RURAL WIRELESS ASSOCIATION

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Scott Scheele, Esq.
Chief, Telecommunications and Broadband Section
Antitrust Division, U.S. Department of Justice
450 Fifth Street NW, Suite 7000
Washington, DC 20530

Re: United States v. Deutsche Telekom AG, et al., No. 1:19-cv-02232-TJK

TUNNEY ACT COMMENTS OF THE
RURAL WIRELESS ASSOCIATION, INC.

I. INTRODUCTION

The Rural Wireless Association, Inc. ("RWA") is a trade association representing rural wireless carriers who each serve fewer than 100,000 subscribers. RWA's members provide mobile and fixed wireless services to their subscribers and to the subscribers of larger carriers, while those customers roam in RWA members' rural service areas. On August 27, 2018, RWA filed with the Federal Communications Commission ("FCC" or "Commission") a Petition to Deny the proposed merger between Sprint Corp. ("Sprint") and T-Mobile US, Inc. ("T-Mobile").[1] Since that date, RWA has filed numerous subsequent pleadings and *ex parte* letters in the FCC docket.[2]

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[1] *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations*, Petition to Deny of The Rural Wireless Association, Inc., WT Docket No. 18-197 (August 27, 2018).

[2] *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations*, Petition to Deny of The Rural Wireless Association, Inc., WT Docket No. 18-197 (August 27, 2018); Reply to Opposition of the Rural Wireless Association, Inc. (October 31, 2018); RWA *Ex Parte* (December 10, 2018); RWA *Ex Parte* (February 13, 2019); RWA *Ex Parte* (March 7, 2019); RWA *Ex Parte* (April 1, 2019); RWA Supplemental Comments (April 1, 2019); RWA *Ex Parte* (April 17, 2019); Joint Open Letter to DOJ and FCC *Ex Parte* (April 18, 2019); RWA *Ex Parte* (May 30, 2019); Informal Request for Commission Action of The Rural Wireless Association, Inc. and NTCA – The Rural Broadband Association (August 5, 2019); Public Interest and Labor Organizations

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("Tunney Act")[3], RWA respectfully submits the following comments on the Proposed Final Judgment ("PFJ" or "Consent Decree")[4] submitted by the United States' Department of Justice ("DOJ") in the above-referenced matter. In the present case, on July 26, 2019, the DOJ filed with the court: (a) a Complaint detailing how "without appropriate remedies, the merger of T-Mobile and Sprint would extinguish substantial competition"[5]; (b) a Stipulation and Order[6], which among other things, adds Dish Network Corp. ("Dish") as a defendant in the current proceeding; and (c) a PFJ/Consent Decree that purports to "preserve competition by enabling the entry of [Dish as] another national facilities-based mobile wireless network operator."[7] Our country's antitrust laws unequivocally provide that after any proposed final judgment is "submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States," concerned parties may also submit "[a]ny written comments relating to such proposal."[8] RWA files these comments in this case so that the court may have a more educated understanding of the anticompetitive effects that the Sprint/T-Mobile merger will have on rural consumers, and more importantly, how the entrance of Dish as a white-knight fourth nationwide

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Ex Parte (August 13, 2019); Reply to Joint Opposition to Informal Request for Commission Action of The Rural Wireless Association, Inc. and NTCA – The Rural Broadband Association (August 22, 2019); Supplement to Petition to Deny of The Rural Wireless Association, Inc., *et. al*, (October 3, 2019).

[3] 15 U.S.C. § 16(e).

[4] U.S. Department of Justice, Proposed Final Judgment, *U.S. and Plaintiff States v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., Sprint Corp., and Dish Network Corp.*, No. 1:19-cv-02232 (D.C. Cir. July 26, 2019).

[5] U.S. Department of Justice, Complaint, *U.S. and Plaintiff States v. Deutsche Telekom AG et. al*, No. 1:19-cv-02232 (D.C. Cir. July 26, 2019) at para. 3.

[6] U.S. Department of Justice, Stipulation and Order, *U.S. and Plaintiff States v. Deutsche Telekom AG, et. al*, No. 1:19-cv-02232 (D.C. Cir. July 26, 2019).

[7] PFJ at p. 2.

[8] 15 U.S.C. § 16(b).

competitor, via the Consent Decree, does nothing to mitigate the very concerns the DOJ raised in its Complaint.

A. Standard of Review

Prior to any consent decree becoming final, § 16(e) of Title 15 mandates that the district court make an "independent determination"[9] that "entry of such judgment is in the public interest."[10] Indeed, when originally passing the Tunney Act, Congress felt the courts had an "independent duty"[11] to ensure that they would not act as a mere "judicial rubber stamp."[12] Additionally, district courts presiding over antitrust matters have been advised by the U.S. Supreme Court to "pay close attention" to the enforcement provisions contained in any proposed consent decree.[13] Furthermore, to the extent there are third-party claims that the proposed consent decree is not just insufficient, but "will cause affirmative harm, the district court should at least pause or 'hesitate' in order to consider these claims before reaching a conclusion."[14]

The role of the court is to take the public interest harms clearly identified in the Complaint and weigh them against the proposed remedies described in the PFJ and then "determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified."[15] There is no need for the court to look beyond

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[9] *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995).

[10] 15 U.S.C. § 16(e).

[11] 119 Cong. Rec. 3452 (1972) (remarks of Sen. Tunney).

[12] *United States v. Thomson Corp.*, 949 F. Supp. 907, 914 (D.D.C. 1996) (quoting H.R. REP. NO. 1463, 93rd Cong., 2d Sess. 8 (1974)); see also *United States v. Microsoft Corp.*, 56 F.3d at 1458.

[13] *United States v. Microsoft Corp.*, 56 F.3d at 1462.

[14] *United States v. Microsoft Corp.*, Memorandum Opinion (Nov. 1, 2002) at p. 6.

[15] *United States v. Thomson Corp.*, 949 F. Supp. at 913.

the four corners of the Complaint to identify how anticompetitive the proposed merger between T-Mobile and Sprint is and how American consumers – whether in rural or urban markets – will be negatively impacted by such consolidation. The DOJ absolutely recognizes the multitude of likely harms and shines a bright light on them. However, what is crucial in the present case, and what must be scrutinized by the district court in its Tunney Act review, is the likelihood that the "Dish solution" as envisioned by the Defendants will alleviate the known harm identified by the DOJ. RWA explains below why the PFJ is ineffective and more importantly why Dish is not an adequate substitute for Sprint as a fourth nationwide wireless service provider.

B. Summary of RWA's Comments

Section II of RWA's Tunney Act Comments provides a summary of the public interest harms identified by the DOJ in its Complaint filed against T-Mobile and Sprint. Section III broadly speaks about why Dish's entry into the mobile wireless marketplace does not eradicate the antitrust concerns raised by the DOJ in its Complaint. Specifically, Section III.A addresses why the same barriers to entry, that exist for any hypothetical new market player, also exist for Dish, and that these barriers are difficult, if not impossible, to overcome. Section III.B explains why market forces are likely to diminish Dish's marketplace power, and in the process, allow the other nationwide carriers to raise prices on consumers. Section III.C discusses in-depth how the elimination of Sprint as a reliable, stand-alone provider of domestic wholesale mobile virtual network operator ("MVNO") access and nationwide roaming services not only hurts millions of Americans, but stymies marketplace innovation in the MVNO and Internet-of-Things ("IoT") sectors. Section III.D explains why it is likely that after the elimination of Sprint, and with Dish facing overwhelming market forces, AT&T, Verizon, and a merged Sprint and T-Mobile ("New T-Mobile") are likely to act in an anti-competitive manner as equally-sized nationwide players. Finally, Section IV describes in detail why the provisions contained in the PFJ, the modified deadlines

sought by Dish from the FCC, and the plethora of commitments made by Dish to both the DOJ and FCC are not enough to mitigate the harms likely to occur after Sprint exits the marketplace.

II. SUMMARY OF PUBLIC INTEREST HARMS IDENTIFIED BY THE DOJ

The DOJ's Complaint found that the proposed merger between Sprint and T-Mobile, if allowed to proceed without any federal antitrust intervention, "would extinguish substantial competition."[16] Today, Sprint and T-Mobile each act as disruptive competitors to Verizon and AT&T. The DOJ recognizes that allowing Sprint and T-Mobile to merge "would cause the merged T-Mobile and Sprint ("New T-Mobile") to compete less aggressively."[17] Rather, the union would cement AT&T, Verizon, and New T-Mobile as equally-sized behemoths[18] with little incentive to try and win-over customers, like Sprint and T-Mobile do on a daily basis today. The DOJ also noted that the proposed merger "would substantially lessen competition for retail mobile wireless service"[19] and "harm consumers" in the process.[20] Finally, the DOJ determined that "[a]ny efficiencies generated by this merger are unlikely to be sufficient to offset the likely anticompetitive effects on American consumers in the retail mobile wireless service market, **particularly in the short term**, unless additional relief is granted."[21]

III. THE DOJ'S PROPOSED REMEDIES WILL NOT CURE THE PUBLIC INTEREST HARMS IDENTIFIED BY THE DOJ, INCLUDING THE ADVERSE IMPACT ON COMPETITION

While the DOJ correctly identifies the public interest harms that will result from the proposed

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[16] Complaint at ¶ 3.

[17] *Id.* at ¶ 5.

[18] *Id.* at ¶ 16.

[19] *Id.* at ¶ 6.

[20] *Id.* at ¶ 16.

[21] *Id.* at ¶ 24 (emphasis added). While the "relief" contemplated by the DOJ is not defined in the Complaint, RWA believes the DOJ is referring to the existence of a fourth nationwide wireless operator.

merger, its recommended prescription for curing them is based on false assumptions and fails to reflect the realities of what makes a successful, facilities-based wireless service provider. The blind assumption that Dish will immediately succeed Sprint as the country's fourth nationwide carrier is not supported by any historical evidence of a new, facilities-based mobile wireless carrier entering the marketplace at the national, or even regional, level. Rather, the history of the wireless industry in the last two decades is replete with nothing but rampant consolidation, including many notable and well-backed MVNO failed ventures.[22] If anything, what Dish is attempting to do is launch not one, but two highly speculative business ventures: the first venture is an MVNO, which have a verifiable and notoriously high churn rate; and the second is a nationwide, facilities-based 5G network built from the ground-up, which it plans to accomplish in less than seven years.

Unlike service providers in other tech industries such as e-commerce, content development, or software, where new industry actors can scale quickly to reach some level of market maturity and stable income streams, mobile wireless carriers require tens of billions of dollars of entrenched capital and assets (*e.g.*, towers, network core, FCC licenses) in order to compete effectively at the national level.[23] History has shown that this level of market maturity requires decades to achieve.[24] It is not credible to

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[22] *See* "Cox Hangs Up on Cell Phone Service", CNET (November 26, 2011), *see* https://www.cnet.com/news/cox-hangs-up-on-cell-phone-service/; "Disney Will Shut Down Cellphone Service", Wall Street Journal (September 28, 2007), *see* https://www.wsj.com/articles/SB119094140401842103; "ESPN to Shut Down Wireless Network Operations", MarketWatch (September 28, 2006), *see* https://www.marketwatch.com/story/espn-to-shut-down-wireless-network-operations; "Amp'd Mobile to Shut Down Service", FierceWireless (July 23, 2007), *see* https://www fiercewireless.com/tech/amp-d-mobile-to-shut-down-service.

[23] "US Wireless Leaders Ramp Up Capital Spending Amid 5G Deployments", S&P Global (February 11, 2019) ("Combined, the four operators recorded a total capital expenditure of $55.71 billion during calendar year 2018, up from $53.72 billion in 2017, according to S&P Global Market Intelligence data. These expenditures include any cash spent to maintain, improve or construct operators' networks, including interest. Among the carriers, the biggest year-over-year jump came from Sprint Corp., which reported capex of $12.26 billion for the year, up from $9.68 billion in 2017."), *see* https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-wireless-leaders-ramp-up-capital-spending-amid-5g-deployments.

[24] "T-Mobile Says It Has Seven Major Competitors, Which is Complete Nonsense," The Verge (April 30, 2018) ("Conventional wisdom, as well as facts and history, say that there are four major US wireless carriers: Verizon, AT&T, T-

believe or even argue that Dish will be able to compete against AT&T, Verizon, and New T-Mobile within seven years, let alone in the first few quarters or even years after the merger is consummated. The DOJ Complaint notes that the proposed merger of Sprint and T-Mobile is likely to incentivize collusion amongst the remaining players, fortify the barriers to entry by new market entrants, raise consumer prices, and decimate innovation and the ability for start-ups, like MVNOs, and IoT providers (and rural roaming partners) to remain or enter the marketplace.[25] RWA's comments address each of these likely harms and explain why Dish is incapable of becoming and remaining a nationwide competitor that can effectively compete against AT&T, Verizon, and New T-Mobile.

A. Barriers to Entry

The DOJ has rightly concluded that "[g]iven the high barriers to entry in the retail mobile wireless service market, entry or expansion of other firms is unlikely to occur in a timely manner or on a scale sufficient to replace the competitive influence now exerted on the market by Sprint."[26] Even more, the DOJ recognizes that nationwide, facilities-based wireless carriers need both spectrum and network assets deployed nationwide in order to compete, and that "de novo entry by a facilities-based mobile wireless carrier is very difficult."[27] The Consent Decree's proposed solution to overcoming these undisputed barriers to entry is to allow Dish to acquire, upon approval of the deal, the Boost Mobile, Virgin Mobile, and Sprint pre-paid subscriber bases, and the Boost Mobile retail operations.[28]

Mobile, and Sprint. This has basically been true for two decades, and remains true today. If you want cellphone service in the US, you're likely going to have to pay one of those four companies or their subsidiaries, which includes the brands Virgin Mobile, Boost Mobile, and MetroPCS."), *see* https://www.theverge.com/2018/4/30/17302454/tmobile-sprint-merger-internet-competition.

[25] Complaint at ¶ 21.

[26] *Id.* at ¶ 23.

[27] Competitive Impact Statement at p. 7.

[28] PFJ at p. 4.

Additionally, the DOJ recognizes that Dish intends to enter into a "Full MVNO Agreement" with New T-Mobile while it attempts to construct a facilities-based 5G network.[29] Such a proposed solution is fraught with problems. First, the various Sprint prepaid subscriber bases, which Dish estimates to include approximately 9.3 million users, are a fraction of Sprint's overall subscriber base.[30] More importantly, that pre-paid subscriber base will generate only a fraction of the operating revenue Sprint currently enjoys, yet Dish must rely on this revenue-stream to re-invest in the type of new 5G network necessary to compete with AT&T, Verizon, and New T-Mobile. Second, the subscribers Dish stands to inherit are 100% pre-paid. If the current Sprint pre-paid "churn" rate of 4.23%[31] holds firm, and there is zero evidence it would decrease under Dish management, that subscriber pool of 9.3 million customers inherited by Dish will dwindle to zero before Dish can launch services on its own 5G network, barring sales increases and better customer retention. Notably, the PFJ only requires Sprint and T-Mobile to decommission "not…fewer than four hundred (400) Retail Locations, available to Acquiring Defendant immediately after such Decommissioning,"[32] and such decommissioning can take up to five years. Put differently, there is no guarantee that Dish's retail footprint will ever match what Sprint/Boost/Virgin have today. Third, while New T-Mobile is required to decommission Retail Sites, Dish is under no obligation to actually purchase them nor keep them open. Accordingly, there is no realistic basis to

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[29] "DISH to Become National Facilities-based Wireless Carrier," Dish Press Release (July 26, 2019), *see* http://about.dish.com/2019-07-26-DISH-to-Become-National-Facilities-based-Wireless-Carrier; *see also* "T-Mobile and Sprint Receive Clearance from Department of Justice for Merger to Create the New T-Mobile," T-Mobile Press Release (July 26, 2019), *see* https://www.t-mobile.com/news/t-mobile-sprint-merger-doj-clearance.

[30] "Press Release Details," Sprint Press Release (August 2, 2019) (As of June 30, 2019, Sprint had 54.3 million subscribers), *see* https://investors.sprint.com/news-and-events/press-releases/press-release-details/2019/Sprint-Reports-Fiscal-Year-2019-First-Quarter-Results/default.aspx.

[31] *Id.* (Sprint ended its Q1, Fiscal Year 2019 with a pre-paid churn rate of 4.23%. By comparison, Sprint's post-paid churn rate for the same quarter was 1.74%.).

[32] PFJ at p. 16.

assume that Dish will be capable of operating as a legitimate fourth nationwide retail carrier starting on Day One after the merger.

The DOJ believes that the proposed merger of Sprint and T-Mobile will make it *harder* for a new competitor to emerge, and yet its proposed solution is to hope that Dish, with no guarantees or oversight, quickly scales-up a retail operation that under optimal circumstances has a shrinking subscriber base, a revenue stream a fraction the size of Sprint's today, and a non-guaranteed sales distribution system. In truth, the PFJ makes Dish nothing more than a second-tier MVNO, well behind TracFone with its 21.4 million subscribers.[33] As discussed more fully below, the cost and length of time it would take Dish to execute on its commitment to deploy a facilities-based 5G network with the depth and breadth of AT&T, Verizon, and New T-Mobile is a legitimate, and much bigger, barrier to entry than any of the hurdles faced by Dish in trying to successfully operate as a mid-sized, retail MVNO.

B. Higher Prices

Another concern raised by the DOJ in its Complaint is the prospect of higher prices once Sprint disappears. Indeed, the DOJ predicts that the merger will usher in "increased prices and less attractive service offerings for American consumers."[34] More specifically, the U.S.'s antitrust watchdog anticipates that "[a]fter the elimination of Sprint, the industry's low-cost leader, New T-Mobile would have the incentive and the ability to raise prices," as would "the other remaining facilities-based mobile wireless carriers, Verizon and AT&T."[35] It is extremely unlikely that Dish could offer prices competitive with AT&T, Verizon, and New T-Mobile. Starting on Day One, New T-Mobile will control

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[33] "About Us," América Móvil (Tracfone, the country's largest MVNO, will have post-merger over twice as many subscribers as Dish stands to inherit.), *see* https://www.americamovil.com/English/about-us/footprint/default.aspx.

[34] Complaint at ¶ 5.

[35] *Id.* at ¶ 21.

the coverage footprint, network performance, and, most importantly, the wholesale access costs paid by Dish. All of these factors will impact Dish's retail offerings and price points. If Dish's wholesale access costs are increased, it will be forced to make corresponding increases to its retail prices, which will result in decreased retail competition to AT&T, Verizon, and New T-Mobile. Dish will not control its operating budget as the country's fourth nationwide service provider - - New T-Mobile will control that key metric.

C. MVNO/Roaming

The DOJ anticipates that the proposed "merger's elimination of [MVNO competition provided by Sprint] likely would reduce future innovation."[36] This decrease in competition for the MVNO marketplace extends into the domestic roaming marketplace as well. Given that the Full MVNO Agreement between Dish and New T-Mobile has not been entered into, neither the DOJ nor the court have any idea of the terms, conditions, and prices that will affect Dish as an MVNO, and in return, the retail pricing Dish will be able to offer to consumers. The loss of Sprint and the creation of New T-Mobile is harmful to all American consumers (whether urban, suburban, or rural), but especially to those mobile wireless consumers in rural markets who are dependent upon nationwide, facilities-based mobile wireless carriers who provide out-of-market roaming to their local, rural mobile wireless carriers when those rural consumers travel to urban and suburban areas not served by the rural carrier. Today, AT&T, Sprint, T-Mobile, and Verizon all provide wholesale (to MVNOs) and roaming (to other domestic rural carriers) access. Noticeably, the Full MVNO Agreement between Dish and New T-Mobile is alleged to strictly forbid Dish from "re-selling" its 4G/LTE and 5G access on the New T-Mobile network to other

[36] *Id.* at ¶ 22.

carriers[37], while Sprint, more than any of the Big Four, has been a champion of roaming deals with small and rural U.S. carriers.

The elimination of Sprint and the entry of Dish will mean the nation will go without a fourth wholesale or nationwide domestic roaming alternative to compete against AT&T, Verizon, and New T-Mobile for an extended period of time. It will take at least seven years for Dish to even approach what Sprint and T-Mobile each separately offer today. The inability of rural U.S. carriers to get competitive roaming deals (or independent or start-up telecommunications providers to get MVNO deals) with Dish will only further eliminate retail competition and innovation (provided by MVNOs and IoT providers) across the nation. What's more, Dish's complete inability to offer MVNO or roaming services could further reduce facilities-based competition in rural markets if rural carriers are unable to survive independently due to a dearth of commercially reasonable nationwide data roaming agreements offered by AT&T, Verizon, and New T-Mobile. Dish proclaims that it will offer 5G services, but as soon as Sprint is eliminated, rural carriers (and the consumers they serve) will lose a roaming option for 3G, 4G/LTE, and 5G services. Dish, by its own admission, will be years away from offering 5G services on a nationwide basis.

D. Increased Coordination Between AT&T, Verizon and New T-Mobile

According to the DOJ's Complaint, "the merger would make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings."[38] In turn, such increased coordination "harms consumers through a combination of higher

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[37] "DISH's 5G Deployment: Exploring Opportunities with Rural Carriers," RWA Webinar Presented by Dish Corp. (August 29, 2019) ("But to be clear, the access to the [Full] MVNO Agreement is not available under [a RWA Carrier Member] brand."), *see* https://ruralwireless.org/rwa-webinars/.

[38] Complaint at ¶ 5.

prices, reduced quality, reduced innovation, and fewer choices."[39] The proposed remedy for such ills is to have Dish fill the void left by the loss of Sprint and attempt to mimic the three remaining, and firmly-entrenched, facilities-based market participants. Unfortunately, Dish would begin on Day One with one arm tied behind its back. As discussed above, unlike Sprint today, Dish has no facilities-based network that it can utilize to sell capacity on a wholesale basis to MVNOs and IoT providers. Nor can Dish enter into roaming agreements with rural carriers to allow for roaming in urban and suburban markets. Accordingly, the merger will result in one less competitor providing wholesale MVNO access, roaming access, and nationwide facilities-based voice and data services directly to retail consumers, making this a 4-to-3 market consolidation. The necessary network "ramp-up" by Dish will take many years to achieve, which the company acknowledges in its own submissions to the FCC.[40] During the intervening years, Dish is very unlikely to be successful, based not only on the low margins and low retention rate of the pre-paid subscribers it plans on inheriting, but also because its mainline business of video satellite service is also losing hundreds of thousands of subscribers each quarter, which will hurt the parent company's finances for the foreseeable future.[41] Additionally, Dish has yet to come forward with any specifics about the true cost of building a nationwide 5G network, and just as importantly, how it intends to finance such a massive project. While Dish Chairman Charlie Ergen has stated on earnings conference calls that he believes a new network might cost as little as $10 billion, the wireless industry analysts call this figure "silly" and note that Verizon spends $15 billion per year just to maintain its

[39] *Id.* at ¶ 21.

[40] Dish Ex Parte (July 26, 2019), Attachment A.

[41] "Cord-Cutting Clips Dish Network's Profit," Wall Street Journal (May 3, 2019) ("'It's still a declining business,' Executive Chairman Charlie Ergen said during a conference call."), *see* https://www.wsj.com/articles/cord-cutting-clips-dish-networks-profit-11556911471.

existing network.[42] Post-merger marketplace collusion by AT&T, Verizon, and New T-Mobile will not only be easier, as recognized by the DOJ, but almost inevitable given the fact that Dish on Day One will be a mere shadow of Sprint and/or T-Mobile today, and those two companies took over 20 years to become what they are.

IV. THE PROVISIONS IN THE PFJ, THE MODIFIED DEADLINES SOUGHT BY DISH FROM THE FCC, AND THE COMMITMENTS MADE BY DISH TO THE DOJ AND FCC ARE NOT ENOUGH TO MITIGATE THE HARMS LIKELY TO OCCUR FROM T-MOBILE'S ACQUISITION OF SPRINT.

The PFJ is based on a flawed premise – namely, that Dish will be able to serve as a capable replacement for Sprint. Today, Sprint can offer nationwide roaming and MVNO access, and it can base its retail plans and operating budget on its control of its own FCC licenses and facilities-based network. Starting on Day One, Dish can do none of these things. Additionally, while Sprint can lease spectrum to rural carriers and roaming partners (something it has done for decades), Dish has no history of doing so, and Dish does not even control some of the spectrum it intends to use once it starts operating its own 5G network. Each of these factors limits Dish from acting as a true "stand alone" nationwide, facilities-based mobile wireless operator, at least in the first decade of its existence. If the DOJ thought that effective competition after the loss of Sprint could be achieved merely by the creation of a new nationwide MVNO, it would not have required Dish to comply with its "Nationwide 5G Broadband network build commitments" to the FCC.[43] It stands to reason that the long-term success of a nationwide, facilities-based mobile wireless operator should be the focal-point of this court's review, not just the emergence of a successful, short-term, retail MVNO provider, which itself is not even

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[42] "Dish's $10B Estimate for 5G Wireless Network Build 'Just Silly', Analyst Says," Multichannel News (July 26, 2019), *see* https://www.multichannel.com/news/10-billion-dollar-price-estimate-for-dish-5g-buildout-is-silly-analyst-says.

[43] PFJ at p. 23.

guaranteed.

A. The Proposed Remedies Are Not Reasonably Adequate to Assure That Antitrust Concerns Will Not Remain Post-Merger

As the DOJ states in the Competitive Impact Statement, "the government need not prove that the settlements will perfectly remedy the alleged antitrust harms…it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms."[44] Applying this standard, the court should find that the various settlements reached are not reasonably adequate remedies for the likely harms initially raised by the DOJ. Furthermore, the "remedies" proposed by the DOJ in the PFJ are either insufficient, not feasible, based on faulty premises, and/or not capable of being accomplished in a timely manner. There is no dispute about the likely competitive harms should the market decrease the number of nationwide, facilities-based mobile wireless providers from four to three. The Complaint makes this clear.

Dish, by its own admission, will not be a 100%, self-dependent, facilities-based, nationwide mobile wireless carrier until at least *six years* from now, and even achieving that goal is highly speculative and contingent on factors well outside of Dish's control.[45] Even assuming Dish makes good on its 5G Broadband Service deployment commitments, it has only promised to offer wireless services to 75% of the country's ***population***, which is only a small fraction of the country's geography. Sprint, which delivers 4G/LTE and 5G services today to over 90% of the country's population and has 5G services deployed to nine of the country's largest cities (with new 5G deployment increasing daily) is in a different league than Dish as Dish promises to deliver 5G services to only 75% of the country's

[44] Competitive Impact Statement at p. 21.

[45] Dish Ex Parte, Attachment A. Dish never commits to deploying 5G to more than 75% of the country's population before the year 2025, and its Full MVNO Agreement with T-Mobile expires after seven years.

population in six years' time.[46] Moreover, as discussed in more detail below, it is questionable whether Dish has any intention of actually becoming a nationwide mobile wireless competitor. Dish has no real-world wireless network experience to speak of, which should speak volumes to the court. Operating a video satellite system that does not involve an interconnected, terrestrial network is akin to Dish playing checkers while AT&T, Verizon, and a New T-Mobile play 3-D chess.

B. The PFJ's Proposed Enforcement Measures do not Provide a Sufficient Incentive for Dish to Meet its Buildout Obligations.

In its July 26, 2019 Ex Parte, Dish makes various commitments to the FCC, including a promise to pay up to $2.2 billion if it is unsuccessful in meeting certain network deployment targets.[47] Indeed, the DOJ relied on these network build-out commitments when making its decision to entrust Dish as a fourth nationwide competitor.[48] A closer examination of these self-imposed financial penalties for failing to meet core-deployment and RAN deployment deadlines (which are tax-deductible because they are voluntary) shows that the penalties are not as striking or severe as DOJ appears to believe, and are heavily back-loaded. For example, $200,000,000 of that potentially $2.2 billion penalty is for failure to deploy a core network (which is a key element to being a self-sufficient network operator), and this commitment does not have to be accomplished until June 2022.[49] Similarly, if Dish fails to meet 100% of its interim build-out commitments for its AWS-4, AWS H Block, and 700 MHz licenses[50], which also

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[46] Sprint currently offers 5G in Atlanta, Chicago, Dallas-Fort Worth, Houston, Kansas City, Los Angeles, New York, Phoenix, and Washington, DC. See https://www.sprint.com/en/landings/5g.html.

[47] Dish Ex Parte, Attachment A.

[48] PFJ at p. 23.

[49] Dish Ex Parte, Attachment A.

[50] Having already missed its FCC-imposed interim construction deadlines for its AWS-4, 700 MHz Lower E Block, and AWS H Block licenses, Dish is currently required to build out to 70% of the population for each AWS-4 and 700 MHz Lower E Block license by March 7, 2020, and 75% of the population for each AWS H Block license by April 29, 2022. Letter from Donald K. Stockdale, Jr., Chief, FCC Wireless Telecommunications Bureau to Dish Network Corp. (July 9, 2018), *see* https://docs fcc.gov/public/attachments/DOC-352379A1.pdf. The FCC's interim license build-out deadlines, let

have a self-imposed deadline of June 2022, the most it will pay is $198,000,000.[51] What this effectively means is that Dish can attempt to operate only as an MVNO and not deploy any core network or any 5G Broadband Services, and it will only face a total financial penalty of less than $400,000,000 by June 2022. Indeed, Dish would be better off biding its time, operating only as an MVNO, and then selling its spectrum at a later date rather than invest the tens of billions of dollars needed to build a nationwide, facilities-based 5G network in several years. With respect to building a nationwide, 5G network in seven years, it would be impossible for any carrier to accomplish that if they are starting from basically nothing, which is where Dish is starting.

C. Other Dish Commitments to the DOJ and FCC Are of Little Value or Significance

In addition to relying on Dish's promise to deploy 5G to only 75% of the country's population by 2025 (leaving a quarter of the country's population without a fourth nationwide provider for at least six years), the DOJ relies on other Dish commitments that may sound impressive on paper but are highly speculative, not capable of being completed in a timely manner, or completely infeasible. First, Dish promises to deploy services using its 600 MHz licenses on an "accelerated" basis.[52] However, Dish only agrees to this commitment if it also gets build-out extensions for hundreds of its other FCC licenses in the 700 MHz and AWS Bands.[53] Second, Dish offers to "waive" its flexible use rights for all of these FCC licenses and instead voluntarily consent to deploying 5G Broadband Service "as a special condition of the licenses."[54] However, in so doing, Dish is not forgoing anything meaningful. All it is doing is

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alone its final build-out deadlines, are generally not that difficult to meet for established and well-intentioned wireless carriers.

[51] Dish Ex Parte, Attachment A.

[52] *Id.*

[53] *Id.*

[54] Dish Ex Parte, Attachment A.

waiving its right to deploy a non-5G, narrowband IoT ("NB-IoT") network that would allow it to meet its current buildout deadlines for its AWS-4, Lower 700 MHz E Block, and AWS H Block licenses. A key part of the PFJ is that the FCC extend the construction deadlines for those very same licenses. Because Dish is committed to deploying 5G and would be required to do so in the timeframe mandated by the PFJ, there is no reason Dish would choose to exercise its flexible use rights. Accordingly, its offer to waive such rights is simply a meaningless gesture.

For Dish to successfully operate as a nationwide, facilities-based mobile wireless operator, it must deploy a facilities-based network and manage that network and a correspondingly vast retail operation, day-in and day-out. Dish has no history of deploying wireless facilities on a nationwide basis, and its commitments to the DOJ and FCC that it would do so are clouded by numerous caveats. Moreover, Dish has also made commitments that seem to suggest it has no intent to be a "carrier" beyond six or seven years.

D. Various Dish Commitments Provide It An Opportunity to Exit the Mobile Marketplace In Six or Seven Years.

The Tunney Act requires a reviewing court to determine that any consent decree entered into between the defendants and the DOJ is in the public interest. Whatever proposed settlement is reached must have some reasonable expectation of addressing the antitrust concerns raised by the U.S. government. In the present case, the Complaint is unequivocal in determining that a 4-to-3 consolidation of the marketplace is inherently anticompetitive and against the public interest. Should Sprint be allowed to exit the marketplace, a legitimate fourth facilities-based, truly nationwide, competitive carrier needs to take its place. RWA's comments list numerous reasons why Dish is unable to meet this burden. In addition, Dish by its own words, has created specific opportunities to exit the marketplace. For example, Dish never actually agrees to acquire and deploy 800 megahertz spectrum

currently held by Sprint. According to the terms of the PFJ, New T-Mobile is definitely required to divest "all of Sprint's 800 MHz spectrum holdings."[55] However, Dish is not mandated to acquire any of the divested 800 MHz licenses, so long as it pays a financial penalty. The PFJ stipulates that Dish can bypass its option to purchase this spectrum and instead "pay a penalty of $360,000,000 to the United States" government.[56] However, even the entirety of this financial penalty can be waived if Dish "has deployed a core network and offered 5G Service to at least 20% of the U.S. population over DISH's facilities-based network within three (3) years of the closing of the divestiture of the Prepaid Assets,"[57] a goal that can be accomplished by Dish deploying rudimentary service to just the top six or seven Metropolitan Statistical Areas,[58] which means the rest of the nation is stuck with only three nationwide, facilities-based competitors who can act in concert to raise pricing. Similarly, just as with the Boost Retail Locations and the 800 MHz licenses, Dish is not obligated to purchase any New T-Mobile Decommissioned Cell Sites. What the PFJ demands is that New T-Mobile divest no fewer than 20,000 Cell Sites, but Dish is under no obligation to actually purchase any of these 20,000 Cell Sites.[59]

In its July 26, 2019 Ex Parte, Dish also "consents" within six years of the transaction closing "not to sell its AWS-4 and 600 MHz spectrum" or "lease, directly or indirectly, to any of the three largest wireless providers, or any combination thereof, traffic accounting for more than 35% of the

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[55] PFJ at p. 5.

[56] *Id.* at 12.

[57] *Id.*

[58] The U.S. Census Bureau estimates the current U.S. Population at 327 million people. The combined populations of the New York-Newark, Los Angeles-Long-Beach-Anaheim, Chicago, Dallas-Fort Worth-Arlington, Houston, Washington-Alexandria-Arlington, and Miami-Fort Lauderdale-West Palm Beach is nearly 70 million people. *See* https://www.census.gov/topics/population/data html.

[59] PFJ at p. 13.

network capacity on its 5G network."[60] These are peculiar voluntary commitments. They suggest that Dish wants to be able to exit the mobile wireless industry after six years, and just prior to when its Full MVNO Agreement with T-Mobile expires. After seven years, if Dish has a radio access network ("RAN") that cannot operate on a geographic level competitive with AT&T, Verizon, or New T-Mobile, it will be forced to rely on roaming agreements, just like RWA's members. And because the Full MVNO Agreement with New T-Mobile expires after seven years, New T-Mobile has no incentive to extend whatever initial pricing it has extended to Dish after such date, which means that Dish cannot rely on New T-Mobile coverage long-term. Accordingly, Dish has sought specific language that makes it entirely possible to sell its entire spectrum portfolio (and subscriber base) to one of the three remaining legacy carriers and face no Department of Justice or Federal Communications Commission repercussions.

V. CONCLUSION

Prior to a court adopting any proposed consent decree, 15 U.S.C. § 16(e)(1) requires a court to first make a public interest determination. When making this determination, a court is obligated to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from the determination of the issues at trial.[61]

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[60] Dish Ex Parte at p. 4.

[61] 15 U.S.C. § 16 (e)(1)(A) and (B).

As demonstrated above, the proposed merger is not in the public interest. In the present case, the competitive impact of the PFJ is rather straight forward. First, there is no guarantee that New T-Mobile, together with AT&T and Verizon, will promote MVNO and roaming access to other companies, refrain from raising prices, or abstain from coordinating their efforts, in large part because Sprint, a wireless company which has been operating nationwide for decades, will cease to exist, and Dish, which has zero experience constructing or operating a commercial, terrestrial mobile wireless network, will not be a facilities-based operator for at least three years, if at all. Second, all of the court-imposed checks-and-balances and Dish-proposed voluntary financial penalties do nothing to address the actual level of consumer choice in the marketplace or benefit consumers in any way. Potential enforcement mechanisms administered by the FCC and DOJ come many months or even years after they are triggered and the consumer harms are incurred. Additionally, the potential monetary "fines" go to the U.S. Treasury, which also does nothing to aid American consumers. Third, some of the terms contained in the PFJ, if not "ambiguous" on their face, at least raise eyebrows about Dish's intent to quickly scale-up a retail operation comparable to that of Sprint or deploy a facilities-based wireless network the size and breadth of Sprint's. It is worth reminding the court that Dish has already failed to meet FCC construction build-out deadlines in the recent past, and has admitted it will be unable to offer any type of MVNO or roaming access to consumers, rural carriers, or innovative IoT providers in the short and medium terms. Finally, all of these harms likely to emerge from the merger between Sprint and T-Mobile, which Dish will be incapable of mitigating, will not be localized and in fact will be felt across

the country. For all of these reasons, RWA respectfully requests that the court reject the PFJ submitted by the DOJ and the Plaintiff States.

Respectfully submitted,

The Rural Wireless Association, Inc.

By: [redacted]

Carri D. Bennet
General Counsel
Daryl Zakov
Assistant General Counsel

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