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Game of Phones:
Examining the Competitive Impact of the T-Mobile – Sprint Transaction

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[1] I would like to thank Public Knowledge Senior Counsel John Bergmayer for substantial assistance in preparing this testimony.

For the second time in a decade the Department of Justice (DOJ) and Federal Communications Commission (FCC) are asked to bless a transaction that would reduce the number of national wireless carriers from four to three. Based on what we know, they should come to the same conclusion this time as they did with the AT&T / T-Mobile deal, and find that this deal also would harm consumers and should be stopped.[2]

Sprint and T-Mobile have put forward a particular vision for the future of the wireless industry where combining their networks, spectrum, and customer bases will lead to a better future. But different consumers have different priorities. Competition, not consolidation, is the best way to achieve the best mix of coverage, next-generation technologies, and affordable plans. There are many different combinations of spectrum, coverage, and network upgrades that carriers can deploy to provide what consumers want. What the companies leave out of their pitch is that the combined companies would acquire enough market power to inflate prices and harm competition.

When the Department of Justice sued to stop the proposed merger of AT&T and T-Mobile, it 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."[3] An FCC staff report similarly found that "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."[4] These findings are all the more important given the importance of wireless technology. As the DOJ argued,

> 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.

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[2] *See* Petition to Deny of Public Knowledge and Future of Music Coalition, in 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 (May 31, 2011), https://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf

[3] 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

[4] FCC, Bureau Staff Analysis & Findings in in 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 (November 29, 2011), https://docs.fcc.gov/public/attachments/DA-11-1955A2.pdf

> Vigorous competition is essential to ensuring continued innovation and maintaining low prices.[5]

Since that time 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 I 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, it 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 the pre-merger trend. 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 subscriber, the total savings for consumers are more than $11 billion per year.[6]

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.[7]

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[5] AT&T Complaint at 1.

[6] 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.

[7] 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.

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 good part of the market — for the fourth consecutive year. It has boasted frequently of stealing customers from rival carriers.[8]

Especially when viewed in light of these benefits, it is clear that the last thing consumers need is *fewer* choices when it comes to their communications provider. Yet Sprint and T-Mobile are here today to offer explanations for why less competition and fewer choices will actually be good for consumers that are speculative at best. Their arguments mirror those AT&T made before.

They have a high burden to meet. First, they have to show that the purported benefits of this deal exceed the loss of a major competitor in a concentrated market. They have not done this. Then, they have to show that these benefits (for example, their claim that this merger is a prerequisite to their upgrading to 5G technology) are *only* achievable through the loss of a competitor, not through any other means. They have not done this, either. Finally they need to show how alleged efficiencies, such as cost-savings, will actually be passed along to consumers, instead of pocketed by executives and investors, or used as fuel for yet more acquisitions. Again

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[8] 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.

they have not done this, and since we know that only competition delivers benefits of this kind to consumers, it is unlikely that they will be able to meet this burden.

In attempting to make this case, Sprint and T-Mobile rely on many of the same arguments that merging companies routinely make, and that were rejected in AT&T/T-Mobile. First, they have to claim that the market is much more competitive than it is, or that new competition is just around the corner. It isn't—but even if it were, we can't risk competition in the present on the basis of a better tomorrow. Second, claim that if policymakers only understood all the technical details of spectrum licensing and usage and the economics of 5G equipment siting, then they would realize that in this case a merger from four to three national carriers will actually increase competition. These arguments are quite similar to the ones AT&T advanced with respect to LTE, that have since been proven false.[9] At most, while the carriers may have succeeded in showing that a merger is one way to achieve 5G, they haven't shown that it's the only way, nor have they shown that the benefits of achieving 5G at the expense of competition is worth the tradeoff. Nor have they convincingly shown that any cost-savings they achieve from this deal will be invested back into the network, or even how future upgrades to 5G are enough to justify a loss of competition in the meantime. Given past experience, policymakers should be skeptical of claims that bending the rules in just this one case is necessary for some particular investment or upgrade.

T-Mobile points to its record as a dynamic competitor, an "uncarrier," as proof that it will continue to compete vigorously. The entire point of antitrust, however, is the that the behavior of companies depends on not on famous CEOs or winning personalities but on the cold equations of economic analysis. As noted above, T-Mobile became a vigorous competitor because rigorous antitrust enforcement left it no choice. Allowing T-Mobile to grow to approximately the same size as AT&T, rather than forcing it to fight for customers, will eliminate the combined

[9] In its attempted takeover of T-Mobile, AT&T specifically committed to cover 250 million Americans with LTE by the end of 2013, 'as a result' of that transaction. Letter to Marlene H. Dortch from AT&T, Notice of Ex Parte Presentation: In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Dkt No. 11-65 (Aug. 8, 2011), http://apps.fcc.gov/ecfs/document/view?id=7021701223 Yet AT&T not only met but exceeded that target even though that merger was blocked. AT&T, More Than 270 Million People Now Covered by the Nation's Most Reliable 4G LTE Network (Jan. 6, 2014), http://about.att.com/newsroom/att_4g_lte_covers_more_than_270_million_people_jan.html.

company's need to disrupt the market and create an incentive to maintain the existing market structure.

Finally, while T-Mobile generally portrays itself as competing with AT&T and Verizon, it competes directly with Sprint in two additional market segments—wholesale, and the pre-paid low-income/cost sensitive segment.[10] As discussed below, elimination of competition in these sectors will have significant impact on low-income communities. Not only will the combined company have the ability to stabilize, and even raise, prices in the pre-paid segment, but it will be able to raise the cost of spectrum access to low-cost resellers.

The Market is Highly Concentrated.

The Clayton Act prohibits mergers when their effect "may be substantially to lessen competition, or to tend to create a monopoly."[11] Congress used the term "may," not "will," because "its concern was with probabilities, not certainties."[12] The Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines establish that when a market is sufficiently concentrated, or when a merger would increase concentration by more than a set amount, it will be presumed to enhance market power. Because the wireless market is already highly concentrated, and this merger would make it even more so, it easily meets the Guidelines' criteria, and can be presumed to be unlawful.

The national wireless market is highly concentrated. Antitrust enforcers calculate market concentration using the Herfindahl-Hirschman Index ("HHI"), which is the sum of the squares of the market shares of the respective market participants. The more concentrated a market, the higher the number. A market is presumed to be highly concentrated if its HHI is above 2500.[13]According to the DOJ's guidelines, "Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly

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[10] *See* Chris Welch, "What A Combined T-Mobile and Sprint Will Look Like, The Verge (April 30, 2018). Available at: https://www.theverge.com/2018/4/30/17301392/t-mobile-sprint-merger-preview-phone-carrier
[11] 15 U.S.C. § 18.
[12] Brown Shoe Co. v. United States, 370 US 294, 323 (1962).
[13] US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), . The revised guidelines issued in 1997 set the "highly concentrated" threshold at 1800. See Horizontal Merger Guidelines (1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0.

concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." This merger meets these criteria.

To see exactly how concentrated the wireless market is, and how combining Sprint and T-Mobile would even further lessen competition, it may be helpful to break down the market into several segments: postpaid, prepaid, and wholesale.[14]

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. Thus the DOJ should presume that this merger is likely to enhance market power.

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. This too shows that the DOJ should presume that this merger is likely to enhance market power.

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.

Total: Each of these market segments provides a grounds for challenging the deal—as does the market as a whole, which would see its HHI rise 408 points from 2,966 to 3,374, meeting the established threshold for a deal that is likely to increase market power.[15]

Lower-Income Customers Would Be Disproportionately Harmed By This Merger

The largest increase in concentration would be to the prepaid segment. This is because Sprint and T-Mobile disproportionately serve this segment compared to other market segments, with shares of 21% and 38% respectively. A merger would give them a commanding lead over AT&T and Verizon, with a 59% share. According to data from Kagan cited by Reuters, "T-Mobile is the most popular among customers who make less than $75,000 per year, and Sprint's

[14] The following 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-sprint-merger.

[15] The total market share figure includes the nascent Connect Devices market, which is also highly concentrated and would see its HHI increase from 4,094 to 4,174, according to the Recon Analytics figures cited above.

pre-paid brand Boost counts 83 percent of its users in that income range."[16] The consumers who are most likely to be hurt by this loss of choice are the consumers who disproportionately purchase prepaid services—lower-income individuals and families, who if anything need more protection from the anticompetitive practices such market concentration would lead to.

This would be exacerbated by the fact that Sprint and T-Mobile's wholesale customers—mobile virtual network operators (MVNOs)—often serve the prepaid segment, as well. If those two carriers combine, not only may their direct customers be harmed but their indirect MVNO customers, as well. As the OECD has found, "Recent experience following mergers … indicates the reduction in wholesale competition that follows the elimination of an MNO can curtail the competitiveness of MVNOs."[17] According to Reuters, the DOJ is investigating this issue, and Peter Adderton, a former MVNO executive has stated that "A merger between T-Mobile and Sprint without any concessions would be bad for consumers, businesses and the country."[18]

This Merger Would Create A Significant Risk of Parallel Behavior, Magnifying Its Anticompetitive Effects

This merger creates a high likelihood of coordinated effects—the risk that the prices, plans, and practices of AT&T, Verizon, and T-Mobile/Sprint would increasingly mirror each other, even if this is simply because behaving in similar ways is the profit-maximizing strategy for each of the three carriers.[19] Coordination is likely in concentrated markets, and "[i]t is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur."[20] As the economist Edward Chamberlin put it

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[16] Sheila Dang, U.S. Justice Department Probes T-Mobile-Sprint Merger Effect on Smaller Wireless Companies (June 7, 2018), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-exclusive/exclusive-u-s-justice-department-probes-t-mobile-sprint-merger-effect-on-smaller-wireless-companies-sources-idUSKCN1J328E.

[17] OECD Working Party on Communication Infrastructures and Services Policy, Wireless Market Structures and Network Sharing 8 (2015).

[18] Sheila Dang, U.S. Justice Department Probes T-Mobile-Sprint Merger Effect on Smaller Wireless Companies (June 7, 2018), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-exclusive/exclusive-u-s-justice-department-probes-t-mobile-sprint-merger-effect-on-smaller-wireless-companies-sources-idUSKCN1J328E.

[19] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 US 209, 227 (1993) (coordinated actions are the process "by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

[20] FTC v. Heinz, 246 F.3d 708, 725 (quoting Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law ¶ 901b2, at 9 (rev. ed.1998).). The Horizontal Merger Guidelines state that coordinated effects are "conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."

in 1933, in a concentrated market with coordinated effects, "the equilibrium result is the same as though there were a monopolistic agreement."[21]

The Horizontal Merger Guidelines establish a framework for analyzing coordinated effects.[22] This merger satisfies several of its indicia.

- *"Agencies evaluate the risk of coordinated effects using measures of market concentration."*

As discussed above, the wireless market is already highly concentrated, and this merger would make things substantially worse. Therefore coordinated effects are likely if this merger goes through.

- *"A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals."*

Particularly with retail customers, carriers typically advertise their offerings publicly, and frequently announce plan and billing changes through press releases and the media. Therefore the carriers can easily observe each other's actions.

- *"An acquisition eliminating a maverick firm ... in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects."*

In their documents describing the failed AT&T/T-Mobile merger, both the FCC and DOJ described T-Mobile as a risk-taking, innovative, maverick firm. This merger would remove this maverick firm from the market, replacing it with a new company with substantially different incentives.

Sprint, also, can be seen as a maverick. It has offered "unlimited" plans and simplified its rate plans, for instance, driving the rest of the industry forward to more consumer-friendly options. As Sprint CEO Marcelo Claure stated, "Sprint and T-Mobile have similar DNA and have eliminated confusing rate plans, converging into one rate plan: Unlimited."[23]Whether both or just one of the companies can be seen as a "maverick" today, in either case the newly-combined company would simply have the same structural incentives as the larger carriers both Sprint and T-Mobile today work so hard to differentiate themselves from.

21 Edward Chamberlin, The Theory of Monopolistic Competition 48(Harvard University Press 1933).
22 Guidelines 25.
23 T-Mobile, 5 G For All, https://www.t-mobile.com/news/5gforall.

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In terms of the likelihood of coordination, this deal is similar to the failed AT&T/T-Mobile transaction. There, the DOJ found 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. Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyerside market power, and high barriers to entry and expansion, make them particularly conducive to coordination.[24]

The same applies here, and these coordinated effects provide an additional reason why this merger likely violates Section 7 of the Clayton Act, as well as the FCC's public interest test. T-Mobile and Sprint's experts attempt to rebut this, making several claims that require careful evaluation.

For example, T-Mobile and Sprint argue that after the upgrade to 5G, "Newco will have the incentive to use this additional capacity to gain subscribers… rather than settle into a coordinated effects outcome at a lower market share."[25] Similarly they argue that "asymmetry between Newco's superior network quality and lower profitability will give Newco an incentive to grow its market share, rather than coordinate in a way that maintains the status quo."[26] But how is this any different than previous network upgrades the wireless industry has undertaken—2G to 3G, or 3G to LTE? Despite the increased capacity these upgrades provided, the major carriers, especially the larger ones, typically settled into a pattern of similar plans and prices, with stable market shares. Temporary, generally technology-driven shifts in the marketplaces may have caused occasional shifts in relative market shares—for example, AT&T's brief iPhone exclusive. We can even grant that this merger and an upgrade to 5G may cause a temporary destabilization in the marketplace. But the true threat is of longer-term parallel behavior of the kind that frequently occurs in concentrated markets. Other of the arguments advanced by the companies (e.g., dynamic pricing[27], or differentiated service bundles[28]), if true, were also true

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[24] AT&T Complaint ¶ 36.
[25] Declaration of Joint Declaration of Professor Steven C. Salop and Dr. Yianis Sarafidis 18.
[26] Id.
[27] Salop and Sarafidis 21-28.
[28] Salop and Sarafidis 19.

when the DOJ and FCC rejected the AT&T/T-Mobile merger, and may not be sufficient to overcome the presumption that coordination is more likely in oligopolistic market structures.

Claims That "Other Large Players Will Intensify Competition Further" Are False or Speculative

Official documents from Sprint and T-Mobile paint a picture of a competitive wireless marketplace that would be utterly unrecognizable to most consumers.[29] They describe how other companies are involved tangentially in the wireless market though offering backhaul or cell sites,[30] count the business partners and customers of major carriers as competitors to the carriers themselves, and represent that WiFi-based offerings are interchangeable with ubiquitous LTE networks. John Legere even stated, "This isn't a case of going from 4 to 3 wireless companies – there are now at least 7 or 8 big competitors in this converging market."[31] Policymakers should not be taken in by these overly creative descriptions of a market that does not truly exist.

The wireless marketplace is subject to high, even impassable barriers to entry, not just in terms of capital costs but in terms of access to limited wireless spectrum, which is for the most part already allocated, and in use. If no unused and useful spectrum is available, even a potential competitor with nearly unlimited resources may be only able to enter the market by buying an existing competitor, rather than constructing a new network. The state of the art in wireless technology does change, and spectrum that may currently be unusable may one day be valuable, and ways to compete with the major carriers that bypass the existing hurdles may one day emerge. That will be a wonderful day. But it is not today, and policymakers should not bless a reduction in competition in the here and now on the basis of such speculation.

In particular it is worth analyzing why two commonly-cited forms of "competition"—that from Mobile Virtual Network Operators (MVNOs), and from WiFi-based services, are really nothing of the sort.

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[29] "The market will be disrupted by new technology and new platforms—companies like Verizon, AT&T, Comcast, Charter, and DISH will be scrambling to design and offer new service packages." Declaration of Peter Ewens, 9.
[30] "[C]able companies have important assets that can provide them with competitive advantages: large retail customer bases; the ability to offer triple-play and quad-play bundles; and ubiquitous hotspot availability (where a significant portion of data traffic occurs). Moreover, they control backhaul and small cell sites, which will be very important for 5G technology, as well as valuable video content. Cable MVPDs also can build their own wireless networks. Comcast already owns spectrum and Charter has plans to eventually develop its own wireless mobile network relying on small cell LTE towers." Salop and Sarafidis 20.
[31] T-Mobile, 5 G for All, https://www.t-mobile.com/news/5gforall

MVNOs provide valuable alternatives for consumers, but they are customers of the major carriers and resellers of their services, not true competitors. By partnering with MVNOs, carriers are able to reach different end-user markets, indirectly offer more varied price plans, and create brand differentiation. Additionally, some MVNOs, like Comcast, complement their resale of carrier network access with other services, such as WiFi connectivity, or can bundle their services with other offerings (e.g., video subscriptions) that the carrier itself cannot offer. These are an important part of the marketplace, but fundamentally a retailer cannot be said to "compete" with its own wholesaler in an economically meaningful sense.

As for WiFi, while it is a valuable technology to be sure, it is wireless in the sense that a cordless phone is wireless, not wireless in the sense a mobile phone is wireless. A single WiFi base station typically covers about the area of a floor of a single-family home, not many square miles as a cellular tower does. Thus while a majority of smartphone data usage occurs over WiFi, this is typically in home or at work, not true mobile usage. Cable companies, which can control a large number of hot spots through their control of end-user customer premises equipment, have tried to work around this inherent technical limitation by allowing customers to more easily "roam" from one WiFi hotspot to another (to simplify, to ensure that the different hotspots have the same network name and password), and to enable features such as calling and SMS over WiFi (as the major carriers have also done). Due to their large existing customer bases and ability to bundle their services, some cable companies like Comcast have acquired thousands of customers. But they have not met with much success. In the words of T-Mobile CEO John Legere, in answering a question about Comcast's entry into the wireless market,

> I continue ... to be astonished at the lack of success, or ability to enter wireless in any scale by the cable players. You know, 180,000 adds in that base, and a year cost of $412 million dollars, with a stated intent to grow similar in that range for another year and to lose $1.2 billion dollars, that's kind of an admission that the MVNO contract sucks, and nobody is interested in a WiFi phone, and we're just going to sit on our hands and decide what to do later. But it's very irrelevant, and I imagine that Charter will be irrelevant squared.[32]

[32] T-Mobile Q4 and Full Year 2017 Earnings Call: Behind-the-Scenes Livestream, https://www.youtube.com/watch?v=FJGtZIxBet4, at 33:00.

It appears likely that Comcast's resale of Verizon network access is what truly makes the product possible at all, but that in any case, a WiFi/MVNO offering does not appear to be particularly compelling.

International Comparisons Confirm the Benefits of Four-Carrier Competition

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."[33] 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.
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> 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.[34]

Other analysts have shown increases in the relative pricing of wireless services in countries that have undergone four-to-three mergers compared with those that have not.[35] For example, Canada has only three wireless carriers, and prices are significantly higher than in the United States.[36]

The Purported Benefits of This Deal May Not Be Passed Through to Consumers

While the companies claim many efficiencies as a result of this deal, they have not yet demonstrated either that they would in fact benefit consumers, or could not be achieved through other means.

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[33] OECD, Wireless Market Structures and Network Sharing 5.
[34] 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
[35] 4 To 3 Wireless Mergers Doubled Relative Prices, http://wirelessone.news/10-r/1021-prices-up-58-on-4-to-3-wireless-mergers-rewheel
[36] Chris Welch, "What A Combined T-Mobile and Sprint Would Look Like," The Verge (April 30, 2018), https://www.theverge.com/2018/4/30/17301392/t-mobile-sprint-merger-preview-phone-carrier

Less Competition Means Higher Prices, Not Lower Prices

It is "well understood that mergers can simultaneously generate efficiencies and consumer harm if the merging firms appropriate the efficiencies solely for themselves as cost savings and fail to pass them on to consumers."[37] Thus, antitrust enforcers are frequently concerned that purported merge efficiencies will not actually benefit consumers.[38] In general "[t]he approach taken in the 2010 Merger Guidelines requires not only that significant efficiencies be proven, but also that these be sufficiently 'passed on' to consumers such that the post-merger price is no higher than the pre-merger price."[39]

As is the case with many mergers, Sprint and T-Mobile point to their own cost-savings, without providing an adequate explanation of how this might benefit consumers.[40] Given the vast increase in market power this merger would give the new company, and the increase in concentration in the marketplace, it should be presumed that any efficiencies in terms of cost savings will not result in actual consumer savings.

5G

Cost-savings to consumers are not the only merger efficiencies that might benefit consumers. Among the non-cost-related efficiencies that may benefit consumers are "improved quality, enhanced service, or new products."[41] Sprint and T-Mobile argue strenuously that the main consumer benefit of this merger would be the faster deployment of 5G networks.

But under the Guidelines, only "those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects"[42]can be credited. The default assumption should be that competition, not consolidation, spurs network investment. As the OECD found, "in markets introducing new players or maintaining at least four operators,

[37] Daniel A. Crane, Rethinking Merger Efficiencies 110 Mich. L. Rev. 347, 371 (2011).
[38] Malcolm B. Coate and Andrew J. Heimert, Merger Efficiencies At the Federal Trade Commission 1997–2007 8 (2009), https://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997–2007/0902mergerefficiencies.pdf.
[39] Herbert J. Hovenkamp, Appraising Merger Efficiencies, 24 Geo. Mason L. Rev 703, 731 (2017).
[40] The companies argue that they will pass on savings to consumers because of competition with Sprint and T-Mobile. However as is the case with their arguments with respect to coordinated effects they are attempting to offset a permanent reduction in competition with a one-time incentive created by a network upgrade.
[41] Guidelines 29.
[42] Guidelines 30.

investments in new network infrastructure increase and are pulled forward by existing operators, to defend against challengers."[43]

Even taking Sprint and T-Mobile's technical claims at face value, they should be required to demonstrate that other paths to achieve the same benefits, but without removing a competitor from the market, are unworkable. There are many such paths, such as acquiring new investors, partnering with companies other than one of the major carriers, and acquiring new spectrum at auction. While we do not endorse this or any specific approaches, the OECD has described the potential benefits of network sharing as an alternative to merger:

> If it is decided based on a market assessment that the current number of MNOs is not sustainable or that new facilities based entry is not likely, then it is worth considering to utilise voluntary network sharing agreements – either as an alternative to a merger or to allow a new player to enter a market. The potential savings from network sharing may represent a significant proportion of the savings that are used to justify a full merger, and in the case of network sharing without merger; the benefits of these savings are more likely to be passed on to consumers.[44]

One fundamental question in this is whether the only way to achieve 5G it is through the permanent loss of a major competitor. It likely is not. But another question is whether policymakers should endorse a particular vision for the future of wireless networks in the United States instead of allowing competition to determine the proper balance between technology, prices, and coverage.

[43] OECD, Wireless Market Structures and Network Sharing 9.
[44] OECD, Wireless Market Structures and Network Sharing 5.

Conclusion

The likely loss of competition that would result from this deal is obvious. Its benefits are substantially less so. Giving T-Mobile and Sprint the benefit of the doubt, even if they have shown that they can combine their assets to build a next-generation network, they have not shown that cost-savings would be passed along to consumers, that price-sensitive consumers will not be left behind, and that the public, rather than the companies themselves, will be the real winners from this deal. Nor have they ruled out alternative paths to 5G that would not carry such a competition tradeoff. In a market that suffers from endemic competition problems, policymakers should be skeptical of claims that somehow few competitiors will truly deliver more competition.