BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U5112) 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
And Related Matter	Application 18-07-012

LEGAL BRIEF OF THE PUBLIC ADVOCATES OFFICE

(PUBLIC)

MICHELLE SCHAEFER
Attorney

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2722
Email: michelle.schaefer@cpuc.ca.gov

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5G – 5th Generation

CCPA – California Consumer Privacy Act

COPPA – Children's Online Privacy Protection Act

DOJ – Department of Justice

FCC – Federal Communications Commission

HHI – Herfindahl-Hirschman Index

MHz – Megahertz

MNO – Mobile Network Operator

MVNO – Mobile Virtual Network Operators

PFJ – Proposed Final Judgment

SEC – Securities and Exchange Commission

I. INTRODUCTION

Pursuant to Rule 13.11 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and the October 24, 2019 Assigned Commissioner's Amended Scoping Ruling, the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office) files this Brief. The Public Advocates Office opposes the merger[1] proposed by Sprint Communications Company L.P., Sprint Spectrum L.P, Virgin Mobile USA, L. P. and T-Mobile USA, Inc (Joint Applicants), even in light of the Department of Justice's (DOJ) Proposed Final Judgment (PFJ)[2] divesting assets of the New T-Mobile to DISH Network, Corp. (DISH).

There are currently four nationwide Mobile Network Operators (MNO) operating in California: Sprint, T-Mobile, AT&T, and Verizon.[3] MNOs are facilities-based carriers that utilize their networks to provide retail wireless service, as well as to interconnect with other networks, and to provide wholesale services to other carriers that do not have their own networks, known as Mobile Virtual Network Operators (MVNOs), which resell MNO services to retail customers. This proposed merger would reduce the number of MNOs to three, by combining Sprint and T-Mobile into "New T-Mobile," resulting in a highly concentrated wireless market.

The reduction in the number of major wireless service providers in California from 4 to 3, results in increased market concentration, leading to fewer choices for consumers and high prices. The concerns raised in the April 26, 2019 Opening Brief of the Public Advocates Office are not eliminated or even diminished by the proposed entry of DISH as a fully operational MNO in California. Furthermore, DISH will not have the market presence or power to pressure New T-Mobile, Verizon, and AT&T to lower prices and

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[1] Joint Applicants filed two merger Applications, one for their wireline businesses and one for their wireless businesses, A.18-07-011 and A.18-07-012. On September 11, 2018, the Assigned Administrative Law Judge issued a Ruling consolidating both applications and stating "….the underlying transaction that gives rise to each of them is the proposed Sprint-T-Mobile Merger and the underlying factual and legal issues are effectively identical" (September 11, 2019, ALJ Ruling at 1).

[2] *See generally United States of America et al., v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., and Sprint Corp.,* Case 1:19-cv-02232, filed Jul. 26, 2019, (PFJ). Exhibit Jt. Appl.-20.

[3] Pub Adv-02C, Testimony of Dr. Lee Selwyn, at viii.

offer competitive mobile wireless plans to consumers.[4] The reduced competition resulting from the departure of Sprint as the fourth national, facilities-based MNO will result in higher prices and likely lead to less innovation, deteriorating service quality, the elimination of the LifeLine program for low-income Californians, and reduced customer privacy.[5]

In its complaint challenging the merger, filed on the same day as the Proposed Final Judgment (PFJ), the DOJ stated that "[b]y combining two of the only four national mobile facilities-based wireless carriers, without appropriate remedies, the merger of T-Mobile and Sprint would extinguish substantial competition."[6] To remedy the loss of Sprint as an MNO, the DOJ issued its PFJ on July 26, 2019 with the intent to "preserve competition by enabling the entry of another national facilities-based mobile wireless network operator."[7] The DOJ, Joint Applicants, and DISH Network, Corp. (DISH), entered into an agreement whereby Joint Applicants would divest certain assets to DISH to "remedy" the DOJ's concern about competition being reduced in the MNO marketplace.[8] The Public Advocates Office disagrees with the DOJ that DISH will become an effective, facilities-based mobile wireless provider to remedy the loss of Sprint from the marketplace. Sprint has operated as an MNO for nearly three decades, while DISH has never operated as an MNO before and will be a Mobile Virtual Network Operator (MVNO) on New T-Mobile's network for several years before potentially becoming its own facilities-based, mobile wireless provider. The PFJ requires New T-Mobile to provide DISH with MVNO capabilities on its network "for a term of no fewer

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[4] *See* Pub Adv-11C at 52, para. 52 ("Even if DISH succeeds in building a nationwide 5G network reaching 70% of the population as it has committed to, DISH cannot replace Sprint as the fourth national, facilities-based wireless provider capable of constraining the other three carriers from engaging in the type of conduct that the Department of Justice has addressed in its Complaint.").

[5] Opening Brief of the Public Advocates Office, A.18-07-011 *et al*., Apr. 26, 2019, at 1 (Cal Advocates April Opening Brief).

[6] *See United States of America et al.*, *vs. Deutsche Telekom AG et al*, Case 1:19-cv-02232, Document 1, filed Jul. 26, 2019.

[7] *See* Jt. Appl.-20 at 2 (PFJ).

[8] *See* Jt. Appl.-20 at 1-2 (PFJ).

than seven (7) years."[9] While DISH is required to comply with its June 2023 commitment to the Federal Communications Commission (FCC) with respect to the deployment of its its Fifth Generation (5G)-capable network,[10] it remains uncertain as to whether and when DISH will be an MNO operating 5G service in any significant part of California.[11]

The Public Advocates Office's reply testimony[12] reinforces its finding from April 2019 that the proposed merger is not in the public interest and should be denied.[13] Further, the November 22, 2019 reply testimony of the Public Advocates Office demonstrates that that the Joint Applicant's divestitures to DISH will not remedy harms to competition in the mobile wireless industry and will not be of any benefit to California consumers.[14] The extensive and detailed reply testimony of the Public Advocates Office demonstrates that the proposed merger is not in the public interest and must be denied. The November 22, 2019 reply testimony of the Public Advocates Office presents facts that the proposed merger remains contrary to the public interest and that DISH obtaining customers and infrastructure from the New T-Mobile will not solve the competitive harms or harms to consumers, including the buildout of coverage of 5G for California consumers and the availability of affordable plans, that are posed by the reduction of MNOs.[15]

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[9] Jt. Appl.-20 at 19, VI.A (PFJ).

[10] *See* Jt. Appl.-20 at 23, VIII.A (PFJ).

[11] *See*, *infra*, V.A.

[12] Reply testimony was served on parties on November 22, 2019. The following are the Exhibit Numbers for the testimony of the Public Advocates Office: Pub Adv-11, Pub Adv-11C, Pub Adv-13, Pub Adv-13C, Pub Adv-14, Pub Adv-14C, Pub Adv-15, Pub Adv-20, Pub Adv-20C.

[13] *See* Cal Advocates April Opening Brief at 2 ("The Public Advocates Office "unequivocally finds that the proposed merger is not in the public interest, and should be denied.").

[14] *See generally* Pub Adv-15.

[15] *Id*.

II. PROCEDURAL HISTORY

On July 13, 2018, Joint Applicants filed a "*Joint Application For Review Of Wireless Transfer Notification Per Commission Decision 95-10-032*."[16] On September 11, 2018, Administrative Law Judge (ALJ) Bemesderfer consolidated the two merger applications into one proceeding. Evidentiary hearings were initially held over four days in February 2019, and a decision was originally set for the second quarter of 2019.[17] However, the schedule was delayed due to Joint Applicants being nonresponsive to the Public Advocates Office's data requests, so the Public Advocates Office filed a Motion to Compel. ALJ Bemesderfer granted the Public Advocates Office's Motion to Compel and revised the schedule.[18] Briefs were filed in April and May 2019. While neither a ruling closing the proceeding nor a proposed decision were issued, the record was effectively closed.

On July 26, 2019, the DOJ, together with five State Attorneys General, jointly filed a Complaint in the United States District Court for the District of Columbia alleging, *inter alia*, with respect to the mobile wireless telecommunications market, that:

> (1) Competition has kept mobile wireless service prices down and served as a catalyst for innovation. Preserving this competition is critical to ensuring that consumers will continue to have reasonable and affordable access to an essential service that, for many, serves as a gateway to the modern economy.
>
> (2) By combining two of the only four national mobile facilities-based wireless carriers, without appropriate remedies, the merger of T-Mobile and Sprint would extinguish substantial competition.
>
> (3) As the nation's third and fourth largest mobile wireless carriers, T-Mobile and Sprint have positioned themselves as challengers to

[16] On July 13, 2018, Joint Applicants also filed an application for transfer of control of Sprint's wireline business, "Joint Application For Approval Of Transfer Of Control Of Sprint Communications Company L.P. (U-5112-C) Pursuant To Public Utilities Code Section 854(a)", but the Public Advocates Office's protest and testimony focuses on the wireless application.

[17] *See* Amended Assigned Commissioner's Scoping Memo and Ruling, A.18-07-011 et al, at 4, filed Oct. 4, 2018.

[18] Administrative Law Judge's Ruling Granting the Motion of the Office of the Public Advocate to Compel the Responses to Data Requests and Revising the Schedule of This Proceeding, A.18-07011 et al at 3, filed Mar. 25, 2019.

Verizon and AT&T, their larger and more expensive rivals, targeting retail customers who particularly value affordability. Some of these customers purchase mobile wireless service on a postpaid basis and are billed monthly after receiving service. Others, including those who may lack ready access to credit, purchase prepaid mobile wireless service and pay for service in advance of using it.

(4) The merger would eliminate Sprint as an independent competitor, reducing the number of national facilities-based mobile wireless carriers from four to three. The merger would cause the merged T-Mobile and Sprint ("New T-Mobile") to compete less aggressively. Additionally, 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. 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.[19]

Having concluded that "the merger of T-Mobile and Sprint likely would substantially lessen competition for retail mobile wireless service,"[20] the DOJ asked the Court to "permanently enjoin the proposed transaction."[21]

Also, on July 26, 2019, the Joint Applicants filed a Motion to advise the Commission of the terms of a proposed consent decree (the PFJ) and related Stipulation and Order (Stipulation & Order) that had been filed by the DOJ that same day in the US District Court for the District of Columbia. Attached to the Joint Applicants' Motion were three documents – (1) the aforesaid Proposed Final Judgment (PFJ); (2) the proposed Stipulation & Order; and (3) an Asset Purchase Agreement among T-Mobile US, Inc., Sprint Corporation and DISH Network Corporation dated as of July 26, 2019 and filed with the Securities and Exchange Commission as an exhibit to T-Mobile's July 26, 2019 Form 8-K.

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[19] *United States et al. v. Deutsche Telekom AG et al.*, D.D.C. No. 1:19-cv-02232, Complaint, July 26, 2019, at paras. 2-5 (DOJ Complaint).

[20] DOJ Complaint at 3, para. 6.

[21] DOJ Complaint at 10, para. 31(b).

On August 27, 2019, the ALJ reopened the record of the proceeding.[22] The proceeding was opened following the Joint Applicants filing a "motion to inform the Commission" of the stipulations and agreements the Joint Applicants and DISH entered into with the DOJ in the PFJ.[23] The ALJ determined that the PFJ and accompanying documents "appear to fundamentally change the Transaction" and that the record was incomplete in light of the PFJ.[24]

On October 24, 2019, the Assigned Commissioner's Amended Scoping Ruling (Amended Scoping Memo) was issued.[25] The Amended Scoping Memo expanded the scope of the proceeding to include a detailed examination of how the PFJ's inclusion of DISH's acquisition of assets from the Joint Applicants impacted California.[26] On November 26, 2019, the ALJ issued a ruling confirming the need for evidentiary hearings and their scope.[27] Evidentiary hearings were held on December 5, 2019 and December 6, 2019. Per the Amended Scoping Memo, simultaneous briefs are due December 20, 2019.

III. JURISDICTION AND BURDEN OF PROOF

Applications (A.)18-07-011 and A.18-07-012 were submitted pursuant to Public Utilities Code Section 854(a), which requires prior authorization from the California Public Utilities Commission (Commission) before the finalization of any transaction that results in the merger, acquisition, or a direct or indirect change in control of a public utility. Section 854(c) requires the Commission to determine that an acquisition/merger is in the public interest.

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[22] *See* Administrative Law Judge's Ruling Re-Opening Record to Take Additional Evidence and Directing Joint Applicants to Amend Application 18-07-012, filed in A.18-07-011 and A.18-07-012, at 5 (Motion Reopening Record).

[23] Motion Reopening Record at 2.

[24] Motion Reopening Record at 5.

[25] *See* Amended Scoping Memo.

[26] *See* Amended Scoping Memo at 3.

[27] *See* Administrative Law Judge's Ruling Confirming Evidentiary Hearings and Establishing Their Scope, A.18-07-11 *et al*. (Hearing Memo).

Joint Applicants have the burden of proving by a preponderance of the evidence that the requirements of Section 854 are met.[28] An applicant must provide its affirmative showing in its application, with "percipient witnesses in support of all elements of its application."[29] An applicant does not meet its burden if it submits an incomplete application, or attempts to meet its burden in its rebuttal testimony.[30]

If the Commission determines that the harms of the proposed merger outweigh the alleged benefits (i.e., the merger is not in the public interest), the Commission may consider other "reasonable options," including "no merger" and "whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal."[31] The Commission must determine whether this proposed merger is in the public interest, and, if it is not, the Commission shall deny the merger.

Supplemental testimony by Joint Applicants and testimony submitted by DISH in response to the Amended Scoping Memo did not meet the burden. Joint Applicants and DISH failed to prove that the benefits to California consumers proposed by this merger and the DOJ PFJ outweigh the harms and uncertainties created for California consumers if this merger were approved.

IV. THE PFJ BETWEEN THE DOJ, THE JOINT APPLICANTS, AND DISH DOES NOT SUBSTANTIALLY ALLEVIATE ANY COMPETITIVE HARMS OF THE PROPOSED MERGER.

In his November 26, 2019 Ruling Confirming Evidentiary Hearings and Establishing their Scope, the ALJ noted specifically "[t]he significant change in the terms of the proposed merger that has occurred over the past months is the addition of DISH as a proposed fourth facilities-based wireless carrier, replacing Sprint" and ruled that "[t]he hearings will focus on the impacts of this change on California consumers and the

[28] California Public Utilities Code Section 854(e).

[29] *Re Southern California Edison Company*, 11 CPUC 2d, 474, 475 (D.83-05-036).

[30] *Re San Diego Gas and Electric Company*, 46 CPUC 2d 538, 764, n. 17. (D.04-07- 022); See also, D.09-03-025, p. 8 (SCE 2009 GRC); D.04-03-034 (Southwest Gas Corporation GRC) at 7-8.

[31] California Public Utilities Code Section 854(d).

potential competitive harms of the proposed merger."[32] The Ruling identified five (5) specific topics to be addressed at the hearings, the very first one of which was "Does the agreement with DISH substantially alleviate any competitive harms of the proposed merger?" As discussed in detail herein, the short answer to this question is decidedly "no;" the introduction of DISH into the national and California wireless market will have no discernible impact in alleviating the substantial competitive harms that will result from the proposed T-Mobile/Sprint merger.

The terms of the PFJ that provide for certain divestitures of Sprint and T-Mobile Assets to DISH[33] do not rectify the competitive harms to the mobile wireless market. Sprint is an established, facilities-based mobile wireless provider with nearly three decades of experience serving the unique needs of mobile wireless customers. DISH, on the other hand, does not provide any mobile wireless services and has not deployed any facilities to establish itself as an MNO. Even if DISH were to meet all network buildout commitments required under the PFJ, DISH would not be able to replace Sprint as the fourth nationwide MNO within the next several years and would not reduce the massive increase in market concentrations that will occur if the proposed merger between Joint Applicants is approved.

DISH is a very late entrant into a mature and largely saturated market.[34] The only customers available to DISH would come from industry-wide wireless market growth, currently below 5% annually,[35] and from customer churn from other established MNOs and MVNOs.[36] During cross examination, T-Mobile's Chief Technology Officer Neville Ray himself expressed doubt as to DISH's ability to capture anything close to the 41.8 million customers currently being served by Sprint.[37] When it was suggested that DISH

[32] ALJ Hearing Ruling, November 26, 2019, at 2-3.

[33] Jt. Appl.-20 at 2 (PFJ).

[34] Pub Adv-11C at 36, para. 38.

[35] *See* Pub Adv-11C at 41, ln. 1.

[36] *See* Pub Adv-11C at 38, Table 6 for the churn rates for the current four major wireless carriers.

[37] *See* Hearing Transcript Vol. 8 at 1402-06.

might acquire 40-million customers over a two year period, Ray testified that "there hasn't been that much wireless [growth] throughout the industry in any given year for the last decade." Ray dismissed the notion of growth of that magnitude as "whacky hypotheticals."

Mr. Ray's skepticism as to DISH's ability to amass a customer base remotely comparable to Sprint's should not be lightly dismissed. Mr. Ray confirmed that it would be unlikely for DISH to amass large numbers of customers to make it a comparable size to AT&T, Verizon Wireless, and the New T-Mobile because the wireless industry has not experienced massive growth, as it did in its incipiency, "for the last decade."[38]

In fact, the Public Advocates Office's witness Dr. Selwyn created a Ramp-Up Model that projects DISH to have 11.35 million prepaid and 6.1 million postpaid customers by the end of 2026, a combined wireless market share of only 3.74%.[39] Dr. Selwyn also provided a sensitivity analysis that "include[d] what can best be described as highly optimistic, best-case assumptions."[40] Even under what Dr. Selwyn describes as "better-than-best-base assumptions, DISH will still only achieve an overall market share of 6.58% by the end of year seven [if the merger is approved]."[41] For comparison, in 2017, Verizon approximated 35% of the total wireless market share, AT&T approximated 34% of the total wireless market share, T-Mobile approximated 17%, and Sprint approximated 12.5%.[42] Dr. Selwyn's overly positive model for DISH's market share *seven years post-merger* would be 6% *lower* than what Sprint currently holds of the market share today, without the merger, and only about one-fifth of the post-merger market share than a combined T-Mobile/Sprint would control. Importantly, Dr. Selwyn's Ramp-Up Model was based on the assumption that DISH was fully successful in achieving its projections of 20% and 70% U.S. population coverage by 2022 and 2023,

[38] Hearing Transcript Vol. 8 at 1406, lns. 24-25.

[39] Pub Adv-11C at 45, Table 7.

[40] Pub Adv-11C at 46, para. 48.

[41] Pub Adv-11C at 46-47, para. 49.

[42] Pub Adv 11-C at 37, Table 5.

respectively.[43] It can hardly be argued that DISH will be disruptive to the current largest, nationwide MNOs when in 2026, it will still have a smaller amount of the market than Sprint currently has today.

Despite extensive cross-examination by the Joint Applicants, the accuracy of Dr. Selwyn's Ramp-Up Model or any of its conclusions were not contested. DISH declined to cross examine Dr. Selwyn to challenge his predictions and offered no evidence that challenged or undermined Dr. Selwyn's models. Furthermore, neither Joint Applicants nor DISH offered any alternative projections as to DISH's likely market share over the seven-year term of the PFJ. The only DISH market share projections that exist in the record were developed by Dr. Selwyn.

Dr. Selwyn presented testimony comparing Comcast's entry into the MVNO market as a comparison to DISH's proposed entry into the MVNO and eventually MNO markets.[44] DISH and Comcast are similarly situated in that both companies' primary businesses are pay-television and high-speed Internet access, and neither company has their origins in the mobile wireless industry. Dr. Selwyn cites the leading cable industry trade publication, which states that Comcast's MVNO, "which currently has 1.6 million subscribers, will control around 6% of the U.S. wireless market by 2023, seven years into Comcast's entry into the mobile wireless market."[45] Dr. Selwyn notes that Comcast has roughly *three times* as many television and Internet customers as DISH's Satellite TV customer base, which indicates that the projected 3.74% DISH mobile market share seven years after the proposed merger is a realistic estimate.[46] Notably, the DOJ makes no reference to the presence of Comcast as a mobile wireless provider either in its Complaint or its Competitive Impact Statement, which underscores the lack of any market significance that the DOJ attributes to a market presence as minimal as that which

[43] Hearing Transcript Vol. 8 at 1323, lns. 2-14.

[44] *See* Pub Adv-11C at 40, para 42.

[45] Pub Adv-11C at 40, para. 42.

[46] Pub Adv-11C at 40, para. 42, citing "Xfinity Mobile to Generate $266M in EBITDA By 2023," Multichannel News, September 12, 2019, https://www.multichannel.com/news/xfinity-mobile-to-generate-266-million-in-ebitda-by-2023 (last viewed Oct. 31, 2019).

Comcast is expected to achieve. Even under Dr. Selwyn's "better-than-best-cast" assumptions, DISH will do no better than Comcast.

DISH's projected, near-negligible market share seven years post-merger, 3.74%, will leave the mobile wireless market nearly as highly concentrated as under the originally merger proposal. Dr. Selwyn calculated California Herfindahl-Hirschman Indices[47] (HHIs) pre-merger and for each of the seven years following the proposed merger both at the statewide and county level.[48] Using statewide spectrum-based market shares shown in Table 9 of Dr. Selwyn's November 2019 reply testimony, Dr. Selwyn calculated HHIs and the change in HHI based upon the results of his Ramp-Up Model. Table 10 of his testimony shows his calculations placing the pre-merger California HHI at 2713.[49] If the merger is approved, his HHI calculations rise by 660 to 3373 in the first year of the New T-Mobile landscape in 2020. As DISH ramps up its mobile wireless business, by the end of 2026, Dr. Selwyn calculates the California HHI to be at 3126, which is still an increase of 413 points in the HHI from pre-merger California.[50] The DOJ's Horizontal Merger Guidelines, cited to in Dr. Selwyn's testimony, sets a 200+ point increase threshold as a signifier that a market would be highly concentrated and presumed to likely enhance market power.[51]

During cross examination of Dr. Selwyn on December 5, 2019,[52] Joint Applicants' counsel noted that under the *Horizontal Merger Guidelines*, HHI increases of over 200 points is only one consideration among many.[53] In the instance of this proposed merger,

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[47] The Herfindahl-Hirschman Index, HHI, is "a commonly accepted measure of market concentration… Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power under" Section 5.3 of *Horizontal Merger Guidelines* of the DOJ and Federal Trade Commission. *See* The United States Department of Justice, Antitrust Division, Herfindahl-Hirschman Index, https://www.justice.gov/atr/herfindahl-hirschman-index (last viewed Dec. 17, 2019).

[48] Pub Adv-11C at 49, para. 51.

[49] Pub Adv-11C at 50.

[50] Pub Adv-11C at 50, Table 10.

[51] *See* Pub Adv-11C at 11, para. 10.

[52] *See* Hearing Transcript Vol. 8.

[53] The DOJ/Federal Trade Commission Horizontal Merger Guidelines (HMG), Section 5.3 provides that "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200

however, the initial 660-point increase and the ultimate 413-point increase in HHI are so far above the 200-point threshold that the presumption of the *Horizontal Merger Guidelines* must be afforded far more weight than if the increase were only slightly above the 200-point level. Moreover, Dr. Selwyn's HHI calculations were based upon spectrum shares, not revenue shares, as the latter was not available on a California-only or California county-only basis. Dr. Selwyn did note, however, that the Average Revenue per Unit (ARPU) for prepaid services was typically much lower than for postpaid services.[54] Therefore, given that DISH will initially be serving only prepaid customers, DISH's revenue-based shares are likely to be even lower than an HHI based upon spectrum shares, thus resulting in an HHI increase that will likely be even greater than as calculated by Dr. Selwyn in his reply testimony.

In the PFJ, the DOJ specified that a fourth national mobile wireless carrier was necessary for a competitive market.[55] However, the PFJ's terms do not assure that DISH can or will be able to assume the role as the fourth MNO, as envisioned by the DOJ, which defeats the goal stated in the PFJ of resolving the harm of combining two of the current four national MNOs. Sprint currently serves approximately 50 million customers; after seven years, DISH can only be expected to serve slightly more than 17 million customers, possibly up to 30 million customers under Dr. Selwyn's "better-than-best-case" projection.[56] As noted above, Sprint has been a mobile wireless network provider for nearly three decades. Sprint has thousands of retail stores nationwide and an extensive facilities-based network. DISH, on the other hand, has no experience as a facilities-based mobile wireless carrier and has no network in place. DISH also does not have experience selling directly to retail customers at company-owned stores and does

points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."

[54] Pub Adv-11C at para. 23.

[55] Jt. Appl.-20 at 2 (PFJ).

[56] Pub Adv-11C at 45, 47, Tables 7, 8.

not have direct-to-consumer customer service experience,[57] unlike Sprint who has decades of customer retail experience to deal with consumers' issues with cellular service or devices.

Furthermore, Dr. Selwyn's testimony explains that "DISH's current financial condition and the current market climate provide a level of uncertainty as to DISH's actual financial ability to fulfill the various buildout commitments it has made."[58] While DISH will be subject to a variety of fines and other penalties if it fails to meet the commitments made to the DOJ in the PFJ and the commitments to the FCC, the fines cannot assure that the buildout commitments will actually happen, particularly where DISH lacks the financial ability to achieve what it has promised. If DISH cannot or does not fulfill the commitments it has made to the DOJ, the DOJ's reliance on these commitments as the basis for the Consent Decree [proposing approval of the merger] is serious doubt."[59] Dr. Selwyn cautions that these concerns about DISH's finances and ability to fulfill the commitments made in the PFJ "should not be lightly dismissed."[60] As the DOJ has stated in its Complaint, "[b]y combining two of the only four national mobile facilities-based wireless carriers, without appropriate remedies, the merger of T-Mobile and Sprint would extinguish substantial competition."[61] Dr. Selwyn explains that, "if DISH cannot finance the 5G build-out and the additional spectrum acquisition, it certainly cannot be counted upon to become the fourth competitively viable national facilities-based wireless carrier that lies at the heart of the DOJ Consent Decree."[62] The irreparable harms to competition and price increases to California consumers cannot be avoided through this proposed merger, *unless* this Commission can affirmatively find that DISH will be able to raise the necessary capital to meet its 5G commitments and the

[57] Hearing Transcript Vol. 8 at 1598, lns. 4-11.

[58] Pub Adv-11C at 62, para. 66.

[59] Pub Adv-11C at 62, para. 66.

[60] Pub Adv-11C at 62, para. 66.

[61] Pub Adv-11C at 62, para. 66.

[62] Pub Adv-11C at 62, para. 66.

additional $3.6-billlion it will need to purchase the 800 MHz spectrum from Sprint.[63] Based on the evidence presented, DISH does not appear capable of raising adequate capital funds.

During cross examination of Dr. Selwyn, Sprint's counsel – not DISH's counsel – raised the possibility of DISH using its considerable inventory of spectrum licenses as collateral for loans that could provide the capital needed for DISH's 5G network buildout.[64] Currently, DISH has only unsecured debt, which means that these spectrum licenses, together with DISH's other assets, are available to creditors in the event of DISH's default. Encumbering any significant part of DISH's spectrum inventory as collateral for additional debt would degrade DISH's existing and future unsecured debt, thereby increasing its cost of debt and potentially its cost of equity as well. Such encumbrances of these assets would constitute a "material"[65] financial event, which requires disclosure in a company's Security and Exchange Commission (SEC) filings, such as Forms 10-K and 10-Q. Even the contemplation of encumbering potentially billions of dollars of DISH's assets (including spectrum licenses) as collateral for additional debt would constitute a material event that requires disclosure by DISH in its financial reports to the Securities and Exchange Commission. However, after being provided with a copy of DISH's SEC Form 10-Q for the quarter that ended on September 30, 2019, which includes the period of time when the PFJ was submitted, Mr. Blum of DISH could not find any reference in the Form 10-Q to DISH considering or intending to encumber its FCC licenses as collateral for additional debt.[66] DISH's 10-Q was certified by its Chief Executive Officer, Chief Financial Officer, and several other senior company

[63] Pub Adv-11C at 62, para. 66.

[64] *See* Hearing Transcript Vol. 8 at 1276.

[65] 17 C.F.R. Section 230.50 defines materiality as the basis for inclusion of material in financial statements. "The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."

[66] *See* Hearing Transcripts Vol. 9 at 1590-91.

officers, each certifying, inter alia, that "Based on my knowledge, this report does not contain any untrue statement of material fact *or omit to state a material fact necessary to make the statements made*, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report." Since it is extremely unlikely that DISH's senior officers who signed the 10-Q under penalty of perjury would have omitted the disclosure of their consideration of encumbering DISH's FCC licenses, this potential source of debt financing as alluded to by counsel for the Joint Applicants and by Mr. Blum must be discounted and must not be considered by the Commission in determining the financial ability of DISH to raise the necessary capital to build its 5G network. Finally, the relatively short duration of DISH's various FCC spectrum license holdings and the potential for their forfeiture in the event that DISH fails to meet its buildout commitments make it unlikely that DISH could actually find lenders willing to accept these licenses as collateral. As such, there is no evidence, and DISH offered none into the record, that DISH is capable of securing the financing necessary to meet the various buildout commitments it has made to the DOJ and to the FCC.

V. ADDING DISH AS A FOURTH MNO WILL NOT ALLEVIATE THE HARM THE PROPOSED MERGER WILL HAVE ON CALIFORNIA CONSUMERS.

A. DISH has not committed to any California-specific service obligations.

In order to replace Sprint as an MNO, DISH will have to construct a greenfield 5G network to provide cellular service.[67] This means that DISH must construct its new network from scratch. Even though DISH has the option to potentially acquire cell sites that may be decommissioned by New T-Mobile over five years,[68] New T-Mobile has an incentive to retain that infrastructure for 3 years to support legacy Sprint customers.[69]

[67] Pub Adv-20 at 16, lns. 23-24. Greenfield networks are networks constructed where no previous network existed.

[68] Pub Adv-20 at 16, ln. 26; 17, lns. 1-2.

[69] Pub Adv-20 at 19, lns. 18-19; 20, ln. 1.

DISH's Senior Vice President of Public Policy and Government Affairs, Jeff Blum, stated that DISH is prepared to construct 50,000 cell sites nationwide as part of its initial planning to meet its FCC commitments.[70] This is roughly as many national cell sites Sprint had in use at the end of 2017.[71] Assuming DISH meets its nationwide buildout, this means that by 2023 DISH would have the same number of cell sites that Sprint had in 2017.

Whether DISH will meet its buildout commitments is dubious, given the high level of uncertainty expressed by Mr. Blum in the Commission's evidentiary hearings about DISH's plans.[72] In fact, when asked about DISH's network deployment, Mr. Blum repeatedly responded that DISH has made no specific commitments or has no final plans for where its California network buildout would be.[73] DISH has provided no concrete plans as to how it will raise the $10 billion it says it will need to meet the commitments set forth in the PFJ for 5G buildout. More than just the $10 billion needed for the buildout of a 5G network, DISH will also need $3.6 billion if it chooses to exercise the option to buy Sprint's 800MHz spectrum amounting to a total of $13.6 billion.[74] And this does not include the $1.4 billion that DISH will need to pay New T-Mobile for the 9.3 million Sprint prepaid customers and related assets that will be divested to DISH shortly after the merger is consummated, if it is approved.[75] DISH will likely encounter difficulties in securing additional debt or equity financing for its 5G buildout, as discussed above.[76]

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[70] Evidentiary Hearing Transcript Vol. 9 at 1591, lns. 22-24.

[71] Pub Adv-11 at 75, Table 15.

[72] Mr. Blum testified on December 6, 2019 of the Commission's evidentiary hearings.

[73] *See* Evidentiary Hearing Transcript Vol. 9 at 1671, lns. 1-6. In fact, when questioned about DISH's specific California plans for how DISH would conduct business Mr. Blum answered in some variation of DISH having no specific commitments, decisions, or final plans at least 16 times.

[74] Pub Adv-11C at 60, para. 23.

[75] *See* Pub Adv-11C at 21, para. 23.

[76] *See* Pub Adv-11C at 61, para. 65.

DISH made national commitments to the FCC that underscore the uncertainty of the buildout of its 5G network in California because they cover percentages of the US population, not specific geographic areas. Generally, DISH committed to cover 70 percent of the US population by 2023.[77] DISH has further committed to cover 75 percent of populations in the FCC's Partial Economic Areas (PEAs) with its 600 Megahertz (MHz) spectrum by 2025.[78] This means that even if DISH met these commitments discussed in its July 2019 ex parte letter with the FCC, DISH would cover fewer customers with its facilities based network in 2023 than Sprint does now.[79] Furthermore, as Mr. Blum stated, PEAs, as defined by the FCC, can stretch across multiple counties and even into other states.[80] Even if the DISH buildout commitments are interpreted to apply to each PEA (and there is nothing in the PFJ that would support such an interpretation), there is no assurance that the buildout will be anything close to uniform throughout each PEA. Thus, the commitments provide no guarantee that DISH would provide cellular coverage in each California county or in sparsely populated rural areas.[81] For example, DISH can meet its commitment by serving most, *not even all*, of ten of California's 58 counties.[82] As such, even if DISH meets its network commitments, its coverage would be worse than stand-alone Sprint's absent the merger.[83]

DISH's FCC commitments also offer no assurance that its presence will put meaningful competitive pressure on AT&T, Verizon, and post-merger New T-Mobile.[84] The Commission should not gamble on the future of California's competitive marketplace by betting on whether DISH could replace Sprint as an competitive MNO.

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[77] Exhibit T to the Amended Application "DISH FCC Ex Parte (July 26, 2019)" at 3.

[78] Exhibit T to the Amended Application "DISH FCC Ex Parte (July 26, 2019)" at 4.

[79] Pub Adv-06 at 12, lns. 13-16.

[80] Evidentiary Hearing Transcript Vol. 9 at 1623, lns. 2-12.

[81] Pub Adv-20 Reply Testimony of Cameron Reed on Network Impacts at p. 20, lns. 3-9.

[82] Pub Adv-11 at 33, lns. 1-7.

[83] Pub Adv-20 at 16, lns. 18-22.

[84] Pub Adv-11 at 30, lns.14-16.

Sprint already exists and the Commission should preserve the current competitive wireless market by denying the proposed merger.

B. The proposed transfer of 800 MHz spectrum to DISH will negatively impact the quality and extent of New T-Mobile's existing 4G network and potentially negatively impact its planned 5G network.

The Amended Scoping Memo asks how the proposed transfer of spectrum to DISH impacts the quality of New T-Mobile's current and future networks.[85] As discussed previously, New T-Mobile's aggressive spectrum re-farming plan would result in worse service quality for Sprint's LTE customers.[86] The PFJ will worsen this service quality degradation by ordering New T-Mobile to divest 14 MHz of Spectrum to DISH three years following the closure of the proposed merger.[87] The divestiture could also reduce the claimed speeds of New T-Mobile's 5G network if New T-Mobile needs to devote more low-band or mid-band spectrum to LTE than planned in efforts to maintain LTE service quality.[88]

As T-Mobile's Chief Technology Officer (CTO) Mr. Ray explains in his supplemental testimony, the 14 MHz of Sprint's 800 MHz spectrum was intended to support "CDMA and LTE service for Sprint Customers during the migration period and LTE-based technologies such as narrow band IoT beyond that."[89] While New T-Mobile did not plan to use the 800 MHz for 5G, Mr. Ray earlier stressed 5G in declarations submitted to the FCC that the 800 MHz spectrum was vitally important to transition customers to by stating "the combined company will need to optimize the use of existing LTE spectrum resources (AWS, PCS, 600 MHz, 700 MHz, and 800 MHz) to provide enhanced LTE."[90]

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[85] Amended Scoping Memo at p. 3.

[86] Supplemental Declaration of Mr. Cameron Reed at Attachment 3, paras. 9-10, filed Apr. 26, 2019.

[87] Pub Adv-20 at 4, lns. 20-22.

[88] *Id* at 7, lns. 11-14.

[89] Jt. Appl.-28 at 10-11.

[90] Jt. Appl.-03 at Attachment A at p. 32.

Now New T-Mobile will need to divest that spectrum after three years, reducing the amount of spectrum supporting New T-Mobile's LTE service.[91] The divestiture of Sprint's 800 MHz spectrum places a firm timeline on the migration of Sprint's customers to T-Mobile's network. Such migration will negatively affect customers who cannot afford to or do not want to exchange their current handsets including low-income customers.[92] These customers would now lose service, or at least have worsened service quality.[93] Furthermore, deteriorated LTE service could necessitate that New T-Mobile reevaluate its spectrum allotments and deploy more low-band or mid-band LTE spectrum in 2023 and 2024.[94] This could reduce the capacity of New T-Mobile's 5G network, reducing 5G data speeds.[95] Stand-alone Sprint and stand-alone T-Mobile have adequate spectrum to build out a 5G network without merging. Thus, the benefits of an expanded 5G network are not merger-specific, as the expansions in 5G network coverage would occur for both companies as stand-alone MNOs without the need for merging.[96]

C. The divestiture of Sprint, Boost, and Virgin pre-paid assets will negatively affect California consumers who are currently receiving service from one of these plans.

New T-Mobile will divest Sprint's pre-paid customers from a facilities-based carrier to a carrier with no existing cellular network.[97] As stated above, DISH's network is likely to have significantly less facilities-based coverage than current Sprint has, even if and when achieves its FCC build-out commitments.[98] Furthermore, when DISH finishes its network build-out, that network will be entirely 5G with no legacy 4G LTE

[91] Pub Adv-20 at p. 6, lns. 6-9.

[92] Pub Adv-20 at p. 6, lns. 3-5.

[93] Pub Adv-20 at p. 6, lns. 3-5.

[94] Pub Adv-20 at 6, lns. 22-23; 7, ln. 1.

[95] Pub Adv-20 at p. 7, lns. 1-2.

[96] Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office filed April 26, 2019 at p. 23, lns. 17-18.

[97] Pub Adv-20 at p. 16 lns. 23-24.

[98] Pub Adv-20 at p. 18, lns. 11-13.

support.[99] This is important as legacy Sprint customers on New T-Mobile's network would experience a decline in available LTE capacity, speeds, and service quality post-merger compared to stand-alone Sprint.[100] These customers are likely to be lower income customers who cannot afford or otherwise cannot acquire 5G compatible handsets.[101] As such, the proposed merger will materially worsen service quality for both retained and divested Sprint post-paid and pre-paid customers.

D. The requirement that New T-Mobile make its network available to DISH for seven years if the merger is approved does not guarantee benefits to California consumers.

Joint Applicants have purported numerous benefits of the proposed transaction over the course of the proceeding.[102] Joint Applicants further claim that these benefits will carry through to DISH through an MVNO agreement.[103] These claims of an improved 5G network that underly the Joint Applicants claims of merger benefits, regardless of whether its benefits apply to New T-Mobile or DISH's customers, are misleading. The Commission should recognize that the alleged merger benefits of an expansive 5G network are either: benefits of 5G service over 4G service,[104] not an improvement over the status quo absent the merger,[105] and thus not specific to the merger,[106] or unlikely to materialize.[107]

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[99] Evidentiary Hearing Transcript Vol. 9 at 1670, lns. 25-26.

[100] Pub Adv-20 at p. 6, lns. 11-13. *See also* Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office, Attachment 3, paras. 9-10, filed Apr. 26, 2019.

[101] Pub Adv-20 at p. 6, lns. 3-5.

[102] *See* Jt. Appl.-3 at 3, lns. 22-29; 4, lns. 1-29, and 5, lns. 1-9, filed Jan. 29, 2019.

[103] Jt. Appl.-28 at p. 22, lns. 8-9.

[104] Pub Adv-05, Public Advocates Office Testimony on Fifth Generation Wireless Service at p. 22, lns. 2-5.

[105] Pub Adv-20C at p. 10, lns. 3-9.

[106] Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office at p. 37, lns. 3-10.

[107] Pub Adv-20C at pp. 13, lns. 7-19 and 14, lns. 1-7.

E. California consumers will receive worse privacy protections under the PFJ with DISH.

The October 24, 2019 Amended Scoping Memo specifically asked parties to address the impacts of privacy on California consumers.[108] Per Public Utilities Code Section 854(e), DISH had the burden of proof to show it would not raise privacy concerns if the proposed merger is approved. However, DISH failed to address privacy at all in its testimony, completely ignoring the question raised in the Amended Scoping Memo[109] on the privacy concerns raised by the terms of the PFJ.

The Public Advocates Office privacy witness, Kristina Donnelly, submitted testimony on the potential impact to customer privacy following a divestiture of certain wireless customers to DISH if the merger is approved.[110] Because DISH failed to address the customer privacy concern raised in the Amended Scoping Memo, Ms. Donnelly relied on publicly available information and DISH's incomplete responses to data requests from the Public Advocates Office to evaluate whether DISH will be a good steward of California wireless customers' privacy.[111]

Ms. Donnelly's reply testimony highlighted the fact that DISH provided no privacy policies or drafts of privacy policies for its future wireless customers.[112] While DISH currently operates television services, via satellite and streaming television content over the Internet, the privacy policies for those services will inevitably differ in significant ways from DISH's proposed wireless services. Even with the lack of information DISH provided to the Public Advocates Office on its privacy policies, or lack

[108] Amended Scoping Memo at 2.

[109] Amended Scoping Memo at 2-4.

[110] Pub Adv-14.

[111] DISH's continued refusal to respond to Data Requests from the Public Advocates Office resulted in a meet and confer with the company on October 30, 2019, followed by a motion to compel submitted on November 5, 2019. Although DISH responded to some of the requests from the Public Advocates Office, others are still outstanding to this day; as a result of DISH's continued failure to comply with Commission direction, the evidentiary record in this case is still incomplete.

[112] Pub Adv-14.

thereof for wireless customers, Ms. Donnelly found deficiencies in DISH's current practices that could harm California consumers.

During Evidentiary Hearings on December 5, 2019, DISH's counsel, Ms. Anita Taff-Rice asked Ms. Donnelly numerous questions about the California Consumer Privacy Act (CCPA).[113] These questions demonstrate that Ms. Taff-Rice believes that wireless customer privacy, in general, is no longer a concern because of the passage of the CCPA. Ms. Taff-Rice is incorrect for a number of reasons.

The CCPA will not go into effect until January 1, 2020 and bars the California Attorney General (AG) from bringing any enforcement action until six months after the publication of the final regulations or July 1, 2020, whichever is sooner.[114] The AG has not yet finalized the CCPA regulations, as of the date of this briefing, which prevents the Public Advocates Office from fully examining how the CCPA will protect consumers, including current and future DISH customers. As a result, it is not yet clear how businesses – including both DISH and the Joint Applicants – will interpret or implement the CCPA in their privacy policies and practices.

Ms. Taff Rice provided Ms. Donnelly with two Commission documents regarding the CCPA: The first was D.18-11-003, which denied a petition to open a rulemaking to evaluate wireless customer privacy policies and the second was a letter to the AG providing comments on the AG's draft regulations. Ms. Taff-Rice misinterprets both documents in different ways.

Ms. Taff-Rice provided Ms. Donnelly with a copy of the Commission's decision denying a petition for rulemaking to evaluate the customer privacy policies and practices of wireless telecommunications providers.[115] Through her line of questioning, Ms. Taff-Rice incorrectly suggested that the decision indicates that the Commission believes the CCPA sufficiently addresses any and all concerns regarding the protection of wireless

[113] *See* Evidentiary Hearings Transcript Vol. 8 at 1458-1466, 1473-1474, 1481.

[114] Cal. Civ. Code Section 1798.185(c).

[115] DISH-01; D.18-11-003.

customer privacy. The Public Advocates Office filed comments opposing the Commission's decision to deny Petition (P.) 18-03-014.[116]

Commission Decision (D.)18-11-003 concludes that "it is *not* certain that a review of wireless providers practices is needed at this time."[117] It also states, "In denying the Petition without prejudice, the Commission confirms that it retains jurisdiction over wireless providers, that it retains its commitment to the appropriate regulation of wireless providers, and that it remains concerned regarding privacy protection in the appropriate collection and use of consumer personal information by wireless providers."[118] In October 2019, the legislature passed five bills modifying the CCPA; [119] thus, D.18-11-003 –published on November 16, 2018 – does not take these changes – or other future changes that could be made – into account.

Ms. Taff-Rice herself noted that D.18-11-003 states that the Commission intends to monitor this issue:[120] "if there appears to be a need for additional consumer [personal information] privacy rules in the future, the Commission can open a Rulemaking at that time."[121] The Commission *not* opening a rulemaking into wireless consumer privacy practices does not indicate that the Commission believes that no additional rules are necessary. The Public Advocates Office does not know what the Commission or individual Commissioners may decide to do in the future. Any current inaction on the Commission's part should not be construed as confirmation of what the Commission believes.

Ms. Taff-Rice also provided Ms. Donnelly with a copy of the Commission's comments on the Attorney General's CCPA draft regulations, stating, "I don't see

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[116] *See* The Public Advocates Office's Comments on the Proposed Decision Denying Petition 18-03-014, filed on Oct. 11, 2019.

[117] DISH-01; D.18-11-003 at 11 (emphasis added).

[118] DISH-01; D.18-11-003 at 10.

[119] These include 2019 Assembly Bills 25, 1355, 1146, 1564, and 874.

[120] Evidentiary Hearings Transcript Vol. 8 at 1459-1462.

[121] DISH-01; D.18-11-003 at 11.

anything in these comments that suggest that the CPUC believes that the CCPA is inadequate to protect the privacy of customers of wireless carriers."[122] Ms. Taff-Rice incorrectly assumes that the Commission's comments on the draft regulations represent everything the Commission believes; the mere absence of a statement from the Commission on the adequacy of the CCPA to protect wireless customers does not provide evidence of what the Commission's stance is on the adequacy of the CCPA's protection of wireless consumers.

DISH's policies, or lack thereof, on how to protect children from companies collecting and using data they generate is a major concern.[123] During cross examination, Ms. Taff-Rice asked Ms. Donnelly to confirm that administrative profiles – which belong to the accountholder who cannot be under the age of 18 – are responsible for creating new profiles on their accounts; this includes the profiles for a "kid."[124] As described in Ms. Donnelly's November 22, 2019 reply testimony, DISH requires its account holders, who must be 18 or older, to provide the age of the child, from 2 to 13 years old.[125] Ms. Taff-Rice appears to suggest that DISH is not responsible for enforcing privacy laws that apply to children simply because the parent chooses to create the profile. This is incorrect; creating a profile for a child does not exempt DISH from Children's Online Privacy Protection Act's parental consent, notification, and opt-out requirements.[126] Moreover, the CCPA states, "[a] business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age."[127] Again, because DISH failed to provide the Public Advocates Office with any semblance of a privacy policy, both generally and specifically for how it will collect data from children for its

[122] Evidentiary Hearings Transcript Vol. 8 at 1472.

[123] *See* Pub Adv-14 at II.A.

[124] Evidentiary Hearings Transcript Vol. 8 at 1482-1484.

[125] *See* Pub Adv-14.

[126] 16 CFR § 312 et seq.

[127] Cal. Civ. Code Section 1798.120(c).

future wireless plans, it is questionable how DISH will protect its future wireless customers' data.

In addition, Ms. Taff-Rice asked Ms. Donnelly whether she was aware of any data breaches "in which customer proprietary information was disclosed in California," or if she was aware of any complaints that have been filed against DISH in California for violating a state California privacy law"[128] or had any evidence that DISH has ever violated a California privacy law.[129] As stated during cross examination, Ms. Donnelly stated she was aware of a federal lawsuit against DISH for violating a customer privacy law.[130] In fact, DISH has been sued – and found guilty – for violating customer privacy laws under both federal and California state law.[131]

VI. THE PFJ WITH DISH WILL NEGATIVELY IMPACT AVAILABILITY OF LOW-COST PLANS.

DISH has made no public pronouncements of, let alone commitments regarding, the rates or plan options it will offer to its prepaid customers.[132] Because of the lack of commitments from DISH to continue offering low-cost and prepaid plans, low-cost plans may not be as abundant as they currently are in the mobile wireless market. The divestiture of Sprint's Prepaid Assets, both its customers and its retail locations, to DISH from New T-Mobile undercuts the only explicitly stated promises found in the entire record to lower any. These were made by T-Mobile prior to the PFJ and no longer apply as New T-Mobile will not own the Boost brand.[133]

Additionally, the future of Boost Pilot Program, which helps low-income consumers in California afford mobile wireless service including Internet access, is

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[128] Evidentiary Hearings Transcript Vol. 8 at 1456-1457.

[129] Evidentiary Hearings Transcript Vol. 8 at 1482.

[130] Evidentiary Hearings Transcript Vol. 8 at 1456, 1482.

[131] *See e.g.*, *United States District Court for the Central District of Illinois. United States of America, and the States of California, Illinois, North Carolina, and Ohio v. DISH Network LLC.*, Case No. 09-3073 (2017); *Krakauer v. DISH Network, L.L.C.*, Case No. 18-1518. United States Court of Appeals, Fourth Circuit (2019).

[132] Evidentiary Hearings Transcript Vol. 9 at 1650, lns. 19-27.

[133] Pub Adv-14C at 7, lns. 10-17.

uncertain. There are no enforceable commitments for either New T-Mobile or DISH to assume Boost's current place in the pilot. During the evidentiary hearings on December 6, 2019, Mr. Sievert of T-Mobile stated that DISH would decide on participating in the Boost pilot and Mr. Blum stated the same of New T-Mobile, which shows that neither company has made plans or enforceable promises to continue with the Boot pilot. New T-Mobile would not be bound to the pilot rate plans since they are transferring those customers to DISH.[134] Furthermore, DISH is not bound by any requirements to participate in the Boost Pilot Program or the California LifeLine program following the merger, and it does not currently intend to do so.[135] While both T-Mobile and DISH have volunteered to discuss the continuation of the Boost Pilot Program with the Commission, there are no enforceable commitments that either company has made to indicate that the Pilot Program will continue.[136] Without enforceable commitments made by T-Mobile or DISH to the Commission, there is a grave risk that prepaid plans will no longer continue to be offered in their current form if the merger is approved.[137]

VII. PLANS DO NOT EXIST TO ACCOMMODATE CONSUMERS WHO ARE DIVESTED TO DISH WITH INCOMPATIBLE HANDSETS, THUS HARMING CONSUMERS.

DISH will receive approximately nine million Sprint, Boost Mobile, and Virgin Mobile pre-paid customers as a result of the proposed merger and the US DOJ's PFJ.[138] Joint Applicants have explained these customers are now DISH's responsibility to ensure continuity of service.[139] DISH did not outline any specific plan for addressing pre-paid customers with incompatible handsets.[140] Furthermore, the transition services agreement

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[134] *See* Pub Adv 11C at 5.

[135] Hearing Transcript Vol. 9 at 1664-64.

[136] *See* Hearing Transcript Vol. 9 at 1658, lns. 5-10; 1549, lns. 21-24.

[137] *See* Hearing Transcript Vol. 9 at 1652, ln. 9. Mr. Blum states that it is the "current plan" to offer postpaid and prepaid services if it obtains the assets from Sprint. "Current plan" is not a definitive statement ensuring that prepaid plans will continue to be offered by DISH if the merger is approved.

[138] *See* Jt. Appl.-20, Section IV.A (PFJ).

[139] Jt. Appl.-28 at p. 18, lns. 27-28.

[140] DISH-03 (response to Question 6).

outlined within the PFJ will expire roughly when New T-Mobile is required to divest Sprint's 800 MHz spectrum.[141] This means that customers with incompatible handsets could be left behind post-merger. These customers could lose service entirely[142] and customers with compatible handsets will experience reduced service quality as New T-Mobile refarms more spectrum from LTE to 5G.[143]

VIII. CALIFORNIA LIFELINE CUSTOMERS ARE AT RISK OF LOSING THEIR SUBSIDIES IF THE PROPOSED MERGER IS CONSUMMATED.

While T-Mobile's current Chief Operating Officer and President, Mr. Sievert, testified that T-Mobile "likes" LifeLine and that the program is "important" and is "consistent with [T-Mobile's] core values,"[144] T-Mobile does not currently participate in the California LifeLine program. T-Mobile demonstrated its supposed commitment to LifeLine by including an overbroad "material changes" provision in the California Emerging Technology Fund Memorandum of Understanding (CETF MOU) that could allow New T-Mobile to end its LifeLine participation in California for undefined reasons.[145] This caveat is vague and ambiguous and does not clearly bind T-Mobile to its LifeLine commitment, even in cases where program changes to LifeLine have been found to be in the public interest and are adopted/scheduled in advance by the FCC.[146] The CETF MOU does not adequately ensure T-Mobile's continued participation in California's LifeLine program, which puts current California LifeLine customers on Sprint's Assurance Wireless at risk for losing their subsidies.

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[141] Evidentiary Hearing Transcript Vol. 8 at p. 1374, lns. 20-22.

[142] Pub Adv-20 at p.20, ln. 25.

[143] Supplemental Declaration of Cameron Reed of the Public Advocates Office at p.21, lns. 8-12

[144] Hearing Transcript Vol. 9 at 1533, lns. 20-21.

[145] Pub Adv-13C at 8-9.

[146] Pub Adv-13C at 9, lns. 11-13.

IX. THE DOJ AND FCC COMMITMENTS DO NOTHING TO ENSURE CALIFORNIA CONSUMERS BENEFIT FROM THE PROPOSED MERGER OR THE AGREEMENT WITH DISH.

The FCC Commitments are little improvement, if any, over the status quo of the proposed merger. Within six years of the close of the proposed merger (which would now be 2026 at the earliest), New T-Mobile needs to have an average of **<<Begin Confidential>>** [redacted] **<<End Confidential>>** of low-band and mid-band spectrum across its nationwide 5G sites.[147] As stand-alone companies, Sprint and T-Mobile would dedicate a sum of **<<Begin Confidential>>** [redacted] **<<End Confidential>>** of low-band and mid-band spectrum across its 5G sites by 2024.[148] This FCC commitment is only**<<Begin Confidential>>** [redacted] **<<End Confidential>>** more 5G spectrum for New T-Mobile over the combined 5G spectrum of the stand-alone companies, assuming the unlikely scenario that stand-alone T-Mobile or Sprint refarm no additional spectrum to 5G from 2024 to 2026. This is not an improvement over the current plans of Sprint and T-Mobile to deploy 5G on their separate networks.

The FCC speed commitments are likewise inadequate and New T-Mobile commits to build-out slower speeds than what the speed tests for 5G have shown thus far.[149] Tests from already deployed 5G service show speeds faster than what's committed to from both Sprint and T-Mobile.[150] Furthermore, the Rural Wireless Association has alleged, and an FCC Staff Report has discovered, that T-Mobile has exaggerated its rural 4G LTE coverage.[151] As the Rural Wireless association states: "T-Mobile's actions cast doubt on

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[147] Exhibit S to Amended Application New T-Mobile May 20, 2019 Commitments to the FCC, Attachment 1, Section 1.

[148] Supplemental Declaration of Cameron Reed of the Public Advocates Office at p.25 at Figure 1.

[149] Exhibit S to Amended Application New T-Mobile May 20, 2019 Commitments to the FCC, Attachment 1, Section 1.

[150] Pub Adv-20C at p.10, lns. 3-9.

[151] Pub Adv-20C at p.13, lns. 15-19. *See also* Exhibit CWA-17 Mobility Fund Phase II Coverage Maps Investigation Staff Report in GN Docket No. 19-367 at para. 8. "Staff recommends that the [FCC] assemble a team with the requisite expertise and resources to audit the accuracy of mobile broadband coverage maps submitted to the [FCC]. The [FCC] should further seeking appropriations from Congress to carry out drive testing, as appropriate."

the unsubstantiated promises of rural coverage the company is making to justify their anti-competitive merger with Sprint. The company's recent track record confirms that rural Americans will be harmed if the merger is approved."[152]

Furthermore, as a stand-alone company T-Mobile covered 96.6% of total US population in 2017.[153] Joint Applicants have not proven why stand-alone T-Mobile is unable to make the necessary investment to expand rural coverage.[154] The Joint Applicants have not demonstrated that New T-Mobile would make this investment, stating T-Mobile undertook no business case analysis on whether it would expand coverage to match the maps in Attachment D to Mr. Ray's rebuttal testimony.[155] Furthermore, considering the divestiture New T-Mobile and stand-alone T-Mobile would have the **<<Begin Confidential>>** [redacted] **<<End Confidential>>** amount of low-band spectrum by 2024.[156] Joint Applicants have not put forward any positive business case to support any promised investment in rural areas.[157] Additionally, New T-Mobile could simply exaggerate its rural coverage to the FCC[158] to claim compliance with its commitments.[159] As such, there is no basis to conclude the proposed merger will materially alter the lack of existing wireless coverage in rural California.[160]

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[152] Pub Adv-20C at p.14, lns. 2-5.

[153] Pub Adv-06C at p. 12, lns. 15-16.

[154] Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office, filed Apr. 26, 2019, at p. 37, para. 67 and fn.80.

[155] Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office, filed Apr. 26, 2019, at p. 37, para. 68 and fn.81.

[156] Supplemental Declaration of Mr. Cameron Reed of the Public Advocates Office, filed Apr. 26, 2019, at p. 25, Figure 1.

[157] Supplemental Declaration of Dr. Lee Selwyn on behalf of the Public Advocates Office at p. 61, lns. 15-18.

[158] *See* CWA-17 (FCC Staff Report finding that some wireless providers, including T-Mobile, exaggerated their coverage maps when reporting to the FCC.)

[159] Pub Adv-20C at p.14, lns. 2-5.

[160] Supplemental Declaration of Dr. Lee Selwyn on behalf of the Public Advocates Office, filed Apr. 26, 2019, at p. 62, lns. 3-4.

Voluntary behavioral commitments do not work to alleviate the harms of mergers. Pricing commitments made by New T-Mobile are examples of voluntary behavioral commitments.[161] Such commitments are temporary, and the pricing commitment in particular fails to replicate the *downward* trajectory of mobile prices in the last decade.[162] As is evident from the concerns raised by DISH in a February 12, 2019 ex parte letter to the FCC from T-Mobile's counsel,[163] the pricing commitment can be interpreted as allowing New T-Mobile to retire legacy plans by replacing them with plans that could potentially cost more while possibly providing more perks, such as increased data allotments or speed. Because the FCC and DOJ commitments provide no California-assurances, the commitments cannot be said to protect Californians and are not enforceable by California regulatory agencies. The proposed merger is not in the public interest and must be denied.

X. CONCLUSION

If approved, this merger will harm California consumers by consolidating the mobile wireless industry to unprecedented levels of concentration, which has historically meant higher prices for consumers. The DOJ's solution to make DISH the fourth, competitive carrier is attenuated, at best. DISH has provided no concrete plans as to how it will buildout its own, facilities-based 5G network in California, nor has it provided any plans on how it intends to benefit low-income consumers or protect California consumers' privacy. DISH has held a significant amount of spectrum for over a decade[164] and expressly stated during hearings that the infrastructure divestitures and leases that will be made available to DISH via the New T-Mobile are "not critical" for DISH's success as a 5G MNO.[165] Yet, despite having invested more than $25 billion to acquire wireless spectrum, DISH has thus far not used any of that spectrum to offer

[161] *See* Pub Adv-04C at 12, lns. 20-24.

[162] *See* Pub Adv-02C at 20-21.

[163] *See* Jt. Appl.-26.

[164] Hearing Transcript Vol. 9 at 1604, lns. 4-6.

[165] Hearing Transcript Vol. 9 at 1628, lns. 6-8.

mobile wireless service, and DISH currently does not operate as a facilities-based, mobile wireless provider. Nowhere in this record has DISH offered any explanation as to why the nominal transfer of Sprint's prepaid customers and related assets to DISH will enable DISH to accomplish what its $25 billion in spectrum purchases made of the past several years has thus far not enabled it to do, i.e., to enter the mobile wireless market has a facilities-based provider. Neither DISH nor the Joint Applicants have provided evidence that this merger's benefits will materialize. The proposed merger, including the divestitures to DISH, are thus not in the public interest and should be denied.

Respectfully submitted

/s/ *MICHELLE SCHAEFER*

MICHELLE SCHAEFER
Attorney

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2722
Email: michelle.schaefer@cpuc.ca.gov

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