IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff v. DEUTSCHE TELEKOM AG; T-MOBILE U.S., INC.; SOFTBANK GROUP CORP.; and SPRINT CORPORATION. Defendants	:	**No. 1:19-cv-02232- TJK**

WRITTEN COMMENTS SUBMITTED BY DANIEL MARTIN BELLEMARE IN OPPOSITION TO THE PROPOSED FINAL JUDGMENT FILED FOR ENTRY BY THE UNITED STATES IN THE ABOVE-CAPTIONED MATTER PURSUANT TO THE ANTITRUST PROCEDURES AND PENALTIES ACT 15 U.S.C. § 16 (b)-(h).

The United States published a notice in the Federal Register pursuant to the *Antitrust Procedures and Penalties Act*. 15 U.S.C. § 16 (b)-(h) ("Act") informing the public that a proposed Final Judgment, Stipulation, and Competitive Impact Statement ("materials") had been filed in the above-captioned matter. 84 Fed. Reg. 39862 (Aug. 12, 2019). On July 26, 2019 the United States and several states filed simultaneously a Complaint pursuant to Section 7 of the *Clayton Act* (15 U.S.C. § 18) seeking declaratory and injunctive relief to prevent completion of a merger between Sprint Corp. and T-Mobile US ("proposed merger").

The proposed Final Judgment is in settlement of the civil action filed against the proposed merger. The Court must determine whether entry of the proposed Final Judgement is in the public interest, the statutory standard set forth in 15 U.S.C. § 16 (e) (1). The Act contemplates a public interest determination following submission of written comments. 15 U.S.C. § 16 (c) (iii). Unfortunately, materials published in the Federal Register do not allow meaningful public comments.

The Complaint's conclusory statements, the Competitive Impact Statement's brief antitrust analysis do not aid understanding the proposed Final Judgment's terms and conditions — adequacy; impact in the relevant market should the Court enter it. The United States filed a civil antitrust action pursuant to Section 7 of the *Clayton Act* (15 U.S.C. § 18) to prevent the consolidation of T-Mobile and Sprint. The Complaint states summarily that the proposed merger may lessen competition substantially while the Competitive Impact Statement discusses relief in the proposed Final Judgment hastily.

The Complaint and Competitive Impact Statement are silent on key elements of the relevant market's structure — precise pre- and post-merger market shares of T-Mobile, Sprint and their competitors; pre- and post-merger levels of concentration; trend toward concentration. The above information appears routinely in antitrust complaints stating a claim under Section 7 of the *Clayton Act*; it is essential, as the Complaint filed in the Federal Register defines the scope of the public interest determination. *United States v. Microsoft Corp*., 56 F.3d 1448, 1459 (D.C. Cir. 1995) (Silberman C.J.).

Pre- and post-merger indexes of concentration, accurate pre- and post-merger market shares of market participants in the relevant market are central to judicial review of the proposed merger. *United States v. Antem, Inc*. 855 F.3d 345, 349-350 (D.C. Cir. 2018) (Kavanaugh C.J. dissenting). Complete statements of material facts in antitrust pleadings is of the essence in order to avoid dismissal *in limine*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Souter J.); *Eastman Kodak Co. v. Image Technical Servs., Inc*., 504 U.S. 451 (1992); *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986).

Materials published in the Federal Register prevent full judicial oversight of the proposed merger, despite the Act's express purpose to foster accountability and openness in the Department of Justice's Antitrust Division. *A priori* the proposed merger — among two rivals operating within an oligopoly counting four market players — raises antitrust concerns under Section 7 of the *Clayton Act*. Therefore, materials published in the Federal Register should provide more detailed information on the proposed merger's antitrust implications in the relevant market.

The Competitive Impact Statement published in the Federal Register must meet statutory requirements set forth in 15 U.S.C. 16 (b) (3), *inter alia* explain "unusual circumstances giving rise" to the proposed Final Judgment. We take the Complaint as it stands, as "the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General". *Microsoft* 56 F.3d at 1462. Conversely, the Executive Branch may not repeal by administrative action a statute enacted by Congress, especially one meant to subject Executive action's to judicial oversight.

I. THE COMPETITIVE IMPACT STATEMENT FAILS TO EXPLAIN UNUSUAL CIRCUMSTANCES WARRANTING ENTRY OF THE PROPOSED FINAL JUDGMENT.

The *Antitrust Procedures and Penalties Act* provides a statutory framework governing judicial oversight of settlements reached by the United States and antitrust defendants. The Act aims at maximizing public participation respecting judicial review of antitrust settlements. In the instant case, the United States must seek judicial approval as to entry of the proposed Final Judgment. The public must have an opportunity to submit written comments within sixty-days; during that period, the United States "*shall* receive and consider"written comments, and, upon review, file all materials before the Court. 15 U.S.C. § 16 (b) (emphasis added).

The Competitive Impact Statement filed by the United States in the above-captioned matter must meet an important statutory requirement: "an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such a proposal or any provision contained therein". Also, it must explain relief sought in the proposed Final Judgment along with "anticipated effects on competition of such relief". 15 U.S.C. § 16 (b) (2), (3). The last requirement means that the Competitive Impact Statement must explain how the proposed Final Judgment would adequately remedy the anti-competitive effect of the proposed merger in the relevant market.

Congress further encouraged public participation by directing publication, in newspapers circulating in enumerated judicial districts, of summaries of the proposed Final Judgement, Competitive Impact Statement, and of a list of materials and documents "for purposes of meaningful public comment". 15 U.S.C. § 16 (c). Also, defendants are required to file with the Court "a description of any and all written or oral communications by or on behalf of such defendants ... with any officer or employee of the United States" regarding the proposed Final Judgment. 15 U.S.C. § 16 (g). Written comments, and response thereto, must be filed with the Court. 15 U.S.C. § 16 (d).

The Court may also take appropriate "action" when determining whether entry of the proposed Final Judgment would be in the public interest. For instance: appoint expert witnesses; "request and obtain the views, evaluations, or advice of any individual, group"; grant "interested persons" leave to intervene. 15 U.S.C. § 16 (f) (2), (3). To sum up, the Act enunciates strict nondiscretionary statutory requirements aimed at encouraging submission of meaningful written comments. Consistent with the Act's central purpose, the materials published in the Federal register should provide more information on the proposed merger to enable meaningful public comments.

The 13-page Complaint in the above-captioned matter claims that the proposed merger violates Section 7 of the *Clayton Act* (15 U.S.C. ¶ 18) in retail mobile wireless service in the United States, the relevant market. Complaint ("Compl.") ¶¶ 14, 15, 29.[1] Basically, the Complaint states that the proposed merger would lessen competition substantially in the relevant market. We reproduce *in extenso* the relevant paragraphs of the Complaint stating how the proposed merger affects competition in the relevant market:

4. As the nation's third and fourth largest mobile wireless carriers, T-Mobile and Sprint have positioned themselves as challengers to Verizon and AT&T, their larger and more expensive rivals, targeting retail customers who particularly value affordability. Some of these customers purchase mobile wireless service on a postpaid basis and are billed monthly after receiving service. Others, including those who may lack ready access to credit, purchase prepaid mobile wireless service and pay for service in advance of using it.

5. The merger would eliminate Sprint as an independent competitor, reducing the number of national facilities-based mobile wireless carriers from four to three. The merger would cause the merged T-Mobile and Sprint (''New Tmobile'') to compete less aggressively. Additionally, the merger likely would make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings. The result would be increased prices and less attractive service offerings for American consumers, who collectively would pay billions of dollars more each year for mobile wireless service.

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16. The proposed merger would substantially lessen competition and harm consumers in the relevant market. Post-merger, the combined share of T-Mobile and Sprint would account for roughly one-third of the national retail mobile wireless service market, leaving only two other national wireless carriers of roughly equal size (AT&T and Verizon).

17. American consumers, including those who are customers of Verizon and AT&T, have benefitted from the competition T-Mobile and Sprint have brought to the mobile wireless industry. For instance, it was not until after T-Mobile and Sprint introduced unlimited data plans to retail customers in 2016 that Verizon and AT&T followed with their own standalone unlimited data offerings to retail customers in 2017.

18. T-Mobile and Sprint have been particularly intense competitors for the roughly 30% of retail subscribers who purchase prepaid mobile wireless service. These customers tend to be even more value conscious, on average, than postpaid subscribers.

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[1] We refer to the Complaint, Competitive Impact Statement, and proposed Final Judgment as published in the Federal Register, 84 F.R. 39862 (Aug. 12, 2019), pursuant to 15 U.S.C. § 16 (b).

19. The head-to-head competition between T-Mobile's Metro brand and Sprint's Boost Mobile brand has exerted significant downward pressure on prices. When Boost introduced a family plan of four lines for $100 in February 2017, Metro countered with an aggressive promotion that a Sprint executive described this way: ''We gave them a jab and they punched back with a left hook.'' In the fall of 2017, when Metro responded to a Boost four lines for $100 promotion with a three lines for $90 promotion of its own, Boost executives countered with a ''Metro attack plan.'' Boost's ''Combat Metro'' strategy upped the ante further by offering five lines for $100. Observing inMarch 2018 that Sprint postpaid and prepaid plans were priced 50% lower than the competition, the senior leadership at T-Mobile's Metro reduced prices to $40 per month and then to $30per month for entry level plans.

20. The competition between T-Mobile and Sprint also has led to improvements in the quality of devices and the plan features available to prepaid subscribers. As one Sprint senior executive observed in 2015, ''The prepaid space is experiencing a severe price war. We now have two competitors (Cricket and Metro) spending at postpaid-like advertising levels with strong, best in class nationwide networks. We need to find ways to differentiate our service beyond device and rate plan price.'' To ''one up Metro'' in May 2017, for example, Boost offered unlimited calling to Mexico and unlimited voice roaming to customers traveling in Mexico. That same year, Boost introduced its''BoostUp!''program, which allowed prepaid customers with a solid payment history to purchase a phone for $1 down and pay for it over 18 months with no interest. And in February 2018, Boost offered an iPhone 6 for $49 to customers who switched to Boost and kept their phone number.

21. If the merger were allowed to proceed, this competition would be lost. After the elimination of Sprint, the industry's low-price leader, New T-Mobile would have the incentive and the ability to raise prices. In a post-merger world, the other remaining national facilities-based mobile wireless carriers, Verizon and AT&T, also would have the incentive and the ability to raise prices. Additionally, the merger would leave the market vulnerable to increased coordination among these three competitors. Increased coordination harms consumers through a combination of higher prices, reduced quality, reduced innovation, and fewer choices.

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

The Competitive Impact Statement (C.I.S.) describes the form of relief sought in the proposed Final Judgment; specifically, it "requires T-Mobile to divest to DISH Network Corporation ("DISH") certain retail wireless business and network assets ...". C.I.S. I. Divestiture is "designed to ensure the development of a new national facilities-based mobile wireless carrier competitor". C.I.S. III. For the most part, the Competitive Impact Statement summarizes the proposed Final Judgment's provisions regarding divestiture of assets to DISH.

Only two sections in the Competitive Impact Statement explain (summarily) how relief in the proposed Final Judgment would remedy the anti-competitive effect of the proposed merger. We reproduce *in extenso* sections III.A.5 and 7 in the Competitive Impact Statement:

> 5. Facilities-Based Entry and Expansion
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> The proposed Final Judgment requires T-Mobile and Sprint to comply with all network build commitments made to the Federal Communications Commission (FCC) related to their merger or the divestiture to DISH as of the date of entry of the Final Judgment, subject to verification by the FCC.3 In turn, DISH is required to comply with the June 14, 2023 AWS-4, 700 MHz, H Block, and Nationwide 5G Broadband network build commitments made to the FCC on July 26, 2019, subject to verification by the FCC.4 Incorporating these obligations into the proposed Final Judgment is intended to increase the incentives for the merged firm to achieve the promised efficiencies from the merger and for DISH to build out its own national facilities-based mobile wireless network to replace the competition lost as a result of Sprint being acquired by T-Mobile. Increasing DISH's incentives to complete the buildout of a fourth nationwide wireless network also serves to decrease the likelihood of coordinated effects that arise out of the merger. (Footnote omitted)
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> 7. T-Mobile's and DISH's eSIM Obligations
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> The proposed Final Judgment requires T-Mobile and DISH to support eSIM technology and prohibits T-Mobile and DISH from discriminating against devices based on their use of remote SIM provisioning or use of eSIM technology. The more widespread use of eSIMs and remote SIM provisioning may help DISH attract consumers as it launches its mobile wireless business. These provisions are intended to increase the disruptiveness of DISH's entry by making it easier for consumers to switch between wireless carriers and to choose a provider that does not have a nearby physical retail location, thus lowering the cost of DISH's entry and expansion. These benefits also decrease the likelihood of coordinated effects by increasing DISH's ability to reach consumers with innovative offerings.

A complete analysis of the relevant market's structure appears neither in the Complaint nor in the Competitive Impact Statement — pre- and post-merger levels of concentration (Herfindahl-Hirschman Index) (HHI); increase in HHI numbers as a result of the merger; exact pre- and post- merger market shares of all entities in the relevant market; trend toward concentration (or recent acquisitions). Similarly, there is no substantial information either on regulatory or non-regulatory entry barriers in the relevant market, a determinant factor to assess the viability of a new

entrant. Barriers to entry is critical to horizontal merger analysis under Section 7 of the *Clayton Act*. *United States v. Baker Hughes*, 908 F.2d 981, 982, 984 (D.C. Cir. 1990).

The foregoing is the information the United States has made public in the materials filed in the Federal Register about the proposed merger's anti-competitive effect. The Court must make a public interest determination based upon that information; it is also the information which the public has access to for making written comments. This is surprising, given the proposed merger takes place in a highly concentrated oligopoly, and involves entities offering a service which is "an integral part of modern American life.". Compl. § 1.

II. THE COMPLAINT PROVIDES AN INCOMPLETE STATEMENT AS TO THE ANTI-COMPETITIVE EFFECT OF THE PROPOSED MERGER IN THE RELEVANT MARKET.

The proposed Final Judgment incorporates a jurisdictional statement to the effect that the Complaint states a claim upon which relief can be granted, under Section 7 of the *Clayton Act*. 84 Fed. Reg. 39866. Under *Federal Rules of Civil Procedure* 8, a complaint must contain "a short and plain statement of the claim"; the statement must show that plaintiff "is entitled to relief". Rule 8 requires "[f]actual allegations ... enough to raise a right to relief above the speculative level" (reference omitted) *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Souter J.) (holding antitrust complaint alleging conscious parallel conduct must state material facts sufficient to infer an agreement among defendants).

Likewise, under Rule 56, the moving party must meet a two-prong standard to obtain summary judgment: 1. Absence of "any genuine dispute as to any material fact"; and 2 entitlement to judgment "as a matter of law". An antitrust complaint is subject to a "reasonable trier of fact" standard under Rule 56. *Eastman Kodak Co. v. Image Technical Servs., Inc*., 504 U.S. 451, 462 (1992) (Blackmun J.). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S.

574, 597 (1986) (Powell J.).

Indices of concentration, market shares, are two structural factors central to horizontal merger analysis under Section 7 of the *Clayton Act*. The Federal Trade Commission and the United States Department of Justice classify as highly concentrated a market exhibiting an index of concentration (Herfindhal-Hirschman Index) (HHI) above 2,500. A merger in a concentrated market increasing the index of concentration (HHI) by more than 200 points is "presumed to be likely to increase market power". HORIZONTAL MERGER GUIDELINES (U.S. Department of Justice and Federal Trade Commission) (Aug. 19, 2010) § 5.3. The presumption of illegality enunciated in the Guidelines incorporates the antitrust legal standard set forth in *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963) (Brennan J).

In litigation under Section 7 of the *Clayton Act*, once plaintiff introduces evidence showing that a proposed merger would produce an undue level of concentration in a pre-defined market, the transaction is presumed illegal. Defendants must then rebut the presumption. If defendants are unable to rebut the presumption, a finding of illegality ensues; otherwise, the burden of persuasion reverts back to plaintiff. But, plaintiff has the burden to prove by a preponderance of evidence that a proposed merger would limit competition substantially. *United States v. Anthem Inc.*, 855 F.3d 345, 349-350 (D.C. Cir. 2017) (Rogers C.J.).

A complaint based on a *Clayton Act's* Section 7 claim, without detailed statements on pre- and post -merger level of market concentration, or entry barriers, is incomplete. The Complaint does not specify the level of concentration, or increase thereof, in the relevant market resulting from the proposed merger. Thus, the Complaint makes difficult any meaningful assessment of the proposed Final Judgment's adequacy — namely, how relief would remedy the anti-competitive

effect in the relevant market stemming from the proposed merger. Any assessment can only be speculative.

The approach taken by the United States in the Complaint and the Competitive Impact Statement is inconsistent with the Act's purpose. The Complaint fails to support the *Clayton Act's* Section 7 claim with clear market concentration data while the Competitive Impact Statement contain vague explanations as to the proposed Final Judgment's relief. In short, the Complaint and Competitive Impact Statement provide an incomplete picture of the likely anti-competitive effect of the proposed merger in the relevant market.

By contrast, the complaint and competitive impact statement filed in the Federal Register by the United States in a recent merger transaction provided a more complete analysis of the relevant market's structure. 83 Fed. Reg. 27652 (June 13, 2018) (Department of Justice - Antitrust Division; *United States v. Bayer AG and Monsanto Company*; Proposed Final Judgment and Competitive Impact Statement).

III. MEANINGFUL PUBLIC COMMENTS IS INTEGRAL TO THE PUBLIC INTEREST DETERMINATION THE COURT MUST MAKE UNDER THE ACT.

The Court must determine whether entry of the proposed Final Judgment is in the public interest. 15 U.S.C. § 16 (e). While making a public interest determination, the Court must consider two elements. Firstly, the proposed Final Judgment's adequacy in terms of terminating the antitrust violation stated in the Complaint. Secondly, how entry of the proposed Final Judgment would impact competition in the relevant market. 15 U.S.C. § 16 (e) (A), (B). The Act delegates to the Court a limited , but important, jurisdiction. As the Court noted: "A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power.".

Microsoft 56 F.3d at 1462.

"Giving due respect to the Justice Department's perception of the market structure and its view of the nature of its case", *Microsoft* 56 F.3d at 1461, the proposed merger has antitrust implications readily discernable even from the Complaint's conclusory statements. A merger between two rivals in a four-firm oligopoly raises immediate antitrust concerns. Nevertheless, a complete assessment of the antitrust implications of the proposed merger demands information beyond that outlined in the Complaint and Competitive Impact Statement.

The United States seeks relief that "requires T-Mobile and Sprint to divest to DISH Corporation certain retail wireless businesses and network assets and to provide to DISH certain transition and network services", to enable DISH "building and operating of its own nationwide mobile wireless network". 84 Fed. Reg. at 39863. In sum, to remedy the anti-competitive effect of the proposed merger in the relevant market, the proposed Final Judgment puts forth the creation of a fourth competitor built with divested assets.

The proposed Final Judgment's relief restructures an oligopoly composed of two dominant firms (Verizon and AT&T) and two fringe firms (T-Mobile and Sprint). The proposed relief creates a third dominant firm, New T-Mobile; as a result, three dominant firms emerge — Verizon, AT&T and New T-Mobile — holding each 33% of the relevant market. Compl. ¶ 16. Notably, the restructuring removes two "particularly intense competitors" in the relevant market — T-Mobile and Sprint. These two entities were involved in aggressive price competition, which at one point triggered a "severe price war". ¶¶ 18-20. In addition, regulatory and non-regulatory barriers to entry (which we do not know the exact scope) entrench the oligopoly's dominant firms. Compl. § 13.

The Competitive Impact Statement discusses summarily how the proposed Final Judgment's relief remedies the proposed merger's anti-competitive effect in the relevant market. C.I.S. III.A.5. and 7. The proposed merger's anti-competitive effect stems from the fact that Verizon, AT&T, and New T-Mobile would have the ability and incentive to impose higher prices in the relevant market through tacit coordination, a situation attributable to further market concentration within the oligopoly. Compl. ¶ 21.

The Horizontal Merger Guidelines defines "coordinated interaction" as "conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions to the others". H.M.G. § 7. Coordinated interaction or "conscious parallelism" is not *per se* illegal under Sherman Act §§ 1-2. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 227 (1993) (Kennedy J.). However see *American Tobacco Co. v. United States*, 328 U.S. 781, 809-810) (1946) ("The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in the exchange of words.").

A merger may trigger enforcement action if three conditions are met: 1. The transaction would "significantly increase concentration", thereby transforming the structure of a relevant market into a "moderately or highly" concentrated one; 2. the relevant market's "vulnerability" to conscious parallelism ("coordinated conduct"); and 3. credible evidence showing that the level of concentration, and increase thereof, in the relevant market may ease coordinated conduct among remaining market players. H.M.G. § 7.1. *Arguendo* the United States concluded that the proposed merger meets all three requirements, and filed a complaint claiming a violation of Section 7 of the *Clayton Act*.

A group of firms sharing a monopoly ("collective market power") in a relevant market can more easily elect to adopt a market strategy designed to avoid price competition, a scheme which may be disrupted "by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market." H.M.G.. § 7.2. The key words here are "market *participants*", and "can *rapidly* expand their sales in the relevant market" (emphasis added). Therefore, the central issue that should have been addressed and explained in the Competitive Impact Statement is whether DISH would countenance the big three's market power in the relevant market.

An explanation as to whether the creation of a new entrant is preferable to T-Mobile and Sprint remaining in the relevant market, as two separate entities, is absent from the Competitive Impact Statement. Sprint is a maverick — "a firm that plays a disruptive role in the market to the benefit of customers". H.M.G. § 2.1.5. Should the Court enter the proposed Final Judgment, the relevant market's structure would supply a friendlier environment for tacit collusion than the existing one — very high level of concentration; homogeneity of products; entry barriers. H.M.G. § 7.2.

Tentatively, pre-merger, the index of concentration in the relevant market reached 2,756 (Verizon 33^2; AT&T 33^2; T-Mobile 17^2; Sprint 17^2); post-merger the index of concentration would jump to 3,267 (Verizon 33^2; AT&T 33^2; New T-Mobile 33^2), an increase of 511 points. The merger takes place in a highly concentrated market (more than 2,500 points), and produces a concentration increase of more than 200 points in the relevant market. H.M.G. § 5.3. Anti-competitive performance may occur in such a market setting "if *a substantial part of the market* is subject to [coordinated conduct]" (emphasis added). H.M.G. § 7.2.

Whether DISH would become a maverick in a more concentrated oligopoly is by no means assured. T-Mobile and Sprint contain actual market power of Verizon and AT&T, to a certain extent. However, the Competitive Impact Statement does not explain how DISH, a new entrant built with divested assets, will be able to tame the market power of three (not two) well-entrenched shared-monopolists; neither does it explain why the market structure that would emerge following entry of the proposed Final Judgment is preferable to the *status quo*.

In that regard, the proposed merger is "an all-stock transaction valued at approximately $26 billion". C.I.S. I. Such staggering amount of capital could be invested by Sprint and T-Mobile to improve their respective (as opposed to collective) competitiveness in the relevant market. The Competitive Impact Statement makes no mention that T-Mobile and Sprint are unable to improve their market position on their own, through internal growth — in other words, that they lack the minimum scale of efficiency to compete in the relevant market. In fact, the record shows that they are effective competitors. Compl. ¶¶ 17-20.

Lastly, the Complaint states that no efficiencies would likely offset the anti-competitive effect of the proposed merger. Compl. ¶ 24. Yet, the Competitive Impact Statement mentions "that the proposed Final Judgment is intended to increase the incentives for the merged firms to achieve the promised efficiencies". C.I.S. III.A.5. The Competitive Impact Statement explains neither which efficiencies would be achieved through the proposed merger nor how they would be achieved should the Court enter the proposed Final Judgment. As already mentioned, barriers to entry are critical to horizontal merger analysis under *Clayton Act* Section 7.

For the foregoing reasons, we respectfully submit that the materials published in the Federal Register do not allow submission of meaningful written comments.

This 25 September 2019.

Daniel Martin Bellemare

DANIEL MARTIN BELLEMARE
Attorney at Law

Vermont Bar (# 3979)
Quebec Bar (# 184129-7)
338 St-Antoine est Suite 300
Montréal, Québec H2Y 1A3
Tel: (514) 384-1898
dmbellemare@videotron.ca

TO: Scott Scheele
Chief, Telecommunications and Broadband Section
Antitrust Division, Department of Justice
450 Fifth Street NW, Suite 7000
Washington D.C. 20530