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Assessing DOJ's Proposed Remedy in Sprint/T-Mobile: Can Ex Ante Competitive Conditions in Wireless Markets Be Restored?

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Economists' Tunney Act Comments on the DOJ's Proposed Remedy in the Sprint/T-Mobile Merger Proceeding

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INTRODUCTION

1. As economists with significant experience in competition and regulatory matters, we are submitting formal comments on the remedies proposed by the Department of Justice (DOJ) to address the competitive effects flowing from the proposed merger of Sprint and T-Mobile, as recognized by the DOJ's Complaint.[1] We are not being compensated for these comments. We accept the Complaint as written as a description of the significant anticompetitive effects inherent in this merger. We understand that the Tunney Act hearing is designed to assess whether the settlement agreement described by the DOJ's Proposed Final Judgment constitutes a "reasonably adequate"[2] remedy for addressing the competitive harms raised in the DOJ's Complaint. The Tunney Act requires that a court make an independent determination that the remedy the DOJ settled for is in the "public interest."[3] Indeed, Assistant Attorney General Makan Delrahim[4] and

1. Department of Justice Complaint, U.S. et al v. Deutsche Telekom AG, T-Mobile Us, Inc., Softbank Group Corp., and Sprint Corporation, No. 1:19-cv-02232, at 3 (D.D.C. Jul. 26, 2019) Case 1:19-cv-02232, July 26, 2019 [hereafter *Complaint*].

2. U.S. v. Iron Mountain, Inc., 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016).

3. When the government seeks to settle a civil antitrust suit through a consent judgment, a court must independently "determine that ... entry of [the proposed] judgment is in the public interest" before granting the government's request. 15 U.S.C. § 16(e)(l).

4. Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, Washington, D.C., Nov. 16, 2017 ("I believe the Division should fairly review offers to settle but also be skeptical of those consisting of behavioral remedies or divestitures that only partially remedy the likely

Deputy Assistant Attorney General Barry Nigro[5] recently affirmed in public speeches that an acceptable remedy must restore competition on "day one."[6]

2. For the reasons explained herein, we believe that this condition is not satisfied—that is, the Proposed Final Judgment cannot and will not address the anticompetitive harms identified in the Complaint, or restore the *ex ante* competitive conditions in the affected antitrust product markets.[7] First, Dish will operate on a mobile virtual network operator ("MVNO") model that the DOJ and the Federal Communications Commission (FCC) have never deemed to be a meaningful competitive constraint on facilities-based providers. Second, Dish will be reliant on New T-Mobile for its network and operational support for years to come—the type of ongoing entanglements between the divestiture buyer and merged company that the DOJ and the FCC find problematic because the remedy creates ongoing competitive concerns. Third, even if Dish meets its commitments to build a 5G network covering 70 percent of the population—and we are highly skeptical that Dish will ever build out its network—it still would not replace Sprint, which currently reaches over 90 percent of Americans.

3. The proposed merger of Sprint and T-Mobile will have unambiguous anticompetitive effects, according to the DOJ's Complaint itself. The DOJ recognizes that existing competition among the four national wireless competitors has been essential in keeping "prices down" and "serv[ing] as a catalyst for innovation."[8] The DOJ emphasizes that "preserving this competition is critical to ensuring that consumers will continue to have reasonable and affordable access to an essential service."[9] Because this merger, in the DOJ's own words, "will eliminate Sprint as an independent competitor," the result is that, left to its own devices, the merged firm (the "New T-Mobile") would "compete less aggressively."[10] The DOJ concludes that "the result would be increased prices"[11] such that American consumers "would pay billions of dollars more

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harm. We should settle federal antitrust violations only where we have a high degree of confidence that the remedy does not usurp regulatory functions for law enforcement, and fully protects American consumers and the competitive process."), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

5. Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida, Feb. 2, 2018 ("We take seriously the choice of remedy, because consumers bear the risk of mistakes, and if we get it wrong, the consequences can be irreversible. Our client is the American consumer, and therefore it is our view, having been presented with an anticompetitive transaction, that the risk of a failed remedy must be borne by the parties, not the consumer. Any remedy must be complete and effective—or, as the Supreme Court put it, "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" If we cannot reach a solution with the parties that will accomplish these goals, then we are left with no choice but to sue to block."), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

6. *Id.* ("In other words, the goal of a divestiture is not to simply remove the offending combination; rather, it is to promote and protect competition by preserving the status quo competitive dynamic in the market from *day one*.)" (emphasis added).

7. The DOJ's Merger Remedies Guide states that a remedy must "effectively preserv[e] the competition that would have been lost through the merger." U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf. The 2004 Merger Remedy Guidelines have similar statements regarding effective remedies. *See* Department of Justice, Antitrust Division Policy Guide to Merger Remedies, Oct. 2014, *available at* https://www.justice.gov/atr/page/file/1175136/download.

8. *Complaint*, ¶2.

9. *Id*.

10. *Id*. ¶5.

11. *Id*.

each year for mobile wireless service."[12] Yet, as we will explain, this is precisely what will result from the proposed settlement. Rather than suing to block the transaction (as a number of states have done), the DOJ has accepted a consent decree with Sprint/T-Mobile whereby Dish—a company with no history or presence in this industry—will for the foreseeable future try to compete as an MVNO reseller with no network, and in the less foreseeable future may acquire and develop assets sufficient to become a full-fledged wireless carrier. For that to happen, however, Dish will have to rely on T-Mobile's vague and non-credible promises to behave counter to its economic incentives.

4. Given the failings of the Proposed Final Judgment to address the harms enumerated in the DOJ Complaint, the proposed merger should be blocked; allowing the merger to move forward even with DOJ's proposed conditions would clearly reduce consumer welfare.[13] The DOJ settled for a remedy that does not meet the standard of restoring the competition currently provided by Sprint. Therefore, it does not satisfy the Tunney Act requirement that the remedy address the competitive harm alleged in the Complaint. We urge its rejection.

I. THE COMPETITIVE HARMS ENUMERATED IN THE DOJ'S COMPLAINT

5. We briefly review the harms enumerated in the DOJ's Complaint, and then characterize those harms from an economic perspective. We do this to underscore the DOJ's unambiguous acknowledgement that four wireless carriers are essential to competition in these markets. Moreover, while the DOJ itself describes this as a four-to-three merger overall, in fact it is significantly worse than that: The merger is effectively three-to-two in prepaid services, and roughly equivalent to two-to-one in the wholesale market.

A. The DOJ's Position on Competitive Harms

6. The DOJ's Complaint spells out harms in two markets: the wholesale market and the retail market. The Complaint also strongly implies that prepaid services—the locus of competition between Sprint and T-Mobile—constitutes a relevant antitrust market or, at a minimum, is a segment in which the harm is particularly acute.

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12. *Id*.

13. Moreover, to the extent that the DOJ's Complaint omitted certain important harms flowing from the merger, including harms to employees of the merging parties, it bears noting that the DOJ's Proposed Final Judgment fails to address those harms as well. *See* U.S. et al. v. CVS Health Corp. et al., Civil Case No. 18-2340 (RJL), Sept. 4, 2019, at 12 ("The Government's suggestion here—that by narrowly drafting a complaint it can effectively force the Court to shut its eyes to the real-world impact of a proposed judgment-thus—misconstrues *Microsoft*. 11 It also strikes-at the heart of the Tunney Act's very purpose. Congress passed the law to 'ensure[] that the economic power and political influence of antitrust violators do not unduly influence the government into entering into consent decrees that do not effectively remedy antitrust violations.' *Airline Tariff Pub. Co*., 836 F. Supp. at 11. The Government's position here could actually facilitate such undue influence so long as unduly influenced attorneys strategically draft complaints to shield their indifference to the public interest from judicial review. Neither the statute, nor *Microsoft*, supports such a reading.").

1. Harms in the Wholesale Market for MVNO Access

7. The merging parties offer wholesale wireless services to resellers or mobile virtual network operators (MNVOs). According to the DOJ's Complaint, the Sprint/T-Mobile merger would harm competition in the wholesale market for MVNO access:

> Competition between Sprint and T-Mobile to sell mobile wireless service wholesale to MVNOs has benefited consumers by furthering innovation, including the introduction of MVNOs with some facilities-based infrastructure. The merger's elimination of this competition likely would reduce future innovation.[14]

Wholesale services permit resellers to target customer segments that would otherwise be ignored or underserved by vertically integrated carriers. For example, an incumbent carrier cannot post two separate prices for the same service—a high price for price-insensitive customers, and a low price for price-sensitive customers. Resellers allow carriers to effectively offer the same service at different price points under a different brand. MVNOs are the mechanism by which cable companies compete in wireless; with the ability to bundle wireless offerings with other products like broadband and pay television, cable companies such as Comcast and Charter have competed aggressively on price (for example, selling wireless at a loss).[15] These innovative offerings, including prepaid plans, could be threatened if wholesale prices were to rise as a result of the merger.

8. The merging parties represent the two largest companies in the wholesale market, accounting for nearly 68 percent of U.S. wholesale connections. This is no accident: Relative to AT&T and Verizon, Sprint and T-Mobile are more willing to engage in wholesale activity because the risk of cannibalizing their retail offerings are less, given their relatively smaller retail market shares and relatively low margins per retail customer. Moreover, given their excess spectrum, Sprint and T-Mobile would have strong incentives to continue offering wholesale service in the absence of the merger. In the national wholesale market, the merger would increase HHI by a staggering 2,256 points by our estimation, representing roughly the equivalent of a two-to-one merger and triggering the presumption of enhanced market power.

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14. *Complaint.* ¶22.

15. In September 2019, Altice launched an extremely aggressive wireless offering—undercutting the major carriers on price—utilizing, in part, an innovative MVNO with Sprint that no other MNO was willing to offer. *See* Press Release, Altice Mobile, the New 'Unlimited Everything' Mobile Service is Here, Sept. 5, 2019, *available at* https://alticeusa.com/news/articles/press-release/products-services/altice-mobile-new-unlimited-everything-mobile-service-here. The DOJ settlement agreement may force New T-Mobile to honor this MVNO for the term of the Proposed Final Judgment (seven years), but the critical question is whether this type of MVNO would have been possible if Sprint was not competing independently. *See* Bevin Fletcher, *Altice Mobile launches its wireless service at $20/month*, FIERCE WIRELESS, Sept. 5, 2019, *available at* https://www.fiercewireless.com/operators/altice-mobile-launches-wireless-service-at-20-month ("Both Charter and Comcast operate as MVNOs running on Verizon's network, but Altice's infrastructure-based MVNO with Sprint is different in that Altice owns and operates its own mobile core.").

2. Harms in the Retail Mobile Wireless Services, Including Postpaid and Prepaid

9. The DOJ's Complaint defines a relevant product market as "retail mobile wireless services."[16] These include postpaid and prepaid services, and the Complaint concludes that "The proposed merger would substantially lessen competition and harm consumers in the relevant market."[17] The Complaint acknowledges that U.S. wireless consumers "have benefitted from the competition T-Mobile and Sprint have brought to the mobile wireless industry," including the introduction of unlimited data plans to retail customers in 2016.[18] Within this broader market, the DOJ recognized that an important dimension of competition between the merging parties has been in prepaid services, which has "exerted significant downward pressure on prices."[19] The Complaint notes that "competition between T-Mobile and Sprint also has led to improvements in the quality of devices and the plan features available to prepaid subscribers,"[20] including unlimited calling to Mexico. It concludes that "If the merger were allowed to proceed, this competition would be lost," resulting in what economists refer to as unilateral price effects.[21] Moreover, "the merger would leave the market vulnerable to increased coordination among these three competitors."[22]

10. Prepaid wireless subscriptions are aimed at price-sensitive (or budget-constrained) customers. This is consistent with the DOJ's and FTC's *Horizontal Merger Guidelines* which contemplate markets in which services are targeted to certain customers as "price discrimination" markets.[23] Given that wireless customers select into prepaid and postpaid on the basis of price-sensitivity, and given the merging partners focus on the prepaid segment—they collectively account for 53 percent of prepaid connections—it is natural to posit a prepaid market when studying this merger. Indeed, the DOJ defined a market in its Complaint in the (since abandoned) AT&T/T-Mobile merger, as "mobile wireless telecommunications services provided to enterprise and government customers," under the rationale that "[t]hese customers constitute a distinct set of customers for mobile wireless telecommunications services."[24] In the national retail prepaid market, the Sprint/T-Mobile merger would increase HHI by at least 808 points, from 2,880 to 3,688, by our estimation. This estimate conservatively treats Dish as if it were a full-blown facilities-based horizontal competitor, as opposed to a prepaid MVNO—despite FCC and industry precedent to the contrary.[25] The clear implication is that this merger triggers a presumption of enhanced market power.

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16. *Complaint* ¶14.
17. *Id.* ¶16.
18. *Id.* ¶17.
19. *Id.* ¶19.
20. *Id.* ¶20.
21. *Id.* ¶21. Unilateral effects arise when the customers of one merging party might have opted for the other if the former attempted to raise price. The effect of the merger is to recapture within the combined firm those otherwise lost customers—a clear incentive for the parties to merge.
22. *Id.*
23. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at Section 4.1.4.
24. Department of Justice Complaint, U.S. et al v. AT&T, Inc. T-Mobile USA and Deutsche Telekom AG, Case: 1:11-cv-01560, Aug. 31, 2011, ¶13.
25. *See, e.g.,* Federal Communications Commission, 20th Wireless Competition Report, n. 99 ("Following widespread industry practices, the Commission generally attributes the subscribers of MVNOs to their host facilities-based service providers, including when it calculates market concentration metrics.").

B. There Is No Compelling Record Evidence of Marginal Cost Savings Attributable to the Merger

11. The DOJ's Complaint rejects the sufficiency of the merging parties' efficiency claims.[26] Having reviewed the record evidence presented by the merging parties in the FCC proceeding, we agree and conclude that there is no compelling evidence that the merger would reduce the *marginal costs* of New T-Mobile.[27] According to Dr. David Evans, an economist hired by the merging parties, the merger purportedly will increase capacity, which "will decrease the marginal cost of each gigabyte of data, New T-Mobile will be able to lower prices while increasing quality and value."[28] But Dr. Evans offers no proof that the merger would reduce the marginal costs of the carriers. Similarly, T-Mobile CEO John Legere claims the merger would reduce marginal cost by creating new capacity.[29] But again there is no explanation of how a purported increase in capacity reduces the merged firm's marginal cost of serving the next customer or the next neighborhood. Even if one were to credit T-Mobile's economists' claims of enhanced 5G deployment in otherwise unprofitable-to-deploy neighborhoods—prior to the merger proposal, Sprint and T-Mobile separately announced plans to deploy 5G services nationwide[30]—these largely rural households are distinct from those urban and suburban households that likely will incur a price increase on 4G services resulting from the merger. An economically significant and pervasive merger-related injury to one party should not be treated as being "offset" by a purported gain to a separate party.[31]

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26. *Complaint*, ¶24 ("Any efficiencies generated by this merger are unlikely to be sufficient to offset the likely anticompetitive effects on American consumers in the retail mobile wireless service market, particularly in the short term, unless additional relief is granted.").

27. Marginal or incremental costs are the costs associated with making the last unit of production. Because fixed costs do not inform a firm's (marginal) pricing analysis in the short run, changes in fixed costs are not given the same consideration in efficiencies analysis as are changes in marginal costs. *See, e.g.*, Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines, Section 10 Efficiencies ("In a unilateral effects context, *incremental cost reductions* may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a coordinated effects context, *incremental cost reductions* may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm.") (emphasis added).

28. David Evans Declaration, ¶¶212-13.

29. John Legere Declaration, ¶12.

30. *See*, *e.g.*, R. Cheng, *Sprint: We're in a Unique Position to Deliver Broader 5G*, CNET, Feb. 2018; T-Mobile Newsroom, *T-Mobile Building Out 5G in 30 Cities This Year…and That's Just the Start*, Feb. 2018.

31. Given the DOJ's rejection of efficiency claims in its Complaint, it not necessary to rebut the merging parties' efficiency claim of more ubiquitous 5G. From a policy perspective, because there is no mechanism to compensate harmed parties by purported gains to newly served rural subscribers, the court should be skeptical of supposed offsetting merger-related efficiencies or offsets. The DOJ's own position on efficiencies is consistent with our position. *See* DOJ Joint Statement on the Burden of Proof at Trial, U.S. v. AT&T Inc., DIRECTV Group Holdings, LLC, and Time Warner Inc., *available at* https://www.justice.gov/atr/case-document/file/1043756/download ("No court has ever found efficiencies that justified the anticompetitive effects of a merger. As a result, the law is unsettled as to whether defendants can defeat a Section 7 case merely by showing the merger creates efficiencies, even if they 'outweigh' the anticompetitive effects proven by the plaintiff. There is absolutely no support for, or merit to, the contention that it is the anticompetitive effects that must 'substantially outweigh' the pro-competitive efficiencies, rather than the other way around. Rather, 'doubts are to be resolved against the transaction.'" (citations omitted)). This position is also consistent with the Supreme Court's decision in *Philadelphia National Bank*, which rejected an efficiency argument that the district court had accepted—that the merger would stimulate economic development in Philadelphia. 374 U.S. at 371 ("We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may

II. THE NATURE OF THE PROPOSED FINAL JUDGMENT

12. The Proposed Final Judgment establishes a number of affirmative obligations on the parties, obligations that lock the parties into a long-term relationship with Dish. Despite this fact, the AAG for Antitrust has described this settlement as "structural" in nature, undoubtedly because structural remedies are more likely to be successful in remedying a merger's harm. But as we will establish, this remedy strays far from the classic model of divestiture, which involves identifying an overlapping operation or product of two merging companies, requiring divestiture of one of them, and then—if done well—counting on competition to produce roughly the same market outcome as before. In the classic model case, no further oversight, monitoring, or intervention is necessary.

13. In reality the structural elements of this settlement are modest, problematic in several respects, and dwarfed by behavioral provisions, as we shall now explain.

A. Behavioral and Structural Aspects of the DOJ's Proposed Remedy

1. Behavioral Aspects

14. The DOJ's proposed remedy contains several critical behavioral components. It imposes on the merging parties an obligation to permit Dish to operate as a reseller on New T-Mobile's wireless network for the entire seven-year term of the settlement.[32] In setting out various provisions seeking to make this arrangement work, it discloses by implication the enormous difficulties that arise in having one company assist its direct competitor. The settlement details a host of obligations that T-Mobile must observe in carrying out the resale agreement, including traffic non-discrimination, device non-discrimination, and obligations to provide operational support and support handover mobility.[33] The settlement requires T-Mobile and Sprint to provide certain "transition services" to Dish for a period up to three years, including billing, customer care, SIM card procurement, device positioning, and "all other services [previously] used by the Prepaid Assets."[34] The New T-Mobile is also required to extend existing MVNO agreements to resellers.[35] In the wholesale market, until Dish builds its own network, the number of network operators is indisputably reduced from four to three. In this market the settlement has only a behavioral remedy in which competition is supposedly preserved by the parties extending existing MVNO agreements. But as previously described, an MVNO agreement is widely acknowledged to result in less than a full competitor because its provisions, like behavioral remedies, require the merged company to act against its own interests.

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be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.").

32. Proposed Final Judgment at Section VI.A.
33. *Id*. at VI.B.
34. *Id*. at IV.A.4.
35. *Id*. at VII.A.

15. Moreover, Dish is required to "offer retail mobile wireless services, including offering nationwide postpaid retail mobile wireless service,"[36] reflecting the concern that Dish may ultimately have little incentive to expand beyond prepaid service. Dish also must "comply with the June 14, 2023, network build commitments made to the FCC."[37] The settlement stipulates that Dish must provide wireless service using cell sites and retail stores as they are "decommissioned" and determined to be redundant by the merged firm. If Dish's own network does not serve 70 percent of the country by 2023, it will face penalties up to $2.2 billion. To the DOJ, these detailed operational instructions may have seemed necessary for the remedy to be effective, but just as surely, they will prove insufficient for all the reasons that behavioral remedies—especially when critical and long-term—have proven unlikely to succeed.

2. Structural Aspects

16. The DOJ's Proposed Final Judgment is claimed to be structural in nature, whereas any arguable structural features are extremely limited. The sole certain divestiture consists of Sprint's prepaid business, but that business consists of subscribers, which are to be divested to Dish, and an opportunity to contract with Sprint's current employees in that business. These are not hard and sunk assets whose transfer clearly confers on the recipient a going viable production process. It is essentially a handoff of a business operation which could evaporate overnight if either customers or employees decide not to switch to the new and untested Dish brand and management.

17. Dish also has the option to purchase Sprint's 800-megahertz spectrum licenses, as well as decommissioned cell sites and retail locations. In terms of acquired personnel, the settlement "includes a complicated process by which Sprint will identify all employees of its existing prepaid operations so that Dish can vet, interview, and negotiate with those employees for continued employment with Dish's follow-on service."[38] The option to purchase spectrum is intended to expand Dish's own 800 MHz spectrum holdings and thereby permit it to build out an entirely new 5G network. The settlement penalizes Dish for failing to acquire Sprint's spectrum, unless it demonstrates that it can provide such service strictly with its own, currently unused 800 MHz spectrum.

B. It Is Inappropriate to Characterize the DOJ's Proposed Remedy as Structural

18. The above-cited provisions make clear that the proposed settlement has all the crucial elements of a conduct or behavioral remedy. It involves the parties in an on-going relationship over critical aspects of the business. It depends on the DOJ's ability to oversee and judge those relationships for a period of seven or more years. The extreme dependency of Dish on the good graces of New T-Mobile creates abundant opportunities for the merged firm to engage in strategic pricing, slowdown of provision, alteration of terms or quality of the assets and services, and so forth. This proposed settlement, in short, has all the hallmarks of a detailed, regulatory, and interventionist remedy of the sort previously and properly criticized by the same AAG now inexplicably offering up this proposal to an anticompetitive merger.

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36. *Id*. at Section IV.F.

37. *Id*. at Section VII.A.

38. This section draws heavily from John Kwoka, Masquerading as Merger Control: The U.S. Department of Justice Settlement with Sprint and T-Mobile, AAI Working Paper 2019.

III. THE MERGER-RELATED HARMS WILL NOT BE ADEQUATELY ADDRESSED BY THE PROPOSED FINAL JUDGMENT

19. For the reasons offered below, we are highly skeptical that Dish will ever deploy its own facilities-based network. What is clear, however, is that the merger reduces the number of facilities-based carriers from four to three, and the loss to postpaid customers is immediate, obvious, and long-term. Any price-disciplining effect that Sprint previously imposed on T-Mobile's postpaid offerings (and vice versa) is forever lost. And wholesale competition is forever diminished. The only harm potentially attenuated via the settlement is the harm to prepaid customers, and even that is partial and uncertain; because Dish will operate as an MVNO, where its business partner is a rival, the remedy will not fully offset the loss of a facilities-based provider of prepaid services. Even in the unlikely scenario where Dish elects to build out, given the significant time required, competition will be weakened in the intervening years. Because prepaid customers, by definition, do not have long-term contracts (they pay month-to-month), they are particularly susceptible to seeing any benefits from competition disappear to the extent *other* prepaid providers—primarily offering service via MVNOs—experience the effects of lost competition in wholesale.

A. If Dish Does Not Build Out a National Facilities-Based Network, Wireless Competition Will Be Forever Weakened

20. The supposed rationale for approving the merger subject to this settlement appears to be Dish's actually building out its own national facilities-based network. We urge a careful assessment of the prospects for this happening. In predicting what a firm might do in the future when subject to a remedy, one good source of such information is the firm's past behavior in analogous settings. Dish has repeatedly failed to meet prior FCC build-out requirements on its existing spectrum. This conduct goes back to as early as 2012 with the company's acquisitions of DBSD and TerreStar. Dish's existing 700 megahertz and AWS-4 spectrum licenses come with an FCC requirement to construct a wireless network by March 2020. Dish has missed a number of interim construction deadlines on that front. Indeed, in the FCC's review of the pending merger, in March 2019 a T-Mobile attorney wrote that "Dish has a track record of price increases for its services, speculative warehousing of spectrum and failing to meet FCC-imposed deadlines to construct the facilities required."[39] The filing goes on to note "Dish stands out for its efforts to game the regulatory system by proffering a modernized version of last century's two-way paging as a substitute for meeting its obligations to start building a real 5G network."[40]

21. Moreover, because of Dish's importance in securing the settlement, it likely extracted a favorable resale arrangement. Why would Dish invest and become a facilities-based provider if the margins from resale are large and guaranteed for seven years? If the DOJ wanted to wean Dish from the resale agreement, the term would have been shorter than seven years and the access terms would have deteriorated over time. The financial markets would likely penalize

39. Letter from Nancy Victory to Marlene Dortch, In Re Notification of Written *Ex Parte* Presentation Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Dkt. No. 18-197, Mar. 11, 2019, at note 3, *available at* https://bit.ly/2kVbOrI.

40. *Id.*

Dish for making any infrastructure investments. Any Dish investment in towers and other facilities likely would not add value to the most likely buyers of the spectrum—namely, New T-Mobile, AT&T or Verizon. A similar episode occurred in Germany. There, a reseller named Drillisch served the role of "fixing" a four-to-three merger of E-Plus and Telefonica, by taking on a retail obligation.[41] Drillisch saw its stock hammered when it started to invest in spectrum to build out its own network.[42]

22. The risk to Dish if it fails to build a national facilities-based network is a modest $2.2 billion financial penalty, which is small compared to Dish's estimated $10 billion in build-out costs.[43] The penalty is also small relative to what some think its spectrum holdings could fetch if sold outright. It bears noting that the $2.2 billion fine is the maximum, which implies that it could be lower, as Dish could challenge the fine in court as, for example, inappropriate due to unforeseen obstacles to the build-out. Because the license forfeitures would have occurred with respect to Dish's original buildout requirements, they are not incremental to Dish's marginal calculus now. If Dish has the "natural" incentive to build out anyway, it is not clear why financial penalties are even necessary. If Dish reaches only 50 percent of nationwide population by June 2023, it will have to make a voluntary, tax-deductible contribution of $580 million. In that case, Dish gets a two-year extension until June 2025 to hit the buildout criteria for license renewal, which are 70 percent population coverage in each license area for AWS-4, H block, and the Lower 700 MHz E Block, and 75 percent of population for 600 MHz.[44]

23. With respect to resellers, given that Sprint was a well-documented innovator in the wholesale market, T-Mobile's extending existing MVNO agreements will not fully restore competition in wholesale. Sprint's MVNO with Altice USA was the first and only MVNO agreement with so-called "core control" provisions, giving Altice control over various features such as subscriber identity module (SIM), roaming and network partners, customer care, and billing.[45] It is true that New T-Mobile would be constrained from raising wholesale rates to existing MVNO partners. But absent the merger, wholesale competition between Sprint and T-Mobile

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41. *See, e.g.,* Michael Filtz, *Telefonica Deutschland closes €8.6bn acquisition of E-Plus*, ZDNET, Oct. 2, 2014, *available at* https://www.zdnet.com/article/telefonica-deutschland-closes-eur8-6bn-acquisition-of-e-plus/ ("For the deal to pass muster, the regulator found, Telefonica had to agree to initially sell off 20 percent of the combined network capacity to Drillisch, a mobile virtual network operator.").

42. *See Market unimpressed as billionaire throws hat into Germany's 5G ring*, DW.com, *available at* https://bit.ly/2kI5Kmv ("Investors were skeptical about the move. TecDax-listed Drillisch and United Internet shares fell after the announcement by 7.7 percent and 2.8 percent, respectively, on concerns they would give up their current profitable business as a virtual mobile network operator (MVNO) and have to borrow heavily to secure a license and build network infrastructure. Since the announcement of interest in the auction in last summer, Drillisch has lost 43 percent of its value.").

43. *See* Drew Fitzgerald, *A TV Maverick Is Going All-In on a New Wireless Bet*, WALL STREET JOURNAL, July 27, 2019, *available at* https://on.wsj.com/2ZjITws.

44. There are other reasons to suspect that Dish might not build out its network. For example, the handsets that would work on Dish's 5G network might not be readily available, and that delay would provide a fresh justification for Dish to delay its 5G infrastructure roll-out. Moreover, because Dish will be a wholesale customer of T-Mobile, Dish will be limited to T-Mobile's handsets that will have 5G for the particular Dish spectrum added to them. It is unclear whether handset OEMs will create and sell such handsets without enough demand from Dish customers. But with Dish being new in this market, its customers may be few, resulting in few if any handsets for T-Mobile and 5G Dish capabilities, resulting in even fewer Dish 5G customers.

45. Responses of Altice USA, Inc. to the Federal Communication Commission's October 4, 2018 Information and Document Request, Jan. 28, 2019, *available at* https://bit.ly/2m71dua.

might well have driven down the wholesale rates to MVNOs. Now that competition is eliminated. The existing MVNOs, who are only guaranteed to be held whole by the settlement, would be worse off relative to the but-for world with no merger. Moreover, holding the terms of existing agreements in place does not mean that New T-Mobile has to enter into new agreements with MVNOs, such as cable operators; it simply preserves existing prices for existing MVNO partners.

B. Even in the Unlikely Scenario Where Dish Elects to Build Out, Given the Time Required, Competition Will Be Weakened in the Intervening Years

24. Under this proposed settlement Dish has until June 2023 to construct a network covering 70 percent of the population. That leaves four years in which Dish does not operate its own network, and so the transaction is essentially a four-to-three merger. This is because of the widespread recognition that MVNOs do not actually constrain the postpaid pricing of incumbent operators; thus, postpaid competition will be diminished in the interim even if Dish ultimately deploys its own network. Dish will certainly not be able to constrain New T-Mobile's selling power in the wholesale market in the intervening years. Moreover, because the coverage requirement is denominated in terms of population, not geography, it is clear that certain parts of the country will lose out. Thus, it possible, for example, to cover 50 percent of the population by just targeting 15 percent of the most urban areas in the U.S. Even if Dish hits that 70 percent goal, the resulting network likely will not fully replace Sprint's ubiquitous nationwide network, leaving nearly 100 million Americans with one fewer facilities-based carrier.[46]

25. T-Mobile's CEO, John Legere, acknowledged on an investor call right after the settlement was announced that Dish would not affect New T-Mobile's profitability: "It's important to point out that the target synergies, profitability and long-term cash generation have not changed for T-Mobile."[47] If New T-Mobile really just helped provision a disruptive number four carrier, as Mr. Delrahim suggested, then the new carrier would rapidly take market share away from the incumbents: otherwise, it would not justify a $10 billion network investment. How would it *not* impact the profitability of a player (New T-Mobile) that is going to have roughly one third of the wireless market? Thus, it is very hard to square Mr. Legere's comments with what the DOJ's settlement promises. Expecting that Dish will bring "disruptive" competition is implausible. The parties would never willingly and knowingly create such a competitor. This statement would seem to reflect DOJ's anxiety about approving the merger that eliminates such a firm, and the claim should be firmly rejected.

C. The Impact of the Deficient Remedy Will Be Significant Consumer Injury

26. At the closing of this deal, and with this proposed settlement, there will in fact be only three facilities-based national wireless competitors, and the DOJ's own concerns about competition will be realized. Dish will acquire and seek to maintain a small prepaid business with roughly 8.7 million customers, or about 2.5 percent of all U.S. wireless subscribers and less than one fifth of Sprint's 54.3 million subscriber base. And Dish will operate on an MVNO model that

46. *See, e.g.*, Jon Brodkin, *DOJ's plan to make Dish the fourth major carrier has a fatal flaw*, ARS TECHNICA, Aug. 27, 2019, *available at* https://bit.ly/2kqbzVs.

47. T-Mobile US, Inc. (TMUS) CEO John Legere on Q2 2019 Results - Earnings Call Transcript, Seeking Alpha, July 29, 2019, *available at* https://bit.ly/2m38U4o.

the DOJ and the Federal Communications Commission (FCC) have never deemed to be a meaningful competitive constraint on facilities-based providers.[48] Dish will be reliant on New T-Mobile for its network and operational support for years to come—the type of ongoing entanglements between the divestiture buyer and merged company that the DOJ and the FCC find problematic because the remedy creates ongoing competitive concerns. Indeed, the DOJ itself recognizes that going from four to three wireless providers will harm consumers through higher prices, lower quality and less choice.[49]

27. There will also be consumer harm in the long term. In 2023, in the unlikely event that Dish meets its commitments to build a 5G network covering 70 percent of the population, it still would not replace Sprint, which currently reaches over 90 percent of Americans. Accordingly, the DOJ settlement would leave over 60 million Americans (or 30 percent of the U.S. population), primarily in smaller communities and rural areas, still paying those higher prices and without any assurance of restored competition. But Dish is not likely to ever be able to replace Sprint even for that 70 percent of the population. Dish would be starting from scratch with significant debt, no network infrastructure or wireless experience, in a business that the DOJ itself characterizes as having "high barriers to entry."[50] It would be attempting what no company has ever done before—to build and operate a nationwide wireless network, at a cost of at least $10 billion, from scratch, and in a short number of years.[51] This significant undertaking exceeds what Dish has promised regulators before, but failed to deliver time and again. The DOJ's aspiration to create a new competitor in these circumstances is fraught with risk that will surely doom it to failure.[52]

CONCLUSIONS

28. For the foregoing reasons, we conclude that DOJ's proposed remedy does not address the competitive harms identified in the Complaint, and will not restore competition to its *ex ante* state. By eliminating Sprint as an independent competitor, the Sprint/T-Mobile merger, even in the presence of DOJ's proposed remedy, would inflict serious antitrust injury on consumers and competition. Some may disagree with that assessment and contend that there is some prospect of success. But that prospect, if it exists at all, is surely dim, and does not alter the conclusion that

48. *See* FCC 20th Wireless Competition Report, ¶33 n. 99, Sept. 17, 2017, *available at* https://www.fcc.gov/document/fcc-releases-20th-wireless-competition-report-0 ("Following widespread industry practices, the Commission generally attributes the subscribers of MVNOs to their host facilities-based service providers, including when it calculates market concentration metrics.").

49. *Complaint* ¶30 ("… prices likely would be higher, quality of service likely would be lower, innovation likely would be lessened, and consumer choice likely would be more restricted than in the absence of the merger.").

50. *Id.* ¶23 ("Given the high barriers to entry in the retail mobile wireless service market, entry or expansion of other firms is unlikely to occur in a timely manner or on a scale sufficient to replace the competitive influence now exerted on the market by Sprint.").

51. *See* Drew Fitzgerald, *A TV Maverick Is Going All-In on a New Wireless Bet*, WALL STREET JOURNAL, July 27, 2019, *available at* https://on.wsj.com/2ZjITws. Dish has also pointed to a $10 billion investment figure for its 5G buildout. *See* Mike Dano, *Ergen's 5G build-out ambitions for Dish could pass $10B*, FIERCE WIRELESS, May 23, 2018, *available at* https://bit.ly/2kJ6xUo.

52. Letter from T-Mobile to Donald Stockdale, Oct. 25, 2018 ("On its face, DISH's plan fails to meet its stated commitment to fulfill the Commission's vision of using the spectrum to deploy wireless broadband services. Significantly, the plan would use only a fraction of the available spectrum capacity. DISH's build out plan is nothing more than a scheme for the company to further warehouse valuable spectrum assets, and the Commission should not condone it."), *available at* https://bit.ly/2mdLOs7.

this remedy ought not be accepted. The reason is "error analysis." A Type I error is accepting the remedy when it fails to restore competition, and a Type II error is rejecting the remedy when it adequately restores competition. Our point is that rejection of the merger leaves all options open, both for the firm and the agency. But approval is irreversible, so if that is the wrong policy, there is no fixing it retrospectively. This case is far from a close call, but even close calls (or "ties") should go to stopping a merger.

29. This proposed settlement would permit a four-to-three merger based on a remedy that accepts competitive harms in the short and medium term even based on an exceedingly optimistic view of possible benefits in the longer term. This does not represent good policy. Rather, it suggests a determined effort to invent a basis for approval of a merger that is anticompetitive on its face. Indeed, if the substantial and acknowledged competitive problems with this four-to-three merger are remedied by this strategy of re-arranging some assets, negotiating some contracts, and then hoping for the best some years down the road, it is unclear what merger would *not* be salvageable with the same scheme.