October 11, 2019

Scott Scheele
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Antitrust Division
U.S. Department of Justice
450 Fifth Street NW, Suite 7000
Washington, D.C. 20530

Re: *United States v. Deutsche Telekom AG*, No. 1:19-cv-02232, Tunney Act Comments of the American Antitrust Institute

Dear Mr. Scheele:

The American Antitrust Institute (AAI) submits these comments pursuant to the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16 (1974). AAI makes two independent requests of the Antitrust Division of the Department of Justice (DOJ). First, AAI requests that the DOJ exercise its right to withdraw its consent to the Proposed Final Judgment (PFJ) prior to the Court's entry of the Final Judgment.[1] For the reasons explained in Parts I and II below, the PFJ is not in the public interest.

Second, AAI requests that the DOJ encourage the Court to defer its public interest determination and keep the public comment period open until after the conclusion of *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434 (S.D.N.Y. filed June 11, 2019) [hereinafter the "States' case"], in which 17 states and the District of Columbia have sued to permanently enjoin the proposed transaction. For the reasons explained in Part III, the goals of the Tunney Act, including a meaningful public comment period and well-informed public interest determination, require the reviewing Court to consider the evidence adduced at trial and the verdict issued in the States' case.

I. THE SPRINT-T-MOBILE MERGER THREATENS SUBSTANTIAL HARM TO THE NATIONAL MARKET FOR RETAIL MOBILE WIRELESS SERVICE

A. Introduction

A well functioning, competitive telecommunications sector is fundamental to the workings of an open and democratic society, the public well-being, economic productivity, and citizen engagement. Vigorous competition between rivals results in products and services that enhance

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[1] Competitive Impact Statement 18, *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434 (S.D.N.Y. filed July 30, 2019) [hereinafter "Competitive Impact Statement"].

consumer welfare and promote innovation and market entry. This vision of the U.S. wireless industry has quickly receded. Consolidation, especially between 2002 and 2009, reduced the number of rivals from seven to four.[2] Now comes the merger of Sprint-T-Mobile, which further reduces the field from 4 to 3 and stokes even higher concentration, eliminates vital head-to-head competition, and creates an oligopoly that promotes anticompetitive coordination. This significant and illegal diminution of competition will undoubtedly result in higher prices, less choice, lower quality, and slower innovation—to the detriment of U.S. wireless subscribers.

B. The Sprint-T-Mobile Merger is Presumptively Illegal

The antitrust laws protect competition and consumers. Certain types of mergers are presumptively illegal under Section 7 of the Clayton Act because they threaten to stifle competition, raise prices, lower quality, and slow innovation.[3] The bedrock concept underlying U.S. merger law—that deals that "may substantially lessen competition" should be stopped in their incipiency—confirms the illegality of mergers such as Sprint-T-Mobile.

The Sprint-T-Mobile merger combines the third and fourth national facilities-based wireless carriers in the U.S. market for retail mobile wireless service. A combined Sprint-T-Mobile would have a market share of about 32%, followed by AT&T with a share of about 32%, and Verizon with a share of about 35%.[4] These three carriers would make up about 99% of the market, with smaller mobile virtual network operators (MVNOs) accounting for the remaining one percent.[5]

The merger would boost concentration by almost 500 HHI points, to about 3,250 HHI in the post-merger market. The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines explain that "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."[6] A Sprint-T-Mobile merger results in concentration that exceeds the Guidelines threshold by an order of magnitude. The merger is presumptively illegal under Section 7 of the Clayton Act. It would increase concentration in an already highly concentrated national market for retail mobile wireless service, increasing the risk of higher prices, lower quality, less choice, and slower innovation.

Sprint-T-Mobile is much like the abandoned AT&T-T-Mobile proposal in 2011. That merger would have eliminated T-Mobile as a smaller, efficient, and innovative player. AT&T's argument that the merger was essential for expanding to the then-impending 4G LTE network technology did not pass muster with the DOJ. And as the DOJ predicted, the agency's rejection of

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[2] *Wireless Company Mergers Since 2002*, WASH. POST (Mar. 21, 2011), https://www.washingtonpost.com/business/economy/wireless-company-mergers-since-2002/2011/03/21/AByLkf9_graphic.html.

[3] Clayton Act § 7, 15 U.S.C. § 18 (1996).

[4] Shares based on number of subscribers. Sprint has a national market share of 14%, while T-Mobile's is 17%. Mike Dano, *How Verizon, AT&T, T-Mobile, Sprint and More Stacked Up in Q1 2017: The Top 7 Carriers*, FIERCEWIRELESS (May 8, 2017), https://www.fiercewireless.com/wireless/how-verizon-at-t-t-mobile-sprint-and-more-stacked-up-q1-2017-top-7-carriers.

[5] These carriers include TracPhone, Republic Wireless, and Jolt Mobile, Boost Mobile, and Cricket Wireless, which purchase access to wireless infrastructure such as cell towers and spectrum at wholesale from the large players and resell at retail to wireless subscribers.

[6] U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010) ("HORIZONTAL MERGER GUIDELINES").

the deal led to significant gains for consumers.[7]

The government's complaint in Sprint-T-Mobile acknowledges that competition in the national market for retail mobile wireless service has brought benefits to consumers:

> Competition has kept mobile wireless service prices down and served as a catalyst for innovation. . . . American consumers . . . have benefitted from the competition T-Mobile and Sprint have brought to the mobile wireless industry. For instance, it was not until after T-Mobile and Sprint introduced unlimited data plans to retail customers in 2016 that Verizon and AT&T followed with their own standalone unlimited data offerings to retail customers in 2017.[8]

Nothing is different now. As the DOJ did in the AT&T-T-Mobile merger in 2011, the current DOJ should have moved to prohibit the Sprint-T-Mobile merger from proceeding under *any* conditions.

C. The Proposed Merger's Adverse Competitive Effects are Significant Enough to be Unremediable

1. The Merger Eliminates Vital Head-to-Head Competition Between Sprint and T-Mobile

Sprint and T-Mobile have demonstrated strong incentives to be aggressive competitors as standalone rivals. As the third and fourth largest carriers in the market, both Sprint and T-Mobile have differentiated themselves from Verizon and AT&T through aggressive price and non-price competition. They compete head-to-head for consumers that may not be able to afford more expensive Verizon and AT&T plans or who do not need the more extensive variety of plans offered by the two largest carriers. The government's complaint highlights this vital competitive dynamic:

> T-Mobile and Sprint have been particularly intense competitors for the roughly 30% of retail subscribers who purchase prepaid mobile wireless service. . . . After the elimination of Sprint, the industry's low-price leader, New T-Mobile would have the incentive and the ability to raise prices. In a post-merger world, the other remaining national facilities-based mobile wireless carriers, Verizon and AT&T, also would have the incentive and the ability to raise prices.[9]

Preserving the positive competitive dynamics that disruptive rivalry creates was the major reason why the DOJ opposed the merger of AT&T and T-Mobile in 2011. As the DOJ's complaint noted, "AT&T's elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market."[10] The loss of disruptive rivalry that would follow a merger of Sprint and T-Mobile is as important here as it was in the merger of AT&T-T-Mobile. That the DOJ in 2011 moved to block the merger reveals the severity of this anticompetitive effect and attendant harms to consumers.

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[7] *See, e.g.*, Patrick DeGraba & Gregory L. Rosston, *The Proposed Merger of AT&T and T-Mobile: Rethinking the Possible*, Case 1 in THE ANTITRUST REVOLUTION (John E. Kwoka & Lawrence J. White eds., 6th ed. 2014).
[8] Complaint 2, 6, *United States v. Deutsche Telekom Ag*, No. 1:19-cv-02232 (D.D.C. filed Jul. 26, 2019) ("Complaint").
[9] *Id.* at 7, 8.
[10] Complaint ¶ 3, United States v. AT&T, No.1:11-cv-01560 (D.D.C. filed Aug. 31, 2011).

2. The Merger Would Facilitate Anticompetitive Coordination Among the Remaining Three Wireless Carriers

In eliminating head-to-head competition between Sprint and T-Mobile, the merger would leave three roughly equal-size firms in the U.S. market for retail mobile wireless service. Such highly concentrated markets are highly conducive to anticompetitive coordination. With a bigger piece of the national wireless pie, the merged entity would likely find that maintaining a competitive "peace" with Verizon and AT&T is more profitable than aggressively trying to gain market share from them. The government's complaint clearly articulates this threat posed by the Sprint-T-Mobile merger:

> [T]he merger would leave the market vulnerable to increased coordination among these three competitors. Increased coordination harms consumers through a combination of higher prices, reduced quality, reduced innovation, and fewer choices.[11]

Coordinated conduct in the oligopoly of remaining wireless carriers could arise in any number of ways. The remaining three carriers would have stronger incentives to fix prices or "follow" each other on pricing for wireless service plans and/or equipment. They could collectively discontinue certain types of plans or forbear from introducing new, cheaper and better plans; face stronger incentives to divide up geographic markets within the U.S.; or agree on "rules" that govern competition in the industry.[12] Potential anticompetitive coordinated conduct would not be limited to retail mobile wireless subscribers. It could extend to fixing wholesale prices for MVNOs, jointly developing rules governing MVNO access to infrastructure, or even a group boycott of MVNO resellers in gaining access to the resources necessary to compete at retail.[13]

Economic research buttresses the concern that highly concentrative mergers have produced post-merger price increases.[14] For example, analysis of multiple merger retrospectives shows that mergers resulting in post-merger HHIs and increases in HHI similar to the Sprint-T-Mobile merger produced price increases in between 88-93% of cases.[15] Moreover, empirical work shows that the agencies have a high rate of challenging highly concentrative mergers like Sprint-T-Mobile.[16]

The law on the risks of post-merger anticompetitive coordination is clear and settled. For example, the D.C. Circuit explained in 1986 that an acquisition may violate section 7 of the Clayton Act where "increased concentration raises a likelihood of 'interdependent anticompetitive conduct.'"[17] The court explained, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."[18] In 2001 the same court explained, "[t]he combination of a

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[11] Complaint at 8.
[12] *See* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 950 (2000).
[13] *See* HORIZONTAL MERGER GUIDELINES § 5.
[14] John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?* 81 ANTITRUST L.J. 837, 860-61 (2017).
[15] *Id.*
[16] *Id.* at 866.
[17] *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).
[18] *Id.*

concentrated market and barriers to entry is a recipe for price coordination."[19] The government's complaint in Sprint-T-Mobile acknowledges both high concentration and high barriers to entry.[20]

Several private antitrust cases also highlight the perils of anticompetitive coordination in the wireless industry. These concerns range from: alleged collusion between AT&T and Verizon to thwart eSIM technology[21]; to coordination of text message pricing as an "exemplar" of lawful tacit collusion;[22] alleged parallel conduct with respect to leasing of common short codes[23]; and alleged parallel tying.[24] Moreover, the DOJ recently opened an investigation into collusion by the two largest carriers, Verizon and AT&T, and an industry standards organization to inhibit consumer switching between wireless carriers.[25]

In AT&T-T-Mobile, *both* the DOJ and Federal Communications Commission (FCC) found that the wireless market was conducive to coordinated interaction. The government's complaint noted, "Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyer-side market power, and high barriers to entry and expansion, make them particularly conducive to coordination."[26] The complaint concluded that the "substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will lead to lessened competition due to an enhanced risk of anticompetitive coordination."[27] The FCC explained similarly that "[c]oordinated effects are of particular concern here because the retail mobile wireless services market, being relatively concentrated and hard to enter, appears conducive to coordination."[28]

Moreover, other countries' experience with 4-3 mergers demonstrates the pervasiveness of the competitive concerns they raise. For example, three national wireless carriers dominate the Canadian market—Bell, Rogers, and Telus.[29] One commentator wrote in 2018 that the three Canadian carriers' proposals to address a lack of low-cost data-only plans were "embarrassing, and harrowing for anyone considering a future in the US with just three wireless carriers."[30] European competition enforcement provides additional perspective on 4-3 wireless mergers.[31] In 2016, the European Commission (EC) blocked the 4-3 merger of the United Kingdom's Three and O2 mobile

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19 *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 724 (D.C. Cir. 2001).
20 Complaint at 16, 23.
21 *See, e.g.,* Complaint, *Allen v. Verizon Communications, Inc.*, No. 3:18-cv-08918 (D.N.J., filed May 8, 2018).
22 *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).
23 *In re A2P SMS Antitrust Litig.*, 972 F.Supp.2d 465 (S.D.N.Y. 2013).
24 *In re Wireless Telephone Services Antitrust Litig.*, 385 F.Supp.2d 403 (S.D.N.Y. 2005).
25 Cecilia Kang, *U.S. Investigating AT&T and Verizon Over Wireless Collusion Claim*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/technology/att-verizon-investigate-esim.html.
26 Complaint ¶ 36, *United States v. AT&T*, No.1:11-cv-01560 (D.D.C., filed Aug. 31, 2011).
27 *Id.*
28 *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16200, ¶ 75 (2011).
29 Can. Radio-television & Telecomm. Comm'n, Communications Monitoring Report, at 301 (2017), *available at* https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2017/cmr2017.pdf.
30 The Canadian sector regulator is the Radio-television and Telecommunications Commission. Chris Mills, *Canada's Embarrassingly Bad Data Plans Are Another Reason to Hate the T-Mobile-Sprint Merger*, BGR (May 2, 2018), http://bgr.com/2018/05/02/t-mobile-sprint-merger-competition-regulation-canada-example.
31 For example, Europe maintains a robust field of wireless rivals, with nine competitors with market shares above 10%, and an overall market concentration of about 1,100 HHI. *Leading telecommunication operators in Europe by Revenue in 2016 (in Billion Euros)*, STATISTA, https://www.statista.com/statistics/221386/revenue-of-top-20-european-telecommunication-operators.

operators.[32] The EC also forced the abandonment of the 4-3 merger of Danish wireless carriers Telenor and TeliaSonera by requiring conditions that were unpalatable to the companies.[33]

In sum, the Sprint-T-Mobile merger would create a post-merger national market for retail mobile wireless service that would dramatically reduce incentives for the remaining three carriers to compete and strengthen incentives for them to engage in anticompetitive coordination. Such mergers have long been recognized as particularly damaging to competition and consumers and should be blocked because a remedy is unlikely to be effective in restoring competition.

II. THERE IS NO REASONABLE BASIS TO CONCLUDE THAT THE PROPOSED FINAL JUDGMENT WILL PRESERVE COMPETITION IN THE NATIONAL MARKET FOR MOBILE WIRELESS SERVICE

A. The DOJ's Complaint Clearly Recognizes the Need for a Fourth Wireless Rival

In announcing settlement of its investigation into the proposed merger of Sprint and T-Mobile, the DOJ acknowledged the serious competitive concerns with the merger itself. The government's complaint explained the myriad ways in which the merger could harm competition and consumers:

> The merger would eliminate Sprint as an independent competitor, reducing the number of national facilities-based mobile carriers from four to three. The merger would cause the merged T-Mobile and Sprint ("New T-Mobile") to compete less aggressively. Additionally, the merger would likely make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings. The result would be increased prices and less attractive service offerings for American consumers, who collectively would pay billions of dollars more each year form mobile wireless service.[34]

The DOJ's own assessment sets a high bar for approval of the merger since the government admits that competition requires a fourth firm. That very firm, however, would be eliminated by the merger. The DOJ's remedy fails to reconcile these two seemingly incompatible forces, namely, approving the merger of Sprint and T-Mobile while acknowledging the need for a fourth wireless carrier.

Given the nature of a highly concentrative, 4-3 merger of national facilities-based mobile wireless carriers, it is unclear where a new fourth carrier will come from. The proposed settlement attempts to create a new fourth firm by combining some assets of a firm entirely outside the wireless industry (Dish Network or "Dish") with certain assets divested by one of the merging parties (Sprint), plus transition services from the new merged firm (T-Mobile).[35]

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[32] David Meyer, *Here's Why the EU Just Blocked a Major Telecoms Merger*, FORTUNE (May 11, 2016), http://fortune.com/2016/05/11/o2-three-merger-blocked.

[33] *Id.; see also* Kalpana Tyagi, *Four-to-Three Telecoms Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector,* 49 INT'L REV. OF INTELLECTUAL PROP. & COMPETITION L. 185 (February 2018).

[34] Complaint at 3.

[35] Proposed Final Judgment, *United States v. Deutsche Telekom Ag*, No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019) [hereinafter "PFJ"].

Dish is currently a satellite-based multichannel video program distributor, with no wireless operation or experience, but now a party to this agreement. The consent decree assures consumers that this cobbling together of assets will result in an entirely new national facilities-based mobile wireless carrier that will, eventually, bring strong and effective and even "disruptive" competition to AT&T and Verizon.

In an acknowledgment of the long gestation period for this new carrier to appear, as well as the direct overlap of the merging parties' prepaid wireless businesses, the DOJ settlement also provides for the immediate divestiture of Sprint's prepaid wireless operations, also to Dish. The result would be that Dish would initially offer only prepaid wireless service as a reseller as it acquires and builds out its own facilities and, according to the settlement, becomes a full-fledged national network carrier.

B. The Proposed Remedy Involves Significant Complexity, Moving Parts, Optional Components, and Requirements to Deal with Rivals, Making it Vulnerable to Failure

1. Dish Will Provide Pre-Paid Services Acquired from Sprint, Propped Up with Transition Services Requirements and Complex Personnel Transfer Procedures

Dish will initially be providing only one wireless service—prepaid service—and that will simply be Sprint's divested Boost and other brands. Prepaid services are a modest fraction of all services, less profitable and less stable than postpaid (subscription) service. Moreover, and crucially, Dish will provide those prepaid services only as a reseller, namely by buying them from a facilities-based carrier and then marketing them. The divestiture process involves Dish acquiring Sprint's prepaid retail locations, personnel, licenses, data, and other associated assets.

The settlement includes a process by which Sprint will identify all employees of its existing prepaid operations so that Dish can vet, interview, and negotiate with those employees for continued employment with Dish's follow-on service. Further, the settlement requires T-Mobile and Sprint to provide certain "transition services" to Dish for a period up to three years. These transition services include billing, customer care, SIM card procurement, device positioning, and "all other services [previously] used by the Prepaid Assets."

2. Dish Must Quickly Begin Providing Post-Paid Wireless Service, Dependent on a Rival Providing Access to Critical Infrastructure

Within one year, Dish is required to begin providing nationwide retail postpaid wireless service. The settlement stipulates that Dish must do so using cell sites and retail stores as they are "decommissioned" (i.e., shut down), as they are determined to be redundant by the merged firm. This stipulation is intended to ensure that Dish becomes a facilities-based provider, rather than continuing to provide services simply by resale. The merged company's decommissioning of cell sites is to take place gradually over a period of up to five years, eventually totaling at least 20,000 sites.

The actual timing appears to be governed by language simply requiring Sprint and T-Mobile to "decommission unnecessary cell sites promptly" and "as soon as reasonably possible after the site is no longer in use." In the interim, the merged company is required to provide Dish with "robust access" to its own cell sites to ensure nationwide coverage for Dish's postpaid service. If Dish's own network does not serve 70% of the country by 2023, it will face penalties up to $2.2 billion. A similar five-year horizon applies to the transfer of decommissioned retail locations held by the merged company. A total of at least 400 such locations are to be subject to transfer.

3. Because Dish's Purchase of Spectrum Necessary to Build Out a 5G Network is Optional, It May Remain a Reseller for a Lengthy Period of Time

The merged Sprint-T-Mobile is also required to offer to divest to Dish, at Dish's option, all of Sprint's 800 MHz spectrum. This is intended to expand Dish's own 800 MHz spectrum holdings and thereby permit it to build out an entirely new 5G network that would allow for super-high-speed wireless transmission. The settlement penalizes Dish for failing to acquire Sprint's spectrum, unless it demonstrates that it can provide such service strictly with its own, currently unused 800 MHz spectrum. Dish has touted this new network as its primary purpose in entering the market and the primary benefit that it will provide.

Recognizing that the process by which Dish obtains or builds the infrastructure required to provide services on its own facilities might be lengthy, the settlement provides a backstop in the form of a requirement that Sprint and T-Mobile enter into a full resale agreement with Dish for at least seven years. As a result, Dish may remain a reseller of whatever services it does not itself provide for a potentially lengthy period of time. The settlement states that those resale services are to be supplied to Dish by the merged company on "commercially reasonable terms."

C. The Proposed Remedy Does Not Meet the Requirements of DOJ's Own Remedies Guidelines

The standard of viability and effectiveness of a merger remedy is contained in the DOJ's own Policy Guide to Merger Remedies. The Guide states that a remedy must "effectively preserv[e] the competition that would have been lost through the merger."[36] Evaluated against this standard, the proposed settlement will not plausibly and predictably succeed in this objective for a number of reasons. As noted above, the settlement has numerous moving parts, significant complexity, optional components, and requirements to deal with rivals. It carves a single path to its intended end result, but numerous points on which it is vulnerable to failure.

Dish will be strictly a reseller at the outset, largely a reseller in the first few years, and probably a partial reseller for seven years or more. But resale services are competitively much less significant than those produced by a seller, since a reseller is entirely dependent on one of its facilities-based rivals for the service itself. The reseller's ability to compete by lowering price or devising bundling and marketing options is limited by the potentially narrow margin between the retail price and the price charged by its supplier. In fact, that supplier can alter the margin so as to handicap its competitive impact in a classic strategy generally known as "raising rivals' costs."

[36] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

For this reason alone, the settlement fails the DOJ's own test of preserving competition in the nationwide market for retail mobile wireless service over the next few years. And that is not the worst-case scenario. There is no guarantee that current personnel operating Sprint's prepaid business or, for that matter, its customers, will seamlessly transfer over to Dish's operation.

D. The Proposed Settlement Depends on Provisions That Have Elsewhere and Often Proved Problematic and Ineffective

The effectiveness of the proposed settlement is dependent on numerous provisions that elsewhere and often have proven problematic or outright ineffective. These include the already cited dependence of Dish on a major rival for its crucial input, but also the likelihood that the customer base of divested prepaid services will be difficult to sustain. There is also the risk that personnel affiliated with Sprint's prepaid operation do not choose to transfer to Dish's unproven operation. The merged firm will also have adverse incentives with respect to providing transition services to Dish.

Additional concerns include the hazard that the merged firm will not decommission cell sites as quickly as necessary and the likelihood that the decommissioned sites and stores will be the weaker ones. There is also the difficulty of defining and ensuring "robust access" to the merged firm's cell sites. Finally, the merged firm will have control over price and other terms of the MVNO agreement that represent crucial features for Dish's viability.

Past experience with close linkages between a merged firm and divested or new operations are not encouraging. The merged firm has advantages in terms of information, control of assets, and pretextual excuses for what may appear to be non-compliance. It also has strong incentives not to aid its direct rival and make it into a more effective constraint on its own market position. These have proven to be problematic at best, and very often ineffective.[37]

E. The Settlement Has All the Hallmarks of a Regulatory and Interventionist Remedy That Will Spark Conflicts and Require Active Agency Oversight

Attempts to cast the settlement more favorably as "structural" in nature should be rejected outright. In its structural components, the remedy strays far from the classic model of divestiture, which involves identifying an overlapping operation or product of two merging companies, requiring divestiture of one of them, and then—if done well—counting on competition to produce roughly the same market outcome as before. In such cases, no further oversight, monitoring, or intervention is necessary.

The present settlement presents a different and more complex reality. The term divestiture might be said to apply to prepaid services but competition in the broader "national facilities-based mobile wireless market" will not arise simply from divestiture. Rather, because of the range of assets required to create a brand-new wireless carrier and because of the timeline, other assets have to be divested and combined, and crucial supply, transition and support services need to be provided.

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[37] Diana Moss & John Kwoka, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, ANTITRUST BULLETIN (2012).

The cobbling together of various necessary assets envisioned by the settlement is a task that would challenge a Wall Street M&A firm or a turn-around specialist. It is well outside the expertise of any antitrust agency and the courts to enforce. Indeed, more modest efforts to create competitors and thereby resolve mergers have recently resulted in notable failures.[38] The conglomeration of provisions included in the settlement make clear that it is by no means simply structural. Rather, it has crucial elements of a conduct or behavioral remedy.

A conduct remedy is one that does not fully separate the merged firm and the outside firm, but rather locks them into some kind of business relationship, inevitably with incompatible incentives—and disputes—between the parties. Here that relationship arises because Dish will be completely or partially dependent on the merged firm for prepaid services, transition services, asset decommissioning, and the long term MVNO agreement. All of these create abundant opportunities for the merged firm to engage in strategic pricing, slowdown of provision, alteration of terms or quality of the assets and services, and so forth. Not until Dish is completely independent of its rival or rivals—something that will not plausibly happen for seven or more years—will it be a fully competitive entity.

The settlement therefore has all the hallmarks of a detailed, regulatory, and interventionist remedy, one that will spark conflicts between the parties and require active oversight by the agency. Approval of this conduct-laden settlement has been fashioned and defended by the Antitrust Division notwithstanding that the Assistant Attorney General, upon assuming his position in 2017, announced a skeptical view toward conduct remedies. He did so because of past experience as well as economic arguments and evidence of their ineffectiveness. He specifically criticized their regulatory nature for requiring ongoing monitoring of the relationship between the parties.[39] Those concerns and criticism apply with equal force in this instance.

F. The DOJ Appears to Have Accepted the Parties' Erroneous Claim that They Need the Merger to Roll Out 5G

The DOJ appears to fully accept the need for the merger in order to achieve benefits claimed by the parties. Those claimed benefits are centered on faster deployment of much faster 5G wireless technology that remains, for all carriers, an expensive and longer-term strategy. The parties to this case argued that Sprint in particular would not have the resources to undertake the necessary investment and so, in that longer term, would not be a viable player anyway. Despite evidence that both Sprint and T-Mobile were separately rolling out 5G technology prior to the merger proposal,[40] the DOJ appears to accept that claim uncritically. If it did not, the merger would be automatically rejected for its acknowledged anticompetitive effects.

This is not the first instance in which DOJ has confronted the argument that a merger between major wireless companies is required for network expansion. As discussed above, DOJ and the FCC firmly rejected AT&T's attempt to acquire T-Mobile in 2011, concluding there would be

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[38] John Kwoka, *Merger Remedies: An Incentives/Constraints Framework*, ANTITRUST BULLETIN (2017).
[39] *See* Makan Delrahim, Asst. Att'y Gen., Antitrust Div., Dep't of Justice, Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018) (citing Moss & Kwoka, *supra* note 41, in support of rejecting a conduct approach).
[40] Roger Chen, *Sprint: We're in a Unique Position to Deliver Broader 5G*, CNET (Feb. 28, 2018); T-Mobile Newsroom, *T-Mobile Building Out 5G in 30 Cities This Year. . . and That's Just the Start*, T-MOBILE.COM (Feb. 26, 2018).

substantial competitive harms and, upon careful examination, few if any attributable benefits.[41] The rejection of that merger has been widely credited with preserving—indeed, enhancing—competition in the wireless business, triggered largely by the very companies that now seek to merge.[42] In the present case and without much disclosure of its reasons, the DOJ has taken a different view, even though the benefits claimed here—a new 5G network build-out—are at least as speculative as those in the prior case.

G. Conclusion

The settlement permitting the merger of Sprint and T-Mobile fails the test of plausibly and predictably preserving competition in the U.S. market for retail mobile wireless services. It is anything but certain that Dish can successfully make itself into the fourth carrier that otherwise will disappear. Even if it does, it will be years before that happens, during which time the effect of approving the merger will be precisely as predicted in the paragraph cited from the complaint: significant harm to consumers and competition in a three-firm national wireless market.

More broadly, the settlement represents a worrisome new development in merger control, which has demonstrably weakened over time, resulting in documented competitive harms.[43] Permitting a 4-3 merger based on a remedy that accepts competitive harms in the short and medium term for an exceedingly optimistic view of possible benefits in the longer term does not represent good policy. Rather, this remedy suggests heroic efforts to devise a basis for approval of a merger that is anticompetitive on its face. If the substantial and acknowledged competitive problems with this four-to-three merger are fixable by this strategy of re-arranging some assets, negotiating some contracts, and then hoping for the best some years down the road, it is unclear what merger is not fixable.

III. A PUBLIC INTEREST DETERMINATION SHOULD BE DEFERRED, AND THE PUBLIC COMMENT PERIOD SHOULD REMAIN OPEN, PENDING A FINAL, APPEALABLE JUDGMENT IN *NEW YORK V. DEUTSCHE TELEKOM AG*

Even if the DOJ is undeterred and continues to maintain that the merger and settlement are in the public interest, it should support AAI's request that the Tunney Act Court defer a public interest determination and keep the public comment period open pending a final judgment in the States' challenge to the proposed transaction. The Tunney Act is silent on the timing of reviewing courts' public interest determinations, leaving discretion to federal judges. The Act specifically contemplates that the 60-day period for accepting public comments may be extended.[44]

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41 Patrick DeGraba & Gregory L. Rosston, The Proposed Merger of AT&T and T-Mobile: Rethinking the Possible, Case 1, *in* THE ANTITRUST REVOLUTION (John E. Kwoka & Lawrence J. White eds., 6th ed. 2014).

42 The then AAG for Antitrust noted the "much more favorable competitive conditions" that emerged after rejecting the AT&T/T-Mobile proposal and, looking ahead, opined that, "It's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers." *See* Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, NY TIMES (Jan. 30, 2014), https://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/.

43 JOHN E. KWOKA, MERGERS, MERGER CONTROL AND REMEDIES (2015).

44 *See* APPA, 15 U.S.C. § 16(d) (United States shall receive and consider public comments during 60-day statutory period and "such additional time as the United States may request and the court may grant").

Deferring the public interest determination and keeping the public comment period open will impose no hardship on the merging parties, because they stipulated in the States' case that they will not consummate the merger until no sooner than "12:01 A.M. PT on the sixth day following the entry of a final and appealable judgment, and only if the Court enters judgment in favor of Defendants or otherwise permits consummation of the challenged transaction."[45] Defendants thus would not be required to accept a delay beyond what they have already agreed to accept in the States' case. At the same time, deferring the public interest determination and keeping the public comment period open is necessary and appropriate to effectively accomplish the goals of the Tunney Act, to make efficient use of judicial resources, and to avoid the risk of inconsistent judgments.

By supporting deferral of the public interest determination and further public comment, the DOJ would enhance public confidence in the consent decree process by demonstrating that it has the courage of its convictions, and that it is willing to submit its analyses and conclusions to robust and meaningful public and judicial scrutiny.

A. Deferring the Public Interest Determination and Extending the 60-Day Period Will Ensure the Public Has a Meaningful Opportunity to Comment on the Proposed Final Judgment

The fundamental goal of the Tunney Act is to "assure that the courtroom rather than the backroom becomes the final arbiter in antitrust enforcement."[46] It was designed "to bring the consent decree process into the full light of day" and "make our courts an independent force rather than a rubber stamp."[47] However, the Congress that enacted the law "stresse[d] that effective and meaningful public comment is also a goal."[48] For example, the Tunney Act extended the public notice period for consent decrees from 30 to 60 days to better "facilitate public study and comment."[49] The Tunney Act's requirement that the government issue a response to public comment also was conceived as a "mechanism which permits meaningful public comment."[50]

If the statutory comment period is closed prior to the conclusion of the States' case, then public comments will not be usefully informed or supplemented by probative information implicating the public's ability to critique the proposed consent decree. In addition to a fulsome discovery plan allowing for document requests, interrogatories, expert reports, and 140 hours of fact depositions, the States' Case Management Plan provides for the States "to present expert testimony regarding the settlement announced on July 26, 2019, between the Defendants, the United States Justice Department, and any subsequent related orders of the Federal Communications Commission."[51] Allowing the public to issue new or supplementary public comments in response to

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45 Civil Case Management Plan and Scheduling Order 1, *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434 (S.D.N.Y. filed Aug. 20, 2019) [hereinafter "States' Scheduling Order"]

46 *S. 782, The Antitrust Procedures and Penalties Act, and S. 1088, The Antitrust Settlement Act of 1973: Hearings Before the S. Subcomm. on Antitrust and Monopoly* 1, 93RD CONG. 1 (1973) (Statement of Sen. Tunney) [hereinafter "Statement of Sen. Tunney"].

47 *Id.*

48 APPA, H. Rep. No. 93-1463, at 7 (1974).

49 Statement of Sen. Tunney at 3.

50 *Id.*

51 Case Management plan at 2-6.

this testimony and other public discovery is necessary to facilitate the Tunney Act's goal of ensuring meaningful public comment.

B. Deferring the Public Interest Determination and Extending the 60-Day Period Is Necessary for the Court to Conduct an Efficient and Adequate Public Interest Review

1. The States' Case Will Assure the Court Has Access to Necessary Information Without Expending Any Scarce Judicial Resources

In conducting its public interest review, the Court must consider whether the government has established "a reasonable basis upon which to conclude that . . . the proposed final judgment will adequately remedy the competitive harms alleged in the government's complaint."[52] "A court must engage in an independent determination,"[53] and the factors "explicitly enumerated in the Tunney Act's text . . . must all be considered."[54]

Ordinarily, Tunney Act review requires courts "to accommodate a balancing of interests."[55] On the one hand, "with so much at stake, the congressionally mandated public interest inquiry must be thorough."[56] The Act thus provides that it is appropriate for the reviewing court, among other things, to take testimony, appoint a special master and outside consultants or expert witnesses, conduct hearings or other court proceedings, and allow appearances by amici curiae or intervenors.[57]

On the other hand, Congress chose merely to permit rather than "compel a hearing or trial on the public interest issue" because it "anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible."[58] Congress thus did not wish to automatically impose heavy burdens on the judiciary.

Here, deferring the public interest determination until after the conclusion of the States' case is both the most thorough means of gathering the necessary information *and* the least taxing on judicial resources. That another federal court will have completed a trial and adjudicated the legality of the proposed transaction may substantially reduce the demands on the Tunney Act Court to conduct additional hearings or discovery for purposes of its public interest review. At the same time, the Tunney Act Court can obtain this information without having to devote any of its own resources to the information gathering process. Indeed, if the States prevail at trial, the public interest review may prove altogether unnecessary.

2. The States' Case Bears Directly on Specific Issues the Court is Obligated to Consider as Part of Its Tunney Act Review

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52 United States v. Republic Servs., 723 F. Supp. 2d 157, 161 (D.D.C. 2010).

53 *United States v. Verizon Communs., Inc.*, 2013 U.S. Dist. LEXIS 113705 (D.D.C. Aug. 9, 2013) (internal citation omitted).

54 *United States v. SBC Communs., Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007) (citing 15 U.S.C. § 16(e)(1)).

55 APPA, H. Rep. No. 93-1463, at 8 (1974) (internal citation omitted).

56 *United States v. CVS Health Corp.*, 2019 U.S. Dist. LEXIS 150645, *4 (Sept. 4, 2019).

57 APPA, 15 U.S.C. § 16(f); *see CVS Health*, 2019 U.S. Dist. LEXIS 150645, at *11(holding hearings and taking witness testimony "rather than risk an uninformed public interest determination").

58 APPA, H. Rep. No. 93-1463, at 8 (1974) (internal citation omitted).

The States' case also promises to provide helpful evidence on issues the Court is obligated to consider during its Tunney Act review, much of which is not otherwise available. For example, Section 2(e)(1)(B) of the Tunney Act requires the Court to consider "the public benefit, if any, to be derived from a determination of the issues at trial."[59] Ordinarily, this entails consideration of a *hypothetical* trial, but here the Court can access direct information regarding the public benefit of trial, without prejudicing the parties.

The Tunney Act also mandates that the reviewing Court must consider the "anticipated effects of alternative remedies actually considered."[60] The DOJ's Competitive Impact Statement unequivocally shows that it actually considered blocking the merger—the same remedy the States seek.[61] By availing itself of information gleaned in the States' case, the Court can directly compare the anticipated effects of the proposed consent decree to those of the alternative remedy the DOJ actually considered.

3. Allowing the States' Case to Proceed Avoids the Risk of Inconsistent Judgments

Deferring the public interest determination and keeping the public comment period open also are consistent with the "compelling public interest in avoiding duplicative proceedings . . . and potentially inconsistent judgments."[62] Although Tunney Act proceedings are non-binding and inadmissible in other antitrust proceedings,[63] and the Tunney Act Court and the trial court in the States' case will apply different standards, the risk of inconsistent judgments nonetheless may be "compelling" when "there are some differences between the . . . claims" but "at the core the two matters involve identical issues of fact and law."[64]

C. Supporting Deferral of the Public Interest Determination and Keeping the Public Comment Period Open Best Serves the Interests of the DOJ

1. The DOJ Should Maximize the Enforcement Value of the States' Case

The States' case also may lead the DOJ, if it keeps an open mind, to exercise its right to withdraw from the PFJ for the benefit of the public. The Competitive Impact Statement does not state or imply that the DOJ necessarily believes the proposed consent decree is the best means of protecting market competition and consumers in the retail mobile wireless service market. Instead, it maintains only that "[t]he United States is satisfied . . . that the relief described in the proposed Final Judgment will provide a reasonably adequate remedy."[65] The Competitive Impact Statement shows that the DOJ settled for a reasonably adequate remedy because the consent decree would, it claims, afford "all or substantially all" of the necessary relief while allowing the DOJ to avoid "the

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59 APPA, 15 U.S.C. § 16(e)(1)(B); *see also* Statement of Sen. Tunney at 8 (court should consider whether "it is more in the public interest . . . that the case go to trial instead of being settled by agreement").
60 APPA, 15 U.S.C. § 16(e)(1)(A).
61 Competitive Impact Statement at 18 ("As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits challenging the merger.")
62 *Fed. Hous. Fin. Agency v. First Tenn. Bank Nat'l Ass'n*, 856 F. Supp. 2d 186, 193 (D.D.C. 2012).
63 *See* APPA, 15 U.S.C. § 16(e)(1)(A).
64 *FTC v. Cephalon, Inc.,* 551 F. Supp. 2d 21, 29 (D.D.C. 2008).
65 Competitive Impact Statement at 18.

time, expense, and uncertainty of a full trial on the merits."[66] However, the States' case alters the DOJ's risk-benefit calculus.

In general, it is true that the DOJ can enter a consent decree which is not "the one that will best serve society" and yet still manage to avoid "breach[ing] its duty to the public."[67] But all else equal, the DOJ should obviously prefer the remedy that best serves the public interest, regardless of the Tunney Act's minimum requirements. In the overwhelming majority of cases, all else will not be equal because of the aforementioned trade-offs. But here, under very unique circumstances, the States have volunteered to incur all of the time, expense, and uncertainty of a full trial. Simply by stepping aside and encouraging the Court to appropriately sequence the Tunney Act proceedings to conclude after the States' case, the DOJ has a unique opportunity to benefit the public by facilitating an unimpeded, fully informed court decision as to whether blocking the merger best serves the public interest, at no cost to itself or the merging parties. It should embrace this valuable opportunity.

2. Supporting Deferral of the Public Interest Determination and Keeping the Public Comment Period Open Would Enhance Public Confidence in the Consent Decree Process

Supporting deferral of the public interest determination and keeping the public comment period open also would enhance public support for the consent decree process. As Assistant Attorney General Delrahim emphasized in his first public remarks following Senate confirmation, "we must be willing and able to open up our policies and decisions to review and challenge."[68] Former Deputy Assistant Attorney General Roger Alford has added that, "To retain the confidence of both the business community governed by our laws and the public we protect, we must be willing to expose our agencies' policies and practices to aggressive scrutiny and challenge."[69] Whether the States win or lose, the DOJ's willingness to defer the public interest determination and keep open the public comment period would significantly enhance public confidence in the legitimacy of the settlement and the DOJ's analysis.

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[66] *Id.*

[67] *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981).

[68] Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Remarks at New York University School of Law (Oct. 27, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law.

[69] Roger Alford, Dep. Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Remarks Delivered at China Competition Policy Forum (Aug. 30, 2017), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-china-competition-policy.

IV. CONCLUSION

For the foregoing reasons, the Antitrust Division should exercise its right to withdraw from the PFJ. Regardless, it should encourage the Tunney Act Court defer a public interest determination and keep the public comment period open pending a final judgment in the States' case.

Respectfully submitted,

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