

Decision 22-11-005 November 3, 2022

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of 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

**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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**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

This *Modified Presiding Officers' Decision* affirms the findings from the *Presiding Officers' Decision* 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). The Commission relied on T-Mobile USA's commitment to a three-year customer migration period when it issued D.20-04-008.

This *Modified Presiding Officers' Decision* also affirms that T-Mobile's conduct was continuous in nature in accordance with Pub. Util. Code §§ 2107 and 2108, but we downwardly adjust the penalty imposed on T-Mobile USA from \$5,325,000.00 to \$3,585,000.00.

Section 6 of this *Modified Presiding Officers' Decision* summarizes our resolution of T-Mobile USA's *Appeal*. For ease of reference, the following sections of the instant decision have been added or modified in response to the arguments raised in T-Mobile USA's *Appeal*: 1.2.5, 2., 4.1.1., 4.1.2., 4.1.3., 4.1.5., 4.2.1., 4.2.2., 4.2.3., 4.2.4., 5.2.1., and 5.2.2.

1. Background

1.1. Factual 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

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.*

Sprint-T-Mobile merger and was contained in a Final Judgment³ issued by the federal District Court approving the merger.⁴

As part of the Boost Divestiture, DISH and T-Mobile USA entered into a Master Network Services Agreement (MNSA) by 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

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 Judgment*. On August 27, 2019, the assigned Administrative Law Judge Bemserderfer 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.*

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 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 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.

1.2. Procedural Background

1.2.1. 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

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

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 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

1.2.2. 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

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

⁹ OSC, at 2 and 4.

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 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.

1.2.3. 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

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.

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

1.2.4. The Presiding Officers' Decision

The Presiding Officers' Decision was mailed on April 25, 2022, and found that T-Mobile USA violated Rule 1.1 of the Commission's Rules of Practice and Procedure when it made certain false or misleading representations to the Commission 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 *Presiding Officer's Decision* penalized T-Mobile USA in the amount of \$5,325,000.00 pursuant to Pub. Util. Code §§ 2107 and 2108.

1.2.5. T-Mobile USA's Appeal

On May 25, 2022, T-Mobile USA filed its *Appeal* from the *Presiding Officers' Decision*. T-Mobile USA argues that in concluding that T-Mobile USA violated Rule 1.1., the Presiding Officers' Decision erroneously rests on two "core premises," neither of which, in T-Mobile USA's view, is supported by the record: (1) T-Mobile USA misrepresented that it would continue to operate the CDMA network for at least three full years after the close of the merger, to ensure that DISH would have time to build its own network to serve Boost Mobile (Boost) customers; and (2) the Commission relied on and memorialized that

representation in drafting Ordering Paragraph 6 (OP 6) of the April 2020 Merger Decision (D.20-04-008).¹¹

Instead, T-Mobile USA's position is as follows: (1) the promise to complete customer migration within three years was only for T-Mobile USA to complete its customer migration to T-Mobile USA's new LTE or 5G network; (2) T-Mobile USA had the discretion to sunset the CDMA network in less than three years pursuant to the MNSA if it completed its customer migration to the new T-Mobile USA LTE or 5G network in a more expedited fashion, provided DISH was given at least six months' notice as required by the MNSA; (3) T-Mobile USA's authority to sunset the CDMA network could be exercised regardless of whether DISH was still migrating customers because it was DISH's sole responsibility to migrate its customers.¹²

T-Mobile USA further argues that even if the Rule 1.1 violation were proper, the *Presiding Officers' Decision's* penalty calculation is flawed and the proposed fine is unwarranted.¹³

On June 8, 2022, T-Mobile USA filed a *Motion Requesting Alternative Dispute Resolution and Stay of Appeal of the Presiding Officers' Decision*.

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 State; to maintain the respect due to the Commission, members of the Commission or its Administrative Law

¹¹ *Appeal*, at 2.

¹² *Response*, at 8.

¹³ *Id.*, at 3.

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.”¹⁴ 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.¹⁵

Importantly, an intent to mislead is not required to find a Rule 1.1 violation.¹⁶ 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.”¹⁷ 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.¹⁸ 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.¹⁹

¹⁴ D.13-12-053, at 21 (citations omitted); and D.01-08-109 at 18 (mimeo).

¹⁵ See D.19-12-041, at 13-14, 84.

¹⁶ 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*”).

¹⁷ See D.19-12-041, at 36-37.

¹⁸ See D.13-12-053, at 15.

¹⁹ 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."²⁰ A finding that a party has violated Rule 1.1 can be established by a preponderance of the evidence.²¹

In its *Appeal*, T-Mobile USA does not dispute the foregoing authorities or the grounds for finding a Rule 1.1 violation. Instead, T-Mobile USA engages in another tactic and provides examples of where a Rule 1.1 violation was not found because the respondent's statements were either at best unclear,²² were not relied on by the Commission,²³ or were forward-looking statements of intent that

²⁰ *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.

²¹ 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.' "].)

²² *Sawaya v. MCI Telecomms. Corp.*, D.01-11-017, at 6. (*Appeal*, at 14.)

²³ *In re Cal.-Am. Water Co.*, D.15-04-008, at 18 (stating that, in cases involving alleged Rule 1.1 violations, "[t]he relevant point is that the Commission must be able to rely upon the representations made ... in order to effectively protect the public interest"); *Hetherington v. Pac. Gas & Elect. Co.*, D.20-05-007, at 34 (finding that PG&E did not violate Rule 1.1 with respect to certain inaccurate information provided to third-party complainants and in complaint proceeding before the Commission where "PG&E did not have knowledge that the Commission was relying on erroneous understandings or information to make decisions"). (*Appeal*, at 14.)

were inaccurate at the time they were made.²⁴ T-Mobile USA also claims that there is no “freestanding duty” to correct a statement unless it was inaccurate when made or a party affirmatively promised to update the record on that topic.²⁵

While we appreciate T Mobile USA’s recitation of Commission precedent, the decisions cited are of little persuasive value as they are factually distinguishable as our analysis of the factual record will demonstrate. As we shall see from a review of the entirety of the evidentiary record,²⁶ the evidence establishes that T-Mobile USA did misrepresent to the Commission that it would continue to operate the CDMA network for three years after the close of the merger to permit DISH time to migrate the Boost Mobile customers to the DISH network, and that the Commission relied on T-Mobile USA’s misrepresentation when it approved the merger and memorialized the three year migration period in Ordering Paragraph 6 of D. 20-04-008.

3. Issues Before the Commission Addressed by the Modified Presiding Officers’ Decision

- Did the *Presiding Officers’ Decision* correctly determine that T-Mobile USA promised the Commission that

²⁴ *In re Pac. Bell*, D.98-12-018, 1998 Cal. PUC LEXIS 690, at *16 (Dec. 3, 1998) (declining to find a Rule 1.1 violation where statements appearing untrue in hindsight were, in context, related to forward-looking plans that had evolved and changed over time). (*Appeal* at 14.)

²⁵ *In re PG&E Co.*, D.90-04-021, 1990 Cal. PUC LEXIS 185, at *14 (Apr. 11, 1990) (“At some point, all parties must stop updating information or [else] the record will be unmanageable.”). *See also In re PG&E Co.*, D.85-08-006, 1985 Cal. PUC LEXIS 646, at *28-29 (Aug. 7, 1985)

(recognizing a “need to end the continuous updating of a record prior to issuing a decision”); *In re SCE Co.*, D.82-12-055, 1982 Cal. PUC LEXIS 1209, at *199 (Dec. 13, 1982) (concluding general rate case applicant was under no requirement to update study submitted two years earlier). (*Appeal*, at 14.)

²⁶ *In re San Diego Gas & Electric Co.*, D.17-06-009, at 15 (Commission considered the entirety of the record before concluding that SDG&E had not violated Rule 1.1.).

DISH would have three years (2020 to 2023) in which to complete its customer migration?

- Did the *Presiding Officers' Decision* correctly determine that by misleading the Commission on the promise to provide DISH with a three-year customer migration period, T-Mobile USA violated Rule 1.1?
- Did the *Presiding Officers' Decision* correctly determine that as a result of its Rule 1.1 violation, T-Mobile USA should be subject to a continuous penalty accrual in the amount of \$5,325,000.00 pursuant to Pub. Util. Code §§ 2107 and 2108?

4. Modified Presiding Officers' Decision

4.1. T-Mobile USA Violated Rule 1.1 when it Misled the Commission by Promising that the CDMA Network would be Available for Three Years for DISH to Complete its Boost Customer Migration

4.1.1. T-Mobile USA's Promise of a Three-Year Customer Migration was both Unambiguous and Broad Enough to Include DISH's Migration of its Customers to the New DISH LTE or 5G Network

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*."²⁷
- "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..."²⁸

²⁷ Supplemental Ray Testimony, at 47:5-6 (emphasis added).

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

- “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*.”²⁹
- “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.”³⁰

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.³¹ Emphasizing the three-year duration of the migration period (“That’s why we’ve always said it’s a three-year integration program”),³² 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.”³³ 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

²⁹ *Id.*, at 1375:18-21 (emphasis added).

³⁰ *Id.*, at 1383:28-1384:5 (emphasis added).

³¹ *Joint Applicants Post-December 2019 Hearing Brief*, December 20, 2019 (“*Appl. Dec. 2019 Brief*”), at 35 (emphasis added).

³² EH 2019, at 1382.

³³ 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.”)

Sprint customers migrating to the new T-Mobile 5G network, and to the former Sprint subsidiary Boost customers migrating to the new DISH 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."³⁴
- 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...**"³⁵
- "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."³⁶

³⁴ EH 2019, at 1378:13-19 (emphasis added).

³⁵ Supplemental Ray Testimony, at 13:14-17 (emphasis added).

³⁶ *Id.*, at 21:6-8 (emphasis added).

- “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.”³⁷
- “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**.”³⁸
- “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.”³⁹
- “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.”⁴⁰
- “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.”⁴¹

Taken together, these multiple references establish: (1) the CDMA network would be available until DISH completed its customer migration; (2) the Sprint

³⁷ *Id.*, at 13:14-15 (emphasis added).

³⁸ OSC-TMO-33, at 1375:11-17 (emphasis added).

³⁹ Ray Testimony, at 1374:15-22 (emphasis added).

⁴⁰ *Id.*, at 1375:4-10 (emphasis added).

⁴¹ *Id.*, at 1382:17-23 (emphasis added).

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 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 USA, 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 USA'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.⁴²

⁴² EH 2019, at 1605:27-1606:10 (emphasis added).

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 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.**⁴³

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.⁴⁴

Despite this consensus in understanding what T-Mobile USA promised, in its *Appeal*, T-Mobile USA argues that the Presiding Officers' Decision erred in giving weight to third-parties' statements as they allegedly have no probative value. With respect to DISH, T-Mobile-USA says its statement "simply reflects that T-Mobile had an obligation to divest, and DISH had an option to acquire, the 800 MHz spectrum after three years."⁴⁵ In T-Mobile USA's view, it was prudent for it to ensure that it had the "spectrum for the maxim period that it might be

⁴³ 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).

⁴⁴ OSCD-9 (*Public Advocates Office Reply Brief on Application for Approval of Transfer of Control Over Tracfone Wireless, Inc.*), at 30 (emphasis added).

⁴⁵ *Appeal*, at 25.

needed.”⁴⁶ But T-Mobile USA appears to overlook the apparent significance of the quote from DISH—that it understood T-Mobile’s promise that the 800 MHz spectrum would be available for three years to facilitate customer migration.

T-Mobile USA’s attempts to dismiss the statements by TURN and PAO are also unpersuasive. First, it is unclear what T-Mobile USA is suggesting by its assertion that both TURN and PAO opposed the merger.⁴⁷ If T-Mobile USA is suggesting that their opposition means that they would make any argument to undermine the merger then T-Mobile USA is incorrect. If anything, by acknowledging that T-Mobile USA promised a three-year migration period, TURN’s and PAO’s comments are supportive of the merger. Second, T-Mobile USA’s claim that neither TURN nor PAO have firsthand knowledge to make a contemporaneous account of what Mr. Ray testified to regarding the three-year migration promise is unconvincing. TURN and PAO could have reached their conclusions from reading the hearing transcripts, testimony, or other exhibits from this proceeding that quote Mr. Ray’s testimony. Thus, T-Mobile USA cannot say with certainty that TURN and PAO did not base their conclusions upon reviewing the pertinent testimony from Mr. Ray.

Yet over a year after D.20-04-008’s adoption, T-Mobile USA 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:

⁴⁶ *Id.*

⁴⁷ *Id.*

“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 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.”⁴⁸

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, the that *the three-year migration period applied to both Sprint customers migrating to the new T-Mobile network and to*

⁴⁸ OSC EH, at 87:11-88:2.

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.⁴⁹ T-Mobile's efforts to deny these promises and 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 where the party to be fined (1) engaged in conduct that misled the Commission even if the conduct was inadvertent; (2) engaged in conduct that was reckless; (3) engaged in conduct that resulted in material information being withheld from the Commission; or (4) failed to provide correct material information to the Commission.⁵⁰

⁴⁹ See Evidence Code § 800.

⁵⁰ See, e.g. D.09-04-009, at 23, 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

Nonetheless, in its *Appeal*, T-Mobile USA states that the Commission misunderstands the customer migration process and that this misunderstanding undermines the conclusion that T-Mobile USA violated Rule 1.1. First, T-Mobile takes issue with the Presiding Officers' Decision that T-Mobile USA agreed to keep the CDMA network up for three years so DISH could complete the Boost customer migration to the new DISH LTE or 5G network.⁵¹ T-Mobile USA claims there was never a promise of a three-year migration period but that the process could be completed within three years, which included a period of less than three years. Second, as for DISH's customer migration, T-Mobile USA claims it owed no obligations to keep the CDMA network open for three years or a less period because DISH was migrating CDMA customers to the T-Mobile network under its MVNO with T-Mobile USA, a process that DISH was able to begin after the divestiture. T-Mobile USA further claims that DISH had no plans to build an LTE network and that DISH's 5G network would take longer than three years to complete.⁵² Finally, T-Mobile USA asserts that the Boost customer migration off the CDMA network was unrelated to DISH's network buildout. In sum, T-Mobile USA asserts that it would not have made sense to provide a three-year customer migration promise to DISH because DISH was solely responsible for migrating its customers.

But the evidentiary support for T-Mobile USA's argument is either lacking, or where it does exist, does not cause the Commission to reach the conclusions that T-Mobile USA advocates. As for the claims that (1) DISH had no plans to

Company (SoCalGas) misrepresented and misled the Commission....By behaving in such a manner, SoCalGas violated Rule 1."].

⁵¹ *Presiding Officers' Decision*, at 47.

⁵² *Appeal*, at 16.

build an LTE network and that DISH's 5G network would take longer than three years; and (2) the CDMA network was unrelated to DISH's network buildout, T-Mobile USA's *Appeal* cites to its own *Response* to the OSC. The *Response* is also noticeable for its few citations to the evidentiary record. In fact, the single reference in the *Response*, at page 8, is to the Ray Supplemental and Rebuttal Testimonies that reinforce the Commission's conclusion that T-Mobile USA did, in fact, agree to keep the CDMA network up for DISH to complete the Boost customer migration to the new DISH LTE or 5G network. Mr. Ray's Rebuttal Testimony acknowledged: "*T-Mobile will not terminate the CDMA network in any market without migrating users from the network first.*"⁵³ Mr. Ray did not qualify his Rebuttal Testimony to exclude DISH's migration efforts to DISH LTE or 5G services. It was only later that with his Supplemental Testimony that Mr. Ray tried to limit his Rebuttal Testimony to the Sprint customers that T-Mobile USA retained and excluded the divested Boost customers.⁵⁴

Furthermore, we reject T-Mobile USA's attempt to draw a distinction between where T-Mobile USA and DISH customers were being migrated. While T-Mobile USA seems to place considerable weight on its assertions that DISH had no plans to build an LTE network and that a 5G network would take more than 5 years to complete, those assertions, even if true, do not alter the conclusion that T-Mobile USA violated Rule 1.1. T-Mobile USA promised a three-year migration period to DISH regardless of what new LTE or 5G network its customers were migrated to, with T-Mobile USA having the additional option of

⁵³ Rebuttal Ray Testimony, at 47:9-10.

⁵⁴ Supplemental Ray Testimony, at 20:22-21:1.

leasing back a portion of the 800 MHz spectrum for up to two additional years in case the customer migration was not completed in three years:

If New T-Mobile needs the 800 MHz spectrum for a longer period of time after (and if) DISH has acquired the 800 MHz spectrum, New T-Mobile has the option to lease back from DISH up to 4 megahertz of spectrum as needed for up to two (2) years following its divestiture.”⁵⁵

Thus, when we review the record as a whole, we conclude that T-Mobile USA did promise a three-year customer migration period to DISH.

We also reject T-Mobile USA’s attempt to claim that the promise to maintain Sprint’s 800 MHz spectrum did not amount to a promise to operate the CDMA network for three years. In its *Appeal*, T-Mobile USA claims that the fact it wanted three years of access to Sprint’s 800 MHz spectrum, which Sprint used to support CDMA services, is consistent with T-Mobile USA’s plan to complete the customer migration within three years, rather than a minimum of three years.⁵⁶ Further, T-Mobile USA asserts that the use of the 800 MHz spectrum was not impacted by the Boost divestiture as it planned to use the spectrum to complete the migration of Sprint customers before the three-year deadline.⁵⁷

But as with the promised migration period, there are six references from Mr. Ray’s testimony, quoted in the Presiding Officers’ Decision and above, that establish, unambiguously, the availability of the 800 MHz spectrum for three years.⁵⁸ And as for T-Mobile USA’s claim that the 800 MHz spectrum had nothing to do with the divested Boost customers, that claim is not accurate. As

⁵⁵ Supplemental Ray Testimony, at 14:5-10.

⁵⁶ *Appeal*, at 20.

⁵⁷ *Appeal*, at 20-21, citing to Supplemental Ray Testimony, at 13:14-18.

⁵⁸ *Presiding Officers’ Decision*, at 13-14.

T-Mobile USA acknowledges, the 800 MHz spectrum was used to support CDMA services for all customers be they T-Mobile USA or divested Boost customers.⁵⁹ T-Mobile USA even acknowledges in its *Appeal* that DISH had the responsibility for ensuring Boost CDMA customer migration.⁶⁰ Thus, both T-Mobile USA and DISH needed access to the 800 MHz spectrum during the promised three-year customer migration following the closing of the divestiture. It was only after the migration period and after the legacy network was terminated that T-Mobile USA planned to stop using the 800 MHz spectrum.

Moreover, the Commission rejects T-Mobile USA's notion that the use of the 800 MHz spectrum could be unilaterally terminated in less than the promised three-year period. Again, as it did with the migration promise, T-Mobile USA places emphasis on the word "within" or "anticipated" that sometimes appears before the words "three years."⁶¹ But as we will explain, this is not a situation where T-Mobile USA's testimony might be characterized as "merely ambiguous." When properly understood in the context of the evidentiary record, there is only one reasonable conclusion that can be reached – that a three-year migration period had been promised to DISH. We discuss that context in Section 4.1.6. of this decision.

⁵⁹ *Appeal*, at 10: "In the Boost divestiture, DISH assumed responsibility for ensuring Boost CDMA customers could migrate onto T-Mobile network."

⁶⁰ *Id.*

⁶¹ *Id.*, at 21.

4.1.2. Did T-Mobile USA Promise a Three-Year Customer Migration or a Within Three Year Customer Migration, with Corresponding use of the 800 MHz Spectrum?

Even though the *Presiding Officers' Decision* provided two unambiguous quotes from the testimony of Mr. Ray of a three-year customer migration that were not qualified by the word “within,” T-Mobile USA claims it never promised a three-year customer migration period. Instead, T-Mobile USA claims that when placed in their proper context, the promise of a customer migration and the use of 800 MHz spectrum to support that migration was for a period of less than three years. As proof, T-Mobile USA quotes from Mr. Ray’s rebuttal testimony that it expected “all Sprint [including Boost] customers [] to be completely migrated within three years.”⁶² Following the DISH divestiture, T-Mobile USA states that it would retain 800 MHz spectrum for a period of three years to support the migration of legacy Sprint (including Boost) customers but that the three years was a “deadline.”⁶³ T-Mobile USA accuses the *Presiding Officers' Decision* of not engaging with this broader context and therefore fails to reconcile how the phrase “within three years” can interpreted to mean “at least three years.”⁶⁴

We reject the argument that the *Presiding Officers' Decision* did not consider the broader context of how the migration was to occur. Our review of the record convinces us that regardless of using the phrase “within three years” or calling the three-year period a “deadline” by which the migration could be completed in a lesser time, there is enough evidence in the record to conclude that T-Mobile

⁶² *Appeal*, at 18, quoting from the Rebuttal Ray Testimony, at 46:23-47:10 (emphasis added).

⁶³ *Appeal*, at 18, quoting from the Supplemental Ray Testimony, at 13:17-18.

⁶⁴ *Appeal*, at 18.

USA unambiguously promised a three-year customer migration. As we have quoted above, there are at least two references from Mr. Ray's testimony of a three-year migration period that are not qualified by the word "within" or "deadline." Thus, regardless of whatever context that T-Mobile USA wishes the Commission to consider, the promise of a three-year customer migration is inescapable.

Even if we were to assume that the word "within" qualified all "three years" references in Mr. Ray's testimony and T-Mobile USA's pleadings, it does not undermine the *Presiding Officers' Decision* that T-Mobile USA promised to keep the CDMA network open for three years. Considering the context of this proceeding, "within three years" refers to two possible scenarios where the migration could be completed in less than the promised three years, and the concomitant need for access to the 800 MHz spectrum would not be needed for three years: first, where both T-Mobile USA and DISH complete their respective customer migrations ahead of three years, the CDMA network could be ended. But T-Mobile USA does not claim in its *Appeal* that both companies had completed their customer migrations at the time T-Mobile USA announced in October of 2020 that it intended to shut down the CDMA network on or around January 1, 2022, so the first scenario for ending the CDMA network before the expiration of three years did not occur. The second scenario is for an incremental shut down of the CDMA network where T-Mobile USA and DISH complete their respective customer migrations in a single market. Section 2.2(c) of the MNSA provides that if the customer migration is complete, then the CDMA network can be shut down in that city market by providing at least six months' notice. But when T-Mobile USA announced its plan to shut down the CDMA network, it was not on an incremental city market basis. Instead, it was the entire CDMA

network, a move that the MNSA did not give T-Mobile USA the right to do if customer migrations are still occurring in designated city markets.

As such, our review of the record as a whole leads us to conclude that the *Presiding Officers' Decision* was correct in finding that T-Mobile USA promised a three year period for DISH to complete its customer migration, with the possibility of extending the migration for an additional two years; and that the two limited circumstances that could have permitted either a complete or partial shutdown of the CDMA network in less than three years did not occur. We also conclude that the *Presiding Officers' Decision* was corrected that T-Mobile USA promised that the access to the 800 MHz spectrum would be available for three years to help facilitate the customer migration.

4.1.3. The Boost Divestiture Does Not Excuse or Restrict T-Mobile USA's Promise to Maintain the Migration Period for Three Years for DISH's Benefit.

T-Mobile USA quotes from Mr. Ray's 2019 Supplemental Testimony which attempted to clarify his earlier Rebuttal 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 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.⁶⁵

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.⁶⁶

As such, 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 to complete the migration of Sprint customers before this deadline.⁶⁷

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

⁶⁵ Hearing Ex. Jt. App. 28-C, Supplemental Ray Testimony, at 20:22-21:6.

⁶⁶ EH 2019, at 1374:28-1375:3.

⁶⁷ Supplemental Ray Testimony, at 13:14-18.

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.⁶⁸ 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 will address this distinction between the "CDMA network" and the "CDMA network in a specific market" further in this decision.

In its *Appeal*, T-Mobile USA takes issue with the *Presiding Officers' Decision's* omission of the phrase "obviously the intent there is" from the remaining phrase "to make sure that no Sprint customer during that migration process, be they a Boost customer or a Sprint customer, or however they are [situated], suffers anything approaching a degraded experience."⁶⁹ T-Mobile

⁶⁸ OSC EH, at 68:5-9; and 116:2-21.

⁶⁹ *Appeal*, at 21, quoting the *Presiding Officers' Decision*, at 12.

USA suggests that reading the two phrases together leads to the conclusion that Mr. Ray's testimony "simply reflects a statement of intent, not a promise."⁷⁰

We reject T-Mobile USA's attempt to draw a meaningful distinction between a statement of intent and a promise. It appears that T-Mobile USA is arguing that a statement of intent is not an enforceable promise. In doing so, T-Mobile USA is attempting to avail itself of California law which recognizes that letter of intent or agreements to agree are unenforceable because a Court cannot imply what the parties may agree upon in the future.⁷¹

But here there is no need to conjecture about what the parties may agree to in the future because there was a promise made in the present that T-Mobile USA would maintain the CDMA network for three years. Under California law, a statement of intent, be it oral or in writing, can be enforceable as a binding promise⁷² unless the promisor states that the promise has no binding effect⁷³ or that future events must occur before the promise can be deemed binding and enforceable.⁷⁴ Here, the circumstances taken as a whole lead the Commission to

⁷⁰ *Appeal*, at 22.

⁷¹ See *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1257-1258, in which the Court states: "In *Autry v. Republic Productions*, for example, after stating the law 'provides [no] remedy for breach of an agreement to agree' the court explained this was so because '[t]he court may not imply what the parties will agree upon.'"

⁷² Pursuant to Civil Code § 1621, "all contracts may be oral, except such as are specially required by statute to be in writing."

⁷³ See *Rennick v. O.P.T.I.O.N. Care, Inc.* (9th Cir. 1996) 77 F.3d 309, 315-316.

⁷⁴ See *First National Mortgage Company v. Federal Realty Investment Trust* (9th Cir. 2011) 631 F.3d 1058, 1066, wherein the Court explained:

Moreover, contrary to Federal Realty's argument, calling something a "proposal," instead of a "contract" or a "lease," does not necessarily mean it was not meant to be binding, especially where the circumstances suggest otherwise. Cf. *id.* at 315 ("[C]alling a document 'letter of intent' implies, unless circumstances suggest otherwise, that the

conclude that T-Mobile USA's claimed "statement of intent" was indeed a promise to maintain the CDMA network for three years so DISH could complete its customer migration.

We also reject T-Mobile USA's attempt to walk back its promise of a three-year customer migration by claiming that it made no similar commitment to any other regulator or in its MNSA negotiation with DISH. That T-Mobile USA did not make a promise in other regulatory proceedings or negotiations to maintain the CDMA network for three years does not impact the Commission's outcome. That is because in deciding if a Rule 1.1 violation occurred, we must focus on what representations were made to the Commission, not some other regulatory body involved with the approval of T-Mobile USA's merger with Sprint. Thus, it is immaterial to our purposes of deciding if T-Mobile USA violated Rule 1.1 that T-Mobile USA was opposed to commenters in the FCC merger proceeding who objected to T-Mobile USA's plan to "rapidly shut down Sprint's key legacy CDMA network," or that the FCC may have declined to require T-Mobile USA to maintain the CDMA network.⁷⁵

Nor would the MNSA between T-Mobile USA and DISH need to memorialize the three-year customer migration since the promise had already been made to the Commission and to DISH. The Commission has the constitutional authority to regulate entities subject to its jurisdiction, and that authority includes the power to penalize parties who make false promises to the Commission. The Commission's power to penalize a party is not dependent on a

parties intended it to be a nonbinding expression in contemplation of a future contract, as opposed to its [sic] being a binding contract.")

⁷⁵ *Appeal*, at 22-23.

promise made in a Commission proceeding also being memorialized in a document negotiated outside the province of the Commission's open proceeding.

4.1.4. T-Mobile USA's Acceleration of its Customer Migration Does Not Obviate its Promise to Provide a Three-Year Customer Migration to DISH.

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.⁷⁶

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.”⁷⁷

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”

⁷⁶ EH 2019, at 851:28-852:20.

⁷⁷ OSC Post-Hearing Brief, at 21, fn. 62.

but “at best unclear” may not violate Rule 1.1.⁷⁸ In contrast to the scenario in 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.⁷⁹

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[.]”⁸⁰

⁷⁸ *Id.*, fn. 60.

⁷⁹ OSC EH, at 208:15-209:1.

⁸⁰ *Petition to Modify*, at 2.

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 overture does little to stave off the possibility of millions of DISH customers' service being disrupted, which is why the *Presiding Officers' Decision* found that three-year migration period that T-Mobile committed to was so critical.⁸¹

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?

⁸¹ *Presiding Officers' Decision*, at 22-23. The Commission acknowledges that since the *Presiding Officers' Decision* was issued, T-Mobile USA and DISH have resolved their dispute concerning the CDMA shutdown, and that the terms of the resolution were approved by the Department of Justice on May 13, 2022. (See *Update to Joint Comments of T-Mobile USA, Inc. and DISH Network Corp. in Response to ALJ Mason's February 25, 2022 Email Ruling*.) In addition, on June 23, 2022, DISH filed its *Motion to Withdraw Request for Sanctions Against T-Mobile US, Inc.*, wherein DISH now believes the resolution reached by DISH and T-Mobile USA:

"...satisfactorily addresses the issues raised by DISH related to the Legacy Network shutdown and any associated requests for relief, and facilitated T-Mobile's cooperation with DISH to avoid potential harm to Boost CDMA customers from the impact of the Legacy Network shutdown."

While DISH's position has changed, the Commission's determination has not. It must view the potential harm to DISH and to the regulatory process at the time the Rule 1.1 violation was made, and not based on events subsequent thereto.

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."*⁸²

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 maintained until they are migrated to the New T-Mobile network as customers of New T-Mobile or **DISH**.*⁸³

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.

⁸² EH 2019, at 1382:11-1383:1 (emphasis added).

⁸³ *Appl. Dec. 2019 Brief*, at 35 (emphasis added).

4.1.5. 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 as well as in its *Appeal*, 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.”⁸⁴ 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”.⁸⁵ 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.⁸⁶

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

⁸⁴ *OSC Response*, at 17. *See also Appeal*, at 10: “In the Boost divestiture, DISH assumed responsibility for ensuring Boost CDMA customers could migrate onto T-Mobile’s network.”

⁸⁵ *Id.*, citing EH 2019, at 1382:19-1383:1.

⁸⁶ *See OSC Brief*, at 19.

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.⁸⁷

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?

A: Yes.⁸⁸

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.

⁸⁷ Supplemental Ray Testimony, at 20:22-24, 21:6-8 (emphasis added).

⁸⁸ EH 2019, at 1378:13-19.

4.1.6. 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 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.⁸⁹ 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.⁹⁰

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 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

⁸⁹ 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.”

⁹⁰ OSC Post-Hearing Brief, at 23.

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 Bemederfer 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.⁹¹

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 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

⁹¹ OSC EH, at 69:27-71:25.

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.⁹²

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 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 complements, 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

⁹² 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.

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[.]”⁹³

4.2. T-Mobile USA’s Defenses to a Rule 1.1 Violation are Legally Flawed.

4.2.1. T-Mobile USA Employs an Incorrect Legal Standard for Determining if a Rule 1.1 Violation has Occurred

In its *Appeal*, T-Mobile USA argues that there is no other reasonable way to interpret what it said on the record about the three-year migration period, and that DISH was never promised such a time frame in which to migrate its customers.⁹⁴ But even if the Commission were to disagree, T-Mobile USA asserts that a disagreement as to a matter of interpretation is an insufficient grounds for finding a Rule 1.1 violation because T-Mobile USA’s statements were not “clearly false.”

But T-Mobile USA has advanced an incorrect standard for the Commission to find that a Rule 1.1 violation has occurred. T-Mobile USA cites to *Sawaya v. MCI Telecommunications Corporation*⁹⁵ for the proposition that to violate Rule 1.1 the respondent’s statements must be “clearly false.”⁹⁶ But T-Mobile USA has taken the “clearly false” language out of its proper context. In *Sawaya*, we first

⁹³ *Appl. Dec. 2019 Brief*, at 45-46.

⁹⁴ *Appeal*, at 25.

⁹⁵ D.01-11-017, at 6

⁹⁶ *Appeal*, at 26.

set forth the proper standard for finding a Rule 1.1 violation: “Rule 1 prohibits every person appearing before the Commission or signing a pleading from misleading the Commission by an artifice or false statement of law or fact.”⁹⁷ After setting forth the standard, we then analyzed WorldCom’s conduct and determined that given the uncertainty of the record, WorldCom’s conduct was not clearly false but unclear:

We then advised WorldCom that its future statements must be “clear and not misleading” to avoid a Rule 1.1 violation.⁹⁸ As such, *Sayawa* does not deviate from Rule 1.1’s WorldCom’s answer, as of the date it was filed, reflected the facts of which WorldCom was aware at that time. However, WorldCom could reasonably have assumed, based on normal banking practices, that the bank would honor the stop payment request. Although as of the date the answer was filed, WorldCom’s statement that it had paid Sawaya twice was not clearly false, it was at best unclear.

The prohibition against misleading the Commission through artifice or false statements of law or fact does not require that all false statements must be “clearly false.” To hold otherwise would impose an interpretation of Rule 1.1 that is inconsistent with other Commission precedent that has found a Rule 1.1 violation when the respondent has withheld information, demonstrated a lack of candor, or its actions were inadvertent.⁹⁹ Thus, T-Mobile USA’s promises must be viewed as to when making them did T-Mobile USA withhold information, demonstrated a lack of candor, or misled the Commission through inadvertent actions.

⁹⁷ D.01-11-017, at 6.

⁹⁸ *Id.*, at 7.

⁹⁹ See D.09-04-009, at 23, Finding of Fact 24; D.92-07-084, (1992) 45 CPUC 2d 241, 242; and D.93-05-020, (1993) 49 CPUC 2d 241.

Moreover, our finding in *Sawaya* that WorldCom did not violate Rule 1.1 was premised on the fact that WorldCom was entitled to make a reasonable inference based on normal banking practices. Here, the Commission does not find that T-Mobile USA's statements on the record indicated that it was reasonable for T-Mobile USA to believe that it was not promising a three-year migration period to DISH. There are too many clear references in the record, which we have cited above, that a three-year migration period had, in fact, been promised to DISH.

Our conclusion that a Rule 1.1 violation can occur without the attendant requirement that the violator's statements must always be "clearly false" finds support when we consider the purpose behind the Rule. As the Court explained in *Pacific Gas & Electric Co, supra*, when it interpreted Rule 1.1, "the subject addressed by the rule — ensuring the transmission of truthful information to the Commission — is obviously central to the proper discharge of the PUC's responsibilities."¹⁰⁰ One of those duties is to protect the public interest, a duty that goes hand in hand with the requirement that the Commission be able to rely on truthful representations, a point we made clear in *In re Cal-Am. Water Co.*,

The relevant point is that the Commission must be able to rely upon the representations made in response to MDRs and data requests in order to effectively protect the public interest. Whether the requested information may be independently available from other sources does not relieve a party from its Rule 1.1 obligations.¹⁰¹

Through words, documents, or a combination thereof, there are a number of ways a party can fail to transmit truthful information to the Commission

¹⁰⁰ 237 Cal.App.4th, at 853.

¹⁰¹ D.15-04-008, at 17-18. *Affirmed*, D16-01-025 (*Order Denying Rehearing of D.15-04-008*).

without making a statement that is “clearly false.” The essential inquiry in finding a Rule 1.1 violation is to determine if the respondent’s actions have resulted in truthful information not being transmitted to the Commission.

In this situation, that standard has been met. T-Mobile USA did not inform the Commission that it would shut down the entire CDMA network once it finished its migration in less than three years, and before DISH completed its migration in the three-year period. To the contrary, T-Mobile USA promised just the opposite on multiple occasions and both DISH and the Commission relied on those promises that proved to be false given T-Mobile USA’s subsequent conduct. Thus, a Rule 1.1 finding is supported by the facts and the applicable law.

We reject T-Mobile USA’s attempt to extend the *Presiding Officers’ Decision’s* determination, that T-Mobile did not mislead the Commission regarding the spectrum needed to maintain CDMA service during customer migration, to the promise of a three-year migration period as the two situations are not analogous.¹⁰² As the *Presiding Officers’ Decision* pointed out about the spectrum issue, “T-Mobile USA’s testimony was unclear in places and clearer in other places,” and when viewed in its entirety, did “not rise to the level of a Rule 1.1 violation.”¹⁰³ In contrast to the conflicting testimony regarding the spectrum needed to maintain CDMA service, there is no conflicting testimony regarding the promise of a three-year migration period for DISH. As we have explained, *supra*, neither the use of the word “within” before “three years” nor the wording of the MNSA gave T-Mobile USA the power to shut down the entire CDMA

¹⁰² *Appeal*, at 26-27.

¹⁰³ *Presiding Officers’ Decision*, at 36.

network before the expiration of the three-year period if DISH was still migrating its customers.

Contrary to T-Mobile USA's contention, this is not a situation where T-Mobile USA's overall testimony was, in its words, "merely ambiguous."¹⁰⁴ As T-Mobile USA's own filings made clear, shutting down the entire CDMA network in January of 2022, rather than in three years as promised was "a critical component of a detailed network transition plan years in the making."¹⁰⁵ But during the Commission's review of T-Mobile USA's requested merger, T-Mobile USA never advised the Commission or DISH that the network shut down was going to occur in the beginning of 2022. At best, T-Mobile asserted that the integration of T-Mobile USA and Sprint's wireless network was "anticipated to be largely complete." Rather than present testimony that, overall, could be considered ambiguous, there was no ambiguity here as T-Mobile USA consistently promised a three-year customer migration to DISH.

4.2.2. T-Mobile USA's Assertion that the Commission Did Not Rely on its Promise of a Three-Year Customer Migration is Rebutted by Ordering Paragraph 6 of the Commission's Decision Approving the Merger.

To support its claim that the Commission did not rely on the promise of a three-year customer migration when the Commission included such language into OP 6 of D.20-04-008, T-Mobile USA takes us on a journey as to how OP 6 came into being. T-Mobile USA first asserts that the original version of OP 6 did not include the three-year migration period and that it was only added after

¹⁰⁴ *Appeal*, at 27.

¹⁰⁵ *T-Mobile USA's Response to DISH's Petition for Modification*, at 23.

T-Mobile USA suggested in its reply comments that the Commission add the three-year time frame as the “time within which it expected to complete the migration of all Sprint customers to the T-Mobile network[.]”¹⁰⁶ while the final language of OP 6 does include language that T-Mobile USA proposed, the plain language requires a three-year customer migration, rather than “within three years” and the language did not exclude DISH:

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).¹⁰⁷

Our conclusion is not altered by T-Mobile USA’s quote from D.20-04-008 wherein the Commission explained why it was revising OP 6: “At Applicants’ request, we revised Ordering Paragraph 6 so the requirement to maintain the existing LTE network quality is limited to the relevant timeframe.”¹⁰⁸ The “relevant timeframe” refers, in part, to the three year customer migration (2020-2023), without regard to whether it is the migration of T-Mobile USA or DISH customers.

T-Mobile USA’s final attack on the Commission’s interpretation of OP 6 is unavailing. T-Mobile asserts it had no reason to believe that anyone would interpret OP 6 to cover the CDMA network until DISH raised that argument after T-Mobile provided notice that it was shutting down the CDMA network.¹⁰⁹ T-Mobile USA claims that once it became clear how DISH was construing OP 6, it “promptly made clear that it had never promised to maintain the CDMA

¹⁰⁶ *Appeal*, at 30.

¹⁰⁷ First sentence of OP 6.

¹⁰⁸ *Appeal*, at 31, citing D.20-04-008, at 44.

¹⁰⁹ *Appeal*, at 33.

network for three years and that it believed OP 6 did not apply to the CDMA network.”¹¹⁰ But as we have demonstrated above, there is sufficient evidence in the record wherein T-Mobile USA promised that the three-year migration period, as well as the maintenance of the 800 MHz spectrum, were for both the benefit of T-Mobile USA and DISH. For T-Mobile USA to claim that it did not understand the clear import of its own words, as well as the scope of OP 6, strains credibility.¹¹¹

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

Following the OSC Evidentiary Hearing and in its *Appeal*, 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.”¹¹² T-Mobile USA continues to argue that there 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.¹¹³ However, contrary to T-Mobile USA’s

¹¹⁰ *Id.*

¹¹¹ Because the time frame set forth in OP 6 for how long the migration period would last was clear, this is not a situation where T-Mobile USA can legitimately claim that it lacked fair notice of its obligations and was denied due process. As such, T-Mobile USA’s reliance on *FCC v. Fox TV Stations, Inc.* (2012) 567 U.S. 239, 253, and *General Electric Company v. EPA* (D.C. Cir. 1995) 53 F.3d 1324, 1333-1334 fails to advance its lack of notice claim. (*Appeal*, at 33, fn. 124.)

¹¹² *OSC Post-Hearing Brief*, at 6. T-Mobile USA makes a similar argument in its *Appeal*, at 14: “[A]nd there is no freestanding duty to correct a statement unless it was inaccurate when made or a party affirmatively promised to update the record on that topic.”

¹¹³ *OSC Post-Hearing Brief*, at 6, 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).”).

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.¹¹⁴

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.82-12-055¹¹⁵ 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.

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

¹¹⁴ See D.13-12-053, at 15.

¹¹⁵ D.82-12-055, 1982 Cal. PUC LEXIS 1209, at *198 (Dec. 13, 1982), cited in T-Mobile USA’s *Appeal*, at 14, fn. 62.

the Federal Energy Regulatory Commission.¹¹⁶ 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.90-04-021.¹¹⁷ 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 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

¹¹⁶ D.85-08-006, 1985 Cal. PUC LEXIS 646, at *22 (Aug. 7, 1985), cited in T-Mobile USA's *Appeal*, at 14, fn. 62.

¹¹⁷ Cited in T-Mobile USA's *Appeal*, at 14, fn. 62.

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.¹¹⁸ That is because an intent to mislead is not required to find a Rule 1.1 violation.¹¹⁹ 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."¹²⁰ 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.¹²¹ Rule 1.1 violations may even be found where the conduct was inadvertent

¹¹⁸ 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.

¹¹⁹ 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.")

¹²⁰ 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.]

¹²¹ 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.")

or unintentional, if the effect was to mislead the Commission or its staff.¹²² 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.¹²³

4.2.4. 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*, and in its *Appeal*, T-Mobile USA argues that the Commission's Citation Program confirms that it was not under any obligation to maintain the CDMA network.¹²⁴ T-Mobile USA cites Resolution T-17722 (T-Mobile Citation Program Per Ordering Paragraph 39 of Decision 20-04-008) for the proposition that it was only obligated to maintain LTE broadband speeds and coverage areas.¹²⁵

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

¹²² 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).

¹²³ 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.")

¹²⁴ *Response to Petition to Modify*, at 12. *Appeal*, at 31-32.

¹²⁵ *Appeal*, at 31-32.

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.20-04-008.¹²⁶

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.¹²⁷

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.¹²⁸

Staff authority under the Citation Program is cumulative rather than exclusive. As such, nothing in the language of Resolution T-17722 diminished T-Mobile's responsibility for maintaining the CDMA network during the three-year customer migration.

In its *Appeal*, T-Mobile USA acknowledges that the Citation Program does not limit the Commission's authority to enforce the requirements of D.20-04-008 yet argues that the *Presiding Officers' Decision* misses "the real point."¹²⁹ T-Mobile USA argues that since the Citation Program did not include any penalties concerning the operation of the CDMA network confirms that the Commission did not intend for OP 6 to requirement T-Mobile to maintain the

¹²⁶ Resolution T-17722, at 1.

¹²⁷ *Id.*, at 2.

¹²⁸ *Id.*, at 3

¹²⁹ *Appeal*, at 32.

CDMA network.¹³⁰ We reject T-Mobile USA's argument as a speculative assertion that is unsupported by law or fact.

5. T-Mobile USA's Violation of Rule 1.1 Warrants the Imposition of a Continuing Financial Penalty.

5.1. 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 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

¹³⁰ *Id.*

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 May 24, 2021, which was the date T-Mobile USA communicated its intent to end the CDMA network to the Commission. This amounts to a continuing offense period of 239 days. Using the per day penalty amount of \$15,000 results in a penalty of \$3,585,000.

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.¹³¹ Two general factors are considered in setting fines or penalties: (1) the severity of the offense and

¹³¹ 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.)

(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.¹³² 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.¹³³

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

¹³² D.98-12-075, *mimeo*, at 34-39.

¹³³ 1998 Cal. PUC LEXIS 1016 at 71-73.

of consumers is a more severe offense than one that is limited in scope.

At the time T-Mobile USA expressed its intent to end the customer migration process ahead of the three-year window, such an intent constituted 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.”¹³⁴ 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 some sort of affirmative technology change in order to access service once the CDMA network is shut down.¹³⁵

But as we noted above, T-Mobile USA and DISH have reached a resolution of their dispute.¹³⁶ While we appreciate the parties’ efforts, that resolution does not excuse T-Mobile USA’s duty to comply with OP 6 when D.20-04-008 was issued, nor does the resolution excuse T-Mobile USA from misleading the Commission with its promise of a three-year customer migration. The fact that T-Mobile USA was fortunate in reaching a settlement with DISH that avoided the potential harm to DISH’s customers does not excuse the conduct that forms the basis of a Rule 1.1 violation.

¹³⁴ *Petition to Modify*, at 2; Declaration of Stephen Stokols (Executive Vice President of Boost Mobile), at 7-10.

¹³⁵ Stokols Decl., at 8.

¹³⁶ See discussion, *supra*, at Section 4.1.4., fn. 81.

Our conclusion is consistent with the judicial determination that the Commission's authority to impose a penalty does not require proof of actual harm. In *PG&E, supra*, the Court of Appeal explained:

[T]he legitimate police power device of 'securing obedience'... requires more than compensation of [actual] losses, a penalty that might achieve little or no compliance."²¹ (*City and County of San Francisco v. Sainez* (2000) [77 Cal.App.4th 1302](#), 1315 [[92 Cal.Rptr.2d 418](#)].) Our Supreme Court is equally unreceptive to challenges to the Commission's powers to impose deterrent penalties: "Civil penalties under [section 2107] ... *require no showing of actual harm ...*, " *are imposed ... irrespective of actual damage suffered,*" "without regard to motive," and "require no showing of malfeasance or intent to injure." (*Kizer v. County of San Mateo, supra*, [53 Cal.3d 139](#), 147.)¹³⁷

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."¹³⁸ OP 6 expressly stated that the migration period would be three years

¹³⁷ 237 Cal.App.4th, at 845 (italics added).

¹³⁸ D.20-04-008.

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 reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.”¹³⁹

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:¹⁴⁰

- 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

¹³⁹ 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).

¹⁴⁰ 1998 Cal. PUC LEXIS 1016 at 73-75.

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.

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.

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:¹⁴¹

- 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.

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

¹⁴¹ 1998 Cal. PUC LEXIS 1016 at 75-76.

and MetroPCS brands.¹⁴² Its 2017 revenues were \$40.6 billion and assets totaled approximately \$70.56 billion in 2018.¹⁴³ 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.¹⁴⁴ Given these figures, we conclude that T-Mobile USA has the financial wherewithal to pay a penalty of \$3,,585,000.

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:¹⁴⁵

- **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 act otherwise. Such intransigence indicates that T-Mobile USA’s conduct represents the highest degree of wrongdoing that runs counter to the

¹⁴² *Joint Application for Approval and Control of Sprint Communications Company* (A.18-07-011), at 4.

¹⁴³ *Id.*, at 5.

¹⁴⁴ *Response to OSC*, at 2.

¹⁴⁵ 1998 Cal. PUC LEXIS 1016, 76.

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.¹⁴⁶

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 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

¹⁴⁶ 1998 Cal. PUC LEXIS 1016, 77.

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 \$3,585,000 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.

5.2. T-Mobile USA's Challenge

5.2.1. The Continuing Violation Finding

T-Mobile USA challenges the *Presiding Officers' Decision's* determination to begin imposing daily penalties for T-Mobile USA's violation on October 1, 2020, the date T-Mobile USA announced that it was ending the customer migration program in January of 2021, and to end the accrual of penalties on September 20, 2021.¹⁴⁷

T-Mobile USA challenges the *Presiding Officers' Decision's* conclusion that the accrual of penalties began on October 1, 2020, since T-Mobile USA continues to dispute that it ever made a promise to maintain the CDMA network for three years. But our review of the record refutes T-Mobile USA's position. As set forth

¹⁴⁷ *Presiding Officers' Decision*, at 38-39.

above, the evidentiary record is replete with references to T-Mobile USA's promise to maintain the CDMA network for three years in order to complete the customer migrations. Thus, we affirm the *Presiding Officers' Decision's* determination that the accrual of penalties began on October 1, 2020, when T-Mobile USA announced that it intended to shut down the CDMA network in advance of the promised three-year migration period.

T-Mobile USA next challenges the *Presiding Officers' Decision* to end the accrual of penalties on September 20, 2021. Instead, T-Mobile USA argues that it made the Commission aware of its position that it had not promised to operate the CDMA network for three years by May 24, 2021, when T-Mobile USA met with Commissioner Rechtschaffen's Office and other Commission staff,¹⁴⁸ and, therefore, the Commission was no longer being misled. We agree with T-Mobile USA. May 24, 2021, the date that T-Mobile USA asserts the penalty accrual should end, is a reasonable time to stop the accrual of daily penalties, because that is when T-Mobile USA informed the Commission that it never intended in its earlier representations to commit to a three-year migration period. As such, the daily penalty accrual is reduced from 355 days to 239 days.

5.2.2. Freedom of Speech

T-Mobile USA's final attack on the *Presiding Officers' Decision's* continuing offense determination amounts to an unconstitutional freedom of speech challenge. T-Mobile USA claims that "to the extent the POD is saying that T-Mobile violates Rule 1.1 anew each day it disagrees with the Commission's view, such a conclusion has no support in the text of Rule 1.1 and would in any

¹⁴⁸ *Appeal*, at 34-35.

case raise serious constitutional issues.”¹⁴⁹ The cases that T-Mobile USA cites have nothing to do with the interpretation of Pub. Util. Code § 2108. Instead, the cases deal with parties being compelled to make statements that conflict with their beliefs. Contrary to what T-Mobile USA may be suggesting, it is not being punished for exercising its right to speak in a particular manner. The continuing offense is grounded not in what T-Mobile USA said after D.20-04-008 was issued, or how it has chosen to defend itself from the OSC, but for its continuing failure to comply with the requirement to provide for a three-year migration period.

6. Resolution of T-Mobile USA’s Appeal of Presiding Officers’ Decision and Request for Alternative Dispute Resolution

The *Presiding Officers’ Decision* of ALJ Mason and ALJ Bemserderfer in the instant matter was mailed on April 25, 2022 to the parties in accordance with Section 311 of the Public Utilities Code and an appeal was allowed under Rule 14.4 of the Commission’s Rules of Practice and Procedure. On May 25, 2022, T-Mobile USA filed an Appeal of the Presiding Officers’ Decision.

After analyzing both the *Presiding Officers’ Decision* and T-Mobile USA’s *Appeal*, the Commission concludes that the *Presiding Officers’ Decision* should be affirmed in its entirety. The *Presiding Officers’ Decision*’s conclusions (*i.e.*, that (1) T-Mobile USA violated Rule 1.1 by misleading the Commission when it promised to provide DISH with a three-year customer migration; and (2) T-Mobile USA should be subject to regulatory penalties) are supported by both the evidentiary record and the applicable law. Mobile USA’s *Appeal* has

¹⁴⁹ *Appeal*, at 35, fn. 135, citing *Dahn v. Adoption All.*, (D. Colo. 2016) 164 F.Supp. 3d 1294, 1318, *rev’d on other grounds sub nom. & remanded*, *Dahn v. Amedei*, (10th Cir. 2017) 867 F.3d 1178; *Kramer v. Thompson* (3rd Cir. 1991) 947 F.2d 666, 680-682; and *Rumsfeld v. Forum for Academic & Institutional Rights* (2006) 547 U.S. 47, 65.

failed to demonstrate, either factually or legally, that any conclusions in the *Presiding Officers' Decision* were reached in error.

As we noted above in the Summary, the arguments from the *Presiding Officers' Decision* have been set forth above in this *Modified Presiding Officers' Decision*, with T-Mobile USA's *Appeal* arguments and the Presiding Officers' replies incorporated therein.

The following sections of the instant decision have been added or modified in response to the *Appeal*: 1.2.5, 2., 4.1.1., 4.1.2., 4.1.3., 4.1.5., 4.2.1., 4.2.2., 4.2.3., 4.2.4., 5.2.1., and 5.2.2.

Finally, because we have affirmed the *Presiding Officers' Decision*, we deny, on mootness grounds, T-Mobile USA's *Motion Requesting Alternative Dispute Resolution and Stay of Appeal*.

7. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner, and Karl Bemmesderfer 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.

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 and ending on May 24, 2021, 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 \$15,000 per each day of the continuing offense, leading to a total penalty in the amount of \$3,585,000.

8. It is reasonable to conclude that the penalty of \$3,585,000 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 \$3,585,000 such that the penalty is not excessive under the Eighth Amendment of the United States Constitution.

10. It is reasonable to deny, on mootness grounds, T-Mobile USA's *Motion Requesting Alternative Dispute Resolution and Stay of Appeal of the Presiding Officers' Decision*.

O R D E R

IT IS ORDERED that:

1. T-Mobile USA shall pay a penalty in the amount of \$3,585,000.00, 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 22-11-005.".

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. T-Mobile USA's *Motion Requesting Alternative Dispute Resolution and Stay of Appeal of the Presiding Officers' Decision* is denied on mootness grounds.

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

This order is effective today.

Dated November 3, 2022, at Chico, California.

ALICE REYNOLDS

President

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE L. HOUCK

JOHN REYNOLDS

Commissioners