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“Protecting Consumers and Competition:
An Examination of the T-Mobile and Sprint Merger”

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The proposed merger of Sprint and T-Mobile (the “companies”) is a bad deal for consumers, competition, and America’s wireless future. Since the transaction was announced in April 2018, T-Mobile and Sprint have had numerous opportunities to demonstrate to antitrust enforcers, regulators, policymakers, and the public that this 4-to-3 merger would not violate competition laws, would affirmatively serve the public interest, and that the substantial reduction in competition it would cause is somehow offset by other public interest benefits. They have failed to make the case.

The evidence Sprint and T-Mobile have presented shows that permitting the companies to merge and consolidating the wireless market down to only three national carriers would result in higher prices for consumers – inflicting significant harm on low-income, prepaid, and rural consumers; while also leading to tens of thousands of lost jobs; harming small and rural wireless providers; and eliminating avenues for potential new competitors to enter the wireless market.

The companies’ claims that the merger would somehow speed up 5G deployment, or that the companies cannot independently deploy competing 5G networks have collapsed under scrutiny. The companies’ economic models have come under substantial attack, and have even been shown to undermine the company’s own case – showing the merger will lead to higher prices for consumers. At best, the companies have a vision where, post-merger, New T-Mobile would sell more profitable plans to more affluent customers. Regardless of whether this result benefits T-Mobile shareholders, such an outcome is certainly not good for the people T-Mobile would leave behind.

Simply put, the proposed Sprint/T-Mobile merger is unlawful under the antitrust laws and harms the public interest. Policymakers should oppose this transaction, the Department of Justice (“DOJ”) should move to block it, and the Federal Communications Commission (“Commission” or “FCC”) should deny the merger or designate the companies’ application for review by an administrative law judge.

I. This Merger Violates Antitrust Law Because It Would Raise Prices and Reduce Competition

Economic evidence in the record compiled by the FCC demonstrates the merger would likely lead to consumer price increases of as much as 15.5% immediately after the merger, due to the loss of competition in this concentrated market. Additionally, the market power and incentives of the three remaining firms – New T-Mobile, Verizon Wireless, and AT&T – is likely to lead to tacit coordination or parallel behavior – and would lead to up to an additional 21% price increases.¹

¹ Petition to Deny of DISH Network Corporation, WT Docket No. 18-197 (filed Aug. 27, 2018), <https://ecfsapi.fcc.gov/file/108271088719800/REDACTED%20DISH%20PTD%20Sprint%20TMO%208-27-18.pdf> (“DISH Petition”).

While the companies unsurprisingly arrive at lower figures, even T-Mobile's own economic studies also show that this merger would lead to higher prices. T-Mobile contends that low-income consumers, who are more likely to be dependent on their smartphone for basic communications and access to information, will be willing to pay these higher prices; the subtext is that consumers will pay higher prices because the merger will eliminate lower-priced options in the marketplace.²

Evidence that a planned merger will lead to higher prices for consumers is often fatal. In 2011, the FCC's Staff Report and Economic Analysis on the abandoned AT&T/T-Mobile merger showed that transaction was likely to lead to price increases of at least 6% per year – an increase significantly lower than the price increases likely to occur here, yet large enough for the Commission to deem it “substantial,”³ ultimately leading to the collapse of that proposed merger.

These unavoidable price effects are perhaps unsurprising given how concentrated the national wireless market already is. In fact, this merger is presumptively illegal based on market concentration figures alone.

According to the DOJ/Federal Trade Commission Horizontal Merger Guidelines, horizontal mergers in “highly concentrated markets that involve an increase in the Herfindahl-Hirschman index (“HHI”) of more than 200 points will be presumed to be likely to enhance market power.” The Commission's December 2018 Communications Marketplace Report found that HHI for the wireless market was 3,106 when measured at the end of 2017. Last year, Recon Analytics measured the HHI of the wireless industry as approximately 2,942. Both measurements far exceed what competition authorities and regulators consider “highly concentrated.” Further, if approved, the Sprint/T-Mobile merger would increase the HHI “by more than 400 points, well above 200 points, which is considered to enhance the market power of the merged company.”⁴ Similarly, Dish Network found the proposed merger would raise the HHI of the wireless market from the very concentrated 2,814 to the extremely concentrated 3,265.⁵

Analysis by Public Knowledge that breaks out the wireless market into various segments paints an even bleaker picture.

² See Notice of Ex Parte Meeting of DISH Network Corporation, WT Docket No. 18-197 (filed Dec. 21, 2018).

³ Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, WT Docket No. 11-65, Bureau Staff Analysis & Findings, Appendix C – Economic Analysis (November 29, 2011), <https://docs.fcc.gov/public/attachments/DA-11-1955A2.pdf>. (“AT&T/T-Mobile FCC Staff Report”).

⁴ Roger Entner, Industry Voices—Entner: Putting some context behind the T-Mobile, Sprint merger, FierceWireless, Apr. 30, 2018, <https://www.fiercewireless.com/wireless/industry-voices-entner-putting-some-context-behind-t-mobile-sprint-merger>.

⁵ DISH Petition.

Postpaid: The HHI of the postpaid segment is currently highly concentrated, at 3,282. A merger between Sprint and T-Mobile would raise it to 3,562, an increase of 280 points.

Prepaid: The HHI of the prepaid segment is currently just under the highly concentrated threshold, at 2,467. A merger between Sprint and T-Mobile would bring this well into “highly concentrated” territory at 4,481, an increase of a whopping 2,014 points.

Wholesale: The HHI of the wholesale segment is also highly concentrated, at 2,865. A merger between Sprint and T-Mobile would raise this to 3,909, a substantial increase of 1,044 points.⁶

No matter how you slice it, the wireless market is highly concentrated, and the companies’ merger would make it worse, leading to substantial consumer price increases. The merger is presumptively unlawful under the antitrust laws and antitrust enforcers, regulators, and policymakers should oppose the transaction.

II. This Merger is Broadly Similar to the Blocked AT&T/T-Mobile Transaction, and International Comparisons Show Four-to-Three Mergers to be a Disaster for Consumers

This merger is similar, from an antitrust and public interest perspective, to the failed 2011 merger between AT&T and T-Mobile, and should be opposed on the same grounds. If anything, this merger is likely to be more harmful to consumers, since both Sprint and T-Mobile are innovative, low-cost competitors when compared with their larger rivals. Examples of four-to-three mergers from around the world also show that less competition is not good for consumers.

When the Department of Justice sued to stop the proposed merger of AT&T and T-Mobile, DOJ argued that “unless this acquisition is enjoined, customers of mobile wireless telecommunications services likely will face higher prices, less product variety and innovation, and poorer quality services due to reduced incentives to invest than would exist absent the merger.”⁷ A FCC staff report similarly found that a combined AT&T/T-Mobile would have significant incentives and power to substantially increase consumer prices. Further, the Commission’s report concluded, “the proposed transaction would likely lead to a substantial lessening of competition under the Clayton Act. A transaction that violates the Clayton Act would not be in the public interest.”⁸ These findings are all the more important given the importance of wireless technology. As the DOJ argued,

⁶ These calculations are drawn from Recon Analytics numbers cited by FierceWireless. Roger Entner, Industry Voices—Putting Some Context Behind the T-Mobile, Sprint Merger (April 30, 2018) <https://www.fiercewireless.com/wireless/industry-voices-entner-putting-some-context-behind-t-mobile-sprintmerger>.

⁷ Complaint, United States v. AT&T, Case 1:11-cv-01560 3 (August 31, 2011), <https://www.justice.gov/atr/case-document/file/487776/download> (“AT&T Complaint”).

⁸ AT&T/T-Mobile FCC Staff Report.

Mobile wireless telecommunications services have become indispensable both to the way we live and to the way companies do business throughout the United States. Innovation in wireless technology drives innovation throughout our 21st-century information economy, helping to increase productivity, create jobs, and improve our daily lives. Vigorous competition is essential to ensuring continued innovation and maintaining low prices.⁹

Like the companies' proposed merger, in AT&T and T-Mobile the companies claimed that they would be unable to roll out nationwide 4G LTE networks unless their merger was approved. There, the government rejected that argument and found that competitive pressure would ultimately require the companies to independently deploy the 4G LTE mobile broadband networks that AT&T and T-Mobile claimed were contingent on their merger. The same is true here. While the companies now allege that their 5G network deployments will be limited without the merger, the truth is that competitive pressures from Verizon and AT&T will ultimately force both Sprint and T-Mobile to build independent 5G networks without sacrificing the recognized benefits of four firm competition.

Since the FCC and DOJ rejected allowing the wireless market to consolidate from four firms to three, consumers have reaped the benefits of four-carrier competition, and T-Mobile's increased focus competing in the marketplace for customers, rather than through mergers. The lesson is clear: companies will compete vigorously when they have the incentive to do so. This means that a market must be sufficiently competitive. It also means that the companies must be under no illusion that they can simply buy their way into success through anticompetitive deals.

Blocking the AT&T/T-Mobile deal was a measurable antitrust success. As Mark Cooper and Gene Kimmelman found last year,

As the fourth-largest of the major national carriers, and as a firm that had played the role of a disruptive maverick, [T-Mobile] made the decision to compete vigorously on price and service terms to increase market share, as the Justice Department had anticipated.

By 2014, the impact was apparent. The dominant national carriers were forced to respond to T-Mobile's competitive behavior by abandoning the pattern of relentlessly raising prices, and their operating income per subscriber showed the effect. By 2015, average revenue per user was \$4 to \$5 less than [it otherwise would have been]. This competitive gain was not by any means sufficient to wring out all of the pricing abuse by the dominant wireless carriers, but it shows the benefits of competition. At \$4 per

⁹ AT&T Complaint at 1.

subscriber, the total savings for consumers are more than \$11 billion per year.¹⁰

Other analysts have come to similar conclusions. Discussing the benefits that flowed from antitrust enforcement and four-carrier competition in 2014, one observer wrote,

Since the US government stopped AT&T from buying rival T-Mobile—a move that would have cemented AT&T as the largest wireless company in the US, and reduced the number of nationwide operators to three from four—the Deutsche Telekom subsidiary has kept the industry on its toes... the carrier has lowered prices, offered contract-free plans, subsidy-free phones, options to upgrade early, free international data roaming, and even provided free music streaming. Most recently, T-Mobile unveiled a two-line plan with unlimited data for \$100 a month.¹¹

This is not the type of behavior that is likely in a three-firm market. And this year, another industry observer commented,

[T]he U.S. government effectively blocked [T-Mobile’s] last big deal — when AT&T was going to acquire T-Mobile in 2011 for \$39 billion — because of its threat to the market’s competitiveness.

And that actually turned out to be a great move for American consumers! T-Mobile ... dramatically shook up the U.S. mobile market with aggressive pricing and innovative new features, including free video streaming, generous all-access plans, big incentives to switch to T-Mobile, free international data roaming, free Netflix and MLB.TV subscriptions, free in-flight texting and more.

T-Mobile went from a boring also-ran to the most exciting company in telecom, seemingly overnight.

And it worked! T-Mobile finished 2017 with almost 73 million total customers, up from 33 million at the end of 2011. The company says it captured the majority of the U.S. mobile industry’s “postpaid phone growth” in 2017 — smartphone subscribers who aren’t on prepaid plans, a.k.a. the

¹⁰ Gene Kimmelman and Mark Cooper, *A Communications Oligopoly on Steroids*, Center For Equitable Growth (2017) 17, <https://equitablegrowth.org/wp-content/uploads/2017/07/071817-kimmelman-cooper2.pdf>.

¹¹ Alice Truong, *Blocking AT&T’s merger with T-Mobile has been great for US consumers, but bad news for operators*, QUARTZ (Dec. 14, 2015), <https://qz.com/312907/blocking-atts-merger-with-t-mobile-has-been-great-for-us-consumers-but-bad-news-for-operators>.

good part of the market — for the fourth consecutive year. It has boasted frequently of stealing customers from rival carriers.¹²

Especially when viewed in light of the benefit of past merger enforcement, it is clear that the last thing consumers need is *fewer* choices when it comes to their communications provider. T-Mobile had to compete vigorously when faced with four firm competition. The incentives would be completely changed in a market with only three competitors – each with similar shares of the market.

International comparisons confirm the American experience. An October 2018 report from Finnish research firm Rewheel found that consumers in markets with three facilities-based providers paid twice as much per gigabyte as consumers in four firm markets.¹³ The OECD has concluded that “in countries where there are a larger number of MNOs [mobile network operators], there is a higher likelihood of more competitive and innovative services being introduced and maintained.”¹⁴ Austria is one clear example. As reported by the Financial Times,

Telecoms consolidation in Austria almost doubled some consumers’ smartphone bills...data from Austrian competition and telecoms authorities show that existing customers faced average price rises of 14 per cent to 20 per cent in the two years after the commission approved the 4-to-3 deal between Hutchison’s H3G Austria and Orange Austria in late 2012.

Vienna’s telecoms regulator estimated that smartphone bills in 2013 and 2014 were 50 per cent to 90 per cent higher. Traditional phone users, without data services, received bills 20 per cent to 31 per cent higher.¹⁵

The European Commission has also analyzed this issue. It found that a four-to-three merger between T-Mobile and Orange in the Netherlands led to prices rising as much as 17% higher than the otherwise would have.¹⁶ Other analysts have shown

¹² Dan Frommer, Blocking T-Mobile’s last big merger turned out great for U.S. consumers. So what’s different now?, Recode (April 30, 2018), <https://www.recode.net/2018/4/30/17302426/tmobile-sprint-merger-regulatory-approval-competition>.

¹³ Rewheel/research, The state of 4G pricing – 2H2018, 1 2018, http://research.rewheel.fi/downloads/The_state_of_4G_pricing_DFMonitor_10th_release_2H2018_PUBLIC.pdf.

¹⁴ OECD, Wireless Market Structures and Network Sharing 5 2015, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP\(2014\)2/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2014)2/FINAL&docLanguage=En).

¹⁵ Christian Oliver and Daniel Thomas, *Austrian data raise red flags for UK telecoms merger*, *Financial Times* (March 14, 2016), <https://www.ft.com/content/e536751e-e9fc-11e5-888e-2eadd5fbc4a4>

¹⁶ Ex-post analysis of two mobile telecom mergers: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands, European Commission (2015), <http://ec.europa.eu/competition/publications/reports/kd0215836enn.pdf>.

increases in the relative pricing of wireless services in countries that have undergone four-to-three mergers compared with those that have not.¹⁷

We can see real-world evidence of this playing out just across our northern border. In Canada, three wireless companies, Bell, Telus, and Rogers, dominate the market, with a combined 89 percent market share.¹⁸ And there are strong indications of complacency, and companies acting in concert with one another, rather than strongly competing. Canada's mobile phone rates are among the highest in the world.¹⁹ And when Bell hiked its monthly plans by \$5 per month in January 2016, Telus and Rogers followed suit with their own rate increases within a week—the opposite of what we saw happen in the United States.²⁰ As one tech analyst put it, the Canadian carriers raise prices “because they can.”²¹

Finally, four-firm national wireless competition in the United States is perfectly sustainable. In past years Sprint has made various business and technology decisions which did not work as planned and which caused it to fall behind its competitors. But despite various attempts by the companies to insinuate that Sprint is a “failing firm,” it is anything but. It is a successful company with many paths to competing more successfully against its three major competitors. It is not necessary to destroy competition to save Sprint.

III. The Effects of This Merger Would Fall Especially Hard on Lower-Income and Prepaid Customers

The proposed transaction would harm the prepaid and wholesale mobile wireless markets, which are critical for serving low-income consumers. Both T-Mobile and Sprint offer their own prepaid services that often serve as direct competitors to each other.²² The transaction would not only reduce competition in the prepaid market by eliminating direct competitors, but also give T-Mobile unrivaled market power to raise prices for prepaid service.

¹⁷ 4 To 3 Wireless Mergers Doubled Relative Prices, <http://wirelessone.news/10-r/1021-prices-up-58-on-4-to-3-wireless-mergers-rewheel>.

¹⁸ Number of mobile subscribers in Canada by service provider from 2010 to 2016, Statista, (2018), <https://www.statista.com/statistics/460099/total-number-of-mobile-subscribers-by-provider-canada/>.

¹⁹ Rose Behar & Sameer Chhabra, *Canadians still paying some of the highest wireless rates in the world: ISED*, Mobile Syrup, Dec. 12, 2017, <https://mobilesyrup.com/2017/12/12/international-telecom-pricingstudy-shows-canadians-still-pay-more-than-everyone-else/>.

²⁰ Tristan Hopper, *Why Canadian cell phone bills are among the most expensive on the planet*, National Post, Sept. 18, 2017, <http://nationalpost.com/news/canada/why-canadian-cell-phone-bills-are-among-the-most-expensive-on-the-planet>.

²¹ *Id.*

²² See Zach Epstein, *Sprint is giving away a month of unlimited prepaid service - so now T-Mobile is giving away 2 months*, BGR, April 14th, 2018, <https://bgr.com/2018/04/14/t-mobile-unlimited-plan-pricefree-metropcs-offer/>.

T-Mobile and Sprint also sell mobile wireless capacity wholesale to mobile virtual network operators (“MVNOs”) who resell these services under their own prepaid brands. The merger would substantially reduce competition in the wholesale market by raising the cost of capacity access to low-cost resellers. As a result, post-merger, MVNOs are likely to increase the prices that consumers pay to account for the higher wholesale prices a combined Sprint/T-Mobile is likely to charge.

Further, Sprint is the main facilities-based provider that participates in the Lifeline program. T-Mobile does not participate in Lifeline. The transaction would potentially eliminate Sprint as a Lifeline participant. Elimination of competition in the prepaid and wholesale markets will have a disproportionate impact on low-income and marginalized communities. As the Commission has acknowledged, the prepaid market offers more affordable prices in order to serve low-income consumers who may not have the income or credit background to qualify for postpaid service.²³ The lack of competition in these markets would displace millions of low-income consumers who rely on prepaid services and further widen the digital divide.

IV. The Supposed Benefits of this Merger to 5G Deployment, Especially in Rural Areas, are Misleading, Non-Merger Specific, or Speculative and Non-Verifiable.

Perhaps the biggest misdirection put forward by T-Mobile and Sprint is their attempt to tie this merger to 5G rollout. This is a standard move in the anticompetitive playbook, of course—AT&T, for instance, once claimed that it would not be able to quickly achieve nationwide LTE deployment without acquiring T-Mobile. That merger was blocked and LTE was rolled out even faster than predicted. Similarly, here, there is no reason to think that this merger would result in faster 5G deployment, especially not in areas, such as rural parts of the country, that are already underserved by wireless carriers.

Indeed, statements from company executives to investors and the public fly in the face of their merger advocacy. In 2017, Sprint stated that it is “working with Qualcomm and network and device manufacturers in order to launch the first truly mobile [5G] network in the United States by the first half of 2019,”²⁴ and T-Mobile CEO stated that his company would “leapfrog” its competitors and be the first to

²³ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 15-125, Eighteenth Report, 30 FCC Rcd 14515, 14515 ¶ 96 (2015) (finding that “the remaining differences [between prepaid and postpaid plans] largely reflect the different characteristics of postpaid and prepaid subscribers: ‘prepaid subscribers are typically prepaid for a reasons, relating to their income and credit.’”).

²⁴ Mike Dano, *Sprint promises to launch nationwide mobile 5G network in first half of 2019*, Light Reading (Feb 2, 2018), <https://www.fiercewireless.com/5g/sprint-promises-to-launch-nationwide-mobile-5g-network-first-half-2019-and-to-raise-unlimited>.

deploy nationwide 5G.²⁵ Even after the merger announcement both companies have stuck to their existing plans to roll out 5G by 2019 or 2020. T-Mobile has stated that “T-Mobile is already well on their [sic] way to delivering nationwide 5G in 2020,”²⁶ and Sprint has said that “[i]n the first half of 2019 Sprint plans to launch its mobile 5G network in nine of some of the largest cities in the country[.]”²⁷ This merger is not necessary for either company to upgrade to 5G.

T-Mobile and Sprint’s argument that rural Americans will benefit from the transaction is unsupported. If anything, the anticompetitive impact of the merger could exacerbate the divide between rural and urban areas, while creating even stronger incentives for the merged company to invest more heavily in densely-populated, wealthy areas.

There is every reason to be skeptical that the companies will prioritize deployment of 5G technologies to rural communities. With low population density and high per-consumer costs, these areas have historically lacked the economies of scale needed to attract strong investment from Sprint, T-Mobile, Verizon, and AT&T. Mobile 5G service will likely be a modest, incremental improvement over LTE speeds, particularly in areas where the cost of network densification is prohibitive. Even if mobile 5G is ultimately deployed on a widespread basis, analysts do not believe 5G signals will be able to penetrate buildings in a manner that is competitive with fixed broadband. Indeed, mobile 5G networks will rely heavily on fixed broadband networks for backhaul support to quickly deliver vast amounts of data, similar to current mobile wireless technology. An estimated 60 percent of mobile data traffic is currently offloaded onto fixed networks, and that number is increasing annually.²⁸ However, the companies do not explain where they will find this fixed backhaul support in rural, less densely-populated areas. Mobile 5G networks will need more than wireless systems to function, since gigabit capacity requires proximity to fixed-line backhaul. These are the very high-capacity wired networks that are in short supply in lower-income and less densely-populated areas, and areas with challenging terrain. Nothing about this merger changes that.

Further, based on the history of prior mobile wireless technology upgrades and the technical characteristics of millimeter wave spectrum, mobile 5G deployment will likely focus on the nation’s most urban, affluent areas and do little

²⁵ John Legere, The Revolution Continues, T-Mobile Blog (Dec. 27, 2017) <https://www.t-mobile.com/news/legere-2018-predictions>.

²⁶ T-Mobile Press Release, One Step Closer to Nationwide 5G: T-Mobile Marks a World’s First on the Road to 5G (Nov. 20, 2018), <https://www.t-mobile.com/news/first-600mhz-5g-test>

²⁷ Sprint Press Release, Sprint Planning to Debut 5G Smartphone from Samsung in Summer 2019 (Jan. 7, 2019), <https://investors.sprint.com/news-and-events/press-releases/press-release-details/2019/Sprint-Planning-to-Debut-5G-Smartphone-from-Samsung-in-Summer-2019/default.aspx>.

²⁸ See Cisco, Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016–2021 (2017), <https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf>

for rural America. In all likelihood, the merged company would focus on the same high-value markets that they do today.

V. This Merger Would Destroy Jobs and Lower Wages

This merger would destroy American jobs. The CWA estimates that the transaction could result in a loss of over 30,000 jobs in the United States.²⁹ MoffetNathanson more conservatively estimates a loss of 20,000 jobs.³⁰ Either figure is far too high for a merger that provides no public benefits.

Neither would the labor effects of this merger be limited to direct job losses—further concentration in the wireless market would lead to lower wages across the industry. The Roosevelt Institute and the Economic Policy Institute have concluded that “For the 50 most-affected labor markets,” this merger would cause “a decline in annual earnings of between \$520 and \$3276 on average” for affected workers.³¹

These labor effects would be concentrated on lower-wage workers across the country, who can afford it least, and provide a sufficient basis on their own for policymakers to oppose this deal.

VI. No Remedies Can Fix This Deal

There are no conditions that can alleviate the competitive and public interest harms this deal would cause.

The kinds of conditions that regulators sometimes impose “take two basic forms: one addresses the structure of the market, the other the conduct of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms.”³² When available, structural remedies such as the sale of property, lines of business, geographic markets, or subsidiaries can be effective. But they are simply unavailable here—the basic logic of this merger is the combination of Sprint and T-Mobile’s nationwide networks and businesses. The anticompetitive aspects of this deal cannot be separated out, and no realistic divestiture plan that addresses the competitive harms has even been proposed.

²⁹ CWA Calls on Sprint and T-Mobile to Make Binding Commitments to Address Potential Job Loss and Respect Workers’ Rights, Communications Workers of America (June 26, 2018), <https://www.cwaunion.org/news/releases/cwa-calls-on-sprint-and-t-mobile-make-binding-commitments-address-potentialjob-loss>.

³⁰ Karl Bode, *The Jobs-and-Competition-Killing T-Mobile/Sprint Merger Is Back On*, Vice Motherboard, Apr. 13, 2018, https://motherboard.vice.com/en_us/article/gymm3w/sprint-t-mobile-merger-can-stillhappen.

³¹ Roosevelt Institute, *The Labor Market Impact of the Proposed Sprint/T-Mobile Merger*, <http://rooseveltinstitute.org/labor-market-impact-proposed-sprint-t-mobile-merger/>

³² Department of Justice, Antitrust Division Policy Guide to Merger Remedies, at 7 (2004).

The other kind of remedy, behavioral or conduct remedies, is also inappropriate here, because such remedies are unlikely to be effective. As the DOJ explains, allowing anticompetitive mergers to go through and subjecting them only to behavioral conditions is fraught with peril:

Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.

The DOJ continues,

Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter....Third, a conduct remedy may restrain potentially procompetitive behavior....Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.³³

This is not to say that behavioral remedies can never be effective. But they amount to requiring that companies act against their own economic self-interest. Companies subject to them have every incentive to find loopholes in them, stretch their interpretation to the breaking point, or minimally comply, and typically can afford to and have the incentive to expend more resources trying to avoid the conditions than regulators or third parties can afford to spend in trying to enforce them. To be effective, such remedies must be simple and clear, and have a clear path to enforcement. The complexity and fundamental issues at stake here suggest that this merger is not among those rare occasions where behavioral remedies can be effective.

What's more, this administration has already announced policies of extreme skepticism toward behavioral conditions, making discussing such remedies—including proposals put forth by the companies themselves—almost a moot point. Assistant Attorney General Makan Delrahim has said,

Our goal in remedying unlawful transactions should be to let the competitive process play out.

³³ *Id.* at 8.

Unfortunately, behavioral remedies often fail to do that. Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.³⁴

Finally, whatever the efficacy of conditions may be, the fact remains that they are typically time-limited remedies for marketplace problems that may have no expiration date. Thus, the DOJ and FCC should err on the side of consumers and innovation and block this deal. The costs of getting this wrong are simply too great.

VII. This Merger Could Set the Stage for Further Antitrust Activity

As the Committee on Energy & Commerce is well aware, the Federal Trade Commission is currently in the midst of examining Competition and Consumer Protection in the 21st Century, and debates over the future of antitrust enforcement are underway. This merger is a bellwether. There's no reason that a horizontal, four-to-three merger with essentially no cognizable, merger-specific efficiencies should be permitted to close. The economics are clear, and the harms are obvious. The American public sees the impact of corporate mega-mergers in their daily lives in the form of higher prices, fewer choices, lower wages, and less opportunity to start new businesses and grow existing ones. Just as the Commission and DOJ have previously decided, further consolidation of the four nationwide wireless carriers would run afoul of the antitrust laws and harm the public interest.

VIII. Conclusion

This merger might benefit the investors and executives of nationwide carriers who would like to see higher prices and less competition throughout the industry, allowing carriers to focus on expanding their margins rather than investing in new networks and new technologies, and winning customers with lower prices and superior service. But everyone else would be a loser. In particular, the consumers and companies who want to see affordable, ubiquitous, high-performing wireless availability would not benefit, as a significant reduction in competition works against each of those goals. This merger is so harmful for the American public that the companies' own analysis confirms many of the arguments of the deal's critics, requiring the companies to scramble and improvise reasons why it should be approved nonetheless. The primary supposed benefit of this merger—increased 5G deployment—makes no technical or economic sense. Therefore we ask this Committee to support competition, not consolidation, in the wireless market as the engine that will power American innovation and economic leadership in the digital economy.

³⁴ Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, Washington, DC (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.