October 11, 2019

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Re: *United States of America et al. v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., Sprint Corporation, and DISH Network Corporation, United States District Court for the District of Columbia, Case 1:19-cv-02232.*

Mr. Scheele:

The Department of Justice's Competitive Impact Statement ably describes why the proposed merger between Sprint and T-Mobile would substantially lessen competition for retail mobile wireless service. It is therefore troubling that the same agency argues that the merger should be allowed to go through nonetheless. And all the more troubling, the DOJ does so not because it has devised a set of conditions that it can demonstrate will reliably preserve the competition that exists today, or that would increase competition beyond its current level. Instead, it has put forward conditions that, at most, and only if all goes well, *might* bring back a semblance of the current level of competition some years from now. In the meantime, it adopts a complex set of regulatory measures to allow DISH to operate as a mobile virtual network operator (MVNO). This convoluted proposal violates many, if not all, of the Justice Department's guiding principles for merger remedies.[1]

The proverb states that "A bird in the hand is worth two in the bush." But here, the DOJ isn't even proposing that we give up competition now to get even more competition later—it's proposing that we give up the bird we have today in the hope that it eventually flies back. This proposed merger substantially lessens competition in violation of antitrust law. Betting the future of wireless competition in this country on a shaky set of promises and hopes would not serve the American consumer.

**MVNOs Are Not Competitors to Facilities-Based Providers**

The DOJ states that,

[1] Antitrust Division Policy Guide to Merger Remedies, October 2004, https://www.justice.gov/atr/page/file/1175136/download.

> The proposed Final Judgment requires T-Mobile and Sprint to enter into a Full MVNO Agreement with DISH for a term of no fewer than seven years. Under the agreement outlined in the proposed Final Judgment, T-Mobile and Sprint must permit DISH to operate as an MVNO on the merged firm's network on commercially reasonable terms and to resell the merged firm's mobile wireless service.[2]

But seven years of DISH operating as an MVNO is seven years of only three meaningful national wireless competitors: T-Mobile, AT&T, and Verizon. DISH will be a nonfactor, as all MVNOs are, because its viability as a business will be dependent on T-Mobile.

MVNOs resell to consumers at retail mobile wireless service obtained at wholesale from a carrier that has network facilities. While many MVNO customers might not perceive the difference between facilities-based competitors like Sprint or Verizon and MVNOs like TracFone, the difference is significant: the facilities-based providers who supply MVNOs with network access would not do so unless they found the arrangement to be beneficial to themselves. The relationship between MVNOs and facilities-based providers is only beneficial to the extent that since MVNOs serve customer segments, and offer pricing plans, that facilities-based providers might not want to bother with. The marketing and brand differentiation services that MVNOs provide to augment what facilities-based carriers offer is real. But MVNOs would never be permitted to cut significantly into the sales of their suppliers and provide true competition.

And after those seven years, even those minimal conditions go by the wayside. Unless and until, at some uncertain, speculative time in the future, if and when, after investing billions of dollars, DISH succeeds in creating a brand-new wireless network, it will simply be an MVNO, reselling T-Mobile network access. The conditions proposed by the DOJ do not even attempt to address this: They merely require that T-Mobile provide access to DISH on "commercially reasonable and mutually beneficial terms."[3] These terms (as contrasted with, for example, a requirement that T-Mobile sell DISH spectrum and network access *at cost*) by definition will simply resemble the MVNO terms currently prevalent in the marketplace. But those terms, again, are for facilities resellers, not competitors, and it is difficult to see how it could ever be beneficial to T-Mobile to sell network access to DISH under terms that could allow the MVNO to steal away T-Mobile customers.

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[2] Competitive Impact Statement 11.
[3] Proposed Final Judgement 18.

Further, as T-Mobile itself has argued, a "commercially reasonable" standard is in general ambiguous and likely to be ineffective without significant elaboration.[4]

It is true that during the seven years, these terms "must be acceptable to the United States"[5] But no conditions, however stringent, proposed by the DOJ and imposed by a federal court can change the inherent economic hierarchy of the relationship between an MVNO and its suppliers, and it is to be expected that during the time when DISH is an MVNO it will not be a significant competitive presence in the wireless market. And again, once the conditions expire, T-Mobile's ability to set the terms of how it chooses to provide MVNO access to DISH would be completely unrestrained.

**The Hope of Future Entry Does Not Alleviate Competition Problems Today**

Recognizing the inadequacy of MVNO "competition," the DOJ does optimistically envision that DISH will eventually construct a new wireless network. The details of how this might happen are rather scarce in the DOJ's documentation, and merely require that DISH follow its existing legal obligation to "comply with the June 14, 2023 AWS-4, 700 MHz, H Block, and Nationwide 5G Broadband network build commitments made to the FCC as of the date of entry of this Final Judgment."[6] Beyond that, the DOJ merely wants to get status reports, and requests that T-Mobile not "interfere" with DISH's legal obligations.

It is far from clear how the DOJ simply re-requiring DISH to undertake its existing legal obligations does anything to promote or preserve competition. In fact, it shows how the order is likely to *lessen* competition. Absent the merger, DISH is currently under an obligation to enter the market as a wireless carrier, or else give up wireless spectrum holdings. Entry on those terms, as has been envisioned, could usefully create an additional nationwide wireless carrier, potentially giving users five options. Instead, if the DOJ's proposal is accepted, and even if these very optimistic hopes for DISH's success all go according to plan, the best we can hope for is that consumers will be left with only the equivalent of what they already have, four options. That does not seem like a smart trade.

Certainly, the divested assets might help make DISH's entry easier than it might otherwise have been. But it remains a daunting and uncertain challenge, even with those assets. Without the merger, the worst-case scenario was that DISH would not build that

[4] Petition for Expedited Declaratory Ruling of T-Mobile USA in WT Docket No. 05-265, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services (filed May 27, 2014), https://ecfsapi.fcc.gov/file/7521151798.pdf.

[5] Proposed Final Judgment 17.

[6] Proposed Final Judgment 23.

new network, and customers would be left with the level of competition they have now—four national wireless competitors. But under the DOJ's plan, the worst-case scenario is far worse — that customers are left with *three* national wireless competitors. The proposed conditions do not even have a "Plan B" for restoring competition in the event that DISH's efforts to enter the market are unsuccessful or insufficiently pursued. This is simply too great a risk.

**This Matter Should Be Paused During the Pendency of the State Lawsuit, and It Warrants an Evidentiary Hearing Before the Court Acts**

Aside from the considerations expressed elsewhere in this document, we respectfully request that the DOJ ask the court to wait to decide whether to accept its proposed consent decree until the pending state enforcement action to block this merger is resolved. First, actions taken by the District Court for the District of Columbia—which has not had the benefit of briefing by the states as to the extensive harms of this merger—could interfere with the pending litigation. It seems likely that the states will put forward a strong case as to why this merger harms competition and consumers in the wireless marketplace. The District Court in New York hearing the state challenge is no doubt well aware of this. But in the event that the DC District Court grants the DOJ's request that the merger be approved, based on the more limited record before it, it is likely that defendants would then attempt to frame the DC court's ruling as somehow dispositive, creating unnecessary complexity and delay. The DOJ can help avoid that scenario, and should.

Second, if the states are successful in their challenge, any actions taken in the DC court could simply be redundant, or moot, and an unnecessary diversion of DOJ and judicial resources.

Both these reasons counsel for delay in considering this proposed consent decree unless and until it is actually necessary.

If and when it becomes time to consider this proposed consent decree, we ask that the court conduct an in-depth review that includes an evidentiary hearing. This remedy, and the process that has surrounded it, is unprecedented, at least in the recent memory of merger reviews in this sector. The Department of Justice, the Federal Communications Commission, and state attorneys general—entities that usually speak with one voice on telecommunications mergers—reached different conclusions. This unusual circumstance, and the strong evidence against the proposed remedy, warrants a closer examination than has been typical in Tunney Act proceedings.

**Conclusion**

Merger conditions generally try to retain for consumers the benefits of competitive markets, by restricting how the newly merged firm can behave, or by spinning off assets to either lessen harms or generate new competition. The proposed conditions in this matter do not take that route. Instead, the DOJ proposes to simply allow a merger that substantially lessens competition to go through, in violation of the law, and put its hope in new market entry down the line. This is a stark departure from DOJ precedent and is not a risk worth taking. Even with the proposed conditions, this merger should be blocked.

Respectfully submitted,

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PUBLIC KNOWLEDGE

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