BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).	Application 18-07-011
And Related Matter	Application 18-07-012

OPENING BRIEF OF DISH NETWORK CORPORATION

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I. Introduction and Summary

DISH Network Corporation ("DISH")[1] respectfully opposes the above-captioned merger of T-Mobile U.S., Inc. ("T-Mobile") and Sprint Corporation ("Sprint") (together, the "Joint Applicants"). The Joint Applicants have not demonstrated that this merger would serve the public interest, and there is a reasonable basis to believe that the merger would harm California consumers by creating a national mobile voice/broadband market controlled by three companies, leading to excessive concentration in relevant markets, and increasing prices for consumers. The purported public interest benefits of this merger do not outweigh its many harms. As presented by the Joint Applicants, the Commission should deny this merger.

II. LEGAL STANDARD

A. Requirements of California Public Utilities Code Section 854

California Public Utilities Code Section 854 imposes a broad requirement for any entity wishing to "merge, acquire or control, either directly or indirectly any public utility" to obtain prior Commission approval. For almost 100 years, California law has required any entity that wishes to acquire or otherwise control a public utility to obtain prior Commission approval "to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition to the transfer, as the public interest may require."[2]

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[1] On January 30, 2019, Judge Bemesderfer granted DISH's Motion for Party Status. The Joint Applicants objected to this ruling, but subsequently waived their opposition to DISH's motion during a February 1, 2019 status call.

[2] D.10-03-008, *Application of NobelTel, LLC (U6739C) and Nobel Holding, Inc. for Approval of an Indirect Transfer of Control of NobelTel, LLC* at 4 (March 11, 2010) (*citing* D.09-08-017 at 7 and D.05-12-007 at 6). *See also San Jose Water Co.* 10 CRC 56 (1916); *see also, In re E. B. Hicks Water Company* 37 CPUC 2d 13 (1990).

The well-settled standard to be applied when evaluating a proposed merger is the public interest.[3] Commission precedent is split[4] as to whether the acquiring entity must demonstrate the transaction will cause no negative effects, or whether the acquiring entity must demonstrate the transaction will create a public benefit.[5] Under either standard, the Joint Applicants' proposed merger should be denied. As discussed below, the weight of evidence in this proceeding demonstrates that California consumers will be harmed by the merger, most notably in the form of increased prices.

III. COMPETITION AUTHORITIES HAVE ROUTINELY RECOGNIZED THE COMPETITIVE THREATS OF FOUR-TO-THREE MERGERS

The Joint Applicants seek to consolidate the national mobile voice/broadband market from four-to-three players. Economic analysis and empirical evidence demonstrate that, instead of enhancing competition, such consolidation is apt to thwart it. Competition authorities in the United States and abroad routinely step in to prevent four-to-three mergers because of the threats they pose to competition. As nine United States Senators recently noted in letters to Federal Communications Commission ("FCC") Chairman Ajit Pai and Assistant Attorney General Makan Delrahim urging them to reject the deal: "[a]ntitrust regulators around the world have consistently blocked four-to-three mergers in the mobile and telecommunications industry, and those who have allowed such mergers have lived to regret it."[6] The FCC and Department of

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[3] *See e.g.*, D.11-12-007, *Western Water*, at 3, §3.1.

[4] D.11-12-007, *Western Water*, at 2-3, §3.1. (*Compare* D.00-05-047, 2000 Cal.PUC LEXIS 314 (May 18, 2000), concerning California Water Services Company's purchase of Dominguez Water Company, et al. (CWS/Dominguez) *with* D.01-09-057, 2001 Cal. PUC 2011 Cal. PUC LEXIS 540, *LEXIS 826, concerning California American Water Company's acquisition of the water utility operations of Citizens Utilities (CalAm/Citizens).).

[5] D.00-05-047, 2000 Cal. PUC LEXIS 314, *60-61. *See also* D.03-08-058, 2000 Cal PUC LEXIS 1134, *9 (Aug. 21, 2003) citing orders following ratepayer indifference and net benefit approaches.

[6] Letter from Senators Richard Blumenthal, Amy Klobuchar, Tom Udall, Sherrod Brown, Kirsten Gillibrand, Elizabeth Warren, Bernie Sanders, Cory Booker, and Edward Market to FCC Chairman Ajit

Justice ("DOJ") recognized these threats when they rejected the proposed AT&T/T-Mobile merger, finding it likely that the transaction would have led to coordination among the remaining three wireless carriers, among other harms.[7]

In addition, evidence from previous mergers in Europe confirms the harms to consumers of going from four-to-three carriers. For example, a T-Mobile affiliate was party to a four-to-three merger in the Netherlands. A study examining the four-to-three merger of T-Mobile Nederland and Orange in that country found the merger resulted in price increases of between 10% and 17% compared to control countries.[8] In Austria, a merger of Orange Austria and H3G Austria also resulted in a four-to-three consolidation. The result? Consumers suffered a 14% to 20% price increase from that merger.[9] The Austrian example is especially instructive for an additional reason: one of the three remaining players was another T-Mobile affiliate, T-Mobile Austria.

Indeed, price studies conducted by European regulators or the EU are unanimous on one thing: *prices are higher in three-carrier markets that have experienced four-to-three consolidations than in markets with more than three mobile carriers.*

Pai, at 2 (Feb. 12, 2019); Letter from Senators Richard Blumenthal, Amy Klobuchar, Tom Udall, Sherrod Brown, Kirsten Gillibrand, Elizabeth Warren, Bernie Sanders, Cory Booker, and Edward Market to Assistant Attorney General Makan Delrahim, at 2 (Feb. 12, 2019) ("Feb. 12, 2019 Letter from Nine Senators").

[7] Applications of AT&T Inc. and Deutsche Telekom AG, 26 FCC Rcd. 16184, 16227 ¶ (2011); *United States v. AT&T et al*., Complaint, 1:11-cv-01560 ¶ 36 (D.D.C. Aug. 31, 2011) ("DOJ AT&T/T-Mobile Complaint").

[8] Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR), *Ex-post Analysis of the Merger Between H3G Austria and Orange Austria* (March 2016), https://www.rtr.at/en/inf/Analysis_merger_H3G_Orange/Ex_post_analysis_merger_H3G_Orange_RTR.pdf ("2016 RTR Study").

[9] Austrian Competition Authority (BWB), *The Austrian Market for Mobile Telecommunication Tervices to Private Customers: An Ex-Post Evaluation of the Mergers of H3G and Orange*, Sectoral Inquiry BWB/AW-393, at 3 (March 2016), https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB2016-re-Ex-post_evaluation_of_the_mobile_telecommunications_market.pdf ("BWB Study").

A. The Mobile Broadband Industry Has Reached a Tipping Point in Concentration

In 2003, there were eight major national wireless carriers. If this merger is approved, only three will remain, leaving each of the remaining three carriers with more market share than even the *largest* carrier possessed in 2003:

National Wireless Carriers, 2003[10]

Carrier	Number of Subscribers	Market Share
Verizon	37.52 million	23.4%
Cingular	24.03 million	15%
AT&T	21.98 million	13.7%
Sprint	15.9 million	10%
T-Mobile	13.13 million	8.2%
Nextel	12.88 million	8%
Alltel	8.02 million	5%
Metro PCS[11]	977,000	.06%

National Wireless Carriers, 2018 (showing in parentheses the carriers acquired)[12]

Carrier	Number of Subscribers	Market Share
Verizon (Alltel)	151.48 million	35.3%
AT&T (Cingular)	143.83 million	33.5%
T-Mobile (MetroPCS)	74.02 million	17.3%
Sprint (Nextel)	53.6 million	12.5%

[10] Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Ninth Report*, 19 FCC Rcd. 20597, 20601 ¶ 5 & A-8 (2004) (reporting subscriber counts for top mobile operators and total US subscribers by year end 2003).

[11] While MetroPCS was not a national carrier in 2003, it became one by the time it merged with T-Mobile in March 2013 as the 5th largest wireless provider in the US. *See* Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Transfer of Control of Licenses and Authorizations, 28 FCC Rcd. 2322, 2324 ¶ 5 (2013).

[12] Mike Dano, *How Verizon, AT&T, T-Mobile, Sprint and More Stacked up in Q1 2018: The Top 7 Carriers*, FierceWireless (May 11, 2018), https://www.fiercewireless.com/wireless/how-verizon-at-t-t-mobile-sprint-and-more-stacked-up-q1-2018-top-7-carriers.

National Wireless Carriers, 2018 (with T-Mobile/Sprint combined)

Carrier	Number of Subscribers	Market Share
Verizon (Alltel)	151.48 million	35.3%
AT&T (Cingular)	143.83 million	33.5%
T-Mobile/Sprint	127 million	29.8%

Even with four national carriers, the mobile wireless industry is already a highly concentrated market.[13] The FCC recognized this when it approved the five-to-four Sprint/Nextel merger in 2005 and expressed skepticism about any further reduction among competitors in the wireless sector, explaining: "clearly, there is a point beyond which further consolidation would not be in the public interest."[14]

B. Four-to-Three Mergers Are Disfavored at Home and Abroad

Competition authorities in the United States and abroad routinely step in to prevent four-to-three mergers because of the threats they pose to competition. The FCC and DOJ recognized these threats when they rejected the proposed AT&T/T-Mobile merger, finding it likely that the transaction, if consummated, would lead to coordination among the remaining three wireless carriers.[15]

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[13] Jonathan Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, AEI-Brookings Joint Center for Regulatory Studies, 45 & n.150 (June 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089198 ("Baker and Shapiro") ("[I]f the merger reduces the number of significant firms from, say, four to three, three to two, or two to one, that change in market structure alone may alone be enough to create a presumption that the merger would make coordination more likely or more effective. . . . A four-to-three merger is a natural break point for creating a presumption of harm to competition from coordinated effects based solely on the number of firms.").

[14] Applications of Nextel Communications, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations, 20 FCC Rcd. 13967, 14035 ¶ 185 (2005).

[15] Applications of AT&T Inc. and Deutsche Telekom AG, 26 FCC Rcd. 16184, 16227 ¶ (2011) ("*AT&T/T-Mobile Staff Report*"); *United States v. AT&T et al.*, Complaint, 1:11-cv-01560 ¶ 36 (D.D.C. Aug. 31, 2011) ("DOJ AT&T/T-Mobile Complaint").

The Joint Applicants tried to differentiate the proposed merger from AT&T's attempted purchase of T-Mobile in 2011. But, while AT&T is certainly larger than Sprint, the two transactions have much in common. The FCC and the DOJ highlighted two aspects of the mobile voice/broadband market that posed substantial threats to competition: (1) high barriers to entry, and (2) the elimination of a disruptive and value-driven carrier from the market.[16] The DOJ's Horizontal Merger Guidelines recognize that the type of merger most likely to enhance coordination is one that eliminates a disruptive player.[17]

It is little or no different this time around. New T-Mobile likely would be less disciplined by competitive forces and better able to coordinate with the remaining industry players, likely leading to higher prices and less choice for consumers.[18] And, the harm here could be even

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[16] *AT&T/T-Mobile Staff Report*, 26 FCC Rcd. at 16227 ¶ 76 ("The retail mobile wireless services market would be more vulnerable to coordination post-transaction. Features of this market make it likely that the remaining three nationwide providers would be able to reach a consensus on the terms of coordination (by identifying a mutually agreeable coordinated price), deter cheating on that consensus (by undercutting the coordinated price to steal high-margin business from its rivals), and prevent new competition in this market. Because these providers offer the same plans and charge the same prices nationwide, increased coordination would most likely take the form of raising the level of prices."); DOJ AT&T/T-Mobile Complaint ¶ 36 ("The substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will lead to lessened competition due to an enhanced risk of anticompetitive coordination. Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyer-side market power, and high barriers to entry and expansion, make them particularly conducive to coordination. Any anti-competitive coordination at a national level would result in higher nationwide prices (or other nationwide harm) by the remaining national providers, Verizon, Sprint, and the merged entity. Such harm would affect consumers all across the nation, including those in rural areas with limited T-Mobile presence. Furthermore, the potential for competitive harm is heightened given T-Mobile's recent decision to grow its market share via a 'challenger' strategy.").

[17] *See* DOJ Horizontal Merger Guidelines § 2.1.5 (consideration of whether a merger may lessen competition by eliminating a maverick firm); *see also* Baker and Shapiro at 45 & n.150 ("[I]f the merger reduces the number of significant firms from, say, four to three, three to two, or two to one, that change in market structure alone may alone be enough to create a presumption that the merger would make coordination more likely or more effective. . . . A four-to-three merger is a natural break point for creating a presumption of harm to competition from coordinated effects based solely on the number of firms.").

[18] *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (1986) ("The reduction in the number of competitors is significant in assessing the competitive vitality of the [relevant] market. The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing.")

greater in one key respect: the AT&T/T-Mobile deal would have produced asymmetrical market shares, which can be a deterrent to coordination in a three-player market, as the interests of the three remaining carriers are misaligned.[19] By contrast, the current transaction will result in roughly comparable market shares among the three remaining carriers.

1. DOJ in the AT&T/T-Mobile Merger

The DOJ filed suit to enjoin the proposed merger of AT&T and T-Mobile on the grounds that the merger would substantially lessen competition.[20] Seven states, including California, joined the DOJ in the lawsuit. In its complaint, the DOJ and the states were concerned that the merger would reduce the number of national carriers from four to three and eliminate competition between the two merging carriers. In the words of the complaint:

- Eliminating "one of the four national competitors" would result "in a significant loss of competition."[21]
- The disappearance of an independent fourth competitor would eliminate "important price, quality, product variety, and innovation competition" in the marketplace.[22]
- "Where there is significant substitution between the merging firms by a substantial share of consumers, anticompetitive effects are likely to result."[23]
- Actual and potential competition between AT&T and T-Mobile would be eliminated.
- The acquisition would preempt a "disruptive" carrier that had been a clear threat to its larger rivals.[24]

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[19] Declaration of Joseph Harrington, Coleman Bazelon, Jeremy Verlinda, and William Zarakas, at 67-68 (Exhibit B to Petition to Deny of DISH Network Corp., WT Docket No. 18-197 (Aug. 27, 2018) ("Brattle Declaration"). On January 30, 2019, Judge Bemesderfer initially granted DISH's Motion for Official Notice, but after the Joint Applicants objected to this ruling, he denied the Motion. DISH understands Judge Bemesderfer's ruling to indicate that while wholesale incorporation of DISH's FCC filings is not warranted, parties are not precluded from incorporating materials from DISH's FCC filings in their briefs to the extent that those filings were referenced in other parties' testimony in this proceeding.

[20] *See* DOJ AT&T/T-Mobile Complaint.

[21] *Id.* ¶ 35.

[22] *Id.* ¶ 33.

[23] *Id.* ¶ 37.

As a result, the DOJ and the states found that prices would be higher and quantity of services would be lower, and innovation and product discovery would likewise suffer.

This transaction raises comparable concerns: it will likewise leave three national carriers in the market. It will also eliminate the existing competition between T-Mobile and Sprint. And, the transaction may mean that a maverick strategy is no longer in New T-Mobile's interests, and could result in incumbent-like conduct akin to what T-Mobile's affiliates exhibit in other three-player markets.

2. FCC in the AT&T/T-Mobile Merger

The FCC was also skeptical of the four-to-three market consolidation that the AT&T/T-Mobile transaction would have created. The Wireless Bureau recommended to the full FCC that the applications be designated for a hearing, a conclusion the FCC did not have to make because the parties withdrew the applications before a full agency vote. But the FCC released the Wireless Bureau's Staff Report. The Staff Report found, among other things, that:

- AT&T and T-Mobile "ignore[d] several potential competitive harms, ma[de] overly simplistic assumptions about the structure and conduct of the wireless industry, [and] overestimate[d] the benefits that would be passed onto consumers."[25]

- The loss of competitive alternatives would give the merged company "a unilateral incentive to raise price on non-merging rivals, including Verizon Wireless and Sprint,"[26] and that the "GUPPI values for both AT&T and T-Mobile are above the level at which unilateral effects concerns are triggered by the antitrust authorities."[27]

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[24] *Id.* ¶ 32.

[25] *AT&T/T-Mobile Staff Report*, 26 FCC Rcd. at 16194 ¶ 13.

[26] *Id.* at 16212 ¶ 48.

[27] *Id.* at 16218 ¶ 56.

- The transaction raised the potential for coordination, noting that even tacit coordination must be avoided because "tacit coordination is feared by antitrust policy even more than express collusion as it is harder to detect and to prevent."[28]

3. Commission in the AT&T/T-Mobile Merger

The Commission opened an investigation into the AT&T/T-Mobile merger to determine, under state law, whether the transaction would have adverse effects on competition and customer service in California, and if so, whether mitigation measures were warranted as a condition of regulatory approval.[29] Although the investigation was dismissed at the request of applicants after the DOJ and the states filed suit to block the merger, the Commission had determined it should conduct its own investigation because of the increase in concentration of the market that would occur as a result of the four-to-three merger. There, the Commission stated, "due to the increase in concentration in the wireless market that would result from this proposed merger, and the fact that the concentration increase would be greater in California than nationally, we find it reasonable to gather facts and receive comments in this Investigation in order to analyze whether the proposed merger comports with California law, and to inquire into the effects of such consolidation on California customers and the California economy."[30] The same concerns apply to the proposed merger of Sprint and T-Mobile.

4. Sprint in the AT&T/T-Mobile Merger

When evaluating a proposed four-to-three merger of competitors, Sprint was the fiercest opponent. Sprint filed both a Petition to Deny at the FCC and its own antitrust complaint in federal court opposing the proposed AT&T/T-Mobile merger.

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[28] *Id.* at 16226 ¶ 74.

[29] I.11-06-009, *Order Instituting Investigation*, at 3 (June 9, 2011).

[30] *Id*. at 9.

Sprint's filings explained that "competition among wireless providers takes place on a national level."[31] Specifically, Sprint noted that "AT&T, Verizon, Sprint, and T-Mobile are distinguished from other wireless carriers by the nationwide service that their networks and spectrum assets allow them to provide to their subscribers. These four providers all have wireless networks that cover about 90 percent or more of the U.S. population."[32]

Sprint admitted that it "closely monitors the prices offered by Verizon, AT&T, and T-Mobile for their postpaid plans, but does not consider prices offered by smaller carriers in evaluating its own pricing plans. Verizon, AT&T, and T-Mobile demonstrate the same focus in their pricing behavior for postpaid plans."[33] Sprint debunked the assertion that smaller carriers could compete effectively, noting that the "Application maintains that post-merger AT&T will face strong competition from small regional carriers and companies such as LightSquared, but the small carriers serve less than 3 percent of all post-paid subscribers and LightSquared offers no service today."[34] Sprint also provided evidence that the market was limited to those four carriers because of targeted national advertising aimed by each of the carriers at the other three,[35] and the "four national carriers'" control of "innovation in the wireless market … with a national focus."[36] Other market forces limiting competition to the four nationwide, facilities-based carriers included the pricing of "services and equipment on a national basis;" development, procurement, and offering of handsets nationally; national advertising; plan distribution through

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[31] Petition to Deny of Sprint Nextel Corp., WT Docket No. 11-65, at ii (May 31, 2011) ("Sprint Petition to Deny AT&T/T-Mobile").

[32] *Sprint Nextel Corp. v. AT&T, Inc.*, Complaint, No. 1:11-cv-01600 ¶ 98 (Sept. 6, 2011) ("Sprint AT&T/T-Mobile Complaint").

[33] *Id.* ¶ 99.

[34] Sprint Petition to Deny AT&T/T-Mobile at 6.

[35] Sprint AT&T/T-Mobile Complaint ¶ 103.

[36] *Id.* ¶ 104.

national chains; and national promotion campaigns.[37] Sprint also pointed to consumer demand as another reason: because "it is this nationwide service that consumers want and that wireless carriers strive to offer."[38]

5. Other Domestic Transactions

Four-to-three mergers are also disfavored in other industries. The Federal Trade Commission ("FTC") found that the four-to-three merger of rental car companies Hertz and Dollar Thrifty would permit the combined company to unilaterally exercise market power, increase the likelihood of coordinated interaction, and increase consumer prices.[39] The FTC only allowed the merger to proceed after mandating extensive divestitures, including requiring Hertz to sell its entire Advantage Rent-A-Car business and 29 additional airport locations.[40] The goal of the divestiture was to "replace the current and future competition that otherwise would have been lost as a result of the deal, while also eliminating the likelihood of coordinated interaction post-acquisition" by "enabl[ing] Advantage to become the fourth-largest car rental competitor in the United States."[41] Additional examples abound:

- *Anthem/Cigna* & *Aetna/Humana*: the DOJ sued to stop two proposed mergers in the health insurance industry that would otherwise have consolidated the "Big Five" health insurers in the United States to three.[42]

[37] Sprint Petition to Deny AT&T/T-Mobile at 21.

[38] *Id.* at 20.

[39] Hertz Global Holdings, Inc., *Complaint*, Docket No. C-4376, 2012 WL 5879801 *1, *3 (Nov. 15, 2012).

[40] Hertz Global Holdings, Inc., *Decision and Order*, Docket No. C-4376, 2013 WL 3756606 *1, *10 (July 10, 2013); Press Release, Federal Trade Commission*, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets* (Nov. 15, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition ("FTC Press Release").

[41] *Id*.

[42] *See* Remarks of Attorney General Loretta Lynch (July 21, 2016) https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-justice.

- *Alcan/Pechiney*: the DOJ opposed the merger: "by reducing the number of major North American producers of brazing sheet from four to three, this acquisition would substantially increase the likelihood that the combined firm will unilaterally increase, or that it and the other major competitor will tacitly or explicitly cooperate to increase, prices of brazing sheet to the detriment of consumers."[43] The DOJ thus required divestiture of either Alcan or Pechiney's brazing sheet business, thus maintaining a fourth competitor.
- *Koninklijke Ahold/Delhaize Group*: the DOJ found this merger to be presumptively unlawful, as it would reduce the number of meaningful supermarket competitors from four to three in 18 geographic markets.

6. International Regulators

Nor are regulators' concerns about four-to-three consolidations unique to the United States. The European Commission ("EC") blocked what would have been a four-to-three merger in the United Kingdom between the mobile operators O2 and Three.[44] The EC found that "the merged entity's incentives to compete aggressively are likely to be significantly weaker than those of Three and O2 pre-Transaction."[45] The EC linked the lack of competition post-merger specifically to the decline from four to three carriers:

> the Transaction is likely to give rise to non-coordinated anti-competitive effects on the retail market for mobile telecommunications services in the United Kingdom. The anti-competitive effects would arise from a reduction of the number of MNOs from four to three and the elimination of the important competitive constraints that the Parties previously exercised upon each other and a reduction of competitive pressure on the remaining players on the market.[46]

Denmark mobile carriers TeliaSonera and Telenor were likewise forced to abandon their merger, which would have reduced the number of facilities-based carriers in Denmark from four

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[43] *United States v. Alcan, Inc., Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC*, Complaint, 1:03-CV02012, ¶ 3 (D.D.C. Sept. 29, 2003).

[44] European Commission, Case M.7612 – Hutchison 3G UK/Telefonica UK (Nov. 5, 2016), http://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf. Telefonica UK Ltd. is known as O2.

[45] *Id.* ¶ 906.

[46] *Id.* ¶ 1226. The EC also concluded that moving from four to three would have anti-competitive effects on the wholesale market. *Id.* ¶ 2313.

to three, after the EC expressed competition concerns.[47] The EC found that in another four-to-three merger (between Italian mobile carriers H3G Italy and Wind/JV), "the reduction in the number of MNOs from four to three as a result of the Transaction is likely to contribute to facilitating and incentivising coordination."[48] The EC only approved this transaction after the parties agreed to facilitate the entry of Iliad, a French facilities-based carrier, into the Italian market: "[this commitment,] which is structural in nature, . . . could create a fourth MNO capable of compensating for the loss of competition deriving from the Transaction (namely the elimination of H3G as an independent competitor) both in the retail and in the wholesale markets."[49]

Similarly, in December 2012, the EC imposed facilities-based entry as a condition to approving the merger of Orange Austria and H3G, which would have left three carriers in Austria, including T-Mobile Austria: "a structural commitment is necessary to make up for the loss of competition, which would result from the Proposed Transaction . . . the right commitment should allow a new MNO entrant to acquire the divestment spectrum and be able to roll out LTE in competition with the remaining MNOs."[50] Notably, entry from a new MVNO was not

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[47] *See* Press Release, European Commission, Statement by Commissioner Vestager on Announcement by Telenor and TeliaSonera to Withdraw from Proposed Merger (Sept. 11, 2015) http://europa.eu/rapid/press-release_STATEMENT-15-5627_en.htm ("Based on the Commission's in-depth analysis and evidence gathered, we are convinced that the significant competition concerns required an equally significant remedy. This means the creation of a fourth mobile network operator.").

[48] European Commission, Case M.7758 Hutchison 3G Italy/Wind JV, Commission Decision ¶ 971 (Jan. 9, 2016), http://ec.europa.eu/competition/mergers/cases/decisions/m7758_2937_3.pdf. The EC also found that "the reduction of competition resulting from the Transaction in this already concentrated market, with high barriers to entry, may make it even more difficult than it already is today for MVNOs to obtain wholesale access on commercially attractive terms." *Id.* ¶ 1343.

[49] *Id.* ¶ 1696. This was effectuated by substantial spectrum divestitures, a national roaming agreement, access to network sites, and an option to provide backhaul and interconnection during the transitional period, among other requirements. *See Id.* ¶ 1720-38.

[50] European Commission, Case No M.6497 Hutchison 3G Austria/Orange Austria, Commission Decision ¶ 481 (Dec. 12, 2012),

deemed sufficient, even though MVNOs typically have greater rights in Europe than in the United States.[51]

Similarly, when examining *merger-specific* price effects, the EC, national competition authorities and the OECD, among others, have found that countries with four-to-three mergers in fact experienced price *increases* following the four-to-three merger.[52]

IV. The Proposed Merger Will Result in Excessive Increases In Concentration Under FCC and DOJ Standards

A. The Merger Will Result in Spectrum Holdings Substantially in Excess of the Spectrum Screen in 51 Counties in California

Spectrum is the core asset for a mobile broadband business.[53] Indeed, the FCC has found that "for there to be robust competition, multiple competing service providers must have access

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http://ec.europa.eu/competition/mergers/cases/decisions/m6497_20121212_20600_3210969_EN.pdf. The divestiture spectrum was reserved for a new entrant, under the condition that if no new entrant bid on the spectrum, the divested spectrum would revert to H3G. *Id.*at ¶ 526. Only the three incumbent providers participated in Austria's 2013 spectrum auction, leaving Austria with three MNOs. RTR, Multiband Auction 2013: Comments on Essential Points of Criticism Addressed in the High-Court Proceedings, 1 (Dec. 18, 2014), https://www.rtr.at/en/inf/Stellungnahme_Multiband_Auktion/Multiband_Auction_2013_Comments.pdf.

[51] *See* OECD, *Wireless Market Structures and Network Sharing*, OECD Digital Economy Papers, No. 243, at 72-73 (2014), https://www.oecd-ilibrary.org/wireless-market-structures-and-network-sharing_5jxt46dzl9r2.pdf?itemId=%2Fcontent%2Fpaper%2F5jxt46dzl9r2-en&mimeType=pdf (discussing regulatory tools that have been deployed in European countries to facilitate MVNO market entry and growth, including mandatory wholesale access to MNO facilities as a condition of a merger or spectrum license, and finding that in the United States, "MVNOs are not viewed as providing robust competition to MNOs . . . they do not provide an effective competitive restraint on the four nationwide carriers.").

[52] *See e.g.*, Body of European Regulators for Electronic Communications, *Report on Post-Merger Market Developments - Price Effects of Mobile Mergers in Austria, Ireland and Germany*, at 2-3 (June 2018), https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8168-berec-report-on-post-merger-market-devel_0.pdf; United Kingdom Office of Communications (Ofcom), *A Cross-Country Econometric Analysis of the Effect of Disruptive Firms on Mobile Pricing*, at 2 (March 15, 2016), https://www.ofcom.org.uk/__data/assets/pdf_file/0019/74107/research_document.pdf ("Ofcom Study"); 2016 RTR Study, at 5-6, 17; BWB Study, at 6-7 (March 2016); European Commission, Authority for Consumers and Markets, & Austrian Regulatory Authority for Broadcasting and Telecommunications, *Ex Post Analysis of Two Mobile Telecom Mergers: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands*, at 76-77 (2015), http://ec.europa.eu/competition/publications/reports/kd0215836enn.pdf.

to or hold sufficient spectrum to be able to enter a marketplace or expand output rapidly in response to any price increase or reduction in quality, or other change that would harm consumer welfare."[54] But the amount of spectrum available at any given time for such applications is finite. As a result, the FCC applies a spectrum "screen" to proposed transactions to "ensur[e] that sufficient spectrum is available for multiple existing mobile service providers as well as potential entrants," finding that such balance "is crucial to promoting consumer choice and competition throughout the country."[55]

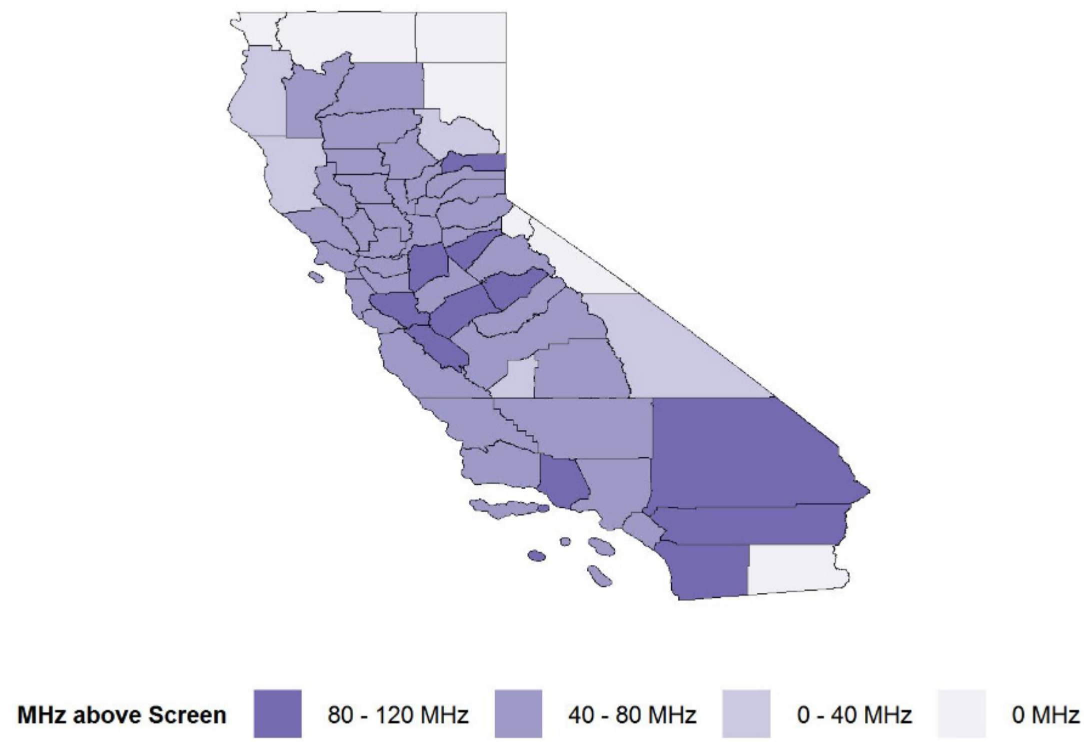
As illustrated below, New T-Mobile would be over the screen threshold in 51 out of California's 58 counties, or in 29 of California's 31 cellular market areas ("CMAs"), covering all of California's top ten CMA markets ranked by population. New T-Mobile would be at least 50 MHz above the screen in the top 3 CMAs ranked by population: Los Angeles, San Francisco, and San Diego. New T-Mobile would be over the screen across 99.2% of California's population and 84.8% of its land area when applying the screen at the county level.

[53] *See 19th Wireless Competition Report*, 31 FCC Rcd. 10534, 10572 ¶ 49 (2016) ("Spectrum is a critical input in the provision of mobile wireless services and affects if and when existing service providers and potential entrants will be able to expand capacity or deploy networks").

[54] Policies Regarding Mobile Spectrum Holdings, *Report and Order*, 29 FCC Rcd. 6133, 6144 ¶ 17 (2014).

[55] *Id.*

Figure 1: New T-Mobile MHz above Screen in California



Nationally, New T-Mobile would trigger the spectrum screen in 532 CMAs, and exceed the screen by a population-weighted average of 67 megahertz per market.[56] It would exceed the spectrum screen by at least 50 MHz in 315 CMAs, and by 100 MHz in 31 CMAs.[57] As nine United States Senators recently explained, "[r]ather than promote competition, this consolidation of spectrum holdings would foreclose competition in nationwide and even regional markets" and "should give any enforcer or regulator assessing this deal serious pause."[58]

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[56] DISH's analysis is set forth in its August 27, 2018 filing at the FCC (DISH Petition to Deny at 73).

[57] *Id.*

[58] Feb. 12, 2019 Letter from Nine Senators at 4.

B. The Merger Triggers a Dramatic Increase in HHI, Indicating Significant Threats to Competition

The Commission has previously looked to the DOJ's Horizontal Merger Guidelines when analyzing market power.[59] As CWA's witness, Debbie Goldman notes, the DOJ Guidelines include the Herfindahl-Hirschman index ("HHI"), a measure of industry consolidation. The Guidelines explain that mergers resulting in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."[60] In this case, the transaction would lead to a dramatic increase in the HHI index—451 points from its already "highly concentrated" value of 2,814 to 3,265.[61] As Ms. Goldman notes, such an increase in market concentration is large enough to trigger the DOJ presumption that the merger is "likely to enhance market power."[62] Indeed, in its 2016 complaint challenging Anthem's acquisition of Cigna, the DOJ explained that "mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful."[63]

[59] *See e.g.*, D.16-12-025, *Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market* (December 1, 2016).

[60] Opening Testimony of Debbie Goldman, et al. on Behalf of Communications Workers of America District 9, Before the Public Utilities Commission of the State of California, at 13-14 (as amended on February 4, 2019) (*citing* Horizontal Merger Guidelines § 5.3) ("Goldman Testimony").

[61] DISH's analysis is set forth in its August 27, 2018 filing at the FCC (DISH Petition to Deny at 74), as referenced in the Goldman Testimony at 30.

[62] Goldman Testimony at 13 (citing Horizontal Merger Guidelines § 5.3).

[63] *United States et al. v. Anthem, Inc. and Cigna Corp.*, Complaint, 1:16-cv-01493 ¶ 30 (July 21, 2016).

V. BOTH SPRINT AND T-MOBILE ARE POTENTIAL 5G COMPETITORS THAT LIKELY CAN SUCCEED WITHOUT MERGING

A. T-Mobile Does Not Need to Merge with a Competitor to Continue Its Outstanding Market Performance

T-Mobile bears no signs of a company that needs a market-consolidating merger to succeed. If anything, T-Mobile's performance in the years since its failed merger with AT&T demonstrates why a diverse mobile voice/broadband market with many players is good for consumers. T-Mobile's stock is up, its customers are delighted, the incumbents have been forced to lower their prices due to T-Mobile's market disruptions, and it is investing in the technologies of the future.

T-Mobile's "un-carrier" strategy has been widely successful and represented a complete turnaround for the company under CEO John Legere. In 2017, Legere celebrated five years as CEO and released a blog post to reflect on how much the company had changed. As Mr. Legere observed, when he first arrived, T-Mobile "didn't have much to celebrate. The AT&T merger had just collapsed, we were losing customers right and left, we had no iPhone, no LTE and we were ranked number 4 (out of 4) in customer service and market share."[64] But because T-Mobile had a "team passionate about their customers and committed to their values," the un-carrier movement "turned [the] company around and changed the wireless industry for good."[65]

As a result of T-Mobile's focused approach to challenging the incumbents, the successes began to stack up. In January 2019, T-Mobile posted "its best quarter ever in total net customer additions of 2.5 million, delivered its best fourth quarter ever in branded postpaid net additions

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[64] John Legere, *Un-Carrier is From the Inside Out!*, T-Mobile Blog (Sept. 26, 2017), https://www.t-mobile.com/news/un-carrier-is-from-the-inside-out.

[65] *Id.*

of 1.4 million and had record low fourth quarter postpaid phone churn of 0.99%."[66] According to T-Mobile's CEO, the company experienced "23 quarters in a row where more than 1 million customers have chosen T-Mobile - along with a postpaid phone churn result that's below 1%. These customer results speak volumes about our company, our network and our brand!"[67] Just yesterday, T-Mobile reported "another record quarter in Q1 2019, with customer growth that accelerated year-over-year, all-time record-low postpaid phone churn, and record first quarter financials" including "record service revenues of $8.3 billion, record Q1 Net income of $908 million and record Adjusted EBITDA of $3.3 billion."[68] Further, T-Mobile reported customer additions of "1.7 million in Q1 2019, bringing our total customer count to 81.3 million."[69] This is a lot to be proud of, and nothing in the Application explains why T-Mobile needs a merger to continue this impressive track record of success.

B. Sprint Has Plenty of Spectrum and Expertise to Challenge T-Mobile and the Other Incumbents as a Standalone Competitor

Sprint, too, is experiencing success. While the Joint Applicants seek to paint Sprint as firm that is financially troubled with an uncertain future,[70] the company's recent communications to investors continue to contradict the Joint Applicants' claims about Sprint's supposedly dismal financial state and precarious 5G plans.

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[66] Press Release, T-Mobile, *T-Mobile Posts Its Best Customer Results Yet, Repots Lowest Every Q4 Postpaid Phone Churn, Beats Customer Guidance for FY 2018* (Jan. 9, 2019), https://www.t-mobile.com/news/t-mobile-customer-results-q4-2018 ("T-Mobile Jan. 9 Press Release").

[67] *Id.*

[68] Press Release, *T-Mobile Reports Accelerated Customer Growth, All-Time Record-Low Churn, and Best Ever Q1 Financial Results* (Apr. 25, 2019), https://investor.t-mobile.com/news-and-events/t-mobile-us-press-releases/press-release-details/2019/T-Mobile-Reports-Accelerated-Customer-Growth-All-Time-Record-Low-Churn-and-Best-Ever-Q1-Financial-Results/default.aspx.

[69] *Id.*

[70] A.18-07-012, Joint Application for Review of Wireless Transfer Notification Per Commission Decision 95-10-032, at 29 (July 13, 2018) ("Joint Application") (Sprint recites falling market share, an inability to attract and retain customers and an inability to fund network investments and promotions).

Sprint's financial condition. Sprint's most recent earnings report (released on January 31, 2019) touts the following metrics of health:

- Wireless service revenue grew year-over-year for the second consecutive quarter
- Postpaid service revenue grew year-over-year for the first time in five years
- Prepaid service revenue grew year-over-year for the fifth consecutive quarter
- 309,000 postpaid net additions in the quarter, an improvement of 53,000 year-over-year
- Network investments of $1.4 billion more than doubled year-over-year
- 12 consecutive quarters of operating income.[71]

During recent testimony, Mr. Claure told Congress that Sprint "[doesn't] generate any cash flow" and therefore doesn't have the ability to invest.[72] But as Sprint explained during its most recent earnings call, its temporary drop in cash flow was due to increased capital expenditures.[73] In its immediately preceding quarter (Q2 2018), Sprint reported *positive* cash flow of $525 million.[74] And, despite the recent ramp-up in spending, Sprint executives have expressed confidence in Sprint's cash flow and liquidity position:

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[71] Press Release, *Sprint Reports Continued Year-Over-Year Growth In Wireless Service Revenue With Fiscal Year 2018 Third Quarter Results* (Jan. 31, 2019), https://investors.sprint.com/news-and-events/press-releases/press-release-details/2019/Sprint-Reports-Continued-Year-Over-Year-Growth-In-Wireless-Service-Revenue-With-Fiscal-Year-2018-Third-Quarter-Results/default.aspx.

[72] *Protecting Consumers and Competition: An Examination of the T-Mobile and Sprint Merger Before the House Committee on Energy and Commerce*, 116th Cong. (Feb. 13, 2019) (Testimony of Marcelo Claure), https://www.c-span.org/video/?457782-1/mobile-sprint-executives-testify-merger ("Feb. 13 Commerce Hearing") *See also The State of Competition in the Wireless Market: Examining the Impact of the Proposed Merger of T-Mobile and Sprint on Consumers, Workers, and the Internet Before the House Committee on the Judiciary*, 116th Cong. (March 12, 2019) (Testimony of Marcelo Claure), https://www.c-span.org/video/?458695-1/sprint-mobile-executives-testify-impact-proposedmerger ("March 12 Judiciary Hearing") ("Sprint is expected to generate a negative free cash flow of $1 billion this year.").

[73] Transcript, Sprint Q3 2018 Earnings Call (Jan. 31, 2019), https://s21.q4cdn.com/487940486/files/doc_financials/quarterly/2018/Q3/S-US-20190131-2200667-C.pdf ("As expected, adjusted free cash flow dipped into negative territory, a $908 million this quarter as network investments continued to ramp.").

[74] Press Release, *Sprint Reports Year-Over-Year Growth in Wireless Service Revenue With Fiscal Year 2018 Second Quarter Results* (Oct. 31, 2018), https://s21.q4cdn.com/487940486/files/doc_financials/quarterly/2018/Q2/01_Fiscal-2Q18-Earnings-Release-FINAL.PDF.

- "Our liquidity position now is strong. We should also highlight that not only we have secured this financing, but in the past 12 months, we have also been able to improve the terms of this financing in terms of maturity and costs compared to where we were 12 months ago. So I think that ***we have quite a strong and robust balance sheet***."[75]

- "***We are more than adequately funded right now*** . . . we've done a lot of work on liquidity, cost of debt over the last several quarters, which puts us in a really strong position right now."[76]

- Mr. Davies (Sprint's Chief Financial Officer): "There's many different buttons and levers that we can push and pull that will result in us having a path towards at least to cash flow breakeven."

  Analyst: "Okay. As a CFO, so I think a lot of spending decisions have to come to you to get the sign-off. Does the state of the balance sheet, the leverage, the free cash flow profile, does that constrain the company from any desired spending or investment areas promotionally and network-wise, investment-wise?"

  Mr. Davies: "No, it doesn't. ***I really don't feel that my decision-making is constrained at all by any balance sheet or liquidity considerations.***"[77]

- "The next 2 to 3 years, we are going to invest in the network. ***We can finance it. No doubt*** . . . I have all what is needed in order to do that. So next 2 to 3 years, expanding networks."[78]

And, the Joint Applicants have repeatedly failed to take into account the possibility of future investment by Sprint's owner Softbank, even though, as Mr. Claure acknowledged, "Sprint is a strategic asset for SoftBank."[79] As one of the largest companies in the world,

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[75] Transcript, Sprint Corp. at Goldman Sachs Communacopia Conference, Fair Disclosure Wire (Sept. 14, 2018) (Sprint CEO Michel Combes).

[76] Transcript, Sprint Corp. at Deutsche Bank Leveraged Financial Conference, Fair Disclosure Wire (Oct. 2, 2018) (Sprint CFO Andrew Davies).

[77] Transcript, Sprint Corp. at Bank of America Merrill Lynch Leveraged Finance Conference, Fair Disclosure Wire (Dec. 5, 2018).

[78] Transcript, Sprint Corp. at Deutsche Bank Media, Telecom and Business Services Conference, Fair Disclosure Wire (March 7, 2018).

[79] Transcript, Sprint Q3 2017 Earnings Call (Feb. 2, 2018), https://s21.q4cdn.com/487940486/files/doc_financials/transcripts/S-US-20180202-2039822-C.pdf.

Softbank holds more than $47 billion (or 5.3 trillion yen) in cash and cash equivalents.[80] Softbank's Vision Fund has already invested $70 billion since it was formed in November 2016.[81] Thus, to the extent that Sprint did need an infusion of capital in the future, Softbank is more than capable of funding Sprint to enable it to compete.

Sprint's 5G plans. As part of its merger advocacy, Sprint has also questioned its future ability to provide 5G service as a standalone company. For example, Sprint stated in the Joint Application that its ability to deploy a robust 5G network is limited because it purportedly lacks the spectrum, sites and sufficient financial resources to build a robust nationwide 5G network on its own to enable capacity, coverage, and quality comparable to New T-Mobile's network.[82] Sprint executives have repeated that message elsewhere. Mr. Combes recently told the FCC that his company "cannot build a consistently reliable nationwide 5G network on our own."[83] And Mr. Claure told the House Judiciary Committee that "we do plan to deploy 5G in a very limited area . . . but we do not have the capability to offer true nationwide 5G." He similarly told the House Commerce Committee that "the combination of our two companies . . . is the only way that we're going to be able to build a 5G network that basically has capacity all over the US."[84]

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[80] Softbank Group, Consolidated Financial Report for the Period Ended December 31, 2018 at 26 (Feb. 6, 2019), https://cdn.group.softbank/en/corp/set/data/irinfo/financials/financial_reports/pdf/2019/softbank_results_2019q3_001.pdf.

[81] Fred Imbert, *SoftBank's Vision Fund Has Already Invested $70 billion, CEO Masayoshi Son Says*, CNBC (Mar. 8, 2019), https://www.cnbc.com/2019/03/08/softbanks-vision-fund-has-already-invested-70-billion-ceo-son-says.html.

[82] Joint Application at 28 (*citing* the Joint Applicants' Public Interest Statement filed at the FCC, at p. 19-20).

[83] Letter from Michel Combes, President and CEO, Sprint, to Commissioner Geoffrey Starks, FCC, WT Docket No. 18-197 (April 2, 2019) ("April 2, 2019 Sprint Letter").

[84] Feb. 13 Commerce Hearing (Testimony of Marcelo Claure).

But, Sprint has told a different story to investors. During the last earnings call before the merger was announced, Mr. Claure explained:

> I am very confident in Sprint's future based on the competitive advantage that we will have with the deployment of 5G on our 2.5 spectrum. We're working with Qualcomm and network and device manufacturers in order to launch the first truly mobile network in the United States . . . ***This latest development will put Sprint at the forefront of technology and innovation, on par with other leading carriers around the world***.
>
> We believe our next-gen network will truly differentiate Sprint over the next couple of years due to our strong spectrum assets that enables Sprint to be the leader in the true mobile 5G.[85]

Mr. Combes is now telling the FCC that "we lack the spectrum assets" needed to compete.[86] This is the opposite of what he told investors in March 2018, when he touted the spectrum holdings he now purports to find lacking. At the time, he said: "we have depth in terms of spectrum . . . All our competitors have one or the other. We have both, mid-band and depth, so which means the ability to really build national-wide network, a 5G network."[87]

Indeed, Sprint's recent Mobile World Congress announcement—that it plans to bring 5G to four cities in May 2019 (Chicago, Atlanta, Dallas and Kansas City) and another five cities (Houston, Los Angeles, New York City, Phoenix and Washington, D.C.) in the first half of 2019—demonstrates that the company is well on its way to deploying 5G. Describing these developments, Sprint's CTO announced that "wireless customers are soon going to have their first mobile 5G experience with Sprint, and it won't be limited to their home or a millimeter

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[85] Transcript, Sprint Q3 2017 Earnings Call (Feb. 2, 2018), https://s21.q4cdn.com/487940486/files/doc_financials/transcripts/S-US-20180202-2039822-C.pdf.

[86] April 2, 2019 Sprint Letter.

[87] Transcript, Sprint Corp. at Deutsche Bank Media, Telecom and Business Services Conference, Fair Disclosure Wire (March 7, 2018). *See also* March 12 Judiciary Hearing (Testimony of Marcelo Claure) (telling Congress that Sprint's "main challenge" is its "lack of low-band spectrum.").

wave hotspot."[88] Just this week, Sprint's CTO explained that the company is using 5G to help congestion in urban markets, noting that "we have purposely gone in there and made sure that we have substantial 5G coverage, so you can see a 5G icon for more than just a few seconds and you don't lose it" and that Sprint is just waiting on network software and then it is "good to go" for its 5G launch.[89]

The best explanation for these inconsistencies is the interpretation proffered by Sprint's own CFO back in October 2018: "You have to be able to tailor your message based on the same set of facts to different audiences, dependent on what point you're trying to make."[90] The Commission should view Sprint's financial and 5G claims in support of this merger with skepticism, given its own executives' statements that Sprint is hardly an ailing firm, or one that needs a market-consolidating merger to launch a 5G network that is already underway.

C. Merging T-Mobile and Sprint Means Customers Lose Out on Years of the Two Companies Competing Head-to-Head with Each Other and the Incumbents

As discussed above, Sprint and T-Mobile have proven themselves to be strong, independent wireless competitors over the last five years, particularly regarding price and plan features.[91] For its part, T-Mobile has touted its position as the "un-carrier" by providing

[88] Linda Hardesty, *Sprint to Launch Commercial 5G in 4 U.S. Cities in May*, FierceWireless (Feb. 25, 2019), https://www.fiercewireless.com/wireless/sprint-to-launch-commercial-5g-4-us-cities-may.

[89] Kelly Hill, *Sprint's CTO Talks Massive MIMO, Imminent 5G Launch*, RCR Wireless (Apr. 25, 2019), https://www.rcrwireless.com/20190425/carriers/sprints-cto-talks-massive-mimo-imminent-5g-launch.

[90] Transcript, Sprint Corp. at Deutsche Bank Leveraged Finance Conference, Fair Disclosure Wire (Oct. 2, 2018).

[91] *See e.g.* Karissa Bell, *Say Goodbye to the Epic Twitter Feud Between T-Mobile, Sprint*, Mashable (Apr. 30, 2018), https://mashable.com/2018/04/30/sprint-tmobile-merger-ceo-twitter-beef/#hNtDsbUJusqP (describing and cataloging tweets from 2013 through 2018 that T-Mobile Chief Executive Officer John Legere wrote comparing Sprint and T-Mobile's customer satisfaction, marketing promotions, network speed, and network reliability).

competitive offerings, including domestic and international unlimited data, talk, and text plans,[92] and Binge On, which provides unlimited video streaming for participating services.[93] Sprint has similarly disrupted the market with innovative offerings. For example, in January 2014, Sprint launched the "Framily Plan" which allowed consumers to choose up to 10 phone lines to add to a group plan, with unique incentives and billing for each participant.[94] Sprint recently launched a "100% Total Satisfaction Guarantee" along with up to $900 in incentives for new customers switching to Sprint.[95]

Sprint and T-Mobile compete against each other. Among other factors, Sprint and T-Mobile's strength as independent companies comes from their efforts to attract and retain customers by competing head-to-head.[96] Their relationship has been characterized as one of "largely competing against each other . . . since both are trying to lure customers away from the two giants of the industry"[97] Observers have noted that "when either drops the price of plans, or

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[92] *See One Plan to Rule Them All.*, T-Mobile, https://www.t-mobile.com/our-story/un-carrier-history (last visited Aug. 26, 2018); *Unlimited Video Streaming with Binge On*, T-Mobile, https://www.t-mobile.com/offers/binge-on-streaming-video (last visited Aug. 26, 2018).

[93] *Unlimited Video Streaming with Binge On*, T-Mobile, https://www.t-mobile.com/offers/binge-on-streaming-video (last visited Aug. 26, 2018).

[94] *See* Press Release, Sprint, *Sprint Redefines the Wireless Family with the New Sprint Framily Plan* (Jan. 7, 2014), http://newsroom.sprint.com/sprint-redefines-the-wireless-family-with-the-new-sprint-framily-plan.htm.

[95] *See* Press Release, Sprint, *Sprint Launches 100% Total Satisfaction Guarantee; Customers Switching to Sprint Can Get up to $900 to Cover Switching Fees and New Phone* (Apr. 12, 2019), https://investors.sprint.com/news-and-events/press-releases/press-release-details/2019/Sprint-Launches-100-Total-Satisfaction-Guarantee-Customers-Switching-to-Sprint-Can-Get-up-to-900-to-Cover-Switching-Fees-and-New-Phone/default.aspx.

[96] *See* Dan Frommer, *Blocking T-Mobile's Last Big Merger Turned out Great for U.S. Consumers. So What's Different Now?*, Recode (Apr. 30, 2018), https://www.recode.net/2018/4/30/17302426/tmobile-sprint-merger-regulatory-approval-competition ("T-Mobile and Sprint have been wasting a lot of money stealing customers from each other.").

[97] Chris Morris, *What Would a T-Mobile Sprint Merger Mean for Customers*, Fortune (Sept. 22, 2017), http://fortune.com/2017/09/22/t-mobile-sprint-merger-customers.

includes extra 4G data, the other matches the plans or betters them."[98] As the FCC has recognized, consumers have directly benefitted from this competition in the form of lower prices and innovative offerings provided by the two carriers.[99] The following are just some examples of Sprint and T-Mobile competing for market share by changing services or products in response to each other's offerings:

- On the same day in August 2016 that T-Mobile announced T-Mobile ONE, its unlimited plan,[100] Sprint announced the launch of its Unlimited Freedom plan.[101] Both plans offer unlimited video, gaming, and music streaming, as well as "unlimited nationwide 4G LTE data for most everything else[.]"[102]
- In August 2017, T-Mobile announced a new unlimited plan, which offers consumers aged 55 years and older two lines of unlimited talk, text, and 4G LTE data for $60.[103] In May 2018, Sprint announced an unlimited plan that offers consumers 55 years and older two lines of unlimited data, talk, text, and mobile hotspot data for $70.[104]
- In February 2017, less than a week after T-Mobile announced that T-Mobile ONE would include HD video and 10 GB of high-speed hotspot data, [105] Sprint

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[98] Joseph Hanlon, *5 Reasons to Choose T-Mobile Over Sprint*, WhistleOut (Nov. 5, 2015), https://www.whistleout.com/CellPhones/Guides/reasons-to-choose-tmobile-over-sprint.

[99] *AT&T/T-Mobile Staff Report*, 26 FCC Rcd. at 16198-16201 ¶¶ 21-25; Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Twentieth Report*, 32 FCC Rcd. 8968, 9002-04 ¶¶ 50-52 (2017) ("20th Mobile Wireless Competition Report").

[100] *See* Press Release, T-Mobile, *Hello Un-carrier 12 … R.I.P. Data Plans T-Mobile Goes All in on Unlimited* (Aug. 18, 2016), https://www.t-mobile.com/news/rip-data-plans ("T-Mobile Aug. 18, 2016 Press Release").

[101] Press Release, Sprint, *Sprint Launches Unlimited Freedom: Two Lines of Unlimited Talk, Text and Data for Just $100– All on a Great Network – and the Best Price among All National Carriers* (Aug. 18, 2016), http://newsroom.sprint.com/sprint-launches-unlimited-freedom-two-lines-of-unlimited-talk-text-and-data-for-just-100-all-on-a-great-network-and-the-best-price-among-all-national-carriers.htm.

[102] T-Mobile Aug. 18, 2016 Press Release.

[103] *See* Press Release, T-Mobile, *A New Reason to Get a Fake ID: Introducing T-Mobile ONE Unlimited 55+* (Aug. 6, 2017), https://www.t-mobile.com/news/unlimited-55.

[104] *See* Press Release, Sprint, *55+ Reasons to Switch to Sprint Now!* (May 17, 2018), http://investors.sprint.com/news-and-events/press-releases/press-release-details/2018/55-Reasons-to-Switch-to-Sprint-Now/default.aspx.

[105] *See* Diana Goovaerts, *T-Mobile Parries Verizon's Unlimited Move with HD Video Upgrade, 2 Line Promo*, Wireless Week (Feb. 13, 2017), https://www.wirelessweek.com/blog/2017/02/t-mobile-parries-verizons-unlimited-move-hd-video-upgrade-2-line-promo.

launched an unlimited plan with HD-quality video and a 10 GB mobile hotspot at a discounted rate.[106]

- In April 2018, T-Mobile launched T-Mobile ONE Military, which offers U.S. military, veterans, their families, and their small businesses "20% off the first line and [h]alf [o]ff up to five additional voice lines[,]" in addition to standard T-Mobile ONE features.[107] Three months later, Sprint launched its Unlimited Military plan, which offers veterans, active duty, and reserves of the U.S. armed forces "50 percent off family lines[.]"[108]
- In April 2018, soon after Sprint announced that its prepaid brand Boost was offering new customers a month of free unlimited data service,[109] T-Mobile announced that its prepaid MetroPCS brand would offer two months of free unlimited service and a MetroPCS phone to new customers.[110]
- In July 2018, Sprint debuted two tiers of unlimited plans: Unlimited Basic and Unlimited Plus. Unlimited Basic includes unlimited talk, text, and data as well as Hulu and a 500 MB mobile hotspot, while Unlimited Plus includes a premium Tidal subscription, 15 GB of 4G LTE mobile hotspot data, 10 GB of 4G LTE data in Canada and Mexico, and full HD video streaming on Sprint's 4G LTE network.[111] Two years earlier, in 2016, T-Mobile launched its own two-tier unlimited offerings: T-Mobile ONE, which offers unlimited talk, text, and high-speed data[112] and as of September 2017, Netflix,[113] and T-Mobile ONE Plus,

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[106] *See* Diana Goovaerts, *Following Verizon and T-Mobile, Sprint Springs for HD Video in Unlimited Plan Upgrade*, Wireless Week (Feb. 16, 2017), https://www.wirelessweek.com/news/2017/02/following-verizon-and-t-mobile-sprint-springs-hd-video-unlimited-plan-upgrade.

[107] Press Release, T-Mobile, *You've Got Our Backs, So We've Got Yours. T-Mobile Launches Extensive Military Support Initiative* (Apr. 18, 2018), https://www.t-mobile.com/news/t-mobile-one-military ("T-Mobile Apr. 18, 2018 Press Release").

[108] Press Release, Sprint, *Sprint's Industry-Leading Unlimited Plans Just Got Even Better! New Unlimited Plans Include Features Customers Love for the Best Price* (July 12, 2018), http://newsroom.sprint.com/sprints-industry-leading-unlimited-plans-just-got-even-better-new-unlimited-plans-include-features-customers-love-for-best-price.htm ("Sprint July 12, 2018 Press Release").

[109] *See* Zach Epstein, *Sprint Is Giving Away a Month of Unlimited Prepaid Service – So Now T-Mobile Is Giving Away 2 Months*, BGR (Apr. 14, 2018), https://bgr.com/2018/04/14/t-mobile-unlimited-plan-price-free-metropcs-offer.

[110] *See* Press Release, T-Mobile, *Switch to MetroPCS Today and Get TWO Months Unlimited Data Free* (Apr. 12, 2018), https://www.t-mobile.com/news/metropcs-two-months-free.

[111] *See* Sprint July 12, 2018 Press Release.

[112] *See* T-Mobile Aug. 18, 2016 Press Release.

[113] *See* Press Release, T-Mobile, *America's Best Unlimited Just Got Even Better – T-Mobile Now Includes Netflix on Us* (Sept. 5, 2017), https://www.t-mobile.com/news/tmobile-uncarrier-netflix.

which offers 20 GB of 4G LTE mobile hotspot data, unlimited HD streaming, and unlimited data abroad at double the speed of T-Mobile ONE.[114]

- In November 2018, Sprint announced that customers can receive a Sprint Drive device free with a 24-month installment plan and qualifying data plan.[115] Less than three weeks later, T-Mobile offered its car connection device, SyncUP DRIVE, for free.[116]
- In December 2018, Sprint announced that new Unlimited Basic customers get their 3rd, 4th, and 5th line free.[117] In March 2019, T-Mobile offered a free third line to new and existing customers.[118]

Consumers and the industry as a whole have benefitted from the direct competition between T-Mobile and Sprint.

Importantly, the companies' efforts have also forced AT&T and Verizon to respond with lower prices and more attractive offers. In 2008, Verizon's decision to introduce an unlimited wireless plan was spurred by Sprint's imminent announcement of its own unlimited wireless offer, which was then matched by AT&T within days.[119] In 2010, Sprint released the first 4G

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[114] *See Amp Up T-Mobile ONE*, T-Mobile, https://www.t-mobile.com/cell-phone-plans?icid=WMM_TM_Q117TMO1PL_H85BRNKTDO37510 (last visited Apr. 25, 2019); Press Release, T-Mobile, *T-Mobile Shakes Things Up with T-Mobile ONE Plus* (Dec. 20, 2016), https://www.t-mobile.com/news/t-mobile-shakes-things-up-with-t-mobile-one-plus (introducing T-Mobile ONE Plus in December 2016).

[115] Press Release, Sprint, *Attention, Drivers! Enhance Your In-Vehicle Experience with a Sprint Drive Device, FREE for a Limited Time* (Nov. 19, 2018), https://newsroom.sprint.com/attention-drivers-enhance-your-in-vehicle-experience-with-sprint-drive-device-free-for-limited-time.htm.

[116] Press Release, T-Mobile, *Get Peace of Mind AND a Free T-Mobile SyncUP DRIVE This Season!* (Dec. 3, 2018), https://www.t-mobile.com/news/syncup-drive-promo-2018.

[117] Press Release, Sprint, '*Tis the Season to Switch to Sprint – Get Lines Three, four and Five FREE with Unlimited Basic* (Dec. 13, 2018), https://newsroom.sprint.com/tis-season-to-switch-to-sprint-get-lines-three-four-and-five-free-with-unlimited-basic.htm.

[118] Alan Friedman, *T-Mobile Promotion Offers New and Existing Customers a Free Third Line*, PhoneArea.com (Apr. 19, 2019), https://www.phonearena.com/news/T-Mobile-promotion-offers-a-free-third-voice-line_id115442.

[119] Saul Hansell, *Verizon Stabs Sprint With Unlimited Wireless Plan* (Feb. 19, 2008), https://bits.blogs.nytimes.com/2008/02/19/verizon-stabs-sprint-with-unlimited-wireless-plan.

phone in the United States, leading Verizon to respond with the Droid X.[120] More recently, AT&T matched Sprint's offer of a $500 credit for customers buying the Galaxy S9.[121] The response to T-Mobile's consumer-friendly policies is similarly well-known. After dropping unlimited data plans three years earlier, "[in] response to T-Mobile's One plan, Verizon, AT&T, and Sprint all introduced or improved their unlimited data offerings."[122] And, since T-Mobile began introducing competitive no-contract plans in 2013, the "overall cost of wireless service has come down 19%."[123] Additional examples of Verizon's and AT&T's responses to T-Mobile's maverick behavior abound:

- *Military discounts:* In April 2018, T-Mobile offered the "biggest military discount in wireless," with 20% off a first line and 50% off additional lines.[124] In June 2018, Verizon followed with its own stepped-up military discount, offering its Go Unlimited plan "for $30 per month per line for four lines—a savings of $40 per month."[125]

- *Buy-One-Get-One-Free offers:* In January 2018, T-Mobile announced a buy-one-get-one free deal for major smartphone brands when a line is switched to T-Mobile.[126] In May 2018, Verizon introduced its own buy-one-get-one-free deal.[127] In June, T-Mobile added

[120] Jane McEntegart, *Droid X is Verizon's Answer to Sprint's EVO 4G* (June 16, 2010), https://www.tomsguide.com/us/Droid-x-Verizon-Sprint-EVO-4G,news-7088.html ("Verizon's answer to [Sprint's] HTC Evo 4G").

[121] Eric Zeman, PhoneScoop, *AT&T Matches Sprint's Samsung Galaxy S9 Offer* (Mar. 2, 2018), https://www.phonescoop.com/articles/article.php?a=20293.

[122] Chris Mills, *Everyone Loves Their Unlimited Data Plans*, BGR (Jan 22, 2018), https://bgr.com/2018/01/22/best-unlimited-plan-verizon-vs-t-mobile-att.

[123] Danielle Wiener-Bronner, *What T-Mobile-Sprint Deal Could Mean for Wireless Prices*, CNN (Apr. 30, 2018), https://money.cnn.com/2018/04/30/technology/business/tmobile-sprint-wireless-rates/index.html.

[124] T-Mobile Apr. 18, 2018 Press Release.

[125] Press Release, Verizon, *Now Military Families Can Save Even More with Verizon Unlimited*, (June 28, 2018), https://www.verizon.com/about/news/now-military-families-can-save-even-more-verizon-unlimited.

[126] Press Release, T-Mobile, *T-Mobile Unveils Major Smartphone Deals to Start the New Year Right* (Jan. 10, 2018), https://www.t-mobile.com/news/bogo-offers.

[127] Chris Mills, *Verizon's New iPhone BOGO Deal Has Shockingly Little Fine Print*, BGR (May 7, 2018), https://bgr.com/2018/05/07/verizon-iphone-deal-buy-one-get-one.

the LG G7 to its buy-one-get-one-free deal.[128] One week later, Verizon matched T-Mobile's offer and added LG G7 to its deal.[129]

- *Senior discounts:* In August 2017, T-Mobile introduced an unlimited plan for consumers over the age of 55, offering two lines for $60/month.[130] Verizon later matched T-Mobile's offer with its own plan for customers 55 years and older in Florida, offering an unlimited line for $60/month and two unlimited lines for $80/month.[131]

Without the presence of both companies as independent players in the market, consumers stand to lose out on the innovative offerings and lower prices that have resulted from this head-to-head competition.

VI. THE PROPOSED MERGER WILL HARM CALIFORNIA

A. This Merger Will Lead to Higher Prices for Consumers

As described above, the merger will result in a loss of competition, excessive spectrum consolidation, and an increase in market concentration. Among other outcomes, this market-consolidation will lead to price increases for consumers. In its Petition to Deny, filed at the FCC and cited by CWA witness Ms. Goldman,[132] DISH originally estimated that the transaction will likely result in estimated consumer price increases of 2.8-15.5%, or weighted average price increases of 4.2-10.4%. On top of these likely price increases, the transaction would also

[128] Chris Mills, *The LG G7 Isn't Even on Sale Yet, But T-Mobile Already Has a Buy-One-Get-One-Free Deal*, BGR (May 30, 2018), https://bgr.com/2018/05/30/the-lg-g7-release-date-deals-t-mobile-vs-sprint-verizon.

[129] Chris Mills, *Verizon is Matching T-Mobile's iPhone and Android Buy-One-Get-One-Free Deal Almost Exactly*, BGR (June 7, 2018), https://bgr.com/2018/06/07/t-mobile-phones-deals-2018-vs-verizon.

[130] Press Release, T-Mobile, *A New Reason to Get a Fake ID: Introducing T-Mobile ONE Unlimited 55+* (Aug. 6, 2017), https://www.t-mobile.com/news/unlimited-55.

[131] Mike Dano, *Verizon Offers Response to T-Mobile's Unlimited Plan for Customers Over 55 Years of Age*, Fierce Wireless (Feb. 23, 2018), https://www.fiercewireless.com/wireless/verizon-tests-response-to-t-mobile-s-unlimited-plan-for-customers-over-55-years-old.

[132] Goldman Testimony at 11 n.31; 17 n.52.

increase the risk of coordination in the industry, likely resulting in another 15-21% in post-merger price increases.[133]

In subsequent submissions to the FCC, the Joint Applicants' economists conceded that the pricing pressure would be greater than DISH originally estimated.[134] The Joint Applicants have asserted, however, that such a price effect should not matter because the anticompetitive effects of this greater magnitude will be offset by the benefits they claim this transaction will produce.[135] Tellingly, the Joint Applicants do not deny that the price of consumers' plans may increase as a result of this merger. Instead, they argue that consumers should not care about the higher prices they will pay for their plans because they allegedly will have more data and greater speeds at their disposal.[136] However, the Joint Applicants have not demonstrated that the higher prices that this merger would produce would be offset by the claimed increase in the quantity or speed of data consumers could potentially receive. And, as nine United States Senators noted, "this merger will weaken competitive pressures that otherwise discipline price increases" making it "likely to lead to higher monthly bills for consumers" noting that "at a time of growing inequality, we cannot afford another merger that will likely increase costs for the many, while lining the pockets of a few wealthy executives and shareholders."[137]

As DISH's economists have shown, even if *all* of the Joint Applicants' claims about diversion rates, marginal cost savings, and consumers' willingness to pay more for supposed quality improvements are accepted, prices for millions of customers will still increase, and most

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[133] Goldman Testimony at 30 n.114 (*citing* Brattle Declaration at 10).

[134] Joint Applicants FCC reply.

[135] Declaration of Compass Lexecon ¶ 6, 46, 48 (Appendix F to Opposition of T-Mobile/Sprint to Petitions to Deny).

[136] *Id.* ¶ 124.

[137] Feb. 12, 2019 Letter from Nine Senators at 5.

of the two companies' customers would not be willing to pay for the increases.[138] DISH has explained that the Joint Applicants' claimed benefits (*i.e*., their marginal cost savings from the merger) are inflated and speculative: (1) their claimed "spectral efficiency" assumption is too low; (2) the costs for the same solutions are assumed to be higher for Sprint than for New T-Mobile; (3) standalone Sprint's speed for the transition to 5G is too sluggish;[139] and (4) their economists have artificially boosted marginal cost savings by reducing usage estimates.[140]

In addition, the Joint Applicants have dramatically exaggerated the marginal cost savings of this merger by not incorporating any additional spectrum into the engineering model they submitted to the FCC beyond what the Applicants held in 2018.[141] The addition of just 200 MHz of millimeter wave spectrum to each standalone company would vastly increase capacity for the standalone companies, gutting the merger's claimed effect on marginal costs.[142]

B. The Transaction Will Significantly Increase the Risk of Coordination

As discussed above, the three network operators remaining after the proposed merger (AT&T, Verizon, and New T-Mobile) would each have the incentive to raise prices individually (or "unilaterally"). However, the merger will also substantially increase the maximum price increase that carriers will be willing to initiate and match, hence increasing the risk of tacit

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[138] *See* Coleman Bazelon, Jeremy Verlinda, and William Zarakas, *Reply to Cornerstone's Response to DISH and CWA Comments* at 10 (Feb. 19, 2019) (attachment A to letter from Pantelis Michalopoulos, DISH Counsel, to Marlene Dortch, FCC, WT Docket No. 18-197).

[139] This is especially so given Sprint's recent announcement at the Mobile World Congress: the company stated that it plans to bring 5G to four cities in May 2019 (Chicago, Atlanta, Dallas and Kansas City) and another five cities (Houston, Los Angeles, New York City, Phoenix and Washington, D.C.) in the first half of 2019.

[140] *See* Reply Declaration of Joseph Harrington, Coleman Bazelon, Jeremy Verlinda, and William Zarakas at 34-36 (Exhibit 1 to Reply of DISH Network Corp., WT Docket No. 18-197) (Oct. 31, 2018).

[141] *See* Letter from Pantelis Michalopoulos, DISH Counsel, to Marlene Dortch, FCC, WT Docket No. 18-197 (Feb. 4, 2019); Reply of DISH Network Corp., WT Docket No. 18-197, at 81-86 (Oct. 31, 2018) ("DISH Reply").

[142] *See* Letter from Pantelis Michalopoulos, DISH Counsel, to Marlene Dortch, FCC, WT Docket No. 18-197, at 2 (Apr. 16, 2019).

coordination. It is well recognized that a "merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms."[143]

C. The Industry Is Suitable for Tacit Coordination, but Coordination Remains Difficult in the Current Market

The mobile voice/broadband market is generally suitable for tacit coordination: prices are public and the carriers' plans are similar; buyers—the individual consumers—lack power, and the barriers to entry are high. Nevertheless, coordination in the current four-player market is difficult, especially because the market shares and interests of the four players are misaligned. Specifically, as shown in the table below, each of AT&T and Verizon has a significantly higher share than each of T-Mobile and Sprint.

2016 U.S. Wireless Provider Comparison

Provider	2016 Market Share	Share of Total U.S. Population Covered	Share of Total U.S. Square Miles Covered	Total 5 Year Capital Investment	Total 10 Year Capital Investment	Average Monthly Churn	Average Subscription Life (Years)
[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]
AT&T	32.4%	99.3%	71.7%	$ 52,519,000,000	$ 86,954,000,000	1.5%	6.1
Verizon Wireless	35.0%	97.3%	66.3%	$ 51,762,000,000	$ 89,273,000,000	1.2%	7.3
Sprint	14.3%	92.0%	27.5%	$ 22,426,000,000	$ 34,885,000,000	2.2%	4.3
T-Mobile	17.1%	95.1%	47.7%	$ 20,885,000,000	$ 36,333,000,000	1.7%	5.3

Sources: Estimated total connections, coverage data, and capital expenditure data from 2010 through 2016 from the FCC Twentieth Mobile Wireless Competition Report, pp. 15, 48, and 80. Capital expenditure data from 2005 through 2009 from the FCC Fifteenth Mobile Wireless Competition Report, p. 132. Churn data from UBS Wireless 411, p. 19.

Notes:

[B]: Market share based on estimated total connections as reported in the 20th Mobile Wireless Competition Report.

[C]: Share of total U.S. population covered by provider as reported in the 20th Mobile Wireless Competition Report.

[143] Horizontal Merger Guidelines § 7.

[D]: Share of total U.S. square miles covered by provider as reported in the 20th Mobile Wireless Competition Report.

[E]: Sum of capital expenditures for each provider from 2012 through 2016 as reported in the 20th Mobile Wireless Competition Report.

[F]: Sum of capital expenditures for each provider from 2007 through 2016 as reported in the 15th Mobile Wireless Competition Report and the 20th Mobile Wireless Competition Report. Capital expenditures from 2005 through 2009 are estimated based on Chart 30 in the 15th Mobile Wireless Competition Report.

[G]: Average monthly churn calculated as the geometric mean of monthly churn rates as reported in UBS Wireless 411.

[H]: Average subscription life, calculated as 1 / average monthly churn. Figures based on monthly churn rates reported in UBS Wireless 411.

Given these positions, coordination is unlikely to be effective unless both AT&T and Verizon were to participate. Thus, the possible coordinated arrangements in the pre-merger market are: (1) AT&T and Verizon coordinating by themselves (i.e., without Sprint and T-Mobile), (2) AT&T and Verizon coordinating with either Sprint or T-Mobile (but not both), or (3) AT&T and Verizon coordinating with both Sprint and T-Mobile. We address each of these scenarios in turn.

First, coordination by AT&T and Verizon without Sprint and T-Mobile is likely to break down not long after it begins. This is because Sprint and T-Mobile typically sell at a discount compared to AT&T and Verizon. A coordinated price increase by AT&T and Verizon would provide a golden opportunity for T-Mobile and Sprint to further expand, and at even higher profit margins than in the past.

Second, coordination by AT&T, Verizon, and either Sprint or T-Mobile (but not both) suffers from a similar infirmity. For example, if Sprint coordinated with AT&T and Verizon to raise prices, T-Mobile could then either maintain its price or increase its price by less than the rise in the prices by the other three network operators, resulting in a rise in T-Mobile's sales and market share because of the discount it would offer relative to the three other companies. Thus, the risk of mis-coordination is heightened in the current four-player market because of the uncertainty regarding whether Sprint or T-Mobile would participate.

Third, coordination among all four current network operators is unlikely because T-Mobile and Sprint are unlikely to participate in a coordinated arrangement that would require freezing their market share. Even if T-Mobile were willing to participate, it is difficult for four firms to coordinate without express communication. For example, if Sprint were willing to participate if the other three network operators were to do so, it may still not follow a price increase by Verizon or AT&T because it would be unsure that T-Mobile would follow. Even if all four network operators did want to participate in a coordinated arrangement and were able to coordinate, such an arrangement would be highly unstable. Sprint or T-Mobile would be tempted to undercut Verizon or AT&T to increase market share, hoping that the three remaining firms would continue to coordinate. Sprint and T-Mobile's recent attempts to increase their market shares show that they are not content with their current market positions.

D. The Merger Will Make Tacit Coordination Easier

In the post-merger environment, however, tacit coordination would be easier. The merger would likely lead to coordinated effects because: (1) New T-Mobile would be more willing to coordinate with AT&T and Verizon than either standalone Sprint or T-Mobile; and (2) it would be less difficult for AT&T, Verizon, and New T-Mobile to coordinate than any grouping of the current four incumbents.

T-Mobile would also have fewer incentives for maverick behavior. As demonstrated in the above scenarios, one of the main obstacles to coordination in the pre-merger market is T-Mobile's maverick behavior.

Merging with Sprint would largely eliminate the rationale for T-Mobile's maverick behavior. Once it has obtained through the merger the higher market share that it has previously used competition to obtain, there would be little need for New T-Mobile to continue acting as a maverick. Indeed, with its larger customer base, it would be even more costly for New T-Mobile to be a maverick, because low prices would be more costly in terms of foregone lost profits on the larger customer base. It would instead be more rational for New T-Mobile to reap larger profits from those customers, rather than continue trying to gain market share.[144] New T-Mobile would likely act to increase its margins, by among other methods, engaging in tacit coordination with AT&T and Verizon.

VII. The Transaction Has No Cognizable Benefits for Consumers

A. 5G Deployment Likely Would Happen With or Without the Proposed Transaction, and Should Not Be Credited as the Transaction's But/For Benefit

In support of this merger, the Joint Applicants assert that the merger "will unlock massive synergies" that will enable them to deploy a "superior" 5G network, an outcome they claim they will be unable to achieve standing alone.[145] But, as Ms. Goldman testified, each of the Joint Applicants have claimed that they will deploy 5G networks as standalone companies, including in executives' statements to financial markets.[146] And, their own engineering model, submitted to the FCC in support of this merger, confirm that the standalone companies can deploy 5G without experiencing almost any congestion at all.[147] As nine United States Senators recently cautioned, "officials should not be blinded by the glittery promises of nationwide 5G. Not only

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[144] *See* Brattle Declaration at 69 ("[A] maverick strategy of aggressive pricing is less attractive when a firm has a higher market share, as would be the case with New T-Mobile.").

[145] Joint Application at 3.

[146] Goldman Testimony at 32-35.

[147] DISH Petition to Deny at 77.

do each of these companies have their own path forward to achieving 5G coverage, but the financial details of this deal and the technical challenges of building a 5G network suggest that the New T-Mobile is unlikely to meaningfully speed up the deployment of 5G."[148] They added that "T-Mobile's and Sprint's sudden claims that neither can create a competitive 5G network separately flies in the face of announcements, disclosures, and marketing to consumers and investors over the past two years."[149]

For example, before the merger, T-Mobile stated that it "will be the first to give customers the truly transformative, nationwide 5G network they deserve[.]"[150] It also announced it would "accelerate our 600 megahertz rollout in 2018, while laying the foundation for the country's first nationwide 5G network by 2020."[151] In its annual 10-K filing for 2017, the company explained that it is "rapidly preparing for the next generation of 5G services" by creating a "network that will allow us to deliver innovative new products and services with the same customer focused and industry disrupting mentality that has redefined wireless service in the United States."[152]

Sprint, for its part, believes it has "the BEST spectrum and assets to build an incredible nationwide #5G network that our customers will love."[153] And Sprint's CEO said pre-merger

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[148] Feb. 12, 2019 Letter from Nine Senators at 9.

[149] *Id.*

[150] *See* Alex Scroxton, MWC 2018: 5G Collaboration Dominates Agenda at Annual Mobile Fair, Computer Weekly.com (Feb. 28, 2018), https://www.computerweekly.com/news/252435888/MWC-2018-5G-collaboration-dominates-agenda-at-annual-mobile-fair (T-Mobile Chief Technology Officer Neville Ray).

[151] T-Mobile US, Inc., Q4 2017 Earnings Call Transcript (Feb. 8, 2018), https://seekingalpha.com/article/4145138-t-mobile-uss-tmus-ceo-john-legere-q4-2017-results-earnings-call-transcript.

[152] T-Mobile US, Inc., Annual Report (Form 10-K) at 4 (Feb. 8, 2018).

[153] Marcelo Claure (@marceloclaure), Twitter (Mar. 9, 2018 12:24 PM), https://twitter.com/marceloclaure/status/972206391858483201.

that "I have never seen a company with such a rich spectrum which is a sweet spot for 5G, I guess that gives us a tremendous opportunity for the years to come."[154] Sprint boasted about its 5G progress at the recent Mobile World Congress: the company stated that it plans to bring 5G to four cities in May 2019 (Chicago, Atlanta, Dallas and Kansas City) and another five cities (Houston, Los Angeles, New York City, Phoenix and Washington, D.C.) in the first half of 2019. T-Mobile, for its part, is on track to deploy 5G in 30 major American cities this year, also including Los Angeles,[155] and announced yesterday that it is "[o]n track to have the first nationwide 5G network available next year."[156]

Before the merger, the Joint Applicants also backed up their promises of 5G deployment with aggressive and independent capital buildout plans. T-Mobile announced plans to spend $25.9 billion in CapEx through 2022, and noted that its expenditures for 5G deployment in 2018 are "now expect[ed] to come in at the high end" of its estimated range of $4.9 to $5.3 billion.[157] Sprint indicated that it planned to spend between $5 and $6 billion on 5G in fiscal year 2018.[158]

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[154] Transcript, *Sprint's Management Presents at Deutsche Bank 2018 Media, Telecom & Business Services Conference* (Mar. 7, 2018), https://seekingalpha.com/article/4154284-sprints-s-management-presents-deutsche-bank-2018-media-telecom-and-business-services?page=2 (comments of Sprint President and Chief Financial Officer Michel Combes).

[155] Roger Cheng, *T-Mobile delays full 600MHz 5G launch until second half of 2019, CNet (Feb. 25, 2019), https://www.cnet.com/news/t-mobile-delays-full-600-mhz-5g-launch-until-second-half/.*

[156] Press Release, *T-Mobile Reports Accelerated Customer Growth, All-Time Record-Low Churn, and Best Ever Q1 Financial Results* (Apr. 25, 2019), https://investor.t-mobile.com/news-and-events/t-mobile-us-press-releases/press-release-details/2019/T-Mobile-Reports-Accelerated-Customer-Growth-All-Time-Record-Low-Churn-and-Best-Ever-Q1-Financial-Results/default.aspx.

[157] Declaration of Neville Ray ¶ 8 (attached as Appendix B to Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197) (June 18, 2018); T-Mobile Q2 2018 Earnings Call Transcript (Aug. 1, 2018), https://seekingalpha.com/article/4193405-t-mobile-us-inc-tmus-ceo-john-legere-q2-2018-resultsearnings-call-transcript?page=2.

[158] Sprint Corp., Q1 2018 Earnings Call Transcript (Aug. 1, 2018), https://seekingalpha.com/article/4193250-sprint-s-q1-2018-results-earnings-call-transcript ("Sprint Q1 2018 Earnings Call").

And, the engineering model submitted by the Joint Applicants, which they have had to revise several times in the FCC's proceeding, now shows that each company will be able to provide full 5G without experiencing almost any congestion at all. [159] In addition, until April 22nd, when the Joint Applicants submitted yet another model revision, the model failed to take into account the acquisition of any additional spectrum—including millimeter wave spectrum that both companies have announced plans to acquire.[160] As discussed above, adding in those frequencies significantly reduces the claimed efficiencies the merger will bring.

These pre-merger plans, backed by the companies' respective spectrum holdings, and the realities of what 5G entails, demonstrate that both companies appear to have the spectrum assets and resources to deploy 5G networks on their own today.

B. The Transaction Will Do Nothing to Help Rural Americans

The Joint Applicants also attempt to justify this merger by arguing that their combination will allow them to better serve rural Americans. But, their claims are contradictory and belied by the evidence. For example, the Joint Applicants claim that by utilizing Sprint's 2.5 GHz spectrum, "small towns and rural communities will experience greater coverage and quality of service, increased capacity, and faster speeds."[161] Public Advocates' witness Dr. Selwyn noted that such claims defy economic reality. He testified that rural areas are currently underserved

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[159] In its opening testimony, CWA referenced DISH's Petition to Deny and Reply filings to the FCC, which provide detailed analysis of the Joint Applicants' 5G claims. Goldman Testimony (citing DISH's FCC filings at 3 n.8; 11 n.31; 17 n.52; 29 n.110; 30, nn.111, 113 & 114.

[160] Monica Alleven, *New T-Mobile Will be in the Market for More Spectrum: Legere*, FierceWireless (March 13, 2019), https://www.fiercewireless.com/wireless/new-t-mobile-will-be-market-for-more-spectrum-legere.

[161] A.18-07-011, Joint Application at 65.

due to the high cost of deploying facilities in sparsely populated areas and the relatively small population from which costs may be recovered.[162]

C. New T-Mobile Will Have the Incentive and Ability to Foreclose New Competitors

The transaction could even hamper and delay the 5G entry of competitors, including DISH, by giving New T-Mobile greater influence over an ecosystem of key network inputs, including radios, chipsets, devices, towers, crews, and backhaul.[163] New T-Mobile, for example, would have the incentive and ability to use its newfound market power to customize radio solutions that could be detrimental to DISH and lead to a delay in DISH being able to implement its 5G entry.[164]

VIII. T-Mobile's Rate Plan Pledge Does Nothing to Help Consumers

T-Mobile's attempt to answer the clear consensus that this merger will lead to higher prices is a supposed "rate plan" freeze, offered in submissions to the FCC.[165] But by its *own* terms, T-Mobile's pledge to maintain existing T-Mobile and Sprint "rate plans" is an empty promise that leaves gaping loopholes, effectively rendering the pledge meaningless. It is therefore no surprise that T-Mobile has "no objection to this representation being included as a formal merger condition"[166]—such a toothless condition would be a boon to New T-Mobile by giving it virtual free rein to raise effective prices while consolidating its position post-merger to

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[162] Testimony of Lee L. Selwyn on Behalf of the Public Advocates Office at the California Public Utilities Commission, Before the California Public Utilities Commission, at 165 (Jan. 7, 2019), http://www.publicadvocates.cpuc.ca.gov/uploadedFiles/Content/Communications/A.18-07-011%20Public%20Advocates%20Office%20Testimony%20of%20Lee%20Selwyn%20[PUBLIC].pdf.

[163] DISH Petition to Deny at 52-53.

[164] *Id.*

[165] Letter from Nancy Victory, T-Mobile Counsel, to Marlene Dortch, FCC , WT Docket No. 18-187, at 2-3 (Feb. 4, 2019).

[166] *Id.* at 3.

the detriment of consumers and competition. And once whatever meager protection the commitment provides expires after 36 months, customers will be left at the mercy of New T-Mobile to raise their base rates as well.

It is in large part because of all the ways a company can evade restrictions on its conduct that behavioral remedies are disfavored. As Assistant Attorney General Makan Delrahim has explained: "in telecommunications, as in other industries, we strongly favor structural remedies. If a structural remedy isn't available, then, except in the rarest of circumstances, we will seek to block an illegal merger."[167] Similarly, as one leading antitrust economist observed, "[c]ompetition is a better tool than price controls for protecting consumers[.]"[168] The Commission should reject this proposed remedy, as it is ineffective to solve this merger's many proven harms.

IX. CONCLUSION

In short, this merger would harm California consumers by creating a national mobile voice/broadband market controlled by three companies, leading to excessive concentration in other relevant markets, and increasing prices for consumers. The purported public interest benefits of this merger do not outweigh its many harms. As presented by the Joint Applicants, the Commission should deny this merger.

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[167] Makan Delrahim, Assistant Attorney General, Department of Justice, *Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunications Institute's Conference in Mexico City* (Nov. 7, 2018) https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute; *see also* John E. Kwoka and Diana L. Moss, *Behavioral Remedies: Evaluation and Implications for Antitrust Enforcement*, The Antitrust Institute, at 5 (Nov. 3, 2011), https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf ("[A]llowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve.").

[168] Fiona M. Scott Morton, *The Problems of Price Controls*, Regulation: The Cato Review of Business and Government, at 53 (Spring 2001), https://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/morton.pdf.

Signed and dated April 26, 2019 at Walnut Creek, CA.

Respectfully submitted,

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