BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).	Application No. 18-07-011
And Related Matter.	Application No. 18-07-012

SUPPLEMENTAL TESTIMONY OF DEBBIE GOLDMAN ON BEHALF OF COMMUNICATIONS WORKERS OF AMERICA DISTRICT 9

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1 **I. INTRODUCTION**
2
3 Pursuant to the October 24, 2019 Assigned Commissioner's Amended Scoping Ruling in
4 the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-
5 Mobile USA, INC., a Delaware Corporation ("Applicants") For Approval of transfer of Control
6 of Sprint Communications Company L.P, Communications Workers of America District 9
7 ("CWA") submits the following written supplemental testimony. CWA's supplemental
8 testimony responds to some of the Applicants' claims and issues identified in the Amended
9 Scoping Ruling regarding the Applicants' and a new party, DISH Network's, federal agreements
10 and commitments which significantly alter the original proposed merger.[1]
11 To obtain merger approval from the Department of Justice ("DOJ") and Federal
12 Communications Commission ("FCC"), the Applicants agreed to provide to DISH spectrum, cell
13 sites and access to the new T-Mobile network for a period of seven years. The idea is that, over
14 time, DISH could become a fourth national facilities-based mobile service provider. Prior to
15 making these federal commitments, the Applicants entered into an agreement with the California
16 Emerging Technology Fund ("CETF"). The federal commitments not only alter the originally
17 proposed merger, but also affect the CETF agreement. Therefore, the Commission required the
18 Applicants to submit an amended application reflecting the changes and, subsequently,
19 additional testimony addressing the implications of the federal commitments on California.
20 CWA's testimony shows that the federal commitments are not appropriate, effective or
21 principled measures that would remedy the proposed merger's competition problems outlined in
22 CWA's previous testimony and briefs. The DISH divestiture assets do not restore the

[1] Attached as **Attachment A** is CWA's previously submitted testimony revised in redline to show changes resulting from Sprint, T-Mobile and DISH Network entering into the Department of Justice and Federal Communications Commission commitments.

1 competition lost by the elimination of Sprint as an independent competitor. The divestitures
2 create a Mobile Virtual Network Operator ("MVNO"), but competition from MVNOs are de
3 minimis.

4 Moreover, the divestitures fail to *promptly* restore the competition lost due to the merger.
5 For years DISH would be entirely or largely reliant on the merged firm for network access and
6 would be a customer and reseller, not a full-fledged competitor. For as long as three years, the
7 merged firm is required to provide billing, customer care, SIM card procurement, device
8 provisioning, and other services to DISH as "transition" services. The exceptionally long
9 "transition" period is necessitated because the divestitures are not of an existing business entity
10 but rather are a collection of asset carve-outs. This scenario creates heightened execution risk
11 and excessive entanglements.

12 In fact, the core provisions of the federal commitmenets are not divestitures at all but
13 rather the sharing of the "New T-Mobile" network with DISH for a minimum of seven years
14 under a mobile virtual network operator agreement. This is intended to give DISH time to
15 transition from a customer to a competitor – or, in the DOJ Antitrust Division's words, "to
16 facilitate DISH building its own mobile wireless network with which it will compete in the retail
17 mobile wireless service market." Whether it will ever accomplish that goal is questionable. But
18 what it will accomplish beyond any reasonable doubt is to cement a multiyear business
19 relationship between DISH and New T-Mobile that would require extensive government
20 oversight – exactly the sort of remedy the DOJ has strongly, and persuasively, argued is
21 ineffective as a matter of enforcement policy and, moreover, one that inappropriately puts a law
22 enforcement agency into a regulatory role it is ill-suited to perform.

23 In summary, DISH, during the years it operates as an MVNO, would not put significant
24 competitive pressure on the merged firm or any of the other remaining Mobile Network

1 Operators ("MNOs"); *a fortiori*, it would not replace the competitive pressure Sprint currently
2 exerts in the relevant market.
3 Further, DISH lacks managerial, operational, technical, and financial capability to
4 compete effectively in the relevant market. DISH lacks financial resources of its own and has not
5 secured third-party funding; it has management that has not built a wireless network despite the
6 legal obligation to do so; and it has no experience or demonstrated technical ability to operate
7 such a network, the challenges of which are extensive. At the same time, DISH has shown a
8 willingness to abuse a federal program to obtain over $3 billion in taxpayer-funded discounts,
9 and thereby to make "a mockery of the small business program" in the words of then-
10 Commissioner Ajit Pai.
11 T-Mobile itself highlighted DISH's lack of fitness as a buyer in an FCC filing in March,
12 2019, commenting that DISH has a track record of price increases for its services, speculative
13 warehousing of spectrum, and failing to meet FCC-imposed deadlines. T-Mobile additionally
14 commented that "*DISH stands out for its efforts to game the regulatory system*" and "*has little*
15 *interest in actually delivering real 5G service*."
16 Even assuming for the sake of argument that a weak and otherwise unacceptable buyer
17 could somehow transform into a strong competitor at some future date, the DISH divestiture
18 provides insufficient incentives (positive or negative) for this transformation to take place.
19 From an engineering standpoint, there are numerous perils and pitfalls which stand
20 between the desire to create a new competitive retail wireless network and realization of that
21 goal. These include activating infrastructure at tens of thousands of sites while relying on
22 technologies that do not yet exist, creating and managing a large new team in a tight labor
23 environment, getting permitting approvals and third-party consents, coordinating with T-Mobile
24 (itself in the process of an ambitious build, drawing on a significant amount of expertise and

1 network build capacity), handling procurement, and financing a project costing over ten billion
2 dollars. Furthermore, because DISH is required to operate on a shared infrastructure with T-
3 Mobile, it would need to rely on T-Mobile to make modifications to support new services (e.g.,
4 advanced streaming platforms, multimedia broadcast). In coordinating with T-Mobile, it may
5 need to disclose sensitive intellectual property to a competitor to make the changes.
6 Moreover, the commitments DISH has made are far more limited than they appear at first
7 blush. DISH is required to serve only 70% of the population by 2023 – and only at 35 Mbps.
8 This speed is already exceeded in many 4G-served areas (including by Sprint) and represents a
9 very low goal for 5G service. If 35 Mbps is the typical speed of the DISH network in 2023, while
10 the other three facilities-based wireless carriers offer service in hundreds of Mbps – and if this
11 limitation is a baked-in technological limit because of fewer sites or less capacity per site – the
12 result will not be a bona fide fourth network, but a niche network closer to the limited internet of
13 things (IoT) network proposed by DISH prior to the T-Mobile deal.
14 From a financial standpoint, DISH's incentives run counter to the goal of creating a
15 competitively significant new entrant. Several prominent analysts who have examined DISH's
16 incentives have pointed to: (a) the enormous financial challenges of building a competitive 5G
17 retail network; (b) the fact that DISH may be better served financially by remaining an MVNO
18 customer of T-Mobile rather than building a competitive network; and (c) the incentives DISH
19 has to provide services outside of the relevant market (e.g. wholesale services) even if it does
20 build a network.
21 For example, a research analyst at Guggenheim Securities wrote: "We continue to see
22 many possible outcomes for DISH that are unlikely to result in a multi-billion dollar network
23 build to end up a sub-scale distant fourth provider with a handful of prepaid subscribers." A
24 CFRA analyst noted: "[W]e remain skeptical on the potential financial, technical and regulatory

1 hurdles" DISH faces in entering the market. And Deutsche Bank Research analysts wrote: "We
2 don't believe that DISH's strategy has been focused in any meaningful way on consumer
3 wireless, at least not for the past few years. Instead, the company has focused on a Neutral Host
4 wholesale model, which would allow clients to own and manage their own slice of the network
5 through virtualization and to fully control and provision their company's own applications and
6 services." *DISH's inability to satisfy basic requirements for a divestiture buyer, and the lack of*
7 *adequate incentives for DISH to compete in the relevant market, render the federal commitments*
8 *useless in remedying the proposed merger's anti-competitiveness*.
9 Complex remedies carrying a high risk of failure are antithetical to Congress's
10 determination that risks to the public should be small. The "MVNO-to-iMVNO-to-MNO" model
11 may be facially attractive, but as recent experience in Europe demonstrates, the reality is that this
12 model is extraordinarily complex, full of risks, and may not be a profitable strategy. There is
13 evidence both in the DOJ Amended Complaint[2] and in the FCC record[3] of the substantial harm
14 the public would bear in the event that the remedy fails to create a viable fourth competitor –
15 harm estimated by the DOJ Antitrsut Division to be in the *billions* of dollars annually.
16 Under any reasonable definition of the "public interest," a remedy that carries a high risk
17 of failure and exposes the public to substantial economic harm if it fails cannot be said to be in
18 the "public interest." The Commission cannot find that the proposed merger, with or without the
19 the federal commitments, is in the public interest and therefore, must deny the merger.

[2] *See* **Attachment B**: *U.S. Department of Justice, Antritrust Division, et al. v. Deutsche Telekom AG, et al.*, Case No. 1:19-cv-02232-TJK, Fourth Amended Complaint, November 8, 2019.
[3] *See e.g.,* **Attachment C**: Letter from P. Michaelopoulos to D. Dortch re: Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, April 8, 2019 (In sum, "[t]he historical precedent lends credence to the economic findings in this merger review that prices for consumers will rise precipitously if the merger is approved."); **Attachment D**: Reply of DISH Network Corporation, Applications of T-Mobile US, Inc. and Sprint Corporation Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, October 31, 2018, pp. 22-27.

1 **II. THE FEDERAL COMMITMENTS DO NOT REMEDY THE MERGER'S JOB**
2 **LOSSES OR STORE CLOSURES**
3
4 The proposed transaction puts 30,000 U.S. jobs at risk, including more than 3,000 retail
5 jobs in California.
6 **A. Postpaid Retail Job Losses in California**
7 The Applicants' proposed divesture of the Boost Mobile business does not impact our
8 initial estimate of postpaid retail job losses in California. We project that initial store closures
9 following the merger will eliminate more than 2,864 postpaid retail positions in California, but
10 that these losses will be somewhat offset by gains at remaining stores which will increase
11 employment to deal with the higher volumes. We project the proposed transaction will cause a
12 net loss of 1,707 postpaid retail jobs in California.[4]
13 **B. Prepaid Retail Job Losses in California**
14 We initially estimated that the merger would lead to the closure of 545 Metro and Boost
15 Mobile prepaid stores in California. With an estimated three employees per store,[5] we projected
16 that this consolidation in the prepaid wireless market would cost 1,635 retail jobs.[6] The
17 Applicants' proposed divestiture of the Boost Mobile business to DISH attempts to address these
18 concerns, among others. However, neither DISH nor T-Mobile has made any commitments to
19 maintain employment levels in the prepaid retail operations. In the absence of such

[4] Opening Testimony Of Debbie Goldman On Behalf Of Communications Workers Of America District 9 in the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, INC., a Delaware Corporation, For Approval of transfer of Control of Sprint Communications Company L.P, Pursuant to California Public Utilities Code Section 853(a), Application No. 18-07-011, And Related Matter, Application No. 18-07-012, as amended February 4, 2019 (hereinafter *Debbie Goldman Testimony*).
[5] Employment estimates from press coverage of store openings such as: https://patch.com/florida/newportrichey/talk-time-store-opens-new-tampa-bay-location, http://www.mlive.com/business/west-michigan/index.ssf/2012/07/boost_mobile_to_open_location.html
[6] See *Debbie Goleman Testimony*, at 54.

(footnote cont'd…)

1 commitments, we believe that thousands of jobs in Boost and Metro stores continue to be at risk
2 as a result of this transaction. Indeed, new analysis by CWA shows that since the announcement
3 of their proposed merger in April 2018, the Applicants have reduced their prepaid retail footprint
4 by a net 225 retail locations resulting from 368 closures and 143 openings. This net reduction
5 equates to 41 percent of the prepaid store closures and job losses that CWA initially projected to
6 take place following the merger.[7] In the Los Angeles metro area, the second largest wireless
7 market in the country, the Applicants reduced their prepaid retail footprint by 15 percent, a net
8 decrease of 116 locations, including a 12 percent reduction of Metro locations and 20 reduction
9 percent of Boost Mobile locations.[8]

10 The Applicants' shrinking prepaid retail footprint in California is alarming because this
11 directly contradicts the Applicants' prior claims in this proceeding that there would be no change
12 to their prepaid strategy and that their merger would create jobs. Furthermore, if the Applicants
13 are seeking to divest the Boost operation to DISH in order to create a bona fide competitor, it is
14 not clear why they would choose to reduce Boost retail locations by one fifth in one of the largest
15 wireless retail markets in the country. The Applicants' actions over the last year raise serious
16 questions about whether their unenforceable claims of public interest benefits can be trusted.
17 Without any commitments by the Applicants to protect jobs, California remains at risk of losing
18 thousands of additional prepaid retail jobs.

19 **C. Downward Wage Pressure**

20 Analysis by the Economic Policy Institute and Roosevelt Institute of the labor market
21 impact of the proposed Sprint/T-Mobile merger found that the resulting consolidation will put

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[7] CWA analysis of store location data collected from Metro and Boost Mobile's websites in May 2018 and November 2019.

[8] *Id*. The Los Angeles-Long Beach-Anaheim, CA U.S. Census Metropolitan Statistical Area includes Los Angeles and Orange counties.

1 downward pressure on the annual earnings of retail workers who sell wireless equipment and
2 services. The economists found that post-merger, the annual earnings of retail wireless workers
3 could decline by $3,276 on average (across the 50 largest markets) using the specification with
4 the largest magnitude, and $520 on average using the smallest magnitude specification."[9] The
5 authors found that post-merger average annual earnings of retail wireless workers will decline in
6 these California local labor markets as follows (using the specification with the largest
7 magnitude):

8 - Los Angeles: $2,906 decline in retail wireless workers annual earnings
9 - San Francisco: $2,953 decline in retail wireless workers annual earnings
10 - San Diego: $2363 decline in retail wireless workers annual earnings
11 - San Jose: $2,728 decline in retail wireless workers annual earnings
12 - Sacramento: $2,319 decline in retail wireless workers annual earnings.[10]

13 New evidence in the FCC's Order approving the merger supports the findings of the
14 Economic Policy Institute and Roosevelt Institute report. In its analysis, the FCC notes that the
15 merged entity will be able to reduce dealer commission rates because of the increased volumes
16 after closure of duplicative retail locations. [11] These supposed "synergies" represent affirmative
17 plans by the Applicants to use their increased market power to extract economic benefit from

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[9] Adil Abdela and Marshal Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger*, Economic Policy Institute and Roosevelt Institute (December 17, 2018), https://www.epi.org/files/pdf/159194.pdf.
[10] *Id*.
[11] Memorandum Opinion And Order, Declaratory Ruling, And Order Of Proposed Modification in the Matter of the Joint Application of Sprint Communications Company L.P. and T-Mobile USA, INC., a Delaware Corporation. For Consent To Transfer Control of Licenses and Authorizations and Applications of American H Block Wireless before the Federal Communications Commission. FCC 19-103. WT Docket No. 18-197. Adopted October 15, 2019.

(footnote cont'd…)

authorized dealers through reduced commissions. The Applicants' plans to reduce dealer commission rates will directly translate to lower compensation levels for retail workers.

D. New Evidence of T-Mobile's Violation of Workers Rights

In our Opening Testimony and Opening Brief, CWA provided the Commission with substantial evidence of T-Mobile's long history of violation of labor law and workers' rights, a history that speaks volumes about the Applicant's trustworthiness and corporate character.[12] We now update this evidence. Recently, the National Labor Relations Board's Region 32 found merit to the following unfair labor practice charge allegations that CWA filed against T-Mobile on September 16, 2019 regarding employer behavior at a T-Mobile retail store in Pinole, CA:

> Within six months, the employer threatened employees with discharge in response to protected concerted activity. The employer, through the same person [name], interrogated employees about their protected concerted activity. [Name] further precluded employees from addressing group or workplace concerns, impliedly threatened employees with transfer in retaliation for protected concerted activities, and advised employees of the futility of organizing a union.[13]

III. THE FEDERAL COMMITMENTS DO NOT REMEDY THE MERGER'S COMPETITION CONCERNS

A. Antitrust Division Policy Requires Merger Remedies to be "Appropriate, Effective, and Principled" – the DISH Divestiture Violates All of These Basic Tenets

The DOJ's Antitrust Division policies on merger remedies provide guidance for determining whether the federal commitments resolve the proposed merger's anti-competitivenss.[14] They do not. In fact, the DISH divestiture ***violates*** a number of clearly

[12] Opening Testimony of Debbie Goldman, as amended February 4, 2019, pp. 61-64; Opening Brief of CWA, April 26, 2019, pp. 32-34

[13] Communications Workers of America, District 9, Unfair Labor Practice Charge against Deutsche Telekom AG d/b/a T-Mobile, Case 32-CA-248363, filed Sept. 16, 2019; National Labor Relations Board Settlement Agreement, In the Matter of T-Mobile USA, Inc., Case 32-CA-248363.

[14] Sources of Antitrust Division merger remedy policies include: (a) U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) ("2004 Merger Remedies Guide"), https://www.justice.gov/atr/page/file/1175136/download; (b) speeches, testimony and other

(footnote cont'd…)

1 articulated Antitrust Division policies on merger remedies and, therefore, could not resolve the
2 merger's anti-competitiveness.
3 On the most fundamental level, Antitrust Division policy mandates that any merger
4 remedy must adhere to three basic tenets. As stated in the 2004 Merger Remedies Guide:
5 "Remedial provisions in Division decrees must be *appropriate, effective, and principled*."[15] The
6 use of the word "must" shows that these characteristics are not optional. The remedy here
7 violates all of these basic tenets.
8 In order to be "appropriate," a remedy must address the competitive harm alleged. The
9 government is obligated to insure that "the remedy fits the violation and flows from the theory of
10 competitive harm."[16] Stated otherwise, "[t]here must be a significant nexus between the proposed
11 transaction, the nature of the competitive harm, and the proposed remedial provisions."[17]
12 In this case, the Antitrust Division's Amended Complaint summarizes its theory of harm
13 for the proposed merger. The merger would "eliminate Sprint as an independent competitor" in
14 the national market for retail mobile wireless service, thereby "reducing the number of national
15 facilities-based mobile wireless carriers from four to three."[18] The elimination of Sprint as an
16 independent competitor would cause the merged firm to "compete less aggressively" and "likely
17 would make it easier for the three remaining national facilities-based mobile wireless carriers to
18 coordinate their pricing, promotions, and service offerings."[19] The result would be "increased

public statements of Division officials, *see* ANTITRUST DIVISION MANUAL (Fifth Edition) at III-21 ("Other sources of Division policy include the public statements of Division officials"), https://www.justice.gov/atr/file/761166/download; and (c) court filings by the United States that include statements about Division policy.

[15] 2004 Merger Remedies Guide at 2.

[16] *Id*. at 3-4.

[17] *Id*. at 2.

[18] **Attachment B**: ¶¶ 5, 14, 15.

[19] *Id*. ¶ 5.

(footnote cont'd…)

1 prices and less attractive service offerings for American consumers, who collectively would pay
2 billions of dollars more each year for mobile wireless service."[20]
3 Sprint is characterized as an "independent competitor" and one of four "national
4 facilities-based mobile wireless carriers." There is no suggestion anywhere in the Amended
5 Complaint that carriers without their own networks (MVNOs) are competitively significant
6 market participants in the relevant market alleged in the Amended Complaint. Indeed, paragraph
7 16 suggests the opposite: "Post-merger, the combined share of T-Mobile and Sprint would
8 account for roughly one-third of the national retail mobile wireless service market, leaving only
9 two other national wireless carriers of roughly equal size (AT&T and Verizon)." In other words,
10 the four facilities-based competitors are the only competitively significant firms in the market as
11 alleged. There is no suggestion anywhere in the Amended Complaint that MVNOs would or
12 could constrain the post-merger price increases the Antitrust Division has predicted or that they
13 would or could disrupt the coordinated effects the Antitrust Division has alleged.
14 A complaint that alleges competitive harm in one relevant market is not appropriately
15 remedied by divestitures that enable a buyer to participate in a different market, as a
16 competitively insignificant force in the relevant market alleged in the complaint, and unable to
17 constrain the asserted competitive harm. In order to be "effective," a remedy must restore the

[20] *Id.* ¶ 5.

(footnote cont'd…)

1 competition lost through the merger.[21] That is the only acceptable goal of a merger remedy.[22]
2 The 2004 Merger Remedies Guide uses the word "effective" dozens of times, including in a
3 quotation from the Supreme Court: "The relief in an antitrust case must be 'effective to redress
4 the violations' and 'to restore competition.'. . ."[23]

5 There are two dimensions of remedial effectiveness we focus on here: First, a divestiture
6 remedy "must include all assets necessary for the purchaser to be an effective, long-term
7 competitor."[24] Second, the remedy must allow the purchaser "to compete effectively in a timely
8 fashion."[25] The first of these requirements takes a long term view, the second looks at the near
9 term. The remedy fails on both scores.

10 The assets to be divested do not include a fully operational standalone network with a
11 core and spectrum, which is the critical asset that differentiates an independent, competitively
12 significant MNO from a dependent, competitively insignificant MVNO.[26]

13 In *United States v. Aetna and Humana*, the Antitrust Division alleged that the lack of a
14 network (in that case, a provider network) was a key reason for rejecting the partial asset
15 divestiture proposed by the parties as a remedy. The Antitrust Division also highlighted the

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[21] Sprint has $33.6 billion in annual revenue, $12.8 billion in annual EBITDA, $84.6 billion in assets, $21.2 billion property, plant, and equipment, 28,500 employees, 300 million POPs, 46,000 towers, 30,000 small cells, 1,500 massive MIMO radios, 14 MHz in 800 MHz band, 40 MHz in the 1.9 GHz band, and 150 MHz in the 2.5 GHz band (varies by location), 54.5 million subscribers, including 28.4 million postpaid, 8.8 million prepaid, and 12.9 million wholesale. In contrast, DISH has $13.4 billion in annual revenue, $2.8 billion in annual EBITDA, $31.7 billion in assets, $2.6 billion in property, plant, and equipment, 16,000 employees, 10-40 MHz in the 600 MHz band, 6 MHz in 700 MHz band, 70 MHz in the AWS band, and no wireless subscribers. Sprint's leverage ratio is 2.6x compared to DISH at 6x (Source: CapitalIQ for LTM 12 months ending in March 31, 2019; DISH leverage ratio: Bank of America).
[22] 2004 Merger Remedies Guide at 4 ("restoring competition is the only appropriate goal with respect to crafting merger remedies").
[23] *Id*. at 9 n.13 (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972)).
[24] *Id* at 9.
[25] *Id*.
[26] *See* 2004 Merger Remedies Guide at 15 n.21 ("A critical asset is one that is necessary for the purchaser to compete effectively in the market in question.").

(footnote cont'd…)

difference between an "independent competitor" and one dependent on the merged entity. As the Antitrust Division alleged in its complaint:

> 60. The buyer would not be an independent competitor as Humana is today. The proposed remedy would leave the buyer dependent on Aetna—potentially for years—for providing basic services. Since the buyer would not have a healthcare provider network in place or be acquiring an intact business unit that would enable it to operate on its own, it would have to rely on Aetna's healthcare provider network and receive administrative services from Aetna for a lengthy period. Because the buyer would receive only limited assets, the buyer would be highly unlikely to timely replicate Aetna's and Humana's existing provider networks and competitive strengths in the relevant markets.[27]

This case illustrates the problem with a divestiture that lacks a key asset that cannot be readily obtained or duplicated by the buyer. Without that asset, the buyer cannot compete in the relevant market. The absence of a critical asset in this case is even more significant than in the *Aetna* case: If anything, it is far more difficult and challenging for a divestiture purchaser to create a nationwide wireless network than a healthcare provider network. The remedy here significantly departs from Antitrust Division policy that a divestiture must include all of the assets necessary for the purchaser to be an effective, long-term competitor. (We discuss several other reasons to doubt that the purchaser would ever become an effective long-term competitor in the relevant market later in these comments.)

The timeliness of a remedy is also critical. Per Antitrust Division policy, the remedy must "restore[ ] premerger competition to the marketplace as soon as possible."[28] Deputy Assistant Attorney General Barry Nigro emphasized this point in a speech in 2018: "[T]he goal of a divestiture is not to simply remove the offending combination; rather, it is to promote and protect

[27] Complaint, *United States et al. v. Aetna Inc. and Humana Inc.*, Case 1:16-cv-01494 (July 21, 2016), available at https://www.justice.gov/atr/file/878196/download.
[28] 2004 Merger Remedies Guide at 29.

(footnote cont'd…)

1 competition by preserving the status quo competitive dynamic in the market from day one."[29]

2 The Antitrust Division has explained the rationale behind this policy as follows:

3 A quick divestiture has two clear benefits. First, it restores premerger competition to the
4 marketplace as soon as possible. Second, it mitigates the potential dissipation of asset
5 value associated with a lengthy divestiture process.[30]
6
7 The DISH divestiture dramatically departs from the long-standing Antitrust Division

8 policy that an effective remedy must *quickly* restore the lost competition in the relevant market

9 alleged in the complaint. Here, the remedy envisions a multiyear process whereby the divestiture

10 buyer may, someday, transform from an MVNO into an "Infrastructure MVNO" (iMVNO) and

11 then into an MNO. At that point, assuming it ever arrives, the remedy would "restore premerger

12 competition to the marketplace" and "protect competition by preserving the competitive dynamic

13 in the market." But it is indisputable that this result, assuming it occurs at all, will take years.

14 The remedy will not restore competition "quickly," let alone on "day one." In the interim,

15 subscribers to DISH's prepaid wireless service may go elsewhere, eliminating one of the asserted

16 benefits of transferring these customers. Further, while Sprint currently has postpaid as well as

17 prepaid customers, the remedy does nothing to enable DISH to quickly enter the postpaid

18 segment of the market, which is the more profitable segment.

19 Finally, the remedy in this case includes non-contract (prepaid) customers, limited

20 intellectual property rights, and assets that are not freely transferable but require

21 decommissioning and third-party consents.

22 In sum, the remedy in this case lacks the fundamental characteristics the Antirtrust

23 Division requires, as a matter of policy, in an "effective" remedy.

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[29] Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.
[30] 2004 Merger Remedies Guide at 29.

(footnote cont'd…)

1 The remedy is not "principled." One of the guiding principles of merger remedies is that
2 "[t]he remedy should promote competition, not competitors."[31] As the 2004 Merger Remedies
3 Guide states: "Because the goal is reestablishing competition — rather than determining
4 outcomes or picking winners and losers — decree provisions should promote competition
5 generally rather than protect or favor particular competitors."[32]

6 Senator Mike Lee has raised questions about the Antritrust Division's adherence to this
7 guiding principle. As Senator Lee has stated, "I have concerns whenever government joins hands
8 with industry to cobble together a would-be competitor, particularly one who so stridently
9 opposed the merger earlier this year."[33] Doing so "will no doubt invite similar gamesmanship in
10 future antitrust reviews."[34] The remedy attempts to cobble together an entirely new wireless
11 competitor. The selection of DISH as that would-be new competitor raises questions about
12 whether the Antitrust Division is carrying out its law enforcement mandate or is stepping outside
13 of its role.

14 DISH has been a persistent and vocal opponent of the proposed merger from the
15 beginning. It has submitted detailed economic evidence rebutting the Applicants' claims that the
16 transaction would be procompetitive. As recently as March, T-Mobile asserted that "DISH has
17 little interest in actually delivering real 5G service and its private pecuniary interest is to delay or
18 block those who would actually do so."[35] In the same month, T-Mobile accused DISH's

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[31] 2004 Merger Remedies Guide at 5.
[32] *Id.*
[33] "Sen. Lee Comments on DOJ's T-Mobile/Sprint Decision," July 26, 2019, available at https://www.lee.senate.gov/public/index.cfm/press-releases?ID=E4D78A0C-2096-4830-889F-825516016647.
[34] *Id.*
[35] *See* Ex Parte Letter from Nancy J. Victory, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2019), at 1 n.3, available at https://ecfsapi.fcc.gov/file/1031124977749/March%2011%202019%20Pricing%20ex%20parte.pdf.
(footnote cont'd…)

1 economists of fabricating data.[36] Now the Applicants and DISH have reached an accommodation
2 with each other. The deal joins the T-Mobile and DISH at the hip for up to seven years, ridding
3 T-Mobile of a thorn in its side. The deal also would delay yet again FCC network deployment
4 deadlines that DISH must meet, ridding DISH of the prospect of spectrum forfeiture.

5 In sum, the DISH divestiture fails to satisfy Antitrust Division merger remedy policies
6 which represent sound antitrust enforcement.

7 **B. The Divestiture of Less Than a Full Business Unit Carries Significant Execution**
8 **Risk and the Risk is Particularly High in This Case**
9

10 The divestiture of less than a full business unit creates a serious risk that the divestiture
11 will fail to restore competition. This is why, as a matter of policy, the Antitrust Division "favors
12 the divestiture of an existing business entity that has already demonstrated its ability to compete
13 in the relevant market."[37] As Deputy Assistant General Barry Nigro has stated, "asset carve outs
14 are fraught with execution risk."[38]

15 The DISH divestitures are far less than a full business unit. The divested assets in this
16 case include prepaid brands with high churn rates, options on "decommissioned" cell sites and
17 "decommissioned" retail stores (that may additionally require third-party consents), and an
18 option to acquire Sprint 800 MHz licenses representing a small frequency band. If asset carve
19 outs in general are "fraught with execution risk," the execution risk is even greater in this case.

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[36] *See* Letter from Regina M. Keeney, Nancy J. Victory and additional signatories to Marlene H. Dortch, Secretary, Federal Communications Commission (March 14, 2019) at 1-2, available at https://ecfsapi.fcc.gov/file/10314256344084/March%2014%202019%20Public%20Ex%20Parte%20(Response%20to%20Brattle).pdf.
[37] 2004 Merger Remedies Guide at 12.
[38] Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

(footnote cont'd…)

1 DISH will have no reliable track record for current and prospective customers to evaluate
2 whether the business will continue to be a reliable provider of the relevant products.[39] Here, for
3 example, the Boost and Virgin brands will be divested, but not the network on which the phones
4 run, the vast majority of retail stores, or the call centers. This creates a potential one-two punch
5 for customers who experience issues with their phones or network service and leads to the
6 likelihood that customer churn will be even higher than it is now. Sprint's prepaid customer
7 churn is already very high – more than 4% monthly, according to its SEC filings.[40] If Boost,
8 Virgin and Sprint prepaid customers were to switch to other carriers, even at the current rate of
9 churn, the divestiture buyer could easily lose *most* of its installed base of customers within two
10 years – well before it could be expected to construct its own network even under the most
11 optimistic of projections. This would wipe out the asserted benefits to the buyer of "acquiring an
12 installed base of existing customers."[41]

13 Second, Antitrust Division policy highlights that the divestiture of less than a full
14 business entity carries the risk that the seller will sell fewer assets than are required for the
15 purchaser to compete effectively going forward while the buyer may be willing to purchase these
16 assets, even if they are insufficient to restore competition, at a low enough price.[42] As the
17 Antitrust Division has aptly observed:

18 A purchaser's interests are not necessarily identical to those of the public, and so long as
19 the divested assets produce something of value to the purchaser (possibly providing it
20 with the ability to earn profits in some other market or enabling it to produce weak
21 competition in the relevant market), it may be willing to buy them at a fire-sale price
22 regardless of whether they cure the competitive concerns.[43]
23

[39] 2004 Merger Remedies Guide at 12-13.
[40] Sprint Communications, SEC Form 10Q, August 6, 2019, p. 47.
[41] Competitive Impact Statement at 9.
[42] 2004 Merger Remedies Guide at 13.
[43] *Id*.

1 In this case, both of these concerns are front and center. The assets being sold are on their face
2 insufficient to cure the competitive concerns, as they represent a tiny fraction of Sprint's existing
3 business. And, although the terms of the commercial agreements are confidential, one may
4 assume in the absence of evidence to the contrary that DISH has negotiated favorable terms in
5 exchange for withdrawing its opposition to the transaction.

6 Under these circumstances, neither the seller's nor the buyer's interest can be expected to
7 match the interest of the public.

8 **C. At its Core, the Divestiture Depends on Behavioral Conditions that Will Last for**
9 **Years, Creating Excessive Entanglements Between Buyer and Seller and**
10 **Requiring Multiyear Oversight**
11

12 Although the Antitrust Division has characterized the DISH divestiture as "structural,"
13 that this is not an accurate characterization. Under Antitrust Division policy, the term
14 "structural" is generally reserved for divestiture remedies that do not involve ongoing
15 entanglements between the divestiture buyer and seller, do not involve ongoing regulation of the
16 buyer or seller's conduct, and do not require lengthy and extensive government monitoring and
17 enforcement. The DISH divestiture is more accurately characterized as a "conduct" remedy that
18 includes certain limited divestitures. As such, it is contrary to long-standing DOJ policy which
19 strongly favors structural remedies over behavioral decrees, particularly in horizontal mergers.[44]

20 The weaknesses inherent in behavioral decrees are spelled out in the 2004 Merger
21 Remedies Guide:

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[44] *See* 2004 Merger Remedies Guide at 9 ("structural merger remedies are strongly preferred to conduct remedies"). Indeed, the current Division leadership has reinforced the strong preference for structural relief by withdrawing the 2011 Merger Remedy Guides which lacked this explicit statement of Division preference. See Assistant Attorney General Makan Delrahim, "Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium" (September 25, 2018) at 11-12 (withdrawing 2011 Merger Remedies Guide and stating that 2004 Merger Remedies Guide will be in effect until Division releases an updated policy).

(footnote cont'd…)

> Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. . . . A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.[45]

Antitrust Division leadership has elaborated on the problems with behavioral remedies in recent speeches. In a 2017 speech, Assistant Attorney General Delrahim explained that behavioral remedies are inherently regulatory, and therefore at odds with both free market principles and the dynamic realities of markets:

> Like any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don't think I'm smart enough to do that.
>
> Behavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep's clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.[46]

Deputy Assistant Attorney General Barry Nigro expanded on these principles in a speech in 2018. He stressed that there is a growing consensus among antitrust economists and attorneys that *behavioral remedies "may simply be ineffective at remedying harm to competition."* Plus, he emphasized the costs of monitoring and enforcing such remedies, and in particular the fact that the Antitrust Division too often finds itself in the business of investigating possible violations. This is not surprising, as behavioral decrees compel companies not to do things they ordinarily would do, and compel them to do other things they ordinarily would not do in an unregulated environment:

[45] 2004 Merger Remedies Guide at 7-8.
[46] U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (November, 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

> The imposition of a behavioral remedy inverts the Division's role into something it is not—the hall monitor for private businesses operating in a free market economy. Even worse, a behavioral approach raises serious risks of false negatives and false positives. Antitrust economists and attorneys across the ideological spectrum have recognized that behavioral decrees may simply be ineffective at remedying harm to competition. As FTC Commissioner Terrell McSweeny explained last year, behavioral relief 'at best only delays the merged firm's exercise of market power.' In addition, trying to regulate corporate behavior creates challenges monitoring and enforcing compliance. It should be no surprise that we find ourselves too often in the business of expending scarce taxpayer resources investigating possible violations of regulatory decrees, all aimed at ensuring that consumers do not suffer the harm the decree attempted to regulate away.[47]

The bulk of the remedial provisions in the federal commitments consist of behavioral conditions. Some of these require the merged company to work against its profit-maximizing incentives, such as by providing numerous services to a would-be competitor for an extended period of time. Others purport to order DISH to do things it would not ordinarily do, such as to offer a particular type of service. The net result is excessive entanglements between buyer and seller and the requirement of multiyear oversight.

Indeed, the Antitrust Division has experience in the telecom space with a failed remedy involving excessive entanglements. In 1998, MCI/WorldCom agreed to divest MCI's Internet assets to Cable & Wireless as a merger remedy.[48] At the time, Sprint and other third parties expressed concern that Cable & Wireless' post-divestiture dependence on MCI WorldCom for transport, operations support, and other services would leave Cable & Wireless vulnerable and a weak competitor.[49]

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[47] U.S. Dep't of Justice, Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida (February 2, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

[48] *See In the Matter of Application of Worldcom, Inc. & MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to Worldcom, Inc.*, 13 F.C.C. Rcd. 18025 ¶151 (F.C.C. 1998).

[49] *Id.* at 154 and fn. 426 (citing, among other comments, Sprint June 11, 1998 Comments at 11, 16).

(footnote cont'd…)

1 Within two years, Cable & Wireless' Internet market share dropped from MCI's pre-
2 divestiture 40 percent to less than 10 percent.[50] As it turned out, MCI failed to transfer all
3 necessary personnel, contracts, contract documentation, database access, and billing services,
4 despite obligations to do so.[51] The result was not replacement of lost competition but was,
5 instead, litigation. Cable & Wireless eventually lodged a formal complaint with the European
6 Commission and filed suit against MCI WorldCom in U.S. District Court, reaching an out of
7 court $200 million settlement.[52]
8 The failed MCI divestiture to Cable & Wireless should stand as a stark warning about
9 excessive entanglements and information asymmetries in a telecom remedy.
10 **D. DISH Fails to Meet Standard Requirements for a Divestiture Buyer**
11 The Antritrust Division's Amended Complaint alleges that the loss of a fourth competitor
12 in the retail wireless market is competitively harmful. The record here also shows that the loss of
13 Sprint as a fourth competitor would be competitively harmful. Thus, the minimum requirement
14 that any remedy must meet to protect the public interest is that it must recreate a competitively
15 significant fourth competitor. This makes the competitive attributes of DISH critical to the
16 Commission's public interest determination. If DISH is not a suitable or effective competitor, the
17 remedy is likely to fail and the competitive harm of the merger will not be remedied.
18 The DOJ Antitrust Division policies are, once again, useful guidance on this issue. The
19 Antitrust Division requires divestiture buyers to demonstrate "managerial, operational, technical,

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[50] CWA Comments, MCI/World Com Applications for Transfer of Control, CC Docket No. 99-333 at 37. Data from Applicants' Internet Submission Attachments 3 and 5 for C&W's 2000 market share and *Boardwatch* June 1997 for MCI's pre-divestiture market share.
[51] *See* Cable & Wireless FCC Comments, CC Docket No. 99-333, Feb. 18, 2000 at 36-41.
[52] Rebecca Blumenstein, *MCI WorldCom to Pay Cable & Wireless $200 Million to Settle Internet Dispute*, Wall Street Journal, March 2, 2000, available at https://www.wsj.com/articles/SB951922751787792103.

(footnote cont'd…)

1 and financial capability" to "compete effectively" in the relevant market alleged in the
2 complaint.[53] The buyer in this case fails on every score – DISH lacks financial resources of its
3 own and has not secured third-party funding; it has management that has not built a wireless
4 network despite the legal obligation to do so; and it has no experience or technical ability to
5 operate such a network, the challenges of which are extensive. At the same time, DISH has
6 demonstrated a willingness to abuse a federal program to obtain over $3 billion in taxpayer-
7 funded discounts, and thereby to make "a mockery of the small business program" in the words
8 of then-Commissioner Ajit Pai.[54]

9 **1. Financial**

10 Financially, DISH is not in good shape. It has been steadily losing customers.[55]
11 It is highly and increasingly leveraged, with significant debt maturing soon.[56] Analysts predict
12 that DISH will have difficulty meeting its debt obligations related to DBS in 2022 and that

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[53] 2004 Merger Remedies Guide at 32.

[54] Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing before the Senate Appropriations Subcommittee on Financial Services and General Government (May 12, 2015) at 5, https://www.appropriations.senate.gov/imo/media/doc/hearings/051215%20Commissioner%20Pai%20Testimony%20-%20FSGG.pdf.

[55] *See* Tuna N. Amobi, CFRA Research Note, July 30, 2019 ("We project a decline of 7.8% in 2019 revenues, to $12.56 billion. In recent years, DISH has persistently shed a relatively sizable portion of its traditional pay-TV subscriber base (down 7% in H1 2019 on top of a 10% decline in 2018 on some notable carriage disputes and a 9% decline in 2017 in the aftermath of hurricane disruptions). With likely continued pricing pressures on a blended pay-TV average revenue per user (ARPU), we see another 4.5% decline in 2020 revenues. . . .") (Accessed via Standard & Poor's Capital IQ research database, hereinafter "CIQ.")

[56] See "Ratings Action: Moody's places DISH Network's and DISH DBS's ratings on review for downgrade," July 29, 1019, https://www.moodys.com/research/Moodys-places-DISH-Networks-and-DISH-DBSs-ratings-on-review--PR_405815 (detailing the company's debt maturity obligations, the ratings agency noted "DISH DBS's leverage is high at about 4.2x (with Moody's standard adjustments) as of March 31, 2019, and it has steadily mounting maturities with $4.4 billion due through June 2021. We believe that the company can meet the DISH DBS September 2019 $1.3 billion maturity and the $1.4 billion purchase price for the prepaid wireless subscriber businesses being acquired with cash and securities on hand ($2.4 billion as of March 31, 2019) and free cash flow generated through the close of the acquisition. However, DISH DBS has another maturity totaling $1.1 billion in May 2020 and another totaling $2.0 billion in June 2021 which appear to be beyond current cash flow capacity. Therefore, it is highly likely in our view, that the company will raise new debt at DISH Network over the coming year. . .

(footnote cont'd…)

1 business may be forced into a restructuring.[57] Moody's states that DISH's June 2021 $2.0 billion
2 maturity is "beyond cash flow capacity" and the company likely will need to take on new debt.[58]
3 According to its CEO, DISH presently has no financing in place to build a 5G retail
4 network.[59] This should be a big red flag for the Commission. At least one analysist has
5 commented that DISH's estimate of the cost of building a network is so low as to be "just
6 silly."[60] In short, while Sprint may have financial challenges, it is at least actively building a 5G
7 network. DISH, on the other hand, faces similar if not greater financial challenges in its present
8 business without factoring in the billions of dollars it would cost to construct a 5G retail network.
9 DISH has failed to show that it has the financial capability required of an acceptable buyer.

10 **2. Managerial**

11 Over the last year DISH has lost a significant number of senior executives.[61] Its
12 management has no experience building a retail 5G network. There has been no showing that it

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. If any or all of the capital needs are financed with new debt, a significant strain on DISH's consolidated balance sheet will likely occur.").

[57] Jeffrey Wlodarczak, Pivotal Research Group, "Story Morphs from Spectrum Sale to Building Wireless Business," July 30, 2019 ("Using our current forecasts, we believe that the core DBS business will have difficulty repaying its $2B '22 maturity, and beyond. . . . potential DBS could be forced into '22 restructuring")(Accessed via CIQ).

[58] See https://www.moodys.com/research/Moodys-places-DISH-Networks-and-DISH-DBSs-ratings-on-review--PR_405815.

[59] *See* Drew FitzGerald, Dish's Ergen Defends Company's Wireless Plans, Wall Street Journal (August 6, 2019) ("We know that we do need to strengthen our balance sheet, but we don't need it tomorrow . . . . We don't need $10 billion tomorrow. In fact, we don't need any money tomorrow,"), https://www.wsj.com/articles/dishs-ergen-defends-companys-wireless-plans-11565119655; Jeffrey Hill, The Dish on Ergen's 5G Masterstroke, Via Satellite (October 2019) ("We still plan to spend about $10 billion to build our network and we're still going to need help."), http://interactive.satellitetoday.com/via/october-2019/the-dish-on-ergens-5g-masterstroke/.

[60] *See* Daniel Frankel, Can Dish Really Build a 5G Network for $10B?, Multichannel News (August 5, 2019) ("Verizon spends $15 billion annually to maintain a network that they've already built," MoffettNathanson principal and senior analyst Craig Moffett wrote in a research note. "The idea that Dish might spend $10 billion (their own estimate on previous conference calls) and then somehow be finished is, well, just silly."), https://www.multichannel.com/news/can-dish-really-build-a-5g-network-for-10b.

[61] Jeffrey Wlodarczak, Pivotal Research Group, "Story Morphs from Spectrum Sale to Building Wireless Business," July 30, 2019 ("Over the last year DISH has lost a significant number of senior executives.")

(footnote cont'd…)

1 has the management in place to oversee the construction of a 5G retail network. Moreover,
2 DISH's CEO has earned a reputation as an unreliable partner with an appetite for litigation.[62]
3 This hardly makes DISH management a "maverick" in the sense contemplated by the Horizontal
4 Merger Guidelines.

5 **3. Technical and Operational**

6 DISH faces enormous operational and technical obstacles in emerging as an independent
7 competitor with its own 5G network and has not demonstrated that it has the necessary expertise
8 to do so. Because T-Mobile will control the technical aspects of the network, T-Mobile will be
9 able to limit the MVNO's potential service strategies—for example, by determining where
10 networks will and will not be upgraded, and when and whether new services will be available.
11 The proposed relationship between T-Mobile and DISH turns the typical MNO incentive on its
12 head: "MNOs typically only seek ways to monetize their excess capacity where it exists—not to
13 nurture the MVNOs." In addition, since the MVNO is essentially reselling the MNO's service,
14 deficiencies in the service provided by the merged company become unsolvable deficiencies in
15 the MVNO's service. Enforcement will be difficult, and remedies may not be commensurate
16 with the harm inflicted on DISH. Simply by underperforming or delaying response to resolving
17 technical problems, the merged company can badly harm the buyer.

18 DISH's execution risks in constructing a network are substantial and real. Under the most
19 optimistic timeline, DISH will require at least a year to build a robust internal team, seek and
20 select contractors, and prepare detailed designs and engineering. DISH will need more than four
21 years to deploy tens of thousands of sites with robust fiber backhaul to develop a reliable

[62] *See*, *e.g*., Mike Dano, "What Does Dish's Charlie Ergen Want?" https://www.lightreading.com/mobile/5g/what-does-dishs-charlie-ergen-want-/d/d-id/752684; Dish Network's Charlie Ergen Is the Most Hated Man in Hollywood, https://www.hollywoodreporter.com/news/dish-networks-charlie-ergen-is-432288.

1 footprint that is not highly dependent on T-Mobile. That process will require extensive design,
2 planning, procurement, site acquisition, and approvals—as well as an enormous capital
3 investment.
4 On July 30 and July 31, 2019, DISH staff met with FCC Commissioners and staff to
5 discuss the company's technical and business plans and to share an executive summary of the
6 "RFI/P" DISH had earlier distributed to potential industry suppliers. Based on the executive
7 summary of the RFI/P provided in the Ex Parte filing, we see that DISH is still in a fact-finding
8 stage—identifying which suppliers may be candidates for different parts of the build process, and
9 asking wide-ranging questions about their potential roles. This type of document usually
10 precedes engineering and design decisions, the development of more focused procurement
11 documents, and the selection of contractors to supply materials and build a network.
12 In addition, the 3GPP Rev 16 equipment that DISH Chairman Charlie Ergen has said
13 would be central to building a highly virtualized network with low operation costs relies on
14 standards that will not be available until 2020, with actual equipment possibly not available until
15 late 2020 or 2021. Without that equipment, DISH would need to change its approach to a less
16 virtualized network and, potentially, a different business model.
17 DISH's risk factors thus include activating infrastructure at tens of thousands of sites
18 while relying on technologies that do not yet exist, creating and managing a large new team in a
19 tight labor environment, getting permitting approvals, coordinating with T-Mobile (itself in the
20 process of an ambitious buildout—which could limit T-Mobile's resources available for
21 coordinating with DISH), handling procurement, and financing a project likely to cost more than
22 $10 billion.
23 In this light, it is also worth considering other major communications infrastructure
24 initiatives (e.g., Google Fiber) that failed to execute according to plan.

1 **4. History of Regulatory Evasion**

2 In addition to failing the Antitrust Division's standard evaluation of a potential buyer,
3 DISH has two attributes which make it uniquely unsuited as a divestiture buyer. First, it has a
4 well-documented history of warehousing spectrum and avoiding its obligations to the FCC.
5 Second, it has abused the FCC's small business program.

6 **a. Warehousing spectrum**

7 T-Mobile itself highlighted DISH's long history of speculative warehousing of spectrum
8 and failure to meet FCC-imposed deadlines. As T-Mobile commented in a March 2019 letter to
9 the FCC, "*DISH stands out for its efforts to game the regulatory system*" and "*has little interest*
10 *in actually delivering real 5G service*."[63] As detailed below, in three separate instances dating
11 back to 2009, DISH acquired spectrum licenses and each time missed the FCC mandated
12 construction deadlines. In fact, DISH has failed to put any of its extensive spectrum holdings to
13 use. Now, DISH seeks approval from the FCC for further extension of its construction deadlines
14 to 2025 – a full 16 years after its initial spectrum acquisition. Based on this track record, the
15 Commission should view with enormous skepticism the DISH commitments to build a facilities-
16 based wireless network.

17 *700 MHz E Block.* In 2008, DISH won in the Lower 700 MHz E Block 168 licenses in
18 auction 73. The licenses were granted in February 2009. The FCC rules for this spectrum block
19 require licensees to construct a wireless network reaching 35 percent of the geographic area of
20 each licensed Basic Economic Area (BEA) by June 2013 and 70 percent of the geographic area
21 of each BEA by 2019.[64] One day before the 2013 deadline, DISH asked the FCC for an

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[63] *See* Ex Parte Letter from Nancy J. Victory, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2019), at 1 n.3, available at https://ecfsapi.fcc.gov/file/1031124977749/March%2011%202019%20Pricing%20ex%20parte.pdf.
[64] *See* 28 FCC Rcd 15122 ¶ 55, *See also* 47 CFR 27.14G

1 extension and easing of build out requirements. The FCC complied, extending the first
2 construction deadline to March 2017, and the second to March 2021, and easing the construction
3 requirements to 40 percent and 70 percent of the population of each BEA. DISH missed the
4 March 2017 deadline, triggering a requirement that DISH build to 70 percent of the population in
5 each BEA by March 7, 2020.[65] With this deadline looming, DISH asked the FCC on July 26,
6 2019 to delay the construction deadline once again, with a requirement to build to 50 percent of
7 the U.S. population by 2023, and to 70 percent of the population in each BEA by 2025.[66] The
8 2025 deadline is a full 16 years after DISH acquired the spectrum licenses. To date, the FCC has
9 not approved the construction extension request.[67]

10 *AWS-4 Spectrum.* In March 2012, DISH acquired the spectrum licenses in the bankruptcy
11 of two satellite companies. In December 2012, the FCC approved DISH's request to use the
12 spectrum for terrestrial wireless, creating the AWS-4 service. In the *AWS-4 Order*, the FCC
13 required DISH to build out to 40 percent of the population in each BEA by March 2017 and to
14 70 percent of the population in each BEA by March 2020.[68] Missing the March 2017 deadline
15 would push the 2020 deadline back to March 2019. DISH subsequently asked for, and the FCC

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[65] *Id.*
[66] *See* Application for Extension of Time of American H Block Wireless L.L.C., ULS File No. 0008741236 (filed July 26, 2019); Application for Extension of Time of Gamma Acquisition L.L.C., ULS File No. 0008741603 (filed July 26, 2019); Application for Extension of Time of Manifest Wireless L.L.C., ULS File No. 0008741789 (filed July 26, 2019). *See* also Letter from Jeffrey H. Blum, DISH Senior Vice-President, Public Policy & Government Affairs to Donald Stockdale, Chief, Wireless Telecommunications Bureau, *re: DBSD Corporation, AWS-4, Lead Call Sign T070272001; Gamma Acquisition L.L.C., AWS-4, Lead Call Sign T060430001; Manifest Wireless L.L.C., Lower 700 MHz E Block, Lead Call Sign WQJY944; American H Block Wireless L.L.C., H Block, Lead Call Sign WQTX200; ParkerB.com Wireless L.L.C., 600 MHz, Lead Call Sign WQZM232* (filed July 26, 2019) ("DISH July 26, 2019 Letter").
[67] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.
[68] 28 FCC Rcd 16787 ¶¶ 187-188. *See also* 27 FCC Rcd 16102.

(footnote cont'd…)

1 granted, an extension of the 2020 deadline to March 2021, with a push back to March 2020 if the
2 March 2017 deadline was missed.[69] DISH failed to meet the 2017 deadline, and therefore faces a
3 looming March 2020 construction deadline for this spectrum.[70] DISH has asked the FCC to delay
4 the construction deadline once again, with the same requirements noted above for the 700 MHz
5 E block (e.g. 50 percent of US population by 2023, and 70 percent of the population in each
6 BEA by 2025).[71] To date, the FCC has not approved the construction extension request.[72]The
7 2025 deadline is a full 13 years after DISH received FCC authority to use the AWS-4 spectrum
8 for terrestrial wireless.
9 *H Block.* In 2014, DISH won all the licenses in the H block auction, with construction
10 requirements to serve 40 percent of the population in each license area by April 2018 and 75
11 percent of the population in each license area by April 2024. Not meeting the first benchmark
12 reduces the license term to April 2022.[73] DISH did not meet the 2018 deadline.[74] It has asked the
13 FCC to delay the final construction deadline to 2023 and 2025, as noted above, which is 11 years
14 after it acquired the H Block spectrum.[75] To date, the FCC has not approved the construction
15 extension request.[76]
16

[69] 28 FCCR 16787 ¶¶ 8, 41-42.
[70] 28 FCCR 16787 ¶¶ 43; 47 CFR 27.14Q; see also License T0272001.
[71] DISH July 26, 2019 Letter.
[72] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.
[73] 28FCCR9483, ¶195, 47 CFR 27.14R.
[74] *Id*. License # WQTX200.
[75] DISH July 26, 2019 Letter.
[76] *See* Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, August 7, 2019.

(footnote cont'd…)

1 **b. Misuse of government auction**

2 DISH has also misused a government program designed to incentivize wireless
3 competition via new entrants and independent small businesses.

4 Northstar and SNR Wireless participated in the FCC's 2015 Spectrum Auction 97.[77]
5 Northstar and SNR claimed gross revenues of less than $15 million over three years in order to
6 qualify as a "very small business" under the FCC rules. The "very small business" status
7 qualified them to receive bidding credits equal to $3.3 billion or 25 percent off the amount of
8 their gross winning bids.[78] The FCC ruled that Northstar and SNR were not eligible for the credit
9 as they did not include the average gross revenues of DISH which held an 85 percent equity
10 interest in both companies.[79]

11 The United States Court of Appeals for the District of Columbia Circuit ruled that the
12 FCC "reasonably interpreted and applied" its precedent "when it determined that DISH had de
13 facto control over SNR and Northstar."[80] The D.C. Circuit remanded the case back to the FCC so
14 that the Commission could provide the companies with an opportunity to modify and renegotiate
15 their agreements with DISH.[81] In a hearing before the Senate Appropriations Subcommittee on
16 Financial Services and General Government, then-FCC Commissioner Ajit Pai stated that DISH
17 had made "a mockery of the small business program."[82]

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[77] Memorandum and Opinion Order, In the Matter of Northstar Wireless, LLC (File No. 0006670613) and SNR Wireless LicenseCo, LLC (File No. 0006670667) Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands, FCC 15-104, at 2 (Released August 18, 2015), available at https://docs.fcc.gov/public/attachments/FCC-15-104A1.pdf.
[78] *Id.* at 2-3.
[79] *Id.* at 3.
[80] *SNR Wireless LicenseCo, LLC, et al. v. F.C.C.*, 868 F.3d 1021, 1030 (D.C. Cir. 2017).
[81] *Id.* at 1046.
[82] Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Senate Appropriations Subcommittee On Financial Services And General Government, May 12, 2015 ("Allowing DISH, which has annual revenues of approximately $14 billion and a market capitalization of over $31 billion, to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small
(footnote cont'd…)

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

3 **E. The Incentives for DISH to Build in a Timely Framework its Own Retail Wireless**
4 **Network in Competition With AT&T, Verizon And T-Mobile are Weak; DISH**
5 **has Strong Incentives to Remain an MVNO Under Favorable Terms and**
6 **Ultimately Sell its Spectrum, or, Alternatively, to Operate any Network it Builds**
7 **Outside of the Relevant Market**
8
9 Even assuming for the sake of argument that a weak and otherwise unacceptable buyer
10 could somehow transform into a strong competitor at some future date, the remedy provides
11 insufficient incentives for this transformation to take place.

12 The Antitrust Division's Policy Guide to Merger Remedies provides: "The goal of a
13 divestiture is to ensure that the purchaser possesses both the means and the incentive to maintain
14 the level of premerger competition in the market(s) of concern."[83] This point is repeated and
15 emphasized later on:

16 The package of assets to be divested must not only allow a purchaser quickly to replace
17 the competition lost due to the merger, but also provide it with the *incentive* to do so.
18 Unless the divested assets are sufficient for the purchaser to become an effective and
19 efficient competitor, the purchaser may have a greater incentive to deploy them outside
20 the relevant market.[84]
21
22 From an engineering standpoint, DISH has powerful incentives to create something less
23 than a fully competitive 5G network. As discussed earlier in these, the technical difficulties of
24 creating a nationwide 5G network are enormous and likely to be underappreciated. At the same

business program. Indeed, DISH has now disclosed that it made approximately $8.504 billion in loans and $1.274 billion in equity contributions to those two companies—hardly a sign that they were small businesses that lacked access to deep pockets. I am appalled that a corporate giant has attempted to use small business discounts to box out the very companies that Congress intended the program to benefit and to rip off American taxpayers to the tune of $3.3 billion. This is money that otherwise would have been deposited into the U.S. Treasury. This is money that could be used to fund 581,475 Pell Grants, pay for the school lunches of 6,317,512 children for an entire school year, or extend tax credits for the hiring of 138,827 veterans for the next 10 years. As appropriators, you know that this is real money.").

[83] 2004 Merger Remedies Guide at 9.

[84] 2004 Merger Remedies Guide at 10-11 (emphasis in original).

1 time, the commitments DISH has made are far more limited than they appear at first blush. DISH
2 is required to serve only 70% of the population by 2023 – and only at 35 Mbps. This speed is
3 already exceeded in many 4G-served areas (including by Sprint) and represents a very low goal
4 for 5G service. If 35 Mbps is the typical speed of the DISH network in 2023, while the other
5 three facilities-based wireless carriers offer service in hundreds of Mbps – and if this limitation is
6 a baked-in technological limit because of fewer sites or less capacity per site – the result will not
7 be a bona fide fourth network, but a niche network closer to the limited internet of things (IoT)
8 network proposed by DISH prior to the T-Mobile deal.

9 From a financial standpoint, DISH's incentives run counter to the goal of creating a
10 competitively significant new entrant. Several prominent analysts who have examined DISH's
11 incentives have pointed to: (a) the enormous financial challenges of building a competitive 5G
12 retail network; (b) the fact that DISH may be better served financially by remaining an MVNO
13 customer of T-Mobile rather than building a competitive network; and (c) the incentives DISH
14 has to provide services outside of the relevant market (e.g. wholesale services) even if it does
15 build a network.

16 For example, a research analyst at Guggenheim Securities wrote: "We continue to see
17 many possible outcomes for DISH that are unlikely to result in a multi-billion dollar network
18 build to end up a sub-scale distant fourth provider with a handful of prepaid subscribers."[85] A
19 CFRA analyst noted: "[W]e remain skeptical on the potential financial, technical and regulatory
20 hurdles" DISH faces in entering the market.[86] And Deutsche Bank Research analysts wrote:
21 "We don't believe that DISH's strategy has been focused in any meaningful way on consumer

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[85] Mike McCormack, Guggenheim Securities, DISH - Unlikely the Last Chapter (July 29, 2019) (Accessed via CIQ).
[86] Tuna N. Amobi, CFRA, CFRA Keeps Sell Opinion on Shares of Dish Network Corp. (July 30, 2019) (Accessed via CIQ).

1 wireless, at least not for the past few years. Instead, the company has focused on a Neutral Host
2 wholesale model, which would allow clients to own and manage their own slice of the network
3 through virtualization and to fully control and provision their company's own applications and
4 services."[87]

5 Although the terms of the commercial agreements between DISH as buyer and T-Mobile
6 as seller are confidential, we can assume in the absence of evidence to the contrary that the terms
7 are highly favorable to DISH. This creates exactly the wrong incentives in the buyer. As one
8 economist has observed:

> 9 . . . Dish had blocking power to stop the settlement from happening. So it likely
> 10 extracted the best resale arrangement in the history of resale. And if that's true, then why
> 11 would Dish invest and become a facilities-based provider if the margins from resale are
> 12 large and guaranteed for seven years?[88]

13
14 The federal commitments include the possibility of financial penalties in an effort to
15 incentivize the buyer to honor its commitments. However, DISH's financial incentives to walk
16 away from its commitments for the right price swamp the penalties in the PFJ. As one analyst
17 has written:

> 18 We also cannot discount that Dish pulls out at the last moment and sells its spectrum. Its
> 19 spectrum is worth much more—with some estimates around $30 billion—than the $3.6
> 20 billion that it paid for the Sprint prepaid business and the fine to the government.[89]

21
22 The failure of DISH to satisfy basic Antitrust Division requirements for a buyer, and the
23 lack of adequate incentives for DISH to compete in the relevant market, show that the DISH
24 divestiture will not resolve the merger's competition issues.

25

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[87] Bryan Kraft, Deutsche Bank Research, The Next Chapter (July 30, 2019) (Accessed via CIQ).
[88] The Capitol Forum, Transcript of T-Mobile/Sprint Conference Call with Hal Singer (August 5, 2019) at 1, available at https://thecapitolforum.com/wp-content/uploads/2019/08/T-Mobile-Sprint-2019.08.05.pdf.
[89] Roger Entner, Industry Voices—Entner: The skinny on the T-Mobile/Sprint/Dish deal, Fierce Wireless (August 2, 2019), https://www.fiercewireless.com/wireless/industry-voices-entner-sorting-out-good-and-bad-t-mobile-sprint-dish-deal.

1 **F. The Commission Cannot Rely on the Federal Commitments as a Remedy Because**
2 **Several Commitments are Vague and Unenforceable**
3
4 In multiple instances, the federal commitments contain open-ended, vague and
5 ambiguous language with reference to Applicants' and DISH's obligations and/or the time within
6 which certain actions must be taken. Examples include "take all actions required," "reasonably
7 necessary," "reasonably related," "promptly," "good faith," "not unreasonably," and "best
8 efforts."
9 If this vague language were limited to unimportant parts of the federal commitments, it
10 would be of less concern. However, vague and non-specific language is used in connection with
11 central behavioral conditions, including migration of divested customers to a new network ("take
12 all actions required"), the ability of DISH to demand additional divestiture assets beyond those
13 specified ("reasonably necessary . . . for continued competitiveness"), the terms of the transition
14 services agreement that would enable DISH to serve its newly acquired customers ("reasonably
15 related to market conditions"), the decommissioning of unnecessary cell cites ("promptly"),
16 negotiations between the Applicants and DISH to lease DISH's unused 600 MHz spectrum
17 ("good faith"), nondiscrimination provisions involving conduct such as blocking, throttling, or
18 otherwise deprioritizing service to DISH and its customers ("shall not unreasonably
19 discriminate"), and the merged company's obligation to provide operational support to those
20 customers ("best efforts").
21 These open-ended, undefined terms provide a convenient escape route for a party wishing
22 to avoid its obligations. Moreover, they make it virtually 100% certain that disputes will arise as
23 to whether the Applicants and DISH have fulfilled their commitments. What would constitute a
24 failure to "take all actions required?" What additional assets would be "reasonably necessary for
25 . . . continued competitiveness?" What does it mean to "not unreasonably discriminate?" The list

1 could go on. The Monitoring Trustee, the Antitrust Division, and ultimately the District Court
2 are likely to see a parade of disputes over the next seven or more years.
3 In addition, the DISH divestiture starkly illustrates a problem with asset carve outsThe
4 divestiture gives DISH one year to determine if it needs additional assets. The determination
5 comes with a requirement that such additional assets are "reasonably necessary for the continued
6 competitiveness of the Divestiture Assets." What constitutes "reasonably necessary for . . .
7 continued competitiveness?" Is this supposed to catch a situation where the buyer did not know
8 what it actually needed until the divestitures have occurred? If so, it suggests a profound
9 weakness in permitting partial asset carve outs in this case.
10 It does not require much imagination to envision a situation in which DISH claims that
11 additional assets are "reasonably necessary" but the seller disagrees. The DOJ Antitrust Division
12 would then be required to side with either the buyer or seller. Although the federal commitments
13 appears to give the Antitrust Division sole discretion to make a determination, the reality is that
14 such a dispute could easily arise and would not be put to rest merely because the Antitrust
15 Division makes a determination. (As an example, if the Division denies DISH's request, DISH
16 can later blame the Division if and when the remedy fails.) Moreover, it appears that neither
17 DISH nor the Anitrust Division knows at this point what DISH may need.
18 There are also likely to be disputes between the DISH and the Antitrust Division that go
19 to the heart of the remedy. The federal commitments require DISH to "offer retail mobile
20 wireless services, including offering nationwide postpaid retail mobile wireless service within
21 one (1) year of the closing of the sale of the Prepaid Assets." The inclusion of postpaid service
22 shows, if nothing else, that the Antitrust Division is aware that unless DISH is able to attract and
23 service postpaid customers, the remedy could not possibly restore the competition lost through
24 the merger. But it takes little imagination to realize that "offering" a service could mean

1 something much different and much less than marketing and promoting the service with millions
2 of dollars of advertising, or hiring and training the personnel necessary fully to support the
3 service.

4 Years ago, prior to their merger, the FCC ordered XM and Sirius to "design" an
5 interoperable radio. The companies designed and built such a radio but never marketed or sold it.
6 Yet they insisted that they had complied with the FCC's requirements.[90] The word "offer" has
7 the same problems as the word "design." DISH can "offer" a service without publicizing it or
8 supporting it or pricing it competitively. This is a fundamental problem in a regulatory decree
9 that orders a party to do something that, as a purely business matter and in the absence of a
10 regulatory obligation, it may well decline to do because there is no business case.[91]

11 Finally, open-ended and non-specific language might well be appropriate in a contract
12 between private parties entering into a long-term business relationship where all of the
13 contractual terms cannot be spelled out in advance. Open-ended and deliberately flexible terms
14 permit the contracting parties to adapt and adjust their relationship as circumstances require. But
15 in a court order that obligates a major market participant to create and facilitate the entry of a
16 new competitor, this sort of language is deeply problematic. It is an invitation to a great deal of
17 mischief, including evasion and repeated disputes. It is likely to draw the Monitoring Trustee, the
18 Antitrust Division, and the court into disputes over the contours and timing of obligations,
19 making the remedy extremely difficult if not impossible to administer.

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21

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[90] *See*, *e.g*., Matthew Lasar, "Sirius, XM blast C3SR, defend lack of radio interoperability," Ars Technica (June 10, 2008), https://arstechnica.com/uncategorized/2008/06/siriux-xm-blast-c3sr-defend-lack-of-radio-interoperability/.

[91] In connection with the FCC remedy in the Comcast/NBCU transaction, Bloomberg and Comcast got into a lengthy dispute over the meaning of the word "neighborhood." *See* https://www.multichannel.com/news/bloomberg-comcast-square-264872.

1 **G. Under Any Reasonable Definition of the "Public Interest," a Remedy that**
2 **Carries a High Risk of Failure and Exposes the Public to Substantial Economic**
3 **Harm if it Fails Cannot be Said to be in the "Public Interest"**
4
5 By far the most likely outcome in this case is that the complex, highly regulatory remedy
6 will fail or fall short. In either event, as the Antitrust Division alleged in its Amended Complaint,
7 consumers will end up paying the price.
8 The risk of failure has significant consequences for the Commission's public interest
9 determination. Risky, partial and complex remedies, however well-intentioned, do not warrant
10 shifting some of the risk posed by an anticompetitive merger back onto consumers. In 2016, then
11 Assistant Attorney General Bill Baer was explicit on this point:

> 12 In enacting Section 7 over 100 years ago, Congress decided how antitrust risk should be
> 13 allocated as between merging parties and the public. The Clayton Act directs antitrust
> 14 enforcers and the courts to employ a low risk tolerance, and zealously protect the
> 15 American economy and American consumers from mergers that may reduce competition
> 16 and may lead to higher prices, reduced output, lower quality, or lessened innovation. . . .
> 17 Merger law is intended to protect consumers from the potential for diminished
> 18 competition. Here is where Congress' risk-allocation determination matters a lot. Partial
> 19 remedies do not cut it. They do not warrant shifting some portion of the risk posed by the
> 20 merger back to consumers and competition.[92]

21
22 The following year, Assistant Attorney General Makan Delrahim reiterated the same
23 point in even stronger language:

> 24 Decrees should avoid taking pricing decisions away from the markets, and should be simple
> 25 and administrable by the DOJ. We have a duty to American consumers to preserve economic
> 26 liberty and protect the competitive process, and we will not accept remedies that risk failing
> 27 to do so. I believe this is a bipartisan view. As my friend, former AAG for Antitrust Bill Baer
> 28 said in Senate testimony last year, "consumers should not have to bear the risks that a
> 29 complex settlement may not succeed."[93]

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[92] U.S. Dep't of Justice, Acting Associate Attorney General Bill Baer Delivers Remarks at American Antitrust Institute's 17th Annual Conference (June 16, 2016), https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute.

[93] U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (November 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

1 The price of a failure of the remedy has been quantified in this case. Not only has the
2 DOJ alleged that the merger, unremedied, would lead to consumers paying billions of dollars
3 more each year, but on April 8, 2019 DISH itself submitted an analysis of the price increases in
4 countries that have gone from 4 to 3 MNOs. As further evidence, an econometric study from the
5 UK's telecommunications regulator of 25 countries found that "removing a disruptive player
6 from a four-player market could increase prices by between 17.2% and 20.5% on average."
7 Another study cited by DISH found "a long run price-increasing effect of a four-to-three
8 merger," of as high as 29% compared to countries with 4 MNOs.[94]

[94] Letter from Pantelis Michalopoulos, Counsel to DISH Network Corporation, to Marlene Dortch, FCC, WT Docket No. 18-197 (April 8, 2019), https://ecfsapi.fcc.gov/file/104080252316854/DISH%204-8-19%20Ex%20Parte%20WT%2018-197%20Europe%20Studies.pdf.