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August 26, 2019

VIA U.S. MAIL

Scott Scheele,
Chief, Telecommunications and Broadband Section,
Antitrust Division,
U.S. Department of Justice,
450 Fifth Street, N.W., Suite 7000,
Washington, D.C. 20530

RE: Tunney Act Comments of NTCH, Inc.
United States v. Deutsche Telekom AG, Civil Action No. 1:19-cv-02232-TJK

Dear Mr. Scheele:

NTCH, Inc., by its undersigned counsel, and pursuant to 15 U.S.C. § 16(b), hereby files the attached comments in response to the Competitive Impact Statement, dated July 30, 2019, filed by the Antitrust Division – Telecommunications and Broadband Section of the U.S. Department of Justice (“DOJ”) with respect to the Proposed Final Judgment in *United States v. Deutsche Telekom AG*, Civil Action No. 1:19-cv-02232-TJK, currently pending before the U.S. District Court for the District of Columbia.

Should you have any questions regarding this transmission, please contact the undersigned.

Respectfully submitted,

Donald J. Evans
Keenan P. Adamchak

Counsel to NTCH, Inc.

Enclosures

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

DEUTSCHE TELEKOM AG, et al.,

Defendants.

Civil Action No. 1:19-cv-02232-TJK

**TUNNEY ACT COMMENTS OF NTCH, INC.
ON THE PROPOSED FINAL JUDGMENT AND
COMPETITIVE IMPACT STATEMENT**

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Dated: August 26, 2019

SUMMARY

NTCH, Inc. (“NTCH”), through these comments, seeks to advise the Court and the U.S. Department of Justice that the adoption of the current terms and conditions of the Proposed Final Judgment with respect to the Sprint-T-Mobile merger would not be in the public’s interest. Specifically, NTCH observes that: (1) there is a good possibility that DISH will be unable to comply with its obligations under the Proposed Final Judgment as it is currently at risk of losing its AWS-4 and H Block spectrum licenses – thereby preventing DISH from operating as the nation’s fourth largest wireless carrier following the merger; (2) DISH’s record at constructing and operating a wireless mobile network cast doubt on its willingness or competence to deliver the broad and ambitious commitments necessary to achieve the pro-competitive aims of the Proposed Final Judgment; and (3) the Proposed Final Judgment fails to impose any conditions on the parties to mitigate the adverse impact of the merger on the data roaming submarket and further raises the bar for any competitor to enter this space. For these reasons, NTCH believes that the current terms and conditions of the Proposed Final Judgment fail to remediate the anticompetitive effects of the Sprint-T-Mobile merger in a reliable manner.

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**UNITED STATES DISTRICT COURT
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ON THE PROPOSED FINAL JUDGMENT AND
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NTCH, Inc. (“NTCH”),¹ by its undersigned attorneys and pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA,” or “Tuney Act”), 15 U.S.C. § 16(b), hereby files comments in response to the Competitive Impact Statement, dated July 30, 2019, filed by the Antitrust Division – Telecommunications and Broadband Section of the U.S. Department of Justice (“DOJ”) with respect to the Proposed Final Judgment in the above captioned proceeding. Through these comments, NTCH seeks to advise the Court and the DOJ of circumstances that will make it either unlikely or impossible for DISH to implement the responsibilities that it purports to shoulder under the Proposed Final Judgment. Accordingly, NTCH respectfully requests that the Court and the DOJ consider whether adoption of the terms and conditions of the Proposed Final Judgment would be in the public’s interest.

¹ NTCH, a Delaware corporation, is a licensee of wireless radio systems licensed by the Federal Communications Commission (“FCC”, or the “Commission”). NTCH is also involved in the construction and leasing of cellular towers.

I. BACKGROUND

A. The Complaint, Competitive Impact Statement, and Proposed Final Judgment

The Complaint alleges that T-Mobile’s proposed acquisition of Sprint “would remove competition from Sprint and restructure the retail mobile wireless service market . . . leav[ing] the market vulnerable to increased coordination among the remaining three carriers” – i.e., T-Mobile, Verizon, and AT&T.² To remedy this, the Proposed Final Judgment requires T-Mobile to divest “certain retail wireless business and network assets,” including some of T-Mobile’s wireless licenses, to DISH.³ The DOJ asserts that “[t]he primary purpose of the Proposed Final Judgment is to facilitate DISH building and operating its own mobile wireless services network by combining the Divestiture Package of assets and other relief with DISH’s existing mobile wireless assets . . . to enable [DISH] to compete in the marketplace.”⁴ The Proposed Final Judgment “obligates DISH to build out its own mobile wireless services network and offer retail mobile wireless service to American consumers”⁵ – with the intent that “DISH 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.”⁶ Accordingly, the Proposed Final Judgment requires DISH to “comply with the June 14, 2023 *AWS-4*, 700 MHz, *H Block*, and Nationwide 5G Broadband

² Competitive Impact Statement at 7, *United States v. Deutsche Telekom AG*, 1:19-cv-02232-TJK (D.D.C., July 30, 2019) (“Competitive Impact Statement”). *See also* Complaint at 3, ¶¶ 3-6, *United States v. Deutsche Telekom AG*, 1:19-cv-02232-TJK (D.D.C., July 26, 2019).

³ Competitive Impact Statement at 2 & 8-10. *See also* Proposed Final Judgment at 6-18, *United States v. Deutsche Telekom AG*, 1:19-cv-02232-TJK (D.D.C., July 26, 2019) (“Proposed Final Judgment”).

⁴ Competitive Impact Statement at 2.

⁵ *Id.*

⁶ *Id.* at 12.

build commitments made to the FCC on July 26, 2019” in order to ensure that DISH has the requisite facilities to provide nationwide wireless service.⁷

B. DISH’s AWS-4 and H Block Licenses

1. *Award of DISH’s AWS-4 Licenses*

In 2012, the FCC created the AWS-4 licenses by repurposing spectrum formerly used for mobile satellite service (“MSS”) on the premise that the spectrum would be used to accelerate mobile broadband deployment.⁸ Simultaneously, the Commission awarded the new AWS-4 licenses to the incumbent licensee in the MSS band – i.e., DISH.⁹ The FCC found that awarding the AWS-4 licenses solely to DISH was in the public interest as doing so ensured the expedited deployment of mobile broadband services in the AWS-4 band¹⁰ – based in part on DISH’s pledge to “aggressively” buildout the band.¹¹

To accomplish this, the Commission required DISH to meet the following construction benchmarks: (1) *Interim Build-out Requirement* – provide service to at least 40% of the total population of its AWS-4 service area within 4 years; and (2) *Final Build-out Requirement* – provide service to 70% of the AWS-4 population within 7 years.¹² The FCC also adopted rules that would penalize DISH if failed to meet either its interim or final AWS-4 build-out

⁷ *Id.* at 11 (emphasis added). *See also* Proposed Final Judgment at 23.

⁸ *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-220 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd. 16102, 16103, ¶ 1 & 16116, ¶ 34 (2012) (“*AWS-4 Report and Order*”).

⁹ *Id.* at 16164, ¶ 161.

¹⁰ *See id.* at 16169-71, ¶¶ 176-80.

¹¹ *See id.* at 16176, ¶ 194 (“[DISH] generally support[s] our seven year end-of-term build-out benchmark and [has] committed to ‘aggressively-build out a broadband network’ if [it] receives terrestrial authority to operate in the AWS-4 band.” (quoting DISH Comments at 18 (other citations omitted))).

¹² *Id.* at 16174, ¶ 187.

benchmarks: (1) *Failure to Meet Interim Build-out Deadline* – Acceleration of the final AWS-4 build-out deadline by 1 year; and (2) *Failure to Meet the Final Build-out Deadline* – DISH’s AWS-4 licenses would automatically terminate and be recovered by the Commission for reauctioning.¹³

2. Award of DISH’s H Block Licenses

The FCC announced its intention that the H Block spectrum (1915-1920 MHz and 1995-2000 MHz) be used for mobile service when it allocated the band for terrestrial operations in 2013.¹⁴ That same year, the Commission granted DISH a one-year extension of its final AWS-4 build-out deadline in exchange for DISH committing to bid \$1.564 billion in the auction the FCC was planning to conduct for the H Block.¹⁵ The Commission adopted DISH’s proposed payment as the reserve price for the H Block auction to ensure that this deal would be effectuated.¹⁶ That very high reserve price exceeded what all other bidders were willing to bid for the licenses, and DISH accordingly won all of the H Block spectrum at auction.¹⁷

DISH’s H block licenses are subject to the following build-out requirements: (1) *Interim Build-out Requirement* – provide service to at least 40% of the total population of its H Block license areas within 4 years; and (2) *Final Build-out Requirement* – provide service to 75% of the

¹³ *Id.* at 16174, ¶ 188.

¹⁴ *See Service Rules for Advanced Wireless Services H Block*, Report and Order, 28 FCC Rcd. 9483, 9484, ¶ 1 & 9488, ¶ 9 (2013) (“*H Block Report and Order*”).

¹⁵ *DISH Network Corporation*, Memorandum Opinion and Order, 28 FCC Rcd. 16787, 16805, ¶ 45 (Wireless Bureau 2013) (“*2013 DISH Waiver Order*”).

¹⁶ *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands*, Public Notice, 28 FCC Rcd. 13019, 13064, ¶ 172 (2013).

¹⁷ *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands*, Public Notice, 29 FCC Rcd. 2044, Attachment A (2014).

of the total population of its H Block license areas within 10 years.¹⁸ DISH is subject to the following penalties in the event it fails to meet its H Block build-out requirements: (1) *Failure to Meet Interim Build-out Deadline* – acceleration of the final H Block build-out deadline by 2 years; and (2) *Failure to Meet the Final Build-out Deadline* – DISH’s H Block licenses would automatically terminate and be recovered by the Commission for reauctioning.¹⁹

3. DISH’s Request for Extension and Modification of Final Build-out Requirements

DISH has already failed to meet its interim build-out deadlines for its H Block and AWS-4 licenses.²⁰ Accordingly, the current buildout deadlines for DISH’s AWS-4 and H Block licenses have been accelerated to March 7, 2020, and April 29, 2022, respectively.²¹ On July 26, 2019, however, DISH requested another extension to June 14, 2023 of the accelerated final buildout deadlines for both its AWS-4 and H Block licenses.²² In the letter attached to each of the extension requests, DISH stated that extending its AWS-4 and H Block construction buildout deadlines was necessary due to its “anticipated acquisition of Boost Mobile and other assets” as a result of its commitments relative to the Sprint-T-Mobile merger.²³

¹⁸ *H Block Report and Order*, 28 FCC Rcd. at 9558, ¶ 195.

¹⁹ *Id.*

²⁰ See Letter from Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC, to Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH at 2 (Jul. 9, 2018) (“FCC July 8, 2018 Letter”).

²¹ See *id.*

²² See, e.g., FCC ULS File Nos. 0008741236 (filed July 26, 2019) (H Block licenses), 0008741420 (filed July 26, 2019) (AWS-4 licenses).

²³ Letter from Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH, to Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC at 1-2 (July 26, 2019) (“DISH Extension Request Letter”).

Furthermore, in exchange for DISH's voluntary waiver of its flexible use rights under its AWS-4 and H Block licenses, DISH requested that the FCC modify DISH's buildout obligations for its licenses by requiring DISH to provide 5G Broadband Service to at least: (1) 20% of the U.S. population by June 24, 2022 (in addition to deployment of a core network); and (2) 70% of the U.S. population by June 14, 2023.²⁴ If DISH failed to comply with those modified construction benchmarks for its AWS-4 and H Block licenses, however, the licenses would be subject to automatic cancellation under the Commission's rules.²⁵ DISH additionally proposed that it would be obligated to pay the FCC a voluntary forfeiture of \$2.2 billion for failure to meet the construction deadlines.²⁶ DISH's extension requests remain pending before the Commission as of the date of these comments.

C. The Data Roaming Market

Over the past 10-15 years, rapid consolidation in the wireless industry has adversely affected the data roaming submarket, with the result that smaller wireless carriers are unable to negotiate reasonable roaming rates with major carriers such as AT&T and Verizon.²⁷ The loss of literally dozens of independent competitive carriers from the market – including such larger ones

²⁴ *Id.* at Attachment A, p. 2.

²⁵ *See id.* at Attachment A, p. 3 (“If DISH is offering 5G Broadband Service with [its] AWS-4 Licenses to *less than 50%* of the U.S. population by 6/14/2023, DISH’s AWS-4 Licenses are subject to automatic termination in any [license area] where DISH is offering 5G Broadband Service with respect to the AWS-4 Licenses to *less than 70%* of the U.S. population in such [license area].” (emphasis added)); *id.* at Attachment A, p. 4 (“If DISH is offering 5G Broadband Service with [its] [H Block] Licenses to *less than 50%* of the U.S. population by 6/14/2023, DISH’s [H Block] Licenses are subject to automatic termination in any [license area] where DISH is offering 5G Broadband Service with respect to the [H Block] Licenses to *less than 75%* of the U.S. population in such [license area].” (emphasis added)).

²⁶ *Id.* at Attachment A, pp. 4-5.

²⁷ Letter from Donald J. Evans, Esq., Counsel for NTCH, Inc. & Wise Electronics, Inc., to Fredrick S. Young, Esq., Antitrust Division, DOJ at 1 (June 14, 2019) (“NTCH Letter”).

as MetroPCS, Leap Wireless, Atlantic Telenetwork, and Allied – are both a primary cause and a result of the growing crisis in roaming rates.²⁸ Many carriers found it difficult to sustain business models (especially to higher end traveling customers) with impossibly high prices they had to pay to allow their subscribers to roam on the large national carriers’ networks when those subscribers were outside their home network.²⁹ Those carriers determined that they could not compete under those circumstances, forcing them to exit the market.³⁰ This is how a vibrant national market of hundreds of independent local, regional, and national carriers transformed into one dominated by 4 national carriers with no incentive to offer reasonable roaming rates.³¹

The FCC has largely ignored the growing crisis in the data roaming market. Despite evidence presented to the Commission in several agency proceedings, including the *T-Mobile Declaratory Ruling* proceeding,³² Verizon’s acquisition of SpectrumCo.’s AWS holdings,³³ and several formal complaints filed with the Commission,³⁴ the FCC has largely ignored the glaring reality that roaming rates charged by the majors to small carriers are grossly excessive. In effect, these astronomical rates amount to a denial of roaming service to these small carriers and their

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 2.

³¹ *Id.*

³² See generally *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd. 15483 (Wireless Bureau 2014).

³³ *Cellco Partnership d/b/a Verizon Wireless*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10698, 10730, ¶ 84 (2012).

³⁴ See, e.g., *Flat Wireless v. Cellco Partnership d/b/a Verizon Wireless*, Order, 33 FCC Rcd. 7972 (2018); *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, Order, 31 FCC Rcd. 7165 (EB 2016), *recon. denied*, 33 FCC Rcd. 7972 (2018); *Worldcall Interconnect, Inc. a/k/a Evolve Broadband v. AT&T Mobility LLC*, Order, 31 FCC Rcd. 3527 (Enforcement Bureau 2016).

subscribers in violation of Sections 201(b) and 202(a) of the Communications Act of 1934, as amended (“Communications Act”).³⁵

II. DISCUSSION

A. Standard of Review

The APPA requires that the Court determine whether entry of the Proposed Final Judgment “is in the public interest.”³⁶ In doing so, the Court must consider *inter alia* “the impact of entry of such judgment upon competition in the relevant markets [and] upon the public generally”³⁷ The “[C]ourt’s inquiry is limited” in Tunney Act settlements.³⁸ The Court only “inquires ‘into whether the government’s determination that the proposed *remedies will cure the antitrust violations alleged in the complaint was reasonable*, and whether the *mechanism to enforce the final judgment are clear and manageable*.’”³⁹ While the Court “must accord deference to government’s predictions about the efficacy of its remedies,”⁴⁰ the Court “can make its public interest determination based on the competitive impact statement and response to public comments alone.”⁴¹

³⁵ 47 U.S.C. §§ 201(b) (unjust and unreasonable rates and practices are unlawful), 202(a) (discrimination in rates and practices unlawful).

³⁶ 15 U.S.C. § 16(e)(1).

³⁷ *Id.* at § 16(e)(1)(B).

³⁸ *United States v. U.S. Airways Grp., Inc.*, 38 F.Supp.3d 69, 75 (D.D.C. 2014).

³⁹ *United States v. Graftech Int’l Ltd.*, No. 10-02039, 2011 WL 1566781, at * 12 (D.D.C. Mar. 4, 2011) (emphasis added) (quoting *United States v. InBev N.V./S.A.*, No. 08-1965(JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009)). *See also id.* (“[T]he court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ‘construct [its] own hypothetical case and then evaluate the decree against that case.’” (emphasis added) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995))).

⁴⁰ *United States v. SBC Commc’ns, Inc.*, 489 F.Supp.2d 1, 17 (D.D.C. 2007).

⁴¹ *U.S. Airways Grp.*, 38 F.Supp.3d at 76 (citing *United States v. Enova Corp.*, 107 F.Supp.2d 10, 17 (D.D.C. 2000)).

B. DISH may fail to Comply with its Obligations Under the Proposed Final Judgment

NTCH has serious doubts whether DISH is able to comply with its obligations under the Proposed Final Judgment. The Proposed Final Judgment requires DISH to “comply with the June 14, 2023 *AWS-4*, 700 MHz, *H Block*, and Nationwide 5G Broadband build commitments made to the FCC on July 26, 2019”⁴² NTCH believes that DISH is at risk of failing to comply with these conditions because: (1) DISH has a history of noncompliance with spectrum buildout deadlines; and (2) adverse outcomes of pending appeals before the D.C. Circuit could lead to DISH losing its AWS-4 and H Block licenses.

1. *DISH is Currently Struggling to Comply with its AWS-4 and H Block Buildout Obligations*

DISH has a demonstrated track record of failing to comply with its construction buildout obligations for its spectrum licenses. It has already failed to meet its interim construction deadlines for both its AWS-4 and H Block licenses.⁴³ Indeed, after DISH failed to meet those construction deadlines, T-Mobile noted in a letter to the FCC that DISH’s buildout plan proposed in the DISH Sept. 21, 2018 Letter for its AWS-4 and H Block licenses was “inconsistent with the Company’s obligations under the Commission’s rules and the spectrum it holds will be recaptured if it only takes the very limited actions it described.”⁴⁴ Specifically, T-Mobile noted that DISH “would use only a fraction of the available spectrum capacity” by its construction

⁴² See Proposed Final Judgment at 23.

⁴³ See FCC July 8, 2018 Letter at 2; Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH, to Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC at 2 (Sept. 21, 2018) (“DISH Sept. 21, 2018 Letter”).

⁴⁴ See Letter from Kathleen O’Brien Ham, Senior Vice President, Gov’t Affairs, T-Mobile, to Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC at 1 (Oct. 25, 2018) (“T-Mobile Oct. 25, 2018 Letter”).

deadlines – only 1% of its AWS-4 licensed spectrum and 6.0% of its H Block licensed spectrum.⁴⁵ Based on its minimal usage and “warehousing” of authorized spectrum, T-Mobile concluded that “DISH’s efforts . . . constitute nothing more than a ‘license saving’ deployment scheme and are insufficient to meet its performance obligations.”⁴⁶ Indeed, T-Mobile rightly concluded that DISH’s plan to leave 98% of its authorized spectrum vacant was “contrary to the public interest and inconsistent with the Commission’s statutory obligation to ‘prevent stockpiling or warehousing of spectrum by licensees.’”⁴⁷

Moreover, T-Mobile contended that DISH’s inability to comply with its buildout requirements are “part of a clear pattern of DISH’s lack of commitment to use its wireless spectrum”⁴⁸ to provide mobile wireless services.⁴⁹ T-Mobile noted that DISH had no immediate intentions to deploy a mobile broadband network with its AWS-4 and H Block licenses.⁵⁰ Instead, DISH would initially deploy a narrowband Internet-of-Things (“NB-IoT”) system in an attempt to minimally comply with the Commission’s buildout obligations and then somehow make a rapid upgrade to a nationwide 5G wireless mobile broadband network by July 2023.⁵¹ While DISH claimed that its immediate deployment of its NB-IoT system served as a “bridge” to

⁴⁵ See *id.* at 2-3.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 5-6 (quoting 47 U.S.C. § 309(j)(4)(B)-(C)).

⁴⁸ Letter from Kathleen O’Brien Ham, Senior Vice President, Gov’t Affairs, T-Mobile, to Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC at 2 (Jan. 29, 2019) (“T-Mobile Jan. 29, 2019 Letter”) (citing *2013 DISH Waiver Order*, 28 FCC Rcd. at 16796, ¶ 23 (extension of AWS-4 buildout deadline) (other citations omitted)).

⁴⁹ See *id.* at 5, n.17 (citing *AWS-4 Report and Order*, 27 FCC Rcd. at 16103, ¶ 1); *id.* at 6, n.25 (citing *H Block Report and Order*, 28 FCC Rcd. at 9484, ¶ 1 & 9488, ¶ 9).

⁵⁰ See *id.* at 2 (citing Letter from Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH, to Marlene H. Dortch, Secretary, FCC (June 7, 2018)).

⁵¹ See *id.*

its eventual rollout of a 5G network,⁵² T-Mobile noted the vast differences between the two systems – and the large “jump” DISH would need to undertake by 2023 to buildout and operate a national wireless broadband network.⁵³ Accordingly, it is not at all evident that DISH has the ability to comply with the construction buildout obligations imposed by the Proposed Final Judgment. It is also worth noting that DISH was awarded its AWS-4 license in 2012 on a sole source rather than competitive bidding basis because the FCC thought that that would be the fastest way to get a nationwide AWS-4 network operational. Seven years later, not a single customer has been offered AWS-4 service, and there is no imminent prospect of such service. If experience is the best teacher, the Court should conclude that betting on DISH to meet its current commitments is not likely to be a winner.

2. *The Commission must Deny DISH’s Extension Request*

It is possible that the FCC may deny DISH’s pending extension and waiver request for its AWS-4 and H Block licenses’ final build-out requirements. The FCC may grant a waiver for good cause shown.⁵⁴ Section 1.946(e)(1) of the Commission’s rules provides that “[a]n extension request may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or *other causes beyond its control.*”⁵⁵ And,

⁵² Letter from Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH, to Donald K. Stockdale, Jr., Chief, Wireless Bureau, FCC at 1 (Nov. 27, 2018).

⁵³ See T-Mobile Oct. 25, 2018 Letter at 4; T-Mobile Jan. 29, 2019 Letter at 2-5.

⁵⁴ Section 1.925 of the Commission’s rules requires applicants to show that: (1) “the underlying purpose of the rule(s) would not be served or would be frustrated by the application to the instant case, and that a grant of the requested waiver would be in the public interest;” or (2) “in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” 47 C.F.R. § 1.925(b). See also *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

⁵⁵ 47 C.F.R. § 1.946(e)(1) (emphasis added).

the FCC “has consistently found that a licensee’s *own business decisions* are not circumstances beyond the licensee’s control and are therefore not an appropriate basis for regulatory relief.”⁵⁶

It is evident that DISH’s latest extension request for its H Block and AWS-4 licenses does not comport with the FCC’s rules. DISH claims that extending its final build-out deadlines “will promote the Commission’s public interest objectives by *enabling and accelerating* DISH’s facilities-based wireless deployment.”⁵⁷ Yet DISH acknowledges that the further delay is based upon its own new commitment to enter the wireless marketplace to effectuate the Sprint-T-Mobile merger.⁵⁸ Nevertheless, DISH’s request rings hollow in light of the fact that the FCC adopted construction deadlines for wireless services “to promote the productive use of spectrum,” and “to encourage licensees to provide service to customers expeditiously”⁵⁹

Just because DISH’s plans on entering the wireless market have been altered due to its recent commitments in connection with the Sprint-T-Mobile merger does not excuse it from

⁵⁶ *Alligator Communications, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd. 2823, 2825, ¶ 9 (Wireless Bureau 2015) (citations omitted). *See also Eldorado Communications LLC*, Order, 17 FCC Rcd. 24613 (Wireless Bureau 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); 47 C.F.R. § 1.946(e)(2) (“Extension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner.”).

⁵⁷ DISH Extension Request Letter at 2 (emphasis added). *See also id.* at 2 (“[T]he modified deadlines . . . will align DISH’s construction milestones with our deployment goals, *leading to a more efficient network build.*” (emphasis added)).

⁵⁸ DISH, however, only makes a cursory reference to the role of the Sprint-T-Mobile merger in its extension request as impacting the effective date of its final build-out deadline. *See id.* at 7.

⁵⁹ *2013 DISH Waiver Order*, 28 FCC Rcd. at 16804, ¶ 43 (discussing adoption of AWS-4 build-out requirements) (quoting *AWS-4 Report and Order*, 27 FCC Rcd. at 16173-74, ¶ 187). *See also H Block Report and Order*, 28 FCC Rcd. at 9563, ¶ 209 (“[The] penalties for failure to meet the interim and final benchmarks . . . are necessary to ensure that licensees utilize the spectrum in the public interest . . . [and] to ensure that the buildout requirements fulfill their purpose of bringing about timely deployment”).

having to deploy wireless services expeditiously. DISH remains bound by FCC's strict policy underlying construction build-out obligations – i.e., to promote the expeditious deployment of spectrum and to prevent spectrum warehousing.

Given DISH's historical struggle in comporting with these underlying objectives – there is little ground to argue that *further* delay of spectrum deployment would be in the public interest. Moreover, in light of DISH's bold commitments to enter the wireless market as the fourth largest provider, DISH's utter lack of experience in building out a terrestrial wireless network indicates that DISH will likely struggle to meet – or fail to meet altogether – its final build-out deadlines for its AWS-4 and H Block licenses. Accordingly, DISH's decision to comply with its obligations under the Proposed Final Judgment does not constitute circumstances beyond the licensee's control which under long held and applied FCC precedent might justify extension of its final H Block and AWS-4 build-out deadlines.

For this reason, the Commission is bound by its own policy to deny DISH's extension request; if not denied, the Commission's action would have to be overturned by the Court of Appeals. And, as discussed above, DISH is likely unable to meet the current construction deadlines – which would result in the automatic termination of DISH's licenses. Without its AWS-4 and H Block licenses, DISH will be unable to comply with its commitments and obligations under the Proposed Final Judgment to construct and operate a new facilities-based nationwide wireless network.

3. *DISH could lose its AWS-4 and H Block Licenses as a Result of NTCH's Appeals Pending Before the D.C. Circuit*

In September 2018, NTCH appealed a series of FCC decisions to the D.C. Circuit which involve the disposition of wireless spectrum to DISH.⁶⁰ In each proceeding, NTCH contended that the Commission failed to comply with provisions of the Communications Act, and/or the agency's regulations, in awarding H Block and AWS-4 spectrum licenses to DISH.⁶¹ NTCH noted that the FCC turned a blind eye to DISH's inexperience in building out a national mobile wireless network in awarding DISH its spectrum licenses.⁶² NTCH has requested that the D.C. Circuit reverse the FCC's award of H Block and AWS-4 spectrum licenses to DISH as unlawful.⁶³

Without going into too much detail on the substance of the pending appeals, we will note here that NTCH is challenging the award of the AWS-4 license on several grounds, including the

⁶⁰ See *DISH Network Corporation*, Memorandum Opinion and Order, 33 FCC Rcd. 8456 (2018), *appeal filed*, *NTCH, Inc. v. FCC*, Case No. 18-1241 (D.C. Cir., Sept. 7, 2018) (concerning DISH's H Block licenses); *NTCH, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd. 8446 (2018), *petition for review filed*, *NTCH, Inc. v. FCC*, Case No. 18-1242 (D.C. Cir., Sept. 7, 2018) (concerning DISH's H Block licenses); *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Order on Reconsideration, 33 FCC Rcd. 8435 (2018), *petition for review filed*, *NTCH, Inc. v. FCC*, Case No. 18-1243 (D.C. Cir., Sept. 7, 2018). Case Nos. 18-1241 and 18-1242 have been consolidated. See Order, *NTCH, Inc. v. FCC*, Case Nos. 18-1241 & 18-1243 (D.C. Cir., Oct. 25, 2018).

⁶¹ See Notice of Appeal, *NTCH, Inc. v. FCC*, Case No. 18-1241 (D.C. Cir., Sept. 7, 2018) (contending that granting DISH waiver of FCC rules gave it an unfair advantage in the H Block auction); Petition for Review, *NTCH, Inc. v. FCC*, Case No. 18-1242 (D.C. Cir., Sept. 7, 2018) (objecting to the H Block auction rules as unlawful); Petition for Review, *NTCH, Inc. v. FCC*, Case No. 18-1242 (D.C. Cir., Sept. 7, 2018) (objecting to FCC's award of AWS-4 licenses to DISH as unlawful).

⁶² See Final Consolidated Reply Brief of Petitioner at 15-18, *NTCH, Inc. v. FCC*, Case No. 18-1243 (D.C. Cir., Apr. 9, 2019).

⁶³ See Final Brief of Appellant-Petitioner at 61, *NTCH, Inc. v. FCC*, Case Nos. 18-1241 & 18-1242 (D.C. Cir., Mar. 28, 2019); Final Brief of Petitioner at 44, *NTCH, Inc. v. FCC*, Case No. 18-1243 (D.C. Cir., Apr. 9, 2019).

determination that such an award without any opportunity for others to bid on the new licenses violated the Communications Act and was based on blind faith that DISH would actually meet its commitment to “aggressively” build out its network. DISH’s recent request for yet another extension of time to initiate the build-out underscores the unreliability of its commitments. The FCC’s award of the H Block licenses is also highly suspect since it involved the Commission’s unprecedented acceptance under unusual circumstances of a payment of over a billion and a half dollars from DISH in exchange for waivers and extensions which were not justified under the Commission’s rules and not available to other participants in the auction. This highly irregular FCC deal with one bidder in an auction to the detriment of all others makes it probable that the grant of the H Block license will have to be reversed.⁶⁴ Oral argument in each of these proceedings is scheduled for October 8, 2019.⁶⁵

Until the D.C. Circuit rules in these cases, there can be no confidence at all that DISH will have either of the spectrum resources which the DOJ is depending on for the creation of a fourth wireless network. Reversal of the FCC’s license grants would doom this entire DISH-to-the-rescue plan to failure, and leave the country with a deeply consolidated three major carrier structure – without DISH to even theoretically remediate the anticompetitive harms that all agree will ensue.

C. The Proposed Final Judgment Fails to Consider the Impact of the Merger on the Data Roaming Submarket

The Sprint-T-Mobile merger, if approved, will further worsen the plight of the smaller wireless carriers given the already anticompetitive data roaming submarket. The impact of the

⁶⁴ See Final Consolidated Reply Brief of Appellant-Petitioner, *NTCH, Inc. v. FCC*, Case Nos. 18-1241 & 18-1242 (D.C. Cir., Mar. 28, 2019).

⁶⁵ See Order, *NTCH, Inc. v. FCC*, Case Nos. 18-1241 & 18-1242 (D.C. Cir., July 30, 2019); Order, *NTCH, Inc. v. FCC*, Case No. 18-1243 (D.C. Cir., July 30, 2019).

merger on the data roaming submarket, however, is not addressed in either the Competitive Impact Statement or the Proposed Final Judgment. In fact, data roaming is addressed only once in the Proposed Final Judgment with respect to prohibiting DISH from “sell[ing], leas[ing], or otherwise provid[ing] the right to use the Divestiture Assets (including, but not limited to, selling wholesale wireless network capacity) to any national facilities-based mobile wireless provider . . . *except for a roaming agreement*, without prior approval of the United States”⁶⁶ While that clause *permits* DISH to enter into roaming agreements with other wireless providers, it does not *require* DISH to offer reasonable roaming rates to offset the anticompetitive effects of the merger. And, as discussed above, the Commission has largely abdicated its statutory responsibility for enforcing reasonable rates in the data roaming market.⁶⁷ For this reason, NTCH believes that the Court’s adoption of the Proposed Final Judgment, in its current form, would not be in the public interest.

Instead, if the Court chooses to approve the Proposed Final Judgment – despite the clouds that hang over it – NTCH proposes the following amendments to the Proposed Final Judgment to mitigate the adverse impact of the Sprint-T-Mobile merger on competition in the wireless market, and to prevent further increases in data roaming rates:

First, DISH and T-Mobile must not charge roaming rates to independent carriers that exceed the retail rates they charge their own customers or MVNOs for the same services. Doing so would ensure that the roaming rates comply with Sections 201(b) and 202(a) of the Communications Act. Furthermore, requiring benchmark parity between the roaming rates charged to independent carriers and the retail rates DISH and T-Mobile charge their own

⁶⁶ Proposed Final Judgment at 31, § XV.C (emphasis added).

⁶⁷ *See also* NTCH Letter at 1-2.

customers would be an easy-to-use benchmark for the Commission and the Court to use in ensuring that these entities comply with the conditions of the merger.

Second, T-Mobile must continue providing CDMA service for at least five more years. In support of their transfer of control application filed with the FCC, Sprint and T-Mobile included a public interest statement in which they committed to allow their existing roaming partners to select the preferable roaming rate schedule of either company going forward.⁶⁸ NTCH has no problem with T-Mobile and Sprint's commitment for the *immediate* future since Sprint's roaming rates are considerably more reasonable than either AT&T or Verizon's rates. But because Sprint and T-Mobile make no commitment to retain their current roaming rates, those could rise as soon as the dust settles on the merger. Indeed, as the history of Leap Wireless and MetroPCS teaches us, roaming rates immediately jump once a smaller competitive company is acquired by one of the majors.

If T-Mobile phases out Sprint's CDMA service as it did with MetroPCS's service, there will be no national carrier which offers CDMA-based service besides Verizon – leaving scores of smaller carriers who have CDMA networks with nowhere for their customers to roam in most of the country (While LTE technology will eventually blur the distinction between CDMA and GSM carriers for roaming purposes, LTE roaming is priced exponentially higher than ordinary voice roaming.). Currently, Sprint's coverage area is only a fraction of Verizon's coverage area, so a roaming customer is often left with only Verizon as an option – an option so expensive as to be unavailable at all.⁶⁹ The crushing impact of this situation on smaller CDMA carriers cannot

⁶⁸ Description of Transaction, Public Interest Statement, and Related Demonstrations at 69, *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197 (filed June 18, 2018).

⁶⁹ The FCC's annual 2015 *Mobile Wireless Competition Report* shows that Sprint served only 24% of the U.S. land area, while Verizon served 63.7%. *Implementation of Section 6002(B)*

be overstated since it will be difficult for them to offer competitive service to their local customers if they cannot roam on reasonable terms when outside their home territory.

Mandating that T-Mobile continue providing CDMA service for at least five more years will allow existing smaller CDMA carriers to gradually transition to other technology standards without being forced out of the marketplace, and, just as importantly, enable new carriers to enter the market as new sources of competition. The parties to the Proposed Final Judgment all recognize that the availability of reasonable roaming rates from T-Mobile is critical to DISH's success as a new entrant into the market. Such rates are equally, if not more, essential to the ability of small carriers and other new entrants who lack nationwide spectrum resources to survive. Yet the Proposed Final Judgment ignores the plight of such carriers while actually worsening their access to reasonable rates. The key here is that roaming rates must be set at nondiscriminatory levels that do not exceed retail and MVNO rates charged by T-Mobile for equivalent services. Smaller carriers are also hampered by the general unavailability of handsets at reasonable prices from the major handset vendors. This problem will worsen as prohibitions on purchases from Huawei and ZTE go in to effect, but that issue will likely require remediation outside the scope of this Proposed Final Judgment. The availability of reasonable roaming rates and reasonably priced handsets would be a game-changer in establishing the conditions under which competition from smaller carriers could flourish.

Third, DISH and T-Mobile must make their roaming rates public – a simple remedy that would incentivize AT&T and Verizon to offer non-discriminatory rates. In 2014, NTCH filed a

of the Omnibus Budget Reconciliation Act of 1993, Eighteenth Report, 30 FCC Rcd. 14515, 14584, Chart VI.B.1 (2015). While Sprint remains a CDMA alternative, Verizon's own advertising demonstrate that Sprint's coverage was significantly smaller than Verizon's footprint.

with the FCC requesting that the Commission to lift its forbearance from Section 211 of the Communications Act that generally requires carriers to make copies of their contracts with other carriers public.⁷⁰ In 1994, the FCC had cursorily forbore from this bedrock provision of the Communications Act on the grounds that the industry was highly competitive, and therefore, there was no need for such information to be public.⁷¹ In a roaming market which is already noncompetitive and likely to become dramatically less so if the Sprint-T-Mobile merger is approved, the need for public rates is compelling as a check on discrimination and unreasonable rates. Almost five years later, the Commission has yet to take action on NTCH's petition.

Finally, the Court should modify the conditions applicable to DISH's acquisition of the Boost-branded business from T-Mobile.⁷² DISH should be required to grant small facilities-based carriers a license to use the Boost tradename and platform – subject to reasonable licensing standards set by DISH. These small carriers would be allowed to offer Boost's prepaid services to customers under their current terms or under terms reasonably negotiated with DISH that would provide a reasonable gross margin of at least 30% on services and handsets offered through this arrangement. At the same time, T-Mobile would be required to offer these carriers a non-exclusive right to lease up to 20 MHz of former Sprint spectrum in the 1900 MHz or lower band at a rate not exceeding \$0.05 per megahertz pop in the areas leased annually. The leased spectrum would enable them to offer their own competitive product in addition to Boost's prepaid services. NTCH believes that this final condition could restore real structural

⁷⁰ NTCH, Inc., Petition to Rescind Forbearance and Initiate Rulemaking Proceeding (filed July 2, 2014).

⁷¹ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1480, ¶ 181 (1994).

⁷² See Proposed Final Judgment at 8-9.

competition from local and regional carriers in the wireless market that have been forced out or marginalized by market consolidation over the past 10-15 years.

Collectively, NTCH believes that these amendments to the Proposed Final Judgment will mitigate the deleterious anticompetitive effects that the Sprint-T-Mobile merger will have both on the wireless market and the data roaming submarket. The amendments, if adopted, have the felicitous effects of: (1) eliminating the crushing weight of exorbitant roaming rates on small independent carriers; (2) establishing a network of experienced agents for Boost's prepaid services – thereby providing DISH with expertise in rolling out a nationwide wireless service; (3) preserving locally-based sources of innovation and competition to offset the national carriers; and (4) accelerating the availability of 5G broadband services nationwide. Accordingly, the suggested conditions will ensure that the approval of the proposed merger does not perpetuate the existing issues created by the consolidated wireless industry.

CONCLUSION

For the foregoing reasons, NTCH respectfully requests that the Court and the DOJ take into account its comments in considering whether the terms and conditions of the Proposed Final Judgment in this proceeding are in the public's interest.

Respectfully submitted

[Redacted signature block]

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Date: August 26, 2019

CERTIFICATE OF SERVICE

I, Keenan P. Adamchak, of Fletcher, Heald & Hildreth, PLC, hereby certify that I caused a true copy of the foregoing Comments to be sent this 26th day of August, 2019, via U.S. First Class Mail, postage prepaid, to the following individual:

Scott Scheele, Chief
Telecommunications and Broadband Section,
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U.S. Department of Justice
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Keenan P. Adamchak