



October 10, 2019

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Department of Justice
450 Fifth Street NW, Suite 7000
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Re: *United States of America et al. V. Deutschland Telecom AG et al.*, No. 1:19-cv-02232-TJK.

Mr. Scheele,

On behalf of the Competitive Enterprise Institute (CEI), I write to you to file these comments in support of the proposed settlement of *United States of America et al. V. Deutschland Telecom AG et al.*, pertaining to the proposed T-Mobile/Sprint merger. These comments are filed pursuant to the Antitrust Procedures and Penalties Act (the Tunney Act).

CEI is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI scholars have written extensively about how antitrust regulation “harms consumers, competition, and innovation” and how “[a] market-based approach to competition would reduce the regulatory uncertainty and chilling of innovation that results from government antitrust regulation.”¹

From our market-based perspective, it is clear that a voluntary transaction such as the proposed T-Mobile/Sprint merger, absent significant market-distorting policies, should be allowed to proceed. However, our institution also recognizes the importance of the balance of power in government under the Constitution. It is the duty of the Executive Branch, in this case the Department of Justice (DOJ) to faithfully execute the law clearly and consistently, minimizing the economic harms caused by inefficient policies and regulatory uncertainty.

Yet, even when evaluating the proposed T-Mobile/Sprint merger within the regulatory guidelines for horizontal mergers outlined by DOJ and Federal Trade Commission (FTC), it is clear that the merger more-than passes muster.

T-Mobile/Sprint qualifies as a horizontal merger, as it is a merger between companies currently competing in the same market. Under the current Horizontal Merger Guidelines of DOJ and FTC (merger guidelines), regulators evaluate mergers to determine if the transaction will “encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm

¹ Crews Jr., Clyde Wayne and Ryan Young, “The Case against Antitrust Law,” Competitive Enterprise Institute, April, 2019. https://cei.org/sites/default/files/Wayne_Crews_and_Ryan_Young_-_The_Case_against_Antitrust_Law.pdf

customers as a result of diminished competitive constraints or incentives.”² It is CEI’s contention that the T-Mobile/Sprint merger will not result in any harms to the public under any of these criteria.

Mergers do not necessarily result in price increases, even in highly-concentrated markets such as the current wireless phone and internet service market (the wireless market). Under the merger guidelines, DOJ is permitted to evaluate “[e]ffects of analogous events in similar markets[.]”³ A strikingly similar merger occurred recently in the domestic airline market.

There are a few important parallels to highlight between the domestic airline market and the wireless market. First, both markets are similarly concentrated at the top. There are four major competitors and there is a significant drop between the fourth and fifth largest companies in terms of annual passengers and quarterly subscribers.

<u>Domestic Airlines</u> ⁴		<u>Wireless Providers</u> ⁵	
2017	Passengers (millions)	Q3 2018	Subscribers (millions)
Southwest	157.677	Verizon Wireless	153.97
Delta	145.647	AT&T	150.25
American	144.864	T-Mobile USA	77.25
United	107.243	Sprint Nextel	53.51
JetBlue	40.015	U.S. Cellular	5.05
SkyWest	35.776	Shentel	1.04

The airline and wireless markets are also similar in that they are network industries. Former Principal Deputy Assistant Attorney General of the Antitrust Division, A. Douglas Melamed defined network industries as follows: “The most important characteristic -- indeed, the defining characteristic -- of network industries is that they involve products that are more valuable to purchasers or consumers to the extent that they are widely used.”⁶

These markets are also subject to comparable market entrance and participation, which are heavily regulated at the federal, state, and local level. Local and state governments control gate access at most airports as well as access to rights of way and other infrastructure to install cellular towers. The air itself is regulated on the federal level in both markets: Federal Aviation

² Horizontal Merger Guidelines, US Department of Justice and the Federal Trade Commission, issued: August 19, 2010. <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>

³ Horizontal Merger Guidelines, Section 2.1.2, *Direct Comparisons Based on Experience*

⁴ 2017 Traffic Data for U.S Airlines and Foreign Airlines U.S. Flights, Bureau of Transportation Statistics, Release Number: BTS 16-18. <https://www.bts.gov/newsroom/2017-traffic-data-us-airlines-and-foreign-airlines-us-flights>

⁵ Holst, Arne, “Number of subscribers to wireless carriers in the U.S. from 1st quarter 2013 to 3rd quarter 2018, by carrier (in millions),” Statista, September 13, 2019. <https://www.statista.com/statistics/283507/subscribers-to-top-wireless-carriers-in-the-us/>

⁶ Melamed, A. Douglas, Before The Federalist Society The Eighteenth Annual Symposium on Law and Public Policy: Competition, Free Markets and the Law, Chicago, Illinois, April 10, 1999. <https://www.justice.gov/atr/speech/network-industries-and-antitrust>

Administration through air traffic control and Federal Communications Commission (FCC) through spectrum allocation.

In 2013, American Airlines completed its merger with U.S. Airways.⁷ Prior to the merger, American and U.S. Airways represented the third and fifth largest domestic carriers by passengers, respectively.⁸ Following this merger of major airlines, similarly situated in terms of marketshare to T-Mobile and Sprint currently, airline ticket prices collapsed:



This demonstrates that greater market concentration in network industries with regulatory constraints on market entry does not necessarily precipitate price increases. Furthermore, while the American Airlines/U.S. Airways merger reduced the total number of large competitors in the marketplace, the terms of the proposed T-Mobile/Sprint settlement creates a new significant competitor in the wireless marketplace. Per DOJ:

“Under the terms of the proposed settlement, T-Mobile and Sprint must divest Sprint’s prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a Colorado-based satellite television provider. The proposed settlement also provides for the divestiture of certain spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also

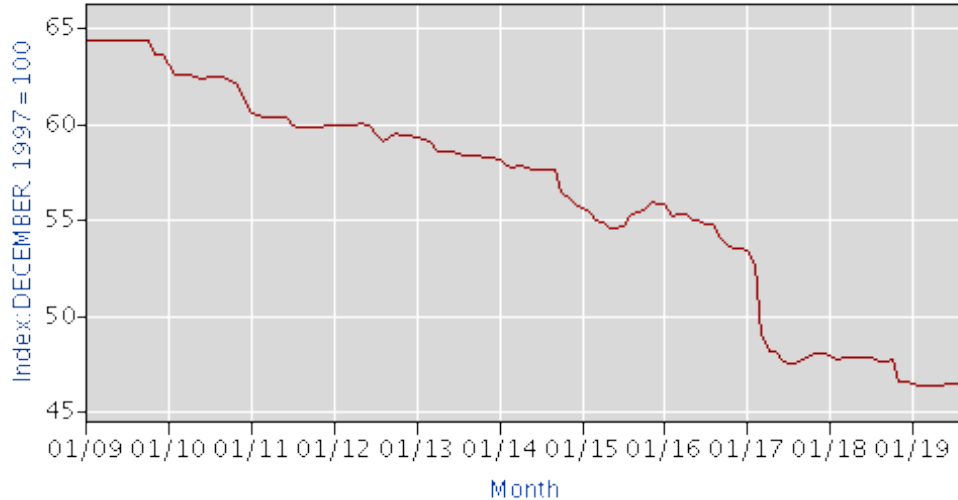
⁷ Carey, Susan, and Jack Nicas, “American Airlines, US Airways Complete Merger,” The Wall Street Journal, December 10, 2013. <https://www.wsj.com/articles/american-airlines-us-airways-complete-merger-1386599350>

⁸ Russell, Karl, “Airline Consolidation Continues,” The New York Times, February 14, 2013. <https://archive.nytimes.com/www.nytimes.com/interactive/2013/02/14/business/Airline-Consolidation-Continues.html>

provide Dish with robust access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network.”⁹

With the post-merger wireless marketplace retaining four significant carriers, it is relevant to look at recent trends in subscription prices. According to the Bureau of Labor Statistics, prices have fallen by nearly 30 percent in the last decade:¹⁰

CPI for All Urban Consumers (CPI-U), Wireless telephone services in U.S. city average



Per merger guidelines, DOJ should also consider “non-price terms and conditions” that result from the merger. These include “reduced product quality, reduced product variety, reduced service, or diminished innovation.” Quality, variety, and service are all natural sub criteria of the output criteria listed above.

In each of these areas, current market characteristics and plans for the proposed merger demonstrate that the public will continue to benefit. While the definitions of quality, variety, and service as set out in the merger guidelines are not neatly defined for the wireless market, for the purpose of these comments, quality will refer to wireless data speeds, variety will refer to available subscription plans, and service will refer to wireless network coverage.

In the current marketplace, wireless data speeds are up across the major carriers. According to a July 2019 report by Ookla, “Mean download speed over mobile in the U.S. increased 24.0% between Q1-Q2 2018 and Q1-Q2 2019[.]”¹¹ With quality increasing in conjunction with falling

⁹ Press Release: Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish, Department of Justice, July 26, 2019. <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>

¹⁰ CPI for All Urban Consumers (CPI-U), Wireless telephone services in U.S. city average, all urban consumers, not seasonally adjusted, Bureau of Labor Statistics. https://data.bls.gov/timeseries/CUUR0000SEED03?output_view=data

¹¹ The 2019 Speedtest U.S. Mobile Performance Report by Ookla, accessed at: <https://www.speedtest.net/reports/united-states/>

prices, this means, in real terms, price decreases are even greater than suggested by the nominal data. Simply put, consumers are paying less and getting more.

Looking at the individual performances by the major networks shows how consumers will receive an additional quality benefit by the merger of T-Mobile and Sprint. T-Mobile, despite being third in marketshare, scored second in terms of overall network speed. Sprint was last among the major carriers. With the merger of the networks, Sprint's current customers will rapidly benefit from increased service quality.

Variety, at a minimum, will not be diminished by the proposed merger. In enforceable commitments to the FCC, T-Mobile and Sprint pledged to “make available the same or better rate plans as those offered by T-Mobile or Sprint ... for three years following the merger.”¹² Consumers are likely to see plan variety increase, especially in light of the recent FCC move to reclassify internet service providers (ISPs), including the wireless data providers, under Title I of the Communications Act (a decision recently upheld by the United States Court of Appeals for the District of Columbia Circuit¹³). This opens the door for a variety of what are known as “zero-rating” plans, where customers can select to have certain kinds of data not subject to their data caps. T-Mobile already offers one such plan known as “Binge On” where customers enjoy unlimited video streaming. Under the prior regulatory regime for ISPs, Title II, Binge On and other similar zero-rating plans came under significant regulatory scrutiny—since abandoned under the current FCC in light of reclassification.¹⁴

In terms of service or coverage, the current market has seen significant wireless coverage increases which should be expected to increase in the post-merger scenario. Per a 2018 FCC filing by CTIA:

“[A] record 323,448 cell sites were in operation in 2017, representing a 52 percent growth over the last decade, and almost all of the country's population now has access to advanced wireless services. Indeed, 4G LTE service is now available to at least 99.7 percent of Americans and covers more than 73 percent of the total U.S. land area.”¹⁵

¹² Ex-parte, jointly filed by T-MOBILE US, Inc. & SPRINT CORPORATION before the Federal Communications Commission, Re: Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations; WT Docket No. 18-197, May 20, 2019. <https://newtmobile.com/wp-content/uploads/2019/05/FCC-Filing-May-20.pdf>

¹³ Mozilla Corporation v. FCC, et al, No. 18-1051, United States Court of Appeals for the District of Columbia Circuit. [https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf)

¹⁴ Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services, Federal Communications Commission. https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf

¹⁵ Comments of CTIA Re: Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, WT Docket No. 18-203, July 26, 2018. <https://ecfsapi.fcc.gov/file/10727028840239/180726%20CTIA%20Comments%20on%20Mobile%20Wireless%20Competition.pdf>

Since this filing, CTIA has reported that the number of cell sites has grown to 349,344 sites, an eight percent increase in a single year that demonstrates continued strong network growth, despite near universal population coverage.¹⁶

All of the above facts regarding quality, variety, and service are without mentioning a significant component of the proposed T-Mobile/Sprint merger: the deployment of a new fifth generation or “5G” wireless data network. The promise of 5G meets the innovation criteria and will significantly benefit the public interest in all other merger guideline criteria areas as well.

Per the companies’ joint commitment to the FCC, within six years of the merger “99 percent of the population [will experience] download speeds equal to, or greater than, 50 Mbps; and 90 percent of the population experiencing download speeds equal to, or greater than, 100 Mbps.”¹⁷ On the most advanced devices and in the most competitive areas, T-Mobile’s current network delivers speeds of 30.94 Mbps. This means, at a minimum, virtually all T-Mobile customers will enjoy roughly 62 percent higher speeds in the near-term.

In short, 5G innovation will deliver higher speeds for more people, increasing quality and service, while the new technology and regulatory structure will allow for continued data plan experimentation above the legally-binding level of plan varieties that currently exist. Even in the unlikely scenario nominal prices remain static or slightly increase—which the data suggest will not happen and the rate commitments will prevent within the post-merger network—real prices will continue to fall as consumers receive markedly better service.

The above analysis is all within the scope of the wireless marketplace. Increasingly, the silos within the broader telecommunications sector are crumbling. With wireless speeds already rivaling wired broadband speeds, and set to substantially increase through 5G networks, all other broadband providers find themselves competing directly against wireless. For example, cable companies such as Comcast, Charter, and Altice have launched their own wireless services.¹⁸ Furthermore, the cable industry as a whole has already announced a 10 gigabit service initiative, trademarked as “10G” in an obvious attempt to compete directly with 5G offerings, despite the respective G’s standing for gigabit versus generation.¹⁹

The increasingly blurred lines between wired and wireless providers is important for DOJ to consider. While the proposed T-Mobile/Sprint merger exceeds the horizontal merger guidelines criteria for approval within the defined market of wireless, the true definition of the market should already be evaluated as all ISPs. In this light, it is clear there is no reason to obstruct the proposed merger as more and more existing firms in previously disparate industries begin to compete with extant wireless providers.

¹⁶ 2019 Annual Survey Highlights, CTIA. <https://api.ctia.org/wp-content/uploads/2019/06/2019-Annual-Survey-Highlights-FINAL.pdf>

¹⁷ Ex-parte, jointly filed by T-MOBILE US, Inc. & SPRINT CORPORATION

¹⁸ Savitz, Eric J., “Cable Companies Are Building New Bundles, but a 5G Threat Looms,” Barron’s, July 18, 2019. <https://www.barrons.com/articles/cable-5g-wireless-51563407055>

¹⁹ Press Release: Introducing 10G: The Next Great Leap for Broadband, NCTA, January 7, 2019. <https://www.ncta.com/media/media-room/introducing-10g>

On behalf of CEI, I appreciate the opportunity to offer these comments in accordance with the Tunney Act in support of the proposed T-Mobile/Sprint merger and respectfully encourage DOJ to accept the proposed settlement.

Sincerely,

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