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. 18-07-012

BRIEF OF COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 9

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SUMMARY OF RECOMMENDATIONS

CWA respectfully urges the Commission to **deny** the proposed merger (with or without the DISH divestiture) as currently structured because:

- The merger is not in the public interest;
- The merger would eliminate thousands of California jobs;
- The merger would combine two companies with long histories of labor and employment violations;
- The merger would increase wireless employers' power to unilaterally set wages;
- There are no merger-specific, verifiable public interest benefits; and
- The DISH divestiture does not remedy the proposed merger's public interest harms.

To protect the public interest in quality jobs, the Commission must require the Applicants and DISH to make verifiable, enforceable commitments that no T-Mobile or Sprint employee (including those of dealers and contractors) loses a job or wages as a result of the transaction, and to ensure the complete protection of employees' right to form a union of their own choosing free from any interference by the New T-Mobile.

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BRIEF OF
COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 9

Communications Workers of America, District 9 ("CWA") respectfully submits this brief pursuant to Rule 13.11 of the Rules of Practice and Procedure and the October 24, 2019 Assigned Commissioner's Amended Scoping Ruling.

I. INTRODUCTION

In July 2018, T-Mobile and Sprint (the "Applicants") filed applications with the Commission for a proposed merger. The Commission then proceeded with evaluating "the fundamental issue presented by these applications," which is whether a merger between the nation's third and fourth largest mobile wireless carriers "is in the public interest of the residents of California."[1] A record was developed which showed that the merger would harm competition

[1] Amended Assigned Commissioner's Scoping Memo and Ruling, October 4, 2018, p. 2.

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and harm the public interest by eliminating jobs and increasing prices with no countervailing verifiable, merger-specific benefits.[2]

Specifically, the record showed that the merger would eliminate more than 3,000 California jobs, increase wireless employers' power to unilaterally set wages and combine two companies with a long history of labor and employment violations. The record also showed that the proposed merger raised serious competitive concerns that would disproportionately impact low- and moderate-income customers. In addition, the record showed that T-Mobile and Sprint failed to provide evidence of verifiable, merger-specific public interest benefits. Both companies are already poised to roll out 5G services and both companies would continue to compete as standalone companies. Moreover, the record did not support the Applicants' claim that the merger would bring improved service to rural California.

After hearings on the proposed merger, the Applicants filed for notice of new agreements and commitments with DISH Network under a settlement with the U.S. Department of Justice. To obtain merger approval from the DOJ and Federal Communications Commission, Sprint and T-Mobile agreed to provide DISH spectrum, cell sites and access to the new T-Mobile network for seven years with the goal of DISH eventually becoming a fourth national facilities-based mobile service provider. In October 2019, recognizing that the DISH divestiture "significantly altered the original proposed transaction,"[3] the Commission issued the Assigned Commissioner's Amended Scoping Ruling, expanding the scope of this proceeding to determine if the DISH

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[2] *See* Opening Brief of Communications Workers of America, District 9, April 26, 2019 and Reply Brief of Communications Workers of America, District 9, May 10, 2019.
[3] Assigned Commissioner's Amended Scoping Ruling, October 24, 2019, p. 2.

divestiture alters the conclusion of whether the proposed merger is in the public interest of Californians. It does not.

The record evidence shows that the DISH divestiture would not remedy the merger's job losses, store closures or downward pressure on wages. With or without the DISH divestiture, the merger would result in a loss of more than 3,000 retail jobs in California. Post-merger, the annual earnings of retail wireless workers in California's major metropolitan areas would decline by $2,319 to $2,953.

In addition, the record shows that the DISH divestiture would not remedy the proposed merger's anti-competitiveness. The DISH divestiture assets do not restore the competition lost by eliminating Sprint as an independent competitor. Record evidence shows that DISH lacks the necessary managerial, operational, technical and financial capability to compete effectively, and DISH would not replace the competitive pressure Sprint currently exerts in the relevant market.

The proposed merger – with or without the DISH divestiture – is not in the public interest. The DISH divestiture fails to remedy the proposed merger's eliminating thousands of California jobs, adversely affecting competition and raising prices for consumers, with no countervailing verifiable, merger-specific benefits. The Commission cannot lawfully approve the merger (with or without the DISH divestiture) as structured. To protect the public interest in quality jobs, the Commission must require the Applicants and DISH to make verifiable, enforceable commitments that no T-Mobile or Sprint employee (including those of dealers and contractors) loses a job or wages as a result of the transaction, and to ensure the complete protection of employees' right to form a union of their own choosing free from any interference by the New T-Mobile.

II. STANDARD OF REVIEW

A public utility merger in California must be authorized by the Commission[4] and the Commission has full discretion and authority to review a merger involving wireless entities and to impose conditions where "necessary in the public interest."[5] Pursuant to Public Utilities Code sections 854(b) and (c), before authorizing a merger where the parties to the transaction meet certain revenue thresholds, the Commission must find that the merger provides short-term and long-term economic benefits to ratepayers, does not adversely affect competition and is in the public interest.[6] The Commission has consistently found that the public interest criteria set forth in sections 854(b) and (c) serve as a useful framework for evaluating mergers under section 854(a) regardless of corporate and financial structures that often allow transactions to evade the revenue thresholds of sections 854 (b) and (c).[7]

The Commission has broad discretion to determine if a merger is in the public interest[8] and must consider, on balance, a range of criteria, including whether the merger maintains or improves the quality of service to ratepayers, is fair and reasonable to utility employees, and benefits the state and local economies and communities served by the resulting public utility, among other factors.[9]

T-Mobile and Sprint, as merger applicants, must prove by a preponderance of the evidence that the merger satisfies these requirements.[10] T-Mobile and Sprint have failed to make

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[4] Pub. Utilities Code § 854(a).
[5] D.95-10-032, pp. 15-18.
[6] Pub. Utilities Code §§ 854(b) and (c).
[7] *See e.g.*, D.07-05-061, p. 24; D.06-02-033, p. 23; D.10-10-017, p. 15; D.16-05-007, p. 20; D.01-06-007; *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370, 377.
[8] D.06-02-033, p. 23.
[9] Pub. Utilities Code §§ 854(c)(1)-(8).
[10] *Id.*, § 854(e); D.10-10-01, pp. 11, 16.

this showing (with or without the DISH divestiture) and, therefore, the Commission cannot find that the merger (with or without the DISH divestiture) would benefit ratepayers or is in the public interest. On the contrary, the record shows that the proposed merger (with or without the DISH divestiture) would eliminate thousands of California jobs and harm ratepayers (particularly low-income ratepayers).

III. THE DISH DIVESTITURE DOES NOT REMEDY THE PROPOSED MERGER'S HARM TO CALIFORNIA WORKERS

A. The Merger Would Still Result in More Than 3,000 Job Losses in California

To authorize a proposed merger, the Commission must find that the merger is in the public interest.[11] To determine whether the proposed merger is in the public interest, the Commission must consider whether the merger, among other factors, is fair and reasonable to utility employees.[12] The proposed merger (with or without the DISH divestiture) would harm Sprint and T-Mobile retail workers in California.

CWA showed that the proposed merger (pre-DISH divestiture) would eliminate more than 3,000 California jobs from retail store closures.[13] Specifically, CWA's modeling found that 902 of 3,241 (28%) stores in California would close from the merger, eliminating 3,342 California jobs.[14] This is because, in California, Sprint and T-Mobile's 1,230 postpaid wireless services corporate and authorized retail stores have a substantial geographic overlap.[15] Therefore, it makes sense that the proposed merger would cause a significant number of store closures.[16]

[11] Pub. Utilities Code § 854(c).
[12] *Id.*, §§ 854(c)(1)-(8).
[13] Exh. CWA-1, pp. 52, 101-109.
[14] *Id.*, p. 52.
[15] *Id.*, p. 53.
[16] *Id.*

According to industry analysts, store closures are a key element of the projected cost savings from the proposed merger.[17] Indeed, T-Mobile acknowledged that the merger would result in a significant number of postpaid store closings in California but it has not determined which stores would close. In early 2019 it was "still evaluating plans related to any prepaid retail store locations as a result of the merger."[18] In other words, T-Mobile did not know how many stores would close as a result of the merger; it still doesn't. Moreover, the DISH divestiture would not change the resulting impacts on workers. The DISH divestiture does not change CWA's finding that the merger would result in more than 3,000 retail job losses in California.

CWA's analysis showed that the merger (pre-DISH divestiture) would result in a net loss of 1,707 postpaid retail jobs in California.[19] The DISH divestiture does not change this conclusion.[20] The initial store closures following the merger will still eliminate more than 2,864 postpaid retail positions in California. Those losses will be somewhat offset by increased employment at remaining stores to cover higher volumes.[21]

For prepaid retail job losses, CWA initially estimated the merger would result in closing 545 Metro and Boost Mobile stores and 1,635 associated retail job losses in California.[22] The DISH divestiture attempts to address these job losses but utterly fails. Neither T-Mobile nor DISH have made any commitments to maintain employment levels in prepaid retail operations. While T-Mobile testified that "it plans to offer **all** of the employees at T-Mobile and Sprint retail

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[17] *Id.*, citing New Street Research "Sprint/T-Mobile Redux: Refreshing Synergies and Scenarios," p. 28 (April 15, 2018).
[18] Exh. CWA-2, p. 6.
[19] Exh. CWA-1, p. 54.
[20] Exh. CWA-18, p. 6.
[21] Exh. CWA-1, p. 54.
[22] *Id.*

stores in California the opportunity to continue as employees of New T-Mobile,"[23] the record shows that T-Mobile's plan would not, in fact, apply to "**all**" employees who sell, service, maintain or build T-Mobile and Sprint products and services. Rather, T-Mobile's jobs "plan" would apply to direct internal employees only (i.e. ***not*** employees of contractors or authorized dealers).[24] T-Mobile's "plan" to offer jobs to current employees would apply to ***none*** of the employees at authorized dealer stores, which make up the vast majority of prepaid retail stores.[25]

When asked whether it has made commitments to maintain employment levels at Boost branded retail stores in California (which are all operated by authorized dealers),[26] DISH testified that:

- DISH has made **no** commitments to maintain the Boost retail footprint in California following the proposed divestiture;[27]
- DISH has made **no** commitments to ensure that employees at Boost authorized dealer stores will not experience loss of employment as a result of the DISH acquisition of the Sprint prepaid assets;[28] and
- DISH has made **no** commitments to ensure that employees at Boost authorized dealer stores will not experience forced relocation as a result of the DISH acquisition of the Sprint prepaid assets.[29]

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[23] Exh. Jt. Appl.-2, p. 38 (emphasis in original).
[24] Tr., Vol. 4, p. 353:10-14 (Sievert).
[25] Exh. CWA-2C.
[26] Tr. Vol. 9 at 1573:13-16 (Blum).
[27] *Id.* at 1578:18-22 (Blum).
[28] *Id.* at 1574:21-27, 1574:10-12 (Blum).
[29] *Id.* at 1575:23 – 1576:2 (Blum).

Without commitments by T-Mobile and DISH to preserve jobs, "thousands of jobs in Boost and Metro stores continue to be at risk as a result of this transaction."[30] Tellingly, since the announcement of the proposed merger in April 2018, the applicants closed a net 225 prepaid retail locations.[31] In the Los Angeles area, the second largest wireless market in the country, the applicants closed a net 116 prepaid retail locations, reducing their prepaid retail footprint by 15%. This was a 12% reduction of Metro locations and 20% reduction in Boost locations.[32] The shrinking prepaid retail footprint in California directly contradicts the Applicants' prior claims that there was no plan to change the retail footprint and that the merger would create jobs. The retail store closures "raise serious questions about whether their unenforceable claims of public interest benefits can be trusted."[33] Without commitments by the Applicants and DISH to protect jobs, "California remains at risk of losing thousands of additional prepaid retail jobs."[34]

B. The DISH Divestiture Does Not Remedy the Merger's Adverse Effect on Industry-Wide Wages

Labor markets in the U.S. are highly concentrated, workers are paid lower wages in more concentrated labor markets and collective bargaining substantially reduces downward pressure on wages from labor market concentration.[35] Therefore, a proposed merger's competitive analysis should identify the affected labor markets and analyze the merger's impact on concentration in those labor markets.[36]

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[30] Exh. CWA-18, p. 7.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] CWA-1, pp. 57-59.
[36] *Id.*

CWA showed that the proposed merger (pre-DISH divestiture) "could substantially increase concentration in numerous local wireless industry retail labor markets, increasing the monopsony power of employers in purchasing labor power of retail wireless workers, thereby depressing workers' wages and benefits through reduced competition for labor."[37] Without the collective bargaining tool "to counter employer concentrated power, retail wireless workers would be worse off by reducing the number of national wireless retail employers from four to three."[38]

The Economic Policy Institute and Roosevelt Institute studied the labor market impact of the proposed merger on retail workers who sell wireless equipment and services. The economists found that post-merger, the annual earnings of retail wireless workers in the most expensive urban areas in the State would decline (by as much as $2,906 in Los Angeles, $2,953 in San Francisco, $2,363 in San Diego, $2,728 in San Jose and $2,319 in Sacramento on an annual basis).[39] New evidence from the FCC supports these findings. According to the FCC, New T-Mobile "will be able to reduce dealer commission rates because of the increased volumes after closure of duplicative retail locations"[40] and "is likely to achieve reduced commission rates due to greater store level productivity at increased average volumes per store."[41] CWA testified that "[t]hese supposed 'synergies' represent affirmative plans by the Applicants to use their increased market power to extract economic benefit from authorized dealers through reduced commissions.

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[37] *Id.*

[38] *Id.*, pp. 58-59.

[39] *Id.*, p. 59; Exh. CWA-18, p. 8.

[40] Exh. CWA-18, p. 8, citing Memorandum of Opinion of and Order, Declaratory Ruling, and Order of Proposed Modification in the Matter of the Joint Application of Sprint Communications L.P. and T-Mobile USA, Inc. FCC 19-103. WT Docket No. 18-197. Adopted October 15, 2019.

[41] Exh. CWA-19, p. 137.

The Applicants' plans to reduce dealer commission rates will directly translate to lower compensation levels for retail workers."[42] Indeed, the President and COO (and soon-to-be CEO) of T-Mobile testified that authorized dealers may earn "a lower commission per transaction."[43] To make matters worse, DISH has made **no** commitments to ensure that employees at Boost authorized dealer stores will not experience reduced compensation as a result of the DISH acquisition of the Sprint prepaid assets.[44]

C. T-Mobile Continues to Violate Workers' Rights

CWA previously showed why T-Mobile's claim that it "has an impressive history of employee satisfaction…"[45] is patently false and its long history of employment law and workers' rights violations "speaks volumes" about the company's "trustworthiness and corporate character."[46] CWA previously outlined T-Mobile's being found guilty of violating U.S. labor law six times since 2015.[47] There is now another example to add to the list. 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, California:

> 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

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[42] Exh. CWA-18, pp. 8-9.
[43] Tr. Vol. 9 at 1515:1-7, 1516:16-25 (Sievert).
[44] Tr. Vol. 9 at 1575:13-20 (Blum).
[45] Exh. Jt Appl-8, p. 13.
[46] Exh. CWA-1, p. 61.
[47] *T-Mobile USA, Inc*., JD(NY)-34-15, 2015 WL 4624356 (August 3, 2015), adopted by NLRB on September 14, 2015; *T-Mobile USA, Inc*., JD-57-16, 2016 WL 3537770 (June 28, 2016); *T-Mobile USA, Inc. v. Nat'l Labor Relations Bd*., 865 F.3d 265 (5th Cir. 2017); *T-Mobile USA, Inc*., JD-23-17,2017 WL 1230099 (Apr. 3, 2017); *T-Mobile USA, Inc*., 365 NLRB No. 15 (Jan. 23, 2017); *T-Mobile USA, Inc. v. Nat'l Labor Relations Bd*., 717 F. Appx 1 (D.C. Cir. 2018).

transfer in retaliation for protected concerted activities, and advised employees of the futility of organizing a union.[48]

In sum, the proposed merger (with or without the DISH divestiture) is unfair and unreasonable for T-Mobile and Sprint employees. Record evidence shows that the merger (with or without the DISH divestiture) would eliminate more than 3,000 California jobs, reduce the employment options available to retail wireless employees in an already concentrated retail wireless labor market and exert downward pressure on wages and other working conditions. The Applicants' willful disregard for the massive job loss that would occur for employees of authorized dealers is remarkable. Collective bargaining mitigates the negative impacts of labor market monopsony power, but T-Mobile and Sprint[49] have fought aggressively to deny their employees this legal right. The merger's employment impacts do not serve the public interest.

IV. THE DISH DIVESTITURE DOES NOT REMEDY THE PROPOSED MERGER'S CUSTOMER SERVICE IMPACTS TO CALIFORNIANS

The record shows that the merger would result in a substantial number of retail store closures, limiting communities' access to a diverse selection of wireless retail options. Reduced customer service is not in the public interest. The DISH divestiture does not change these facts.

Both T-Mobile and DISH recognize that it is important for low-income customers, especially those with limited transportation options, to be able to easily access a diverse selection of wireless retail options in their communities.[50] Yet, record evidence shows that store closures

[48] Exh. CWA-18, p. 9, quoting NLRB Settlement Agreement, Communications Workers of America, District 9, Unfair Labor Practice Charge against Deutsche Telekom AG d/b/a T-Mobile, Case 32-CA-248363, filed September 16, 2019.
[49] *See* CWA Opening Brief, pp. 33-34.
[50] Tr. Vol. 9 at 1504:15-21 (Sievert); Tr. Vol. 9 at 1572:12-19 (Blum).

are a key element of the projected cost savings from the merger.[51] CWA's analysis showed that the merger would result in a significant number of store closures in California.[52] The FCC found that New T-Mobile "will be able to reduce dealer commission rates because of the increased volumes after closure of duplicative retail locations."[53] Indeed, T-Mobile acknowledged that the merger would result in a substantial number of postpaid store closings in California but it has not determined which stores would close and "it is still evaluating plans related to any prepaid retail store locations as a result of the merger."[54] Further, DISH has made no commitments to maintain the Boost retail footprint in California following the proposed divestiture.[55]

The merger will result in not only reduced customer access to a diverse selection of wireless retail options, but also reduced customer service at the remaining retail locations. DISH has made no commitments to maintain or improve customer service.[56] Further, according to the FFC, New T-Mobile will likely achieve merger efficiencies by reducing authorized dealer commission rates "due to greater store level productivity at increased average volumes per store."[57] In other words, dealers will earn less per transaction. This means that, post-merger, employees of authorized dealers will have to complete ***more*** transactions to earn as much as their pre-merger wages. Reducing earnings ***disincentives*** maintaining or improving customer service.

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[51] Exh. CWA-1, p. 53, citing New Street Research "Sprint/T-Mobile Redux: Refreshing Synergies and Scenarios," at 28 (April 15, 2018).
[52] *Id.*, pp. 52, 101-109.
[53] Exh. CWA-18, p. 8, citing Memorandum of Opinion of and Order, Declaratory Ruling, and Order of Proposed Modification in the Matter of the Joint Application of Sprint Communications L.P. and T-Mobile USA, Inc. FCC 19-103. WT Docket No. 18-197. Adopted October 15, 2019.
[54] Exh. CWA-2, p. 6.
[55] Tr. Vol. 9 at 1578:18-22 (Blum).
[56] *Id*. at 1578:7-12 (Blum).
[57] Exh. CWA-19, p. 137.

When asked how earning a lower commission per transaction incentives better customer service to Californians, T-Mobile's President and COO (and soon-to-be CEO) responded that employees would "rather be working with customers than cleaning the counters or doing other things that are less enjoyable."[58] Mr. Sievert's declaration is presumptuous at best. Perhaps employees would like – and deserve – to earn more for doing more work. Perhaps fair pay would translate into maintaining or improving customer service for Californians.

In short, the merger (with or without the DISH divestiture) would result in diminished customer service for Californians and is, therefore, not in the public interest.

V. THE APPLICANTS' CLAIM THAT THE DISH DIVESTITURE WOULD NOT IMPACT NEW T-MOBILE'S NETWORK SERVICE IS UNSUPPORTED

CWA previously showed that the Applicants' claim that the merger would bring dramatically improved network service to rural California is unsupported by the record. In fact, the record shows that for much of rural California, the merger would provide little network benefit. Specifically, the record evidence shows that the merger would provide only marginally better options than standalone T-Mobile in much of rural California. Even six years after a T-Mobile/Sprint merger, service in rural areas would continue to have significant limitations and would still lag far behind urban and suburban areas.[59]

The supplemental testimony of T-Mobile's CTO raises new and troubling questions about the quality of New T-Mobile's mobile broadband service in California. Mr. Ray makes technical claims about several critical issues without offering any calculations or models to support his assertions. Most troubling is the Applicants' failure to provide any engineering

[58] Tr. Vol. 9 at 1518:20-22.
[59] Tr. Vol. 5 at 569 – 573, 578 – 580, 582 (Ray).

justification for Mr. Ray's claim that New T-Mobile's obligation to provide capacity to DISH under an MVNO agreement will have no impact on New T-Mobile's service.

Mr. Ray boldly claims, with zero support, that "T-Mobile's MVNO agreement with DISH will have no adverse impact at all on our existing LTE network or on our planned world-leading 5G network."[60] He then asserts that the "network plan already accounted for the Sprint prepaid customers so there is limited (if any) incremental loading associated with this group of customers in particular."[61] While this may be true at the time of the transfer, it completely fails to account for the potential growth of DISH's subscribership or for any increases in those subscribers' use of capacity outside the parameters of T-Mobile's original model. Indeed, Mr. Ray testified that his conclusion was based on about nine million DISH subscribers,[62] he made no assumptions regarding growth of the number of DISH subscribers over the seven years of the MVNO,[63] he was unsure whether he made any assumptions regarding the data capacity used by those subscribers,[64] and he did not account for the geographic distribution of those subscribers.[65] If, for example, DISH opts to offer low-cost services with high or no bandwidth caps, it may draw more subscribers and result in sharply increased usage per subscriber. If that were to happen, Mr. Ray's claim would be false.

T-Mobile currently has 84.2 million subscribers and Sprint has 54.5 million, for a total of 138.7 million.[66] Of these, 8.8 million are subscribers of the Sprint prepaid brands being sold to

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[60] Exh. Jt. Appl. 28, p. 21.
[61] *Id.*
[62] Tr. Vol. 8 at 1389:3-12 (Ray).
[63] *Id.* at 1392:11-19 (Ray).
[64] *Id.* at 1393:21-25 (Ray).
[65] *Id.* at 1395:19 – 1396:9 (Ray).
[66] Exh. CWA-15, p. 51; Exh. CWA-16, p. 51.

DISH. At the moment, these subscribers comprise 6% of the combined companies' total subscribership.[67] Any increase in DISH subscribers at the expense of AT&T and Verizon, or any increase in usage of the Sprint prepaid subscribers relative to the usage in T-Mobile's model, will increase the New T-Mobile network's utilization. If DISH grows to the size of Sprint, but captures its customers from all of the providers, and offers high-usage unlimited services, the increased use could have a substantial impact on New T-Mobile.

Furthermore, it could take several years for DISH to begin to build and activate its own network with substantial migration off of T-Mobile's network on a national basis, and likely several years longer until DISH has coverage that is sufficiently complete to enable it to fully migrate away from T-Mobile. Thus, it is unlikely that T-Mobile's analysis of the present time will apply for the seven-year MVNO period.

Finally, CWA notes that the last areas where DISH will build its own network will likely be the hardest-to-build and lowest-revenue areas—the country's low-density rural communities. Even in 2024, T-Mobile will only serve many of those areas with low-band spectrum.[68] It is in those exact areas where, in the long term, New T-Mobile will also need to supply capacity to DISH customers.

Mr. Ray's claim that "T-Mobile's MVNO agreement with DISH will have no adverse impact at all on our existing LTE network or on our planned world-leading 5G network"[69] sorely lacks evidentiary support. To analyze the impact of the MVNO agreement on T-Mobile's service, modeling must be performed which includes 1) changes in performance for T-Mobile

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[67] *Id.*
[68] Tr. Vol. 5 at 569 – 573, 578 – 580, 582 (Ray).
[69] Exh. Jt. Appl.-28, p. 21.

customers in the presence of a potential range of DISH subscribers, 2) changes in performance for T-Mobile customers in the presence of a potential range of capacity usage by those subscribers, and 3) a depiction of the sensitivity of the performance in all geographic areas (in maps or GIS files), particularly for areas where there is only low-band T-Mobile coverage.

The Commission should be particularly concerned about Mr. Ray's unsupported claim given the FCC's recent discovery that mobile wireless service providers, including T-Mobile, likely overstated their coverage in maps provided to the FCC.[70] According to the FCC, the maps "did not reflect on-the-ground performance in many instances."[71] For T-Mobile, only 62.3% of drive tests "achieved at least the minimum download speed predicted by the coverage maps."[72] Alarmingly, in 21.3% of drive tests on T-Mobile's network, staff did not obtain any 4G LTE signal despite T-Mobile "reporting coverage in the relevant area."[73] As a result, FCC staff recommended that the FCC "analyze and verify the technical mapping data submitted in the most recent Form 477 filings" of T-Mobile and "audit the accuracy of mobile broadband coverage maps submitted to the Commission."[74] Staff noted that "[w]hile Form 477 currently affords providers significant discretion in determining the extent of their mobile broadband coverage, this discretion does not encompass reporting inaccurate mobile coverage across extended areas in which consumers cannot receive any wireless signal whatsoever."[75] Thus, staff recommended that providers "be required to submit actual on-the-ground evidence of network performance (e.g. speed test measurement samplings, including targeted drive test and stationary test data)

[70] Exh. CWA-17
[71] *Id*., p. 2.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*., pp. 2-3.

that validate the propagation model used to generate the coverage maps."[76] CWA wholeheartedly agrees.

VI. THE DISH DIVESTITURE DOES NOT REMEDY THE PROPOSED MERGER'S COMPETITIVE HARM

The Commission cannot authorize the proposed merger unless it finds that the merger would not adversely affect competition.[77] CWA provided evidence that the proposed merger (pre-DISH divestiture) raises serious competitive concerns. Specifically, CWA showed that the merger would significantly increase concentration in the already highly concentrated mobile telephony/broadband and prepaid wireless retail markets and massively exceed the spectrum screen. The merger would also eliminate fierce competition between two companies whose customers view their products and services as close substitutes.[78] The DISH divestiture fails to remedy the merger's anti-competitive harms.

A. The DISH Divestiture Cannot Remedy the Merger's Competitive Harm Because it Violates Merger Remedy Policies

The DOJ's Antitrust Division policies on merger remedies are useful to determining whether the DISH divestiture resolves the proposed merger's anti-competitiveness. It does not. On the contrary, the DISH divestiture violates several policies on merger remedies and, therefore, could not resolve the merger's competitive harm. The 2004 Merger Remedies Guide requires "[r]emedial provisions in Division decrees" to be "appropriate, effective, and principled."[79] The DISH divestiture fails on all three accounts.

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[76] *Id.*, p. 3.
[77] Pub. Utilities Code § 854(b)(3).
[78] *See* CWA Opening Brief, pp. 4-22 and CWA Reply Brief, pp. 5-21.
[79] Exh. CWA-18, p. 10, citing 2004 Merger Remedies Guide, p. 2.

To be "appropriate" a remedy must address the competitive harm alleged. The remedy must "fit[ ] the violation and flow[ ] from the theory of competitive harm."[80] In other words, "[t]here must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions."[81]

According to the Antitrust Division, the merger would "eliminate Sprint as an independent competitor" in the national market for retail mobile wireless service and reduce "the number of national facilities-based mobile wireless carriers from four to three."[82] Eliminating Sprint as an independent competitor would cause New T-Mobile 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."[83] Further, "[p]ost-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)."[84] The result would be "increased prices and less attractive service offerings for American consumers, who collectively would pay billions of dollars more each year for mobile wireless service."[85]

As CWA points out, the Amended Complaint never suggests that carriers without their own networks (MVNOs) are competitively significant market participants in the national market for retail mobile wireless service.[86] The Amended Complaint never suggests that MVNOs would

[80] *Id.*, citing 2004 Merger Remedies Guide, pp. 3-4.
[81] *Id.*, citing 2004 Merger Remedies Guide, p. 2.
[82] Exh. CWA-18, Attachment B, ¶¶ 5, 14, 15.
[83] *Id.* ¶ 5.
[84] *Id.* ¶ 16.
[85] *Id.* ¶ 5.
[86] Exh. CWA-18, p. 11.

or could constrain the post-merger price increases in the relevant market or that they would or could disrupt the coordinated effects in the relevant market.[87] Rather, the four facilities-based competitors are the only competitively significant firms in that market.[88]

CWA points out that "competitive harm in one relevant market is not appropriately remedied by divestitures that enable a buyer to participate in a different market" since a competitively insignificant force in the relevant market cannot constrain the competitive harm.[89] To be "'effective,' a remedy must restore the competition lost through the merger."[90] DISH cannot be that "effective" remedy. 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.[91] DISH pales in comparison. 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.[92]

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[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*., pp. 11-12.
[91] *Id*., p. 12, fn. 21.
[92] *Id*.

Moreover, under Antitrust Division policy, a divestiture remedy "must include all assets necessary for the purchaser to be an effective, long-term competitor"[93] and must allow the purchaser "to compete effectively in a timely fashion."[94] The DISH divestiture fails on both criteria.

First, the divestiture assets do not include a fully operational standalone network with a core and spectrum, "which is the critical asset that differentiates an independent, competitively significant MNO from a dependent, competitively insignificant MVNO."[95] In *United States v. Aetna and Humana*, the Antitrust Division argued that the lack of a 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. The Antitrust Division stated:

> 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.[96]

The absence of a critical asset here is even more significant. "If anything, it is far more difficult and challenging for a divestiture purchaser to create a nationwide wireless network than a healthcare provider network."[97] The DISH divestiture is inconsistent with Antitrust Division

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[93] *Id.* p. 12, citing 2004 Merger Remedies Guide, p. 9.
[94] *Id.*
[95] *Id.*, citing 2004 Merger Remedies Guide, p. 15.
[96] *United States et al. v. Aetna Inc. and Humana Inc.*, Case 1:16-cv-01494 (July 21, 2016), Complaint ¶ 60.
[97] Exh. CWA-18, p. 13.

policy that a divestiture must include all of the assets necessary for the purchaser to be an effective, long-term competitor.

Second, Antitrust Division policy requires the remedy to "restore[ ] premerger competition to the marketplace as soon as possible."[98] As Deputy Assistant Attorney General recently explained, "the 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."[99] According to the Antitrust Division, "[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."[100]

The DISH divestiture departs from Antitrust Division policy that to be effective, a remedy must *quickly* restore the lost competition in the relevant market. The DISH divestiture is a multiyear process that *may*, *someday*, transform DISH from an MVNO into an "Infrastructure MVNO" (iMVNO) and then into an MNO. Only at that point, if it ever arrives, would premerger competition be restored to the market.[101] "But it is indisputable that this result, assuming it occurs at all, will take years."[102] The remedy will not restore competition on "day one" or "quickly." In the meantime, DISH's prepaid wireless service subscribers "may go elsewhere, eliminating one of the asserted benefits of transferring these customers."[103] Moreover, while

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[98] *Id*., quoting 2004 Merger Remedies Guide, p. 29.
[99] *Id*., quoting Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018).
[100] *Id*. p. 14, quoting 2004 Merger Remedies Guide at 29.
[101] *Id*.
[102] *Id*.
[103] *Id*.

Sprint currently has postpaid and prepaid customers, the divestiture does not enable DISH to quickly enter the postpaid market, which is the more profitable segment.[104]

The DISH divestiture also fails to satisfy the Antitrust Division's "principled" requirement for remedies. Remedies "should promote competition, not competitors."[105] "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."[106]

In this case, DISH appears to be a chosen would-be competitor in an attempt to resolve the federal government's competitive concerns. Senator Mike Lee has expressed concern over this approach: "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."[107] Indeed, the DISH divestiture "attempts to cobble together an entirely new wireless competitor."[108]

Notably, this comes after DISH persistently and vocally opposed the proposed merger. DISH submitted detailed economic evidence rebutting the Applicants' claims that the merger 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."[109] In the same month, T-Mobile accused DISH's economists of

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[104] *Id*.
[105] *Id*., quoting 2004 Merger Remedies Guide, p. 5.
[106] *Id*.
[107] *Id*., p. 15, quoting "Sen. Lee Comments on DOJ's T-Mobile/Sprint Decision," July 26, 2019.
[108] *Id*.
[109] *Id*., p. 15, citing 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.

fabricating data.[110] Not surprisingly, the DISH divestiture would join "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."[111]

The DISH divestiture violates several Antitrust Division policies on merger remedies and, therefore, could not resolve the merger's competitive harm.

B. The Divestiture of Less Than a Full Business Unit Creates Serious Risk that the DISH Divestiture Will Not Restore Competition

The divestiture of less than a full business unit carries significant risk that the divestiture will not restore competition. Accordingly, Antitrust Division policy "favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market."[112] This is because, as Deputy Assistant General Barry Nigro has stated, "asset carve outs are fraught with execution risk."[113]

The DISH divestiture does not come close to a full business unit. The DISH divestiture assets include prepaid brands with high churn rates, options on "decommissioned" cell sites and "decommissioned" retail stores (that may require third-party consent), and an option to acquire Sprint 800 MHz licenses representing a small frequency band. If asset carve-outs are generally "fraught with execution risk," the execution risk is even greater in this case for two reasons.

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[110] *Id.*, pp. 15-16, citing 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.
[111] *Id.*, p. 16.
[112] *Id.*, citing 2004 Merger Remedies Guide, p. 12.
[113] *Id.*, citing Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018).

First, DISH has 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.[114] The Boost and Virgin brands will be divested, but not the network, the 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."[115] Sprint's prepaid customer churn is already very high – more than 4% monthly according to its SEC filings.[116] If Boost, Virgin and Sprint prepaid customers were to switch to other carriers, even at the current rate of churn, the DISH could easily lose *most* of its installed base of customers within two years – long 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 DISH of "acquiring an installed base of existing customers."[117]

Second, 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 at a low enough price even if they are insufficient to restore competition.[118] According to the Antitrust Division:

> 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.[119]

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[114] *Id*., p. 17.
[115] *Id*.
[116] *Id.,* citing Sprint Communications, SEC Form 10Q, August 6, 2019, p. 47.
[117] *Id*.
[118] *Id*.
[119] *Id*., quoting 2004 Merger Remedies Guide, p. 13.

The assets being sold in the DISH divestiture are insufficient to cure the merger's competitive concerns since they represent a tiny fraction of Sprint's existing business. Further, while the terms of the commercial agreements are confidential, it is reasonable to assume in the absence of evidence to the contrary that 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."[120]

C. The Divestiture Depends on Behavioral Conditions that Will Last for Years, Creating Excessive Entanglements Between Buyer and Seller and Requiring Multiyear Oversight

Long-standing DOJ policy strongly favors structural remedies over behavioral decrees, particularly in horizontal mergers. According to 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.[121]

Under Antitrust Division policy, a "structural" divestiture remedy does not (1) involve ongoing entanglements between the divestiture buyer and seller, (2) involve ongoing regulation of the buyer or seller's conduct or (3) require lengthy and extensive government monitoring and enforcement. The DISH divestiture is not a "structural" remedy. Rather, it is a "conduct" remedy that includes certain limited divestitures.[122]

Antitrust Division leadership has recently described the problems with behavioral remedies. In 2017, Assistant Attorney General Delrahim explained that behavioral remedies are

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[120] *Id*., p. 18.
[121] *Id*., pp. 18-19, citing 2004 Merger Remedies Guide, pp. 7-8.
[122] *Id*.

inherently regulatory and therefore at odds with both free market principles and the dynamic realities of markets:

> 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.[123]

In 2018, Deputy Assistant Attorney General Barry Nigro stressed that there is a growing consensus among antitrust economists and attorneys that behavioral remedies "may simply be ineffective at remedying harm to competition." He also emphasized the costs of monitoring and enforcing such remedies, highlighting that the Antitrust Division too often finds itself in the business of investigating possible violations.[124] This makes sense since behavioral decrees compel companies not to do things they ordinarily would do, and compel them to do other things they ordinarily would not do:

> 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

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[123] *Id*., p. 19, quoting 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).
[124] *Id*., p. 19.

possible violations of regulatory decrees, all aimed at ensuring that consumers do not suffer the harm the decree attempted to regulate away.[125]

The bulk of the remedial provisions associated with the DISH divestiture are behavioral conditions, some of which require New T-Mobile to work against its profit-maximizing incentives. For example, the DISH divestiture requires New T-Mobile to provide transition services to a would-be competitor for an extended period of time.[126] Other conditions would require DISH to do things it would not ordinarily do, such as offering a particular type of service. "The net result is excessive entanglements between buyer and seller and the requirement of multiyear oversight."[127]

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.[128] 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.[129] The concerns were not heeded. Within two years, Cable & Wireless' Internet market share dropped from MCI's pre-divestiture 40% to less than 10%.[130] MCI had failed to transfer all necessary personnel, contracts, contract documentation, database access and billing services, despite obligations to do so.[131] Competition was not regained. Instead, Cable &

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[125] *Id*., p. 20, quoting 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).
[126] *Id*., p. 20.
[127] *Id*.
[128] *Id*., citing *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).
[129] *Id*.
[130] *Id*., p. 21.
[131] *Id*., citing Cable & Wireless FCC Comments, CC Docket No. 99-333, Feb. 18, 2000 at 36-41.

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.[132] The failed MCI divestiture to Cable & Wireless is a stark reminder that excessive entanglements and information asymmetries have no place in a telecom remedy.

D. DISH Fails to Meet Standard Requirements for a Divestiture Buyer

According to the Antitrust Division, 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, to protect the public interest, any remedy must recreate a competitively significant fourth competitor. This makes the competitive attributes of DISH 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 of the merger will not be remedied.

The Antitrust Division policies are useful guidance on this issue too. The Antitrust Division requires divestiture buyers to demonstrate "managerial, operational, technical, and financial capability" to "compete effectively" in the relevant market.[133] DISH fails on every score. DISH lacks financial resources of its own and has not secured third-party funding. DISH's management has not built a wireless network despite the legal obligation to do so. DISH has no experience or technical ability to operate such a network, the challenges of which are extensive. At the same time, DISH has demonstrated a willingness to abuse a federal program to obtain

[132] *Id*., p. 21.
[133] *Id*.

over $3 billion in taxpayer-funded discounts, making "a mockery of the small business program."[134]

1. DISH Does Not Have the Financial Capability to Compete Effectively

Financially, DISH is not in good shape. It has been steadily losing customers.[135] It is highly and increasingly leveraged, with billions of dollars of debt maturing soon.[136] Analysts predict that DISH will have difficulty meeting its debt obligations related in 2022 and that business may be forced into a restructuring.[137] Moody's states that DISH's June 2021 $2.0 billion maturity is "beyond cash flow capacity" and the company likely will need to take on new debt.[138]

According to its CEO, DISH has no financing in place to build a 5G retail network.[139] "This should be a big red flag for the Commission."[140] While Sprint may have financial challenges, it is at least actively building a 5G network. DISH, on the other hand, faces potentially greater financial challenges with its present business without factoring in the billions of dollars it would cost to construct a 5G network. DISH has failed to show that it has the financial capability required of an acceptable buyer.

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[134] *Id*., p. 22, quoting Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing before the Senate Appropriations Subcommittee on Financial Services and General Government (May 12, 2015), p. 5.
[135] *Id.*, p. 22.
[136] *Id.*
[137] *Id.*, pp. 22-23.
[138] *Id.*, p. 23.
[139] *Id.,* citing Drew FitzGerald, Dish's Ergen Defends Company's Wireless Plans, Wall Street Journal (August 6, 2019)
[140] Exh. CWA-18, p. 23.

2. DISH Does Not Have the Managerial Capability to Compete Effectively

DISH has lost a significant number of senior executives in the last year.[141] Its management has no experience building a retail 5G network. There is no evidence that it has the management in place to oversee the construction of a 5G network. Moreover, DISH's CEO has earned the "reputation as an unreliable partner with an appetite for litigation."[142] In CWA's view, this "hardly makes DISH management a 'maverick' in the sense contemplated by the Horizontal Merger Guidelines."[143]

3. DISH Does Not Have the Technical and Operational Capability to Compete Effectively

DISH faces massive operational and technical obstacles in emerging as an independent competitor with its own 5G network and there is no evidence that DISH has the necessary expertise to do so. Further, because T-Mobile will control the technical aspects of the network, T-Mobile will be able to limit DISH's potential service strategies by, for example, determining where networks will and will not be upgraded, and when and whether new services will be available.[144] "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.'"[145] In addition, since DISH is essentially reselling the T-Mobile's service, deficiencies in the merged company's service become unsolvable deficiencies

[141] *Id.*
[142] *Id.*, p. 24.
[143] *Id.*
[144] *Id.*
[145] *Id.*

in DISH's service. Moreover, enforcement will be difficult and remedies may not be commensurate with the harm inflicted on DISH.[146]

DISH's 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 will require extensive design, planning, procurement, site acquisition and approvals—as well as an enormous capital investment.[147]

As of July 2019, DISH was still 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 fact-finding typically precedes engineering and design decisions, the development of more focused procurement documents, and the selection of contractors to supply materials and build a network.[148] In other words, DISH is not very far along in the process.

Also troubling is that 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 switch to a less virtualized network and, potentially, a different business model.[149]

In sum, DISH faces significant hurdles, including 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-

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[146] *Id.*
[147] *Id.*, pp. 24-25.
[148] *Id.*, p. 25.
[149] *Id.*

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. DISH has failed to show that it has the managerial, operational, technical, and financial capability to compete effectively.

4. DISH's History of Regulatory Evasion Makes it an Unsuitable Divestiture Buyer

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. Warehousing spectrum

DISH has a long history of speculative warehousing of spectrum and failing 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 service."[150] In 2009, 2012 and 2014, DISH acquired spectrum licenses and missed the FCC mandated construction deadlines.[151] In fact, DISH has failed to put any of its extensive spectrum holdings to use. Now, DISH seeks approval from the FCC to further extend its construction deadlines to 2025 (16 years after its initial spectrum acquisition). With this track record, "the Commission should view with enormous skepticism the DISH commitments to build a facilities-based wireless network."[152]

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[150] *Id.,* p. 26, citing Ex Parte Letter from Nancy J. Victory, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2019), p. 1 n.3.
[151] *Id*., pp. 26-28.
[152] *Id.,* p. 26.

b. Misuse of Government Auction

DISH has also misused a government program designed to incentivize wireless competition via new entrants and independent small businesses. DISH held an 85% equity interest in Northstar and SNR Wireless when these companies in the FCC's 2015 Spectrum Auction 97.[153] 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, which allowed them to receive bidding credits equal to $3.3 billion or 25% off the amount of their gross winning bids.[154] The FCC ruled that Northstar and SNR were not eligible for the credit because they failed to include the average gross revenues of DISH.[155] The D.C. Circuit of the U.S. Court of Appeals ruled that the FCC "reasonably interpreted and applied" its precedent "when it determined that DISH had de facto control over SNR and Northstar."[156] The D.C. Circuit remanded the case back to the FCC so that it could provide the companies with an opportunity to modify and renegotiate their agreements with DISH.[157] 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."[158]

In short, DISH fails the Antitrust Division's standard "fitness" test for a prospective acquirer of divested assets.

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[153] *Id.* p. 29.
[154] *Id.*
[155] *Id.*
[156] *SNR Wireless LicenseCo, LLC, et al. v. F.C.C.*, 868 F.3d 1021, 1030 (D.C. Cir. 2017).
[157] Exh. CWA-18, p. 29.
[158] *Id.*

E. The Incentives for DISH to Timely Become a Competitor are Weak and the Incentives for DISH Remain an MVNO are Strong

Even assuming that a weak and otherwise unacceptable buyer could somehow transform into a strong competitor at some future date, the DISH divestiture has insufficient incentives to make this transformation happen. According to Antitrust Division policy, "[t]he 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."[159] Further:

> [t]he 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.[160]

DISH has incentives to **<u>not</u>** become the competitor necessary to overcome the proposed merger's competitive harm.

From an engineering standpoint, DISH has powerful incentives to create something less than a fully competitive 5G network. There are enormous technical difficulties associated with creating a nationwide 5G network. Notably, DISH's commitments are far less than they first appear.

> DISH is required to serve only 70% of the population by 2023 – and only at 35 Mbps.[161] 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.[162]

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[159] *Id*., p. 30, citing 2004 Merger Remedies Guide, p. 9.
[160] *Id*., citing 2004 Merger Remedies Guide, pp. 10-11 (emphasis in original).
[161] *Id*., p. 31.
[162] *Id*.

From a financial standpoint, DISH's incentives are contrary to the goal of creating a competitive fourth carrier. Several analysts have pointed to (1) the enormous financial challenges of building a competitive 5G retail network, (2) the fact that DISH may be better served financially by remaining an MVNO customer of T-Mobile rather than building a competitive network, and (3) the incentives DISH has to provide services outside of the relevant market (e.g. wholesale services) even if it does build a network.[163]

A Guggenheim Securities analyst wrote, "[w]e 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."[164] A CFRA analyst noted, "we remain skeptical on the potential financial, technical and regulatory hurdles" DISH faces in entering the market.[165] Deutsche Bank Research analysts wrote, "[w]e 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."[166]

While the terms of the DISH and T-Mobile commercial agreements are confidential, it is reasonable to assume in the absence of contrary evidence that the terms are highly favorable to DISH.[167] This creates exactly the wrong incentives for DISH. Indeed, as one economist noted,

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[163] *Id*.
[164] *Id*., citing Mike McCormack, Guggenheim Securities, DISH - Unlikely the Last Chapter (July 29, 2019).
[165] *Id*., citing Tuna N. Amobi, CFRA, CFRA Keeps Sell Opinion on Shares of Dish Network Corp. (July 30, 2019).
[166] *Id*., pp. 31-32, citing Bryan Kraft, Deutsche Bank Research, The Next Chapter (July 30, 2019).
[167] *Id*., p. 32.

"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?[168]

Further, while DISH may face financial penalties if it does not honor its commitments, the financial incentives to walk away from its commitments for the right price heavily outweigh any penalties.[169] One analyst wrote, "[w]e 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."[170]

DISH's failure to fulfill basic Antitrust Division requirements for a buyer, combined with the lack of adequate incentives for DISH to compete in the relevant market, show that the DISH divestiture would not resolve the merger's competition issues.

F. The Commission Cannot Rely on the DISH Divestiture as a Remedy Because Several Commitments are Vague and Unenforceable

The DISH divestiture includes many open-ended, vague and ambiguous obligations and/or the time within which certain actions must be taken.[171] This vague language can be found in central behavioral conditions, including migration of divested customers to a new network ("take all actions required"), the ability of DISH to demand additional divestiture assets beyond

[168] *Id*., citing The Capitol Forum, Transcript of T-Mobile/Sprint Conference Call with Hal Singer (August 5, 2019), p. 1.
[169] *Id*., p. 32.
[170] *Id*., citing Roger Entner, Industry Voices—Entner: The skinny on the T-Mobile/Sprint/Dish deal, Fierce Wireless (August 2, 2019).
[171] *Id*., p. 33.

those specified ("reasonably necessary . . . for continued competitiveness"), the terms of the transition services agreement that would enable DISH to serve its newly acquired customers ("reasonably related to market conditions"), the decommissioning of unnecessary cell cites ("promptly"), negotiations between the Applicants and DISH to lease DISH's unused 600 MHz spectrum ("good faith"), nondiscrimination provisions involving conduct such as blocking, throttling or otherwise deprioritizing service to DISH and its customers ("shall not unreasonably discriminate"), and the merged company's obligation to provide operational support to those customers ("best efforts").[172]

"These open-ended, undefined terms provide a convenient escape route for a party wishing to avoid its obligations."[173] They also make it virtually 100% certain that disputes will arise as to whether the Applicants and DISH have fulfilled their commitments. For example, what would constitute a failure to "take all actions required?" Also, what additional assets would be "reasonably necessary for . . . continued competitiveness?" What does it mean to "not unreasonably discriminate?" The list could go on and likely will before the Monitoring Trustee, the Antitrust Division and ultimately the District Court, who are all likely to see a parade of disputes over the next seven or more years.

In addition, the DISH divestiture highlights a problem with asset carve-outs. The divestiture gives DISH one year to determine if it needs additional assets. This determination comes with a requirement that additional assets are "reasonably necessary for the continued competitiveness of the Divestiture Assets." What does this mean? What constitutes "reasonably

[172] *Id.*
[173] *Id.*

necessary for the continued competitiveness?" Is the purpose to resolve DISH's failure to know what it needed until the divestitures have occurred? "If so, it suggests a profound weakness in permitting partial asset carve outs in this case."[174]

Indeed, it does not require much imagination to envision a situation where DISH claims additional assets are "reasonably necessary" but the seller disagrees. While it appears that the Antitrust Division has sole discretion under the DISH divestiture to determine if the seller or buyer is correct, "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."[175] For example, if the Antitrust Division denies DISH's request, DISH can later blame the Division if and when the remedy fails.[176]

There will also likely be disputes between DISH and the Antitrust Division that go to the heart of the remedy. Under the terms of the divestiture, DISH must "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 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.[177]

For example, prior to their merger, the FCC ordered XM and Sirius to "design" an interoperable radio. The companies designed and built a radio, but never marketed or sold it, and insisted that

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[174] *Id.*, p. 34.
[175] *Id.*
[176] *Id.*
[177] *Id.*

they had complied with the FCC's requirements.[178] The word "offer" poses the same problems as the word "design." That is, DISH can "offer" a service without publicizing it, supporting it or pricing it competitively. "This is a fundamental problem in a regulatory decree 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."[179]

Finally, open-ended and deliberately flexible terms in a contract between private parties entering into a long-term business relationship allow the 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."[180] The Monitoring Trustee, the Antitrust Division and the court with likely oversee disputes over the details and timing of obligations, making the remedy extremely difficult, if not impossible, to administer.

G. A 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 record shows that the most likely outcome in this case is that the complex, highly regulatory remedy will fail or fall short. Either way, consumers will pay the price. The risk of failure has significant consequences for the Commission's public interest determination.

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[178] *Id.*, p. 35.
[179] *Id*.
[180] *Id.*

"Risky, partial and complex remedies, however well-intentioned, do not warrant shifting some of the risk posed by an anticompetitive merger back onto consumers."[181] In 2016, then Assistant Attorney General Bill Baer explicitly denounced this result:

> 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.[182]

In 2017, Assistant Attorney General Makan Delrahim similarly stressed that:

> 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.'[183]

There is ample evidence that the failure of the DISH divestiture would have significant adverse effects on consumers. According to the DOJ, if the remedy in this case fails, the merger would result in consumers paying billions of dollars more each year.[184] DISH itself provided to the DOJ an analysis of the price increases in countries that have gone from four to three MNOs.[185] In addition, 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

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[181] *Id*., p. 36.
[182] *Id*., citing 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).
[183] *Id*., citing 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).
[184] *Id*., p. 37.
[185] *Id*.

prices by between 17.2% and 20.5% on average."[186] 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.[187]

In short, the DISH divestiture carries a high risk of failure and exposes the public to substantial economic harm. Therefore, the DISH divestiture does no resolve the proposed merger's competitive harm and the merger (with or without the DISH divestiture) cannot be found to be in the public interest.

VII. CONCLUSION

The proposed merger would eliminate thousands of California jobs, adversely affect competition, raise prices for consumers and degrade customer service with no countervailing verifiable, merger-specific benefits. The DISH divestiture would not remedy these harms. The merger (with or without the DISH divestiture) is not in the public interest and the Commission cannot lawfully authorize it as currently structured. To protect the public interest in quality jobs, the Commission must require the Applicants and DISH to make verifiable, enforceable commitments that no T-Mobile or Sprint employee (including those of dealers and contractors) loses a job or wages as a result of the transaction, and to ensure the complete protection of employees' right to form a union of their own choosing free from any interference by the New T-Mobile.

Dated: December 20, 2019 Respectfully submitted,

/s/

Rachael E. Koss

[186] *Id*.
[187] *Id*., citing Letter from Pantelis Michalopoulos, Counsel to DISH Network Corporation, to Marlene Dortch, FCC, WT Docket No. 18-197 (April 8, 2019).

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