

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
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TO PARTIES OF RECORD IN APPLICATION 18-07-011 and APPLICATION 18-07-012

This proceeding was filed on July 13, 2018 and is assigned to Commissioner Rechtschaffen and Administrative Law Judges (ALJs) Bemederfer and Mason. This is the decision of the Presiding Officers, ALJs Bemederfer and Mason.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (*i.e.*, the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (*See*, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANNE E. SIMON

Anne E. Simon

Chief Administrative Law Judge

AES:mph

Attachment

ALJ/POD-KJB/RIM/mph

Decision **PRESIDING OFFICERS' DECISION OF BEMESDERFER AND
MASON (Mailed 4/25/2022)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint
Communications Company L.P. (U-5112) and
T-Mobile USA, Inc., a Delaware Corporation,
For Approval of Transfer of Control of Sprint
Communications Company L.P. Pursuant to
California Public Utilities Code Section 854(a).

Application 18-07-011

And Related Matter.

Application 18-07-012

**PRESIDING OFFICERS' DECISION FINDING THAT T-MOBILE USA, INC.
SHOULD BE SANCTIONED BY THE COMMISSION FOR VIOLATING
RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE**

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PRESIDING OFFICERS' DECISION FINDING THAT T-MOBILE USA, INC. SHOULD BE SANCTIONED BY THE COMMISSION FOR VIOLATING RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

Summary

Following the evidentiary hearing on the Commission's Order to T-Mobile USA to Show Cause, the Commission finds that prior to the adoption of Decision 20-04-008 (D.20-04-008) T-Mobile USA, Inc. (T-Mobile USA) made certain representations to the Commission that were false or misleading and that, as a result, T-Mobile USA violated Rule 1.1 of the Commission's Rules of Practice and Procedure. Specifically, we find that T-Mobile USA falsely represented that there would be a three-year customer migration period (2020-2023) for all former Sprint Communications Company L.P. (Sprint) customers (*i.e.*, both the former Sprint customers who would become T-Mobile customers on the new T-Mobile 5G network; and the customers of the former Sprint subsidiary, Boost Mobile, who would become customers on the new DISH Network).

For this Rule 1.1 violation, the Commission penalizes T-Mobile USA in the amount of \$5,325,000.00 pursuant to Pub. Util. Code §§ 2107 and 2108. In determining this penalty amount, we have considered the recent development that T-Mobile USA and DISH are in discussions to resolve their dispute concerning the code division multiple access (CDMA) shutdown which gave rise to the Order to Show Cause.

The proceeding is closed.

1. Background

On April 16, 2020, the Commission adopted Decision (D.) 20-04-008 which granted the joint application of Sprint Communications Company L.P. and T-Mobile USA, Inc. (T-Mobile USA) for approval and transfer of control of Sprint Communications Company L.P, and approved the merger of Sprint Corporation,

a Delaware corporation (Sprint), with T-Mobile US Inc., a Delaware corporation (T-Mobile). The grant and approval were subject to conditions designed to mitigate the potential adverse impacts that might result from merging two of the four nationwide facilities-based wireless carriers. Among the conditions placed on T-Mobile USA by D. 20-04-008 were the requirements set forth in Ordering Paragraph (OP) 6 of an undegraded customer experience during the migration period from 2020-2023. OP 6 states:

The legacy Sprint and T-Mobile customer experience shall not be degraded during the customer migration period (2020-2023) or the 5G build-out period (2020-2026). During such time New T-Mobile shall maintain LTE broadband speeds and coverage areas in California at no less than the speeds and coverage areas reported to the Federal Communications Commission on Form 477 by T-Mobile and Sprint for their respective LTE services as of December 31, 2019.

There are components of OP 6 that bear further explication as they memorialize the Commission's understanding and set forth the conditions that T-Mobile USA had to comply with in receiving Commission authorization of the T-Mobile USA merger. The phrases "legacy Sprint and T-Mobile" and "customer migration period" refer to the three-year period (2020-2023) in which two separate groups of customers, *i.e.* (1) former Sprint customers who would become customers of T-Mobile USA; and (2) customers of the former Sprint subsidiary Boost Mobile, would be migrated to their respective new networks. Thus, there would be a three-year period for former Sprint customers who became T-Mobile USA's customers to be migrated to the new T-Mobile 5G network; and there would be a three-year period during which former Sprint subsidiary Boost customers would become customers of the newly formed DISH network.

Prior to the adoption of D.20-04-008, several events occurred that are relevant to the ultimate issue of whether T-Mobile USA committed a Rule 1.1 violation. After the February 5 and February 6, 2019 evidentiary hearings on the joint application and proposed merger, the Commission learned that on July 19, 2019, T-Mobile USA, Sprint, and DISH agreed to a Proposed Final Judgment (PFJ) with the United States Department of Justice (DOJ) in which T-Mobile USA and Sprint committed to transferring Sprint's Boost wireless business to DISH, allowing DISH to operate as a competitive nation-wide wireless carrier (the "DISH Divestiture")¹ while building its own wireless network. T-Mobile USA also agreed that during the DISH build-out period, T-Mobile USA would make its wireless network (both LTE and CDMA) available for use by DISH as a Mobile Virtual Network Operator (MVNO).² The divestiture of Boost to DISH ("Boost Divestiture"), which was contemplated to lead to the transformation of DISH, a provider of satellite television services, into a fourth national wireless carrier, was structured by the Federal Communications Commission (FCC) and the DOJ, as a condition of their approval of the Sprint-T-Mobile merger and was contained in a Final Judgment³ issued by the federal District Court approving the merger.⁴

¹ See DOJ, PFJ (filed July 19, 2019), copied on Aug. 12, 2019, in the Federal Register, Attachment 4 to D.20-04-008, Competitive Impact Statement, Sec. I. The United States District Court for the District of Columbia entered the Final Judgment on April 1, 2020.

² *Id.*

³ See *United States v. Deutsche Telekom AG*; Final Judgment, 2020 U.S. Dist. LEXIS 87971, 2020 WL 2481785 (D.D.C., Apr. 1, 2020), Sec. IV.A: Divestitures: Prepaid Assets; Memorandum Opinion, 2020 U.S. Dist. LEXIS 65096, 2020 WL 1873555 (Apr. 14, 2020, D.D.C.), Analysis, 2020 U.S. Dist. LEXIS 65096, at *14-*26.

⁴ The Commission learned of these events on July 26, 2019, when Sprint and T-Mobile USA, Inc. (Joint Applicants) filed a *Motion of Joint Applicants to Advise the Commission of DOJ Proposed Final*

As part of the Boost Divestiture, DISH and T-Mobile USA entered into a Master Network Services Agreement (MNSA) pursuant to which DISH would have access to the T-Mobile network while building its own separate facilities-based national wireless network. The MNSA requires T-Mobile USA to give DISH “reasonable notice” of not less than 6 months before shutting down the legacy Sprint wireless network (CDMA network) in any market and replacing it with its new 5G wireless network. Among the assets to be divested by T-Mobile USA pursuant to the PFJ are the 800-megahertz (MHz) spectrum licenses Sprint held and which T-Mobile USA either has to offer to DISH or auction off within three years of the divestiture of Boost to DISH.⁵ If DISH acquires the 800 MHz spectrum, T-Mobile USA has the option of leasing it for up to 2 years.⁶

On or about October 1, 2020, six months after the adoption of D.20-04-008, T-Mobile USA announced to DISH that it would shut down the CDMA Network on January 1, 2022. In response, on April 28, 2021, DISH filed a *Petition to Modify D.20-04-008*. DISH asserted that the proposed January 1, 2022, date was in violation of the promises T-Mobile USA made to the Commission and DISH at

Judgment. On August 27, 2019, the assigned Administrative Law Judge Bemdeserfer issued *his Ruling Re-Opening Record to Take Additional Evidence and Directing Joint Applicants to Amend Application 18-07-012*. The *Amended Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032* was filed on September 19, 2019. The assigned Commission issued his *Amended Scoping Ruling* on October 24, 2019 for the parties to address, *inter alia*, what changes are required to previously submitted written or oral witness testimony from Sprint, T-Mobile or DISH entering into the DOJ and FCC agreements. T-Mobile submitted the Supplemental Testimony of Neville Ray, dated November 7, 2019, and a further evidentiary hearing was held on December 5, 2019.

⁵ See Exhibit Jt. Appl. 28c: Supplemental Testimony of Neville Ray, Executive Vice President and Chief Technology Officer, T-Mobile (November 7, 2019, corrected and re-served on December 4, 2019) (Supplemental Ray Testimony“). at 8:27-9:2 & n. 22

⁶ *Id.*

the evidentiary hearings, was in violation of D.20-04-008 OP 6 and was unreasonable as T-Mobile USA's actions would result in substantial numbers of Boost customers who had not yet been migrated to the LTE network losing phone service altogether as of that date. While it was styled as a modification request, the relief DISH sought was for the Commission to reopen the proceeding so that the Commission could enforce the three-year customer migration period set forth in OP 6.

On May 28, 2021, T-Mobile USA filed its *Response*, and claimed that notice it provided DISH was proper as it was in accordance with the six-month notice provision in the Master Network Services Agreement (MNSA) that T-Mobile USA and DISH executed prior to the close of the merger.⁷ T-Mobile USA further claimed that OP 6 of D.20-04-008 did not require it to maintain the CDMA network for DISH customers until July of 2023, and that T-Mobile USA never made such a commitment.

1.1. The Order to Show Cause

On August 13, 2021, the assigned Commissioner and assigned Administrative Law Judge issued their *Order to Show Cause (OSC)*, directing T-Mobile USA to explain why it should not be sanctioned by the Commission for violating Rule 1.1 of the Commission's Rules of Practice and Procedure for making statements that were false, misleading, or had omitted material facts. The OSC identified the following statements that T-Mobile USA made under oath indicating that 1) its CDMA network would be available to Boost customers until they were migrated to DISH Network Corporation's (DISH) LTE⁸ or 5G

⁷ In Decision 22-03-005, the Commission dismissed DISH's *Petition*.

⁸ LTE stands for Long Term Evolution and is sometimes referred to as 4G LTE.

services, 2) maintaining service to the CDMA network during the Boost customer migration would not affect T-Mobile's 5G build-out, 3) all former Sprint customers would have a seamless upgrade experience during the migration period, 4) DISH would have up to three years in which to complete Boost customer migration, and 5) T-Mobile USA omitted or provided misleading information that PCS spectrum was used to provide service to Boost customers on the CDMA network and the same spectrum would be required for the build-out of the 5G network. The foregoing multiple statements fall into two broad factual categories: time promised for customer migration into the new 5G network; and spectrum services needed for the old and new networks. The OSC also made reference to OP 6 of D.20-04-008 which required the customer experience not be degraded during the customer migration period of 2020-2023.⁹

1.1.1. T-Mobile's Response to the OSC

On September 13, 2021, T-Mobile USA filed its *Response* to the OSC and disputed the statements that the OSC claimed were false, misleading, or had omitted material facts. With respect to the customer migration allegations, T-Mobile USA claimed it never promised to keep the CDMA network available to divested Boost customers while they migrated to the new DISH LTE or 5G because the CDMA network availability did not apply to the divested Boost customers. Second, the statement that all former Sprint customers would have a seamless migration was limited to non-divested customers, *i.e.*, non-Boost customers. In T-Mobile USA's view, it was DISH's duty to oversee the orderly migration of the divested Boost customers to DISH's new network. Third, T-Mobile USA disputed that it ever said that DISH would have a full three years

⁹ OSC, at 2 and 4.

to complete the Boost customer migration to the new DISH network. The three-year limit was the outer bound for T-Mobile USA to complete the customer migration and T-Mobile USA said it intended to complete the migration in less than three years. With respect to the spectrum needed, T-Mobile USA claimed that it informed the Commission that the PCS spectrum was used for the CDMA and would be used for the new 5G network. In T-Mobile USA's view, it had been truthful with the Commission throughout this proceeding.

1.1.2. The Evidentiary Hearing

The evidentiary hearing for the OSC was held on September 20, 2021. Neville Ray testified on behalf of T-Mobile USA. Jeffrey Blum testified on behalf of DISH. At the conclusion of the hearing exhibits were admitted into evidence.

On October 6, 2021, T-Mobile USA filed a *Motion to Strike the OSC Hearing Testimony of Jeffrey Blum* as being irrelevant to the issues that were addressed at the OSC Evidentiary Hearing. Following DISH's October 12, 2021 opposition thereto, T-Mobile USA's *Motion* was denied.

On October 21, 2021, T-Mobile USA filed its *Motion for Adoption of Transcript Corrections*. DISH did not oppose this *Motion*, which was granted.

On October 22, 2021, T-Mobile USA filed its *Post-Hearing Opening Brief*.¹⁰

On November 1, 2021, DISH filed its *Post-Hearing Reply Brief*.

2. Standards for Finding a Rule 1.1. Violation

Rule 1.1 of the Commission's Rules of Practice and Procedure states:

Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this

¹⁰ In addition, on October 22, 2021, T-Mobile USA also filed an *Update* to its *Response to DISH's Petition to Modify*, wherein T-Mobile USA stated it would delay the sunset of the Sprint CDMA network nationwide until March 31, 2022.

State; to maintain the respect due to the Commission, members of the Commission or its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

The use of the words “mislead” and “artifice or false statement of fact or law” are important as they underscore that broad scope of circumstances that can give rise to a Rule 1.1 violation. The Commission has found that a Rule 1.1 violation may occur “where there has been a lack of candor, withholding of information, or failure to correct information or respond fully to data requests.”¹¹ As the Commission established a prima facie case for a Rule 1.1 violation in the OSC, T-Mobile USA has the burden of proof to show a violation did not occur, based on a preponderance of the evidence.¹²

Importantly, an intent to mislead is not required to find a Rule 1.1 violation.¹³ The Commission has held that “an omission to provide correct information can constitute a Rule 1 violation if the consequence is to mislead the Commission about a matter which is material to a proceeding.”¹⁴ The Commission has found a Rule 1.1 violation where a party allowed a “false statement of fact” to remain uncorrected after it had the knowledge to correct it.¹⁵ The need for candor and accuracy is especially important for witnesses giving Commission testimony under oath, as the Commission relies on this testimony to form its decisions, and misrepresentations may lead to harm to the public.¹⁶

¹¹ D.13-12-053, at 21 (citations omitted); and D.01-08-109 at 18 (mimeo).

¹² See D.19-12-041, at 13-14, 84.

¹³ See *id.*; D.15-08-032, at 57; *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 854 (“*PG&E v. Commission*”).

¹⁴ See D.19-12-041, at 36-37.

¹⁵ See D.13-12-053, at 15.

¹⁶ See D.15-12-016, at 41.

In addition to identifying the type of conduct that can give rise to a Rule 1.1 violation, we must also set forth the appropriate level of proof that must be met before a Rule 1.1 violation can be found. Contrary to T-Mobile USA's assertion, it is not incumbent upon the Commission to find that "there is clear evidence that T-Mobile USA misled the Commission through an artifice or false statement."¹⁷ A finding that a party has violated Rule 1.1 can be established by a preponderance of the evidence.¹⁸

Finally, before addressing whether T-Mobile USA violated Rule 1.1, the Commission must also address the level and degree of notice that the respondent must receive in the OSC. In its pre-hearing *Response* to the OSC, T-Mobile USA claimed that it is entitled to "fair notice of the allegations against it" and "will therefore address the five specific points on which it has been ordered to show cause on page 8 of the OSC and the underlying evidence cited in the OSC."¹⁹

T-Mobile USA's approach in responding to the OSC is myopic. The standard for providing notice in an OSC is fairly liberal so the Commission may look to a "fair reading" of the "totality of the circumstances" in finding "reasonable notice" of Rule 1.1 violations, even if all the violations were not

¹⁷ *Response of T-Mobile to ALJ's OSC Ruling (OSC Response)*, at 20; see also *Post-Hearing Brief of T-Mobile on the OSC ("OSC Post-Hearing Brief")*, at 42.

¹⁸ Decision 08-12-058 (Preponderance of the evidence is defined in terms of probability of truth, e.g., such as evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth). The Commission's recital of the preponderance of evidence standard is consistent with how that term has been defined by our California Supreme Court. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 918 [The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' "].)

¹⁹ *OSC Response*, at 6; see also *OSC Post-Hearing Brief*, at 10.

specifically quoted in the OSC Ruling.²⁰ To that end, if there are like or other statements in the record that are related to the five specific points on page 8 of the OSC but are not quoted verbatim, the Commission may nonetheless consider those statements in making its ultimate determination on the Rule 1.1 question.

3. T-Mobile USA Violated Rule 1.1 in its Representations to the Commission

3.1. T-Mobile USA Misled the Commission when it Assured that the CDMA Network would be Available for Three Years for DISH to Complete its Boost Customer Migration.

3.1.1. The Promise of a Three-Year Migration for Sprint and Boost Customers

As a result of a series of T-Mobile USA representations from its witness Neville Ray, the Commission adopted a three-year migration period that was memorialized in D.20-04-008, OP 6. The first group of representations concerned the period for migrating Sprint and Boost customers to the new networks:

- “T-Mobile expects that all Sprint customers are likely to be completely *migrated within three years.*”²¹
- “Why we want to use it for *that three years is during the migration process of Sprint and Boost customers* off of the legacy Sprint network and the Sprint services and onto the New T-Mobile network...”²²
- “That said, we are very, very confident that we will be at a complete migration of customers onto the New T-Mobile network *within that three-year period.*”²³

²⁰ Decision (D.) 15-08-032, at 47-50. In this case, Rule 1.1 violations were not even previously discussed in the OSC charges, but were implied by a “fair reading of the OSC.” Affirmed, Decision (D.) 16-03-032, at 10-11, citing to and quoting *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 859-862.

²¹ Supplemental Ray Testimony, at 47:5-6 (emphasis added).

²² Evidentiary Hearing of December 5, 2019 (EH 2019), at 1374:28-1375:3 (emphasis added).

²³ *Id.*, at 1375:18-21 (emphasis added).

- “We have to make sure we maintain coverage and sufficient capacity. But you can start to decommission certain cell sites well ahead of *the three-year period*. It’s paced on the migration of the customer base.”²⁴
-

In addition to Mr. Ray’s testimony, T-Mobile USA submitted a filing after the Boost divestiture committing not to degrade either the Sprint or the Boost migration time. In a December 20, 2019 pleading, T-Mobile USA stated that its service to existing Sprint CDMA and LTE customers will be maintained *until* they are migrated to the New T-Mobile network as customers of New T-Mobile or DISH.²⁵ Emphasizing the three-year duration of the migration period (“That’s why we’ve always said it’s a three-year integration program”),²⁶ T-Mobile USA pledged “to make sure that no Sprint customer during that migration process, be they a Boost customer or a Sprint customer, or however they are strayed, [sic] suffers anything approaching a degraded experience.”²⁷ Thus, what the foregoing quotes demonstrate is that Mr. Ray testified, and confirmed by T-Mobile USA’s legal filing, that the three-year migration period applied to Sprint customers migrating to the new T-Mobile 5G network, and to the former Sprint subsidiary Boost customers migrating to the new DISH network.

²⁴ *Id.*, at 1383:28-1384:5 (emphasis added).

²⁵ *Joint Applicants Post-December 2019 Hearing Brief*, December 20, 2019 (“*Appl. Dec. 2019 Brief*”), at 35 (emphasis added).

²⁶ EH 2019, at 1382.

²⁷ EH 2019, at 1382-83; *see also* Supplemental Ray Testimony, at 20:5-7 (“In sum, T-Mobile will do all it can to make it possible for DISH to successfully and timely migrate the Sprint prepaid customers to the network.”); *Appl. Dec. 2019 Brief*, at 35 (“In addition, as discussed below, the record is clear that New T-Mobile is otherwise obligated to cooperate with DISH to facilitate the migration of the Sprint divested customers to the New T-Mobile network.”)

That the three-year migration period applied to both sets of customers helps to explain Mr. Ray's multiple references during his testimony to the use of the 800-megahertz (MHz) spectrum during that migration period:

- Q: "New T-Mobile will be divesting the 800-megahertz spectrum **after three years** for which New T-Mobile plan to use to support LTE and CDMA service for Sprint customers during the migration process; is this correct?
 - A: Yes."²⁸
- Q: "The refarming chart seems to show that New T-Mobile will need the 800 MHz spectrum to continue to support CDMA and LTE service. How will you provide that service in light of the divestiture of the 800 MHz spectrum?
 - A: "The divestiture commitments give us three years of continued use of the 800 MHz spectrum from the time we divest Sprint's pre-paid assets to DISH. New T-Mobile planned and still does plan to use that spectrum exclusively to support former Sprint customers during the anticipated **3-year migration period...**"²⁹
- "I would also reiterate that T-Mobile intends to maintain the 800 MHz spectrum **for three years to support CDMA service during our migration process** and that we have an option to lease 4 MHz of spectrum for additional time if required."³⁰
- "The divestiture commitments give us **three years of continued use of the 800 MHz spectrum** from the time we divest Sprint's pre-paid assets to DISH."³¹

²⁸ EH 2019, at 1378:13-19 (emphasis added).

²⁹ Supplemental Ray Testimony, at 13:14-17 (emphasis added).

³⁰ *Id.*, at 21:6-8 (emphasis added).

³¹ *Id.*, at 13:14-15 (emphasis added).

- “I mean why that last four megahertz is important, that's the service or the spectrum that supports primarily today that CDMA voice service, and that's the piece that we want to make sure is protected its needs as we move through the **first three-year period.**”³²
- “And then the 800-megahertz spectrum, we’ve structured an arrangement whereby **after three years we would sell the 800 megahertz spectrum to DISH,** but we have the right to retain a portion of that spectrum for a period of time, four megahertz, I believe it's for another two years after the first three-year period.”³³
- “So our intent is to -- that’s **why we put three years there.** If we determine we need longer, we have the right. We negotiated that through the PFJ with the DOJ and with DISH so that we could retain a portion of that 800 megahertz for up to five years.”³⁴
- “That's why we’ve always said it’s a **three-year integration program.** You know, sites will start to free up and start -- the decommissioning process will start within the three years, but the lion’s share of the activity would be once we’ve successfully migrated the customers.”³⁵

Taken together, these multiple references establish: (1) the CDMA network would be available until DISH completed its customer migration; (2) the Sprint and DISH customer migration periods would be three years; (3) all former Sprint customers would enjoy a seamless experience throughout the migration process; and (4) to help facilitate the three-year migration, the 800 MHz spectrum would

³² OSC-TMO-33, at 1375:11-17 (emphasis added).

³³ Ray Testimony, at 1374:15-22 (emphasis added).

³⁴ *Id.*, at 1375:4-10 (emphasis added).

³⁵ *Id.*, at 1382:17-23 (emphasis added).

be available during that migration period. The Commission relied on these various representations regarding a three-year migration period, which were made on the record and under oath, when it included the three-year migration period in OP 6. At no time prior to announcing that it planned to end the migration period on December 31, 2021, did T-Mobile alert the Commission and DISH that the various representations quoted above had been misinterpreted, or that the scope of OP 6 was in any way inaccurate.

It is telling that, except for T-Mobile, the Commission and all other parties to the proceeding came away from the December 5, 2019 evidentiary hearing with the understanding that the migration period would be three years.

Mr. Blum from DISH testified at the December 2019 hearing to DISH's understanding of T-Mobile's three-year CDMA migration period:

Q: So is it fair to say that the 800 megahertz spectrum was not included in these commitments because you will not be acquiring it until 2023 or later?

A: No. Because it's not our spectrum yet. As part of the consent decree, we have the option to acquire it. And it is additional spectrum. It's low-band spectrum. But one of the issues with it today that Sprint has to deal with it's using old technology, the CDMA technology. So it's not ready for 5G, but it's something that in **three years** from now when Sprint has cleared the CDMA technology we have the right to acquire.³⁶

TURN, another participant in the December 2019 hearing, described its understanding of Mr. Ray's testimony when it filed its response to DISH's Petition for Modification, noting that:

In testimony, T-Mobile's President of Technology indicated that **the three year period** could be extended if necessary, and

³⁶ EH 2019, at 1605:27-1606:10 (emphasis added).

made no mention of reducing the time frame for migration. Per T-Mobile's representations to the Commission, **the three year transition period was a floor, not a ceiling.**³⁷

Finally, PAO staff, who likewise participated in the December 2019 hearing, understood that the CDMA migration period was "at least three years."

According to PAO:

DISH recently filed a petition for modification of the decision for the T-Mobile/Sprint merger, complaining of T-Mobile's plans to shut down its 3G CDMA network, upon which its Boost customers are dependent. This was an abrupt change from T-Mobile's agreement to keep their network operational for DISH/Boost prepaid customers **for at least three years**, as part of the T-Mobile/Sprint merger.³⁸

Yet over a year after D.20-04-008's adoption, T-Mobile USA now claims it never said what its primary witness said or what all the other parties and the Commission heard and understood. Instead, at the OSC evidentiary hearing, Mr. Ray testified that he never said that the CDMA network would be available to the Boost customers until they were migrated to DISH's LTE or 5G services:

"Q. Do you believe that you said that (T-Mobile would maintain the CDMA network until DISH had deployed a 5G network) to the Commission?

A. No. Absolutely not.

Q. Can you explain why you don't think you said that to the Commission?

A. We would never have made a statement that left us responsible for managing and maintaining a CDMA network until such point in time that DISH had built their network.

There was no indication or knowledge from

³⁷ OSCD-8 (*Response of The Utility Reform Network to the Petition of DISH Network Corporation to Modify D.20-04-008*), at 2 (emphases added).

³⁸ OSCD-9 (*Public Advocates Office Reply Brief on Application for Approval of Transfer of Control Over Tracfone Wireless, Inc.*), at 30 (emphasis added).

T-Mobile as to when or how that would happen. There are many reasons why that information would not be provided to me specifically. So did we have any knowledge as to when DISH was going to build-out its network, LTE or 5G? No. And so we would have never tied a CDMA timeline, a CDMA shutdown timeline, to a date in the future that was impossible for us to predict or project.”³⁹

There is a fundamental problem with the factual predicate underlying Mr. Ray’s supplemental testimony. To say that “there was no indication or knowledge from T-Mobile as to when or how that [*i.e.*, the DISH network buildout] would happen” overlooks the fact that T-Mobile had promised a three-year migration period. This would have been the time for DISH to complete the network buildout regardless of what T-Mobile knew about DISH’s buildout schedule or capabilities, so T-Mobile’s ignorance, actual or not, is irrelevant.

The Commission rejects T-Mobile’s attempt to whitewash Mr. Ray’s prior testimony which has been quoted above and is part of the evidentiary record. In his testimony, Mr. Ray stated, unequivocally, that the three-year migration period applied to both Sprint customers migrating to the new T-Mobile network and to the Boost customers migrating to the new DISH network. Mr. Ray was identified as T-Mobile’s executive Vice President and Chief Technology Officer and was T-Mobile’s primary witness. The Commission was entitled to rely on Mr. Ray’s opinions regarding the impact of the merger on the Sprint and Boost customers as this was an area within the scope of his personal knowledge, was rationally based on his perceptions, and was helpful to have a clear understanding of his testimony.⁴⁰ T-Mobile’s efforts to deny these promises and

³⁹ OSC EH, at 87:11-88:2.

⁴⁰ See Evidence Code § 800.

its expressed intent to shut down its CDMA network prior to the completion of the three-year migration period have misled the Commission and constitute a Rule 1.1 violation for which a fine or penalty shall be imposed. There is ample Commission precedent that has justified a Rule 1.1 violation finding based on similar conduct.⁴¹

3.1.2. T-Mobile USA's Attempt to Rely on the Boost Divestiture to Limit the Application of the Three-Year Migration Period is Undermined by the Evidentiary Record

T-Mobile USA attempts another tactic to support its claim that it did not say that Sprint's CDMA network would be available until Boost customers migrated to DISH's LTE or 5G services. T-Mobile USA quotes from Mr. Ray's 2019 testimony which attempted to clarify his earlier testimony that "T-Mobile will not terminate the CDMA network in any market without migrating users from the network first" to be limited to the Sprint customers that T-Mobile USA retained and excluded the divested Boost customers:

[The FCC and DOJ commitments] did not exist at the time I provided that testimony and thus my prior testimony did not account for the divestiture of the Sprint prepaid business. In

⁴¹ See, e.g. D.09-04-009, at 32, Finding Of Fact 24 [Utility was "subject to a fine for its violations, including noncompliance with Rule 1.1, even if the violations were inadvertent..."; D.01-08-019 at 21 Conclusion Of Law 2 ["The actions of Sprint PCS in not disclosing relevant information concerning NXX codes in its possession in the Culver City and Inglewood rate centers caused the Commission staff to be misled, and thereby constitutes a violation of Rule 1."]; D.94-11-018, (1994) 57 CPUC 2d, at 204 ["A violation of Rule 1 can result from a reckless or grossly negligent act."]; D.93-05-020, (1993) 49 CPUC 2d 241, 243 [citing to Rule 1 and Pub. Util. Code § 315 for the proposition that "all public utilities subject to our jurisdiction...are under a legal obligation to provide the Commission with an accurate report of each accident[.]...Withholding of such information or lack of complete candor with the Commission regarding accidents would of course result in severe consequences for any public utility."]; and D.92-07-084, (1992) 45 CPUC 2d 241, 242 ["Therefore, by failing to provide the correct information in its report, and in not informing the Commission of the actual assignment, Southern California Gas & Electric Company (SoCalGas) misrepresented and misled the Commission....By behaving in such a manner, SoCalGas violated Rule 1."].

light of these commitments, my prior testimony would now have to be modified to include only Sprint CDMA customers who are not divested. As I noted above, the migration of the Sprint's prepaid customers (not including Assurance Wireless) will be DISH's responsibility although T-Mobile has a number of obligations to facilitate that process as I describe above. Additionally, I suspect that DISH will have every incentive to complete the migration before the CDMA network is terminated in order to continue to provide the divested Sprint prepaid customers with service under the MVNO arrangement.⁴²

But Mr. Ray's purported clarification of his prior testimony addressed only one of the quotes set forth above. He did not attempt to clarify his other references where he testified that the three-year migration period also included Boost customers migrating to the DISH network. And while Mr. Ray claims that the Boost divestiture is the changed circumstance that caused him to alter his prior testimony, even after the Boost divestiture, Mr. Ray testified at the December 5, 2019 evidentiary hearing that the three-year migration period applied to both Sprint and Boost customers.⁴³

Nothing in the Boost divestiture gave T-Mobile USA grounds for providing Boost customers with less than the promised three years to migration to the new DISH network. In fact, the cited testimony of Mr. Ray does not support T-Mobile USA's position:

The divestiture commitments give us three years of continued use of the 800 MHz spectrum from the time we divest Sprint's pre-paid assets to DISH. New T-Mobile planned and still does plan to use that spectrum exclusively to support former Sprint customers during the anticipated 3-year migration period and

⁴² Hearing Ex. Jt. App. 28-C, Supplemental Ray Testimony, at 20:22-21:6.

⁴³ EH 2019, at 1374:28-1375:3.

to complete the migration of Sprint customers before this deadline.⁴⁴

At best, Mr. Ray's testimony establishes T-Mobile USA's intent to try to migrate the Sprint customers to the new 5G network before the three-year migration deadline. While it is all well and good for T-Mobile USA to try to accelerate its own migration timeline, Mr. Ray's testimony does not stand for the proposition that if T-Mobile USA were successful, that success would somehow deprive Boost customers of the full three years to migrate to the new DISH 5G network.

Nor is T-Mobile USA's claim that it did not tell DISH or reach an agreement with DISH that it would have at least three full years to migrate Boost customers supported by the record. Mr. Ray testified at the OSC evidentiary hearing that there are no statements in the record to support a Boost customer three-year migration period, and no such agreement exists in the MNSA.⁴⁵ As for the first part of Mr. Ray's answer, it is contradicted by the various quotes from his testimony in 2019 assuring the parties and the Commission that there would be such a three-year migration period. As for the MNSA, there is no language providing for "reasonable advance notice of at least six months" ahead of shutting down the entire CDMA network. What the six months' notice in the MNSA refers to is shutting down the network in a specific market, not the CDMA network as a whole. We address this distinction between the "CDMA network" and the "CDMA network in a specific market" further in this decision.

⁴⁴ Supplemental Ray Testimony, at 13:14-18.

⁴⁵ OSC EH, at 68:5-9; and 116:2-21.

3.1.3. T-Mobile USA's Claim of Accelerating the Sprint Customer Migration Does Not Permit T-Mobile to Deny Boost Customers the Promised Three-Year Migration Period

T-Mobile USA argues that it submitted evidence on its expedited network migration and integration timing as part of the proceedings before this Commission in 2019. T-Mobile USA claims it submitted evidence that it planned to integrate its networks and therefore complete the migration of Sprint customers off the legacy Spring network by the end of 2021, and offers the following quote:

Our merger assessment commences in 2021, by which time the integration of the parties' wireless network is anticipated to be largely complete, meaning that the available tools can be used to model the endogenous evolution of the New T-Mobile network.⁴⁶

It is unclear what to make of this quote, but one thing is certain—it does not state that the migration was expected to be completed by 2021 as opposed to the three-year period that T-Mobile USA had represented previously at the February 2019 evidentiary hearing. At best, T-Mobile USA stated in February of 2019 that by the end of 2021, integration of the T-Mobile and Sprint wireless networks was “anticipated to be *largely* complete.”⁴⁷

But “largely complete” is not synonymous with a complete shutdown of the CDMA network. This situation is therefore distinguishable from D.01-11-017, which T-Mobile USA cites to argue that a statement which is “not clearly false” but “at best unclear” may not violate Rule 1.1.⁴⁸ In contrast to the scenario in

⁴⁶ EH 2019, at 851:28-852:20.

⁴⁷ OSC Post-Hearing Brief, at 21, fn. 62.

⁴⁸ *Id.*, fn. 60.

D.01-11-017, the multiple representations about a three-year migration period were not “unclear.” The Commission, DISH, TURN, and PAO all understood what T-Mobile USA said.

In fact, when questioned at the OSC evidentiary hearing, Mr. Ray admitted he never raised the possibility in his prior testimony that T-Mobile USA would shut down the CDMA network while customers were still being served on it:

Q. [RECHTSCHAFFEN] Did you ever identify in the hearings that a potential result of the divestiture was that T-Mobile could shut down the CDMA network while DISH customers were still using it?

[RAY] I don't believe we ever really discussed that topic, Commissioner, directly. Obviously, as I tried to relate my testimony, that there's always the circumstance where some -- you know, a very small number of customers may get disconnected when there's a legacy network shut down. But that's what -- that's what this industry does. That's what telcos do.⁴⁹

Yet Mr. Ray's attempt to paint the possibility a few customers being disconnected from the CDMA network as a *de minimis* circumstance, the circumstance facing DISH was more than just “a very small number of customers” who would face disconnection if the legacy network shut down were permitted to occur on January 1, 2022. In its *Petition to Modify*, DISH argued that “T-Mobile's decision to shut down the CDMA network on January 1, 2022 will potentially disrupt service for millions of Boost customers nationwide[.]”⁵⁰ Following the OSC evidentiary hearing, T-Mobile filed an *Update to its Response to DISH's Petition for Modification*, indicating that it would delay the CDMA network shutdown for an additional three months to March 31, 2022. Yet this late

⁴⁹ OSC EH, at 208:15-209:1.

⁵⁰ *Petition to Modify*, at 2.

overture does little to stave off the possibility of millions of DISH customers' service being disrupted, which is why the three-year migration period that T-Mobile committed to is so critical.

The Commission also rejects T-Mobile's attempt to claim that the three-year period did not refer to the migration period of its customers and former customers, but to the time for T-Mobile to get its new 5-G system up and running. Such a distinction is undermined by Mr. Ray's testimony from the December 20, 2019 evidentiary hearing:

Q: Okay. The New T-Mobile will need the cell towers for at least a few years to ensure the former Sprint customers continue to have service while T-Mobile -- while the New T-Mobile conducts the transmission, correct? It will take a couple of years?

A. Absolutely. That's why we've always said it's a three-year integration program. You know, sites will start to free up and start -- the decommissioning process will start within the three years, but the lion's share of the activity would be once we've successfully migrated the customers. *Obviously the intent there is to make sure that no Sprint customer during that migration process, be they a **Boost** customer or a Sprint customer, or however they are strayed, [sic] suffers anything approaching a degraded experience."*⁵¹

T-Mobile USA made a similar representation in its brief following the December 20, 2019 evidentiary hearing:

In addition, as discussed below, the record is clear that *New T-Mobile is otherwise obligated to cooperate with DISH to facilitate the migration of the Sprint divested customers to the New T-Mobile network*. Thus, it is clear that, if anything, the potential divestiture of the 800 MHz spectrum is designed to *ensure that service to existing Sprint CDMA and LTE customers will be*

⁵¹ EH 2019, at 1382:11-1383:1 (emphasis added).

*maintained until they are migrated to the New T-Mobile network as customers of New T-Mobile or DISH.*⁵²

The clear import of T-Mobile USA's witness testimony and legal filing is that T-Mobile's buildout of its new 5G network and the Boost customer migration to the new DISH network were not mutually exclusive events. They were connected, meaning that T-Mobile's buildout of its new network, DISH's buildout of its new network, and the migration of the divested Boost customers are all related, and that the migration period was three years.

3.1.4. T-Mobile USA's Attack on DISH's Migration Speed Does Not Excuse T-Mobile USA from Honoring the Three-Year Migration Commitment

T-Mobile USA argues that throughout its pre-decisional filings, it made clear that DISH would be responsible for migrating Boost customers, and that "T-Mobile could not and did not take responsibility for DISH fulfilling its obligations with respect to migrating its Boost customers."⁵³ T-Mobile USA also points out where it stated that the migration of all customers (including Boost customers) should or would occur in less than three years, *e.g.*: "the decommissioning process will start within the three years, but the lion's share of the activity would be once we've successfully migrated the customers"⁵⁴ Thus, T-Mobile USA alleges it was accurate when it made its statements as they were based on the assumption that DISH would be timely in migrating the Boost customers.⁵⁵

⁵² *Appl. Dec. 2019 Brief*, at 35 (emphasis added).

⁵³ *OSC Response*, at 17.

⁵⁴ *Id.*, citing EH 2019, at 1382:19-1383:1.

⁵⁵ *See OSC Brief*, at 19.

This argument does not advance T-Mobile USA's position that the Commission should not find it committed a Rule 1.1 violation. Even if the Commission were to accept T-Mobile USA's argument that any delay in DISH's customer migration is DISH's fault, that acceptance does not mean that T-Mobile USA is excused from giving DISH a three-year migration period. While it is true that DISH has sole responsibility for migrating its customers to the new DISH network, T-Mobile USA fails to point to any credible evidence that DISH was obligated to migrate the Boost customers within any time period that was less than the three-year migration period.

Not only is T-Mobile USA's position not supported by the DISH Divestiture agreements, but it is also contradicted by the representations T-Mobile USA made about the time DISH would have to complete the customer migration. In his prepared testimony, Mr. Ray stated:

Q. You also stated in your prior testimony that "...T-Mobile will not terminate the CDMA network in any market without migrating users from the network first." How do the FCC and DOJ Commitments impact that testimony?

A. . . .

I would also reiterate that *T-Mobile intends to maintain the 800 MHz spectrum for three years to support CDMA service during our migration process* and that we have an option to lease 4 MHz of spectrum for additional time if required.⁵⁶

At the December 5, 2019 evidentiary hearing, Mr. Ray again confirmed the three-year migration period:

Q. New T-Mobile will be divesting the 800-megahertz spectrum *after three years* for which New T-Mobile plan to use to support LTE and CDMA service for Sprint customers during the migration process; is this correct?

⁵⁶ Supplemental Ray Testimony, at 20:22-24, 21:6-8 (emphasis added).

A: Yes.⁵⁷

The Commission rejects T-Mobile's attempts to divert attention away from its own failure to live up to its migration time frame by focusing on how quickly or slowly DISH is migrating the Boost customers to the new DISH network. T-Mobile USA's tactics amount to nothing more than a red herring by which the Commission refuses to become distracted.

3.1.5. The Six-Month Termination Provision in the Master Network Services Agreement Does Not Override the Three-Year Migration Period

T-Mobile USA attempts to dispute the foregoing multiple promises of a three-year migration period by claiming that such a promise was never made to DISH. Instead, T-Mobile USA claims that the Master Network Services Agreement (MNSA) between T-Mobile USA and DISH expressly states that T-Mobile USA was only obligated to provide "reasonable advance notice of at least six months" to DISH ahead of shutting down the CDMA network.⁵⁸ In T-Mobile USA's view, the Commission had this information in its possession at the time it was evaluating the merger and could have asked any questions about the terms in the MNSA.⁵⁹

The Commission rejects T-Mobile USA's attempt to provide such an expansive interpretation on the MNSA that it overrides T-Mobile USA's clear promise to provide for a three-year migration period, a promise later

⁵⁷ EH 2019, at 1378:13-19.

⁵⁸ MNSA, Annex 1, Section 2.2(c); OSC EH, at 16:25-27; *see also* OSC Post-Hearing Brief, at 22, fn. 63 which, *inter alia*, cites to OSC EH, at 68:5-9: Q. Is there any contractual commitment in the MNSA to your knowledge that T-Mobile would maintain the Sprint CDMA network for at least three years? A. Absolutely not."

⁵⁹ OSC Post-Hearing Brief, at 23.

memorialized in OP 6 of D.20-04-008. The MNSA's plain language states that T-Mobile USA must provide DISH with "**reasonable** advanced notice of **at least** six months prior to the shutdown of the Legacy Network **in any market.**" The Commission does not read any market as synonymous with a complete shutdown of the CDMA network, an opinion that is supported by the MNSA's definition of the word "market": "market means a city-specific market as set forth in a list to be provided by T-Mobile USA from time to time (*e.g.* the 'Seattle market')." By its own terms the MNSA tied the reasonable advanced notice of at least six months to a market specific shutdown and not the entire CDMA network. This was an important distinction the co-assigned ALJ and Presiding Officer Bemesderfer emphasized at the OSC EH when he discussed shutting down the CDMA network in micro markets:

[W]ould a six-month notice issued a day after . . . the agreement was signed . . . have been reasonable notice?[W]hile I appreciate Mr. Ray's testimony that there are maybe micro markets in which the notice given one day after the agreement was signed might conceivably be thought of as reasonable, I am highly skeptical that the Department of Justice would share that view.⁶⁰

To adopt T-Mobile USA's proffered interpretation of MSNA Section 2.2(c), to mean it could give DISH six months' notice that the entire CDMA network would be shut down, would be contrary to California's rules of contract interpretation. First, pursuant to Civil Code § 1638, "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Second, pursuant to Civil Code § 1641, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably

⁶⁰ OSC EH, at 69:27-71:25.

practicable, each clause helping to interpret the other.” Third, pursuant to Civil Code § 1643, “[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.” Finally, pursuant to Civil Code § 1644, “[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” These bedrock statutory rules for contract interpretation have been utilized by the courts on numerous occasions to resolve disputes over the interpretation of written agreements where there are no claims of ambiguity, and it is unnecessary for a court to resort to extrinsic evidence.⁶¹

Application of the foregoing rules requires the Commission to reject T-Mobile USA’s expansive interpretation of “any market” to include the entire CDMA network. First, the explicit and clear language of the MSNA says that the six months’ notice applies to the shutdown of a market. Second, when Section 2.2(c) is read together with the definition of “market,” we conclude that the notice applies to the shutdown of a specified city market rather than the CDMA market. Third, reading Section 2.2(c) in the manner T-Mobile USA proposes would not be reasonable because it would allow T-Mobile USA to shut down the CDMA market in a manner not contemplated by the terms of the MSNA. Fourth, since T-Mobile USA does establish that “any market” had a special meaning *i.e.*, the CDMA market as a whole, “any market” should be understood in its

⁶¹ See, e.g., *Montrose Chemical Corporation v. Admiral Insurance Company* (1995) 10 Cal.4th 645, 666-667; and *AIU v. Superior Court* (1990) 51 Cal.3d 807, 821-822.

ordinary and popular sense, which would mean a city-specific market, rather than an entire network.

An additional benefit from this construction of Section 2.2(c) is that it compliments, rather than overrides, T-Mobile USA's promise of a three-year migration period that was memorialized in OP 6 of D.20-04-008. There may well be circumstances where T-Mobile USA and DISH complete the migration of their respective customers in a particular market in less than three years. If that were to happen, T-Mobile USA would not have to wait for three years to shut down the CDMA network in that market but would, instead, utilize the six-month notice provision in Section 2.2(c) to shut down the CDMA network in that market. T-Mobile understood this approach to shutting down the CDMA network on an incremental basis as a market migration was completed. T-Mobile assured the Commission that "New T-Mobile will in turn give DISH notice of its intent to decommission cell sites on a rolling basis months before vacating those sites[.]"⁶²

3.2. T-Mobile USA's Defenses to a Rule 1.1 Violation are Legally Flawed

3.2.1. T-Mobile USA had a duty to correct the record

First, T-Mobile USA argues that once it became clear that its good intentions could not be achieved due to DISH's alleged tardy migrations, T-Mobile USA did not have an obligation to correct the record after the proceedings were closed, "particularly for matters that were not even the subject of inquiry in the proceeding."⁶³ T-Mobile USA continues to argue that there

⁶² *Appl. Dec. 2019 Brief*, at 45-46.

⁶³ *OSC Post-Hearing Brief*, at 6.

cannot be grounds for a Rule 1.1 finding where a party fails to correct the record unless a party has affirmatively made such a promise to do so.⁶⁴ However, contrary to T-Mobile USA's assertion, an un-degraded customer experience during migration was clearly a "subject of an inquiry of the proceeding," and the Commission imposed Ordering Paragraph 6 to ensure that happened. In fact, the Commission has found a Rule 1.1 violation where a party allowed a "false statement of fact" to remain uncorrected after it had the knowledge to correct it.⁶⁵

Furthermore, T-Mobile USA's position regarding the duty to correct the record distorts Commission authority on the subject as the trio of Commission decisions it relies upon are factually distinguishable. T-Mobile USA first cites D.82-12-055⁶⁶ as an example of where the Commission found that Southern California Edison (SCE) was not under an obligation to update its study on cogeneration potential when it was unaware that it contained errors. While true, within two weeks of the decision's issuance, SCE notified Commission staff that certain pages in the rate Appendix F of D. 82-12-055 did, in fact, contain mathematical and other errors. Thus, contrary to supporting T-Mobile USA's claim that a party must correct errors only when it has expressly promised to do so, D.82-12-055 underscores the obligation of all parties who appear before the Commission to alert the Commission and to correct errors in the record, even in the absence of a preexisting promise to do so.

⁶⁴ *Id.*, and fn.12 ("The only case T-Mobile was able to locate discussing an affirmative duty to update the record involved one in which a party had expressly committed to the Commission that it would provide updates. See *In re Facilities-Based Cellular Carriers*, D.94-11-018, 57CPUC 2d 176 (Nov. 9, 1994).").

⁶⁵ See D.13-12-053, at 15.

⁶⁶ D.82-12-055, 1982 Cal. PUC LEXIS 1209, at *198 (Dec. 13, 1982).

Equally unpersuasive is T-Mobile USA's reliance on D.85-08-006, wherein Pacific Gas and Electric Company (PG&E) sought to supplement its data on snowpack used to calculate the rates for gas based on the likely availability of hydro power, and to submit evidence that a major supplier had filed a rate case at the Federal Energy Regulatory Commission.⁶⁷ But PG&E did not claim, and the Commission did not find, that the prior data submission was erroneous and needed correcting. Instead, PG&E sought to supplement the record which the Commission declined to authorize since to do so might have resulted in a potential fall or winter rate increase, and possibly delayed the resolution of the proceeding.

Perhaps the most factually inapposite of T-Mobile USA's cited authorities is its last one – D.90-04-021. The Division of Ratepayer Advocates (the predecessor's name of Public Advocates Office) attempted to introduce a new exhibit on gas forecasting methodology into evidence at the Evidentiary Hearing that had not been previously shared. The Commission affirmed the Presiding Officer's decision not to permit the exhibit because of unfairness, and because "the record is not served by such 'on the stand' testimony."

Thus, none of T-Mobile USA's cited authorities support its position that a party need only correct errors in the record when that party has affirmatively promised to do so.

Second, T-Mobile USA suggests that its conduct, and how it was perceived by the Commission, is nothing more than a misunderstanding that does not rise to the level of a Rule 1.1 violation. The Commission rejects this argument as being factually and legally incorrect. At no time prior to the adoption of

⁶⁷ D.85-08-006, 1985 Cal. PUC LEXIS 646, at *22 (Aug. 7, 1985).

D. 20-04-008 or thereafter in either an Application for Rehearing or Petition for Modification, did T-Mobile USA try to correct what it now claims to be a misunderstanding or misconstruction of its position on the length of the migration period. In fact, if T-Mobile USA truly believed that the three-year migration period did not apply to Boost customers, it should have brought that fact to the Commission's attention as soon as D.20-04-008 had been adopted.

This failure to rectify this perceived misunderstanding is an additional reason to find a Rule 1.1 violation. The Commission has previously found that a Rule 1.1 violation can be found based on a utility's lack of candor, withholding of information, and failure to correctly inform and correct mistaken information.⁶⁸ That is because an intent to mislead is not required to find a Rule 1.1 violation.⁶⁹ The Commission has held that "an omission to provide correct information can constitute a Rule 1 violation if the consequence is to mislead the Commission about a matter which is material to a proceeding."⁷⁰ The Commission has found a Rule 1.1 violation where a party allowed a "false

⁶⁸ See D.13-12-053, at 14 ("Once PG&E had knowledge of material errors in its filed Supporting Information that the Commission relied upon to set a safety standard in D.11-12-048, PG&E should have brought the record discrepancies to the Commission's attention[.]"); and Decision 94-11-018.

⁶⁹ See D.15-08-032, at 57 ("Rule 1.1 has to be placed in the larger statutory scheme from which it derives – namely Pub. Util. Code §§ 701, 1701, and 2107, none of which require proof of intent. In applying the rules of statutory construction, which apply equally to administrative regulations, one cannot read Rule 1.1 to require proof of intent when the statutes from which it arises carry no such requirement."); and *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 854 ("*PG&E v. Commission*") ("In any event, our purely independent review would bring us to the same conclusion. Without any input from the Commission, and looking solely at the relevant statutory language, we cannot discern an unmistakable legislative desire for a scienter requirement.")

⁷⁰ See D.19-12-041, at 36-37; and *Re Natural Gas Procurement and Reliability Issues* [D.97-02-084] (1997) 45 Cal.P.U.C.2d 241, 242 [Commission misled by failure to provide correct information in a report and failure to inform of the assignment of a contract.]

statement of fact” to remain uncorrected after it had the knowledge to correct it.⁷¹ Rule 1.1 violations may even be found where the conduct was inadvertent or unintentional, if the effect was to mislead the Commission or its staff.⁷² The need for candor and accuracy is especially important for witnesses such as Mr. Ray giving Commission testimony under oath on T-Mobile USA’s behalf, as the Commission relies on witness testimony to form its decisions, and misrepresentations in witness testimony may lead to public harm.⁷³

3.2.2. Resolution T-17722 Does Not Limit T-Mobile USA’s Duty to Maintain the Customer Migration for Three Years

In its *Response to DISH’s Petition to Modify*, T-Mobile USA argues that the Commission’s Citation Program confirms that it was not under any obligation to maintain the CDMA network.⁷⁴ T-Mobile USA cites Resolution T-17722 (T-Mobile Citation Program Per Ordering Paragraph 39 of Decision 20-04-008)

⁷¹ See D.13-12-053, at 15 (“This unreasonable delay misled the Commission by allowing a key ‘false statement of fact’ to persist uncorrected and was a violation of Rule 1.1.”)

⁷² See *Order Instituting Rulemaking and Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service* [D.01-08-019] (2001). See also *In the Matter of the Application of Bigredwire.com, Inc. for Registration as an Interexchange Carrier Telephone Corporation Pursuant to the Provisions of Public Utilities Code Section 1013* [D.09-04-009] (2009.)

⁷³ See D.15-12-016, at 41 (“Furthermore, harm to the public also attaches to the Rule 1.1 violations. In both instances, SCE representatives misled the Commission, the public, and other parties. We cannot emphasize enough how important it is that witnesses are truthful and accurate when providing information to the Commission, especially under oath. Otherwise, due process and fairness evaporate and the agency’s authority and decisions are undermined.”)

⁷⁴ *Response to Petition to Modify*, at 12. As the issues T-Mobile USA raised in its Response overlap with, and are therefore relevant to, its arguments in this OSC, the Commission determines it is appropriate to consider and address T-Mobile USA’s arguments in this decision.

for the proposition that it was only obligated to maintain LTE broadband speeds and coverage areas.⁷⁵

We reject T-Mobile USA's attempt to rely on Resolution T-17722 to limit its obligations under OP 6 of D.20-04-008. While it is true that the Resolution gives staff the authority to issue a fine for T-Mobile USA's failure to maintain LTE broadband speeds and coverage areas, that grant does not lead to the conclusion that T-Mobile USA was not obligated to maintain the CDMA network for three years. Resolution T-17722 also provides that the Commission maintains enforcement authority behind what has been delegated to staff:

Nothing in this Resolution diminishes, alters, or reduces the Commission's existing authority to enforce the provisions in D.20-04-008.⁷⁶

Nothing in this Resolution affects the Commission's existing Constitutional and statutory authority to pursue enforcement actions for non-compliance by public utilities with any Commission order, decision, rule, direction, or requirement.⁷⁷

The issuance of a citation for a specified violation is not mandatory. In the alternative, the Commission may initiate any authorized formal proceeding or informal action or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.⁷⁸

Staff authority under the Citation Program is cumulative rather than exclusive. As such, nothing in the language of Resolution T-17722 diminished T-

⁷⁵ *Id.*, fn. 27.

⁷⁶ Resolution T-17722, at 1.

⁷⁷ *Id.*, at 2.

⁷⁸ *Id.*, at 3

Mobile's responsibility for maintaining the CDMA network during the three-year customer migration.

3.3. T-Mobile USA Did Not Mislead the Commission Regarding the Spectrum needed to Maintain CDMA Service During the Customer Migration

T-Mobile USA witness Ray testified that the need to maintain CDMA service for Boost customers during the customer migration period would not impact T-Mobile's 5G build-out because T-Mobile USA planned to use Sprint's 800 MHz spectrum to provide CDMA service. Several times in his testimony Mr. Ray listed the types of spectra that would be needed for 5G service, but PCS spectrum and specifically the PCS spectrum acquired through the merger with Sprint - was not on these lists.⁷⁹ Moreover, in response to questions regarding the potential of the DISH Divestiture to affect the 5G build-out, it appeared that T-Mobile USA never indicated that using PCS spectrum for CDMA service could impact T-Mobile's 5G build-out, nor indicated that PCS spectrum was used to provide CDMA service to Boost customers.⁸⁰

In its *Response to DISH's Petition to Modify*, T-Mobile USA appeared to contradict its witness Ray's prior statements regarding the type of spectrum needed for CDMA and 5G service, now saying that "PCS spectrum comprises the *significant majority* of spectrum being used to provide CDMA," (*emphasis supplied*) and "[d]elaying the CDMA sunset would impact the re-farming of this PCS spectrum to support 5G services."⁸¹ T-Mobile USA appeared to further contradict prior sworn statements that maintaining CDMA services would not

⁷⁹ Supplemental Ray Testimony, at 9:14-22, 10:15-19, 12:7-8.

⁸⁰ *Id.*, at. 9:7-12:8.

⁸¹ See *T-Mobile Response to DISH Petition to Modify*, at 24 (*emphasis added*).

delay its 5G build-out, now saying that the build-out requires both the PCS spectrum and the cell towers presently employed to provide CDMA service including the equipment on the towers.⁸² In explaining this apparent about-face, T-Mobile said that “. . . Mr. Ray’s Supplemental Testimony regarding the merged entities spectrum holdings and reframing inadvertently did not show PCS spectrum as being used for CDMA.”⁸³

Despite these apparent inconsistencies, there are other references in the evidentiary record where T-Mobile USA said that PCS spectrum would be used for the new 5G network.⁸⁴ There are also references where T-Mobile UA said that PCS spectrum would be needed for its existing CDMA network.⁸⁵ At worst, T-Mobile USA’s testimony was unclear in places and clearer in other places. Thus, when we view T-Mobile USA’s testimony in its entirety, we find that the comments regarding the use of the PCS spectrum do not rise to the level of a Rule 1.1 violation.

4. The Penalty Calculation and Justification

Having found that T-Mobile USA violated Rule 1.1 with respect to its promise of a three-year customer migration period from 2020 to 2023, we must determine how many offenses did T-Mobile USA commit for purposes of imposing a penalty. Rather than penalizing T-Mobile USA for each misleading comment, we will treat all of T-Mobile USA’s statements as one offense as they all relate to the same subject matter – the length of the customer migration

⁸² *Id.*, at 22-24.

⁸³ *Id.*, at 24, 74

⁸⁴ Supplemental Ray Testimony, at 10:15-19; Ray Rebuttal Testimony, at 13:3-4 and 12-15.

⁸⁵ Supplemental Ray Testimony, at 10:19-22.

period. Pursuant to Pub. Util. Code § 2107, T-Mobile USA may be subject to a penalty of not less than \$500 and not greater than \$100,000 for each offense:

Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than one hundred thousand dollars (\$100,000), for each offense.

Whether the penalty amount should be at the low end or high end of the penalty range depends on many factors such as the severity of the offense which we will analyze in greater detail further in this Section. For the reasons that follow, we conclude that T-Mobile USA's actions are severe as T-Mobile USA misled the Commission and the Boost customers into believing that the customer migration period would be three years, which would avoid degrading service to any of the legacy customers. But as we have recently learned that T-Mobile USA and DISH are in talks to resolve their dispute, we have decided to downgrade the severity of T-Mobile USA's offense and set the penalty at \$15,000 per offense.

Next, we must determine if T-Mobile USA's conduct occurred on a single day or if its conduct should be considered a continuing violation for which the dollar amount provided by Pub. Util. Code § 2107 should be imposed for each day of the continuing offense. The authority to determine that an offense is of a continuing nature is provided by Pub. Util. Code § 2108:

Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing

violation each day's continuance thereof shall be a separate and distinct offense.

We conclude that T-Mobile USA's offense is of a continuing nature, and we have several starting points to consider. First, we could find that the offense began when T-Mobile USA offered testimony to the Commission at the February and December 2019 evidentiary hearings. Second, we could find that the offense began on April 27, 2020, when the Commission issued D.20-04-008, which included OP 6's requirement that the customer migration period for both Sprint and Boost customers would be three years, and T-Mobile USA never attempted to correct that OP via a petition for modification or an application for rehearing. Third, we could find that the offense began on October 1, 2020, when T-Mobile USA informed DISH that it intended to shut down the CDMA network on or around January 1, 2022. It is on October 1, 2020, that T-Mobile USA publicly announced its intention to act in a manner inconsistent with the prior representations that T-Mobile USA made to the Commission. Fourth, we could find that the offense began on August 13, 2021, when the assigned Commissioner issued his OSC to T-Mobile USA. We choose to pick the October 1, 2020 date to start the commencement of the continuing offense as that is when it first became apparent that T-Mobile USA intended to renege on the promise and obligation to provide a three-year customer migration period for Sprint and Boost customers. The offense continued each day after October 1, 2020, as T-Mobile USA continued to maintain that it never made the earlier promise regarding the maintenance of the CDMA network, despite the written evidence and testimony to the contrary that we have set forth above.

Finally, we must determine an end date for the continuing offense. Although the offense is ongoing as T-Mobile USA continues to argue that it

never promised to maintain the CDMA network for three years despite clear evidence to the contrary, we believe it is best to fix the penalty amount rather than have it accumulate potentially indefinitely. We will end the continuing offense time frame on September 20, 2021, which was the date of the OSC evidentiary hearing, which amounts to a continuing offense period of 355 days. Using the per day penalty amount of \$15,000 results in a penalty of \$5,325,000.

Having determined the penalty amount, we must next determine if the amount satisfies the Commission's criteria for penalty calculations. D.98-12-075 provides guidance on the application of fines or penalties.⁸⁶ Two general factors are considered in setting fines or penalties: (1) the severity of the offense and (2) the conduct of the utility. In addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent.⁸⁷ This decision discusses the specific criteria and determine below their applicability to T-Mobile's conduct.

Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine or penalty should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors.⁸⁸

- Physical harm: The most severe violations are those that cause physical harm to people or

⁸⁶ D.98-12-075 indicates that the principles therein distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, and the Commission expects to look to these principles as precedent in determining the level of penalty in a full range of Commission enforcement proceedings. (*Mimeo*, at 34-35.)

⁸⁷ D.98-12-075, *mimeo*, at 34-39.

⁸⁸ 1998 Cal. PUC LEXIS 1016 at 71-73.

property, *with violations that threatened such harm* closely following.

- Economic harm: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.
- Harm to the Regulatory Process: A high level of severity will be accorded to *violations of statutory or Commission directives*, including violations of reporting or compliance requirements.
- The number and scope of the violations: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

T-Mobile USA's intent to end the customer migration process ahead of the three-year window constitutes a threatened harm to the Boost customers. In its *Petition to Modify*, DISH estimated that the premature shutdown of the CDMA network would put millions of Boost Mobile customers, "many of whom are low-income, at risk of losing service entirely."⁸⁹ This is because the Boost customers will either have handsets that will be incompatible with the new T-Mobile 5G network and will need to purchase new handsets to continue receiving service, or because Boost customers will hold devices that will require

⁸⁹ *Petition to Modify*, at 2; Declaration of Stephen Stokols (Executive Vice President of Boost Mobile), at 7-10.

some sort of affirmative technology change in order to access service once the CDMA network is shut down.⁹⁰

T-Mobile USA's violation of Rule 1.1 through its misleading comments has also harmed the Commission's regulatory process. In deciding whether to grant Applications 18-07-011 and A.18-07-012, Pub. Util. Code § 854 requires the Commission to determine if the granting is in the public interest, with consideration given to evaluating the economic benefits to ratepayers and whether competition will be adversely affected. The Commission answered these questions in the affirmative based on, in part, the representations that the customer-migration period would be three years, and that the transition to the new networks would not be degraded. In the Conclusions of Law, the Commission stated that "approval of the Transaction, with the conditions enumerated in the ordering paragraphs thereof, is on balance, in the public interest."⁹¹ OP 6 expressly stated that the migration period would be three years during which time the customer experience "shall not be degraded." Thus, the ultimate determination that approving the application and merger would be in the public interest was influenced by the requirement of a three-year customer migration period. T-Mobile USA's misleading statements directly impact the Commission's regulatory duty to ensure applications and mergers are in the public interest by requiring compliance with the conditions leading up to their approval. As this Commission stated in D.98-12-075, "such compliance is absolutely necessary to the proper functioning of the regulatory process. For this

⁹⁰ Stokols Decl., at 8.

⁹¹ D.20-04-008.

reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.”⁹²

Criterion 2: Conduct of the Penalized Entity

In D.98-12-075, the Commission held that the size of a fine should reflect the penalized entity’s conduct. When assessing the conduct, the Commission stated that it would consider the following factors:⁹³

- **The Entity’s Actions to Prevent a Violation:** Entities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The entity’s past record of compliance may be considered in assessing any penalty.
- **The Entity’s Actions to Detect a Violation:** Entities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management’s involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.
- **The Entity’s Actions to Disclose and Rectify a Violation:** Entities are expected to promptly bring a violation to the Commission’s attention. What constitutes “prompt” will depend on circumstances. Steps taken by an entity to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

⁹² 84 CPUC2d 155, 188; *See also* Resolution ALJ-277 Affirming Citation No. ALJ-274 2012-01-001 Issued to Pacific Gas and Electric Company for Violations of General Order 112-E at 8 (April 20, 2012).

⁹³ 1998 Cal. PUC LEXIS 1016 at 73-75.

Here, T-Mobile USA had the duty to comply with OP 6 yet expressed its intent not to do so. T-Mobile USA has made no efforts to prevent a violation or to detect a violation. But recently, we learned that T-Mobile USA and DISH have attempted to resolve the CDMA shutdown dispute.⁹⁴ T-Mobile USA and DISH are currently in discussions that, if successful, would resolve all issues raised by DISH related to the decommissioning of the Sprint CDMA Legacy Network and all associated requests for relief, including DISH's request for sanctions.⁹⁵ While T-Mobile USA's current efforts to resolve this dispute do not totally exonerate T-Mobile USA for its prior conduct, we view these current efforts as positive steps towards reaching a resolution that accommodates DISH's customers.

Criterion 3: Financial Resources of the Entity

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the entity. When assessing the financial resources of the entity, the Commission stated that it would consider the following factors:⁹⁶

- Need for Deterrence: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the entity in setting a fine.
- Constitutional Limitations on Excessive Fines: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each entity's financial resources.

⁹⁴ See ALJ Mason's E Mail Ruling of February 25, 2022.

⁹⁵ *Joint Comments of T-Mobile USA, Inc. and DISH Network Corp, in Response to ALJ Mason's February 25, 2022 E Mail Ruling*, at 2.

⁹⁶ 1998 Cal. PUC LEXIS 1016 at 75-76.

T-Mobile USA has the financial wherewithal to pay a substantial fine. T-Mobile USA describes itself as the third largest wireless carrier in the United States, serving approximately 72.6 million customers under the T-Mobile USA and MetroPCS brands.⁹⁷ Its 2017 revenues were \$40.6 billion and assets totaled approximately \$70.56 billion in 2018.⁹⁸ Since the issuance of D.20-04-008, T-Mobile USA claims it has spent “over ten billion dollars in investments” to get the new 5G network up and running.⁹⁹ Given these figures, we conclude that T-Mobile USA has the financial wherewithal to pay a penalty of \$5,325,000.

Criterion 4: The Totality of the Circumstances in Furtherance of the Public Interest

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:¹⁰⁰

- **The Degree of Wrongdoing:** The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
- **The Public Interest:** In all cases, the harm will be evaluated from the perspective of the public interest.

As we have noted above, there are no facts to mitigate the degree of T-Mobile USA’s wrongdoing. In fact, T-Mobile USA has been resolute in asserting its position that it intends to shut down the CDMA network ahead of the three-year migration period, and that it neither promised nor is required to

⁹⁷ *Joint Application for Approval and Control of Sprint Communications Company* (A.18-07-011), at 4.

⁹⁸ *Id.*, at 5.

⁹⁹ *Response to OSC*, at 2.

¹⁰⁰ 1998 Cal. PUC LEXIS 1016, 76.

act otherwise. Such intransigence indicates that T-Mobile USA's conduct represents the highest degree of wrongdoing that runs counter to the Commission's mission of assuring that the approved application and merger are in the public interest.

Criteria 5: The Role of Precedent

In D.98-12-075, the Commission held that any decision that imposes a fine or penalty should: (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.¹⁰¹

This decision first looks at prior Commission precedent that imposed a fine or penalty based on the finding of a continuing offense. These cases demonstrate that the Commission is well within its authority to impose a continuing violation penalty against T-Mobile USA based on these past decisions:

- *PG&E, San Bruno*, D.15-04-024, at 77-79 (PG&E engaged in 2425 violations, some of which occurred over a number of years, meaning that the range of potential penalties went from a low of \$9.2 billion to a high of \$254 billion. The Commission arrived at a total penalty and forbearances of \$1.6 billion, of which \$300 million represented the fine that would be paid to the General Fund.)
- *PG&E, Gas Explosion at Rancho Cordova*, D.11-11-001, at 40-42, and Ordering Paragraph 4 (PG&E faced a potential continuing penalty of \$97 million, which the Commission calculated as follows: violations of both Pub. Util. Code § 451 and GO 112-E in each of the five instances set forth in the OII at 9-10; continuing violations from September 21, 2006 to

¹⁰¹ 1998 Cal. PUC LEXIS 1016, 77.

December 24, 2008 for the use of the unmarked pipe in Rancho Cordova; continuing violations from November 9, 2006 to December 24, 2008 for failing to discover the defective Rancho Cordova repair as a result of being notified of the use of defective pipe used in Elk Grove; continuing violations from September 21, 2006 to December 24, 2008 for failing to develop and implement effective gas emergency plans; and \$80,000 in penalties for failing to safeguard life and property and failing to administer drug and alcohol tests on December 24, 2008. In light of this potential exposure, the decision rejected the proposed stipulated penalty of \$26 million and imposed a \$38 million penalty subject to agreement by the parties.)

- *Rasier-CA, TNC Services*, D.16-01-014, at 82-83, and Ordering Paragraph 1 (Rasier's failure to comply with D.13-09-045's reporting requirements for TNCs regarding accessibility requests, service by zip code, and driver problems were separate continuing offenses commencing in September of 2014. At \$5,000 per day per offense, the calculated fine totaled \$7,350,000.00. The decision imposed another \$276,000.00 for the 138 days past the reporting deadline for Rasier to comply with Reporting Requirement J.)
- *Cingular Investigation*, D.04-09-062 at 62 ("Section 2108 provides, in relevant part, that 'in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. Both violations constitute continuing offenses during the relevant time periods. Considering the record as a whole, we find that the penalty for each violation should be calculated on a daily basis."); and Conclusion of Law (COL) 4 ("[F]or the violations of law for the period January 1, 2000 to April 30, 2002 (849 days), Cingular should pay a penalty of \$10,000 per day, or \$8,490,000.")
- *Qwest*, D.02-10-059 at 43, n. 43 ("Qwest is liable for a fine of \$500 to \$20,000 for every violation of the Public

Utilities Code or a Commission decision. Pub. Util. Code § 2108 provides that every violation is a separate and distinct offense, and in case of a continuing violation each day's continuance constitutes a separate and distinct offense.")

- *Southern California Edison Company's (SCE's) Performance-Based Ratemaking OIL, D.08-09-038 at 111* ("Finally, a fine of \$30 million is reasonable when viewed as an ongoing violation that should be subject to a daily penalty, as recommended by CPSD and used by the Commission in the case that was upheld in *Pacific Bell Wireless, LLC v. Pub. Util. Comm'n.* If SCE's violations are viewed as daily violations that continued for seven years, then a \$30 million dollar fine equates to a daily penalty of just less than \$12,000 (\$30 million/7 years/365 days).")

The penalty amount of \$5,325,000 is consistent with the foregoing precedents. There is ample legal authority for imposing a high penalty based on the severity of the harm to the regulatory process and the continuing nature the offense.

5. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner, and Karl Bemesderfer and Robert M. Mason III are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. In written testimony and at the evidentiary hearing leading up to the adoption of D.20-04-008, T-Mobile USA said that DISH would have three years to complete the Boost customer migration to the new DISH LTE or 5G network.
2. In written testimony, at the evidentiary hearing and in a brief leading up to the adoption of D.20-04-008, T-Mobile USA said that it would keep the CDMA

network available to divested Boost customers until they were migrated to the new DISH LTE or 5G network.

3. In written testimony and at the evidentiary hearing leading up to the adoption of D.20-04-008, T-Mobile USA said that all former Sprint customers would have a seamless migration to the new networks.

4. In written testimony, at the evidentiary hearing and in a brief leading up to the adoption of D.20-04-008, T-Mobile USA said it intended to maintain the 800 MHz spectrum for three years to support CDMA service during the migration process.

5. In October of 2020, T-Mobile USA advised DISH that it was going to shut down the entire CDMA network in January of 2022, which was prior to the completion of the three-year customer migration period.

6. When T-Mobile USA advised DISH that it was going to shut down the entire CDMA network in January of 2022, DISH had not completed the migration of the Boost customers to the new DISH LTE or 5G network.

7. The Commission relied upon T-Mobile USA's promise made at the evidentiary hearing of a three-year customer migration for Boost customers to be migrated into the new DISH LTE or 5G network when it adopted Ordering Paragraph 6 of D.20-04-008.

8. The Commission intended that the three-year customer migration set forth in Ordering Paragraph 6 of D.20-04-008 would apply to both former Sprint customers who became T-Mobile customers, and to former Sprint subsidiary Boost customers who became part of the new DISH LTE or 5G network.

Conclusions of Law

1. It is reasonable to conclude that T-Mobile USA misled the Commission in violation of Rule 1.1 when it promised in written testimony and at the

evidentiary hearing leading up to the adoption of D.20-04-008 that DISH would have three years to complete the Boost customer migration to the new DISH LTE or 5G network.

2. It is reasonable to conclude that T-Mobile USA misled the Commission in violation of Rule 1.1 when it promised in written testimony, at the evidentiary hearing and in a brief leading up to the adoption of D.20-04-008 that it would keep the CDMA network available to divested Boost customers until they were migrated to the new DISH LTE or 5G network.

3. It is reasonable to conclude that T-Mobile USA misled the Commission in violation of Rule 1.1 by failing to inform the Commission at any time after D.20-04-008 and prior to the October 1, 2020 announcement of the CDMA network shut down that it intended to discontinue CDMA service sooner than three years from the issuance of D.20-04-008, and by continuing to deny that it had represented it would maintain the CDMA network during a three year migration period.

4. It is reasonable to conclude that T-Mobile USA misled the Commission in violation of Rule 1.1 when it promised in written testimony and at the evidentiary hearing leading up to the adoption of D.20-04-008 that all former Sprint customers would have a seamless migration to the new networks.

5. It is reasonable to conclude that by misleading the Commission, T-Mobile USA committed offenses that should be penalized pursuant to Pub. Util. Code § 2107.

6. It is reasonable to conclude that T-Mobile USA's offenses are continuing in nature as of October 1, 2020, so that each day is a separate offense for which a separate penalty should be imposed pursuant to Pub. Util. Code § 2108.

7. It is reasonable to conclude that T-Mobile USA should be penalized in the amount of \$5,325,000.

8. It is reasonable to conclude that the penalty of \$5,325,000 satisfies the criteria for the imposition of a penalty established by the Commission in D.98-12-075.

9. It is reasonable to conclude that T-Mobile USA has the financial resources to pay a penalty of \$5,325,000 such that the penalty is not excessive under the Eighth Amendment of the United States Constitution.

O R D E R

IT IS ORDERED that:

1. T-Mobile USA shall pay a penalty in the amount of \$5,325,000.00, by check or money order payable to the California Public Utilities Commission (Commission) and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days from the date that this decision is issued. T-Mobile USA shall write on the face of the check or money order "For deposit to the General Fund pursuant to Decision _____".

2. All money received by the California Public Utilities Commission's Fiscal Office pursuant to Ordering Paragraph 1 shall be deposited or transferred to the State of California General Fund.

3. If T-Mobile USA fails to comply with Ordering Paragraph 1 of this decision, the Commission reserves the right to impose additional penalties, fines, and other regulatory sanctions.

4. Applications 18-07-011 and 18-07-012 are closed.

This order is effective today.

Dated _____, at San Francisco, California.