there are no disputed facts or issues concerning the wireline transfer and no Intervenor contests the substantial record evidence demonstrating that the wireline transfer is in the public interest. *See* Joint Applicants' Post-Hearing Opening Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (April 26, 2019); *see also* Joint Applicants' Post-Hearing Reply Brief Requesting Immediate Approval of the Transfer of Sprint Communications Company L.P. to T-Mobile USA, Inc. (May 10, 2019). In the ensuing months, nothing has changed as the exclusive focus of this proceeding since the February 2019 hearing has been on the Wireless Notification. Thus, the Joint Applicants respectfully renew their request that the Wireline Application be granted without further delay.

A. The FCC Commitments and the DOJ Commitments Require One Conforming Change to the Pricing Commitment Memorialized in the CETF MOU

Issue 2 in the October Amended Scoping Ruling asks what changes are required to the terms of the CETF MOU resulting from the DOJ and FCC Commitments. The record developed in the context of the December 2019 hearing unequivocally demonstrates that the DOJ Commitments require only one conforming change to the CETF MOU, and that the FCC Commitments require no changes to the CETF MOU. Specifically, Mr. Sievert testified that no changes are required to the non-network build portions of the CETF MOU other than a conforming change to the referenced nationwide pricing commitment to reflect that,-after the divestiture, the pricing for the divested Sprint prepaid business will be a matter for DISH not new T-Mobile.[24] That change is also consistent with the FCC pricing commitment as updated by T-Mobile after the DOJ Commitments.[25] Mr. Ray similarly testified that neither the DOJ nor FCC Commitments requires any changes to the network buildout terms of the CETF MOU.[26]

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[24] *See* Hearing Ex. Jt Appl. 34 ("Sievert Supplemental Testimony") at 5:17-24. The Joint Applicants note that the supplemental testimony submitted on November 7, 2019 for Messrs. Sievert, Ray, Keys, Israel and Bresnahan, all of which are referenced below, as well as Hearing Ex. Jt Appl. 30 ("Draper Supplemental Testimony") and 31 ("Sywenki Supplemental Testimony") were provided in response to the October Amended Scoping Ruling, Issue 1.

[25] Sievert Supplemental Testimony at Attachment D, Letter from Nancy Victory, Counsel, T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (filed September 13, 2019) (modifying the FCC pricing commitment to reflect the DISH divestiture in the PFJ); *see also* Amended Wireless Notification, Confidential Exhibit S (May 20, 2019 Ex Parte) at 6 ("The Applicants once again take this opportunity to unequivocally reaffirm the February 4, 2019, pricing commitment and include it for convenience as Attachment 3. As previously stated, this commitment not only ensures that prices cannot go up, but that 5G comes at no extra cost – in contrast to surcharges imposed by Verizon and planned by AT&T. In light of the proposed Boost divestiture, the commitment will cover the Boost plans only until Boost is divested.").

[26] *See* Hearing Ex. Jt Appl. 28-C ("Ray Supplemental Testimony") at 4:7-8.

Importantly, this testimony is unrebutted in the record. While Cal PA witnesses Reed and Odell[27] criticize certain elements of the CETF MOU commitments (criticisms which, as explained below, are baseless) neither witness identified any way in which the FCC or DOJ Commitments would alter the CETF MOU beyond the single conforming change to the pricing commitment identified by Mr. Sievert.[28] In fact, Mr. Reed essentially conceded that the FCC commitments have no impact on the CETF MOU.[29]

B. The DISH Divestiture Does Not Impact the Continued Availability of New T-Mobile's Low-Cost Plans and the Merger will Not only Sustain but Improve Service for LifeLine Customers in the State

The ALJ Hearing Issues Ruling asks how the agreements with DISH affect the continued availability of low-cost plans (Issue 3) and whether any Lifeline customers are at risk of losing their subsidies if the merger between Sprint and T-Mobile is consummated (Issue 5). The record in this proceeding, and T-Mobile's track record in the wireless market, establishes that New T-Mobile will continue to offer low-cost plans.[30] In fact, building on its lengthy history of being a low-cost leader, T-Mobile recently announced its T-Mobile Connect plan featuring a $15 per month plan for unlimited talk and text with 2GB of high speed smartphone data, which it will offer if the merger goes

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[27] *See* Hearing Ex. Pub Adv-0015 ("Lyser Reply Testimony") at 5, Table 1. CWA Witness Goldman also includes the following statement on the first page in her testimony "The federal commitments not only alter the originally proposed merger, but also affect the CETF agreement." Hearing Ex. CWA 18 ("Goldman Reply Testimony") at 1:16-17. However she fails to describe any purported effects on the CETF MOU.

[28] *See* Hearing Ex. Pub Adv-0013C ("Odell Reply Testimony"); Hearing Ex. Pub Adv-0020C ("Reed Reply Testimony").

[29] Reed Reply Testimony at 7:22-23 ("While it is true that the FCC commitments could have relatively little impact directly on the CETF MOU….").

[30] Hearing Tr. at 1519:13-16 (Sievert Cross) ("Q. FCC commitments and the CETF commitments do not affect your provision of . . . low-cost services in California? A. That's correct."); *see also* Sievert Supplemental Testimony (describing the nominal impact of the DOJ and FCC Commitments).

through.[31] This plan, which is "half of our [T-Mobile's] conventionally lowest price offer",[32] will be "targeted at low-income households but without eligibility requirements, meaning less red tape, and available to everyone."[33]

The record further establishes that T-Mobile will continue Assurance Wireless' provision of Lifeline service and will provide Lifeline customers with a larger geographic footprint. New T-Mobile has also committed to become a participant in the Boost Mobile Pilot, if the Commission wishes.

1. T-Mobile's practice of offering low-cost plans and its commitment ensuring customer choice of the "same or better rate plans" is well-established in the record.

As acknowledged by Intervenors, T-Mobile and Sprint have been industry leaders in offering affordable plans.[34] Nothing in the merger itself (or the divestiture to DISH) will reduce New T-Mobile's incentive to continue to offer low-cost plans. In fact, as Mr. Israel testified, "with lower costs and higher capacity, New T-Mobile's incentives are to lower prices and increase product quality in order to attract more customers and higher profits."[35] Moreover, the entrance of another competitor in the market, DISH, further strengthens the company's incentive to offer low-cost plans to compete.[36]

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31 Hearing Tr. at 1549:19-25 (Sievert Cross).

32 Hearing Tr. 1550:9-14 (Sievert Cross).

33 *Id.* at 1549:25-28 (Sievert Cross).

34 Hearing Ex. Pub Adv-004C ("Odell Testimony") at 16:5-6 and 12-15.

35 Hearing Ex. Jt Appl. 33 ("Israel Supplemental Testimony") at 1:26-28.

36 *See* Hearing Tr. at 1542:25-1543:22 (Sievert Cross) ("**Q.**… is it...your testimony here today that indeed the goal is to have DISH be not an MVNO but to be a fourth facilities-based wireless competitor that will actually impose some competitive pressure on New T-Mobile? **A** DISH has the unique benefit in this arrangement of being all those at the same time ... But to be clear, and to the premise of your question, DISH will be our competitor.").

That said, to address FCC concerns about whether the same incentive exists in the first three years following the close of the merger, while capacity is being expanded and cost-savings are being achieved, T-Mobile has made a nationwide pricing commitment[37] (which it affirmed in the CETF MOU) pursuant to which the company will make available to consumers the same or better rate plans as those offered by T-Mobile or Sprint as of February 4, 2019, for three (3) years following the close of the Transaction (the "Pricing Commitment").[38] The Pricing Commitment will cover Boost, Virgin Mobile and Sprint prepaid plans only until those businesses are divested to DISH, at which point, the pricing for the divested Sprint prepaid business will be a matter for DISH, not T-Mobile, to determine.[39]

Cal PA challenges the effectiveness of the Pricing Commitment, arguing that (i) it is insufficient because there will not be a fourth competitor ready to "exert the competitive pressure on prices" in three years (when the commitment expires),[40] and (ii) under the Pricing Commitment, New T-Mobile could increase absolute rates if it offered the customer a better value (*e.g.*, offering increased data).[41] However, neither of these criticisms has any merit.

First, the Pricing Commitment was not offered, as Cal PA alleged, to bridge the gap until the development of a fourth competitor. Rather, as the FCC explains, it was offered to serve "as a ceiling

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[37] Hearing Tr. at 387:22-388:9 (Sievert Cross).

[38] Hearing Ex. Jt Appl. 24C, Attachment 3 ("February 4, 2019 FCC Letter"); *see also* Hearing Ex. Jt Appl. 23C ("CETF MOU"); *see also* Joint Applicants' Post-Hearing Opening Brief at 5 and 58. This voluntary commitment is described herein as the "Pricing Commitment."

[39] Sievert Supplemental Testimony at 5:22-25 (citing to Letter from Nancy Victory, Counsel, T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197) (filed September 13, 2019) (modifying the FCC pricing commitment to reflect the DISH divestiture in the PFJ).

[40] Odell Reply Testimony at 5:12-15 ("[t]he assumption that underlies this condition is that within three years, another entity will have gained market entry and market share to the extent that it could exert the competitive pressure on prices . . . .").[40]

[41] *See id.* at 6:8-13.

on potential price increases post-transaction during the network integration period, prior to which the Applicants would not have realized the longer-term network benefits anticipated as a result of this transaction."[42] This purpose of the Pricing Commitment is reinforced by the fact that, as Cal PA witness Odell acknowledged in her hearing testimony, the commitment was made long before the announcement of DISH's proposed market entry.[43] As Cal PA further acknowledged, this pricing commitment is unique among wireless carriers.[44]

Cal PA's criticism of the operation of the Pricing Commitment is similarly unavailing, and reflects the fact that Cal PA has simply neglected to do its homework. T-Mobile has already clearly explained in the record of this proceeding, and before the FCC, that a "better plan" is one with a lower price, the same price and more data, or a lower price and more data.[45] This explanation of the Pricing Commitment is reflected in the FCC's final order approving the Transaction.[46] Moreover, the President of T-Mobile committed in hearing testimony to the following interpretation of "same or better rate plan": "the same plan with the same benefits at a lower price. Or . . . benefits like more data at the exact same price; or both [sic] the same plan with a lower price and more data."[47] As Mr. Sievert explained on redirect:

> Q: And so, for example, Mr. Sievert, if you had a plan that was offered at $30 [for] two gigabytes of data, could you eliminate that plan if you offered a plan for $35 that offered 10 gigabytes of data because obviously that would be [a] better deal for

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42 *See* FCC Merger Approval ¶ 212.

43 Hearing Tr. at 1345:9-10 (Odell Cross) ("[The Pricing Commitment] was significantly before the DOJ filed its proposed final judgment.").

44 *Id.* at 1349:18-22 (Odell Cross) ("Q. And, Ms. Odell, are you aware of any other wireless carriers that are currently committed to not to [sic] raise prices for the next three years? A. No.").

45 *See* Hearing Ex. Jt Appl. 26 ("February 12, 2019 FCC Letter") at 2-3; *see also* Hearing Tr. at 387:4-18 (Sievert Cross) ("We intend to provide the same or better at rapidly increasing levels of quality on top. But prices themselves even not adjusted for quality will be the same or better.").

46 FCC Merger Approval ¶ 212 n.705.

47 Hearing Tr. at 1565:27-1566:4 (Sievert Redirect).

customers. They would be getting more gigabytes of data, but the plan would be more expensive.

A: No. We would keep both plans in place if we contended to offer such a plan.
Q: And is it your understanding that your commitment to the FCC requires your use of the -- requires this definition so that you are bound to this definition, the same or better?

A: Yes.[48]

2. T-Mobile's commitment to continue Assurance Wireless' participation in LifeLine is well-established in the record.

New T-Mobile has affirmed its commitment to be a LifeLine provider in the state through Assurance Wireless[49] by participating in the state and federal Lifeline programs.[50] This commitment has been affirmed by the Joint Applicants in prior written testimony, at the February hearings, in the CETF MOU, in prior briefs, in the recently filed supplemental written testimony, and during the December hearings. This commitment includes affirmative obligations to (i) continue to offer LifeLine services indefinitely in California through 2024 at a minimum; (ii) continue to offer LifeLine services under terms and conditions no less favorable than those offered by Assurance Wireless as of the date of close; and (iii) grow the LifeLine customer base.[51] The Sprint Prepaid Divestiture has no impact on T-Mobile's LifeLine commitment because the Assurance Wireless brand and its customers are not being transferred to DISH.

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[48] Hearing Tr. at 1566:9-25 (Sievert Redirect).

[49] Amended Wireless Notification at 43 n.113 ("The divestitures exclude the Assurance brand Lifeline business and New T- Mobile will continue to provide LifeLine service under that brand.").

[50] Hearing Tr. at 1528:18-22 (Sievert Cross) ("Q. Does it commit T-Mobile to participate in the federal Lifeline program? Q. Until 2024? A. Yes. That's certainly my understanding of it.").

[51] CETF MOU § II.

Nevertheless Intervenors continue to try to disparage and undercut T-Mobile's LifeLine commitment.[52] For example, Cal PA suggests without any foundation that New T-Mobile's continuation of Sprint's LifeLine offering is not a merger benefit and that the "material change provisions" in the CETF MOU undermines the strength of the LifeLine commitment.[53] However, as was made abundantly clear at the hearing, these criticisms are unfounded.[54]

As a threshold matter, during the hearing, it was established that T-Mobile is unique in making a commitment to LifeLine participation;[55] neither AT&T nor Verizon provide wireless LifeLine in the first place and Sprint, the only facilities-based wireless carrier to participate in the program, has made no such commitment.[56] Moreover, Mr. Sievert made the company's strong commitment to LifeLine crystal clear: "We like the [LifeLine] program. We think it's important. It's consistent with our values. . . . Standalone T-Mobile didn't have the same opportunity. But now we get a critical mass of LifeLine participation through the Sprint acquisition, and we intend to continue to pursuant [pursue] it."[57]

The record evidence also establishes that New T-Mobile Lifeline customers will benefit from a more robust network than is available to current Assurance Wireless customers on Sprint's

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[52] *See* Odell Reply Testimony at 8:13-14.

[53] *Id*. at 9:1-22.

[54] Ms. Odell also suggests that T-Mobile's LifeLine commitment does not include continuing Sprint's "transitional" plan for customers transitioning from LifeLine (Odell Reply Testimony at 9:23-10:4), but that is simply not true. The plan referenced by Ms. Odell was in effect per Sprint's November 21, 2018 advice letter filing (*see* Hearing Ex. Jt App 9 ("Sywenki Rebuttal Testimony") at Attachment 1), *i.e.*, prior to the February 4, 2019 reference date in the Pricing Commitment, and as such would be covered by its terms.

[55] Hearing Tr. at 1335:22-23 (Odell Cross) ("I'm not aware of any commitment from Sprint.").

[56] *See* CPUC i-wireless, LLC (U-4372-C) Advice Letter No. 12, filed September 6, 2016, proposing in part the transfer of Virgin Mobile's Assurance Wireless Lifeline customer accounts to i-wireless and the transfer of the transfer of majority control of i-wireless to Sprint. The transaction was never consummated.

[57] Hearing Tr. at 1532:20-26 (Sievert Cross).

network.[58] And while, theoretically, Sprint LifeLine customers could benefit from that larger T-Mobile network if Sprint provided them with roaming as Cal PA Witness Odell suggested,[59] in fact, the record establishes that Sprint does not provide roaming to its LifeLine customers in California.[60]

Finally, during hearings, it was established that the "material change" provision in the CETF MOU is not the "loophole" identified by Cal PA but rather a common sense and necessary aspect of the commitment. In this regard, Cal PA's witness Ms. Odell acknowledged that the "material change" provision does not permit New T-Mobile to unilaterally stop service, or even change rates, terms, or conditions.[61] Ms. Odell further acknowledged that New T-Mobile should be able to seek appropriate relief if there are significant changes to the LifeLine program.[62]

3. T-Mobile's commitment to continue the Boost Mobile Pilot is well-established in the record.

Cal PA similarly doubts New T-Mobile's commitment to the Boost Pilot claiming "the Divestiture commitment calls into question the future of the Boost Pilot Program."[63] However, the record is well-established that New T-Mobile would, if the Commission wished, become a Pilot participant and assume Boost's obligations under the current program.[64] Indeed, Mr. Sievert

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[58] *See* CETF MOU at 4-5; *see also* Hearing Ex. Jt Appl. 25, Attachment A (depicting the broader coverage of New T-Mobile network as compared to Sprint standalone network); Hearing Tr. at 1334:8-13 (Odell Cross) ("Q [I]s it your understanding that T-Mobile has committed, after a brief transition period, to put . . . the new LifeLine customers who sign up onto their broader network? A. Yes.").

[59] Hearing Tr. at 1333:27-1334:7 (Odell Cross).

[60] Hearing Ex. Jt Appl. 5C ("Draper Rebuttal Testimony") at 15:25-16:5.

[61] Hearing Tr. at 1337:19-1338:1 (Odell Cross).

[62] Hearing Tr. at 1341:3-7 (Odell Cross) ("So you do believe we should be able to seek appropriate relief if there are significant changes to the Lifeline Program? A. Theoretically and generally, yes.").

[63] Odell Reply Testimony at 10:12-11:4.

[64] *See*, *e.g.*, Sievert Supplemental Testimony at 7:10-13.

reiterated the Company's commitment to the Boost Pilot in his hearing testimony, stating that: "T-Mobile directly is more than happy to assume the commitments that were prior made by Sprint and Boost . . . ."[65] Mr. Sievert also confirmed the company's willingness to serve both new and current Boost Pilot customers.[66] While New T-Mobile would likely need permission from federal authorities to retain customers currently participating in the Boost Pilot (since the PFJ requires divestiture of all Sprint prepaid customers), T-Mobile is reasonably optimistic that the company could obtain that consent if that was the direction the Commission preferred.[67]

At the December hearing, DISH's witness Jeff Blum also confirmed that while no final decision had been made, DISH's "preference is to continue the Boost pilot . . . . But [if] we decided not to do that, to transfer those customers to T-Mobile to make sure that those participating in the pilot are not dis[en]franchised."[68] Either way, the Boost Pilot will continue and the existing Boost Pilot customers will get to continue to participate in the Pilot. Whether the customers and obligations move to DISH or stay with New T-Mobile post-merger is up to the Commission (who created and authorized the Pilot).

C. New T-Mobile's Network Build Plan, as Supported by the FCC and CETF MOU Commitments, Will Lead to Verifiably Enhanced 5G Coverage and Speeds in California, Including in Rural Areas

T-Mobile has made significant buildout and network-related commitments in both the CETF MOU and the FCC Commitments. The CETF MOU requirements address: (i) network capital expenditures to deploy 5G technology in California; (ii) deployment of 5G technology at California cell site locations; (iii) 5G broadband speeds; (iv) 5G network improvements in various unserved and

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65 Hearing Tr. at 1525:17-19 (Sievert Cross).

66 *Id.* at 1549:2-5 and 1553:12-17 (Sievert Cross).

67 *See id.* at 1554:1-4 (Sievert Cross).

68 Hearing Tr. at 1657:22-28 (Blum Cross).

underserved California areas; (v) 5G wireless service at certain county fairgrounds in rural California counties; and (vi) measures to assist communities impacted by emergencies.[69] The FCC Commitments include specific and concrete national benchmarks, backed up by a robust FCC enforcement mechanism that address (i) nationwide 5G deployment, (ii) nationwide 5G rural deployment, and (iii) in-home broadband deployment.[70]

As Mr. Ray explained in his supplemental testimony, the CETF MOU and FCC Commitments provide for accelerated buildout plans and increases in coverage and speed over New T-Mobile's network model. On a combined basis, these commitments are projected to accelerate mid-band deployment on approximately **[BHC-AEO]** REDACTED **[EHC-AEO]** of the New T-Mobile sites in California by 2021 and add mid-band spectrum to approximately **[BHC-AEO]** REDACTED **[EHC-AEO]** more sites by 2024 – many in rural areas. Additionally, the CETF MOU and FCC Commitments establish metrics to verify buildout and coverage (*e.g.*, the CETF MOU requires speed tests at every site and the FCC Commitments require comprehensive reports including, among other things, data from drive tests and coverage shapefiles).[71]

Cal PA, through the testimony of Mr. Reed, does not contest these basic facts; instead he asserts that the way that the CETF MOU buildout commitments are structured – with a *commitment* to deploy 5G spectrum to 90% of sites and to achieve 80% of speed targets at individual sites – would allow New T-Mobile to avoid costly rural deployments and provide slower speed to rural areas. Mr. Reed also asserts that the merged company will not meaningfully increase rural 5G coverage in

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69 *See* CETF MOU; *see also* Ray Supplemental Testimony at 4:15-20.

70 *See* FCC Commitments; *see also* Ray Supplemental Testimony at 4:21-25.

71 *See* Ray Supplemental Testimony at 4:4-7:2; *see also id*. at Attachment E (detailed projected California buildout under CETF MOU as modified by FCC Commitments) and Attachment H (T-Mobile response to October Amended Scoping Ruling Issue 8 re FCC Commitments and related California projections).

California over standalone T-Mobile.[72] Finally, citing to a Rural Wireless Association ("RWA") FCC filing, Mr. Reed claims that T-Mobile has historically exaggerated rural coverage and will do so again post-merger.[73] Mr. Reed is wrong on all counts.

1. The FCC and CETF MOU Commitments will lead to accelerated buildout, and enhanced coverage and speeds in California, including in rural areas.

As an initial matter, Mr. Reed fundamentally misunderstands the purpose of the FCC and CETF MOU buildout commitments. As T-Mobile has made clear, the company intends to build out all of the **[BHC-AEO]** REDACTED **[EHC-AEO]** sites in its plan – each of which is listed in Attachment D to Mr. Ray's testimony.[74] The state and federal commitments are offered to provide regulators with a minimum guaranteed level of performance that they can use to ensure that Joint Applicants met their objectively defined benchmarks and take enforcement action if they fall short. To the extent that Mr. Reed assumes that the company's buildout plans do not exceed the binding commitments offered, he is simply wrong. Joint Applicants have been clear throughout this proceeding that one of the cornerstones of the national merger is vastly enhanced services for consumers – with rural communities, in particular, reaping enormous benefits. There is simply no support in the record for the supposition that Joint Applicants will neglect rural communities in their buildout plans. Nor is the CETF MOU commitment structured to avoid rural 5G deployment. Instead, as the evidence affirms, the commitments are grounded in the realities associated with building out a wireless network.

Specifically, the reason for the CETF MOU commitment to deploy 5G technology at 90% – rather than 100% of 5G sites – is to allow for "variability in siting, permitting, spectrum clearing

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[72] Reed Reply Testimony at 9:11-14:14. This issue is a rehash of issues addressed in the February hearings and is inappropriately raised again by Cal PA. The evidence presented confirms that this assertion was incorrect in February and is equally untrue today.

[73] *Id.* at 13:15-14:14.

[74] Ray Supplemental Testimony at Confidential Attachment D.

timeframes, backhaul acquisition and other factors beyond New T-Mobile's control."[75] Mr. Reed's claim that the company would exploit the 90% commitment to avoid building any rural sites is completely speculative and borders on irresponsible; he points to nothing in the record to support his remarkable contention and unjustifiably minimizes Joint Applicants' commitments to substantially improving service for consumers (including rural communities) in California and nationwide.

Moreover, there are other commitments and business incentives which guard against this result. For example, under the FCC commitments the company has committed to provide low-band 5G coverage to 90% of the rural population and mid-band coverage to 66.7% of the rural population by 2024 and to deploy 5G technology at **[BHC-AEO]** REDACTED **[EHC-AEO]** rural sites.[76] It is unclear whether the company could even meet these nationwide buildout commitments if it chose to eliminate most of its 5G sites in rural areas in California as Mr. Reed posits. However, even if it could, T-Mobile would have to take approximately [**BHC-AEO]** REDACTED **[EHC-AEO]** of the California rural sites already designated for 5G deployment in California (sites that that the company itself selected as desirable locations for 5G deployment) and replace them with less-desirable rural sites in other states in order to meet its FCC 5G rural site commitment. Such a hypothetical simply makes no business sense.

The CETF MOU not only requires 5G deployment at a certain number of sites, it also commits the company to spend at least **[BHC-AEO]** REDACTED **EHC-AEO]** in network capital expenditures to deploy 5G technology in California.[77] Again if New T-Mobile were to fail to construct most of its rural sites as Mr. Reed speculates it could do, the company would have to make

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75 CETF MOU § VII.C.

76 *See* FCC Commitments, Attachment 1, § II(B).

77 CETF MOU § VII.C.

the extraordinary, and economically irrational, decision to spend the capital associated with those rural sites on other non-rural sites in parts of the State where the 5G plan does not show a need, and where New T-Mobile will likely simultaneously be decommissioning Sprint sites in many of the same areas. This type fanciful speculation should be rejected out of hand.

Mr. Reed's speculation regarding the 80% speed tier commitment is similarly baseless. Mr. Reed claims that New T-Mobile's commitment to deploy 80% of a speed tier at each site gives T-Mobile leeway to implement slower speeds for rural sites.[78] But Mr. Reed misses the core point of the 80% speed tier commitment. Under the CETF MOU, T-Mobile's threshold commitment is to "achieve the average (mean) speed tier … across all sites [in] a specified speed category…."[79] The 80% per site commitment was added to ensure not only that T-Mobile reaches the speed tiers averaged across the overall population of the states but that it will achieve robust speeds *at each and every site.* In other words, if there were only two sites in the 100 mbps speed category, the lowest speed allowed per the commitment for either site would be 80 mbps in which case the other site would have to the 120 mbps. This additional commitment serves to protect and benefit rural customers – not to enable Joint Applicants to avoid a commitment to rural communities, as Mr. Reed wrongly assumes.

2. Cal PA's allegations that the merged company will not offer a better experience to rural customers than the standalone entity is contrary to the record and outside the scope of this phase of the proceeding.

Mr. Reed continues to make unfounded allegations that the New T-Mobile 5G network will not offer a better experience to rural customers than the standalone companies. These assertions are

[78] *See* Reed Reply Testimony at 8:16-20.

[79] CETF MOU § VII.C, *Speed Tests.*

meritless as established by the record of the February hearings[80] and far exceed the scope of this phase of the proceeding in any event.[81] Indeed, as discussed above, if anything, the CETF MOU and FCC Commitments only accelerate and improve rural deployment in CA.

As an initial matter, Cal PA's attempt to reiterate its unfounded claims about the New T-Mobile 5G network and seek additional hearings on several issues, including "[w]hether stand-alone T-Mobile could deploy 5G to rural areas absent the proposed merger"[82] were not included in the scope of this phase of the proceeding. As confirmed by the ALJ's Hearing Issues Ruling, "many of the alleged material factual disputes that Cal Advocates asserts require evidentiary hearings have been sufficiently addressed in the testimony of witnesses for the applicants and do not require further hearings."[83] Accordingly, Mr. Reed's proffered reply testimony is plainly improper and should not be considered.

However, even if that testimony were considered, Mr. Reed's claims are factually incorrect and, at best, misleading. Mr. Reed asserts that the proposed merger will not meaningfully increase rural 5G coverage over that provided by standalone T-Mobile and that, therefore, 5G coverage improvements are not a benefit of the merger.[84] These assertions amount to nothing more than a rehash of Cal PA's earlier attempt to assert that "5G is 5G" and reflects an ongoing failure to understand, or refusal to acknowledge, the fundamentals of wireless network engineering.

At its core, and although addressed exhaustively in February, Mr. Reed still fails to accept the fundamental difference between coverage and capacity. Instead, he reasons that because standalone

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80 *See, e.g.*, Hearing Ex. Jt Appl. 3-C ("Ray Rebuttal Testimony") at 39:1-45:8.

81 *See* Amended Scoping Ruling, *supra*, and ALJ Hearing Issues Ruling, *supra*.

82 Reed Reply Testimony at 3:26-27.

83 ALJ Hearing Issues Ruling at 2.

84 *See Reed* Reply Testimony at 10:17-11:3.

T-Mobile could *cover* most of California with low-band 5G by 2024 using existing sites, and "most" of these sites already exist, standalone T-Mobile has the necessary infrastructure for 5G deployment without the merger.[85] Mr. Reed then concludes that, therefore, improved rural 5G coverage is not a merger-specific benefit – despite the unrefuted evidence to the contrary.[86]

As Joint Applicants have thoroughly addressed in the record, neither T-Mobile nor Sprint standalone have the spectrum, the sites, or the resources to create the type of robust rural 5G network in California that will be created by the merger.[87] Cal PA's continued efforts to ignore engineering realities should be discounted entirely at this point.

3. The allegations regarding the FCC's Mobility Fund II Maps have no bearing on this proceeding or New T-Mobile's commitments to deploy 5G in California.

In his testimony, Mr. Reed repeats allegations by the Rural Wireless Association ("RWA") that T-Mobile overstated its coverage for purposes of the FCC's Mobility Fund-II ("MF-II") proceeding, arguing that "New T-Mobile could repeat the same practice post-merger and claim to cover areas with 5G where it offers no strong connection to end-users."[88] The same point was also raised by Ms. Koss, counsel to the CWA, in her cross examination of Neville Ray, where she brought up the FCC's recently issued *Staff Report* on their investigation of MF-II coverage maps, insinuating

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85 *See* Reed Reply Testimony at 13:10-13.

86 *Id*.; *see also* Ray Supplemental Testimony, Attachment D (confidential inventory of sites expected to be included in the 5G deployment specifically identifying sites in rural areas).

87 *See, e.g.*, Hearing Ex. Jt Appl. 2-C ("Sievert Rebuttal Testimony") at 44:8-18; *see also* Ray Rebuttal Testimony at 3:22-28 ("[T]he benefits of New T-Mobile's 5G network in terms of *coverage, speed, and capacity* – and all the potential consumer uses which depend on those metrics – are simply not possible without the combination of spectrum and other assets created by the merger. T-Mobile and Sprint, as standalone entities, do not have the spectrum, the sites, or the resources to create a network that would so significantly alter the wireless landscape as New T-Mobile. On its own, T-Mobile's 5G network would have good coverage but relatively limited capacity, while Sprint's 5G network would have capacity but very limited coverage.").

88 Reed Reply Testimony at 13:15-14:7.

that T-Mobile overstated its actual coverage to obtain funding from the FCC.[89] As a threshold matter, the information provided by T-Mobile (and the other carriers) to the FCC for MF-II purposes, was not to determine eligibility for funds but to assist with the process of determining where there were identifiable gaps in rural broadband coverage. Critically as well, as discussed by Mr. Ray, the comparisons between coverage as displayed in T-Mobile's 5G coverage maps and the MF-II mapping required by the FCC "are apples and oranges":[90]

> This MF-II coverage, this is not the coverage that is indicated in my testimony. That is what we would normally call Form 477 coverage. That's the coverage that we portray and depict in our websites, and we've used the same process for our maps and material that's been submitted in evidence for this whole transaction.[91]

For MF-II, the FCC requested highly-specialized coverage data that is not produced in the ordinary course of business and that is not reflective of either T-Mobile's customer-facing coverage maps or the maps and coverage data used in this Merger or the CPUC proceeding.[92] For example, for MF-II purposes, the FCC asked carriers to provide mobile coverage data reflecting parameters – most notably minimum download speeds – that deviate significantly from the parameters used for standard and well-established FCC Form 477 filings and from the parameters used in T-Mobile's ordinary course 4G maps. Furthermore, there were other important criteria for coverage mapping the FCC did not specify, which resulted in carriers making different assumptions and submitting inconsistent data. Indeed, the FCC process was widely criticized and the agency is reexamining its process for creating these MF-II maps and has put the Fund program on hold.

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89 *See* Hearing Tr. at 1417:12-1423:14 (Ray Cross). *See also FCC Mobility Fund Phase II Coverage Maps Investigation Staff Report*, GN Dkt. 19-367, (released December 4, 2019).

90 *Id.* at 1422:4 (Ray Cross).

91 *Id.* at 1421:1-9 (Ray Cross).

92 *Id.* at 1421:11-22 (Ray Cross).

By contrast, the coverage maps and related data used in this merger and throughout this proceeding are derived using the company's ordinary course methodologies as adapted for a 5G deployment. T-Mobile stands fully behind the coverage maps it produces in general and in the context of this merger.[93] Moreover, and independent of any coverage maps, New T-Mobile's network deployment commitment will be confirmed in California both by independent, third party site-specific speed test results (under the CETF MOU) and by drive tests (under the FCC Commitments).[94]

D. The DISH Divestiture will not Adversely Impact New T-Mobile's 5G Network

Issues 4 and 6 in the October Amended Scoping Ruling ask how New T-Mobile's proposed transfer of 800 MHz spectrum to DISH and its seven-year MVNO agreement with DISH impacts the quality and extent of New T-Mobile's existing 4G network and its planned 5G network.[95] As the record makes clear, the DISH Divestiture does not adversely impact the plans for, or the buildout of,

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[93] Bevin Fletcher, *FCC to ditch flawed Mobility Fund II over unreliable 4G LTE coverage maps, FierceWireless*, December 5, 2019 ("We [T-Mobile] stand behind our network coverage and all of our maps, but agree with the FCC that there is an opportunity to improve their procedures for collection of broadband coverage data for the Mobility Fund maps. We look forward to working with them and Congress to revamp the process."), https://www.fiercewireless.com/regulatory/fcc-to-scrap-flawed-mobility-fund-ii-program-over-inaccurate-4g-lte-coverage-maps.

[94] Greenlining also submitted supplemental testimony in the phase of the proceeding. *See* GLI-004 ("Goodman Supplemental Testimony"). The testimony, however, focused almost entirely on unsupported allegations that the DISH Divestiture and the FCC Commitments would somehow either (a) make less likely that New T-Mobile would meet its diversity procurement goals, or (b) create incentives for New T-Mobile to prioritize its buildout commitments at the expense of diversity procurement. *See* Goodman Supplemental Testimony at 4-5. Greenlining's statements amount to nothing but pure conjecture and directly conflict with the testimony provided by T-Mobile that reflects its commitment – and its success – to diversity procurement. *See* Ex. Jt. Appl. 8-C ("Sylla Dixon Rebuttal Testimony") at 9:13-12:7. Moreover, Greenlining's criticism of T-Mobile's commitments under the NDC MOU are nothing more than a retread of arguments in made in the February hearings. *See* Goodman Supplemental Testimony at 3. These were all thoroughly addressed by Joint Applicants in its prior post-hearing reply brief. *See* Joint Applicants' Post-Hearing Reply Brief at 91-96. In brief, Greenlining's testimony should not be afforded any weight by the Commission.

[95] Amended Scoping Ruling at 3. Note the question in the scoping memo refers to New T-Mobile's planned "6G" network but Joint Applicants assume that the intended reference was to the company's planned 5G network.

New T-Mobile's 5G network in any way. Moreover, it does not impact the ability of New T-Mobile to continue to provide robust 4G/LTE and CDMA services to consumers during the transition to 5G technology.

1. New T-Mobile will have more than sufficient capacity to support DISH under the MVNO Arrangement.

The evidence from the February hearings – as reiterated by Mr. Ray at the recent hearings[96] – is undisputed that the merger will create a massive increase in capacity and network capabilities through the combination of T-Mobile's and Sprint's complementary spectrum assets and cell sites and the spectral efficiency of 5G technology. By 2024, New T-Mobile's 5G network will have approximately 8x (eight times) the capacity of T-Mobile today.[97] Moreover, as demonstrated in the charts below (which has been introduced on numerous occasions previously), the combined network will more than *double* 5G monthly capacity by 2021 and nearly *triple* 5G monthly capacity by 2024 when compared to the combined 5G capacities of the standalone networks.[98] By 2024, the total capacity of the new network – inclusive of LTE – will be approximately *twice* what the combined capacity of the standalone firms would be.[99] As the charts from prior filings confirm, the increase in capacity is massive:

[96] *See* Hearing Ex. Jt Appl.-28-C (Ray Supplemental Testimony) at 22 at 4-9.

[97] *See, e.g.*, Hearing Ex. Jt Appl.-2C (Sievert Rebuttal Testimony) at 12:5-6.

[98] Ray Rebuttal Testimony at 28:1-6; *see also id.* at 27:14-17.

[99] *Id.* at 28:1-5.

[BHC-AEO]

[EHC-AEO]

Increased capacity will also improve customers' network experience because capacity is correlated with the speed a network can deliver.[101] More customers will be able to use the network to download more data, while achieving faster download speeds, experiencing fewer delays and interruptions, greater continuity, and a more satisfying service generally.

The DISH Divestiture, and the services to be provided to DISH, will have no adverse impact on New T-Mobile's network plan. As an initial matter, and as noted above, the capacity of the New T-Mobile network for the combined companies will be far greater than what is currently available or what is projected to be available from the merging companies on a standalone basis.[102] In addition,

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[100] For a more detailed discussion of these charts, *see* Joint Applicants' Post-Hearing Opening Brief at 32 n.86.

[101] Ray Rebuttal Testimony at 7:25-8:10, 31:3-23.

[102] *Id.* at 8:17-23 and 27:14-17; *see also* Ray Supplemental Testimony at 21:22-24.

the record is clear that this increased capacity will incentivize New T-Mobile to partner with MVNOs. Indeed, New T-Mobile has committed to honor all existing Sprint and T-Mobile MVNO agreements for seven years.[103] As Mr. Ray testified:

> When we put the New T-Mobile network plan together, it looked towards the migration of the entire Sprint business.· And so we built a plan that can support all of the capacity necessary for Sprint and all of its brands, Boost, Virgin, its postpaid, its prepaid business. So, the fact that those customers from Boost are now being, you know, divested in terms of ownership of that customer base is now going to belong to DISH and not to Sprint is effectively a moot point in terms of the network capacity.[104]

He also confirmed that New T-Mobile's network will not only be able to support the divested customers but will also have the capacity needed to support "[New T-Mobile's] own success and any additional success from DISH and . . . their need to utilize [New T-Mobile's] network."[105] Importantly as well, as Mr. Ray testified, DISH's growing its retail wireless business benefits New T-Mobile because "[New T-Mobile] receive[s] revenue from DISH for supporting their MVNO customers."[106]

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[103] *See, e.g.*, PFJ at § VII; *see also* FCC Commitments at 7.

[104] Hearing Tr. at 1389:19-1390:3 (Ray Cross); *see also* Ray Supplemental Testimony at 21:25-27; Hearing Tr. at 1407:11-16 (Ray Cross).

[105] Hearing Tr. at 1407:5-23 (Ray Cross). CWA's attempt to imply that T-Mobile should have taken into account the possibility that DISH's customer base would increase to 40+ million as an MVNO is absurd on its face (*see* Hearing Tr. at 1404:1-1407:28 (Ray Cross)) and does not undermine the evidence regarding the massive capacity of the New T-Mobile network. As is explained above, New T-Mobile will have more than 2X 5G capacity by 2024 when compared to the combined standalone networks. *See, e.g.*, Ray Supplemental Testimony at 21:22-24.

[106] Hearing Tr. at 1407:20-21 (Ray Cross).

2. The potential divestiture of the 800 MHz spectrum will have no impact on New T-Mobile's network or its customers.

The potential divestiture of the Sprint 800 MHz spectrum to DISH[107] will not hinder, delay, or otherwise affect New T-Mobile's ability to deliver the benefits of its 5G network in terms of coverage, speed, capacity or its other commitments to California.[108] Cal PA's unsubstantiated assertions that the divestiture of the 800 MHz spectrum will impact the quality of service New T-Mobile will provide to its 4G/LTE customers (especially those with incompatible handsets) or otherwise force T-Mobile to reallocate spectrum assets to maintain that service (and thus impact 5G service) are based on nothing more than rank and unsubstantiated speculation that is entirely contrary to the record in this matter.[109]

As an initial matter, the 800 MHz spectrum was never intended to be deployed as part of the 5G buildout. Mr. Ray previously described in detail the types of spectrum New T-Mobile intends to use for 5G and he summarized the same in his prepared testimony for the recent hearings.[110] The 800 MHz spectrum is simply not a part of that plan.[111]

To the contrary, the evidence is clear that New T-Mobile planned and still does plan to use the 800 MHz spectrum *exclusively* to support former Sprint customers during the 3-year migration

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[107] The PFJ does not actually require the divestiture of the 800 MHz spectrum to DISH. DISH is required to pay a $360 million penalty if it does not elect to purchase the spectrum although the penalty does not apply if DISH meets certain buildout commitments. If DISH does not elect to purchase the spectrum, New T-Mobile must auction the spectrum or otherwise apply for relief from the divestiture under certain conditions. *See* PFJ § IV.B.

[108] *See* Ray Supplemental Testimony at 13:5-7.

[109] *See* Reed Reply Testimony at 4:16-7:6.

[110] Ray Supplemental Testimony at 9:17-12:9.

[111] *Id.* at 10:17-19.

period.[112] Thus, even with the divestiture, New T-Mobile will have access to the 800 MHz spectrum for sufficient time to support Sprint customers who are reliant on LTE and CDMA technologies and to shepherd customers with incompatible handsets through the migration process. Should T-Mobile need additional time to complete the migration, the PFJ provides that the DOJ may grant one or more extensions of time to divest the 800 MHz spectrum not to exceed sixty (60) calendar days. However, it is highly unlikely that New T-Mobile will need any such extension given its successful experience with customer migrations in the Metro PCS merger just a few years ago. And even if New T-Mobile needs the 800 MHz spectrum for a longer period of time after (and if) DISH has acquired the 800 MHz spectrum, New T-Mobile has the option to lease back from DISH up to 4 megahertz of spectrum as needed for up to two (2) years following its divestiture.[113] Thus, under any realistic scenario, the potential divestiture of the 800 MHz spectrum will not impact New T-Mobile's network or its customers.

Similarly, the potential divestiture of the 800 MHz spectrum to DISH will have no impact on the Sprint prepaid customers that are divested to DISH. First, per the PFJ, New T-Mobile is required to "take all actions required" to enable DISH to provision any new or existing customer holding a compatible device onto the network and to do so within 90 days of entry of the PFJ by the federal court.[114] As reflected by the evidence, that includes a significant number of the Sprint prepaid customers to be divested[115] who will otherwise have access to the New T-Mobile network through

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[112] *See, e.g.*, Ray Rebuttal Testimony at 47:5-6 ("T-Mobile expects that all Sprint customers are likely to be completely migrated within three years."); *see also* Ray Supplemental Testimony at 13:14-21.

[113] Ray Supplemental Testimony at 14:5-10; *see also* Amended Wireless Notification, Exhibit P (PFJ) § XV.C.

[114] Ray Supplemental Testimony at 19:9-10; *see also* Amended Wireless Notification, Exhibit P (PFJ) §§ IV.A. and B.

[115] *See* Hearing Ex. Jt Appl. 22-C (Sprint Responses to data requests re Sprint prepaid wireless device compatibility).

DISH's MVNO arrangement. In addition, as discussed below, the record is clear that New T-Mobile is otherwise obligated to cooperate with DISH to facilitate the migration of the Sprint divested customers to the New T-Mobile network. Thus, it is clear that, if anything, the potential divestiture of the 800 MHz spectrum is designed to ensure that service to existing Sprint CDMA and LTE customers will be maintained until they are migrated to the New T-Mobile network as customers of New T-Mobile or DISH.

3. The temporary lease of the DISH 600 MHz spectrum would be beneficial to both New-T-Mobile and DISH.

Likewise, New T-Mobile's ability under the PFJ to temporarily lease additional 600 MHz spectrum from DISH can only be beneficial to both New T-Mobile and to DISH. As the evidence from the February hearings established, 600 MHz spectrum (low-band spectrum) is a critical component of the 5G buildout. Although New T-Mobile has sufficient 600 MHz spectrum holdings to support its network plans[116] – as reflected by its recent rollout of 5G on this spectrum – the potential temporary lease of additional spectrum will result in more capacity and higher speeds while it deploys mid-band radios and spectrum (much of it obtained from Sprint through the merger).[117] The additional 600 MHz spectrum can be accommodated on T-Mobile's existing hardware so consumer benefits, for both New T-Mobile consumers and DISH customers who are on the network, will be almost immediate.[118]

Moreover, the PFJ's provision for New T-Mobile's leasing of DISH's 600 MHz spectrum does not contemplate a permanent transfer, and empowers DISH to time the term of the lease so as to

[116] *See* Ray Supplemental Testimony at 10:1-3.

[117] *Id.* at 15:18-23.

[118] *Id.* at 15:18-23.

ensure the availability of the 600 MHz spectrum when needed by DISH to meet its network buildout timeline.[119] As Mr. Blum testified:

> So let me clarify that. So, yes, we have to negotiate [in] good faith to lease on a short-term basis our 600, because T-Mobile has a need for it now as they are trying to transition to their new network. So it will help them in that transition period. But once we meet that spectrum – so when we deploy in San Francisco, your Honor, we're going to want to use our 600 megahertz. So we would have the ability to take it back.
>
> So there's not really any tension between the leasing in the short-term and the obligations that we committed to the FCC.[120]

At the same time, DISH will be able to generate revenue from the lease to New T-Mobile, revenues DISH can use to (among other things) possibly finance its network buildout.[121] In the end, the 600 MHz lease provision is only additive.

4. New T-Mobile's obligation to make decommissioned sites and stores available to DISH does not adversely impact either New T-Mobile or DISH.

New T-Mobile's obligation under the PFJ to make decommissioned sites and retail stores available to DISH does not impact the merger benefits or otherwise adversely impact any of New T-Mobile's or DISH's plans. As an initial matter, and as the evidence from the February hearings confirmed, New T-Mobile has long anticipated that it would be decommissioning sites as a result of the merger and did not anticipate using these sites to build out the new 5G network.[122] As previously explained by Mr. Ray:

> Integrating the Sprint and T-Mobile networks into the New T-Mobile network would involve decommissioning a number of Sprint cell sites where they are redundant and unnecessary. These generally will be sites that are either collocated with existing T-Mobile sites (*i.e.*, on the same

[119] PFJ at § V; *see also* Hearing Tr. at 1372:1-3 (Ray Cross).

[120] Hearing Tr. at 1607:21-1608:5 (Blum Cross).

[121] *Id.* at 1607:21-1609:11 (Blum Cross).

[122] *See, e.g.*, Ray Rebuttal Testimony at 21:3-6; *see also* Hearing Tr. at 467:2-17 (Ray Cross).

> tower or rooftop) or located very close to an existing T-Mobile site with extensively overlapping coverage. As such, they are unnecessary to provide or maintain service, and would not be constructed by an operator in the ordinary course. For this reason, decommissioning these sites will not affect the resiliency of the New T-Mobile network or the reliability of service provided to consumers and first responders. On the other hand, eliminating these unnecessary sites is critical to realizing the projected network synergies from the transaction, which are essential to making possible the nearly $40 billion investment in a 5G network and services, which does benefit the network's resiliency.[123]

The same is true for retail stores; New T-Mobile already anticipated store closings although, as Mr. Sievert has testified, not a decrease in employees needed to service the increased customer base in the remaining stores.[124] In brief, the DISH Divestiture does not obligate New T-Mobile to decommission any sites or stores that it was not already planning to decommission. The fact that New T-Mobile now has the obligation to make a minimum number of those decommissioned sites (no less than 20,000 within 5 years) and stores (no less than 400 within 5 years) available to DISH has no impact on its network or retail plans.

Second, per the Asset Purchase Agreement, DISH will have the have the right and the option – but not the obligation – to acquire these decommissioned assets. As Mr. Blum testified, DISH may want all, some or none of these assets as they are not critical to its plans to deploy a 5G network or serve its customer base.[125] The evidence on these issues are described more fully below.

DISH's potential to acquire either the decommissioned sites and/or the decommissioned retail stores can only be beneficial to DISH. As Mr. Ray testified, the ability to acquire a cell site where the leasing and/or land use approval issues have already been resolved can eliminate a significant number

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[123] Ray Rebuttal Testimony at 52:19-53:2.

[124] *See, e.g.*, Hearing Tr. at 1513:14-17 (Sievert Cross).

[125] *See, e.g.*, *id.* at 1627:6-8 (Blum Cross) ("The decommissioned sites is [sic] something that is nice to have for DISH but it's not critical.").

of costs and challenges otherwise associated with the acquisition of such sites.[126] There is no scenario – and no evidence – to suggest how such an option could be problematic or otherwise could hinder the benefits of the merger.

E. The Customer Migration Process for New T-Mobile will be Timely and Efficient

As explained in prior testimony, T-Mobile has extensive experience in successfully and timely migrating customers following a merger.[127] The migration plan for this merger will be modeled on that experience and is not negatively impacted in any way by the DISH Divestiture or by any of the post-February developments including the FCC Commitments or the CETF Commitments.[128] There is no evidence to suggest or even insinuate that the migration process will be anything but successful and timely.[129]

V. THE DISH DIVESTITURE AND RELATED AGREEMENTS PROVIDE DISH WITH THE TOOLS TO BE A VIABLE FACILITIES-BASED COMPETITOR

The October Amended Scoping Ruling asks about DISH's California service obligations (Issue 3) and how the divestiture of the Sprint prepaid business impacts those customers (Issue 5). Several of the topics in the ALJ Hearing Issues Ruling also seek information about how the DISH Divestiture impacts customers (Issues 2-4) and seek information about DISH's viability as a competitor (Issue 1).[130] The evidence introduced at the December hearings confirms that the PFJ,

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[126] Hearing Tr. at 1384:10-1385:9 (Ray Cross).

[127] *See* Ray Rebuttal Testimony at 46:6-21. *See also* Hearing Ex. Jt Appl. 4-C ("Keys Rebuttal Testimony") at 15:5-14.

[128] *See* Ray Supplemental Testimony at 20:20-21:8.

[129] The record also established that 5G handsets have so-called "backwards compatibility"; *i.e.*, a customer with a 5G device will be able to get service even in an area where only 4G, 3G or even 2G is available. *See* Hearing Tr. 1451:7-1452:21 (Ray Cross).

[130] ALJ Hearing Issues Ruling at 3 ("1. Does the agreement with DISH substantially alleviate any competitive harms of the proposed merger? 2. How does the agreement with DISH affect customer service, consumer protections and privacy rights of California consumers? 3. How does the agreement with DISH

FCC commitments, and related agreements with Sprint/T-Mobile provide DISH with the tools to be a viable nationwide facilities-based competitor in the wireless market and that the divested Sprint prepaid customers will not be adversely impacted. These include a historically favorable MVNO agreement with, among other things, core control and a mechanism for costs to drop over time, significant spectrum holdings, the divestiture of Boost and Virgin Mobile and their more than nine million subscribers nationwide and thousands of retail stores, transition service obligations from New T-Mobile for the initial 2-3 years post-divestiture, access to decommissioned Sprint cell sites and retail stores, and a history of being a disruptive competitive force. As recognized by the FCC, "DISH will have access to key elements essential to developing a facilities-based wireless service offering, such as ample spectrum in multiple bands, an existing and significant customer base, and access to existing infrastructure," positioning it "to grow market share and provide robust competition."[131]

In addition to having the tools, DISH is also legally committed to build out its network and deploy its spectrum holdings. Indeed, its FCC commitments even require DISH to deploy certain spectrum bands on an expedited schedule. The evidence is unrefuted that DISH faces severe consequences, including financial contributions as well as the potential loss of spectrum worth billions of dollars, if it fails to meet its commitments.

Finally, DISH's commitments leave no doubt that Sprint's prepaid customers will directly benefit from the DISH Divestiture. Sprint's current prepaid customers holding compatible handsets will be able to seamlessly transfer to DISH with access to New T-Mobile's network via DISH's MVNO agreement. As a result, their network experience will be greatly enhanced given the broader and deeper coverage of New T-Mobile's combined network compared to Sprint's standalone network

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affect the continued availability of low-cost plans? 4. What will happen to pre-paid customers with incompatible handsets when they are divested to DISH?").

[131] FCC Merger Approval ¶ 374.

on which they currently receive service. New T-Mobile will also continue to support those customers during the transitional period, ensuring they will not be harmed as a result of the divestiture.

A. DISH's MVNO Arrangement Allows It to Provide Its Customers with Unfettered Access to the New T-Mobile Network from Day One on Competitive Terms

The PFJ requires New T-Mobile to enter into an agreement with DISH for a term of at least seven years, which will give DISH wireless subscribers, including the divested Sprint prepaid subscribers, full access to New T-Mobile's network (including the legacy Sprint network for as long as it is operational).[132] As Mr. Ray testified, DISH customers "have full access to all of . . . the New T-Mobile network. So everything we do in terms of LTE, 5G, the performance, the Boost customers will be getting all of that from the New T-Mobile Network."[133]

The MVNO arrangement provides DISH with a host of advantages as it enters the wireless market. Importantly, DISH has testified that these advantages will be passed directly on to consumers in the form of lower prices and improved network experience. As Mr. Blum testified, the agreement provides:

- A best-in-market pricing arrangement with New T-Mobile for its MVNO services[134] that "allows [DISH] from the very beginning to undercut the incumbents."[135] It even includes "a mechanism where the price [DISH] ha[s] to pay T-Mobile goes down the better T-Mobile's network is."[136]

- "unlimited capacity that we [DISH]have on T-Mobile's network from the beginning [to] grow the subscriber base"[137]

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[132] *See generally* PFJ § VI.

[133] Hearing Tr. at 1390:10-15 (Ray Cross).

[134] The Joint Applicants' commitments in the FCC Merger Approval mandate that New T-Mobile will offer the Boost buyer terms a "wholesale MVNO agreement that will include wholesale rates that will meaningfully improve upon the commercial terms reflected in the most favorable of T-Mobile's and Sprint's three largest MVNO agreements." FCC Merger Approval, Appendix G at 5, and ¶ 208.

[135] Hearing Tr. at 1680:25-1681:14 (Blum Cross).

[136] *Id.* (Blum Cross).

[137] *Id.* at 1681:9-12 and 1624:10-19 (Blum Cross).

- An obligation for New T-Mobile to provide transition services for the first 2 – 3 years after the divestiture.[138]

- The unprecedented ability to provide its customers with seamless and simultaneous access to both the New T-Mobile network and the core DISH network (as it comes online).[139]

- No limit on the number of customers it can add.[140]

As recognized by the DOJ, the terms of the MVNO agreement will "provide DISH the support it needs to offer retail mobile wireless service to consumers while building out its own mobile wireless network. They will also permit DISH to begin to market itself as a national retail mobile wireless provider immediately after the divestiture closes."[141] Mr. Blum affirmed that the MVNO agreement will position DISH "from day one to offer a competitive [wireless] service, lower prices, [and] improved quality . . . in California and throughout the country."[142]

B. DISH Has Substantial Spectrum Holdings

As the record makes clear, DISH has extensive spectrum holdings that rival those of the established facilities-based carriers. DISH has spent billions of dollars to acquire these licenses which include substantial holdings of both low-band spectrum (600 MHz and 700 MHz) and mid-

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[138] *Id.* at 1597:8-19 (Blum Cross).

[139] *Id.* at 1624:15-24 (Blum Cross); *see also* Hearing Tr. at 1391:11-15 (Ray Cross) ("[T]hey'll have seamless mobility . . . , which is actually very new in this case, . . . between what they build themselves and the new T-Mobile network."); *id.* at 1543:5-10 (Sievert Cross) (noting DISH's "unconventional ability to combine their network with ours").

[140] *Id.* at 1624:14-19 (Blum Cross).

[141] *See United States v. Deutsche Telekom AG, et al.*, No. 1:19-cv-02232 (D.D.C. 2019), Response of Plaintiff United States to Public Comment on the Proposed Final Judgment (filed November 6, 2019) ("DOJ Tunney Act Response") at 11. A copy of that filing by the DOJ (w/o appendices) is included with this submission as Attachment 2.

[142] Hearing Tr. at 1576:7-11 (Blum Cross).

band spectrum (AWS-4 and H-Block).[143] These spectrum licenses cover all of California.[144] And, as discussed below, DISH faces severe penalties, including the possible forfeiture of these licenses, if it fails to meet its commitments to the FCC and the DOJ.

As Mr. Ray testified, DISH's network will put into use "one of the largest fallow volumes of spectrum in the industry today,"[145] making it uniquely well-positioned to deploy a nationwide 5G network. And in building its 5G network from scratch, DISH has the additional advantage of using exclusively 5G technology "unburdened by any need to support a legacy infrastructure based on older technology" (*e.g.*, 3G and 4G technology).[146]

C. DISH is Obligated to, and has a Plan to, Build a Nationwide Facilities-Based Network that is Not Dependent on Decommissioned Cell Sites

DISH's testimony confirms that it has plans, and incentives, to deploy its spectrum holdings and build out its first-in-the-nation 5G-only network – and to do so in a timely manner.

As an initial matter, DISH has committed to meet specific, verifiable network deployment milestones with respect to its spectrum holdings including the following:

- **DISH 5G Broadband Service to At Least 20% of U.S. Population by 2022:** With respect to the AWS-4, 700 MHz E Block and AWS H Block licenses, DISH has committed to offer 5G Broadband Service to at least 20% of the U.S. population and to have deployed a core network no later than June 14, 2022.
- **DISH 5G Broadband Service to At Least 70% of U.S. Population by 2023:** With respect to the AWS-4, 700 MHz E Block and AWS H Block licenses, DISH has committed to offer 5G Broadband Service to at least 70% of the U.S. population no later than June 14, 2023.[147]

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[143] Hearing Tr. at 1585:26-27 (Blum Cross); *id*. at 1602:3-1603:7 (Blum Cross); *see also* Hearing Ex. DISH 3 ("Blum Testimony") at Attachment C (list of licenses DISH holds in California).

[144] Hearing Tr. at 1625:10-15 (Blum Cross).

[145] *Id.* at 1394:23-25 (Ray Cross); *see also id.* at 1395:7-14 (as attested by Mr. Ray, bringing "all of this new fallow capacity unused spectrum that's sat there for several years . . . to the marketplace . . . [i]s going to bring a lot more capacity to the marketplace").

[146] DOJ Tunney Act Response at 26.

[147] Blum Testimony at 4; *see also id.* at Attachment B.

These commitments will bring DISH's spectrum into use more quickly for 5G thereby accelerating the output-expansion in wireless services brought about by the merger.

DISH has also committed to deploy 5G Broadband Service on each of its 600 MHz licenses four years earlier than required by the FCC's rules, and has consented to including a 5G Broadband Service obligation as a special condition its 600 MHz licenses. Specifically, DISH has committed to meeting the following accelerated deadlines:

- Using the 600 MHz licenses, offer 5G Broadband Service to at least 70% of the U.S. population no later than June 14, 2023.
- Using the 600 MHz licenses, offer 5G Broadband Service to at least 75% of the population in each PEA no later than June 14, 2025. [148]

As Mr. Blum clarified, this means that DISH must provide coverage and service to at least 75% of the population in each license area it holds in California which includes all of rural California.[149] The requirement to meet coverage thresholds for each license area eliminates any possible loophole whereby DISH could concentrate on urban areas to meet 75% nationwide coverage without benefitting rural customers. The 600 MHz spectrum is particularly well-suited to covering rural areas and, under the terms of DISH's commitments to the FCC, this spectrum will now be deployed 4 years earlier than otherwise required by the licenses at great benefit to rural Californians.[150]

Failure by DISH to meet its commitments will subject the company to up to $2.2 billion in voluntary contributions and potential license forfeitures, with the contributions calculated separately

[148] *Id.* at 6.

[149] Hearing Tr. at 1623:15-17 (Blum Cross).

[150] *Id*. at 1670:9-11; 1602:8-10, 1602:15-17 (Blum Cross).

for each commitment that is not met and additional penalties associated with contempt of court for violating the PFJ.[151]

In addition, DISH has already actively begun making plans to deploy its facilities-based network. Among other things, DISH's unrefuted testimony establishes that it plans to deploy as many as 50,000 cell sites nationwide, already has arrangements with tower owners across the country that give it access to essential infrastructure.[152] Moreover, DISH has already issued an RFP to vendors to build its network, and has received responses.[153] And DISH has teams already working on such issues as radio frequency design and arrangements with vendors who do permitting, zoning, and structural work.[154] In short, DISH is already well on its way to executing its network build.

Directly contradicting the unfounded assumptions of the Intervenors' witnesses,[155] DISH's network plans are not dependent on the decommissioned Sprint cell sites although, where

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[151] Blum Testimony at 6; *see also id.* at Attachment B; Hearing Tr. at 1605:7-13 (Blum Cross); *see also* FCC Merger Approval ¶ 6 ("DISH has committed to provide 5G mobile broadband services and deploy a fast, nationwide network, and is subject to significant financial consequences, in addition to potential forfeiture, should it fail to satisfy its buildout obligations."); *see also* PFJ at § XVIII.

[152] *Id.* at 1627:6-21 (Blum Cross) (DISH "ha[s] tower agreements with dozen[s] of tower companies that [it] negotiated and entered into as part of [its] internet of things buildout," giving it "access to hundreds of thousands of towers."); *see also id*. at 1591:22-25.

[153] *Id.* at 1634:4-8 (Blum Cross).

[154] *Id.* at 1615:23-28 and 1633:26 - 1634:8 (Blum Cross).

[155] Much of the Intervenors' testimony attacking DISH's viability as a competitor wrongly assumes that DISH will rely exclusively on cell sites decommissioned by Sprint in order to build its network. Mr. Reed, for example, makes this assumption in his allegation that the "prolonged decommissioning, purchasing, and redeploying cell towers is antithetical to the rapid build out of a facilities-based network that DISH needs to meet its deadlines," and that "the cell sites DISH could acquire are fewer in number than Sprint currently has." *See* Reed Reply Testimony at 17:1-4. However, leaving aside Mr. Reed's unfounded assertion that New T-Mobile would somehow intentionally decommission sites in a manner that would harm DISH, Mr. Reed did not cite to DISH's business plan, nor even to its public statements reporting its *independent* plans to build up to 50,000 towers. *See, e.g.*, Mike Dano, *Dish's Ergen Could Spend $10B to Build 50,000 Towers for 5G*, FIERCE WIRELESS (Oct. 8, 2018), https://www.fiercewireless.com/5g/dish-s-ergen-could-spend-10b-to-build-50-000-towers-for-5g.[155]

appropriate, it may decide that it is advantageous to acquire certain of those assets. As Mr. Blum testified:

> The decommissioned sites [are] something that is nice to have for DISH but it's not critical. We already, your Honor, have tower agreements with dozen[s] of tower companies that we negotiated and entered into as part of our internet of things buildout. So we have agreements with the biggest tower companies in the United States, regional, small.
>
> And so today if we wanted to we have access to hundreds of thousands of towers through our contracts with these tower companies. And as part of our team, what we are doing right now is identifying what towers we want to deploy with that have fiber, that have space and things like that. And so we are able to get access to towers today if we wanted to.
>
> What's nice about what the Department of Justice did is T-Mobile is going to have to offer us a minimum of 20,000 towers. And we get to decide whether the tower is in a good location and it potentially could save DISH money because if T-Mobile doesn't need that tower and can transfer it to us, then we could end up saving money.
>
> But just to clarify, it is something that is helpful but not necessary at all because we already have the contractual relationships with the tower companies to get all the towers that we need to meet our business plans of full 5G.[156]

Accordingly, DISH's testimony establishes that it plans to begin to build its network independent of the decommissioned cell sites. That said, the evidence is clear that New T-Mobile has strong economic incentives to quickly decommission redundant sites, in order to take advantage of substantial cost savings, and to make its decommissioned cell sites – a minimum of 20,000 – available to DISH as required under the terms of the PFJ expediently.[157] New T-Mobile will in turn give DISH notice of its intent to decommission cell sites on a rolling basis months before vacating

[156] Hearing Tr. at 1627:6-1628:9 (Blum Cross); *see also id.* at 1629:11-13 ("We're not relying on it [decommissioned sites] at all. It's nice to have. It can save us money.").

[157] Hearing Tr. at 1428:10-20 (Ray Cross) ("[W]e'd be decommissioning [sites], so we can save those rents that you refer to, the backhaul, the connection of the fiber to the sites, maintenance on those sites. Those numbers are, you know, potentially large for any wireless operator, seven, $8,000 a month. It could be $100,000 a year on average, probably higher in California in certain jurisdictions and areas. So we are very motivated to decommission, to secure synergies.")

those sites, which Mr. Blum confirmed gives DISH sufficient time "to decide whether the tower is in a good location and it potentially could save DISH money."[158]

D. DISH Plans to Timely Migrate the Divested Sprint Prepaid Customers onto the New T-Mobile Network

The record is clear that DISH's plans include for "existing pre-paid customers on the legacy Sprint network [to] be migrated to the New T-Mobile network in the normal course, but in any event before the legacy Sprint network is shut-down."[159] The migration process is further streamlined for DISH given that (a) a significant percentage of customers to be divested already have compatible phones, (b) the divestiture cannot take place until DISH has "the ability to provision any new or existing customer of the Prepaid Assets holding a compatible handset device onto the T-Mobile network pursuant to the terms of any Full MVNO Agreement," and (c) the devices that are being sold today by Boost are already compatible with the New T-Mobile network.[160]

The Asset Purchase Agreement also facilitates the migration process for the divested customers. Among other things, it obligates New T-Mobile **[BHC-AEO]** REDACTED REDACTED **[EHC-AEO].**[161] To facilitate DISH's growth during the transition, the DOJ has also mandated that New T-Mobile provide DISH with transition services *at cost* in "billing,

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[158] Hearing Tr. at 1627:26-1628:3 (Blum Cross). *See also* PFJ at 13-14 (detailing notice provisions for decommissioning schedule).

[159] Blum Supplemental Testimony at 3.

[160] Hearing Tr. at 1380:8-12 (Ray Cross).

[161] Ray Supplemental Testimony at 19:22-25; *see also id.* at Exhibit G (Annex 1 to Exhibit C of Asset Purchase Agreement) (Form of Master Network Services Agreement).

customer care, SIM card procurement, device provisioning, and all other services used by the Prepaid Assets prior to the date of their transfer" for two to three years after closing.[162] These transition services will "make sure that the effects on customers are completely seamless" following their transfer to DISH.[163] In addition, DISH already has a history of providing outstanding customer service as reflected by J.D. Powers.[164]

E. DISH has the Financial Means to Execute its Network Build

DISH's testimony addresses any issues about whether it will be able to raise the funds necessary to finance its network buildout. Dr. Selwyn's testimony that DISH "has failed to demonstrate that it has the financial capacity to actually raise [the] $10-billion" estimated cost to build its 5G network is baseless and fails to consider DISH's own history and financial standing.[165] To date, "[DISH] ha[s] raised over $30 billion since [it has] been in business just in the markets. [DISH has] never missed a debt payment, and [has] never had to secure any of [its] debt with [its] spectrum."[166] Going forward, Mr. Blum established that DISH will have access to additional capital through a number of means, including, but not limited to, raising unsecured debt in the market; issuing collateralized debt; investing revenue from operating its wireless business as it acquires and grows Boost's 9.3 million-person customer base; and re-investing its approximately $1 billion in annual satellite profits.[167]

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[162] Ray Supplemental Testimony at 20:1-3; *see also* PFJ at 10.

[163] Hearing Tr. at 1543:11-17 (Sievert Cross).

[164] Hearing Tr. at 1577:28-1578:2 (Blum Cross).

[165] Hearing Ex. Pub Adv-11 ("Selwyn Reply Testimony") at 56.

[166] Hearing Tr. at 1588:4-8 (Blum Cross).

[167] Hearing Tr. at 1589:24-1590:7 (Blum Cross); *see also id.* at 1591:18-1592:6.

F. DISH has the Ability and Incentive to provide its Customers with a Wide Array of Retail Options

As Mr. Blum testified, DISH plans to expand, not reduce, the Sprint prepaid retail footprint for its consumers through a broader distribution chain and technological innovation.

The definition of the "Prepaid Assets" subject to divestiture under the PFJ includes "Boost and Virgin Mobile Retail Locations, licenses, personnel, facilities, data, and intellectual property, as well as all relationships and/or contracts with prepaid customers served by Sprint, Boost Mobile, and Virgin Mobile."[168] Accordingly, Boost and Virgin Mobile dealer relationships and agreements will transfer to DISH upon closing and "DISH will be operating through its contractual arrangements with Boost dealers the entire Boost retail fleet from day one."[169] As Mr. Blum testified, DISH "has met with the dealers, communicated with those dealers, and they are excited about the opportunity to continue as Boost dealers."[170] Indeed, rather than reducing the availability of retail options for Boost customers, DISH plans to increase Boost's retail footprint after the divestiture. Current Boost retail locations are limited to areas served by Sprint's standalone network; as a result of the larger coverage area of New T-Mobile's network compared to standalone Sprint, DISH will have "opportunities to sell Boost in areas that Sprint doesn't [cover] today."[171] To execute this expansion, DISH also can leverage its network of thousands of independent satellite dealers, as well as current Boost dealers.[172]

Additionally, as both Mr. Ray and Mr. Blum testified, the PFJ requires that DISH and New T-Mobile introduce eSIM technology,[173] allowing customers to change carriers without physically

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168 PFJ at 4.

169 Hearing Tr. at 1536:14-17 (Sievert Cross).

170 *Id.* at 1572:23-26 (Blum Cross).

171 *Id.* at 1578:21-79:6 (Blum Cross).

172 *Id.* at 1578:21-1579:6 (Blum Cross).

173 *See* PFJ at 21.

changing the SIM card in their phones. eSIM, in turn, "will tend to lower switching costs for wireless consumers,"[174] which can "help DISH attract consumers as it launches its mobile wireless business [, and] . . . increase the disruptiveness of DISH's entry by making it easier for consumers to switch between wireless carriers . . . , thus lowering the cost of DISH's entry and expansion."[175]

G. DISH has Plans and Teams in Place to Ensure Compliance with All Applicable Laws and Regulations and Experience with Responding to Emergencies

The concerns raised by Intervenors about DISH's willingness and ability to meet its regulatory commitments have no support in the record. Mr. Blum testified that "[DISH] ha[s] a whole team that [he is] in charge of ensuring that all the wireless requirements, so E911 outage, CALEA, USF, Privacy" will be complied with upon the launch of DISH wireless.[176] Cal PA's concerns regarding DISH's emergency preparedness are similarly misplaced. They seem to be based on flawed assumptions which ignore DISH's actual commitments and business plan and otherwise reflect a lack of familiarity with the company's experience. For example, Mr. Reed stated that "resilience and redundancy would be negatively impacted in the several years it takes for DISH to get cell sites and emergency equipment online . . . reduc[ing] provider choice for emergency responders and the public."[177] As an initial matter, Mr. Reed's conclusion is based on a false premise – that the Sprint sites must be decommissioned before DISH will construct its cell sites. However, as explained above, DISH already has access to hundreds of thousands of towers through its agreements with tower and is not waiting for decommissioned sites to build its network.[178]

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[174] FCC Merger Approval ¶ 206.

[175] DOJ Tunney Act Response at 14.

[176] Hearing Tr. at 1642:26-1643:4 (Blum Cross).

[177] Reed Reply Testimony at 16:13-17.

[178] *See* Section IV.C, *infra*. Notably, Cal PA witness Reed levied the same criticisms at New T-Mobile before the divestiture to DISH. *See* Hearing Ex. Pub Adv-006C ("Reed Service Quality Testimony") at 38:23-39:2.

Moreover, Mr. Blum provided testimony regarding DISH's experience supporting victims of natural disasters and noted DISH's advantages in emergency preparedness based on its ability to "come to [disaster] areas and get cell connections through [its] satellite broadband system."[179] This is critical in that it enables DISH to "quickly get to areas that have been adversely affected by natural disasters to get connectivity to consumers, and none of the incumbents have that ability."[180] Finally, DISH will be obligated to comply with all the same regulations as any other wireless carrier in the state once it is certificated and begins offering service.

H. DISH has a History of Being a Disruptive Competitive Force and a Low-Cost Leader Throughout its Service Territory, Including Rural Areas.

DISH's testimony not only confirms that it has the tools and the plans to become a competitive force in the wireless marketplace, but also that it has a history of disruptive entry. Mr. Blum testified with respect to DISH's history of "taking on the big guys and being successful" in the cable market.[181] As he noted, the cable TV market was highly concentrated, with market leaders enjoying large profit margins, when DISH entered as a cost-effective satellite alternative.[182] And DISH's record of disruption is not limited to urban areas: As stated by Mr. Blum, "[W]e grew up in rural America. I mean, that's where we were able to grow our·business by being the value provider, the low-cost provider. Focused on rural America."[183] He explained how DISH's plan was to take a similar approach to the wireless industry, leveraging what he described as the advantages of building

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Although Joint Applicants explained in detail in their reply brief why the decommissioning of certain Sprint cell sites will not affect the resiliency of the New T-Mobile network (Joint Applicants' Post-Hearing Reply Brief at 82-84), the fact that there will now be a new competitor that will be building a new network with new sites only further discredits Cal PA's unfounded concern.

[179] Hearing Tr. at 1638:1-20 (Blum Cross).

[180] *Id.* (Blum Cross).

[181] Hearing Tr. at 1678:10–12 (Blum Cross).

[182] *Id.* at 1678:10-1679:23 (Blum Cross).

[183] *Id.* at 1672:4-7 (Blum Cross).

a greenfield 5G network with massive capacity employing all the tools DISH will receive in the divesture, coupled with a focus on customers and a corporate culture of providing low-cost and high-quality service.[184]

VI. INTERVENORS' ECONOMIC ANALYSIS OF DISH'S COMPETITIVENESS IS SEVERELY FLAWED.

Issue 1 in the ALJ Hearing Issues Ruling asks whether "the agreement with DISH substantially alleviate [sic] any competitive harms of the proposed merger?" As Joint Applicants discussed in detail in their prior post-hearing briefs, the combination of T-Mobile and Sprint is pro-competitive and will provide immense benefits to Californians. Consumers will enjoy vastly better service at lower prices because this merger will allow the New T-Mobile to expand capacity and increase service quality far above what either company could achieve on its own. The divestiture of Sprint's prepaid business to DISH will only enhance those consumer benefits.

Dr. Israel and Professor Bresnahan presented comprehensive economic analyses of this merger. Their analyses showed that this merger enhances consumer welfare by increasing output and quality while simultaneously lowering costs and prices. In their supplemental testimony, Dr. Israel and Professor Bresnahan discuss how the introduction of DISH as a new competitor can only enhance the pro-competitive benefits of this merger.

In response to Dr. Israel's and Professor Bresnahan's testimony, Intervenors offer the testimony of Dr. Selwyn, Ms. Odell, and Ms. Goldman. While that testimony is greater in terms of volume, none of it should be credited by the Commission. The testimony of these three witnesses is incomplete, inaccurate, and unreliable. For example, as discussed in more detail below:

- Dr. Selwyn formed his opinions on DISH's competitive significance without even a basic understanding of how DISH will construct its network. He also failed to appreciate the

[184] *Id.* at 1677:13-1679:23 (Blum Cross).

extensive retail network that DISH will receive from Sprint, and based his conclusions on a severely flawed and incomplete economic analysis.

- Ms. Odell's assertion that the transaction will result in price increases is simply a reference to prior testimony from Dr. Selwyn. She fails to recognize, however, that Joint Applicants have already shown Dr. Selwyn's testimony on this point to be unreliable for the simple, but important, reason that he analyzed the wrong model.

- Ms. Goldman's testimony in these proceedings is essentially the same as CWA's submission to DOJ in connection with court approval of the consent decree. Those recycled arguments have already been evaluated, and dismissed, by DOJ in a public court filing.[185]

A. Joint Applicants' Economic Testimony Demonstrates that Conditions Imposed by Federal Regulators, Who Have Already Approved this Transaction, Enhance Competition and Benefit Consumers

Following a thorough review, the FCC and DOJ imposed a variety of commitments as a condition for their approval of this merger.[186] Dr. Israel and Professor Bresnahan reviewed those commitments and determined their earlier conclusions that the merger is overwhelmingly pro-competitive remain unchanged.[187] In large part, the commitments simply codify New T-Mobile's existing economic incentives.[188] The DOJ also conditioned its approval of the merger on the divestiture of Sprint's prepaid business to DISH and DISH's commitment to build a facilities-based nationwide 5G network. The entry of DISH as a new competitor will add even more pro-competitive force to this merger.

As Professor Bresnahan, the former Chief Economist of the Antitrust Division of the U.S. Department of Justice, testified, in evaluating the effectiveness of regulatory commitments such as those here it is important to examine whether they are (1) verifiable and (2) likely to cause pro-

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185 *See* DOJ Tunney Act Response.

186 *See, e.g.*, FCC Merger Approval; PFJ; *see also* Hearing Tr. at 1314:14-1315:19 (Selwyn Cross).

187 *See* Hearing Ex. Jt Appl.-33 ("Israel Supplemental Testimony") at 2:18-24; Hearing Ex. Jt Appl.-32 ("Bresnahan Supplemental Testimony") at 2:7-15.

188 *See* Israel Supplemental Testimony at 4:18-22.

consumer outcomes.[189] The commitments here are readily verifiable because they can be measured against specific timeframes and performance metrics.[190] Moreover, the commitments are enforceable as reflected by the severe penalties associated with the failure to meet those verifiable metrics.[191] The commitments are also consumer-enhancing. All wireless customers will, directly or indirectly, benefit from New T-Mobile's improved network quality, greater capacity, and lower cost structure because that combination of enhancements incentivizes competition across all carriers as they move to react to New T-Mobile's value proposition.[192] The regulatory commitments imposed here make an already pro-consumer transaction only more so.

In particular, the introduction of DISH as a new facilities-based competitor will enhance consumer welfare in several ways. First, new DISH customers will benefit from T-Mobile's improved network due to a favorable MVNO agreement. Second, DISH will have the assets and incentive to deploy a network using its own trove of spectrum, meaning DISH will gain significant independent capacity and be able to lower its marginal costs.[193] That combination incentivizes DISH to fight for customers and compete on price and quality not only with AT&T and Verizon, but with New T-Mobile as well.[194] Third, incentives to compete "provide [] further assurance that pricing coordination is unlikely," and the additional incentives created by DISH's entry here make coordination even more unlikely.[195]

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[189] *See B*resnahan Supplemental Testimony at 4:21-5:12.

[190] *See* FCC Merger Approval at Appendix G

[191] *See, e.g.*, *id.* at 233-237, 243-244; PFJ at 12, 14; Hearing Tr. at 1273:17-1274:17 (Selwyn Cross).

[192] Israel Supplemental Testimony at 5:10-15.

[193] This is similar to the greater capacity and reduced marginal costs that New T-Mobile will experience as a result of the transaction, as described in Joint Applicants' prior submissions. *See* Joint Applicants' Post-Hearing Opening Brief at 54-58.

[194] *See* Israel Supplemental Testimony at 5:20-6:15.

[195] Bresnahan Supplemental Testimony at 5:21-6:3.

Accordingly, the effect of this transaction and the associated regulatory commitments is to enhance competition and benefit consumers in the form of lower prices and increased quality.

B. Dr. Selwyn's Analysis Is Incomplete, Mistaken, and Incorrectly Performed

Dr. Selwyn's supplemental testimony asserts that DISH will not be competitively relevant following the divestiture of Sprint's prepaid business, and will not, therefore, prevent alleged competitive harms.[196] Dr. Selwyn admits, however, that in reaching this conclusion, he did not review DISH's business plans or any other DISH materials relating to its 5G network planning.[197] Put differently, Dr. Selwyn rendered opinions about DISH that were simply unfounded. Dr. Selwyn compounded this problem by using clearly erroneous factual assumptions to underpin his analysis. And, as he admitted, while Dr. Selwyn claimed to rely on the framework of the Horizontal Merger Guidelines (the "Guidelines") for his analysis, he did not perform the type of rigorous economic analysis that the Guidelines require. These shortcomings may explain why Dr. Selwyn reaches a conclusion different from that of the U.S. Department of Justice and the Federal Communications Commission, agencies that conducted exhaustive investigations of the proposed merger.

1. Dr. Selwyn failed to conduct a thorough review.

Dr. Selwyn failed to review and analyze materials that are highly relevant to his conclusions regarding DISH. While Dr. Selwyn opines that DISH may not be able to build its wireless network[198] – despite his lack of expertise in the area[199] – he did little if any work to understand how DISH plans to build its network and what the capabilities of that network will be. For example, when asked whether he "review[ed] the internal planning documents for how the [DISH] network would be built"

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196 *See, e.g.*, Pub Adv-0012 ("Selwyn Reply Testimony") at 13:1-19:8, 47;1-50:18, 63:1-77:13.

197 Hearing Tr. at 1263:5–1264:3 (Selwyn Cross).

198 *See, e.g.*, *id.* at 55:1-64:2.

199 Hearing Tr. at 1264:4-6 (Selwyn Cross).

Dr. Selwyn replied "Not in any detail."[200] Pressed further, Dr. Selwyn could not recall reviewing *any* internal DISH materials regarding its network build.[201] That pattern continued. Dr. Selwyn admits that he did not speak with any DISH personnel regarding their 5G plans, nor did he review any deposition transcripts of DISH personnel regarding its network plans.[202] In short, Dr. Selwyn is offering an opinion regarding a new network without any relevant details regarding that network.[203]

2. Dr. Selwyn's analysis incorporates and relies on basic factual mistakes.

Dr. Selwyn's testimony also contains basic factual mistakes that undermine his conclusions regarding DISH's ability to compete. Among others, the following three significant errors came to light on cross examination:

- *Dr. Selwyn incorrectly assumed that DISH will not receive retail stores as part of the divestiture.* Dr. Selwyn assumed that DISH would only receive "decommissioned" retail stores in the prepaid divestiture, and that DISH will therefore lack sufficient retail distribution.[204] On cross examination, however, Dr. Selwyn admitted that he simply misread the Proposed Final Judgment – contractual arrangements with Boost retail locations will transfer immediately with the divestiture.[205] Moreover, as Dr. Selwyn admitted, DISH will also have access to the third-party retailers that currently sell Sprint's prepaid brands, such as

[200] *Id.* at 1263:16-19 (Selwyn Cross).

[201] *Id.* at 1263:20-23 (Selwyn Cross).

[202] *Id.* at 1263:24-1264:3 (Selwyn Cross).

[203] To be sure, Dr. Selwyn has reviewed *some* limited materials, stating during cross examination that he looked at "some of the DISH responses" (*id.* at 1263:10-15), but this limited review is not sufficient to make Dr. Selwyn's report credible.

[204] *See* Selwyn Reply Testimony at 10:10-11:3.

[205] Hearing Tr. at 1287:14-1289:23 (Selwyn Cross); *see also id.* at 1536:11-17 (Sievert Cross) ("It's the case in that the divestiture contemplates that DISH inherits all of the contractual arrangements with all of the Boost dealers. So DISH will be operating through its contractual arrangements with Boost dealers the entire Boost retail fleet from day one.").

Walmart, and DISH's existing retail network for its satellite television business.[206] Thus, far from having a weak retail network, DISH will have access to a vibrant retail distribution network from inception.

- *Dr. Selwyn's testimony incorrectly describes the number of employees DISH will acquire.* In his written testimony Dr. Selwyn states that "it is apparent that the explicit limitation of 'Prepaid Assets Personnel' to a maximum of 400 individuals certainly does not include any significant number of retail store employees."[207] On cross examination, however, Dr. Selwyn admitted that DISH actually receives a *minimum* of 400 Sprint and Boost employees, along with even more personnel working for Boost and Virgin Mobile dealers.[208]

- *Dr. Selwyn incorrectly assumes that DISH will have difficulty financing its network build.* Dr. Selwyn asserts that DISH will have difficulty financing its network build, but did not offer any factual support for this claim. He admits that he has no information about DISH's actual financing plans and did not seriously investigate DISH's financing options.[209] For example, Dr. Selwyn stated his belief that DISH's spectrum is already encumbered.[210] But, as discussed above, Mr. Blum testified that DISH has numerous options for financing its network build, including obtaining debt financing secured by DISH's spectrum assets.[211]

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206 *Id.* at 1292:25-1293:4 (Selwyn Cross).

207 Selwyn Reply Testimony at 68:4-6; *see also* Hearing Tr. at 1292:7-16.

208 Hearing Tr. at 1292:4-24 (Selwyn Cross).

209 *Id.* at 1275:26-1276:3 (Selwyn Cross).

210 *Id.* at 1276:4-15 (Selwyn Cross).

211 *Id.* at 1587:22-1588:16 (Blum Cross); *see also* Section V.E, *supra*.

3. Dr. Selwyn fails to apply appropriate economic analysis.

Dr. Selwyn's written testimony includes various analyses purporting to show that DISH will not provide effective competition as a facilities-based carrier.[212] Those analyses are inappropriate, incomplete, and wholly unreliable.

For example, Dr. Selwyn argues that DISH will not be able to afford a 5G network build. But he also admits that he did not independently study how much that build will cost,[213] did not study DISH's ability to finance the required network build,[214] and did not conduct any cash flow analysis.[215] While Dr. Selwyn does present an estimate of aggregated wireless capital expenditures for Sprint and T-Mobile, apparently to argue that DISH will not make similar levels of investment, he admits that this data is not adjusted to account for the fact that DISH is building a *different type of network* – one that is 5G only and will take advantage of new cost-saving technologies.[216]

Dr. Selwyn also attempts to analyze DISH's stock price, asserting that because it has trended down over the past six to eight months investors must not believe DISH will be able to compete effectively.[217] That analysis is meaningless. Dr. Selwyn acknowledges that there are many factors that affect the price of a stock and that he failed to control for any of them in his analysis.[218] In Dr. Selwyn's own words, he "didn't control specifically for anything."[219]

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212 *See* Selwyn Reply Testimony at Section III.

213 Hearing Tr. at 1264:23-1265:4 (Selwyn Cross).

214 *Id.* at 1280:16-1281:5 (Selwyn Cross).

215 *Id.* at 1283:14-18 (Selwyn Cross).

216 *Id.* at 1267:7-1268:5 (Selwyn Cross).

217 *See* Selwyn Reply Testimony at 15:3-8.

218 Hearing Tr. at 1272:11-25 (Selwyn Cross).

219 *Id.* at 1271:2-12 (Selwyn Cross).

In another example, Dr. Selwyn purports to use the Herfindahl-Hirschman Index ("HHI") to analyze changes in market concentration that will result from the divestiture of Sprint's prepaid business to DISH. He claims that the changes in concentration he calculates support his claim that DISH will not be an effective competitor,[220] and argues that, even with the divestiture, the proposed merger will be anticompetitive under the thresholds articulated in the Guidelines. These calculations do not provide any such support.

For example, Dr. Selwyn admitted at the hearing that his HHI calculations did not follow the standards of the Guidelines. He acknowledged that the Guidelines generally call for the market shares used in HHI calculations to be based on revenues, and that he did not use revenues for his market shares.[221] Instead, he based his calculations on spectrum holdings.[222] When asked during cross examination whether there is "guidance in the merger guidelines to use something like spectrum as a proxy for revenue," Dr. Selwyn responded that there is not.[223]

Dr. Selwyn also acknowledged at the hearing that, under the Guidelines, HHI figures are merely a screening tool used by agencies to determine if further analysis of a merger is warranted. And, that the HHI cannot be used to determine whether a merger is procompetitive or anticompetitive. Instead, the Guidelines require a more detailed analysis to be performed. Dr. Selwyn then admitted that he has not performed the further analysis required by the Guidelines.[224] On that basis alone, Dr. Selwyn's opinions should be disregarded.

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[220] *See* Selwyn Supplemental Testimony at 48:6 – 54:28.

[221] Hearing Tr. at 1298:16-28 (Selwyn Cross).

[222] *Id.* at 1297:3-14 (Selwyn Cross).

[223] *Id.* at 1299:20-1300:2 (Selwyn Cross). Dr. Selwyn also acknowledged that the federal regulatory agencies did not take the same approach he did, and instead used revenue figures. *Id.* at 1300:3-8 (Selwyn Cross).

[224] *Id.* at 1301:2-9 (Selwyn Cross).

Dr. Selwyn attempted to support his opinions with a model he constructed – the "ETI Ramp-Up Model." Dr. Selwyn claims that this model estimates that number of subscribers that DISH will have over time. But the model is severely flawed. For example, it assumes that DISH will only compete for what Dr. Selwyn describes as "addressable" consumers – meaning consumers that have already decided to leave other carriers (*i.e.*, churn) plus the natural growth of the overall subscriber base.[225] That assumption is wholly unsupported. As Dr. Selwyn acknowledged at the hearing, AT&T, Verizon, and T-Mobile all compete for all wireless subscribers.[226] Dr. Selwyn provides no basis for assuming that DISH cannot and will not compete for all of those same subscribers.

Dr. Selwyn's ETI Ramp-Up Model is also incapable of assessing the key issue in merger analysis - what will happen to price and quality as a result of the merger. Dr. Selwyn readily agreed that this is the critical issue in merger analysis,[227] and that the ETI Ramp-Up Model does not account for any change in price or quality.[228] This leads to nonsensical results. Dr. Selwyn admitted that his ETI Ramp-Up Model predicts that DISH would have exactly the same number of subscribers if it offered a fully unlimited plan for $1 as the number of subscribers it would have if it charged Boost's current prices.[229]

Nor did Dr. Selwyn look at the critical issues of price and quality using any other model or analytical tool. To the contrary, having acknowledged that changes in price and quality are the most

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[225] *Id.* at 1301:26-1304:1 (Selwyn Cross).

[226] *Id.* at 1301:10-25 (Selwyn Cross).

[227] *Id.* at 1307:26-1308:2 (Selwyn Cross).

[228] *Id.* at 1309:5-10 (Selwyn Cross).

[229] *Id.* (Selwyn Cross).

important issue in merger analysis, he admitted he did not examine them: "I haven't examined quality or price specifically . . . ."[230]

Dr. Selwyn's testimony is the product of an incomplete review, mistakes of fact, and improper economic analysis. The Commission should give it no weight.

C. Ms. Odell's Assertion That the Merger Will Result in Price Increases Is Based on Flawed Analysis by Dr. Selwyn

Ms. Odell's supplemental testimony asserts that "Applicants' own model predicts that absolute dollar price levels for New T-Mobile's plans will go up following the transaction."[231] That is false. The only support provided for Ms. Odell's statement is a citation to Dr. Selwyn's supplemental declaration dated April 26, 2019. Joint Applicants' prior post-hearing briefs have already explained in detail, however, Dr. Selwyn's analysis stems from a basic mistake – he did not actually examine the Joint Applicants' model.[232] Instead Dr. Selwyn relied on an incomplete and discredited model submitted on behalf of Intervenor DISH, which was only included in the IKK materials as part of its critique of the DISH model.[233] In reality, Joint Applicants' economic analyses, as well as the New T-Mobile business plan, confirm that post-merger prices paid by California customers for wireless service plans will go down both on a nominal and quality-adjusted basis.[234] Ms. Odell's testimony merely incorporates and adopts Dr. Selwyn's earlier mistake. It should not be given any weight.

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[230] *Id.* at 1313:15-25 (Selwyn Cross).

[231] *See* Odell Supplemental Testimony at 6:13-15 n.17.

[232] Joint Applicants' Post-Hearing Reply Brief at 30-35.

[233] *See* Joint Applicants' Post-Hearing Reply Brief, Appendix 3 ¶ 6 ("*Critically, the only reason IKK replicated the HBVZ model was in order to critique it*.") (emphasis in original).

[234] *See* Joint Applicants' Post-Hearing Reply Brief, Appendix 3 for a full detailing of the errors, false claims, and mischaracterizations in Dr. Selwyn's supplemental declaration and an explanation of the correct conclusions of the IKK model.

D. Ms. Goldman's Testimony Merely Repeats Claims Already Asserted in This Proceeding and in the Tunney Act Proceeding

Ms. Goldman's supplemental testimony on behalf of CWA is, essentially, a duplication of comments submitted by CWA in the Tunney Act Review proceedings currently underway in the U.S. District Court for the District of Columbia.[235] With the exception of limited testimony relating to jobs (which largely repeats her prior testimony to the Commission on this topic).[236] Ms. Goldman's testimony is almost a word for word repeat of CWA's submission to the DOJ per the Tunney Act Review process.[237] As a result, her testimony addresses topic, such as specific DOJ Antitrust Division policies, that are irrelevant to this proceeding.

Moreover the substance of Ms. Goldman's testimony has already been thoroughly addressed both by Joint Applicants' witnesses *and* by the U.S. Department of Justice in its Response to Comments filed.[238] For example, Ms. Goldman asserts that DISH's operation as an MVNO means it will not create "significant competitive pressure" – but fails to address DOJ's response that the MVNO arrangement here is unique and specifically tailored to make DISH a vibrant competitor.[239] Ms. Goldman also argues that DISH is an inappropriate divestiture purchaser because it has a history

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[235] DOJ Tunney Act Response, Appendix 1, Exhibit 10 ("CWA Tunney Act Comments").

[236] CWA continues to try and raise the specter that the merger will result in massive job losses, lower compensation and that T-Mobile is not a good employer. Goldman Reply Testimony at 6:6 – 9:15. These assertions have been soundly refuted previously. *See e.g.*, Joint Applicants' Post-Hearing Opening Brief at 86-89. CWA also suggests, without any foundation, that the DISH Divestiture will negatively impact the number of Boost retail dealers. Goldman Reply Testimony at 7:10-15. As noted above, the evidence is directly to the contrary. *See, e.g.*, Hearing Tr. at 1572:19–26 (Blum Cross) ("One of the reasons why, your Honor, as part of the DOJ remedy we are getting rights to about 7400 independent Boost dealers that are in the Sprint footprint today. ·And our team has met with the dealers, communicated with those dealers, and they are excited about the opportunity to continue as Boost dealers.").

[237] For your reference we have attached a redline of Ms. Goldman's reply testimony against the CWA Tunney Act Comments as Attachment 3.

[238] *See, e.g.,* DOJ Tunney Act Response at 14, 18, 21-23, 26-36, 45-47.

[239] *Compare* Goldman Testimony at 2-3, *with* DOJ Tunney Act Response at 10-11, n.13.

of "warehousing" spectrum – but the DOJ explicitly addressed this point too, noting that "DISH's spectrum assets make it a prime candidate for entry into the mobile wireless market."[240] Additional examples abound.[241] For these reasons, Ms. Goldman's testimony should be given little or no weight.

VII. CONCLUSION

The Joint Applicants respectfully submit that the Commission has sufficient information to conclude its review of the Wireless Notification and that this proceeding should be closed without further delay.

Respectfully submitted this 20th day of December, 2019.

/s/
Dave Conn
Susan Lipper
T-Mobile USA, Inc.
12920 SE 38th St.
Bellevue, WA 98006
Email: dave.conn@t-mobile.com
Email: susan.lipper@t-mobile.com

Suzanne Toller
Davis Wright Tremaine LLP
505 Montgomery, Suite 800
San Francisco, CA 9411
Telephone: 415.276.6500
Email: suzannetoller@dwt.com

Leon M. Bloomfield
Law Offices of Leon M. Bloomfield
1901 Harrison St., Suite 1400
Oakland, CA 94612
Telephone: 510.625.1164
Email: lmb@wblaw.net

Attorneys for T-Mobile USA, Inc.

/s/
Stephen H. Kukta
Sprint Communications Company L.P.
900 7th Street, NW, Suite 700
Washington, DC 20001
Telephone: 415.572.8358
Email: stephen.h.kukta@sprint.com

Kristin L. Jacobson
Law Offices of Kristin L. Jacobson
491 Gray Court, Suite 1
Benicia, CA 94510
Telephone: 707.742.4248
Email: kristin@kljlegal.com

Attorneys for Sprint Spectrum L.P. (U-3062-C), and Virgin Mobile USA, L.P. (U-4327-C)

[240] *Compare* Goldman Testimony at 26-28, *with* DOJ Tunney Act Response at 19-21.

[241] *See, e.g.*, n. 238, *supra*.

ATTACHMENT 1

OVERVIEW OF ISSUES IDENTIFIED IN OCTOBER AMENDED SCOPING RULING & ALJ HEARING ISSUES RULING

PUBLIC VERSION

ATTACHMENT 1

OVERVIEW OF ISSUES IDENTIFIED IN
OCTOBER AMENDED SCOPING RULING & ALJ HEARING ISSUES RULING

I. OCTOBER AMENDED SCOPING RULING

No.	Issues Identified in October Amended Scoping Ruling	Overview of Issues	Where Issue is Addressed in Post-Hearing Brief
1	What changes are required to previously submitted written or oral witness testimony resulting from Sprint, T-Mobile or Dish Network entering into the DOJ and FCC commitments? The changes must be identified in new testimony from the same witness who submitted the original testimony.	This requested information was provided in the applicable supplemental testimonies of Joint Applicants, submitted November 7, 2019.	Section IV, n. 24 (identifying the relevant Supplemental Testimony submitted by Joint Applicants)
2	What changes are required to the terms of the Memorandum of Understanding between T-Mobile and CETF resulting from Sprint, T-Mobile or Dish Network entering into the DOJ and FCC Commitments?	The FCC Commitments and the DOJ Commitments require only one conforming change to the pricing commitment memorialized in the CETF MOU.	Section IV.A
3	What are Dish Network's California service obligations?	DISH will be obligated to meet the same regulatory requirements of other wireless service providers, and DISH already has plans and teams in place to ensure compliance with all applicable laws and regulations.	Section V.G
4	How does the proposed transfer of spectrum to Dish Network impact the	The potential divestiture of the Sprint 800 MHz spectrum to DISH will not adversely impact, hinder, or delay the	Section IV.D

No.	Issues Identified in October Amended Scoping Ruling	Overview of Issues	Where Issue is Addressed in Post-Hearing Brief
	quality and extent of New T-Mobile's existing 4G network and its planned 6G network?	benefits of New T-Mobile's 5G network in terms of coverage, speed, and capacity or otherwise impact New T-Mobile meeting its commitments to California. New T-Mobile will use the 800 MHz spectrum to support current Sprint CDMA and LTE customers through the 3-year migration period and, if more time is necessary, has the option to lease back 4 megahertz of the 800 MHz spectrum.	
5	How does the divestiture of Sprint, Boost and Virgin pre-paid businesses impact California customers who are currently receiving services from one another or another of these providers?	The divestiture of Sprint's prepaid business will not adversely impact the current customers of Sprint's prepaid businesses (excluding Assurance Wireless). Those customers will have the benefit of DISH's favorable MVNO arrangement and will have unfettered access to the New T-Mobile network from day one as well as the DISH network as it is built out. They will also benefit from DISH's significant spectrum holdings, its broad retail network including Boost retail stores, its transition services agreement with New T-Mobile, and its track record of being a low-cost provider with a focus on rural communities.	Section V
6	How does the requirement that New T-Mobile make its network available to Dish network for up to seven years impact the quality and extent of New T-Mobile's existing 4G network and its planned 6G network?	The merger will create a massive increase in capacity and network capabilities through the combination of T-Mobile's and Sprint's complementary spectrum assets and cell sites and the spectral efficiency of 5G technology. New T-Mobile's post-merger network plan already accounted for aggressive growth in Sprint prepaid customers, and the combined network will have more than sufficient capacity to service MVNO customers including DISH's customers.	Sections IV.C & D
7	In what other ways, if any, could the DOJ and FCC commitments change the benefits that applicants have	The DOJ and FCC Commitments do not adversely impact, hinder, or detract from the benefits of the merger for California customers. If anything, they will enhance those	Sections IV.C and VI

No.	Issues Identified in October Amended Scoping Ruling	Overview of Issues	Where Issue is Addressed in Post-Hearing Brief
	claimed California customers will receive from the proposed transaction?	benefits.	
8	With reference to the Network and In-Home Commitments set forth for New T-Mobile's Nationwide 5G Network Deployment at pages 1-3 of Attachment 1, provide all of the same information in the same format as contained in Sections I, II and III of Attachment 1, specifying the commitments for deployment in California rather than nationwide.	This requested information was provided in the supplemental testimony of Neville R. Ray.	Section IV., n. 70

II. ALJ HEARING ISSUES RULING

No.	Topics Identified in ALJ Hearing Issues Ruling	Overview of Topics	Where Topic is Addressed in Brief
1	Does the agreement with DISH substantially alleviate any competitive harms of the proposed merger?	As the evidence at the February Hearings made clear, the proposed merger is pro-competitive. Among other things, the Sprint/T-Mobile merger will provide consumers with vastly better service at lower prices because this merger will allow the New T-Mobile to expand capacity and increase service quality far above what either company could achieve on its own. The divestiture of Sprint's prepaid business to DISH does not adversely impact those benefits and addresses the concerns expressed by the DOJ regarding the potential competitive impact of the merger.	Section VI
2	How does the agreement with DISH affect customer service, consumer protections and privacy rights of California consumers?	DISH has made clear that it already has plans and teams in place to ensure compliance with all applicable laws and regulations, including laws and regulations covering customer service, consumer protection, and privacy. In addition, New T-Mobile will initially be providing its industry-leading customer service to these customers under the terms of the transition services agreement.	Section V
3	How does the agreement with DISH affect the continued availability of low-cost plans?	T-Mobile's practice of offering low-cost plans and its commitment ensuring customer choice of the "same or better rate plans" is well-established in the record. Additionally, T-Mobile's commitment to continue the Boost Mobile Pilot is also well-established in the record. DISH also has a history of being a low-cost leader and plans to undercut its wireless competitors from the outset.	Section IV.B; Section V
4	What will happen to pre-paid customers with incompatible handsets when they are divested to DISH?	DISH has made it clear that it plans to migrate all the divested customers to the New T-Mobile network in the normal course, but in any event before the legacy Sprint network is shut down. New T-Mobile is obligated to cooperate with DISH's migration. Moreover, a significant percentage of	Section V.D

		customers to be divested already have compatible phones and divestiture cannot take place until DISH has the ability to provision the divested customer with a compatible handset device onto the New T-Mobile network.	
5	Are any LifeLine customers at risk of losing their subsidies if the proposed merger is consummated?	No. T-Mobile's commitment to the LifeLine program in California is unprecedented and fulsome. If anything, the merger will not only sustain but improve service for LifeLine customers in the state. In addition, T-Mobile has reiterated its willingness and enthusiasm for participating in the Boost Pilot program if the Commission so desires. DISH has also made clear that it would work with New T-Mobile to make sure no Pilot customers are disenfranchised if DISH does not choose to participate in this program.	Section IV.B

ATTACHMENT 2

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS OF THE PROPOSED FINAL JUDGMENT

PUBLIC VERSION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

DEUTSCHE TELEKOM AG, *et al.*,

Defendants.

Case No. 1:19-cv-02232-TJK

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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I. Introduction

As required by the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. §§ 16(b)–(h), the United States hereby responds to the public comments received about the proposed Final Judgment in this case regarding the proposed merger between T-Mobile US, Inc. ("T-Mobile") and Sprint Corporation ("Sprint"). For the reasons set forth below, the remedy the United States obtained addresses the competitive harm alleged in this action and is in the public interest. Accordingly, the United States recommends no modifications to the proposed Final Judgment.

This remedy, now adopted by the Attorneys General of eight states who have joined this lawsuit[1] and endorsed by two more through comments in this proceeding, promises to expand output in the mobile wireless market and be a boon for American consumers. The Federal Communications Commission has concluded that the proposed transaction, as modified by the FCC's own set of conditions, would be in the public interest.[2] In reaching this conclusion, the FCC recognized the significant benefits that the proposed Final Judgment would yield. Commenters in this proceeding recognize these benefits as well—the United States received 32 comments regarding the settlement, the majority of which were supportive of the merger and/or the proposed Final Judgment.

The proposed Final Judgment provides for a substantial divestiture which, when combined with the mobile wireless spectrum already owned by DISH Network Corp. ("DISH"), will enable DISH to enter the market as a new 5G mobile wireless services provider and a fourth nationwide

[1] The Complaint filed on July 26, 2019 was joined by the states of Kansas, Nebraska, Ohio, Oklahoma and South Dakota. Dkt. No. 1. An Amended Complaint adding the state of Louisiana as a plaintiff was entered on Aug. 16, 2019. Dkt. No. 28. The United States' Consent Motions for Leave to Amend the Complaint to add the states of Florida and Colorado as plaintiffs remain pending. Dkt. Nos. 33, 40.

[2] *In the Matter of Applications of T-Mobile US, Inc., and Sprint Corporation, et al.*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, WT Docket No. 18-197, FCC 19-103 (rel. Nov. 5, 2019) ("FCC Order").

facilities-based wireless carrier. T-Mobile and Sprint must divest to DISH Sprint's prepaid businesses, including more than 9 million Boost Mobile, Virgin Mobile, and Sprint-branded prepaid subscribers, and make available to DISH more than 400 employees currently running these businesses. The proposed settlement also provides for the divestiture of certain spectrum assets to DISH, and it requires T-Mobile and Sprint to make available to DISH at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also provide DISH with robust access to the T-Mobile network for a period of seven years while DISH builds out its own 5G network.

The United States expects the proposed Final Judgment will provide substantial long-term benefits for American consumers by ensuring that large amounts of currently unused or underused spectrum are made available to American consumers in the form of advanced 5G networks that this proposed Final Judgment will help facilitate. Under commitments made to the FCC that have been incorporated into the proposed Final Judgment, DISH, which has been joined as a defendant in this action, is required to bring its existing spectrum resources online in a nationwide, greenfield 5G wireless network or risk substantial penalties at the FCC and in this Court. Under T-Mobile's commitments to the FCC, which are also incorporated into the proposed Final Judgment, the merged firm will combine T-Mobile's and Sprint's existing complementary spectrum resources and build out a 5G network to deliver network capacity that exceeds the sum of what either carrier could achieve on its own. Additionally, T-Mobile, Sprint, and DISH must support remote SIM provisioning and eSIM technology, which have the potential to lower barriers to entry and increase the options available to consumers.

The proposed Final Judgment also includes several temporary provisions to protect against a decline in near-term competition during the transition period. To facilitate DISH's transition to an independent wireless network, the proposed Final Judgment requires T-Mobile and Sprint to enter into a full mobile virtual network operator agreement ("Full MVNO Agreement") with DISH

at extremely favorable terms. This agreement will enable DISH to operate as a Full MVNO, initially using the T-Mobile network to carry its subscribers' traffic and shifting this traffic to its own network facilities as it deploys them. The unprecedented required divestitures and related obligations in the proposed Final Judgment are intended to ensure that DISH can begin to offer competitive services and become an independent and vigorous competitor in the retail mobile wireless service market in which the proposed merger would otherwise lessen competition. Finally, the proposed Final Judgment requires that T-Mobile and Sprint extend certain current Mobile Virtual Network Operator ("MVNO") agreements until the expiration of the Final Judgment, maintaining the status quo until DISH's network becomes a potential option for MVNOs.

The comments that the United States received reflect a wide array of views. After careful consideration of these comments, the United States has determined that nothing in them casts doubt on its conclusion that the public interest is well-served by the proposed remedy. In accordance with the Court's order granting the Unopposed Motion of the United States to Excuse *Federal Register* Publication of Comments,[3] the United States is publishing the comments and this response on the Antitrust Division's website and is submitting to the *Federal Register* this response and the website address at which the comments may be viewed and downloaded. Following *Federal Register* publication, the United States will move the Court to enter the proposed Final Judgment.

II. Procedural History

On April 29, 2018, T-Mobile and Sprint, together with their parent entities Deutsche Telekom AG ("Deutsche Telekom") and SoftBank Group Corp. ("SoftBank"), agreed to combine their respective businesses in an all-stock transaction.[4] On July 26, 2019, the United States filed a

[3] Minute Order, Dkt. No. 41 (Nov. 5, 2019) (granting motion to excuse publication of the full text of each comment in the Federal Register).

[4] Deutsche Telekom, T-Mobile, SoftBank, Sprint, and DISH are referred to collectively as "Defendants."

civil antitrust Complaint seeking to enjoin the proposed transaction because it would substantially lessen competition for retail mobile wireless services in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the parties that consents to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act.[5] The United States subsequently filed a Competitive Impact Statement describing the transaction and the proposed Final Judgment. The United States caused the Complaint, the proposed Final Judgment, and Competitive Impact Statement to be published in the *Federal Register* on August 12, 2019, *see* 84 Fed. Reg. 39862 (Aug. 12, 2019), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* on August 3-9, 2019.[6] The 60-day period for public comment ended on October 11, 2019.

III. Standard of Judicial Review

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed final judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of

[5] *See* Stipulation and Order, Dkt. No. 2-1; Proposed Final Judgment, Dkt. No. 2-2 ("PFJ").

[6] On Sept. 6, the United States filed a Notice of Determinative Documents, as required by 15 U.S.C. § 16(b), along with an accompanying motion to file these documents with limited redactions of confidential information. *See* Dkt. No. 31. This motion remains pending. The redacted versions of these documents have been available to the public since before the Competitive Impact Statement was filed on July 30, 2019. Dkt. No. 20.

> such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed final judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed final judgment, a court's role is "not to make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political

interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co.*, 900 F.2d at 309).

Moreover, Congress limited the court's role under the APPA to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and did not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not "effectively [to] redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Courts can, and do, make Tunney Act determinations

based solely on the competitive impact statement, comments filed by the public, and the United States' response thereto, even when there is opposition to the proposed remedy. A recent example is *United States v. Bayer AG*, in which the court entered the proposed Final Judgment without further factfinding despite opposition from a number of commenters, including several of the states now involved in the lawsuit seeking to enjoin the T-Mobile/Sprint transaction in the U.S. District Court for the Southern District of New York ("S.D.N.Y. Litigation"). *See* Order, *United States v. Bayer AG*, No. 18-1241 (D.D.C. Feb. 8, 2019); *see also United States v. US Airways,* 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (entering proposed Final Judgment over the opposition of commenters and explaining that "[a] court can make its public interest determination based on the competitive impact statement and response to public comments alone.") (citing *Enova*, 107 F. Supp. 2d at 17).

IV. The Investigation and the Proposed Final Judgment

The proposed Final Judgment is the culmination of a comprehensive, fifteen-month investigation conducted by the Antitrust Division of the U.S. Department of Justice into T-Mobile's proposed acquisition of Sprint. The proposed Final Judgment addresses and ameliorates the harms alleged in the Complaint by enabling DISH's entry as a fourth nationwide facilities-based wireless competitor, expediting deployment of advanced 5G networks for American consumers, and providing other relief. The proposed Final Judgment has several components, by which the parties agreed to abide during the pendency of the Tunney Act proceeding, and which the Court ordered in the Stipulation and Order of July 29, 2019, Dkt. No. 16.

Divestiture of Sprint's Prepaid Businesses: Under the proposed Final Judgment, T-Mobile must divest to DISH Sprint's prepaid retail wireless service businesses and provide DISH an exclusive option to acquire cell sites and retail stores decommissioned by the merged firm.

- Prepaid Assets. The proposed Final Judgment requires T-Mobile to divest to DISH almost all of Sprint's prepaid wireless businesses,[7] including the Boost-branded, the Virgin-branded, and the Sprint-branded businesses. These Prepaid Assets, coupled with required network support from T-Mobile described more fully below, will provide an existing business, with assets including customers, employees, and intellectual property, that will enable DISH to offer retail mobile wireless service. Acquiring this existing business will enhance DISH's incentives to invest in a robust facilities-based network.
- 800 MHz Spectrum Licenses. The proposed Final Judgment further requires T-Mobile to divest to DISH Sprint's 800 MHz spectrum licenses. This spectrum would add to DISH's existing spectrum assets in order to ensure DISH has sufficient spectrum to provide mobile wireless service to customers.[8]
- Cell Sites and Retail Stores. The proposed Final Judgment also requires T-Mobile to provide to DISH an exclusive option to acquire all cell sites and retail store locations being decommissioned by the merged firm. This requirement will enable DISH to utilize such existing cell sites and retail stores that are useful to DISH in

[7] The divestiture does not include subscribers that Virgin Mobile serves under the Assurance Wireless brand as part of the federally subsidized Lifeline program administered by the FCC. The baseline Assurance Wireless plan, which includes unlimited voice and text and a fixed allotment of data, is free to qualifying subscribers. Virgin Mobile receives a subsidy from the FCC for each of these subscribers that it serves. Subscribers may also purchase additional data for a fee. Because Virgin Mobile's revenue for Assurance Wireless subscribers comes primarily from federal subsidies rather than user fees, this segment of the market does not raise the same competitive issues as the unsubsidized prepaid segment. Moreover, T-Mobile has publicly committed to maintaining the Assurance Wireless service indefinitely, barring material changes to the Lifeline program. *See* Letter from T-Mobile CEO John Legere to Rep. Tony Cardenas (Mar. 6, 2019), *available at* https://cardenas house.gov/sites/cardenas.house.gov/files/3-6-19%20T-MOBILE%20RESPONSE%20-%20Final%20Cardenas%20Response%20030619%200908%20am%20est_Executed%20%28002%29%281%29.pdf. The settlement is not affected by recent news reports concerning Sprint's compliance with the Lifeline program's requirements because the Lifeline customers are not included in the divestiture. The divestitures also do not include Sprint's prepaid customers receiving services through its Swiftel and Shentel affiliates, due to contractual obligations.

[8] DISH may, at its option, elect not to acquire the spectrum if DISH can meet certain network buildout and service requirements without it. *See infra* at 23. In such case, T-Mobile will auction the 800 MHz spectrum licenses to any person who is not already a national facilities-based wireless carrier.

building out its own wireless network and providing mobile wireless service to consumers.

- Transition Services. At DISH's option, T-Mobile and Sprint shall enter into one or more transition services agreements to provide billing, customer care, SIM card procurement, device provisioning, and all other services used by the Prepaid Assets prior to the date of their transfer to DISH for an initial period of up to two years after transfer. Such transition services will enable DISH to use the Prepaid Assets as quickly as possible and will help prevent disruption for Boost, Virgin, and Sprint prepaid customers as the businesses are transferred to DISH.

The divestiture of Sprint's prepaid businesses must be completed in such a way as to satisfy the United States in its sole discretion that it can and will be operated by DISH as a viable, ongoing business that can compete effectively in the retail mobile wireless service market. DISH is required to offer retail mobile wireless services, including offering nationwide postpaid retail mobile wireless service within one year of the closing of the sale of the Prepaid Assets.[9] As set forth in the Stipulation and Order, DISH has agreed to be joined to this action for purposes of the divestiture. Including DISH is appropriate because the United States has determined that DISH is a necessary party to effectuate the relief obtained; the divestiture package was crafted specifically taking into consideration DISH's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on DISH to ensure that the divestitures take place expeditiously and

[9] To ensure that DISH and T-Mobile remain independent competitors, Section XV of the proposed Final Judgment prohibits T-Mobile from reacquiring from DISH any part of the Divestiture Assets, other than a limited carveout for T-Mobile to lease back a small amount of spectrum for a two-year period. Further, Section XV of the proposed Final Judgment prohibits DISH from selling, leasing, or otherwise providing the right to use the Divestiture Assets to any national facilities-based mobile wireless carrier. These provisions ensure that T-Mobile and DISH cannot undermine the purpose of the proposed Final Judgment by later entering into a new transaction, with each other or with another competitor, that would reduce the competition that the divestitures have preserved.

that DISH meet certain deadlines in building out and operating its own mobile wireless services network to provide competitive retail mobile wireless service.

Full MVNO Agreement: The proposed Final Judgment requires T-Mobile and Sprint to enter into a Full MVNO Agreement with DISH for a term of no fewer than seven years. Under the agreement outlined in the proposed Final Judgment, T-Mobile and Sprint must permit DISH to operate as an MVNO on the merged firm's network on commercially reasonable terms that are approved by the Department of Justice and to resell the merged firm's mobile wireless service. As DISH deploys its own mobile wireless network, T-Mobile and Sprint must also facilitate DISH operating as a Full MVNO by providing the necessary network assets, access, and services. These requirements will enable DISH to begin operating as an MVNO as quickly as possible after entry of the Final Judgment, and provide DISH the support it needs to offer retail mobile wireless service to consumers while building out its own mobile wireless network.[10] They will also permit DISH to begin to market itself as a national retail mobile wireless provider immediately after the divestiture closes.

Notably, T-Mobile will provide DISH with a broader array of rights under the Full MVNO Agreement than wholesale providers generally grant to their partners in traditional MVNO agreements. This will benefit competition and American consumers. In particular, traditional MVNO agreements generally do not permit the MVNO partner to construct its own network facilities and carry a portion of its traffic on these facilities while relying on the wholesale provider to carry the remainder of the MVNO's traffic. The Full MVNO Agreement will provide DISH with this ability. In addition, unlike traditional MVNO agreements, full MVNO agreements grant

[10] To guard against the possibility that implementation and execution of the proposed Final Judgment and any associated agreements between T-Mobile and DISH could facilitate coordination or other anticompetitive behavior during the interim period before DISH becomes fully independent of T-Mobile, T-Mobile and DISH are required to implement firewall procedures to prevent each company's confidential business information from being used by the other for any purpose that could harm competition. T-Mobile and DISH submitted their respective firewall procedures to the United States on Sept. 10, 2019.

the MVNO control over a broader range of technological components, which allow the MVNO to manage the customer relationship more directly.[11] By providing these capabilities, full MVNO agreements promise to enable more robust competition than traditional MVNO agreements have in the past.[12] The Full MVNO Agreement in this case will allow DISH to begin competing with the other carriers in short order and will facilitate DISH's transition into a full, facilities-based mobile wireless service provider.[13]

Facilities-Based Entry and Expansion: The proposed Final Judgment requires T-Mobile and Sprint to comply with all network build commitments made to the Federal Communications Commission (FCC)[14] related to their merger or the divestiture to DISH as of the date of entry of the Final Judgment, subject to verification by the FCC.[15] The FCC concluded that the transaction, as

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[11] Full MVNO agreements have been used to enable entry in wireless markets outside of the United States as well. *See* European Commission, DG Competition, Case M.7758-Hutchinson 3D Italy/Wind/JV § 5.2.4 (Jan. 1, 2016) ("So-called 'full MVNOs' typically do not have radio network access or spectrum, but own some of the core infrastructure, issue their own SIM cards, have network codes, a database of customers and back-office functions to manage customer relations."), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m7758_2937_3.pdf.

[12] For example, cable provider Altice has launched a wireless service based on an infrastructure-based MVNO agreement that it plans to leverage to compete with facilities-based carriers across a variety of geographic areas. *See* Letter to Marlene H. Dortch (FCC) from Jennifer L. Richter, WT Docket No. 18-197 (June 6, 2019) ("Altice's model to enter the U.S. wireless market by investing in wireless core infrastructure and utilizing a full infrastructure mobile virtual network operator ('MVNO') will position Altice to provide true competition in the retail markets, providing significant benefits for consumers in Altice's diverse markets, from the urban centers in New York and New Jersey to the rural communities in West Virginia and Texas."), *available at* https://ecfsapi.fcc.gov/file/10607282312243/Altice%20USA%20Inc.%20-%20Ex%20Parte%206.4.19%20Meetings.pdf.

[13] Given the difference between traditional MVNO agreements and Full MVNO agreements like the one at issue here, comparisons between DISH and traditional MVNOs that have failed in the past are inapposite. *See, e.g.*, RWA Comment (Exhibit 24) at 6. Similarly, CWA is incorrect in suggesting that there is a "mismatch" between the Complaint and the remedy. CWA Comment (Exhibit 10) at 1. The Complaint alleges that the competitive constraint imposed by *traditional MVNOs* is limited, while the remedy will allow DISH to enter as a *Full MVNO* and ultimately transition into a facilities-based carrier. *See also* FCC Order ¶ 205 (finding that "generalized references to prior Commission decisions regarding the competitive significance of MVNOs fail to account for the unique aspects of the wholesale agreement required by the Boost Divestiture Conditions").

[14] The FCC conducted its own independent review of this transaction and concluded that the transfer of licenses from Sprint to T-Mobile is in the public interest. *See* FCC Order ¶ 4. As part of its review, the FCC accepted T-Mobile's voluntary commitments on various elements of its post-merger plans, including with respect to the post-merger buildout of its 5G network. *Id.* ¶¶ 25-32. In accepting T-Mobile's voluntary commitments in its order, the FCC has transformed them into legally binding commitments. *Id.* ¶ 388.

[15] *See* Letter to Marlene H. Dortch (FCC) from Nancy J. Victory and Regina M. Keeney (Counsel for T-Mobile and Sprint, respectively), WT Docket No. 18-197, Attachment 1 (May 20, 2019), *available at* https://www.fcc.gov/sites/default/files/t-mobile-us-sprint-letter-05202019.pdf.

modified by these commitments, would "result in a number of benefits," including "the deployment of a highly robust nationwide 5G network" and "substantially increased coverage and capacity (and in turn, user speeds and cost structure) compared to the standalone companies."[16] The FCC's order contains a comprehensive Technical Appendix detailing the benefits of T-Mobile's post-merger network plan.[17] The commenters in this proceeding generally do not attempt to criticize T-Mobile's network build commitments or the associated benefits they are expected to bring to consumers.

In turn, DISH is required to comply with the June 14, 2023 AWS-4, 700 MHz, H Block, and Nationwide 5G Broadband network build commitments made to the FCC on July 26, 2019, subject to verification by the FCC.[18] The FCC concluded that modifying DISH's spectrum licenses to include these commitments would be in the public interest and has directed its Wireless Telecommunications Bureau to do so once the divestiture of Boost has been consummated.[19] Incorporating these obligations into the proposed Final Judgment is intended to increase the incentives for the merged firm to achieve the promised efficiencies from the merger and for DISH to build out its own national facilities-based mobile wireless network to replace the competition lost as a result of Sprint being acquired by T-Mobile. Increasing DISH's incentives to complete the buildout of a fourth standalone 5G nationwide wireless network also serves to decrease the likelihood of anticompetitive coordinated effects that may arise out of the merger.[20]

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[16] FCC Order ¶ 236.

[17] *Id.* Technical App'x ¶¶ 31-42 (explaining complementarities between the two firms' spectrum holdings, potential efficiencies regarding cell site equipment deployment, and the merger's benefits to network capacity).

[18] *See* Letter to Donald Stockdale (FCC) from Jeffrey H. Blum (DISH), Attachment A (July 26, 2019) ("Blum July 26, 2019 Letter"), *available at* https://www fcc.gov/sites/default/files/dish-letter-07262019.pdf.

[19] FCC Order ¶ 365.

[20] *See* Complaint ¶ 5 (alleging that, absent the remedy, "the merger likely would make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings"); *see also id.* ¶¶ 21-22. Notably, the FCC "d[id] not conclude that the likelihood of coordination would increase post-transaction." *See* FCC Order ¶ 186.

600 MHz Spectrum Deployment: The proposed Final Judgment requires DISH and T-Mobile to enter into good-faith negotiations to allow T-Mobile to lease some or all of DISH's 600 MHz spectrum for use in offering mobile wireless services to its subscribers. Such an agreement is expected to expand output by making the 600 MHz spectrum available for use by consumers even before DISH has completed building out its network, and would assist T-Mobile in transitioning consumers to its 5G network.

MVNO Requirements: The proposed Final Judgment obligates T-Mobile and Sprint to extend all of their current MVNO agreements until the expiration of the proposed Final Judgment. This obligation will ensure that T-Mobile's and Sprint's MVNO partners remain options for the consumers who currently use them. This will also permit T-Mobile's and Sprint's MVNO partners to retain the benefits of their existing agreements until the expiration of the proposed Final Judgment, by which time DISH is expected to have become an additional provider of wireless services.

T-Mobile's and DISH's eSIM Obligations: The proposed Final Judgment requires T-Mobile and DISH to support eSIM technology and prohibits T-Mobile and DISH from discriminating against devices based on their use of remote SIM provisioning or use of eSIM technology. The more widespread use of eSIMs and remote SIM provisioning may help DISH attract consumers as it launches its mobile wireless business. These provisions are intended to increase the disruptiveness of DISH's entry by making it easier for consumers to switch between wireless carriers (particularly between the merged firm and DISH) and to choose a provider that does not have a nearby physical retail location, thus lowering the cost of DISH's entry and expansion.[21]

[21] The FCC has recognized the benefits of eSIM technology and the potential for this condition to promote competition among mobile wireless service providers. *See id.* ¶ 206 ("[R]equirements related to the use of eSIM will tend to lower switching costs for wireless consumers, increasing the ability of Boost to win subscribers from T-Mobile and, in turn, Boost's ability to constrain pricing for T-Mobile's brands.").

V. Summary of Public Comments and the United States' Response

The United States received 32 comments from different categories of commenters, the majority of which were supportive of the merger and/or the proposed final judgment. The commenters include: The Advanced Communication Law & Policy Institute; the American Antitrust Institute; Americans for Tax Reform; the Asian Business Association; Attorneys General for the States of Utah and Arkansas; Mr. Daniel M. Bellemare; the CalAsian Chamber of Commerce; the California Emerging Technology Fund; the Center for Individual Freedom; the Communications Workers of America; the Competitive Enterprise Institute; Economics Professors (Nicholas Economides, John Kwoka, Thomas Philipon, Robert Seamans, Hal Singer, Marshall Steinbaum, and Lawrence J. White); the Enterprise Wireless Alliance; the Greater Kansas Chamber of Commerce; Mr. Edward S. Hasten; the International Center for Law & Economics; the National Diversity Coalition; the National Hispanic Caucus of State Legislators; the National Puerto Rican Chamber of Commerce; NTCH, Inc.; the Overland Park Chamber of Commerce; a coalition of advocacy groups (Public Knowledge, Consumer Reports, Electronic Frontier Foundation, and New America's Open Technology Institute); Randolph May and Seth Cooper of the Free State Foundation; the Rural Wireless Association; Scott Wallsten of the Technology Policy Institute; Tech Freedom; Members of the United States House of Representatives (Representatives Anna G. Eshoo, Billy Long, Adam Smith, Doug Lamborn, Gregory W. Meeks, Roger W. Marshall, Suzan DelBene, Dan Newhouse, Anthony G. Brown, Ron Estes, Mike Thompson, Blaine Luetkemeyer, and Kurt Schrader); Vermont Telephone Co.; Viaero Wireless; Voqal, Inc.; Mr. R. Bruce Williamson; and Mr. Josh Wool.

The comments can be grouped into categories: (1) comments that fail to acknowledge the context of this Court's Tunney Act review; (2) comments regarding DISH's viability as a competitor; (3) comments regarding the enforceability of the proposed Final Judgment; (4) other

comments opposing entry of the proposed Final Judgment; (5) comments regarding procedural aspects of this review; and (6) other comments supporting entry of the proposed Final Judgment.

A. Comments that Fail to Acknowledge the Context of Tunney Act Review

A number of comments do not actually address the question presented to this Court, which is whether or not entry of the United States' proposed Final Judgment remedy is in the public interest under the Tunney Act. If these commenters acknowledge the Tunney Act at all, they make arguments that do not consider the governing legal standards discussed above, or the fact that the allegations in the United States' complaint have not been tested in any court. Nor do they acknowledge the benefits to the public from the merger itself. Several commenters presuppose that the standard relevant here is the same standard governing how a court is to fashion a remedy *after* an antitrust violation has been proven in court.[22] As discussed above, however, this is not the standard Congress and case law prescribe for courts reviewing settlements under the Tunney Act. Instead, courts recognize that a proposed final judgment necessarily represents a compromise between the parties, and give deference to the United States' views of the likely effects of the settlement.

Entry of the proposed Final Judgment here is fully in keeping with established Tunney Act standards. In *United States v. US Airways*, Judge Kollar-Kotelly entered the proposed Final Judgment in the merger of U.S. Airways and American Airlines over the objections of commenters. While noting that the "the Final Judgment does not create a new independent competitor nor replicate American's capacity expansion plans nor affirmatively preserve the Advantage Fares program," the court credited the United States' "predict[ion] that it will impede the airline

[22] *See* CWA Comment (Exhibit 10) at 6 and n.10 (quoting a statement in the Antitrust Division's remedies guide that "The relief in an antitrust case must be 'effective to redress the *violations,*'" which quotes *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972), a case addressing post-trial relief) (emphasis added); Economics Professors Comment (Exhibit 12) at 2 (referring to "restor[ing] "the *ex ante* competitive conditions in the affected antitrust product markets.").

industry's evolution toward a tighter oligopoly."[23] By reducing slot concentration at Reagan National, the settlement provided low-cost carriers ("LCCs") "with substantial assets at key airports," and the Court credited the United States' prediction that "providing LCCs with these otherwise unavailable opportunities will create incentives for LCCs to invest in new capacity, expand into new markets, and provide more meaningful system-wide competition to the three remaining legacy airlines."[24] Ultimately, the Court found that the "United States has provided a reasonable basis for concluding that the settlement will mitigate the anticompetitive effects of combining two of the remaining legacy airlines."[25]

In *United States v. Bayer AG*, Judge Boasberg entered the proposed Final Judgment, over commenters' criticisms similar to those here.[26] Additionally, in *United States v. Abitibi–Consolidated, Inc.,* Judge Collyer entered the proposed Final Judgment where the "United States has provided a factual basis for concluding that the . . . divestiture was reasonably adequate."[27] "Irrespective of whether that conclusion [was] correct," the court recognized that the "United States has established an 'ample foundation for [its] judgment call' and thus shown 'its conclusion [was] reasonable.'"[28]

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[23] *US Airways*, 38 F. Supp. 3d at 77.

[24] *Id.* at 78.

[25] *Id.* at 79.

[26] In *Bayer*, as here, commenters questioned both the ability of the divestiture buyer, BASF, "to succeed with the divested assets" and its "incentives to compete aggressively against the merged company." *See* Response of the United States to Public Comments on the Proposed Final Judgment at 14, *United States v. Bayer AG*, No. 1:18-cv-1241 (JEB) (D.D.C. Jan. 29, 2019). There, as here, the United States "carefully considered these issues in crafting the proposed remedy" and required the merged company to make an appropriate divestiture and to provide an array of transitional services, all while "specifically taking into account [the divestiture buyer's] existing assets and capabilities." *Id.* And while there, as here, it was "impossible to predict with certainty how well [the buyer, BASF] will perform with the divested assets (just as [the merged firm's] own performance with those assets absent the merger is not certain)," the proposed remedy "ensure[d]" that it "will be as well-positioned as possible and have the necessary incentives" to "replace the competition that otherwise would be lost through the merger." *Id.*

[27] *United States v. Abitibi–Consolidated, Inc.,* 584 F. Supp. 2d 162, 166 (D.D.C.2008).

[28] *Id.* (quoting *Microsoft,* 56 F.3d at 1461).

Almost all the comments opposing the proposed Final Judgment also ignore the benefits to the public from this merger.[29] For example, the Economics Professors attempt to dismiss the value of increasing capacity by arguing that the merger will not result in reductions in marginal cost. Specifically, they state that "the merger purportedly will increase capacity … [but] there is no explanation of how a purported increase in capacity reduces the merged firm's marginal cost of serving the next customer or the next neighborhood."[30] In fact, the relationship between an increase in capacity and a reduction in marginal cost is a well-understood economic phenomenon in industries with capacity constraints. In the market for mobile wireless services, the marginal cost of an additional customer on a capacity-constrained network includes the costs of the congestion caused by adding that customer to the network. Thus, a merger-induced expansion of capacity would result in a reduction in marginal costs for a network facing congestion.[31]

Other commenters, however, recognize the substantial benefits that the proposed Final Judgment promises to bring. The Advanced Communications Law & Policy Institute (ACLP) at New York Law School states that it supports entry of the proposed Final Judgment because it believes the public interest benefits from the merger "are substantial," and because the settlement "will ensure that valuable spectrum resources will finally be put to productive use by Dish Network, an entity that has long lingered on the periphery of the U.S. wireless space."[32] In ACLP's view, DISH is "well positioned to become a viable player" in wireless, not only because of its existing "treasure trove" of spectrum licenses, but also because the proposed Final Judgment will

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[29] *See* U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies, at 2 (Oct. 2004), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf ("2004 Remedies Guide") ("Effective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.").

[30] Economics Professors Comment (Exhibit 12) at 6.

[31] Notably, the FCC found that "New T-Mobile will have significantly lower marginal costs for providing advanced wireless services." FCC Order ¶ 236.

[32] ACLP Comment (Exhibit 1) at 4.

enable DISH to "leverage numerous resources either divested by or leased from the merging parties to support deployment of a standalone mobile service."[33] ACLP further notes that, in addition to the fact that DISH "finally leveraging its stockpile of spectrum licenses . . . is a major win for consumers and the public interest writ large," consumers also will "likely see additional price and service offerings over the next few years as [DISH] rolls out its service and seeks to respond to and one-up its competitors."[34]

B. Comments Regarding DISH's Viability as a Competitor

Several commenters object to the proposed Final Judgment on the basis that DISH will not be a sufficiently strong competitor to AT&T, Verizon, and T-Mobile. These commenters point to DISH's asset base and track record to support their claim that the company will lack the incentive and ability to compete vigorously in the mobile wireless market. The United States disagrees with these assertions.

1. DISH's Assets and Track Record

Some commenters take issue with the fact that DISH has been acquiring spectrum for a number of years but has not yet deployed a network that operates over that spectrum. For example, the CWA and Economics Professors accuse DISH of "warehousing" spectrum and claim that DISH has missed FCC network buildout deadlines.[35] Mr. Wool asks, "given DISH Network's failure to meet prior Federal Communications Commission (FCC) build-out requirements on its existing spectrum . . . how is the proposed Final Judgment consistent with 'a low risk tolerance'?"[36] Several

[33] *Id.* at 6.

[34] *Id.*

[35] CWA Comment (Exhibit 10) at 16-18; Economics Professors Comment (Exhibit 12) at 9.

[36] Wool Comment (Exhibit 32) at 3.

commenters point to T-Mobile's past criticism of DISH as a basis for questioning DISH's viability as a competitor.[37]

Far from undermining the efficacy of the proposed Final Judgment, DISH's spectrum assets make it a prime candidate for entry into the mobile wireless market. DISH has invested more than $20 billion in spectrum licenses.[38] As a result, DISH currently has far more spectrum at its disposal than any other company aside from the existing nationwide wireless carriers.[39] The Division's 2004 Remedies Guide notes that "[t]he circumstances of potential bidders may vary in ways that affect the scope of the assets each would need to compete quickly and effectively."[40] DISH's spectrum assets provide it with the ability to compete more quickly and more effectively than another entrant could. The proposed Final Judgment promises to put this spectrum to use for the benefit of consumers.[41]

These commenters' line of argument also fails to address what incentive DISH could have to acquire $20 billion in spectrum licenses and spend billions of dollars on the divestiture in this matter and risk billions more in fines, only to sit on these assets. The more logical inference, which aligns with DISH's economic incentives, is that DISH will deploy its spectrum and enter the mobile wireless market. DISH has explained to the FCC that the company has engaged in efforts to develop technology that operates over its spectrum but that it opted not to construct a 4G/LTE

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[37] *See, e.g.*, CWA Comment (Exhibit 10) at 16; Economics Professors Comment (Exhibit 12) at 9; NTCH Comment (Exhibit 20) at 9-11.

[38] "DISH to Become National Facilities-Based Wireless Carrier" (July 26, 2019), http://about.dish.com/2019-07-26-DISH-to-Become-National-Facilities-based-Wireless-Carrier ("DISH July 26, 2019 Press Release") ("These developments are the fulfillment of more than two decades' worth of work and more than $21 billion in spectrum investments intended to transform DISH into a connectivity company"); *see also* Todd Shields & Scott Moritz, Bloomberg, "A $20 Billion Wireless Stockpile Is the Key to T-Mobile Merger" (July 6, 2019), https://www.bloomberg.com/news/articles/2019-07-06/a-20-billion-wireless-stockpile-is-the-key-to-t-mobile-merger.

[39] FCC Communications Marketplace Report, 33 FCC Rcd 12558, 12587 Fig. A-25 (Dec. 26, 2018), *available at* https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf.

[40] 2004 Remedies Guide at 11.

[41] *See* ACLP Comment (Exhibit 1) at 6.

network at a time when 5G technology was on the horizon.[42] Now that mobile wireless providers are beginning to deploy 5G, DISH has issued three wide-ranging requests for information/requests for production to vendors of wireless equipment, software, and services to begin the process of sourcing inputs for the construction of a 5G network.[43]

DISH has not, as some commenters suggest, violated the FCC's construction requirements for its spectrum licenses. Those licenses have two relevant dates: an interim construction milestone and a final construction milestone. The FCC provides licensees (and in this case, DISH) with the choice of (1) satisfying both construction milestones, or (2) missing the interim milestones and agreeing to accelerate the final milestones by one year. DISH chose not to meet the interim construction milestones for its licenses, which meant that its final construction milestones were accelerated.[44] These final milestones have not yet passed, and prior to the remedy discussions in this case, DISH had provided the FCC with a proposal on how it planned to meet them. Specifically, DISH planned to rely on the FCC's "flexible use" policy, which permits licensees to choose the technology they use to meet their construction milestones, in order to execute a two-phase network deployment plan: (1) deploy a narrowband Internet of Things ("NB-IoT") network

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[42] *See* DBSD Services Limited, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C.'s Consolidated Interim Construction Notification for AWS-4 and Lower 700 MHz E Block Licenses (filed Mar. 7, 2017) ("DISH March 7, 2017 Buildout Report"), *available at* https://wireless2 fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=1fTvdTtC8v1mzWxXqsWNxw2BFWwHpdcSQM90fP1g21sy8CTyXHgB!-784178296!-1151086485?applType=search&fileKey=1888085105&attachmentKey=20103063&attachmentInd=applAttach.

[43] *See* "DISH to release deployment services RFP for standalone 5G network buildout" (Oct. 21, 2019), https://ir.dish.com/news-releases/news-release-details/dish-release-deployment-services-rfp-standalone-5g-network; Letter from Jeffrey Blum (DISH) to Marlene H. Dortch (FCC), WT Docket No. 18-197, at 4 (Aug. 1, 2019) ("Blum Aug. 1, 2019 Letter"), *available at* https://ecfsapi.fcc.gov/file/10801235883258/2019-08-01%20DISH%20Ex%20Parte%20WT%20Docket%20No%2018-197%20(w%20summary).pdf; *see also* Martha DeGrasse, Fierce Wireless, "Dish Casts Wide Net to Vendor Community" (Aug. 12, 2019), https://www fiercewireless.com/wireless/dish-casts-wide-net-to-vendor-community.

[44] *See* DISH March 7, 2017 Buildout Report at 4 (certifying that DISH planned to meet the accelerated final construction milestones); Letter from Jeffrey Blum (DISH) to Donald Stockdale (FCC) (Sept. 21, 2018) (explaining that "[s]uch a bridge to a 5G deployment is necessary because, among other things, equipment/installation availability for full standalone 5G (3GPP Release 16) will only be available after the March 2020 buildout milestones for our AWS-4 and E Block licenses, making it impractical for us to deploy 5G before such date."), *available at* https://wireless2 fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=1089751155&attachmentKey=20454822&attachmentInd=licAttach.

before the final construction milestones had passed, and (2) use this NB-IoT network as a foundation to ultimately deploy a 5G network at a later date.[45] The United States agrees with commenters who argue that having DISH construct a 5G network immediately is preferable to this two-stage plan, but any suggestion that DISH has violated the FCC's requirements is simply incorrect.[46]

The economics of DISH's entry under the proposed Final Judgment are fundamentally different—and more favorable to DISH—than what was available to DISH before the proposed Final Judgment. Much of the relief in the proposed Final Judgment is to provide DISH with assets and resources to make its entry as a nationwide, facilities-based wireless carrier easier and more certain. DISH has explained that the proposed Final Judgment "will facilitate and accelerate DISH's entry into the wireless market as a 5G competitor by, among other things, enabling DISH to deploy its spectrum at the same time to provide a better overall 5G service, at lower cost, and on a more efficient deployment schedule."[47] In particular, the divestiture of Sprint's prepaid businesses will enable DISH to serve an existing base of 9 million subscribers. This customer base will put DISH into the wireless business immediately upon the closing of the divestitures, without first having to construct a network from scratch. DISH will have the option of acquiring more than 20,000 cell sites and upwards of 400 retail locations directly from T-Mobile, further reducing the burdens of building out a new network. As DISH completes its network buildout, it will be in position to move existing subscribers onto its new network in short order, allowing it to

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[45] *Id.* at 6-7.

[46] Given this background, the Economics Professors' claim that Dish has "no history or presence in this industry" is also incorrect. Economics Professors Comment (Exhibit 12) at 3. In connection with its NB-IoT plans, DISH had established relationships with vendors, leased towers, and acquired equipment for a core network. *See* Mike Dano, Fierce Wireless, "DISH's First Wireless Partners Revealed: Ericsson and SBA" (Nov. 8, 2019), https://www fiercewireless.com/iot/dish-s-first-wireless-partners-revealed-ericsson-and-sba.

[47] Blum Aug. 1, 2019 Letter at 3; *see also* FCC Order ¶ 372 ("We agree with DISH that its acquisition of Sprint's prepaid assets along with the set of MVNO, wholesale, and roaming rights agreed to with the Applicants provides DISH the means to provide nationwide service on a competitive 5G network.").

immediately monetize its own network by shifting away from using a third-party network to serve subscribers. Finally, the Full MVNO Agreement will give DISH the flexibility to serve customers the most efficient and cost-effective way, whether on post-merger T-Mobile's network, DISH's new network, or a combination of both. In light of these changes, DISH has agreed to waive its "flexible use" rights and deploy a 5G network immediately rather than taking the intermediate step of deploying an NB-IoT network first.[48]

RWA raises concern over the fact that the proposed Final Judgment provides DISH with a degree of flexibility as to which of T-Mobile's assets it will ultimately acquire.[49] RWA suggests that DISH should be required to purchase the 800 MHz Spectrum, regardless of whether it deems it necessary, as well as every one of the cell sites and retail locations that T-Mobile plans to decommission.[50] Such an obligation, however, would be counterproductive. The proposed Final Judgment gives DISH the flexibility to decline purchase of the 800 MHz spectrum if it is able to make significant progress in deploying its network without that spectrum.[51] Likewise, the proposed Final Judgment provides DISH with the option to purchase only those cell sites and retail locations that it needs to support its network deployment and business plans. The proposed Final Judgment requires DISH to comply with specific build commitments, including relating to nationwide 5G.[52] Requiring DISH to purchase assets that turn out to be unnecessary would increase DISH's costs and impede its entry as a mobile wireless provider. In contrast, by giving DISH the flexibility to purchase only the assets that it needs in order to comply with the overarching directive to meet its

[48] Blum July 26, 2019 Letter at 3 ("DISH will voluntarily waive its flexible use rights"); Blum Aug. 1, 2019 Letter at 3 ("Rather than approaching a network build in two phases, DISH will be able to shift the resources it has dedicated to building out a narrowband Internet of Things network to a 5G network deployment.").

[49] RWA Comment (Exhibit 24) at 17-18.

[50] *Id.* at 18.

[51] While AAI claims that the 800 MHz spectrum is "necessary to build out a 5G network" (AAI Comment (Exhibit 2) at 8), the proposed Final Judgment recognizes that DISH may find that it is able to deploy a competitive network that does not rely on this spectrum.

[52] PFJ § VIII.A.

nationwide 5G commitment, the proposed Final Judgment will allow DISH's entry to proceed efficiently.

Moreover, DISH will be subject to substantial penalties if it fails to satisfy its commitments. Failure to meet its network buildout obligations would cause DISH to incur penalties of up to $2.2 billion under its commitments to the FCC alone.[53] Failure to meet certain buildout milestones would also result in "automatic termination" of some of DISH's spectrum licenses.[54] The proposed Final Judgment further provides for DISH to pay a penalty of $360,000,000 if it elects not to purchase the 800 MHz Spectrum Licenses, unless it has already made significant progress in constructing its network.[55] All of this would be in addition to other penalties that this Court could impose if it were to find DISH to be in violation of the Final Judgment.[56]

CWA includes in its comment a declaration from engineering consultant Andrew Afflerbach, Ph.D., P.E., which purports to support CWA's criticisms of the proposed Final Judgment. Dr. Afflerbach begins by highlighting several potential risks that DISH will be unable to build a successful facilities-based mobile wireless business. He notes that DISH will be highly dependent on T-Mobile as an MVNO for years following entry of the proposed Final Judgment, and notes the "criticality of the MVNO agreement terms" for DISH's success.[57] However, DISH itself has explained that the Full MVNO Agreement will provide DISH with "more attractive economics than traditional MVNO agreements, including pricing, packaging and marketing

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[53] Blum July 26, 2019 Letter, Attachment A at 4.

[54] *Id.* at 3-4. Thus, claims that DISH's financial penalties alone would be insufficient to ensure compliance are misplaced. *See, e.g.*, RWA Comment (Exhibit 24) at 15-16. Nor do DISH's commitment to the FCC that it will not sell certain of its spectrum licenses for six years somehow suggests that they are planning to exit the mobile wireless market after that time period concludes, as RWA claims. *Id.* at 18-19. RWA provides no support for this assertion. DISH's commitment to the FCC merely ensures that it will maintain ownership of its wireless licenses while its network buildout advances.

[55] *See* PFJ § IV(B)(2).

[56] *See id.* § XVIII(A) ("The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court.").

[57] Afflerbach Decl. ¶¶ 7, 11.

flexibility, a mechanism for costs to drop over time, and access to core control."[58] The FCC likewise recognizes that "New Boost's wholesale network access agreement will be unique among MVNO agreements in the industry, with more favorable terms and conditions that, in turn, will enable New Boost to more effectively constrain potential price increases."[59]

Dr. Afflerbach also argues that "DISH's execution risks are substantial."[60] His criticisms about DISH's prospects for building a 5G network overstate some of the challenges that DISH faces. For instance, Dr. Afflerbach suggests that DISH will be disadvantaged because "[h]andset equipment (i.e. smartphones) is not currently manufactured for DISH's spectrum bands."[61] The current generation of smartphones, however, does support LTE service in DISH's holdings in the 600 MHz band (Band 71), the AWS-3 band, and the AWS-4 band (collectively, Band 66).[62] This is because other established players like T-Mobile and Verizon each offer LTE service in one or more of those bands. There is no reason to believe that DISH will not similarly be able to find support for 5G service in at least some of its spectrum bands as equipment-makers design handsets for the other carriers.

2. DISH's Incentive and Ability to Compete

Some commenters also question whether DISH will have the incentive and ability to compete vigorously in the mobile wireless marketplace. For example, CWA asserts that "DISH has

[58] Blum Aug. 1, 2019 Letter at 2.

[59] FCC Order ¶ 201.

[60] Afflerbach Decl. ¶ 36.

[61] Afflerbach Decl. ¶ 45.

[62] *See* Chris Holmes, Whistle Out, "Cell Phone Networks and Frequencies Explained: 5 Things To Know" (Oct. 14, 2019) (noting Verizon, AT&T and T-Mobile are currently using Band 66, and T-Mobile is currently using Band 71), https://www.whistleout.com/CellPhones/Guides/cell-phone-networks-and-frequencies-explained; Dan Meyer, RCR Wireless News, "T-Mobile LTE network beats AT&T and Verizon with AWS-3 spectrum support" (Oct. 17, 2016) (noting T-Mobile "touting itself as the first domestic carrier to launch commercial services across the AWS-3 spectrum band"), https://www rcrwireless.com /20161017/carriers/t- mobile-lte-network-beats-att-verizon-aws-3-spectrum-support-tag2.

powerful incentives to create something less than a fully competitive 5G network."[63] Mr. Bellemare claims that "Sprint is a maverick" but "[w]hether DISH would become a maverick in a more concentrated oligopoly is by no means assured."[64] Other commenters argue that the fact that DISH's wireless business will initially have only 9 million subscribers will inhibit its competitiveness.[65]

As an initial matter, commenters overlook the substantial advantages on which DISH currently can draw to grow its wireless business. The fact that DISH is unburdened by any need to support a legacy infrastructure based on older technology and has an established presence in a complementary video business, may enhance its ability to price aggressively and attract customers. In addition, and contrary to the commenters' claims, the proposed Final Judgment will position DISH to be an effective competitor to the existing carriers. As described above, the merger, when combined with the proposed Final Judgment, promises to expand output. A significant amount of unused and underused spectrum will be made available by both DISH and T-Mobile for use by consumers within the first years following the closing of the divestiture. Principles of economics tell us that expanded output provides further downward pressure on prices moving forward. Indeed, competition in the wireless industry has often been driven by the smallest of the nationwide carriers, to the benefit of consumers.[66] T-Mobile was previously branded as the maverick and had success in growing its share. Such a firm can discipline prices based on its ability and incentive to

[63] CWA Comment (Exhibit 10) at 19.

[64] Bellemare Comment (Exhibit 6) at 13-14.

[65] *See, e.g.*, RWA Comment (Exhibit 24) at 8 ("[T]he various Sprint prepaid subscriber bases, which Dish estimates to include approximately 9.3 million users, are a fraction of Sprint's overall subscriber base."). AAI and RWA both point to the fact that DISH will initially serve only prepaid subscribers, which are generally less profitable to serve than postpaid subscribers. *See* AAI Comment (Exhibit 2) at 7; RWA Comment (Exhibit 24) at 8, 12. DISH, however, has committed to providing postpaid mobile wireless service within one year of the closing of the sale of the prepaid assets. PFJ § IV(F). Moreover, after spending the significant resources required to become a mobile wireless service provider, DISH will have strong business incentives to serve all profitable segments of the market.

[66] Given the potential for smaller market participants to drive competition, RWA is simply incorrect in claiming that increased coordination among AT&T, Verizon, and T-Mobile will be "inevitable" given that "DISH on Day One" will have fewer subscribers than Sprint and T-Mobile do today. RWA Comment (Exhibit 24) at 13.

expand production rapidly using available capacity, or on its willingness to resist otherwise-prevailing industry norms to cooperate on price setting or other terms of competition.[67] Moreover, even during the period in which DISH is relying on the Full MVNO Agreement, other mobile wireless providers will have full knowledge of DISH's obligations to deploy network infrastructure in the coming years, which itself may have a further constraining effect on their decision-making.

The Economics Professors point to T-Mobile CEO John Legere's statement that T-Mobile's agreement with DISH will not diminish the merged firm's synergies, profitability, and long-term cash generation as evidence that DISH will not be a disruptive competitor.[68] This line of argument assumes that the remedy would have to be harmful to T-Mobile in order to be good for consumers. In fact, T-Mobile stands to benefit by selling DISH wholesale access to its network, even as it stands to lose retail customers to DISH.[69] The relevant question for the Court is not how these two competing effects net out for T-Mobile, but rather whether DISH will introduce new competition into the marketplace that will benefit consumers. In a portion of the same investor call that the Economics Professors do *not* cite, Mr. Legere told investors that "it's very clear that with the spectrum that DISH has, with the acquisition of Boost, with the MVNO arrangement, [with] the transition services agreement while they build out their network, with the ability to get some of the decommissioned towers and stores, DISH has a real significant opportunity to be a very credible disruptive fourth wireless carrier,"[70] which is consistent with T-Mobile's other public

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[67] Dep't of Justice & Fed Trade Comm'n, Horizontal Merger Guidelines § 2.1.5 (2010).

[68] Economics Professors Comment (Exhibit 12) at 11.

[69] *See* T-Mobile US, Inc. (TMUS) CEO John Legere on Q2 2019 Results - Earnings Call Transcript, Seeking Alpha, (July 29, 2019), at 9 (noting that the agreement "will be accretive to our business because the pricing allows us to monetize DISH's access of our network").

[70] *Id.* at 10.

statements.[71] Indeed, DISH has disrupted other established industries in the past, and disrupting the mobile wireless market would be a welcome continuation of that trend.[72]

Some commenters focus on the near-term period prior to DISH's construction of its forthcoming mobile wireless network. For example, Public Knowledge *et al.* claim that "DISH will be a nonfactor, as all MVNOs are" during this period.[73] Under the terms of the proposed Final Judgment, DISH will be able to compete for subscribers immediately using the wholesale agreement and will transition into a full, facilities-based competitor as it constructs its planned network. As discussed above, the broad array of rights that T-Mobile will provide to DISH under the Full MVNO Agreement will empower DISH to become a more effective competitor than traditional MVNOs have been in the past. Additionally, the proposed Final Judgment's requirement that DISH begin offering postpaid plans within one year ensures that DISH will begin to restore the lost competition promptly, and, in any event, well before T-Mobile's commitments to

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[71] *See, e.g.*, Monica Alleven, Fierce Wireless, "T-Mobile CFO on Dish Rivalry: Bring It On" (Sept. 24, 2019) (quoting T-Mobile CFO Braxton Carter remarks that DISH will be "extremely viable" and "a fierce competitor, there's no doubt about it"), https://www fiercewireless.com/wireless/t-mobile-cfo-dish-rivalry-bring-it.

[72] As noted in the Wall Street Journal, DISH's controlling shareholder, Charlie Ergen, "has often played the role of disrupter." Drew Fitzgerald, Wall Street Journal, "A TV Maverick Is Going All-In on a New Wireless Bet" (July 27, 2019), *available at* https://www.wsj.com/articles/a-tv-maverick-is-going-all-in-on-a-new-wireless-bet-11564200000. The article notes that Mr. Ergen and his partners began selling "10-foot-wide satellite dishes from a Denver storefront," then "switched to hubcap-size dishes and took on cable-TV monopolies by slashing prices." *Id.* (noting the "service now has 12 million customers across the country and his controlling stake in Dish is worth about $9 billion"). DISH also launched "one of the first live-TV streaming services, Sling TV, in early 2015." *Id.* (noting that with "a small package of channels and lower price, it made it easy for millions of people to cut their TV bill - even many of Dish's own satellite customers"). The settlement enables DISH to continue its disruptive history in the wireless business. *See id.* (Ergen noting that "with four, there's always somebody that will be a rabble rouser," and that while somebody "will say I don't have enough market share," "I've only got 9 million subs and want 10 million. That person is going to be more aggressive."). *See also* DISH July 26, 2019 Press Release ("When we entered pay-TV with the launch of our first satellite in 1995, we faced entrenched cable monopolies, and our direct competitor was owned by one of the largest industrial corporations in the world. As a new entrant, DISH encountered many skeptics who questioned our ability to succeed. But, customers loved the disruption we brought to the marketplace with innovations such as a 100-percent digital experience, local-into-local broadcast, the DVR and ad-skipping. Our substantial investments, constant innovation, aggressive pricing and commitment to the customer led us to become the third largest pay-TV provider. As we enter the wireless business, we will again serve customers by disrupting incumbents and their legacy networks, this time with the nation's first standalone 5G broadband network.").

[73] Public Knowledge et al. Comment (Exhibit 22) at 2; *see also* Wool Comment (Exhibit 32) at 2 ("Mr. Wool asks, "[g]iven the time required for DISH Network to build a national facilities-based network (i.e. DISH Network has until June 2023 to construct a network covering 70% of the population), how does the proposed Final Judgment 'preserve the status quo ante in affected markets.'").

the FCC expire.[74] The favorable terms in the Full MVNO Agreement will provide DISH with an attractive cost structure, and thus, an incentive to compete immediately. DISH's incentive to expand its output will only increase as DISH begins to realize cost savings by shifting traffic from T-Mobile's network onto its own.[75]

Other commenters raise concerns regarding the portion of the country that DISH's mobile wireless network will cover and its future network performance. For example, RWA argues that DISH could meet its population-based buildout obligations while covering "only a small fraction of the country's geography."[76] Similarly, the Economics Professors assert that "because the coverage requirement is denominated in terms of population, not geography, it is clear that certain parts of the country will lose out."[77] CWA argues that at a speed of 35 Mbps "the result will not be a bona fide fourth network, but a niche network closer to the limited internet of things (IoT) network

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[74] *See* FCC Order ¶ 206 ("[T]he requirement that DISH offer postpaid services bolsters our conclusion that the Boost divestiture buyer will not merely constrain price increases within the prepaid segment, but across the differentiated retail mobile wireless services market.").

[75] Suggestions that DISH will find it in itself too comfortable as an MVNO and decline to carry out its obligations under the decree overlook the various ways the decree guards against this risk. *See* Economics Professors Comment (Exhibit 12) at 9 ("Why would Dish invest and become a facilities-based provider if the margins from resale are large and guaranteed for seven years?"). For example, the proposed Final Judgment limits the term of any Transition Services Agreement to two years, with the possibility of a third subject to approval by the United States after consultation with its co-Plaintiff States. PFJ § IV.A.4. Thus, DISH is required to wean itself from T-Mobile's transitional support in "billing, customer care, SIM card procurement, device provisioning, and all other services used by the Prepaid Assets" by 2022 or 2023. The deadline of 2022 coincides with DISH's commitment to the FCC to offer broadband service to at least 20% of the United States population. Blum July 26, 2019 Letter at 2. Thus, by 2022 DISH is required to establish itself as an independent, facilities-based operator, and its achievement of these commitments will be supervised closely by the Monitoring Trustee. In an attempt to cast further doubt on DISH's plans, the Economics Professors compare DISH to 1&1 Drillisch, an MVNO in Germany that has announced its intention to become the fourth German facilities-based mobile wireless provider by constructing its own 5G network. Economics Professors Comment (Exhibit 12) at 10; *see also* Juan Pedro Tomas, RCR Wireless News, "1&1 Drillisch Confirms Intention to Become Germany's Fourth Mobile Carrier" (Jan. 25, 2019), https://www.rcrwireless.com/20190125/5g/drillisch-confirms-intention-become-germany-fourth-mobile-carrier. The Economics Professors ignore the fact that, since the date of the article they cite, 1&1 Drillisch successfully secured financing to participate in a German spectrum auction and won 70 MHz worth of spectrum licenses to support its network deployment plan. *See* Reuters, "Shares in 1&1 Drillisch soar after Germany 5G auction" (June 13, 2019) ("Shares in 1&1 Drillisch surged on Thursday after it won spectrum in Germany's 5G mobile auction that ensured its position as a new fourth operator in a market that has lagged globally."), *available at* https://www.reuters.com/article/germany-telecoms/shares-in-11-drillisch-soar-after-germany-5g-auction-idUSS8N22R022.

[76] RWA Comment (Exhibit 24) at 14.

[77] Economics Professors Comment (Exhibit 12) at 11.

proposed by DISH prior to the T-Mobile deal."[78] These arguments reflect a misunderstanding of DISH's network build commitments. These commitments were incorporated into the proposed Final Judgment to increase the incentives for DISH to build out its own national facilities-based mobile wireless network.[79] These commitments should not, however, be interpreted as predictions of the likely breadth of DISH's network coverage or its likely speed. The proposed Final Judgment does not dictate the scope of DISH's future investments, but rather provides DISH with necessary assets and appropriate incentives, and then relies on market forces to guide DISH's long-term decisions about where to target its investments. DISH may ultimately have business incentives to provide substantially broader coverage and faster speeds than the minimums required to meet its network build commitments. By focusing on the floors set by the proposed Final Judgment rather than the likely effects of the divestiture, these commenters miss the relevant inquiry.

Separate criticisms that the proposed merger benefits rural customers at the expense of urban ones and that the United States' remedy benefits urban customers at the expense of rural ones illustrate why entry of the proposed Final Judgment is in the public interest. The Economics Professors argue that "even if one were to credit" (as the FCC now has[80]) the claimed benefit from the merger of "enhanced 5G deployment in otherwise unprofitable-to-deploy neighborhoods," these "largely rural households are distinct from those urban and suburban households that likely will incur a price increase on 4G services resulting from the merger."[81] In turn, Andrew Afflerbach, the engineer whose declaration was submitted along with the CWA comments, observes that the "most straightforward way [for DISH] to serve 70 percent of the population is to focus on urban areas," which would mean DISH's "2023 benchmark stops well short of the scale of the networks operated

[78] CWA Comment (Exhibit 10) at 3.

[79] See Competitive Impact Statement (Dkt. No. 20) at 11-12.

[80] *See* FCC Order ¶¶ 257-76 (explaining the benefits of the merger for consumers in rural areas).

[81] Economics Professors Comment (Exhibit 12) ¶ 11.

by the four existing MNOs."[82] Together, these concerns only confirm that the proposed Final Judgment fulfills the twin goals of a merger remedy. It permits the merger to proceed, enabling rural consumers to benefit from its promised efficiencies, while adopting remedies that will protect consumers in and bring new competition to urban areas that may have been at greater risk from this merger without this settlement.

C. Comments Regarding the Enforceability of the Proposed Final Judgment

Other commenters claim that the proposed Final Judgment is too complicated or too "behavioral" to be enforced. CWA and others cite statements in which current and former leaders of the Antitrust Division have identified challenges associated with behavioral conditions.[83] The commenters claim that the proposed Final Judgment is inconsistent with these statements, and they suggest that these inconsistencies should be a basis for denial.[84] These types of argument lack legal support and do not accurately describe the inquiry before the Court. They also misstate the facts of the proposed Final Judgment and the Division's policies.

Objections to the settlement that are based on parsing which elements are structural and which are behavioral miss the important larger point. The overall objective of the remedy is profoundly structural, as it is designed to stand up a fourth nationwide, facilities-based wireless carrier. The mechanisms for doing so begin immediately with a structural divestiture to prevent the consolidation of Sprint's prepaid business into T-Mobile's, and the non-structural elements of the proposed Final Judgment are largely aimed at enabling DISH to begin providing wireless services

[82] Afflerbach Dec. ¶ 51.

[83] *See* CWA Comment (Exhibit 10) at 10-12, 23.

[84] *Id.*; *see also* Wool Comment (Exhibit 32) at 2, 3. Based on his skepticism, Mr. Wool asserts that the proposed Final Judgment "dramatically reinterprets the risk-allocation framework intended by Section 7 of the Clayton Act." Wool Comment at 1. This argument disregards the principle that "[a] district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *United States v. Archer-Daniels-Midland Co.*, 272 F.Supp.2d 1, 6 (D.D.C. 2003).

to consumers immediately, to grow that business as it builds its own network, and to enable it to stand on its own as an effective facilities-based competitor before the end of the decree's term.[85]

Indeed, while the Antitrust Division has expressed a preference for structural remedies, it has not taken the position that behavioral conditions are never appropriate. In fact, the 2004 Remedies Guide explains that "there are limited circumstances when conduct remedies will be appropriate: (a) when conduct relief is needed to facilitate transition to or support a competitive structural solution, i.e., when the merged firm needs to modify its conduct for structural relief to be effective or (b) when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would also sacrifice such efficiencies or is infeasible."[86] As to (a), the guide provides examples of potentially appropriate behavioral conditions that can help "perfect structural relief," such as transitional supply agreements between the merged firm and the divestiture buyer and temporary limits on the merged firm's ability to reacquire personnel from the divestiture buyer.[87] The guide further notes that enforcing behavioral conditions may be easier, and thus such conditions may be more appropriate, in markets subject to ongoing oversight by regulatory agencies.[88]

The remedy in this case is ultimately structural, and fits squarely within the first circumstance described in the 2004 Remedies Guide—it is intended to bring about the entry of an

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[85] Although Mr. Wool takes issue with the proposed Final Judgment's condition requiring the merged firm to extend existing MVNO agreements, he simultaneously argues (1) that the condition is too behavioral, and (2) that the condition does not do enough to protect future innovation. Wool Comment (Exhibit 32) at 3-4 & n.8. By relying on existing agreements, the condition as written does not require regular, ongoing oversight by the United States. In contrast, additional intervention to control the merged firm's conduct with respect to other MVNOs in the future would have required further involvement by the United States in the marketplace.

[86] 2004 Remedies Guide at 18. *Cf.* "Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum" (Nov. 16, 2017) (stating the Antitrust Division would accept behavioral remedies "where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy"), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[87] 2004 Remedies Guide at 18-19.

[88] *Id.* at 22.

independent, facilities-based mobile wireless network operator with the incentive and ability to compete with the other national carriers. DISH has agreed to acquire Sprint's prepaid businesses for $1.4 billion and Sprint's 800 MHz spectrum for $3.6 billion, and it has the option to acquire cell sites and retail locations from the merged firm. Other aspects of the proposed Final Judgment are intended to ensure that these divestitures (and DISH's entry into the mobile wireless market more generally) are successful. Several of these provisions are akin to the examples of appropriate conditions set forth in the Remedies Guide. The Full MVNO Agreement will require T-Mobile to supply DISH with network access on a transitional basis. This will allow DISH to enter the market immediately, providing for MVNO-based competition while DISH works to deploy network facilities. DISH's network buildout obligations will ensure that this transition proceeds in a timely manner. The temporary prohibition on T-Mobile rehiring employees from the divested business will assist DISH in maintaining the personnel required to compete effectively.

The proposed Final Judgment in this case also fits within the second circumstance that the Remedies Guide describes as an appropriate context for behavioral relief—at least in the short term. The merger promises to yield significant efficiencies by enabling T-Mobile to offer 5G mobile wireless services more cost-effectively. These efficiencies would not be realized if the merger were blocked or if T-Mobile were required immediately to divest all of Sprint's existing infrastructure. Further, T-Mobile's network buildout obligations and associated penalties provide additional incentives to ensure that the merged firm will invest in a robust 5G network that becomes available to consumers quickly. These efficiencies will work in combination with the new competitive threat posed by DISH to offset any further harm that may arise from the transaction. By the time the proposed Final Judgment expires, and likely sooner, DISH will provide a fourth nationwide retail mobile wireless option for American consumers, and neither the Antitrust Division nor this Court will need to maintain ongoing entanglements with the company's business.

Including a transitional period in which certain behavioral conditions are present, however, will ensure that consumers get the immediate benefits expected from the merger without risking anticompetitive harm.

These goals are consistent with the position on behavioral remedies expressed in the 2004 Remedies Guide and with the enforcement decisions made by the Antitrust Division. As noted, the Remedies Guide states that transitional behavioral remedies are appropriate for ensuring the effectiveness of structural relief.[89] In keeping with that principle, the Final Judgment submitted by the United States and adopted by Judge Boasberg in *United States v. Bayer* contained substantial divestitures to ensure a long-term structural solution, along with shorter-term behavioral relief including supply agreements with the possibility of extension for up to a total of six years.[90]

More fundamentally, the remedies here are consistent with longstanding guidance that the remedy must be tailored to the particular facts of the industry at hand.[91] Here, building a mobile wireless network takes several years. That fact alone does not bar the adoption of appropriate remedies, and the remedy here necessarily and appropriately reflects that fundamental fact in the interim and final buildout timelines and the overall term of the decree. The timelines also account for the ongoing transition from 4G to 5G, which ultimately will permit DISH to put into service a

[89] 2004 Remedies Guide Section III.E.1 ("Limited conduct relief can be useful in certain circumstances to help perfect structural relief.").

[90] Final Judgment, *United States v. Bayer AG*, No. 18-cv-1241, at 22-23, 24, 25 (D.D.C. Feb. 08, 2019).

[91] 2004 Remedies Guide at 2 (encouraging the Division to "[f]ocus[] carefully on the specific facts of the case at hand" to "permit the adoption of remedies specifically tailored to the competitive harm," and noting that "there must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions"). CWA pulls quotations from the 2004 Remedies Guide that it believes call into question the proposed remedy here. CWA Comment (Exhibit 10) at 4-11, 13, 19. As discussed in this section, the United States vigorously disputes the notion that the proposed Final Judgment is at bottom inconsistent with the Antitrust Division's own guidance. CWA simply ignores the Remedies Guide provisions discussed in this section that explain why this remedy is in keeping with Division policy, and it also ignores the stated purpose of the Guide itself. The Guide "is a policy document, not a practice handbook," it does not list or give "particular language or provisions that should be included in any given decree," but instead it "sets forth the policy considerations that should guide Division attorneys and economists when fashioning remedies for anticompetitive mergers." 2004 Remedies Guide at 1-2. As called for by its own Guide, and as explained in this Response to Comments, in arriving at this proposed Final Judgment the Antitrust Division has applied "the pertinent economic and legal principles, appropriate analytical framework, and relevant legal limitations" to "craft and implement the proper remedy for the case at hand." *Id.* at 2.

new, greenfield 5G wireless network unencumbered by older technology. This is consistent with guidance that the remedy be tailored to the specific characteristics of the divestiture buyer.[92] With this remedy, DISH will bring spectrum (that it currently has no obligation to build out in this way) into service as a mobile broadband 5G service that will serve consumers across the country. With a proposed merger that promises public benefits in the form of stronger 5G competition and expanding output, it is consistent with the Antitrust Division's announced policies to craft this settlement in a way that protects those efficiencies, increases output further through the choice of divestiture buyer, while still guarding against competitive harm.

Moreover, the proposed Final Judgment contains substantial monitoring and enforcement mechanisms. These mechanisms will operate in parallel with the ongoing regulatory oversight that the FCC will perform to ensure compliance with its own conditions.[93] The United States will be moving this Court to appoint a monitoring trustee with the power and authority to investigate and report on the Defendants' compliance with the terms of the Final Judgment and the Stipulation and Order during the pendency of the divestiture. The monitoring trustee will help ensure, among other things, that T-Mobile complies with its obligations relating to its sale of the Divestiture Assets, the exclusive-option requirements for cell sites and retail store locations, and DISH's progress toward using the Divestiture Assets to operate a retail mobile wireless network.

The United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought

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[92] *See* 2004 Remedies Guide at 31 n.43 (noting that "if harmful coordination is feared because the merger is removing a uniquely-positioned maverick, the divestiture would likely have to be to a firm with maverick-like interests and incentives"); *id.* at 5 (noting that "assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets").

[93] *See, e.g.*, FCC Order ¶ 204 ("The Boost Divestiture Conditions also provide for strong Commission oversight to ensure the effectiveness of these principles to ensure New Boost is a meaningful competitor."); *id.* ¶ 378 ("DISH continues to be subject to all of the Commission's other enforcement and regulatory powers, including the loss of part or all of any of its licenses for failing to meet its build-out requirements.").

by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply.[94] This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address. Defendants also agree that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of the goal of the proposed Final Judgment to restore competition that would otherwise be permanently harmed by the merger.[95]

The United States may also apply to the Court for a one-time extension of the Final Judgment, together with other relief as may be appropriate, if the Court finds in an enforcement proceeding that Defendants have violated the terms of the decree.[96] In addition, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any enforcement effort, including the investigation of the potential violation.[97]

Finally, although the Final Judgment is set to expire seven years from the date of its entry,[98] the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated.[99] This provision is meant to

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[94] PFJ §XVIII(A).

[95] *Id.* § XVIII(B).

[96] *Id.* §XVIII(C).

[97] *Id.*

[98] *Id.* §XIX. The Final Judgment may be terminated after five years from the date of its entry upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest. *Id.*

[99] *Id.* §XVIII(D).

address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision thus makes clear that the United States may still challenge a violation that occurred during the Final Judgment's term, for four years after it expired or was terminated.

D. Other Comments Opposing Entry of the Proposed Final Judgment

1. Comments Regarding Harms Outside the Scope of the Complaint

Some commenters raise harms that are outside the scope of the complaint filed in this case, and they propose remedies to address those harms. These comments extend beyond the permissible scope of the Tunney Act review.[100] A few commenters, claiming to rely on a recent opinion interpreting the Tunney Act, urge this Court to engage in a broader inquiry.[101] That opinion, however, agreed that the Court cannot evaluate claims beyond those raised in the complaint.[102] To the extent that commenters read that opinion—and encourage this Court to apply that opinion—in a way that would permit this Court to evaluate legal theories, competitive effects, or claims that the United States chose not to bring, it would violate the Constitution. The D.C. Circuit recognized this fact in *Microsoft* when holding that district courts are "barred from reaching beyond the complaint to examine practices the government did not challenge."[103] Reading the Tunney Act in a way that allows courts to second-guess the United States' exercise of prosecutorial discretion

[100] *See supra* § III.

[101] *E.g.*, Economics Professors Comment (Exhibit 12) at 3; AAI Comment (Exhibit 2) at 13.

[102] *United States v. CVS Health Corp.*, No. 18-2340, 2019 WL 4194925, at *5 (D.D.C. Sept. 4, 2019) ("Courts cannot, of course, 'force the government to make [a] claim.' The Government, alone, chooses which causes of action to allege in its complaint." (citation omitted)).

[103] *Microsoft*, 56 F.3d at 1460; *see also Heckler v. Chaney*, 470 U.S.821, 832 (1985) (citing Article II, Section 3 of the Constitution for the proposition that the decision about what claims to bring "has long been regarded as the special province of the Executive Branch"); *United States v. Fokker Servs.*, 818 F.3d 733, 738 (D.C. Cir. 2016) (recognizing the "long-settled understandings about the independence of the Executive with regard to charging decisions).

would violate separation-of-powers principles, and contravene the guidance that courts should "not construe [a] statute in a manner that renders it vulnerable to constitutional challenge."[104] Put directly, "any agency with limited resources and an investigative mission has the power, absent an express statute to the contrary, to assess a complaint to determine whether its resources are best spent on the violation, whether the agency is likely to succeed, whether the enforcement requested fits the organization's overall policies, and whether the agency has enough resources to undertake the action."[105] Thus, public comments that criticize the Complaint for taking too narrow a scope or that point to a broader set of practices that they also would have liked the government to challenge have no bearing on the public interest inquiry currently before the Court.

For example, RWA and NTCH both express concern about the impact of the merger on roaming services. RWA states that "[t]he elimination of Sprint and the entry of Dish will mean the nation will go without a fourth wholesale or nationwide domestic roaming alternative to compete against AT&T, Verizon, and New T-Mobile for an extended period of time."[106] Likewise, NTCH asserts that "[t]he FCC has largely ignored the growing crisis in the data roaming market," and alleges that data roaming rates that exist today "amount to a denial of roaming service to [] small carriers and their subscribers in violation of Sections 201(b) and 202(a) of the Communications Act of 1934, as amended."[107]

The Complaint, however, does not allege that the merger will eliminate competition in a market for roaming services, or that it will impact roaming rates. RWA attempts to tie its concern to a paragraph in the Complaint that pertains solely to the elimination of "[c]ompetition between

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[104] *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 68 (D.C. Cir. 2016); *cf. Maryland v. United States*, 460 U.S. 1001, 1003-06 (1983) (Rehnquist, J., dissenting) (noting concerns about the ability to formulate judicially manageable standards for the Tunney Act inquiry).

[105] *Caldwell v. Kagan*, 865 F. Supp. 2d 35, 44 (D.D.C. 2012).

[106] RWA Comment (Exhibit 24) at 11.

[107] NTCH Comment (Exhibit 20) at 7-8.

Sprint and T-Mobile to sell mobile wireless service to MVNOs."[108] This paragraph does not allege harm to rural facilities-based mobile wireless carriers that purchase roaming services. RWA and NTCH are free to advocate their positions on this issue to the FCC, and both did so in this proceeding.[109] Given that these concerns are outside the scope of this proceeding, the Court should not factor them into its public interest evaluation. For the same reason, the Court should reject NTCH's proposed new conditions, which it claims are designed to address these alleged harms.[110]

Similarly, Voqal—a coalition of 2.5 GHz spectrum licensees—claims that the merger will cause T-Mobile's spectrum holdings to exceed a "spectrum screen" that has been applied by the FCC in certain past merger reviews.[111] They further allege that New T-Mobile will have "buyer market power in the 2.5 GHz band."[112] Voqal proposes new, self-designed divestitures of 2.5 GHz spectrum that they claim would alleviate their concerns.[113] The question of whether and in what manner a regulatory "spectrum screen" should apply to this transaction is not before the Court.[114] Moreover, the Complaint does not allege a relevant market consisting of 2.5 GHz spectrum, nor does it allege that the merger would cause T-Mobile to acquire "buyer market power" in such a market.[115] Thus, the Court should not factor these claims into its public interest determination, and

[108] RWA Comment (Exhibit 24) at 11 (citing Complaint ¶ 22).

[109] *See* FCC Order ¶ 297 (concluding that concerns raised by RWA, NTCH, and others regarding the impact of the transaction on roaming rates were adequately addressed by existing FCC regulations).

[110] NTCH Comment (Exhibit 20) at 16-20.

[111] Voqal Comment (Exhibit 30) at 7-9.

[112] *Id.* at 10.

[113] *Id.* at 12-14.

[114] This question was addressed directly by the FCC, which found that, although its spectrum screen was triggered in much of the nation, the transaction should be approved because of its potential to increase spectrum utilization and accelerate the deployment of 5G networks. *See* FCC Order ¶¶ 97-99.

[115] The FCC also declined to define such a market. *See id.* ¶ 64 (declining to "define a separate product market for the sale or lease of 2.5 GHz spectrum").

it should reject Voqal's proposal for new divestitures to be added to the proposed Final Judgment under review.[116]

2. Comments Regarding Services Provided to MVNOs

The proposed Final Judgment requires the merged firm to extend T-Mobile's and Sprint's existing MVNO agreements for the term of the proposed Final Judgment, subject to certain conditions. Nevertheless, the Economics Professors and others argue that this does not sufficiently address potential harm that could arise from the loss of competition between T-Mobile and Sprint in providing wholesale mobile wireless services to MVNOs.[117] They claim that future competition between the firms could yield *even better* rates and terms than those in the existing agreements, and that MVNOs will have no protection once the proposed Final Judgment expires. Neither of these arguments warrants finding that this portion of the proposed Final Judgment is not in the public interest.

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[116] Voqal proposes that T-Mobile be required to divest certain 2.5 GHz licenses because, it claims, no other spectrum bands are sufficient substitutes for the deployment of 5G mobile wireless services. *See* Voqal Comment at 6-7, 12-14. The FCC has rejected this view and is actively working to make additional mid-band spectrum available for 5G. FCC Order ¶¶ 99, 110; *see also In re Promoting Investment in the 3550-3700 MHz Band*, Notice of Proposed Rulemaking and Order Terminating Petition, 32 FCC Rcd 8071, ¶ 2 (2017) ("[I]t has become increasingly apparent that the 3.5 GHz Band will play a significant role as one of the core mid-range bands for 5G network deployments throughout the world. . . . In the two years since the Commission first adopted rules for this 'innovation band,' it has authorized service in other bands that also will be critical to 5G deployment, and we are currently evaluating additional bands for 5G use."); *In re Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd 6915, ¶ 1 (2018) ("Today, we seek to identify potential opportunities for additional terrestrial use—particularly for wireless broadband services—of 500 megahertz of mid-band spectrum between 3.7-4.2 GHz. . . . Today's action is another step in the Commission's efforts to close the digital divide by providing wireless broadband connectivity across the nation and to secure U.S. leadership in the next generation of wireless services, including fifth-generation (5G) wireless, Internet of Things (IoT), and other advanced spectrum-based services.").

[117] Economics Professors Comment (Exhibit 12) at 4, 9-11; *see also* Wool Comment (Exhibit 32) at 3. As an initial matter, the Economics Professors are incorrect in claiming that "the DOJ's Complaint spells out harms in two markets: the wholesale market and the retail market." Economics Professors Comment (Exhibit 12) at 3. The Complaint alleges only one relevant product market: the market for retail mobile wireless services. See Complaint ¶ 14. The Complaint does contain one paragraph alleging that "competition between Sprint and T-Mobile to sell mobile wireless service wholesale to MVNOs has benefited consumers by furthering innovation" and that "[t]he merger's elimination of this competition likely would reduce future innovation." Complaint ¶ 22. It does not, however, allege the existence of a distinct wholesale market. To the extent that the concerns expressed by the Economics Professors are premised on the existence of such a market, they are outside the scope of the Complaint. *See, e.g.*, Economics Professors Comment (Exhibit 12) at 4 (calculating an HHI for "the national wholesale market" and arguing that there is a "presumption of enhanced market power"). *See also* FCC Order ¶ 63 (declining to define "a separate product market for wholesale service offerings").

First, T-Mobile and Sprint have both been selling wholesale services to MVNOs for many years, and the rates and terms in existing MVNO agreements are what have resulted from this competition. These terms will remain in place for the duration of the proposed Final Judgment, and the commenters cite no support for their prediction that maintaining this same level of competition would have yielded terms that are better than these. Moreover, by increasing the capacity of T-Mobile's network and reducing its cost of providing service to MVNOs who need to compete against DISH, the merger and proposed Final Judgment may combine to increase T-Mobile's incentive to provide wholesale service to MVNOs.[118] The Economics Professors fail to account for this effect.[119]

Second, when the protections of the proposed Final Judgment expire, MVNOs will not be limited to purchasing wholesale service from AT&T, Verizon, or T-Mobile. By that point, DISH will have constructed a mobile wireless network that could serve as an alternative host network for MVNOs.[120] Indeed, as a new entrant untethered to legacy business models, DISH may be especially willing to partner with innovative MVNOs. Thus, the Department believes that the

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[118] *See* FCC Order ¶ 290 ("New T-Mobile's vastly increased network capacity will likely give it incentives to offer appealing terms and reasonable prices to wholesale service customers so as to put that capacity to productive use by carrying as much revenue-generating traffic as it can.").

[119] More generally, the Economics Professors Comment (Exhibit 12) is internally contradictory on the influence of MVNOs in the marketplace. On the one hand, to attack the settlement the comment dismisses any benefit from the divestitures that will stand DISH up as an MVNO. Economics Professors Comment (Exhibit 12) at 2-3. Later, in going on to attack the settlement for not doing *more* to help MVNOs, the comment champions the competitive benefits that MVNOs provide, including allowing carriers in effect to offer the same service at different price points under a different brand, and enabling cable companies to compete in wireless. Economics Professors Comment (Exhibit 12) at 4. In fact, while observing that by "bundl[ing] wireless offerings with other products like broadband and pay television, cable companies such as Comcast and Charter have competed aggressively on price," *id.*, the comments overlook that this is precisely one of the benefits DISH will be able to provide consumers. *See* Chris Welch, The Verge, "Dish loses more satellite TV customers as it embarks on a mobile future" (July 29, 2019) ("Like other carriers, you can count on Dish combining its video and mobile products. A Sling TV and Dish Mobile bundle is all but guaranteed."), https://www.theverge.com/2019/7/29/20746191/dish-q2-2019-earnings-mobile-carrier-plans-sling-tv-5g. The remedy thus creates an innovative MVNO immediately, and further establishes DISH as a likely future wholesale network provider.

[120] *See* FCC Order ¶ 292 (explaining that the proposed Final Judgment "would enable DISH to emerge as a nationwide facilities-based provider that would be capable of supplying, among other things, robust wholesale wireless services to MVNOs.").

proposed Final Judgment provides sufficient protections to address the narrow wholesale-related harm alleged in the Complaint.

3. Comments Regarding Other Regulatory Matters

NTCH claims that DISH could lose some of its wireless licenses in the future, and if this were to occur, DISH would be unable to construct a network that satisfies the provisions of the proposed Final Judgment.[121] It argues that DISH's licenses could be revoked for one of two reasons, but neither provides a credible basis to reject the decree.

First, NTCH argues that "it is possible that the FCC may deny" DISH's request for an extension of the upcoming construction deadlines for its AWS-4 and H Block licenses.[122] NTCH argues that, in the event of such a denial, DISH would likely fail to meet its future construction deadlines for these licenses, which could result in forfeiture of the licenses. The FCC, however, has concluded that granting these extensions would be in the public interest, and accordingly, has directed the relevant bureau of the agency to do so.[123]

Second, NTCH contends that it might prevail in its pending appeals of certain FCC orders that enabled DISH's purchase of the H Block spectrum and granted DISH the ability to use the AWS-4 spectrum to offer mobile wireless service.[124] NTCH argues that "reversal of the FCC's license grants would doom this entire DISH-to-the-rescue plan to failure."[125] NTCH failed, however, in its opposition of these orders at the FCC, and there is no reason to believe that NTCH will prevail in its appeals. As the FCC and the United States have explained in that litigation, NTCH lacks standing to bring several of these challenges, and even if NTCH were found to have

[121] NTCH Comment (Exhibit 20) at 11-15.

[122] *Id.* at 11.

[123] *See* FCC Order ¶ 365.

[124] NTCH Comment (Exhibit 20) at 14-15.

[125] *Id.* at 15.

standing, its arguments for why the FCC should not have adopted the orders at issue lack merit.[126] In any event, it would be improper for the Court to deny entry of the proposed Final Judgment on the basis of a pending appeal in a separate matter whose outcome is uncertain.

Separately, CWA argues that DISH is not fit to be a divestiture buyer because of the existence of a dispute between DISH and the FCC over a past spectrum auction.[127] The referenced dispute arose from the FCC's auction of so-called AWS-3 spectrum. In that auction, two entities (Northstar and SNR Wireless) purchased spectrum licenses using bidding credits intended for use by small businesses. The FCC subsequently found that Northstar and SNR Wireless were ineligible for the bidding credits they used because they were under the *de facto* control of DISH and therefore were not small businesses. Accordingly, the FCC revoked the credits and imposed a fine. After Northstar and SNR Wireless appealed the FCC's order, the U.S. Court of Appeals for the District of Columbia Circuit found that the FCC had reasonably interpreted its rules but had not provided sufficient notice of its interpretation.[128] Thus, it ordered the FCC to provide Northstar and SNR Wireless an opportunity to cure the violation by amending its agreements with DISH.[129] These efforts are ongoing. Significantly, the D.C. Circuit went out of its way to note that the FCC's finding that DISH exercised de facto control "does not compel a finding that the applicants lacked candor."[130] It also emphasized that the FCC explicitly said that SNR and Northstar appropriately disclosed their relationships with DISH, that no other auction participant was harmed by their conduct, and that no evidence showed that SNR and Northstar "colluded with one another

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[126] *See* Corrected Brief for Respondent/Appellee and Respondent, *NTCH, Inc. v. Fed. Commc'ns Comm'n*, Nos. 18-1241 & 18-1242 (D.C. Cir. Mar. 28, 2019).

[127] CWA Comment (Exhibit 10) at 18-19.

[128] *See SNR Wireless LicenseCo, LLC v. Fed. Commc'ns Comm'n*, 868 F.3d 1021, 1024-25 (D.C. Cir. 2017) (summarizing the background of the case and the court's opinion). In discussing *de facto* control, the D.C. Circuit noted that while "the question of whether one business exercises *de jure* control over another is binary, the highly contextual question of *de facto* control is a matter of degree." *Id.* at 1026.

[129] *Id.* at 1043-46.

[130] *Id.* at 1028.

in violation of federal antitrust laws."[131] Without wading into the merits of that ongoing matter, the United States rejects CWA's contention that this should disqualify DISH from being a divestiture buyer here.

4. Other Negative Comments

CWA objects that the proposed Final Judgment "uses open-ended, vague and ambiguous language with reference to defendants' obligations and/or the time within which certain actions must be taken," and that such language is "deeply problematic" in a court order.[132] Such terminology, however, is not unusual and has been present in final judgments previously approved under the Tunney Act.[133] Moreover, the Final Judgment minimizes any enforceability risks by providing for resolution of any disputes that may arise without the need to involve this Court. For example, if there is no agreement (regardless of the reason), the monitoring trustee will report to the United States, and the Department of Justice can resolve the dispute at its "sole discretion" or at its sole discretion "after consultation with the affected Plaintiff States."[134] Additionally, should any disputes be brought before he Court, the Final Judgment provides standards for resolving disputes over interpretation of any such terms. This is accomplished both by reference to the purpose of the decree "to give full effect to the procompetitive purposes of the antitrust laws," and by empowering

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[131] *Id.*

[132] CWA Comment (Exhibit 10) at 21, 22.

[133] *See, e.g.,* Final Judgment, *United States v. Bayer AG*, No. 18-cv-1241, at 19 (D.D.C. Feb. 08, 2019) ("The divestitures shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between BASF and Bayer and Monsanto give Bayer and Monsanto the ability unreasonably to raise BASF's costs, to lower BASF's efficiency, or otherwise to interfere in the ability of BASF to compete effectively."); *id.* at 26 ("The terms and conditions of all agreements reached between Bayer and BASF under Paragraph IV(G) must be acceptable to the United States, in its sole discretion."); *id.* ("Bayer shall perform all duties and provide all services required of Bayer under the agreements reached between Bayer and BASF under Paragraph JV(G)."). *See also US Airways* Final Judgment at 12 (requiring divestiture to be "accomplished so as to satisfy the United States in its sole discretion, in consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer(s) and Defendants gives Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to effectively compete."); *id.* at 13 ("Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture.").

[134] *See* PFJ § IV.A.4.

the Court to enforce any provision of the Final Judgment, as "interpreted by the Court in light of these procompetitive principles and in applying ordinary tools of interpretation," to terms that are "stated specifically and in reasonable detail, whether or not [they are] clear and unambiguous on [their] face."[135]

E. Comments Regarding Procedural Aspects of this Review

1. Sufficiency of the Filings

Mr. Bellemare argues that the "materials published in the Federal Register do not allow meaningful public comments."[136] He asserts that the United States was required to include additional information in its filings, such as "pre- and post-merger levels of concentration (Herfindahl-Hirschman Index) (HHI); increase in HHI numbers as a result of the merger; exact pre- and post- merger market shares of all entities in the relevant market; trend toward concentration (or recent acquisitions)" as well as "substantial information . . . on regulatory or nonregulatory entry barriers in the relevant market."[137] Mr. Bellemare does not identify a source for his claim that these categories of information are required, and for good reason—neither the Tunney Act itself nor the caselaw interpreting the Act identifies such requirements. Under the Tunney Act, the United States must file a Competitive Impact Statement that recites "(1) the nature and purpose of the proceeding; (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws; (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief; (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such

[135] PFJ § Section XVIII.B. Another commenter expressed general opposition to the proposed remedy but did not provide a sufficient basis for his concern to allow the United States to respond. *See* Hasten Comment (Exhibit 15) ("No! No! No! No! No! You don't need me to tell you the reasons why.").

[136] Bellemare Comment (Exhibit 6) at 1.

[137] Bellemare Comment (Exhibit 6) at 7-8.

proposal for the consent judgment is entered in such proceeding; (5) a description of the procedures available for modification of such proposal; and (6) a description and evaluation of alternatives to such proposal actually considered by the United States."[138] The Competitive Impact Statement filed in this case amply satisfies these requirements.[139]

2. Comments Regarding the Timing of This Review

Some commenters seek to delay this Court's proceedings until after the conclusion of the litigation initiated by a group of state attorneys general in the Southern District of New York ("S.D.N.Y. Litigation"). AAI asks the Court to "defer a public interest determination and keep the public comment period open pending a final judgment in the States' challenge to the proposed transaction."[140] Similarly, Public Knowledge *et al.* "request[s] that the DOJ ask the court to wait to decide whether to accept its proposed consent decree until the pending state enforcement action to block this merger is resolved."[141] These commenters assert that this approach would impose no hardship on the merging parties and would be in the best interests of both the Department and the public. They claim that this approach would be appropriate because it would allow for a more comprehensive public comment process and would promote the efficient use of judicial resources. As discussed below (and in greater detail in the United States's Response to States' Motion to File Brief as Amici Curiae ("Response to States' Brief") filed with this Court on October 23, 2019), AAI's assertions are incorrect.

First, delay would prejudice the public interest, the Department, and DISH. As the Department explained in its Response to States' Brief, T-Mobile's obligation to begin preparing its

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[138] 15 U.S.C. § 16(b)(1)-(6).

[139] Mr. Bellemare also points to the standards that apply to motions to dismiss and motions for summary judgment under the Federal Rules. *See* Bellemare Comment (Exhibit 6) at 2, 8. Those standards have no bearing on this proceeding.

[140] AAI Comment (Exhibit 2) at 11.

[141] Public Knowledge *et al.* Comment (Exhibit 22) at 4.

network for DISH subscribers is triggered by entry of the proposed Final Judgment.[142] No useful purpose would be served by delaying this process and thus delaying the date by which DISH can begin offering mobile wireless service to the public. In addition, the Department has a broader interest in ensuring that its proposed settlements are entered in an efficient manner. Jeopardizing this ability would require the Department to devote resources to matters it has decided to settle rather than matters it has not.[143] For its part, DISH has an interest in prompt entry of the proposed Final Judgment because of its fixed-date network deployment deadlines. The proposed Final Judgment requires DISH to reach certain milestones by June 14, 2023, and delaying the Court's consideration of the proposed Final Judgment would shorten the time available to DISH to comply with this requirement.[144]

Second, contrary to these commenters' claims,[145] the Court need not allow third parties to file "new or supplementary" comments after conclusion of the S.D.N.Y. Litigation. Much of the record developed in the S.D.N.Y. Litigation will pertain to the merits of the states' Section 7 challenge and thus will not be relevant here. Some of that evidence will also pertain to legal claims that the United States did not assert. Considering these claims would violate separation-of-powers principles.[146] Even as to evidence that could arguably be relevant, the United States will not have participated in the creation of that record, and it would violate fundamental principles of procedural fairness to rely on such evidence.

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[142] *See* PFJ § IV.A.1; Response to States' Brief at 7-8.

[143] *See Microsoft*, 56 F.3d at 1459 (noting in an appeal of a Tunney Act decision that "a settlement, particularly of a major case, will allow the Department of Justice to reallocate necessarily limited resources"); *see also Heckler,* 470 U.S. at 831 (explaining that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" because the agency must consider, among other things, "whether agency resources are best spent on this violation or another").

[144] *See* PFJ § VIII.A.

[145] AAI Comment (Exhibit 2) at 12-13.

[146] *See Heckler*, 470 U.S. at 832 (noting that the decision about which claims to bring "has long been regarded as the special province of the Executive Branch"); *Microsoft*, 56 F.3d at 1461 (noting that district courts engaging in Tunney Act review are "barred from reaching beyond the complaint to examine practices the government did not challenge").

Third, adopting the proposed delay would not promote the efficient use of judicial resources. When it passed the Tunney Act, Congress expressed its intent for courts making public interest determinations to "adduce the necessary information through the least complicated and least time-consuming means possible."[147] Consistent with this intent, courts routinely make Tunney Act determinations on the basis of only the Competitive Impact Statement, comments filed by the public, and the response filed by the Department.[148] With the benefit of the Department's Competitive Impact Statement in this proceeding, the comments filed, and this response, the Court now has before it a record sufficient to support a public interest determination.[149]

F. Comments Supporting Entry of the Proposed Final Judgment

Several commenters stated that although they believe the settlement is unnecessary, they nevertheless endorse entry of the proposed Final Judgment. Scott Wallsten of the Technology Policy Institute refers to an earlier analysis he conducted that concluded the empirical evidence was mixed as to whether 4-to-3 mergers "necessarily harm" consumers, but that also "identified areas in which the merger might pose some concerns."[150] Mr. Wallsten goes on to state that, "[t]aken together, the DOJ conditions address the concerns by aiming to lock in existing MVNO agreements while lowering the barriers to entry by a facilities-based carrier (DISH)."[151] Mr. Wallsten observes that these conditions "appear designed to reduce the chances of consumer harm in the areas otherwise most likely to be affected while allowing the New T-Mobile to retain sufficient assets to compete with AT&T and Verizon."[152] Mr. Wallsten states that these "remedies lower the barriers

[147] S. Rep. No. 93-298, at 6 (1973).

[148] *See supra* Section III.

[149] For this reason, the Court should also reject Public Knowledge *et al.*'s unsupported request for an evidentiary hearing. *See* Public Knowledge *et al.* Comment (Exhibit 22) at 4.

[150] Wallsten Comment (Exhibit 25) at 1.

[151] *Id.* at 1-2 (citing, *inter alia*, the divestiture of Sprint's prepaid businesses, the MVNO agreement "to ensure [DISH] is able to sell a competitive mobile product," and the extension of all current MVNO agreements).

[152] *Id.*

to DISH's entry into mobile cellular," and that "[l]owering the cost of entry also increases the chances DISH will enter the market, thereby increasing competitive pressure on the New T-Mobile (and other incumbents) from the threat of new entry."[153] After noting that, "[f]or the longer run, the DOJ also proposes to reduce barriers to entry into facilities-based provision for DISH," Mr. Wallsten concludes that "the conditions proposed by the DOJ are a reasonable approach to managing potential concerns."[154]

Similarly, Randolph May and Seth Cooper of the Free State Foundation state that, while they "do not specifically endorse or oppose the proposed merger or the proposed settlement," they believe there is "strong evidence" that the proposed merger, "if approved pursuant to the proposed settlement, would be in the public interest.[155]" And the Enterprise Wireless Alliance states that it supports the merger because it "would promote competition in the nationwide commercial wireless marketplace and accelerate the deployment of a 5G network covering much of the population including substantial expansions in coverage to rural areas," and that it also "supports the introduction of DISH as a potential fourth national wireless carrier" through the consent decree.[156]

A number of other commenters expressed support for the merger generally, without specifically commenting on the settlement. For example, several scholars affiliated with the International Center for Law & Economics submitted a letter along with their recent report that

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[153] *Id.* at 5.

[154] *Id.* at 6.

[155] May & Cooper Comment (Exhibit 23) at 1.

[156] EWA Comment (Exhibit 13) at 1. Two additional commenters explain that, after their initial concerns were satisfied by negotiating additional relief directly with T-Mobile, they now also support entry of the proposed Final Judgment. *See* California Emerging Technology Fund Comment (Exhibit 8) at 1-2 (after becoming a legal party in proceedings before the California Public Utilities Commission and negotiating a Memorandum of Understanding "that provides unprecedented public benefits for California consumers, especially the digitally-disadvantaged," states that the "subsequent commitments secured by DOJ ensure that there is increased competition and additional choices for all U.S. consumers"); National Hispanic Caucus of State Legislators Comment (Exhibit 18) at 1, 4 (after securing "commitments regarding deployment and hiring" through an "extensive Memorandum of Understanding" between T-Mobile and the National Diversity Coalition, supports the DOJ's proposed settlement because it "addresses some residual concerns we had previously identified").

"reviews 18 empirical analyses in the last five years that study the effects of changes in market concentration (such as by merger) in the wireless telecommunications industry."[157] These scholars express the view that the divestiture package "is likely unnecessary to ensure that the market remains competitive."[158] Nevertheless, and "regardless" of the proposed remedy, the scholars state that they "believe that the DOJ was correct."[159] The United States construes these submissions[160] as comments in favor of entry of the proposed Final Judgment.

Other states besides the Co-Plaintiff States in this matter have also indicated their support for the proposed Final Judgment. The Attorneys General of Arizona and New Mexico have also expressed their support for this settlement.[161] The State of Mississippi went so far as to withdraw

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[157] ICLE Report at 2.

[158] *Id.*

[159] *Id.* at 1-2. Similarly, Tech Freedom filed "comments in support of the proposed Final Judgment and Stipulation and Order" and "urge[s] the Court to approve these Measures." TechFreedom Letter (Exhibit 26) at 1 (also attaching "Comments of TechFreedom" filed with the FCC on Sept. 17, 2018). TechFreedom states that it agrees with the analysis in the ICLE report discussed in the text above, and that while it believes the remedy measures "actually go too far," it "believes that the quickest path to bringing forth the benefits of the merger is for the court to approve the merger as agreed." *Id.* *See also* Competitive Enterprise Institute Comment (Exhibit 11) at 1, 5, 7 (after stating the proposed merger "more-than passes muster" under the DOJ/FTC horizontal merger deadlines, discusses the benefits of T-Mobile's commitments to the FCC and "respectfully encourage[s] DOJ to accept the proposed settlement").

[160] *See also* National Puerto Rican Chamber of Commerce Comment (Exhibit 19) (asking DOJ to "approve the merger to help Puerto Rico expedite its [hurricane] recovery and grow its economy"); Overland Park Chamber of Commerce Comment (Exhibit 21) ("we support approval of the proposed merger"); Vermont Telephone Co. Comment (Exhibit 28) ("Rural America has so much to gain from this [merger], and so much to lose if it does not go forward"); Viaero Wireless Comment (Exhibit 29) (the merger "will directly benefit consumers and rural carriers like Viaero"); Center for Individual Freedom Comment (Exhibit 9) (CFIF and its supporters "urge swift approval of the proposed merger"); Greater Kansas City Chamber of Commerce Comment (Exhibit 14) (writing to "express the KC Chamber's support" for the merger); National Diversity Coalition Comment (Exhibit 17) (stating it is "one of many organizations that support the merger"); Asian Business Association Comment (Exhibit 4) (stating "our believe that this merger has the potential to greatly benefit everyone in America"); Williamson Comment (Exhibit 31) ("I strongly support the T-Mobile-Sprint merger and am hopeful that the Department of Justice will approve the Merger."); Americans for Tax Reform Comment (Exhibit 3) at 1 ("I urge the Department of Justice to approve the merger."); CalAsian Chamber of Commerce Comment (Exhibit 7) ("We have been outspoken in our support for the merger of T-Mobile with Sprint . . ."); Members of the United States House of Representatives Comment (Exhibit 27) (Oct. 10, 2019 letter resubmits "in support of the proposed Final Judgment" Jan. 25, 2019 letter sent to the FCC and the DOJ "to express our support for, and encourage your prompt consideration of, the proposed merger of T-Mobile U.S., Inc. and Sprint Corporation.").

[161] *See* "Attorney General Brnovich Statement on DOJ-T-Mobile/Sprint Merger Settlement" (stating "the divestiture, the FCC commitments, and PFJ provide Dish the realistic ability to become a competitive and fourth facilities-based wireless carrier" and that the PFJ "also facilitates Dish's ability to exercise its option to acquire the spectrum assets, cell sites, and retail assets to establish itself as a viable competitor in the retail mobile wireless services market"), *available at* https://www.azag.gov/press-release/attorney-general-brnovich-statement-doj-t-mobilesprint-merger-settlement; "AG Balderas' Statement on the Department of Justice's Announced Agreement on T-Mobile/Sprint Merger," July 26, 2019 (the AG is "pleased" by the settlement), *available at* https://www.nmag.gov/uploads/

from the S.D.N.Y. Litigation and enter an agreement with T-Mobile that relies on the relief obtained by the FCC and in this proposed Final Judgment.[162] The State of Colorado has now also withdrawn from the S.D.N.Y. Litigation and has requested to join as a plaintiff in this action.[163]

Finally, the Attorneys General of Utah and Arkansas filed a comment in this proceeding stating that they "have studied – and agree with – the conclusions in the DOJ's Competitive Impact Statement."[164] In their view, the proposed settlement "contains a powerful divestiture component" and will "greatly increase the probability that Dish will become a successful and significant fourth competitor in the market."[165] They conclude that "the settlement embodied in the proposed Final Judgment is in the public interest, mitigates the potential harms that the merger could otherwise have created, and offers benefits to rural communities while maximizing output and consumer choice for all Americans."[166]

PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas%E2%80%99_Statement_on_the_Department_of_Justice%E2%80%99s_Announced_Agreement_on_T_mobileSprint_Merger.pdf.

[162] *See* "AG Hood Settles Concerns on T-Mobile-Sprint Merger, Increases Services Available for Mississippians" (Oct. 9, 2019), *available at* https://www.ago.state ms.us/releases/ag-hood-settles-concerns-on-t-mobile-sprint-merger-increases-services-available-for-mississippians/; Letter Agreement, "T-Mobile and Sprint Pledged Commitments in Mississippi" ("Mississippi Letter Agreement") *available at* http://www.ago.state ms.us/wp-content/uploads/2019/10/MS-T-Mobile-agreement-executed.pdf.

[163] *See* Consent Motion for Leave to File Third Amended Complaint (Oct. 28, 2019), Dkt. No. 40; *see also* "Attorney General's Office Secures 2,000 Jobs, Statewide 5G Network Deployment Under Agreements with Dish, T-Mobile" (Oct. 21, 2019), https://coag.gov/press-releases/attorney-generals-office-secures-2000-jobs-statewide-5g-network-deployment-under-agreements-with-dish-t-mobile-10-21-19/.

[164] Utah/Arkansas Comment (Exhibit 5) at 1.

[165] *Id.* at 2 (citing the "multifaceted and detailed nature" of the Divestiture Assets, DISH's willingness to be bound as a party, provisions allowing for DOJ and FCC verification, "all backed by the potential of significant monetary penalties for non-compliance").

[166] *Id.* at 3.

VI. Conclusion

After careful consideration of the public comments, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published as required by 15 U.S.C. § 16(d).

Dated: November 6, 2019

Respectfully submitted,

/s/

Frederick S. Young
Matthew R. Jones
U.S. Department of Justice
Antitrust Division
450 Fifth Street NW, Suite 4100
Washington, D.C. 20530
(202) 307-2869
Frederick.Young@usdoj.gov

CERTIFICATE OF SERVICE

I, Frederick S. Young, hereby certify that on November 6, 2019, I caused a copy of the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/

Frederick S. Young
U.S. Department of Justice
Antitrust Division
450 Fifth Street NW, Suite 4100
Washington, D.C. 20530
(202) 307-2869
Frederick.Young@usdoj.gov

ATTACHMENT 3

COMPARISON OF DEBORAH GOLDMAN'S REPLY TESTMONY AGAINST CWA COMMENTS IN TUNNEY ACT PROCEEDING

PUBLIC VERSION

~~October 10, 2019~~

~~Scott Scheele, Esq.~~
~~Chief, Telecommunications and Broadband Section~~
~~Antitrust Division, U.S. Department of Justice~~
~~450 Fifth Street NW, Suite 7000~~
~~Washington, DC 20530~~

~~Re: United States v. Deutsche Telekom AG, et al., No. 1:19-cv-02232-TJKTUNNEY ACT~~
~~COMMENTS OF THE COMMUNICATIONS WORKERS OF AMERICA~~ **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 No. 18-07-011
And Related Matter	Application No. 18-07-023

SUPPLEMENTAL TESTIMONY OF
DEBBIE GOLDMAN ON BEHALF OF COMMUNICATIONS WORKERS OF AMERICA DISTRICT 9

~~**Introduction.**~~

~~The proposed Final Judgment ("PFJ") violates a number of clearly articulated Antitrust Division policies on merger remedies. These policies, incorporated in current policy guidance documents and in speeches by Division officials, are aimed at ensuring that antitrust remedies are *appropriate, effective and principled*. The remedy here satisfies none of these goals. The Division has not articulated any reasons, let alone principled reasons, why it has turned its back on its own merger remedy policies in this case, many of which are long-standing and represent sound antitrust enforcement.~~

~~The Division has recently and successfully asserted a number of its merger remedy policies in litigated cases as a basis for rejecting proposed fixes to anticompetitive mergers,~~

~~including one in which the proposed divestiture package did not include the *network* necessary for the buyer successfully to compete. That has particular relevance here.~~

November 22, 2019

Rachael E. Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080
(650) 589-1660
rkoss@adamsbroadwell.com
Attorneys for Communications Workers of America District 9

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I. INTRODUCTION

Pursuant to the October 24, 2019 Assigned Commissioner's Amended Scoping Ruling in the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, INC., a Delaware Corporation ("Applicants") For Approval of transfer of Control of Sprint Communications Company L.P, Communications Workers of America District ("CWA") submits the following written supplemental testimony. CWA's supplemental testimony responds to some of the Applicants' claims and issues identified in the Amended Scoping Ruling regarding the Applicants' and a new party, DISH Network's, federal agreements and commitments which significantly alter the original proposed merger.[1]

To obtain merger approval from the Department of Justice ("DOJ") and Federal Communications Commission ("FCC"), the Applicants agreed to provide to DISH spectrum, cell sites and access to the new T-Mobile network for a period of seven years. The idea is that, over time, DISH could become a fourth national facilities-based mobile service provider. Prior to making these federal commitments, the Applicants entered into an agreement with the California Emerging Technology Fund ("CETF"). The federal commitments not only alter the originally proposed merger, but also affect the CETF agreement. Therefore, the Commission required the Applicants to submit an amended application reflecting the changes and, subsequently, additional testimony addressing the implications of the federal commitments on California.

~~Judged from the standpoint of the competitive harm alleged in the Complaint,~~ ~~the~~CWA's testimony shows that the federal commitments are not appropriate, effective or principled measures that would remedy the proposed merger's competition problems outlined in

[1] Attached as **Attachment A** is CWA's previously submitted testimony revised in redline to show changes resulting from Sprint, T-Mobile and DISH Network entering into the Department of Justice and Federal Communications Commission commitments.

CWA's previous testimony and briefs. The DISH divestiture assets do not restore the competition lost by the elimination of Sprint as an independent competitor ~~*under the theories of harm alleged in the complaint and in the product market alleged in the complaint*~~. The divestitures create a Mobile Virtual Network Operator ("MVNO"), but ~~the theories of harm and market definition treat~~ competition from MVNOs ~~as~~are de minimis. ~~There is a mismatch between the theory of harm and~~

Moreover, the divestitures ~~Contrary to Division policy, the remedy also fails~~ fail to *promptly* ~~to~~ restore the competition lost due to the merger. ~~The PFJ envisions a period of time measured not in months, but in years, during which the divestiture buyer~~For years DISH would be entirely or largely reliant on the merged firm for network access and would be a customer and reseller, not a full-fledged competitor. For as long as three years, the merged firm is required to provide billing, customer care, SIM card procurement, device provisioning, and other services to ~~the buyer~~DISH as "transition" services. The exceptionally long "transition" period is necessitated because the divestitures are not of an existing business entity but rather are a collection of asset carve-outs. This scenario creates heightened execution risk and excessive entanglements~~, both of which are contrary to Division policy goals~~.

~~The~~In fact, the core provisions of the ~~remedy~~federal commitmenets are not divestitures at all but rather the sharing of the "New T-Mobile" network with ~~the divestiture buyer~~DISH for a minimum of seven years under a mobile virtual network operator agreement. This is ~~the portion of the remedy that is~~ intended to give ~~the buyer~~DISH time to transition from a customer to a competitor – or, in the DOJ Antitrust Division's words, "to facilitate DISH building its own mobile wireless network with which it will compete in the retail mobile wireless service market." Whether it will ever accomplish that goal is questionable. But what it will accomplish beyond

any reasonable doubt is to cement a multiyear business relationship between ~~*the buyer*~~DISH and ~~*the merged company*~~New T-Mobile that would require extensive government oversight ~~—~~– exactly the sort of remedy ~~Division leadership~~the DOJ has strongly, and persuasively, argued is ineffective as a matter of enforcement policy and, moreover, one that inappropriately puts a law enforcement agency into a regulatory role it is ill-suited to perform.

In summary, ~~based strictly on the allegations in the Complaint, the buyer~~DISH, during the years it operates as an MVNO, would not put significant competitive pressure on the merged firm or any of the other remaining Mobile Network Operators ("MNOs"); *a fortiori*, it would not replace the competitive pressure ~~the Division alleges~~ Sprint currently exerts in the relevant market.

~~Leaving aside the remedy's significant deviations from Division policy, DISH as buyer fails the Division's standard test for a divestiture buyer. DISH lacks "~~Further, DISH lacks managerial, operational, technical, and financial capability~~"~~ to ~~"~~compete effectively~~"~~ in the relevant market. ~~The buyer in this case fails on every score — it~~DISH lacks financial resources of its own and has not secured third-party funding; it has management that has not built a wireless network despite the legal obligation to do so; and it has no experience or demonstrated technical ability to operate such a network, the challenges of which are extensive. ~~(The operational and technical challenges are discussed in the accompanying Declaration of Andrew Afflerbach.)~~ At the same time, DISH has shown a willingness to abuse a federal program to obtain over $3 billion in taxpayer-funded discounts, and thereby to make "a mockery of the small business program" in the words of then-Commissioner Ajit Pai.

T-Mobile itself highlighted DISH's lack of fitness as a buyer in an FCC filing in March, 2019, commenting that DISH has a track record of price increases for its services, speculative

warehousing of spectrum, and failing to meet FCC-imposed deadlines. T-Mobile additionally commented that "*DISH stands out for its efforts to game the regulatory system" and "has little interest in actually delivering real 5G service.*"

Even assuming for the sake of argument that a weak and otherwise unacceptable buyer could somehow transform into a strong competitor at some future date, the ~~remedy~~DISH divestiture provides insufficient incentives (positive or negative) for this transformation to take place.

From an engineering standpoint, there are numerous perils and pitfalls ~~that the PFJ ignores~~ which stand between the desire to create a new competitive retail wireless network and realization of that goal. These include activating infrastructure at tens of thousands of sites while relying on technologies that do not yet exist, creating and managing a large new team in a tight labor environment, getting permitting approvals and third-party consents, coordinating with T-Mobile (itself in the process of an ambitious build, drawing on a significant amount of expertise and network build capacity), handling procurement, and financing a project costing over ten billion dollars. Furthermore, because DISH is required to operate on a shared infrastructure with T-Mobile, it would need to rely on T-Mobile to make modifications to support new services (e.g., advanced streaming platforms, multimedia broadcast). In coordinating with T-Mobile, it may need to disclose sensitive intellectual property to a competitor to make the changes.

Moreover, the commitments DISH has made are far more limited than they appear at first blush. DISH is required to serve only 70 ~~percent~~% of the population by 2023 – and only at 35 Mbps. This speed is already exceeded in many 4G-served areas (including by Sprint) and represents a very low goal for 5G service. If 35 Mbps is the typical speed of the DISH network in 2023, while the other three facilities-based wireless carriers offer service in hundreds of Mbps –

and if this limitation is a baked-in technological limit because of fewer sites or less capacity per site – the result will not be a bona fide fourth network, but a niche network closer to the limited internet of things (IoT) network proposed by DISH prior to the T-Mobile deal.

From a financial standpoint, DISH's incentives run counter to the ~~Division's~~ goal of creating a competitively significant new entrant. Several prominent analysts who have examined DISH's incentives have pointed to: (a) the enormous financial challenges of building a competitive 5G retail network; (b) the fact that DISH may be better served financially by remaining an MVNO customer of T-Mobile rather than building a competitive network; and (c) the incentives DISH has to provide services outside of the relevant market (e.g. wholesale services) even if it does build a network.

For example, a research analyst at Guggenheim Securities wrote: "We continue to see many possible outcomes for DISH that are unlikely to result in a multi-billion dollar network build to end up a sub-scale distant fourth provider with a handful of prepaid subscribers." A CFRA analyst noted: "[W]e remain skeptical on the potential financial, technical and regulatory hurdles" DISH faces in entering the market. And Deutsche Bank Research analysts wrote: "We don't believe that DISH's strategy has been focused in any meaningful way on consumer wireless, at least not for the past few years. Instead, the company has focused on a Neutral Host wholesale model, which would allow clients to own and manage their own slice of the network through virtualization and to fully control and provision their company's own applications and services." *~~The failure of the buyer~~DISH's inability to satisfy basic ~~Division~~ requirements for a divestiture buyer, and the lack of adequate incentives for ~~the buyer~~DISH to compete in the relevant market, ~~violate long-standing Division policy~~render the federal commitments useless in remedying the proposed merger's anti-competitiveness*.

~~Finally, Division policy recognizes that c~~Complex remedies carrying a high risk of failure are antithetical to Congress's determination that risks to the public should be small. The "MVNO-to-iMVNO-to-MNO" model may be facially attractive, but as ~~the accompanying Declaration of Dr. Afflerbach explains, and~~ recent experience in Europe demonstrates, the reality is that this model is extraordinarily complex, full of risks, and may not be a profitable strategy. There is evidence both in the DOJ Amended Complaint[2] and in the FCC record[3] of the substantial harm the public would bear in the event that the remedy fails to create a viable fourth competitor – harm estimated by the DOJ Antitrsut Division to be in the billions of dollars annually.

Under any reasonable definition of the "public interest," a remedy that carries a high risk of failure and exposes the public to substantial economic harm if it fails cannot be said to be in the "public interest." The ~~Division should exercise its power under Paragraph IV(A) of the Stipulation and Order to withdraw its consent to the entry of the PFJ.~~Commission cannot find that the proposed merger, with or without the the federal commitments, is in the public interest and therefore, must deny the merger.

~~**1. Antitrust Division policy requires merger remedies to be "appropriate, effective, and principled" — the PFJ violates all of these basic tenets.**~~

II. THE FEDERAL COMMITMENTS DO NOT REMEDY THE MERGER'S JOB LOSSES OR STORE CLOSURES

[2] *See* **Attachment B**: *U.S. Department of Justice, Antritrust Division, et al. v. Deutsche Telekom AG, et al.*, Case No. 1:19-cv-02232-TJK, Fourth Amended Complaint, November 8, 2019.

[3] *See e.g.*, **Attachment C**: Letter from P. Michaelopoulos to D. Dortch re: Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, April 8, 2019 (In sum, "[t]he historical precedent lends credence to the economic findings in this merger review that prices for consumers will rise precipitously if the merger is approved."); **Attachment D**: Reply of DISH Network Corporation, Applications of T-Mobile US, Inc. and Sprint Corporation Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, October 31, 2018, pp. 22-27.

The proposed transaction puts 30,000 U.S. jobs at risk, including more than 3,000 retail jobs in California.

A. Postpaid Retail Job Losses in California

The Applicants' proposed divesture of the Boost Mobile business does not impact our initial estimate of postpaid retail job losses in California. We project that initial store closures following the merger will eliminate more than 2,864 postpaid retail positions in California, but that these losses will be somewhat offset by gains at remaining stores which will increase employment to deal with the higher volumes. We project the proposed transaction will cause a net loss of 1,707 postpaid retail jobs in California.[4]

B. Prepaid Retail Job Losses in California

We initially estimated that the merger would lead to the closure of 545 Metro and Boost Mobile prepaid stores in California. With an estimated three employees per store,[5] we projected that this consolidation in the prepaid wireless market would cost 1,635 retail jobs.[6] The Applicants' proposed divestiture of the Boost Mobile business to DISH attempts to address these concerns, among others. However, neither DISH nor T-Mobile has made any commitments to maintain employment levels in the prepaid retail operations. In the absence of such commitments, we believe that thousands of jobs in Boost and Metro stores continue to be at risk as a result of this transaction. Indeed, new analysis by CWA shows that since the announcement of their proposed merger in April 2018, the Applicants have reduced their prepaid retail footprint

[4] Opening Testimony Of Debbie Goldman On Behalf Of Communications Workers Of America District 9 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 853(a), Application No. 18-07-011, And Related Matter, Application No. 18-07-012, as amended February 4, 2019 (hereinafter *Debbie Goldman Testimony*).

[5] Employment estimates from press coverage of store openings such as: https://patch.com/florida/newportrichey/talk-time-store-opens-new-tampa-bay-location, http://www.mlive.com/business/west-michigan/index.ssf/2012/07/boost_mobile_to_open_location.html

[6] See *Debbie Goleman Testimony*, at 54.

by a net 225 retail locations resulting from 368 closures and 143 openings. This net reduction equates to 41 percent of the prepaid store closures and job losses that CWA initially projected to take place following the merger.[7] In the Los Angeles metro area, the second largest wireless market in the country, the Applicants reduced their prepaid retail footprint by 15 percent, a net decrease of 116 locations, including a 12 percent reduction of Metro locations and 20 reduction percent of Boost Mobile locations.[8]

The Applicants' shrinking prepaid retail footprint in California is alarming because this directly contradicts the Applicants' prior claims in this proceeding that there would be no change to their prepaid strategy and that their merger would create jobs. Furthermore, if the Applicants are seeking to divest the Boost operation to DISH in order to create a bona fide competitor, it is not clear why they would choose to reduce Boost retail locations by one fifth in one of the largest wireless retail markets in the country. The Applicants' actions over the last year raise serious questions about whether their unenforceable claims of public interest benefits can be trusted. Without any commitments by the Applicants to protect jobs, California remains at risk of losing thousands of additional prepaid retail jobs.

C. Downward Wage Pressure

Analysis by the Economic Policy Institute and Roosevelt Institute of the labor market impact of the proposed Sprint/T-Mobile merger found that the resulting consolidation will put downward pressure on the annual earnings of retail workers who sell wireless equipment and services. The economists found that post-merger, the annual earnings of retail wireless workers could decline by $3,276 on average (across the 50 largest markets) using the specification with

[7] CWA analysis of store location data collected from Metro and Boost Mobile's websites in May 2018 and November 2019.
[8] *Id.* The Los Angeles-Long Beach-Anaheim, CA U.S. Census Metropolitan Statistical Area includes Los Angeles and Orange counties.

the largest magnitude, and $520 on average using the smallest magnitude specification."[9] The authors found that post-merger average annual earnings of retail wireless workers will decline in these California local labor markets as follows (using the specification with the largest magnitude):

- Los Angeles: $2,906 decline in retail wireless workers annual earnings
- San Francisco: $2,953 decline in retail wireless workers annual earnings
- San Diego: $2363 decline in retail wireless workers annual earnings
- San Jose: $2,728 decline in retail wireless workers annual earnings
- Sacramento: $2,319 decline in retail wireless workers annual earnings.[10]

New evidence in the FCC's Order approving the merger supports the findings of the Economic Policy Institute and Roosevelt Institute report. In its analysis, the FCC notes that the merged entity will be able to reduce dealer commission rates because of the increased volumes after closure of duplicative retail locations.[11] These supposed "synergies" represent affirmative plans by the Applicants to use their increased market power to extract economic benefit from authorized dealers through reduced commissions. The Applicants' plans to reduce dealer commission rates will directly translate to lower compensation levels for retail workers.

D. New Evidence of T-Mobile's Violation of Workers Rights

In our Opening Testimony and Opening Brief, CWA provided the Commission with substantial evidence of T-Mobile's long history of violation of labor law and workers' rights, a

[9] Adil Abdela and Marshal Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger*, Economic Policy Institute and Roosevelt Institute (December 17, 2018), https://www.epi.org/files/pdf/159194.pdf.
[10] *Id.*
[11] Memorandum Opinion And Order, Declaratory Ruling, And Order Of Proposed Modification in the Matter of the Joint Application of Sprint Communications Company L.P. and T-Mobile USA, INC., a Delaware Corporation. For Consent To Transfer Control of Licenses and Authorizations and Applications of American H Block Wireless before the Federal Communications Commission. FCC 19-103. WT Docket No. 18-197. Adopted October 15, 2019.

history that speaks volumes about the Applicant's trustworthiness and corporate character.[12] We now update this evidence. Recently, the National Labor Relations Board's Region 32 found merit to the following unfair labor practice charge allegations that CWA filed against T-Mobile on September 16, 2019 regarding employer behavior at a T-Mobile retail store in Pinole, CA:

> Within six months, the employer threatened employees with discharge in response to protected concerted activity. The employer, through the same person [name], interrogated employees about their protected concerted activity. [Name] further precluded employees from addressing group or workplace concerns, impliedly threatened employees with transfer in retaliation for protected concerted activities, and advised employees of the futility of organizing a union.[13]

III. THE FEDERAL COMMITMENTS DO NOT REMEDY THE MERGER'S COMPETITION CONCERNS

A. Antitrust Division Policy Requires Merger Remedies to be "Appropriate, Effective, and Principled" – the DISH Divestiture Violates All of These Basic Tenets

The ~~PFJ~~DOJ's Antitrust Division policies on merger remedies provide guidance for determining whether the federal commitments resolve the proposed merger's anti-competitivenss.[14] They do not. In fact, the DISH divestiture violates a number of clearly articulated Antitrust Division policies on merger remedies and, therefore, could not resolve the merger's anti-competitiveness.~~[1]~~

[12] Opening Testimony of Debbie Goldman, as amended February 4, 2019, pp. 61-64; Opening Brief of CWA, April 26, 2019, pp. 32-34

[13] Communications Workers of America, District 9, Unfair Labor Practice Charge against Deutsche Telekom AG d/b/a T-Mobile, Case 32-CA-248363, filed Sept. 16, 2019; National Labor Relations Board Settlement Agreement, In the Matter of T-Mobile USA, Inc., Case 32-CA-248363.

[14] Sources of Antitrust Division merger remedy policies include: (a) U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) ("2004 Merger Remedies Guide"), https://www.justice.gov/atr/page/file/1175136/download; (b) speeches, testimony and other public statements of Division officials, *see* ANTITRUST DIVISION MANUAL (Fifth Edition) at III-21 ("Other sources of Division policy include the public statements of Division officials"), https://www.justice.gov/atr/file/761166/download; and (c) court filings by the United States that include statements about Division policy.

~~[1] Sources of Antitrust Division merger remedy policies include: (a) U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) ("2004 Merger Remedies Guide"), https://www.justice.gov/atr/page/file/1175136/download; (b) speeches, testimony and other public statements of Division officials, *see* ANTITRUST DIVISION MANUAL (Fifth Edition) at III-21 ("Other sources of Division policy~~

On the most fundamental level, Antitrust Division policy mandates that any merger remedy must adhere to three basic tenets. As stated in the 2004 Merger Remedies Guide: "Remedial provisions in Division decrees must be appropriate, effective, and principled."~~2~~[15] The use of the word "must" shows that these characteristics are not optional. The remedy here violates all of these basic tenets.

In order to be "appropriate," a remedy must address the competitive harm alleged ~~in the complaint~~. The government is obligated to insure that "the remedy fits the violation and flows from the theory of competitive harm."~~3~~[16] Stated otherwise, "[t]here must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions."~~4~~[17]

In this case, the Antitrust Division's Amended Complaint ~~contains a summary of the Division's~~summarizes its theory of harm for the proposed merger. The merger would "eliminate Sprint as an independent competitor" in the national market for retail mobile wireless service, thereby "reducing the number of national facilities-based mobile wireless carriers from four to three."~~5~~[18] The elimination of Sprint as an independent competitor would cause the merged firm to "compete less aggressively" and "likely would make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings."~~6~~[19] The result would be "increased prices and less attractive service offerings for

~~include the public statements of Division officials"), https://www.justice.gov/atr/file/761166/download; and (c) court filings by the United States that include statements about Division policy.~~

~~2~~[15] 2004 Merger Remedies Guide at 2.

~~3~~[16] *Id.* at 3-4.

~~4~~[17] *Id.* at 2.

~~5 Complaint~~[18] **Attachment B:** ¶¶ 5, 14, 15.

~~6 Complaint~~[19] *Id.* ¶ 5.

American consumers, who collectively would pay billions of dollars more each year for mobile wireless service."[7][20]

Sprint is characterized as an "independent competitor" and one of four "national facilities-based mobile wireless carriers." There is no suggestion anywhere in the Amended Complaint that carriers without their own networks (~~Mobile Virtual Network Operators or~~ MVNOs) are competitively significant market participants in the relevant market alleged in the Amended Complaint. Indeed, paragraph 16 suggests the opposite: "Post-merger, the combined share of T-Mobile and Sprint would account for roughly one-third of the national retail mobile wireless service market, leaving only two other national wireless carriers of roughly equal size (AT&T and Verizon)." In other words, the four facilities-based competitors are the only competitively significant firms in the market as alleged. There is no suggestion anywhere in the Amended Complaint that MVNOs would or could constrain the post-merger price increases the Antitrust Division has predicted or that they would or could disrupt the coordinated effects the Antitrust Division has alleged.

A complaint that alleges competitive harm in one relevant market is not appropriately remedied by divestitures that enable a buyer to participate in a different market, as a competitively insignificant force in the relevant market alleged in the complaint, and unable to constrain the asserted competitive harm. In order to be "effective," a remedy must restore the

[7] ~~Complaint~~[20] *Id.* ¶ 5.

competition lost through the merger.[8][21] That is the only acceptable goal of a merger remedy.[9][22] The 2004 Merger Remedies Guide uses the word "effective" dozens of times, including in a quotation from the Supreme Court: "The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'. . ."[10][23]

There are two dimensions of remedial effectiveness we focus on here: First, a divestiture remedy "must include all assets necessary for the purchaser to be an effective, long-term competitor."[11][24] Second, the remedy must allow the purchaser "to compete effectively in a timely fashion."[12][25] The first of these requirements takes a long term view, the second looks at the near term. The remedy fails on both scores.

The assets to be divested do not include a fully operational standalone network with a core and spectrum, which is the critical asset that differentiates an independent, competitively significant ~~mobile network operator (~~MNO~~)~~ from a dependent, competitively insignificant ~~MVNO.~~[13]MVNO.[26]

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[8][21] Sprint has $33.6 billion in annual revenue, $12.8 billion in annual EBITDA, $84.6 billion in assets, $21.2 billion property, plant, and equipment, 28,500 employees, 300 million POPs, 46,000 towers, 30,000 small cells, 1,500 massive MIMO radios, 14 MHz in 800 MHz band, 40 MHz in the 1.9 GHz band, and 150 MHz in the 2.5 GHz band (varies by location), 54.5 million subscribers, including 28.4 million postpaid, 8.8 million prepaid, and 12.9 million wholesale. In contrast, DISH has $13.4 billion in annual revenue, $2.8 billion in annual EBITDA, $31.7 billion in assets, $2.6 billion in property, plant, and equipment, 16,000 employees, 10-40 MHz in the 600 MHz band, 6 MHz in 700 MHz band, 70 MHz in the AWS band, and no wireless subscribers. Sprint's leverage ratio is 2.6x compared to DISH at 6x (Source: CapitalIQ for LTM 12 months ending in March 31, 2019; DISH leverage ratio: Bank of America).

[9][22] 2004 Merger Remedies Guide at 4 ("restoring competition is the only appropriate goal with respect to crafting merger remedies").

[10] ~~2004 Merger Remedies Guide~~[23] *Id.* at 9 n.13 (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972)).

[11] ~~2004 Merger Remedies Guide~~[24] *Id* at 9.

[12][25] *Id.*

[13][26] *See* 2004 Merger Remedies Guide at 15 n.21 ("A critical asset is one that is necessary for the purchaser to compete effectively in the market in question.").

In *United States v. Aetna and Humana*, the Antitrust Division alleged that the lack of a network (in that case, a provider network) was a key reason for rejecting the partial asset divestiture proposed by the parties as a remedy. The Antitrust Division also highlighted the difference between an "independent competitor" and one dependent on the merged entity. As the Antitrust Division alleged in its complaint:

> 60. The buyer would not be an independent competitor as Humana is today. The proposed remedy would leave the buyer dependent on Aetna—potentially for years—for providing basic services. Since the buyer would not have a healthcare provider network in place or be acquiring an intact business unit that would enable it to operate on its own, it would have to rely on Aetna's healthcare provider network and receive administrative services from Aetna for a lengthy period. Because the buyer would receive only limited assets, the buyer would be highly unlikely to timely replicate Aetna's and Humana's existing provider networks and competitive strengths in the relevant markets.[~~14~~27]

This case illustrates the problem with a divestiture that lacks a key asset that cannot be readily obtained or duplicated by the buyer. Without that asset, the buyer cannot compete in the relevant market. The absence of a critical asset in this case is even more significant than in the Aetna case: If anything, it is far more difficult and challenging for a divestiture purchaser to create a nationwide wireless network than a healthcare provider network. The remedy here significantly departs from Antitrust Division policy that a divestiture must include all of the assets necessary for the purchaser to be an effective, long-term competitor. (We discuss several other reasons to doubt that the purchaser would ever become an effective long-term competitor in the relevant market later in these comments.)

The timeliness of a remedy is also critical. Per Antitrust Division policy, the remedy must "restore[ ] premerger competition to the marketplace as soon as possible."[~~15~~28] Deputy Assistant

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[~~14~~27] Complaint, *United States et al. v. Aetna Inc. and Humana Inc.*, Case 1:16-cv-01494 (July 21, 2016), available at https://www.justice.gov/atr/file/878196/download.

[~~15~~28] 2004 Merger Remedies Guide at 29.

Attorney General Barry Nigro emphasized this point in a speech in 2018: "[T]he goal of a divestiture is not to simply remove the offending combination; rather, it is to promote and protect competition by preserving the status quo competitive dynamic in the market from day one."~~16~~29

The Antitrust Division has explained the rationale behind this policy as follows:

> A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process.~~17~~30

The ~~PFJ~~DISH divestiture dramatically departs from the long-standing Antitrust Division policy that an effective remedy must quickly restore the lost competition in the relevant market alleged in the complaint. Here, the remedy envisions a multiyear process whereby the divestiture buyer may, someday, transform from an MVNO into an "Infrastructure MVNO" (iMVNO) and then into an MNO. At that point, assuming it ever arrives, the remedy would "restore premerger competition to the marketplace" and "protect competition by preserving the competitive dynamic in the market." But it is indisputable that this result, assuming it occurs at all, will take years. The remedy will not restore competition "quickly," let alone on "day one." In the interim, subscribers to ~~the buyer~~DISH's prepaid wireless service may go elsewhere, eliminating one of the asserted benefits of transferring these customers. Further, while Sprint currently has postpaid as well as prepaid customers, the remedy does nothing to enable ~~the divestiture buyer~~DISH to quickly ~~to~~ enter the postpaid segment of the market, which is the more profitable segment.

~~16~~29 Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

~~17~~30 2004 Merger Remedies Guide at 29.

Finally, the remedy in this case includes non-contract (prepaid) customers, limited intellectual property rights, and assets that are not freely transferable but require decommissioning and third-party consents.

In sum, the remedy in this case lacks the fundamental characteristics the Antirtrust Division requires, as a matter of policy, in an "effective" remedy.

The remedy is not "principled." One of the guiding principles of merger remedies is that "[t]he remedy should promote competition, not competitors."[18][31] As the 2004 Merger Remedies Guide states: "Because the goal is reestablishing competition — rather than determining outcomes or picking winners and losers — decree provisions should promote competition generally rather than protect or favor particular competitors."[19][32]

Senator Mike Lee has raised questions about the Antritrust Division's adherence to this guiding principle. As Senator Lee has stated, "I have concerns whenever government joins hands with industry to cobble together a would-be competitor, particularly one who so stridently opposed the merger earlier this year."[20][33] Doing so "will no doubt invite similar gamesmanship in future antitrust reviews."[21][34] The remedy attempts to cobble together an entirely new wireless competitor. The selection of DISH as that would-be new competitor raises questions about whether the Antitrust Division is carrying out its law enforcement mandate or is stepping outside of its role.

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[18][31] 2004 Merger Remedies Guide at 5.

[19][32] ~~2004 Merger Remedies Guide at 5.~~*Id.*

[20] "[33] Sen. Lee Comments on DOJ's T-Mobile/Sprint Decision," July 26, 2019, available at ~~https://www.lee.senate.gov/public/index.cfm/press-releases?ID=E4D78A0C-2096-4830-889F-825516016647~~https://www.lee.senate.gov/public/index.cfm/press-releases?ID=E4D78A0C-2096-4830-889F-825516016647.

[21][34] *Id.*

DISH has been a persistent and vocal opponent of the proposed merger from the beginning. It has submitted detailed economic evidence rebutting the ~~parties~~Applicants' claims that the transaction would be procompetitive. As recently as March, T-Mobile asserted that "DISH has little interest in actually delivering real 5G service and its private pecuniary interest is to delay or *block* those who would actually do so."~~22~~[35] In the same month, T-Mobile accused DISH's economists of fabricating data.~~23~~[36] Now the ~~parties~~Applicants and DISH have reached an accommodation with each other. The deal joins the ~~two companies~~T-Mobile and DISH at the hip for up to seven years, ridding T-Mobile of a thorn in its side. The deal also would delay yet again FCC network deployment deadlines that DISH must meet, ridding DISH of the prospect of spectrum forfeiture.

~~The issue is not whether the Division has the authority to approve a proposed purchaser. Of course it does. Division policies relevant to the review and approval of a purchaser are discussed later in these comments, and particularly the "fitness" test for the buyer and the requirement that "the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market." However, Division policy recognizes that there are times when remedies are not appropriate or feasible. One of those times is when an effective divestiture would essentially mean divesting one of the firms involved in the merger in order to restore competition. When "the entity that needs to be divested may actually be the firm itself," then "blocking the entire transaction rather than accepting a divestiture may be the only effective solution."~~[24]

In sum, the DISH divestiture fails to satisfy Antitrust Division ~~has not articulated any reasons, let alone principled reasons, why it has turned its back on its own~~ merger remedy policies ~~in this case, many of~~ which ~~are longstanding and~~ represent sound antitrust enforcement.

~~22~~[35] *See* Ex Parte Letter from Nancy J. Victory, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2019), at 1 n.3, available at https://ecfsapi.fcc.gov/file/1031124977749/March%2011%202019%20Pricing%20ex%20parte.pdf.

~~23~~[36] *See* Letter from Regina M. Keeney, Nancy J. Victory and additional signatories to Marlene H. Dortch, Secretary, Federal Communications Commission (March 14, 2019) at 1-2, available at https://ecfsapi.fcc.gov/file/10314256344084/March%2014%202019%20Public%20Ex%20Parte%20(Response%20to%20Brattle).pdf.

~~24 2004 Merger Remedies Guide at 14-15.~~

B. The ~~d~~Divestiture of ~~l~~Less ~~t~~Than a ~~f~~Full bBusiness ~~u~~Unit ~~c~~Carries ~~s~~Significant ~~e~~Execution ~~r~~Risk and the ~~r~~Risk is ~~p~~Particularly ~~h~~High in ~~t~~This ~~c~~Case

The divestiture of less than a full business unit creates a serious risk that the divestiture will fail to restore competition. This is why, as a matter of policy, the Antitrust Division "favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market."~~25~~37 As Deputy Assistant General Barry Nigro has stated, "asset carve outs are fraught with execution risk."~~26~~38

The DISH divestitures ~~in the PFJ~~ are far less than a full business unit. The divested assets in this case include prepaid brands with high churn rates, options on "decommissioned" cell sites and "decommissioned" retail stores (that may additionally require third-party consents), and an option to acquire Sprint 800 MHz licenses representing a small frequency band. If asset carve outs in general are "fraught with execution risk," the execution risk is even greater in this case.

~~The divestiture buyer~~DISH will have no reliable track record for current and prospective customers to evaluate whether the business will continue to be a reliable provider of the relevant products.~~27~~39 Here, for example, the Boost and Virgin brands will be divested, but not the network on which the phones run, the vast majority of retail stores, or the call centers. This creates a potential one-two punch for customers who experience issues with their phones or network service and leads to the likelihood that customer churn will be even higher than it is now. Sprint's prepaid customer churn is already very high – more than 4% monthly, according to its SEC filings.~~28~~40 If Boost, Virgin and Sprint prepaid customers were to switch to other carriers,

~~25~~37 2004 Merger Remedies Guide at 12.

~~26~~38 Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), available at https://www.justice.gov/opa/speech/deputy-assistant-attorneygeneral-barry-nigro-delivers-remarks-annual-antitrust-law.

~~27~~39 2004 Merger Remedies Guide at 12-13.

~~28~~40 Sprint Communications, SEC Form 10Q, August 6, 2019, p. 47.

even at the current rate of churn, the divestiture buyer could easily lose most of its installed base of customers within two years – well before it could be expected to construct its own network even under the most optimistic of projections. This would wipe out the asserted benefits to the buyer of "acquiring an installed base of existing customers."[29][41]

Second, Antitrust Division policy highlights that the divestiture of less than a full business entity carries the risk that the seller will sell fewer assets than are required for the purchaser to compete effectively going forward while the buyer may be willing to purchase these assets, even if they are insufficient to restore competition, at a low enough price.[30][42] As the Antitrust Division has aptly observed:

> A purchaser's interests are not necessarily identical to those of the public, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or enabling it to produce weak competition in the relevant market), it may be willing to buy them at a fire-sale price regardless of whether they cure the competitive concerns.[31][43]

In this case, both of these concerns are front and center. The assets being sold are on their face insufficient to cure the competitive concerns, as they represent a tiny fraction of Sprint's existing business. And, although the terms of the commercial agreements are confidential, one may assume in the absence of evidence to the contrary that ~~the buyer~~DISH has negotiated favorable terms in exchange for withdrawing its opposition to the transaction.

Under these circumstances, neither the seller's nor the buyer's interest can be expected to match the interest of the public.

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[29][41] Competitive Impact Statement at 9.
[30][42] 2004 Merger Remedies Guide at 13.
[31][43] *Id.*

C. At its ~~c~~Core, the ~~remedy~~Divestiture ~~d~~Depends on ~~b~~Behavioral ~~c~~Conditions that ~~w~~Will ~~l~~Last for ~~y~~Years, ~~c~~Creating ~~e~~Excessive ~~e~~Entanglements ~~b~~Between ~~b~~Buyer and ~~s~~Seller and ~~r~~Requiring ~~m~~Multiyear ~~o~~Oversight

Although the Antitrust Division has characterized the ~~remedy in this case~~DISH divestiture as "structural," ~~we respectfully submit~~ that this is not an accurate characterization. Under Antitrust Division policy, the term "structural" is generally reserved for divestiture remedies that do not involve ongoing entanglements between the divestiture buyer and seller, do not involve ongoing regulation of the buyer or seller's conduct, and do not require lengthy and extensive government monitoring and enforcement. The ~~remedy in this case~~DISH divestiture is more accurately characterized as a "conduct" remedy that includes certain limited divestitures. As such, it is contrary to long-standing DOJ policy which strongly favors structural remedies over behavioral decrees, particularly in horizontal mergers.[~~32~~44]

The weaknesses inherent in behavioral decrees are spelled out in the 2004 Merger Remedies Guide:

> Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. . . . A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.[~~33~~45]

Antitrust Division leadership has elaborated on the problems with behavioral remedies in recent speeches. In a 2017 speech, Assistant Attorney General Delrahim explained that behavioral remedies are inherently regulatory, and therefore at odds with both free market principles and the dynamic realities of markets:

[~~32~~44] *See* 2004 Merger Remedies Guide at 9 ("structural merger remedies are strongly preferred to conduct remedies"). Indeed, the current Division leadership has reinforced the strong preference for structural relief by withdrawing the 2011 Merger Remedy Guides which lacked this explicit statement of Division preference. See Assistant Attorney General Makan Delrahim, "Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium" (September 25, 2018) at 11-12 (withdrawing 2011 Merger Remedies Guide and stating that 2004 Merger Remedies Guide will be in effect until Division releases an updated policy).

[~~33~~45] 2004 Merger Remedies Guide at 7-8.

> Like any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don't think I'm smart enough to do that.
>
> Behavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep's clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.[~~34~~46]

Deputy Assistant Attorney General Barry Nigro expanded on these principles in a speech in 2018. He stressed that there is a growing consensus among antitrust economists and attorneys that *behavioral remedies "may simply be ineffective at remedying harm to competition*." Plus, he emphasized the costs of monitoring and enforcing such remedies, and in particular the fact that the Antitrust Division too often finds itself in the business of investigating possible violations. This is not surprising, as behavioral decrees compel companies not to do things they ordinarily would do, and compel them to do other things they ordinarily would not do in an unregulated environment:

> The imposition of a behavioral remedy inverts the Division's role into something it is not—the hall monitor for private businesses operating in a free market economy. Even worse, a behavioral approach raises serious risks of false negatives and false positives. Antitrust economists and attorneys across the ideological spectrum have recognized that behavioral decrees may simply be ineffective at remedying harm to competition. As FTC Commissioner Terrell McSweeny explained last year, behavioral relief 'at best only delays the merged firm's exercise of market power.' In addition, trying to regulate corporate behavior creates challenges monitoring and enforcing compliance. It should be no surprise that we find ourselves too often in the business of expending scarce taxpayer resources investigating possible violations of regulatory decrees, all

[~~34~~46] U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (November, 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

aimed at ensuring that consumers do not suffer the harm the decree attempted to regulate away.[35][47]

The bulk of the remedial provisions in the ~~PFJ~~federal commitments consist of behavioral conditions. Some of these require the merged company to work against its profit-maximizing incentives, such as by providing numerous services to a would-be competitor for an extended period of time. Others purport to order ~~the buyer~~DISH to do things it would not ordinarily do, such as to offer a particular type of service. The net result is excessive entanglements between buyer and seller and the requirement of multiyear oversight.

Indeed, the Antitrust Division has experience in the telecom space with a failed remedy involving excessive entanglements. In 1998, MCI/WorldCom agreed to divest MCI's Internet assets to Cable & Wireless as a merger remedy.[36][48] At the time, Sprint and other third parties expressed concern that Cable & Wireless' post-divestiture dependence on MCI WorldCom for transport, operations support, and other services would leave Cable & Wireless vulnerable and a weak competitor.[37][49]

Within two years, Cable & Wireless' Internet market share dropped from MCI's pre-divestiture 40 percent to less than 10 percent.[38][50] As it turned out, MCI failed to transfer all necessary personnel, contracts, contract documentation, database access, and billing services, despite obligations to do so.[39][51] The result was not replacement of lost competition but was,

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[35][47] U.S. Dep't of Justice, Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

[36][48] *See In the Matter of Application of Worldcom, Inc. & MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to Worldcom, Inc.*, 13 F.C.C. Rcd. 18025 ¶151 (F.C.C. 1998).

[37][49] *Id.* at 154 and fn. 426 (citing, among other comments, Sprint June 11, 1998 Comments at 11, 16).

[38][50] CWA Comments, MCI/World Com Applications for Transfer of Control, CC Docket No. 99-333 at 37. Data from Applicants' Internet Submission Attachments 3 and 5 for C&W's 2000 market share and *Boardwatch* June 1997 for MCI's pre-divestiture market share.

[39][51] *See* Cable & Wireless FCC Comments, CC Docket No. 99-333, Feb. 18, 2000 at 36-41.

instead, litigation. Cable & Wireless eventually lodged a formal complaint with the European Commission and filed suit against MCI WorldCom in U.S. District Court, reaching an out of court $200 million settlement.[40][52]

The failed MCI divestiture to Cable & Wireless should stand as a stark warning ~~to the Division~~ about excessive entanglements and information asymmetries in a telecom remedy.

D. ~~4.~~ DISH ~~f~~Fails to ~~m~~Meet ~~the Division's s~~Standard ~~r~~Requirements for a ~~d~~Divestiture ~~b~~Buyer

~~Given that the~~The Antritrust Division's Amended Complaint alleges that the loss of a fourth competitor in the retail wireless market is competitively harmful. The record here also shows that the loss of Sprint as a fourth competitor would be competitively harmful. Thus, the minimum requirement that any remedy must meet to protect the public interest is that it must recreate a competitively significant fourth competitor. ~~If it fails to do so, the result has been predicted in the complaint.~~ This makes the competitive attributes of DISH ~~not only relevant to the Tunney Act, but~~ critical to the Commission's public interest determination. If DISH is not a suitable or effective competitor, the remedy is likely to fail and the competitive harm ~~alleged in~~of the ~~Complaint~~merger will not be remedied.

The DOJ Antitrust Division policies are, once again, useful guidance on this issue. The Antitrust Division requires divestiture buyers to demonstrate "managerial, operational, technical, and financial capability" to "compete effectively" in the relevant market alleged in the complaint.[41][53] The buyer in this case fails on every score ~~— it~~ – DISH lacks financial resources of its own and has not secured third-party funding; it has management that has not built a wireless

[40][52] Rebecca Blumenstein, *MCI WorldCom to Pay Cable & Wireless $200 Million to Settle Internet Dispute*, Wall Street Journal, March 2, 2000, available at https://www.wsj.com/articles/SB951922751787792103.
[41][53] 2004 Merger Remedies Guide at 32.

network despite the legal obligation to do so; and it has no experience or technical ability to operate such a network, the challenges of which are extensive. At the same time, ~~the buyer~~DISH has demonstrated a willingness to abuse a federal program to obtain over $3 billion in taxpayer-funded discounts, and thereby to make "a mockery of the small business program" in the words of then-Commissioner Ajit Pai.[42][54]

1. ~~A.~~ Financial

Financially, DISH is not in good shape. It has been steadily losing customers.[43][55] It is highly and increasingly leveraged, with significant debt maturing soon.[44][56] Analysts predict that DISH will have difficulty meeting its debt obligations related to DBS in 2022 and that business may be forced into a restructuring.[45][57] Moody's states that DISH's June 2021 $2.0 billion

[42][54] Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing before the Senate Appropriations Subcommittee on Financial Services and General Government (May 12, 2015) at 5, https://www.appropriations.senate.gov/imo/media/doc/hearings/051215%20Commissioner%20Pai%20Testimony%20-%20FSGG.pdf.

[43][55] *See* Tuna N. Amobi, CFRA Research Note, July 30, 2019 ("We project a decline of 7.8% in 2019 revenues, to $12.56 billion. In recent years, DISH has persistently shed a relatively sizable portion of its traditional pay-TV subscriber base (down 7% in H1 2019 on top of a 10% decline in 2018 on some notable carriage disputes and a 9% decline in 2017 in the aftermath of hurricane disruptions). With likely continued pricing pressures on a blended pay-TV average revenue per user (ARPU), we see another 4.5% decline in 2020 revenues. . . .") (Accessed via Standard & Poor's Capital IQ research database, hereinafter "CIQ.")

[44][56] See "Ratings Action: Moody's places DISH Network's and DISH DBS's ratings on review for downgrade," July 29, 1019, https://www.moodys.com/research/Moodys-places-DISH-Networks-and-DISH-DBSs-ratings-on-review--PR_405815 (detailing the company's debt maturity obligations, the ratings agency noted "DISH DBS's leverage is high at about 4.2x (with Moody's standard adjustments) as of March 31, 2019, and it has steadily mounting maturities with $4.4 billion due through June 2021. We believe that the company can meet the DISH DBS September 2019 $1.3 billion maturity and the $1.4 billion purchase price for the prepaid wireless subscriber businesses being acquired with cash and securities on hand ($2.4 billion as of March 31, 2019) and free cash flow generated through the close of the acquisition. However, DISH DBS has another maturity totaling $1.1 billion in May 2020 and another totaling $2.0 billion in June 2021 which appear to be beyond current cash flow capacity. Therefore, it is highly likely in our view, that the company will raise new debt at DISH Network over the coming year. . . . If any or all of the capital needs are financed with new debt, a significant strain on DISH's consolidated balance sheet will likely occur.").

[45][57] Jeffrey Wlodarczak, Pivotal Research Group, "Story Morphs from Spectrum Sale to Building Wireless Business," July 30, 2019 ("Using our current forecasts, we believe that the core DBS business will have difficulty repaying its $~~213~~2B '22 maturity, and beyond . . . . potential DBS could be forced into '22 restructuring")(Accessed via ~~CIQ~~CIQ).

maturity is "beyond cash flow capacity" and the company likely will need to take on new debt.[46][58]

According to its CEO, DISH presently has no financing in place to build a 5G retail network.[47][59] This should be a big red flag for the ~~Division~~Commission. At least one analysist has commented that DISH's estimate of the cost of building a network is so low as to be "just silly."[48][60] In short, while Sprint may have financial challenges, it is at least actively building a 5G network. DISH, on the other hand, faces similar if not greater financial challenges in its present business without factoring in the billions of dollars it would cost to construct a 5G retail network. ~~Under the Division's standard policy,~~ DISH has failed to show that it has the financial capability required of an acceptable buyer.

2. ~~B.~~ Managerial

Over the last year DISH has lost a significant number of senior executives.[49][61] Its management has no experience building a retail 5G network. There has been no showing that it has the management in place to oversee the construction of a 5G retail network. Moreover, DISH's CEO has earned a reputation as an unreliable partner with an appetite for litigation.[50][62]

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[46][58] See https://www.moodys.com/research/Moodys-places-DISH-Networks-and-DISH-DBSs-ratings-on-review--PR_405815.

[47][59] *See* Drew FitzGerald, Dish's Ergen Defends Company's Wireless Plans, Wall Street Journal (August 6, 2019) ("We know that we do need to strengthen our balance sheet, but we don't need it tomorrow . . . . We don't need $10 billion tomorrow. In fact, we don't need any money tomorrow,"), https://www.wsj.com/articles/dishs-ergen-defends-companys-wireless-plans-11565119655; Jeffrey Hill, The Dish on Ergen's 5G Masterstroke, Via Satellite (October 2019) ("We still plan to spend about $10 billion to build our network and we're still going to need help."), http://interactive.satellitetoday.com/via/october-2019/the-dish-on-ergens-5g-masterstroke/.

[48][60] *See* Daniel Frankel, Can Dish Really Build a 5G Network for $10B?, Multichannel News (August 5, 2019) ("Verizon spends $15 billion annually to maintain a network that they've already built," MoffettNathanson principal and senior analyst Craig Moffett wrote in a research note. "The idea that Dish might spend $10 billion (their own estimate on previous conference calls) and then somehow be finished is, well, just silly."), https://www.multichannel.com/news/can-dish-really-build-a-5g-network-for-10b.

[49][61] Jeffrey Wlodarczak, Pivotal Research Group, "Story Morphs from Spectrum Sale to Building Wireless Business," July 30, 2019 ("Over the last year DISH has lost a significant number of senior executives.")

[50][62] *See, e.g.*, Mike Dano, "What Does Dish's Charlie Ergen Want?" https://www.lightreading.com/mobile/5g/what-does-dishs-charlie-ergen-want-/d/d-id/752684; Dish Network's

This hardly makes DISH management a "maverick" in the sense contemplated by the Horizontal Merger Guidelines.

3. ~~C.~~ Technical and Operational

DISH faces enormous operational and technical obstacles in emerging as an independent competitor with its own 5G network and has not demonstrated that it has the necessary expertise to do so. ~~As Dr. Afflerbach notes in the attached Declaration, because~~ Because T-Mobile will control the technical aspects of the network, T-Mobile will be able to limit the MVNO's potential service strategies—for example, by determining where networks will and will not be upgraded, and when and whether new services will be available. ~~Dr. Afflerbach also observes that the~~The proposed relationship between T-Mobile and DISH turns the typical MNO incentive on its head: "MNOs typically only seek ways to monetize their excess capacity where it exists—not to nurture the MVNOs." In addition, since the MVNO is essentially reselling the MNO's service, deficiencies in the service provided by the merged company become unsolvable deficiencies in the MVNO's service. Enforcement will be difficult, and remedies may not be commensurate with the harm inflicted on DISH. Simply by underperforming or delaying response to resolving technical problems, the merged company can badly harm the buyer.

~~As Dr. Afflerbach also notes,~~ DISH's execution risks in constructing a network are substantial and real. Under the most optimistic timeline, DISH will require at least a year to build a robust internal team, seek and select contractors, and prepare detailed designs and engineering. DISH will need more than four years to deploy tens of thousands of sites with robust fiber backhaul to develop a reliable footprint that is not highly dependent on T-Mobile. That process

Charlie Ergen Is the Most Hated Man in Hollywood, https://www.hollywoodreporter.com/news/dish-networks-charlie-ergen-is-432288.

will require extensive design, planning, procurement, site acquisition, and approvals—as well as an enormous capital investment.

On July 30 and July 31, 2019, DISH staff met with FCC Commissioners and staff to discuss the company's technical and business plans and to share an executive summary of the "RFI/P" DISH had earlier distributed to potential industry suppliers. Based on the executive summary of the RFI/P provided in the Ex Parte filing, we see that DISH is still in a fact-finding stage—identifying which suppliers may be candidates for different parts of the build process, and asking wide-ranging questions about their potential roles. This type of document usually precedes engineering and design decisions, the development of more focused procurement documents, and the selection of contractors to supply materials and build a network.

In addition, the 3GPP Rev 16 equipment that DISH Chairman Charlie Ergen has said would be central to building a highly virtualized network with low operation costs relies on standards that will not be available until 2020, with actual equipment possibly not available until late 2020 or 2021. Without that equipment, DISH would need to change its approach to a less virtualized network and, potentially, a different business model.

DISH's risk factors thus include activating infrastructure at tens of thousands of sites while relying on technologies that do not yet exist, creating and managing a large new team in a tight labor environment, getting permitting approvals, coordinating with T-Mobile (itself in the process of an ambitious buildout—which could limit T-Mobile's resources available for coordinating with DISH), handling procurement, and financing a project likely to cost more than $10 billion.

In this light, it is also worth considering other major communications infrastructure initiatives (e.g., Google Fiber) that failed to execute according to plan.

4. ~~D.~~ History of Regulatory Evasion

In addition to failing the Antitrust Division's standard evaluation of a potential buyer, DISH has two attributes which make it uniquely unsuited as a divestiture buyer. First, it has a well-documented history of warehousing spectrum and avoiding its obligations to the FCC. Second, it has abused the FCC's small business program.

a. ~~I.~~ Warehousing spectrum

T-Mobile itself highlighted DISH's long history of speculative warehousing of spectrum and failure to meet FCC-imposed deadlines. As T-Mobile commented in a March 2019 letter to the FCC, "*DISH stands out for its efforts to game the regulatory system" and "has little interest in actually delivering real ~~5G~~5G service.*"[~~51~~63] As ~~we detail~~detailed below, in three separate instances dating back to 2009, DISH acquired spectrum licenses and each time missed the FCC mandated construction deadlines. In fact, DISH has failed to put any of its extensive spectrum holdings to use. Now, DISH seeks approval from the FCC for further extension of its construction deadlines to 2025 – a full 16 years after its initial spectrum acquisition. Based on this track record, the ~~Division~~Commission should view with enormous skepticism the DISH commitments to build a facilities-based wireless network.

700 MHz E Block. In 2008, DISH won in the Lower 700 MHz E Block 168 licenses in auction 73. The licenses were granted in February 2009. The FCC rules for this spectrum block require licensees to construct a wireless network reaching 35 percent of the geographic area of each licensed Basic Economic Area (BEA) by June 2013 and 70 percent of the geographic area of each BEA by 2019.[~~52~~64] One day before the 2013 deadline, DISH asked the FCC for an

[~~51~~63] *See* Ex Parte Letter from Nancy J. Victory, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2019), at 1 n.3, available at https://ecfsapi.fcc.gov/file/1031124977749/March%2011%202019%20Pricing%20ex%20parte.pdf.

[~~52~~64] *See* 28 FCC Rcd 15122 ¶ 55, *See also* 47 CFR 27.14G

extension and easing of build out requirements. The FCC complied, extending the first construction deadline to March 2017, and the second to March 2021, and easing the construction requirements to 40 percent and 70 percent of the population of each BEA. DISH missed the March 2017 deadline, triggering a requirement that DISH build to 70 percent of the population in each BEA by March 7, 2020.[53][65] With this deadline looming, DISH asked the FCC on July 26, 2019 to delay the construction deadline once again, with a requirement to build to 50 percent of the U.S. population by 2023, and to 70 percent of the population in each BEA by 2025.[54][66] The 2025 deadline is a full 16 years after DISH acquired the spectrum licenses. To date, the FCC has not approved the construction extension request.[55][67]

AWS-4 Spectrum. In March 2012, DISH acquired the spectrum licenses in the bankruptcy of two satellite companies. In December 2012, the FCC approved DISH's request to use the spectrum for terrestrial wireless, creating the AWS-4 service. In the AWS-4 Order, the FCC required DISH to build out to 40 percent of the population in each BEA by March 2017 and to 70 percent of the population in each BEA by March 2020.[56][68] Missing the March 2017 deadline would push the 2020 deadline back to March 2019. DISH subsequently asked for, and the FCC granted, an extension of the 2020 deadline to March 2021, with a push back to March 2020 if the

[53][65] *Id.*

[54][66] *See* Application for Extension of Time of American H Block Wireless L.L.C., ULS File No. 0008741236 (filed July 26, 2019); Application for Extension of Time of Gamma Acquisition L.L.C., ULS File No. 0008741603 (filed July 26, 2019); Application for Extension of Time of Manifest Wireless L.L.C., ULS File No. 0008741789 (filed July 26, 2019). *See* also Letter from Jeffrey H. Blum, DISH Senior Vice-President, Public Policy & Government Affairs to Donald Stockdale, Chief, Wireless Telecommunications Bureau, *re: DBSD Corporation, AWS-4, Lead Call Sign* ~~*7070272001*~~*T070272001; Gamma Acquisition L.L.C., AWS-4, Lead Call Sign* ~~*7060430001*~~*T060430001; Manifest Wireless L.L.C., Lower 700 MHz E Block, Lead Call Sign* ~~*WQ1Y*~~*WQJY944; American H Block Wireless L.L.C., H Block, Lead Call Sign WQTX200; ParkerB.com Wireless L.L.C., 600 MHz, Lead Call Sign WQZM232* (filed July 26, 2019) ("DISH July 26, 2019 Letter").

[55][67] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.

[56][68] 28 FCC Rcd 16787 ¶¶ 187-188. *See also* 27 FCC Rcd 16102.

March 2017 deadline was missed.[57][69] DISH failed to meet the 2017 deadline, and therefore faces a looming March 2020 construction deadline for this spectrum.[58][70] DISH has asked the FCC to delay the construction deadline once again, with the same requirements noted above for the 700 MHz E block (e.g. 50 percent of US population by 2023, and 70 percent of the population in each BEA by 2025).[59][71] To date, the FCC has not approved the construction extension request.[60][72] The 2025 deadline is a full 13 years after DISH received FCC authority to use the AWS-4 spectrum for terrestrial wireless.

H Block. In 2014, DISH won all the licenses in the H block auction, with construction requirements to serve 40 percent of the population in each license area by April 2018 and 75 percent of the population in each license area by April 2024. Not meeting the first benchmark reduces the license term to April 2022.[61][73] DISH did not meet the 2018 deadline.[62][74] It has asked the FCC to delay the final construction deadline to 2023 and 2025, as noted above, which is 11 years after it acquired the H Block spectrum.[63][75] To date, the FCC has not approved the construction extension request.[64][76]

b. ~~H.~~ Misuse of government auction

[57][69] 28 FCCR 16787 ¶¶ 8, 41-42.

[58][70] 28 FCCR 16787 ¶¶ 43; 47 CFR 27.14Q; see also License T0272001.

[59][71] DISH July 26, 2019 Letter.

[60][72] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.

[61][73] 28FCCR9483, ¶195, 47 CFR 27.14R.

[62][74] *Id*. License # WQTX200.

[63][75] DISH July 26, 2019 Letter.

[64][76] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.

DISH has also misused a government program designed to incentivize wireless competition via new entrants and independent small businesses.

Northstar and SNR Wireless participated in the FCC's 2015 Spectrum Auction 97.[65]77 Northstar and SNR claimed gross revenues of less than $15 million over three years in order to qualify as a "very small business" under the FCC rules. The "very small business" status qualified them to receive bidding credits equal to $3.3 billion or 25 percent off the amount of their gross winning bids.[66]78 The FCC ruled that Northstar and SNR were not eligible for the credit as they did not include the average gross revenues of DISH which held an 85 percent equity interest in both companies.[67]79

The United States Court of Appeals for the District of Columbia Circuit ruled that the FCC "reasonably interpreted and applied" its precedent "when it determined that DISH had de facto control over SNR and Northstar."[68]80 The D.C. Circuit remanded the case back to the FCC so that the Commission could provide the companies with an opportunity to modify and renegotiate their agreements with DISH.[69]81 In a hearing before the Senate Appropriations Subcommittee on Financial Services and General Government, then-FCC Commissioner Ajit Pai stated that DISH had made "a mockery of the small business program."[70]82

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[65]77 Memorandum and Opinion Order, In the Matter of Northstar Wireless, LLC (File No. 0006670613) and SNR Wireless LicenseCo, LLC (File No. 0006670667) Applications for New Licenses in the 1695-1710 MHz, and [1755]1780[1755-1780] MHz and 2155-2180 MHz Bands, FCC 15-104, at 2 (Released August 18, 2015), available at https://docs.fcc.gov/public/attachments/FCC-15-104A1.pdf.

[66]78 *Id.* at 2-3.

[67]79 *Id.* at 3.

[68]80 *SNR Wireless LicenseCo, LLC, et al. v. F.C.C.*, 868 F.3d 1021, 1030 (D.C. Cir. 2017).

[69]81 *Id.* at 1046.

[70]82 Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Senate Appropriations Subcommittee On Financial Services And General Government, May 12, 2015 ("Allowing DISH, which has annual revenues of approximately $14 billion and a market capitalization of over $31 billion, to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small business program. Indeed, DISH has now disclosed that it made approximately $8.504 billion in loans and $1.274 billion in equity contributions to those two companies—hardly a sign that they were small businesses that lacked access to deep pockets. I am appalled that

In summary, DISH fails the Antitrust Division's standard "fitness" test of a prospective acquirer of divested assets.

E. ~~5.~~ The ~~i~~Incentives for DISH to ~~b~~Build in a ~~t~~Timely ~~f~~Framework its ~~o~~Own ~~r~~Retail ~~w~~Wireless ~~n~~Network in ~~c~~Competition ~~w~~With AT&T, Verizon ~~a~~And T-Mobile are ~~w~~Weak~~. By comparison,~~; DISH has ~~s~~Strong ~~i~~Incentives to ~~r~~Remain an MVNO ~~u~~Under ~~f~~Favorable ~~t~~Terms and ~~u~~Ultimately ~~s~~Sell its ~~s~~Spectrum, or, ~~a~~Alternatively, to ~~o~~Operate any ~~n~~Network it ~~b~~Builds ~~o~~Outside of the ~~r~~Relevant ~~m~~Market~~.~~

Even assuming for the sake of argument that a weak and otherwise unacceptable buyer could somehow transform into a strong competitor at some future date, the remedy provides insufficient incentives for this transformation to take place.

The Antitrust Division ~~policy is clearly articulated in the~~'s Policy Guide to Merger Remedies provides: "The goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to maintain the level of premerger competition in the market(s) of concern."[~~71~~83] This point is repeated and emphasized later on:

> The package of assets to be divested must not only allow a purchaser quickly to replace the competition lost due to the merger, but also provide it with the incentive to do so. Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market.[~~72~~84]

From an engineering standpoint, DISH has powerful incentives to create something less than a fully competitive 5G network. As discussed earlier in these ~~comments and in Dr. Afflerbach's accompanying Declaration~~, the technical difficulties of creating a nationwide 5G

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a corporate giant has attempted to use small business discounts to box out the very companies that Congress intended the program to benefit and to rip off American taxpayers to the tune of $3.3 billion. This is money that otherwise would have been deposited into the U.S. Treasury. This is money that could be used to fund 581,475 Pell Grants, pay for the school lunches of 6,317,512 children for an entire school year, or extend tax credits for the hiring of 138,827 veterans for the next 10 years. As appropriators, you know that this is real money.").

[~~71~~83] 2004 Merger Remedies Guide at 9.

[~~72~~84] 2004 Merger Remedies Guide at 10-11 (emphasis in original).

network are enormous and likely to be underappreciated. At the same time, the commitments DISH has made are far more limited than they appear at first blush. DISH is required to serve only 70 ~~percent~~% of the population by 2023 – and only at 35 Mbps. This speed is already exceeded in many 4G-served areas (including by Sprint) and represents a very low goal for 5G service. If 35 Mbps is the typical speed of the DISH network in 2023, while the other three facilities-based wireless carriers offer service in hundreds of Mbps – and if this limitation is a baked-in technological limit because of fewer sites or less capacity per site – the result will not be a bona fide fourth network, but a niche network closer to the limited internet of things (IoT) network proposed by DISH prior to the T-Mobile deal.

From a financial standpoint, DISH's incentives run counter to the ~~Division's~~ goal of creating a competitively significant new entrant. Several prominent analysts who have examined DISH's incentives have pointed to: (a) the enormous financial challenges of building a competitive 5G retail network; (b) the fact that DISH may be better served financially by remaining an MVNO customer of T-Mobile rather than building a competitive network; and (c) the incentives DISH has to provide services outside of the relevant market (e.g. wholesale services) even if it does build a network.

For example, a research analyst at Guggenheim Securities wrote: "We continue to see many possible outcomes for DISH that are unlikely to result in a multi-billion dollar network build to end up a sub-scale distant fourth provider with a handful of prepaid subscribers."[~~73~~85] A CFRA analyst noted: "[W]e remain skeptical on the potential financial, technical and regulatory

[~~73~~85] Mike McCormack, Guggenheim Securities, DISH - Unlikely the Last Chapter (July 29, 2019) (Accessed via ~~CIQ~~CIQ).

hurdles" DISH faces in entering the market.[74][86] And Deutsche Bank Research analysts wrote: "We don't believe that DISH's strategy has been focused in any meaningful way on consumer wireless, at least not for the past few years. Instead, the company has focused on a Neutral Host wholesale model, which would allow clients to own and manage their own slice of the network through virtualization and to fully control and provision their company's own applications and services."[75][87]

Although the terms of the commercial agreements between DISH as buyer and T-Mobile as seller are confidential, we can assume in the absence of evidence to the contrary that the terms are highly favorable to DISH. This creates exactly the wrong incentives in the buyer. As one economist has observed:

> . . . Dish had blocking power to stop the settlement from happening. So it likely extracted the best resale arrangement in the history of resale. And if that's true, then why would Dish invest and become a facilities-based provider if the margins from resale are large and guaranteed for seven years?[76][88]

The ~~PFJ~~ federal commitments include~~s~~ the possibility of financial penalties in an effort to incentivize the buyer to honor its commitments. However, DISH's financial incentives to walk away from its commitments for the right price swamp the penalties in the PFJ. As one analyst has written:

> We also cannot discount that Dish pulls out at the last moment and sells its spectrum. Its spectrum is worth much more—with some estimates around $30 billion—than the $3.6 billion that it paid for the Sprint prepaid business and the fine to the government.[77][89]

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[74][86] Tuna N. Amobi, CFRA, CFRA Keeps Sell Opinion on Shares of Dish Network Corp. (July 30, 2019) (Accessed via ~~C1O~~CIQ).

[75][87] Bryan Kraft, Deutsche Bank Research, The Next Chapter (July 30, 2019) (Accessed via ~~CIO~~CIQ).

[76][88] The Capitol Forum, Transcript of T-Mobile/Sprint Conference Call with Hal Singer (August 5, 2019) at 1, available at https://thecapitolforum.com/wp-content/uploads/2019/08/T-Mobile-Sprint-2019.08.05.pdf.

[77][89] Roger Entner, Industry Voices—Entner: The skinny on the T-Mobile/Sprint/Dish deal, Fierce Wireless (August 2, 2019), https://www.fiercewireless.com/wireless/industry-voices-entner-sorting-out-good-and-bad-t-mobile-sprint-dish-deal.

The failure of ~~the buyer~~DISH to satisfy basic Antitrust Division requirements for a buyer, and the lack of adequate incentives for ~~the buyer~~DISH to compete in the relevant market, ~~violate long-standing Division policy~~show that the DISH divestiture will not resolve the merger's competition issues.

~~**6. Vague and ambiguous language in several of the PFJ's central regulatory provisions give the parties an escape route and render the PFJ difficult to administer or enforce.**~~

F. The Commission Cannot Rely on the Federal Commitments as a Remedy Because Several Commitments are Vague and Unenforceable

In multiple instances, the ~~PFJ uses~~federal commitments contain open-ended, vague and ambiguous language with reference to ~~defendants'~~Applicants' and DISH's obligations and/or the time within which certain actions must be taken. ~~This is a recurring theme in the PFJ.~~ Examples include "take all actions required," "reasonably necessary," "reasonably related," "promptly," "good faith," "not unreasonably," and "best efforts."

If this vague language were limited to unimportant parts of the ~~PFJ~~federal commitments, it would be of less concern. However, vague and non-specific language is used in connection with central behavioral conditions ~~in the PFJ~~, including migration of divested customers to a new network ("take all actions required"), the ability of ~~the buyer~~DISH to demand additional divestiture assets beyond those specified ~~in the PFJ~~ ("reasonably necessary . . . for continued competitiveness"), the terms of the transition services agreement that would enable ~~the buyer~~DISH to serve its newly acquired customers ("reasonably related to market conditions"), the decommissioning of unnecessary cell cites ("promptly"), negotiations between ~~merging parties and the divestiture buyer~~the Applicants and DISH to lease ~~the buyer~~DISH's unused 600 MHz spectrum ("good faith"), nondiscrimination provisions involving conduct such as blocking, throttling, or otherwise deprioritizing service to ~~the divestiture buyer~~DISH and its customers

("shall not unreasonably discriminate"), and the merged company's obligation to provide operational support to those customers ("best efforts").

These open-ended, undefined terms provide a convenient escape route for a ~~defendant~~party wishing to avoid its obligations. Moreover, they make it virtually 100% certain that disputes will arise as to whether the ~~defendants~~Applicants and DISH have fulfilled their commitments. What would constitute a failure to "take all actions required?" What additional assets would be "reasonably necessary for . . . continued competitiveness?" What does it mean to "not unreasonably discriminate?" The list could go on. The Monitoring Trustee, the Antitrust Division, and ultimately the District Court are likely to see a parade of disputes over the next seven or more years.

In addition, ~~Paragraph IV(E)~~the DISH divestiture starkly illustrates a problem with asset carve ~~outs. The prior four subsections list the~~outsThe divestiture ~~assets. But Paragraph IV(E)~~ gives ~~the divestiture buyer~~DISH one year to determine if it needs additional assets ~~beyond those included in the PFJ~~. The determination comes with a requirement that such additional assets are "reasonably necessary for the continued competitiveness of the Divestiture Assets." What constitutes "reasonably necessary for . . . continued competitiveness?" Is this supposed to catch a situation where the buyer did not know what it actually needed until the divestitures have occurred? If so, it suggests a profound weakness in permitting partial asset carve outs in this case.

It does not require much imagination to envision a situation in which ~~the buyer~~DISH claims that additional assets are "reasonably necessary" but the seller disagrees. The DOJ Antitrust Division would then be required to side with either the buyer or seller. Although the ~~language~~federal commitments appears to give the Antitrust Division sole discretion to make a

determination, the reality is that such a dispute could easily arise and would not be put to rest merely because the Antitrust Division makes a determination. (As an example, if the Division denies ~~the buyer~~DISH's request, ~~the buyer~~DISH can later blame the Division if and when the remedy fails.) ~~This paragraph also suggests~~Moreover, it appears that neither ~~the buyer~~DISH nor the Anitrust Division knows at this point what ~~the buyer~~DISH may need.

There are also likely to be disputes between the ~~divestiture buyer~~DISH and the Antitrust Division that go to the heart of the remedy. ~~Notably, Paragraph IV(F) requires the buyer~~The federal commitments require DISH to "offer retail mobile wireless services, including offering nationwide postpaid retail mobile wireless service within one (1) year of the closing of the sale of the Prepaid Assets." The inclusion of postpaid service shows, if nothing else, that the Antitrust Division is aware that unless ~~the buyer~~DISH is able to attract and service postpaid customers, the remedy could not possibly restore the competition lost through the merger. But it takes little imagination to realize that "offering" a service could mean something much different and much less than marketing and promoting the service with millions of dollars of advertising, or hiring and training the personnel necessary fully to support the service.

Years ago, prior to their merger, the FCC ordered XM and Sirius to "design" an interoperable radio. The companies designed and built such a radio but never marketed or sold it. Yet they insisted that they had complied with the FCC's requirements.[~~78~~90] The word "offer" has the same problems as the word "design." DISH can "offer" a service without publicizing it or supporting it or pricing it competitively. This is a fundamental problem in a regulatory decree

[~~78~~90] *See, e.g.*, Matthew Lasar, "Sirius, XM blast C3SR, defend lack of radio interoperability," Ars Technica (June 10, 2008), https://arstechnica.com/uncategorized/2008/06/siriux-xm-blast-c3sr-defend-lack-of-radio-interoperability/.

that orders a party to do something that, as a purely business matter and in the absence of a regulatory obligation, it may well decline to do because there is no business case.[7991]

Finally, ~~we note that~~ open-ended and non-specific language might well be appropriate in a contract between private parties entering into a long-term business relationship where all of the contractual terms cannot be spelled out in advance. Open-ended and deliberately flexible terms permit the contracting parties to adapt and adjust their relationship as circumstances require. But in a court order that obligates a major market participant to create and facilitate the entry of a new competitor, this sort of language is deeply problematic. It is an invitation to a great deal of mischief, including evasion and repeated disputes. It is likely to draw the Monitoring Trustee, the Antitrust Division, and the ~~c~~court into disputes over the contours and timing of obligations, making the remedy extremely difficult if not impossible to administer. ~~Given that this problem is not isolated but runs throughout the PFJ, the Division is unlikely to be able effectively to enforce compliance through contempt proceedings under Section XVIII, regardless of the burden of proof.~~

G. ~~7.~~ Under ~~a~~Any ~~r~~Reasonable ~~d~~Definition of the "~~p~~Public ~~i~~Interest," a ~~r~~Remedy that ~~c~~Carries a ~~h~~High ~~r~~Risk of ~~f~~Failure and ~~e~~Exposes the ~~p~~Public to ~~s~~Substantial ~~e~~Economic ~~h~~Harm if it ~~f~~Fails ~~c~~Cannot be ~~s~~Said to be in the "~~p~~Public ~~i~~Interest"

By far the most likely outcome in this case is that the complex, highly regulatory remedy will fail or fall short. In either event, as the Antitrust Division ~~has~~ alleged in ~~the~~its Amended Complaint, consumers will end up paying the price.

[7991] In connection with the FCC remedy in the Comcast/NBCU transaction, Bloomberg and Comcast got into a lengthy dispute over the meaning of the word "neighborhood." See https://www.multichannel.com/news/bloomberg-comcast-square-264872.

The risk of failure has significant consequences for the Commission's public interest determination~~. Division officials have clearly stated as a matter of law and policy that the Clayton Act directs antitrust enforcers and courts to employ a low risk tolerance~~. Risky, partial and complex remedies, however well-intentioned, do not warrant shifting some of the risk posed by an anticompetitive merger back onto consumers. In 2016, then Assistant Attorney General Bill Baer was explicit on this point:

> In enacting Section 7 over 100 years ago, Congress decided how antitrust risk should be allocated as between merging parties and the public. The Clayton Act directs antitrust enforcers and the courts to employ a low risk tolerance, and zealously protect the American economy and American consumers from mergers that may reduce competition and may lead to higher prices, reduced output, lower quality, or lessened innovation . . . . Merger law is intended to protect consumers from the potential for diminished competition. Here is where Congress' risk-allocation determination matters a lot. Partial remedies do not cut it. They do not warrant shifting some portion of the risk posed by the merger back to consumers and competition.~~80~~92

The following year, Assistant Attorney General Makan Delrahim reiterated the same point in even stronger language:

> Decrees should avoid taking pricing decisions away from the markets, and should be simple and administrable by the DOJ. We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so. I believe this is a bipartisan view. As my friend, former AAG for Antitrust Bill Baer said in Senate testimony last year, "consumers should not have to bear the risks that a complex settlement may not succeed."~~81~~93

The price of a failure of the remedy has been quantified in this case. Not only has the DOJ alleged that the merger, unremedied, would lead to consumers paying billions of dollars

~~80~~92 U.S. Dep't of Justice, Acting Associate Attorney General Bill Baer Delivers Remarks at American Antitrust Institute's 17th Annual Conference (June 16, 2016), https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute.

~~81~~93 U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (November 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

more each year, but on April 8, 2019 DISH itself submitted an analysis of the price increases in countries that have gone from 4 to 3 MNOs. As further evidence, ~~we cite~~ an econometric study from the UK's telecommunications regulator of 25 countries found that "removing a disruptive player from a four-player market could increase prices by between 17.2% and 20.5% on average." Another study cited by DISH found "a long run price-increasing effect of a four-to-three merger," of as high as 29% compared to countries with 4 MNOs.[~~82~~94]

~~**Conclusion.**~~

~~For the reasons expressed in these comments and in the accompanying Declaration of Dr. Afflerbach, the proposed remedy flies in the face of numerous Division remedy policies and the odds are remote that the remedy will work as intended. The Division, following its own long-standing policies, rejected similar remedies in Aetna/Humana and Haliburton/Baker Hughes and filed suit to block those transactions.~~

~~We respectfully submit that under any reasonable definition of the "public interest," a complex remedy that carries a high risk of failure and exposes the public to substantial economic harm if it fails is not in the "public interest." The Division should exercise its power under Paragraph IV(A) of the Stipulation and Order to withdraw its consent to the entry of the PFJ.~~

~~Sincerely,~~

~~Debbie Goldman~~
~~Telecommunications Policy and Research Director~~
~~Communications Workers of America~~

~~Allen P. Grunes~~
~~Counsel for Communications Workers of America~~

[~~82~~94] Letter from Pantelis Michalopoulos, Counsel to DISH Network Corporation, to Marlene Dortch, FCC, WT Docket No. 18-197 (April 8, 2019), https://ecfsapi.fcc.gov/file/104080252316854/DISH%204-8-19%20Ex%20Parte%20WT%2018-197%20Europe%20Studies.pdf.

DECLARATION OF ANDREW AFFLERBACH, PH.D., P.E.
Chief Executive Officer and Chief Technology Officer, CTC Technology & Energy

DECLARATION OF ANDREW AFFLERBACH, PH.D., P.E.

Relevant experience and qualifications of Andrew Afflerbach, Ph.D., P.E.

1. I have been the Chief Executive Officer and Chief Technology Officer of Columbia Telecommunications Corporation (d/b/a CTC Technology & Energy), a communications engineering consultancy, since 2000, and was Senior Scientist at CTC from 1996 until 2000. I specialize in the planning, design, and implementation of communications infrastructure and networks. My expertise includes fiber and wireless technologies and state-of-the-art networking applications. I have closely observed the development of wireless technology since the advent of the commercial internet in the 1990s. I submit this Declaration in connection with the Tunney Act Comments of the Communications Workers of America in United States v. Deutsche Telekom AG, et al., No. 1:19-cv-02232-TJK

2. As CTO, I am responsible for all engineering work and technical analysis performed by CTC. I have planned and overseen the implementation of a wide variety of wired and wireless government and public safety networks. I have advised cities, counties, and states about emerging technologies, including successive generations of wireless networks across a range of licensed and unlicensed spectrum bands. I have developed broadband technology strategy for cities including San Francisco, Seattle, Atlanta, Washington, D.C., and New York; for states including Connecticut, Delaware, Kansas,

Kentucky, and New Mexico; and for the government of New Zealand's national broadband project.

3. I have designed wireless networks for large cities, counties, and regions. I lead the CTC team advising the State of Texas Department of Transportation and many local governments on wireless facilities standards and processes. I also lead the CTC technical teams conducting FirstNet planning for the District of Columbia and the State of Delaware.

4. I have prepared extensive technical analyses for submission to the U.S. Federal Communications Commission and U.S. policymakers on broadband expansion to underserved schools, libraries, and other anchor facilities; on due diligence for the IP transition of the U.S. telecommunications infrastructure; on options for open access on wireless broadband networks; and on the relative strengths and weaknesses of various wired and wireless technologies.

5. Under my direction, the technical team at CTC has advised hundreds of public and nonprofit clients, primarily in the United States. My technical staff has been engaged on projects encompassing the evaluation or planning of hundreds of miles of fiber optics and hundreds of wireless nodes in rural, suburban, and urban areas across the country. My experience with rural broadband engineering encompasses the full range of geographic typologies in the United States, from the desert and mountains of the West to the plains in the Midwest to the mountain and coastal areas of the East.

6. I am a licensed Professional Engineer in the Commonwealth of Virginia and the states of Delaware, Georgia, Maryland, and Illinois. I received a Ph.D. in Astronomy in 1996 from

the University of Wisconsin—Madison and an undergraduate degree in Physics from Swarthmore College in 1991. My full CV is included in Attachment A.

From a technical and business standpoint, Dish would be highly dependent on T-Mobile as an MVNO under the terms of the Proposed Final Judgment (PFJ)

7. According to the PFJ, Dish would become a mobile operator initially by purchasing Boost, Virgin Mobile, and Sprint's prepaid services, which currently operate as Sprint brands. Dish would thus operate as a mobile virtual network operator (MVNO), reselling T-Mobile's service while it builds its own mobile network operator (MNO) network—a complex and expensive process that would take many years.

8. The terms of the proposed T-Mobile/Dish MVNO agreement (called the Full MVNO Agreement in the PFJ) have not been provided to the public, and there is no requirement to make them public. (This is not unusual in the telecommunications industry; MVNO agreements frequently are confidential.) But given that an MVNO resells an MNO's capacity under the MVNO's brand name, all MVNOs share a total dependence on their MNO host networks.

9. For example, from a technical standpoint, the MNO issues the Subscriber Identity Module (SIM) cards that identify the MVNO users' devices—so the MVNO users' devices connect to the MNO's network and cannot access another network unless the MNO allows roaming to that network.

10. In addition, the MNO manages how and whether the MVNO network connects to the MNO network; determines how much capacity (speed) is available to each MVNO user device; determines whether there are limits to the total number of MVNO subscribers

(either nationally or within individual areas of the network); determines the price it will charge the MVNO for access and bandwidth; determines whether a service area will have 2G, 3G, 4G or 5G service; chooses the duration of the MVNO agreement; and establishes such parameters as geographic limitations on the MVNO's subscribers, which spectrum blocks can be used, whether the MVNO's users have access to particular services (e.g., video, 5G), the degree to which the MVNO's users have priority (especially where there is heavy demand for the MNO's network), and what types of user equipment can be operated. MNOs provide no transparency to the MVNO—no view into the "back end" of the network; the MVNO simply pays the bill for its services without being able to know how they are delivered, or if there is any way to better optimize the services or the network for its needs.

11. This technical dependence illustrates the criticality of the MVNO agreement terms. Based on the PFJ and other public documents, we have no way of knowing the terms under which Dish's network performance would be determined.

12. Because of its control of the technical aspects of the network, the MNO could also effectively limit the MVNO's potential service strategies—for example, by determining where networks will and will not be upgraded to 5G, and when and whether new services will be available. Additionally, T-Mobile would determine where it will provide its own service and where it would rely on roaming to other MNOs. In roaming areas, T-Mobile and its MVNOs could find it difficult to maintain the quality of their customer experience and would need to pay substantial fees to use the other MNO.

13. Since Dish would essentially be reselling the T-Mobile's service, deficiencies in the service provided by the MNO would become unsolvable deficiencies in the MVNO's service. Enforcement would be difficult, and remedies may not be commensurate with the harm inflicted on the MVNO. Simply by underperforming or delaying response to resolving technical problems, the MNO could badly harm the MVNO. Any intentional or unintentional problems with the service could leave the MVNO damaged, with no alternative path to serve its customers.

14. From a business standpoint, the MVNO agreement would also effectively dictate the MVNO's pricing—because the price that the MVNO could charge would depend heavily on the fee (cost per gigabyte) the MNO charged the MVNO. Further, in their relationships with MVNOs, MNOs typically only seek ways to monetize their excess capacity where it exists—not to nurture the MVNOs. If, over the course of business, the MVNO were to require flexibility in the arrangement (e.g., new services, extensions, relief in costs, capacity changes, accommodations of changes in technical standards or equipment), the MNO would be unlikely to provide that relief.

15. Dish may thus struggle as an MVNO to provide differentiated services on T-Mobile's network if its differentiators were to require network-wide changes or custom operator support to implement (e.g., advanced streaming platforms, multimedia broadcast).

16. If Dish were able to reach an accommodation with T-Mobile on modifications to support new services, it would face the additional challenge of having to disclose sensitive intellectual property to a competitor in order to plan and implement the changes.

17. MVNOs often tolerate a highly dependent relationship with the MNO for reasons other than the profit they may make from the operation.[1] For example the MVNOs operated by the cable companies might not be financially sustainable on their own, but serve an important business purpose for the cable companies; for example, Comcast's MVNO relationship with Verizon enables Comcast to fill an urgent business gap (i.e., how to get wireless service to customers not near Comcast Wi-Fi and as an add-on to existing cable services for customer-retention purposes) but is not a central, money-making part of Comcast's business.

18. In some emerging MVNO models the MVNO would have more leverage with the MNO because it would offer a tangible asset to trade. For example, Altice has a partnership with Sprint in which Altice allows Sprint to install small cells on Altice's cable infrastructure in return for lower MVNO fees.[2] In contrast, in the first few years of its operations as an MVNO, Dish would have little or no leverage with T-Mobile to reduce its costs.

Dish's planned migration to an iMVNO model would potentially give it more control, but many risks will remain while Dish builds its network

[1] And for many MVNOs, the arrangement is not lucrative ("Comcast Lost $743 Million on Xfinity Mobile in 2018," Daniel Frankel, *Multichannel News,* January 23, 2019, https://www.multichannel.com/news/comcast-loses-over-1-billion-on-xfinity-mobile-in-1st-2-years, accessed September 23, 2019.)

[2] "Sprint: Altice deal lets us cut through red tape of small-cell deployments," Colin Gibbs, *Fierce Wireless,* December 8, 2017, https://www.fiercewireless.com/wireless/sprint-altice-deal-enables-us-to-cut-through-red-tape-small-cell-deployments, accessed September 9, 2019. See also: Altice Ex Parte, Federal Communications Commission, In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, Jennifer Richter, Akin Gump, February 8, 2019, p. 14, https://ecfsapi.fcc.gov/file/1020806336649/(REDACTED)%20Altice%20USA%20Inc.%20-%20Ex%20Parte%20Re%202.6%20and%202.7%20Meetings.pdf, accessed September 25, 2019.

19. The agreements call for Dish's migration to an enhanced MVNO model, often called an iMVNO, in which Dish operates a 5G network core and is able to increase its control on the network and govern how its customers migrate to Dish's physical network, as it is built. Setting up the core network would be the first step toward Dish becoming independent, because it would enable Dish to activate sites—which would serve users with Dish bandwidth rather than over the T-Mobile network.

20. The core of a 5G network provides a wide range of functions that manage the network, determine the user experience, and manage users' ability to access different MNO radio access networks. Once it operates a core, Dish would be able to have its own SIM cards (or manage eSIM components in user devices) and manage authentication of individual user devices. It would determine what services are on its network. It would also be able to negotiate arrangements with other MNOs for capacity and coverage, if another MNO were willing to do so.

21. The agreements require Dish to "have deployed a core network" by June 14, 2022. More specificity is needed on the core network requirements (e.g., a demonstration of full operation of a core network) because, for example, activating core hardware and software is not the only challenge of activating a separate core network. Required verification of a fully operational core network should also include that a specified number of customers have migrated from the T-Mobile core to the Dish core, and that Dish, Boost, Sprint Prepaid, and Virgin mobile devices all are using the Dish core.

22. In addition, while the iMVNO model's functionality would give Dish more control, the degree of that control would depend critically on the degree to which Dish has built wireless sites and connected them.

23. Dish users would continue to use T-Mobile's radio access networks (e.g., cell sites, backhaul), but Dish could gradually migrate them away from T-Mobile. Since Dish is planning to build a 5G-only network, however, this migration is questionable and may come with a huge price sticker.

24. If Dish operates a 5G core as planned, that core would not support devices that are not 5G without a large-scale development of new, untried software and continued connectivity with the T-Mobile core. Thus, even after Dish begins to activate its own network, it would need to continue the MVNO arrangement with T-Mobile for all of its customers using 3G and 4G phones. And because some Dish customers—including current Boost MVNO customers—will be seeking to pay less for phones and services, many would not want to be forced to pay for a new phone, forcing Dish to extend the MVNO arrangement, or to push customers to upgrade phones (either incurring cost to subsidize the upgrade or losing customers who will not change).

25. Remaining on T-Mobile's network is not a solution for Dish, however. In a network where most of the antenna sites belong to T-Mobile or others, the available capacity and coverage and the terms of access to the network (whether Dish is an MVNO or an iMVNO) would still be under the control of the MNO.

26. Furthermore, other MNOs would not be under any obligation to make capacity available to Dish; MNOs other than Sprint have resisted the iMVNO model,[3] so the ability of an iMVNO to connect to multiple MNOs may only be a theoretical advantage.

27. With regard to enforcement of the MVNO agreement as Dish migrates to an iMVNO, the agreement between Dish and T-Mobile would remain the same—as would the complexity of enforcement.

Dish's access to capacity on T-Mobile's network (and its pricing) would be critical to Dish's ability to deliver competitive services

28. Under DOJ's proposed solution, T-Mobile will provide capacity on its network to Dish for seven years on "favorable terms"— but those terms are not disclosed.

29. Once Dish activates its network core, the PFJ stipulates network capacity sharing so that Dish devices using the Dish network core can access the T-Mobile network. For network sharing to provide adequate service levels, however, Dish needs access to sufficient capacity, including where T-Mobile capacity is scarce. Insufficient capacity (whether because of intentional or unintentional action by the MNO) could badly damage Dish.

30. It would also be critical that T-Mobile's pricing of its shared capacity be fair and consistent—and that it does not stifle Dish's deployment. The pricing framework could be extremely complex, given that the market value of capacity may vary widely in

[3] Altice Ex Parte, Federal Communications Commission, In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, January 28, 2019, Jennifer Richter, Akin Gump, Exhibit 1, p. 42, https://ecfsapi.fcc.gov/file/1012865940796/(REDACTED)%20Altice%20USA%20Inc.%20-%20Supplemental%20Response%20to%20Information%20Request%20(1.28.19).pdf, accessed September 25, 2019.

different geographic areas, and in areas with different levels of existing broadband capacity.

31. Capacity sharing on the scale contemplated here has not been attempted in the United States among wireless providers, and we are not aware of an existing model for this type of collaboration and coordination between competitors. In the PFJ, this requirement is folded into the MVNO commitments, with the details again hidden from public review in the Full MVNO agreement.

Dish's access to T-Mobile's decommissioned sites may not add much value to Dish's expansion

32. Dish has FCC spectrum licenses but has not activated a wireless broadband network infrastructure. As it builds its network, it has the option to acquire sites from Sprint and T-Mobile—specifically, at least 20,000 sites that T-Mobile would decommission over the five years after the merger closing. For each site, Dish could choose to have the site lease or the lease plus the equipment.

33. DOJ's solution assumes that granting Dish site options would enable Dish's network expansion—but the utility and 5G-readiness of these sites is not guaranteed. Those sites are T-Mobile and Sprint's discards—sites that are being deactivated, likely because they are in less desirable locations, may not have high-quality fiber backhaul or backup power, or might be otherwise suboptimal for 5G. In fact, the PFJ speaks to "microwave backhaul" at the sites[4]—implying that many sites may require extensive investment to become 5G-ready with fiber.

[4] Proposed Final Judgment (PFJ), IV.C.5, https://www.justice.gov/opa/press-release/file/1187706/download, accessed September 25, 2019.

34. These sites might thus accelerate Dish's deployment (e.g., by expediting the site selection and deployment processes) but might also re-create some of the deficiencies of Sprint's network on the Dish network.

35. Enforcement of the agreement would thus require confirmation that T-Mobile is providing sites and equipment as promised and is complying with commitments and schedule—but also verification of the transferability of the leases, as well as verification that T-Mobile is taking the steps it is obligated to take to transfer the sites.[5] Delays or changes in the turnover plans could create delays and drive up Dish's costs.

DOJ anticipates Dish becoming a fourth facilities-based competitor comparable to Sprint—but this would take many years and would be fraught with execution risks

36. Dish's execution risks are substantial. Under the most optimistic timeline, Dish would require at least a year to build a robust internal team, seek and select contractors, and prepare detailed designs and engineering. Dish would also need more than four years to deploy tens of thousands of sites with robust fiber backhaul to develop a reliable footprint that is not highly dependent on T-Mobile. That process would require extensive design, planning, procurement, site acquisition, and approvals—as well as an enormous capital investment.

37. On July 30 and July 31, 2019, Dish staff met with FCC Commissioners and staff to discuss Dish's technical and business plans and to share an executive summary of the "RFI/P" Dish

[5] PFJ, IV.C.

had earlier distributed to potential industry suppliers.[6] Based on the executive summary of the RFI/P provided in the Ex Parte filing, we see that Dish is clearly still in a fact-finding stage—identifying which suppliers may be candidates for different parts of the build process, and asking wide-ranging questions about their potential roles. This type of document usually precedes engineering and design decisions, the development of more focused procurement documents, and the selection of contractors to supply materials and build the network.

38. In addition, the 3GPP Rev 16 equipment that Dish has said would be central to building a highly virtualized network with low operation costs[7] relies on standards that will not be available until 2020, with actual equipment possibly not available until late 2020 or some point in 2021. Without that equipment, Dish would need to change its approach to a less virtualized network and, potentially, a different business model.

39. Dish's risk factors thus include activating infrastructure at tens of thousands of sites while relying on technologies that do not yet exist, scaling up from a relatively small mobile wireless staff to a large new team in a tight labor environment, getting permitting approvals, coordinating with T-Mobile (itself in the process of an ambitious buildout—which could limit T-Mobile's resources available for coordinating with Dish), handling

[6] "DISH 5G Network RFI/P Executive Summary," Dish Ex Parte, Federal Communications Commission, In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, August 1, 2019, Jeffrey H. Blum, p. 4, https://ecfsapi.fcc.gov/file/10801235883258/2019-08-01%20DISH%20Ex%20Parte%20WT%20Docket%20No%2018-197%20(w%20summary).pdf, accessed September 25, 2019.

[7] Thomas A Cullen, EVP of Corporate Development, paragraph 9, in "Edited Transcript of Dish earnings conference call or presentation 29-Jul-19 8:30pm GMT," Thomson Reuters StreetEvents, July 30, 2019, https://finance.yahoo.com/news/edited-transcript-dish-earnings-conference-081650500.html, accessed September 25, 2019.

procurement, and financing a project likely to cost more than $10 billion. In this light, it is worth considering other major communications infrastructure initiatives (e.g., Google Fiber) that failed to execute according to plan.

Dish's nationwide buildout would be a significant challenge even under the best circumstances

40. As an example of the scope of Dish's challenge, we note that T-Mobile operates approximately 64,000 macro sites and 21,000 distributed antenna and small cell sites as of December 31, 2018, and that this is therefore the approximate number of sites that a bona fide national MNO should have when fully operational.[8] Acquisition of a new site typically takes 12 to 24 months—including the process of searching for a site, conducting RF engineering, acquiring approval and permits for the siting, acquiring fiber backhaul, and completing construction of the site.

41. Placing wireless equipment at an existing site (if there is space) still requires negotiating terms, RF engineering, permitting, engineering, and installation, and requires six to 18 months.

42. Similarly, placing equipment at one of T-Mobile or Sprint's 20,000 discarded sites would require construction of fiber backhaul and upgrades and would still require local permitting and approvals and installation—which will take six to 18 months. And, as noted in the PFJ, there may be instances where the site cannot be transferred by T-Mobile, and T-Mobile would be required to "cooperate with [Dish] in its attempt to obtain the rights."[9]

[8] T-Mobile U.S., Inc., U.S. SEC Form 10-K, p.7, http://d18rn0p25nwr6d.cloudfront.net/CIK-0001283699/3bfba910-027f-4ec5-85a5-b8e91d073ba8.pdf, accessed September 25, 2019.
[9] PFJ, IV.C.4.

There is also a risk to Dish that the tower owner may not agree to transfer the existing lease and may charge Dish higher costs since Dish is not an established player and is a higher risk customer compared to existing MNOs, with no track record or credit in the industry.

43. Obtaining capacity in metro areas would require densification and small cells—which usually are not shared and would likely only happen in a second phase of capacity densification after Dish's coverage requirement is met. Small cells have streamlined site acquisition and make-ready processes but would still require fiber construction—likely six to 12 months after macro sites are activated and designs are complete.

Dish faces technical and logistical challenges in deploying its planned network architecture

44. The equipment required to operate a network over the Dish spectrum is not currently mass-produced—Dish would to develop a set of requirements and work with companies like Nokia and Ericsson to start assembly of base station equipment.

45. Handset equipment (i.e., smartphones) is not currently manufactured for Dish's spectrum bands. Dish would have to work with suppliers like Apple and Samsung, which offer volume-based pricing. As a result, the new Dish device portfolio would be expensive in its initial rollout.

46. Relying entirely on a virtualized 5G architecture that has not yet been deployed increases risk of execution, with less flexibility to back out and use a different technology. There is a scenario in which unacceptable delays in Rev 16 or other changes in the business plan (e.g., away from virtualization) would require a redesign or reboot of the build, which would cause a delay of months or years.

47. There is also a possibility that developers and deployers of 5G may adopt a "new cyber duty of care" and make changes in their development and supply chain strategies to enhance cyber security to address the new risks posed by 5G networking and applications.[10] Implementing changes in cyber security in hardware and software may add time to the development and production of equipment and software while cybersecurity risks are assessed and changes in design and architecture are made to address problems and increase preparedness. In this scenario, 5G early adopters introducing cutting-edge technologies might slow deployment while tried-and-true 4G operators would continue to operate broadband wireless networks. Dish might be contractually protected by the "unanticipated circumstances" described in Dish's letter to DOJ (Attachment A, VII, Verification Metrics (B)),[11] but a delay in 5G deployment would mean additional years of delay in the public having a broadband competitor—or even lead to Dish needing to radically change its model or cancel deployment.

Dish's limited buildout and capacity requirements are too limited for a robust fourth competitor

48. As mentioned above, operating an independent Dish network would require deploying tens of thousands of sites with robust fiber connectivity. Even with a supply of decommissioned Sprint and T-Mobile sites, this would be an enormous challenge.

[10] "Why 5G requires new approaches to cybersecurity: Racing to protect the most important network of the 21st century," Tom Wheeler and David Simpson, Brookings Institution, September 3, 2019, https://www.brookings.edu/research/why-5g-requires-new-approaches-to-cybersecurity/, accessed September 25, 2019.

[11] Dish letter to Federal Communications Commission, Jeffrey H. Blum, July 26, 2019, https://www.fcc.gov/sites/default/files/dish-letter-07262019.pdf

49. The benchmarks established in the Dish letter begin with a requirement that by June 14, 2022, Dish will cover 20 percent of the population with its own wireless facilities and activate its core network. The benchmark includes no number of towers, no speeds, and no detail on verification or test approaches—just an indication that Dish will use AWS and 700 MHz spectrum. The service is described as "5G Broadband Service," which is defined only as meaning "at least 3GPP Release 15 capable of providing Enhanced Mobile Broadband (eMBB) functionality"; the letter says nothing about speeds, how many customers the network will support, or other critical metrics. For example, it does not differentiate at all between a thin internet of things (IoT) network and a dense broadband network capable of serving as many people and providing comparable speeds to what the four major MNOs offer today.

50. The next significant performance benchmark is that by June 14, 2023, Dish will have activated 15,000 sites and will be providing 35 Mbps service to 70 percent of the U.S. population. The speed would be verified by drive test, using a methodology approved by the FCC and determined to reflect the actual user experience. Although the metrics for the 2023 requirements are better defined than the 2022 requirements, it is still not clear whether testing would be performed on a loaded network, whether tests would be required at the cell edge, whether testing would be done at peak times, or how many locations would be tested.

51. It is critical to note that the 2023 benchmark stops well short of the scale of the networks operated by the four existing MNOs. For example, the most straightforward way to serve 70 percent of the population is to focus on urban areas. If Dish were to serve only the

country's densest census blocks, a service map of 70 percent of the population would be only the red areas in Figure 1 below.

52. We note, too, that 35 Mbps is substantially lower that the speeds provided by many mobile broadband providers today, and compares poorly to the hundreds of Mbps forecast for T-Mobile and Sprint during the same period in T-Mobile's public interest statement, which states that absent the merger, Sprint would provide average speeds of 55 Mbps and peak speeds of 300 Mbps, and in 2024, absent the merger, would deliver average speeds of 113 Mbps and peak speeds of 700 Mbps[12]

53. Providing a low minimum required speed of 35 Mbps, instead of the speeds likely to be offered by the other MNOs, creates the risk of Dish building something other than a fully competitive broadband network—such as an IoT network that does not provide the capacity of a full broadband network (as had previously been considered publicly by Dish) or a specialized wholesale provider of capacity for other networks that focuses exclusively on high-density, high-value areas.

54. The last major performance milestones are the requirements to serve 70 percent of the population of each Partial Economic Area (PEA) (by June 14, 2023) and 75 percent of the population of each PEA (by June 14, 2025) with 5G using the 600 MHz band. While these requirements would require activation of service in a more widespread way than shown in Figure 1, they still could be met with a small incremental number of sites relative to the other service requirements—for example, by activating a few sites in each PEA at high

[12] Public Interest Statement, June 18, 2018, p. 44-45, https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-1%20(Public%20Redacted)%20.pdf, accessed September 25, 2019.

power. Again, that type of deployment could serve an IoT network with devices using low bandwidth over a large area. The benchmark does not define a speed or how many towers will be required, nor does it provide details on testing or enforcement—it only requires "5G broadband service" which, as noted above, is only defined as a protocol, not with any standard of performance.

The MVNO Agreement would require robust, long-term oversight

55. Finally, we note that, because the MVNO Agreement would cover a wide range of technical terms, it will require considerable effort for the government's overseeing entity—the Monitoring Trustee—to enforce.

56. Regarding the use of devices, for example, the PFJ states (V.B.4): "[T-Mobile] shall not unreasonably refuse to allow any device used by Acquiring Defendant's customers to access the Divesting Defendants' wireless networks, or otherwise unreasonably refuse to approve or support any such devices, and shall approve such devices for use upon request as soon as reasonably practicable, and shall use commercially reasonable efforts to provide technical support or other assistance to the Acquiring Defendant as requested to facilitate approval of any devices for use on Divesting Defendants' wireless networks[.]"

57. We note that "unreasonably," "as soon as reasonably practicable," and "commercially reasonable efforts" are not quantitatively defined and would require significant efforts by the Monitoring Trustee to interpret and mediate.

58. As a further indication of the need for robust monitoring, we note that the terms that govern T-Mobile and Dish's agreement would cover a wider range of topics compared to most existing roaming and peering agreements, including delivery of capacity nationally

(and in the right places at the right times), appropriate prioritization of capacity, managing a wide range of user devices and generations of wireless base station equipment, and accommodating an ongoing migration from T-Mobile sites to Dish sites, all while T-Mobile merges its network with Sprint's and performs its own 5G upgrade. Enforcement of the agreement would require the Monitoring Trustee to have full visibility into all the parties' networks and their configuration. And because poor network performance can have a major impact on Dish as a new entrant, the enforcement would need to be quick and decisive.

59. Finally, the PFJ also states (VI.B.6): "[T-Mobile] shall not otherwise unreasonably delay, impede, or frustrate Acquiring Defendant's ability to use any Full MVNO Agreement and the Divesting Defendants' networks to become a nationwide facilities-based retail mobile wireless services provider," a wide-ranging charge that may be interpreted very differently by the parties. It would be a strenuous task for the Monitoring Trustee to interpret and enforce this complex and ambitious framework over a period of years, all along making decisions and acting quickly enough to protect a party that is being damaged.

DATED: October 8, 2019

Andrew Afflerbach, Ph.D., P.E.

Attachment A: CV

Andrew Afflerbach, Ph.D., P.E. | CEO and Chief Technology Officer
CTC Technology & Energy

Dr. Andrew Afflerbach specializes in the planning, designing, and implementation oversight of broadband communications networks, smart cities strategies, and public safety networks. His expertise includes state-of-the-art fiber and wireless technologies, the unique requirements of public safety networks, and the ways in which communications infrastructure enables smart and connected applications and programs for cities, states, and regions.

Andrew has planned and designed robust and resilient network strategies for dozens of clients, including state and local governments and public safety users. He has delivered strategic technical guidance on wired and wireless communications issues to cities, states, and national governments over more than 20 years. He has advised numerous cities and states, including New York City, San Francisco, Seattle, Atlanta, Washington, D.C., and Boston, and served as a senior adviser to Crown Fibre Holdings, the public entity directing New Zealand's national fiber-to-the-home project.

In addition to designing networks, Andrew testifies as an expert witness on broadband communications issues. And he is frequently consulted on critical communications policy issues through technical analyses submitted to the Federal Communications Commission (FCC) and policymakers. He has prepared white papers on:

- Estimating the cost to expand fiber to underserved schools and libraries nationwide
- Conducting due diligence for the IP transition of the country's telecommunications infrastructure
- Developing technical frameworks for wireless network neutrality
- Streamlining deployment of small cell infrastructure by improving wireless facilities siting policies
- Limiting interference from LTE-U networks in unlicensed spectrum

As CTC's Chief Technology Officer, Andrew oversees all technical analysis and engineering work performed by the firm. He has a Ph.D. and is a licensed Professional Engineer.

Fiber Network Planning and Engineering

Andrew has architected and designed middle- and last-mile fiber broadband networks for the District of Columbia (Washington, D.C.); the city of San Francisco; the Delaware Department of Transportation; the Maryland Transportation Authority; and many large counties.

He oversaw the development of system-level broadband designs and construction cost estimates for the cities of Atlanta, Boston, Boulder, Palo Alto, Madison, and Seattle; the states of Connecticut and Kentucky; and many municipal electric providers and rural communities. He is overseeing the detailed design of the city-built fiber-to-the-premises (FTTP) networks in

~~Westminster, Maryland; Alford, Massachusetts; and Holly Springs and Wake Forest, North Carolina.~~

~~In Boston, Andrew led the CTC team that developed a detailed RFP, evaluated responses, and participated in negotiations to acquire an Indefeasible Right of Use (IRU) agreement with a fiber vendor to connect schools, libraries, public housing, and public safety throughout the City. This approach was designed to allow the City to oversee and control access and content among these facilities.~~

~~*Wireless Network Planning and Engineering*~~
~~Applying the current state of the art—and considering the attributes of anticipated future technological advancements such as "5G"—Andrew has developed candidate wireless network designs to meet the requirements of clients including the cities of Atlanta, San Francisco, and Seattle. In a major American city, Andrew led the team that evaluated wireless broadband solutions, including a wireless spectrum roadmap, to complement potential wired solutions.~~

~~In rural, mountainous Garrett County, Maryland, Andrew designed and oversaw the deployment of an innovative wireless broadband network that used TV white space spectrum to reach previously unserved residents. To enhance public internet connectivity, Andrew provides technical oversight on CTC's Wi-Fi-related projects, including the design and deployment of Wi-Fi networks in several parks in Montgomery County, Maryland.~~

~~Andrew also advises local and state government agencies on issues related to wireless attachments in the public rights-of-way; he leads the CTC team that supports the Texas Department of Transportation (TxDOT) and many large counties on wireless attachment policies and procedures.~~

~~*Public Safety Networking*~~
~~Andrew leads the CTC team providing strategic and tactical guidance on FirstNet (including agency adoption and other critical decision-making) for the State of Delaware and Onondaga County, New York. In the District of Columbia, he and his team evaluated the financial, technical, and operational impact of building the District's own public safety broadband network, including the design of an LTE system that provided public-safety-level coverage and capacity citywide. This due diligence allowed the District to make an informed decision regarding opting in or out of the National Public Safety Broadband Network.~~

~~Andrew currently is working with the State of Delaware to evaluate LTE coverage gaps throughout the state to assist agencies in their choice of public safety broadband networks. On the state's behalf, he and his team are also conducting outreach to AT&T and other carriers to evaluate their public safety offerings. He is performing similar work as part of CTC's engagement with El Paso County, Colorado.~~

~~Earlier, Andrew led the CTC team that identified communications gaps and evaluated potential technical solutions for the Baltimore Urban Area Security Initiative (UASI), a regional emergency preparedness planning effort funded by the U.S. Department of Homeland Security (DHS).~~

He previously served as lead engineer and technical architect for planning and development of NCRnet, a regional fiber optic and microwave network that links public safety and emergency support users throughout the 19 jurisdictions of the National Capital Region (Washington, D.C. and surrounding jurisdictions), under a DHS grant. He wrote the initial feasibility studies that led to this project for regional network interconnection.

Smart Grid

Andrew and the CTC team provided expert testimony and advisory services to the Public Service Commission of Maryland regarding Advanced Metering Infrastructure (AMI). CTC provided objective guidance to the staff as it evaluated AMI applications submitted by three of the state's investor-owned utilities (IOUs). This contract represented the first time the PSC staff had asked a consultant to advise them on technology—a reflection of the lack of standards in the Smart Grid arena.

Broadband Communications Policy Advisory Services

Andrew advises public sector clients and a range of policy think tanks, U.S. federal agencies, and non-profits regarding the engineering issues underlying key communications issues. For example, he:

- Provided expert testimony to the FCC in the matter of the preparation of the **national broadband plan** as a representative of the National Association of Counties (NACo) and the National Association of Telecommunications Officers & Advisors (NATOA).
- Served as expert advisor regarding broadband deployment to the U.S. Conference of Mayors, NACo, National League of Cities, Public Knowledge, New America Foundation Open Technology Institute, and NATOA in those organizations' filings before the FCC in the matter of determination of the deployment of a **national, interoperable wireless network in the 700 MHz spectrum.**
- In connection with the FCC's ongoing **Open Internet proceeding,** advised the New America Foundation regarding the technical pathways by which "any device" and "any application" regimes could be achieved in the wireless broadband arena as they have been in the wireline area.
- Provided expert technical advice on the **700 MHz broadband and AWS-3 proceedings** at the FCC for the Public Interest Spectrum Coalition (including Free Press, the New America Foundation, Consumers Union, and the Media Access Project).
- Served as technical advisor to the **U.S. Naval Exchange** in its evaluation of vendors' broadband communications services on U.S. Navy bases worldwide.
- Advised the **U.S. Internal Revenue Service** regarding the history of broadband and cable deployment and related technical issues in that agency's evaluation of appropriate regulations for those industries.
- Advised the Stanford Law School Center for Internet and Society on the technical issues for their briefs in the ***Brand X* Supreme Court appeal** regarding cable broadband.

Broadband Communications Instruction

Andrew has served as an instructor for the U.S. Federal Highway Association/National Highway Institute, the George Washington University Continuing Education Program, the University of

Maryland Instructional TV Program, ITS America, Law Seminars International, and the COMNET Exposition. He developed curricula for the United States Department of Transportation.

He taught and helped develop an online graduate-level course for the University of Maryland. He developed and taught communications courses and curricula for ITS America, COMNET, and the University of Maryland. His analysis of cable open access is used in the curriculum of the International Training Program on Utility Regulation and Strategy at the University of Florida.

Andrew has also prepared client tutorials and presented papers on emerging telecommunications technologies to the National Fire Protection Association (NFPA), NATOA, the National League of Cities (NLC), the International City/County Management Association (ICMA), and the American Association of Community Colleges (AACC). He taught college-level astrophysics at the University of Wisconsin.

EMPLOYMENT HISTORY

1995–Present CEO/Chief Technology Officer, CTC
Previous positions: Director of Engineering, Principal Engineer, Senior Scientist

1990–1996 Astronomer/Instructor/Researcher
University of Wisconsin—Madison, NASA, and Swarthmore College

EDUCATION

Ph.D., Astronomy, University of Wisconsin—Madison, 1996

- NASA Graduate Fellow, 1993-1996. Research fellowship in astrophysics
- Elected Member, Sigma Xi Scientific Research Honor Society

Master of Science, Astronomy, University of Wisconsin—Madison, 1993
Bachelor of Arts, Physics, Swarthmore College, 1991

- Eugene M. Lang Scholar, 1987-1991

PROFESSIONAL CERTIFICATIONS/LICENSES

Professional Engineer, states of Delaware, Georgia, Maryland, Illinois, and Virginia

HONORS/ORGANIZATIONS

- Disaster Response and Recovery Working Group, FCC's Broadband Deployment Advisory Committee (BDAC)
- Association of Public Safety Communications Officials (APCO)
- Board of Visitors, University of Wisconsin Department of Astronomy
- National Association of Telecommunications Officers and Advisors (NATOA) Technology and Public Safety Committees
- Armed Forces Communications and Electronics Association (AFCEA)
- Society of Cable and Telecommunications Engineers (SCTE)
- Institute of Electrical and Electronic Engineers (IEEE)
- Charleston Defense Contractors Association (CDCA)

SELECTED PUBLICATIONS, PRESENTATIONS, and COURSES

- "SB 937: Wireless Facilities — Installation and Regulation," Testimony before the State of Maryland Senate, Feb. 2019
- "HB 654: Wireless Facilities — Installation and Regulation," Testimony before the State of Maryland General Assembly, Feb. 2019
- "The Three "Ps" of Managing Small Cell Applications: Process, Process, Process," Dec. 2018
- Declaration in Response to FCC's Order, "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," prepared for the Smart Communities and Special Districts Coalition, filed with the FCC, Sept. 2018
- Declaration in Response to the Proposed T-Mobile/Sprint Merger, prepared for the Communications Workers of America, filed with the FCC, Aug. 2018
- "A Model for Understanding the Cost to Connect Anchor Institutions with Fiber Optics" (co-author), prepared for the Schools, Health & Libraries Broadband Coalition, Feb. 2018
- "How Localities Can Prepare for—and Capitalize on—the Coming Wave of Public Safety Network Construction," Feb. 2018
- "Network Resiliency and Security Playbook" (co-author), prepared for the National Institute of Hometown Security, Nov. 2017
- "Mobile Broadband Service Is Not an Adequate Substitute for Wirelines" (co-author; addressing the limitations of 5G), prepared for the Communications Workers of America, Oct. 2017
- "Technical Guide to Dig Once Policies," April 2017
- "Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies," prepared for the Smart Communities Siting Coalition, filed with the FCC, March 2017
- "How Localities Can Improve Wireless Service for the Public While Addressing Citizen Concerns," Nov. 2016
- "LTE-U Interference in Unlicensed Spectrum: The Impact on Local Communities and Recommended Solutions," prepared for WifiForward, Feb. 2016
- "Mobile Broadband Networks Can Manage Congestion While Abiding by Open Internet Principles," prepared for the New America Foundation's Open Technology Institute — Wireless Future Project, filed with the FCC, Nov. 2014
- "The State of the Art and Evolution of Cable Television and Broadband Technology," prepared for Public Knowledge, filed with the FCC, Nov. 2014
- "A Model for Understanding the Cost to Connect Schools and Libraries with Fiber Optics," prepared for the Schools, Health & Libraries Broadband Coalition, filed with the FCC, Oct. 2014
- "The Art of the Possible: An Overview of Public Broadband Options," prepared jointly with the New America Foundation's Open Technology Institute, May 2014
- "Understanding Broadband Performance Factors," with Tom Asp, *Broadband Communities* magazine, March/April 2014

- ~~"Engineering Analysis of Technical Issues Raised in the FCC's Proceeding on Wireless Facilities Siting," filed with the FCC (http://apps.fcc.gov/ecfs/document/view?id=7521070994), Feb. 2014~~
- ~~"A Brief Assessment of Engineering Issues Related to Trial Testing for IP Transition," prepared for Public Knowledge and sent to the FCC as part of its proceedings on Advancing Technology Transitions While Protecting Network Values, Jan. 2014~~
- ~~"Gigabit Communities: Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community," prepared as a guide for local government leaders and planners (sponsored by Google), Jan. 2014~~
- ~~"Critical Partners in Data Driven Science: Homeland Security and Public Safety," submitted to the *Workshop on Advanced Regional & State Networks (ARNs): Envisioning the Future as Critical Partners in Data-Driven Science,* Internet2 workshop chaired by Mark Johnson, CTO of MCNC, Washington, D.C., April 2013~~
- ~~"Connected Communities: How a City Can Plan and Implement Public Safety & Public Wireless," submitted to the International Wireless Communications Exposition, Las Vegas, March 2013~~
- ~~"Cost Estimate for Building Fiber Optics to Key Anchor Institutions," prepared for submittal to the FCC by NATOA and SHLB, Sept. 2009~~
- ~~"Efficiencies Available Through Simultaneous Construction and Co-location of Communications Conduit and Fiber," prepared for submittal to the FCC by the National Association of Telecommunications Officers and Advisors and the City and County of San Francisco, 2009, referenced in the National Broadband Plan~~
- ~~"How the National Capital Region Built a 21st Century Regional Communications Network" and "Why City and County Communications are at Risk," invited presentation at the FCC's National Broadband Plan workshop, Aug. 25, 2009~~

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