

**STATEMENT OF COMMISSIONER GEOFFREY STARKS,
DISSENTING**

Re: *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations, Applications of American H Block Wireless L.L.C., DBSD Corporation, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time, WT Docket No. 18-197*

INTRODUCTION

T-Mobile and Sprint propose to merge their companies. They claim that New T-Mobile will invest nearly \$40 billion to combine the companies' spectrum, sites, and other assets to deliver a nationwide 5G network that will dwarf what the companies could do on their own, and that will force AT&T and Verizon to improve and accelerate their own 5G network investment and deployment plans. T-Mobile and Sprint present their proposed merger as a necessary step for the United States to accelerate deployment and "win" the race for 5G.

Our desire to lead on the world stage, however, must not distract us from the reality of the transaction before us – the proposed merger of the third and fourth largest players in an already highly concentrated mobile wireless telecom service market. T-Mobile and Sprint's promises of 5G leadership sound tempting but, as this order concedes, the facts tell a different story. The proposed transaction is exactly the type of merger that the Justice Department and the Commission have discouraged and rejected in the past: one that would harm competition and result in higher prices and poorer service, particularly for the most vulnerable consumers.

Moreover, this proceeding has been characterized by unprecedented procedural irregularities. We've departed from agency practice by failing to solicit public comment on two rounds of significant changes to one of the largest wireless transactions in FCC history. In addition, we proceed with today's decision even though we are currently investigating Sprint for possible violations that could pose hundreds of millions of dollars in liability and raise questions about the company's fitness to hold Commission authorizations.

Contrary to the conclusion in today's Order, the harm to competition caused by this transaction will not be cured by the parties' commitments of future performance. These commitments not only suffer from serious infirmities but will do little to preserve, let alone enhance, competition. Indeed, the Justice Department found that the parties' commitments to this agency fell so short of protecting competition that it negotiated its own, additional guarantees.¹ As the Assistant Attorney General for Antitrust recently observed: "We were prepared to sue to block that transaction had we not gotten the settlement we did."²

Based on my review of the record, I believe that T-Mobile and Sprint have failed to prove that their merger will benefit the public interest. While the parties promise their merger will accelerate the availability of some form of "5G" for some Americans, history teaches us that the most likely effect of

¹ See Proposed Final Judgment at 6-24, *United States v. Deutsche Telecom AG*, No. 19-cv-02232 (D.D.C. July 26, 2019), ECF No. 2-2 (*DOJ Proposed Final Judgment*) (requiring, *inter alia*, (a) divestiture of Sprint's prepaid assets to DISH Network; (b) transfer of certain spectrum licenses to DISH Network; and (c) entry into an MVNO agreement between DISH Network and New T-Mobile).

² Assistant Attorney General Makan Delrahim, Remarks Before Sen. Subcomm. on Antitrust, Competition Policy, and Consumer Rights (Sept. 17, 2019). Due to the manner in which this proposed transaction appears before the Commission, the DOJ negotiated remedies are not squarely before us in today's Order.

this merger will be higher prices and fewer options for all Americans. In the short term, this merger will result in the loss of potentially thousands of jobs. In the long term, it will establish a market of three giant wireless carriers with every incentive to divide up the market, increase prices, and compete only for the most lucrative customers. The merger will reduce competition, harm consumers, and exacerbate the digital divide between the broadband “haves” and “have-nots.”

The vague promise of 5G does not change what was true when this deal was first proposed and what remains true today—the benefits of this merger, if any, simply do not outweigh the harms. Accordingly, I dissent.

DISCUSSION

Before discussing the merits of the proposed transaction, we must begin with our standard of review. Under the Communications Act, before granting its approval, the Commission must determine whether a proposed transaction would serve “the public interest, convenience, and necessity.”³ Competition principles are a key element to this review, but other factors are also relevant. The Commission must find that a transaction affirmatively serves the public interest, and therefore must determine “whether a transaction would enhance, rather than merely preserve, existing competition.”⁴ Throughout the review, moreover, the applicants to any proposed transaction “bear the burden of proving, by a preponderance of the evidence, that their proposed transaction, on balance, will serve the public interest.”⁵

With this standard in mind, let’s turn to the specifics of the proposal. T-Mobile and Sprint describe themselves as “disruptors” of the mobile wireless telecommunications services market, and by any measure they have done so. These companies developed rollover minutes, competitive pricing, soft data caps, and unlimited plans, many of which have pressured Verizon and AT&T to adopt similar innovations. Additionally, competition has driven T-Mobile and Sprint to focus on many communities largely ceded by Verizon and AT&T, including low-income, minority, and rural consumers.⁶ By their merger, T-Mobile and Sprint propose to consolidate two disruptive carriers into a single large carrier. Ordinarily, reduction in the number of carriers would be considered a reduction in competition – where once four parties competed, only three remain.

But the parties allege that their merger will increase competition by combining two smaller carriers into a single carrier with the resources to compete nationwide with AT&T and Verizon in the delivery of 5G service. As T-Mobile’s CEO put it: “This isn’t a case of going from 4 to 3 wireless companies [I]n 5G, we’ll go from 0 to 1. Only the New T-Mobile will have the capacity to deliver

³ 47 U.S.C. § 310(d).

⁴ *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd. 6327, 6338, para. 29 (2016).

⁵ *Applications of AT&T Inc. and Cellco Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Agreement*, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd 8704, 8716, para. 22 (2010).

⁶ See Sheila Deng & Diane Bartz, *Poorest U.S. Consumers Seen Hit Hard by T-Mobile, Sprint Merger* (May 2, 2018), <https://www.reuters.com/article/us-sprint-corp-m-a-low-income/poorest-u-s-consumers-seen-hit-hard-by-t-mobile-sprint-merger-idUSKBN1132VX>.

real, nationwide 5G.”⁷

This counterintuitive conclusion is at odds with both FCC precedent and mainstream antitrust thought. Eight years ago, the Commission reviewed a very similar transaction with the proposed AT&T/T-Mobile merger, which was blocked by the Justice Department and the FCC. That transaction also promised technological benefits for consumers that would outweigh any potential harm to competition.⁸ But as the Justice Department complaint challenging the merger stated: “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 Such harm would affect consumers all across the nation, including those in rural areas with limited T-Mobile presence.”⁹ Similarly, in 2014, the parties before us today called off a planned merger application after the Commission signaled its likely disapproval by blocking the carriers from making a joint bid in an upcoming wireless spectrum auction.¹⁰

These outcomes reflect how traditional antitrust analysis generally treats four-to-three mergers. As one commentator has said, “[t]he anticompetitive perils of 4-3 mergers feature prominently in the economic analysis of mergers and enforcement decisions.”¹¹ Other commentators have said, “[a] four-to-three merger is a natural break point for creating a presumption of harm to competition from coordinated effects based solely on the number of firms.”¹²

Consistent with this approach, antitrust enforcers have rejected similar four-to-three mergers in other industries. For example, in *Anthem/Cigna & Aetna/Humana*, the Justice Department sued to stop two proposed mergers in the health insurance industry that would otherwise have consolidated the “Big Five” health insurers in the United States to three.¹³ Similarly, in *Koninklijke Ahold/Delhaize Group*, the

⁷ Press Release, T-Mobile, T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition (Apr. 29, 2018), <https://www.t-mobile.com/news/5gforall>.

⁸ See Press Release, AT&T, AT&T to Acquire T-Mobile USA from Deutsche Telekom (Mar. 20, 2011), <https://www.businesswire.com/news/home/20110320005040/en/ATT-Acquire-T-Mobile-USA-Deutsche-Telekom> (arguing that the transaction would “improve network quality” and would “bring advanced LTE capabilities to more than 294 million people”).

⁹ Complaint ¶ 36, *United States v. Deutsche Telekom AG*, No. 11-cv-01560 (D.D.C. Aug. 31, 2011), ECF No. 1 (DOJ Complaint); see also *Applications of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16227, para. 76 (WTB 2011) (*AT&T/T-Mobile Staff Report*) (“The retail mobile wireless services market would be more vulnerable to coordination post-transaction. Features of this market make it likely that the remaining three nationwide providers would be able to reach a consensus on the terms of coordination (by identifying a mutually agreeable coordinated price), deter cheating on that consensus (by undercutting the coordinated price to steal high-margin business from its rivals), and prevent new competition in this market. Because these providers offer the same plans and charge the same prices nationwide, increased coordination would most likely take the form of raising the level of prices.”).

¹⁰ See Michael J. De La Merced, *Sprint and Softbank End Their Pursuit of a T-Mobile Merger* (Aug. 5, 2014), <https://dealbook.nytimes.com/2014/08/05/sprint-and-softbank-said-to-abandon-bid-for-t-mobile-us/>.

¹¹ American Research Institute, *Why the Proposed Sprint-T-Mobile Merger Should be DOA at the DOJ*, at 7 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI_Sprint-T-Mobile_Comm_6.5.18.pdf.

¹² Jonathan Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in *How the Chicago School Overshot the Mark* 235, 262 nn.152-53 (Robert Pitofsky ed., 2008).

¹³ See U.S. Dep’t of Justice, *Attorney General Loretta E. Lynch Delivers Remarks a Press Conference Announcing the Justice Department’s Actions to Block Aetna’s Acquisition of Humana and Anthem’s Acquisition of Cigna* (July

Federal Trade Commission found the proposed merger of two supermarket chains to be presumptively unlawful, where it would have reduced the number of meaningful competitors from four to three in 18 geographic markets.¹⁴

Nor is this approach unique to the United States. European regulators have repeatedly rejected four to three telecommunications mergers,¹⁵ and when they have permitted the transactions to proceed, have found that prices increase.¹⁶ This lesson is also borne out by the experience in Canada, which has only three major wireless carriers—Bell, Rogers, and Telus—and service plans that are priced similarly due to reduced competition.¹⁷

But each transaction deserves assessment on its own merits. This proceeding has been as active as any in recent memory, with nearly 40,000 submissions and 26 million pages of exhibits. T-Mobile, Sprint, and parties interested in this transaction have employed armies of lawyers and economists to argue about whether the Commission and the Justice Department should approve this deal. While I disagree with the conclusions of this Order, I recognize the outstanding job performed by the Commission’s staff in reviewing this mountain of arguments and evidence.

And what does the Commission’s expert staff conclude? Bottom line—that even after considering the parties’ claims of merger-related cost savings, the transaction as proposed would almost certainly result in “price increases in each year modeled” both industry-wide and for the Applicants’ brands from 2019 through 2024, particularly for “price-sensitive consumers” in urban areas.¹⁸

21, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-pressconference-announcing-justice>.

¹⁴ *Koninklijke Ahold, N.V.*, 2016 WL 4010995 (2016).

¹⁵ See, e.g., Summary of Commission Decision 357/15 of 11 May 2016 Declaring a Concentration Incompatible with the Internal Market, 2016 O.J. (C 357) 15, https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf (rejecting a four-to-three merger of mobile operators in the United Kingdom); European Commission, *Statement by Commissioner Vestager on Announcement by Telenor and TeliaSonera to Withdraw from Proposed Merger* (Sept. 11, 2015), http://europa.eu/rapid/press-release_STATEMENT-15-5627_en.pdf (regarding the end of a proposed four-to-three merger of mobile carriers in Denmark).

¹⁶ See, e.g., Austrian Regulatory Authority for Broadcasting and Telecommunications, *Price Increases Caused by Mergers Were Followed by Price Decreases Due to Entry of New Mobile Operators* (Mar. 14, 2016), <https://www.rtr.at/en/pr/PI14032016TK> (concluding that a four-to-three merger among mobile virtual network operators led to “average [price] increases of 20-30% in the pre-paid segment and 13-17% in the post-paid segment.”).

¹⁷ See Luke Filipowicz & Daniel Bader, *Which Canadian iPhone Carrier and Plan Should You Get: Bell, Rogers, Telus, or Another Option?* (Oct. 19, 2018), <https://www.imore.com/which-canadian-iphone-carrier-should-you-get>. See also Chris Mills, *Canada’s Embarrassingly Bad Data Plans Are Another Reason to Hate the T-Mobile-Sprint Merger* (May 2, 2018), <https://bgr.com/2018/05/02/t-mobile-sprint-merger-competition-regulation-canada-example/>; Chris Welch, *What a Combined T-Mobile and Sprint Would Look Like* (Apr. 30, 2018), <https://theverge.com/2018/4/30/17301392/t-mobile-sprint-merger-preview-phone-carrier>; Sabrina Wilkinson, *Canada’s Wireless Sector Has a Competition Problem* (June 19, 2018), <https://blogs.lse.ac.uk/mediapolicyproject/2018/06/19/canadas-wireless-sector-has-a-competition-problem/>.

¹⁸ *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations; Applications of American H Block Wireless L.L.C., DBSD Corp., Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time*, WT Docket No. 18-197, Memorandum Opinion & Order, Declaratory Ruling, and Order of Proposed Modification, FCC 19-103, paras. 163, 175 (Oct. 16, 2019) (*Sprint/T-Mobile Order*).

The reasons for this conclusion are clear. Anyone who has ever shopped for wireless service knows that the relevant market here — the mobile wireless industry — is already highly concentrated. According to the Order, this market is so dominated by the four largest carriers that T-Mobile and Sprint’s merger would trigger the Herfindahl-Hirschman Index (HHI) market concentration screen based on the number of connections throughout the country, creating a presumption that the merger is likely to increase market power and thereby reduce competition. Specifically, the order finds that the merger would trigger the HHI screen in 99 of the 100 most populous Cellular Market Areas (CMAs), including 362 CMAs constituting 82 percent of the U.S. population. This merger’s impact will be felt in many large local markets, including both New York and Los Angeles, where New T-Mobile will have more than 50 percent of the retail mobile wireless telecommunications revenues.¹⁹ But this merger will not only affect large cities. Smaller cities and towns across America will experience even greater increases in market concentration.²⁰ For these towns, New T-Mobile may be the only practical option left for wireless service. Nationwide, New T-Mobile will control more than 31 percent of the wireless market on day one.²¹

But the problems don’t stop there. Entry into the wireless industry is hard. You must spend literally billions of dollars on network infrastructure. Before you do that, you must obtain the spectrum to carry your customers’ communications. But you can’t do so if all the spectrum in that market has already been snapped up. And that’s exactly the case in most of the markets in the United States.

This merger would make the spectrum crunch much worse. Specifically, the Order concludes that New T-Mobile would hold spectrum above the Commission’s 240 megahertz “spectrum screen” in a whopping 356 CMAs covering about 82 percent of the U.S. population.²² By comparison, the rejected AT&T/T-Mobile deal would have exceeded the spectrum screen in “just” 274 CMAs.²³ The numbers get even more eye-popping at the individual market level. The Commission considers 715.5 megahertz of spectrum in each market to be “suitable” and “available” for mobile wireless service.²⁴ This merger would result in a single carrier—New T-Mobile—controlling more than half of that spectrum in nearly 150 CMAs. New T-Mobile would hold nearly three times as much spectrum per subscriber as Verizon and more than twice as much spectrum per subscriber as AT&T.²⁵

Given these outcomes, it’s not surprising that the Order concludes that the proposed merger as originally

¹⁹ Third Amended Complaint ¶¶ 49, 51, *New York v. Deutsche Telekom AG*, No. 19-05434-VM (S.D.N.Y. Sept. 18, 2019), ECF No. 214 (State AG Complaint).

²⁰ See *Sprint/T-Mobile Order* at Appx C.

²¹ *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*, Twentieth Report, 32 FCC Rcd 8968, 8982, Tbl. II.B.1. (2017) (*20th Mobile Wireless Competition Report*) (listing T-Mobile and Sprint as having 17.1% and 14.3%, respectively, of total mobile wireless connections).

²² See *Sprint/T-Mobile Order* at para. 97.

²³ *AT&T/T-Mobile Staff Report*, 26 FCC Rcd at 16211, para. 45.

²⁴ See *Sprint/T-Mobile Order* at para. 99.

²⁵ Letter from Allen P. Grunes, Counsel to Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, Docket No. 18-197, at 11 (filed May 31, 2019) (CWA Commitments Response Letter). The Order turns the Commission’s spectrum screen analysis on its head, suggesting that New T-Mobile’s massive share of mobile wireless spectrum will actually benefit the public interest because it will allow the company to deploy a “highly robust nationwide 5G network.” See *Sprint/T-Mobile Order* at para. 97.

structured would harm competition. Ordinarily, such a conclusion would mean the end of a proposed transaction. That's what happened with the AT&T/T-Mobile merger, where both the Justice Department and FCC staff reached a similar conclusion and the parties ultimately withdrew their application. It's also what happened when these same parties proposed to merge five years ago.

In this case, however, the parties have made several commitments to the Commission. These commitments include the divestiture of Boost Mobile, Sprint's pre-paid mobile wireless brand; promises to deploy 5G service throughout the country, with particular emphasis on rural consumers; a three-year price freeze; guarantees to honor existing mobile virtual network operator (MVNO) agreements; and a pledge to market and provide an in-home broadband service, again with a nod towards rural consumers.²⁶ The Order concludes that these commitments, paired with a verification and compliance regime, remedy the potential harm to competition from the merger of Sprint and T-Mobile, as originally proposed. In addition, while ostensibly not relying on the commitments by the merging parties and DISH in the *DOJ Proposed Final Judgment*,²⁷ the Order repeatedly notes where those commitments will further strengthen the allegedly pro-competitive nature of this transaction.

As I outline below, however, I have little confidence that these commitments will protect competition and result in deployment of 5G services beyond what might have occurred in the absence of a merger. The Justice Department apparently shares my skepticism, given that it negotiated the additional requirements in the *DOJ Proposed Final Judgment* even after the parties had memorialized their promises to this agency. As the Justice Department's press release announcing those requirements states:

[W]ithout the divestiture, the proposed acquisition would eliminate competition between two of only four facilities-based suppliers of nationwide mobile wireless services The combination of T-Mobile and Sprint would eliminate head-to-head competition between the companies and threaten the benefits that customers have realized from that competition in the form of lower prices and better service.²⁸

This Decision Has Serious Procedural Issues. Before discussing my substantive concerns with the commitments, I must first review the procedural shortcomings of this proceeding. First, our review should have been held in abeyance following the Chairman's recent announcement of an investigation into Sprint's alleged misappropriation of Lifeline support for 885,000 ineligible accounts.²⁹ If substantiated, this would represent the misuse of nearly 10 percent of the funds for the entire program.³⁰

²⁶ Letter from Regina M. Keeney, Counsel to Sprint Corporation, and Nancy J. Victory, Counsel to T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, Docket No. WT 18-197, at 2-7 (filed May 20, 2019) (Sprint/T-Mobile Commitments Letter).

²⁷ See *Sprint/T-Mobile Order* at para. 36 n.110. (“[W]hile our conclusion that the transaction as conditioned serves the public interest does not depend on the *DOJ Proposed Final Judgment*, as discussed elsewhere in this MO&O, we find that the *DOJ Proposed Final Judgment* provides further confidence that the proposed transaction as conditioned is unlikely to cause public interest harms.”).

²⁸ Press Release, U.S. Dep't. of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>.

²⁹ Press Release, FCC, FCC Learns that Sprint Received Tens of Millions in Lifeline Subsidies-But Provided No Service (Oct. 1, 2019), <https://docs.fcc.gov/public/attachments/DOC-359820A1.pdf>.

³⁰ *Id.*

The fact that the Commission did not learn about potential violations of this gravity until the 11th hour of this proceeding raises serious questions about the accuracy and completeness of our merger review. Based solely on the information disclosed to date, Sprint may be responsible for the most egregious violations of our Lifeline rules in FCC history. Until that investigation is complete, we cannot fully evaluate the character and fitness of the applicants and exercise our statutorily defined obligation to grant only license transfers that serve the public interest.³¹ I therefore requested that we suspend our review of the merger application until completion of the investigation and any related enforcement action. Unfortunately, the majority rejected my request.

I similarly requested that the Commission seek public comment on the parties' commitments from the May 20, 2019 filing and the *DOJ Proposed Final Judgment*. Under the Administrative Procedure Act, agencies must provide "an adequate opportunity for comment" on Commission proceedings.³² Failure to seek comment on "an important aspect of the problem" before the Commission is deemed arbitrary and capricious.³³ Given that the Order concludes that the agency would otherwise deny this merger but for T-Mobile and Sprint's commitments, it is difficult to imagine a more important aspect of the "problem" at hand. Yet despite repeated calls to put both sets of commitments out for public comment, the agency has failed to do so.³⁴

Instead, the Order argues that a formal Public Notice and comment period is unnecessary because (1) it isn't required under the Administrative Procedure Act or Commission rules; (2) the Order adequately assesses the parties' commitments; and (3) interested parties have had an adequate opportunity to comment during the pendency of the transaction.³⁵ The Order also claims that it does not rely on the commitments in the *DOJ Proposed Final Judgment* to justify its approval³⁶ and that, in any event, the commitments relating to DISH will be subject to notice and comment as separate proceedings.³⁷

Regarding the first objection, public notice and comment are required as a practical matter under

³¹ See Supplement to Petition to Deny of Rural Wireless Association, Inc., et al., WT Docket No. 18-197, at 2-3 (filed Oct. 3, 2019) (arguing that the Commission's longstanding precedent makes clear that "a company cannot sell or transfer a license when the company's fitness to hold a license is at issue") (RWA Supplement). The majority dismisses this argument, claiming that the potential violations do not rise to the level of potential disqualification. See *Sprint/T-Mobile Order* at para. 45. Given the unknown scale, scope and duration of the potential violations, I believe that we should have completed our fact-finding before making this determination.

³² *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728 (D.C. Cir. 2019).

³³ *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁴ See, e.g., Press Release, FCC, Commissioner Geoffrey Starks Calls for Withdrawal on Draft Sprint/T-Mobile Merger Order Based on Serious Misconduct Allegations (Sept. 24, 2019); RWA Supplement at 4-6 (calling the failure to consider the effects of both the *DOJ Proposed Final Judgment* and the DISH commitments through public comment "the epitome of arbitrary and capricious decision making").

³⁵ *Sprint/T-Mobile Order* at para. 36 n.110. Though the Order suggests that the pendency of the Tunney Act proceedings afforded parties two months to submit comments to the Commission, this ignores the fact that the district court's proceedings are separate from the Commission's review, do not direct comments to the Commission, and use a different standard of review. Further, the deadline to submit comment in the Tunney Act proceeding passed only five days before the Commission adopted the Order, and the Department of Justice did not publicly file the comments it received before the Commission acted. Thus, the Tunney Act proceedings can hardly be said to have benefitted the Commission's record.

³⁶ *Id.*

³⁷ *Id.*

the Administrative Procedure Act for the reasons discussed above. As courts have observed, “[w]hen an agency departs from past practice, it ‘must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’ It must, in short, explain why it changed its policy.”³⁸ To seek public notice and comment would be consistent with Commission precedent and practice both generally and in this proceeding.

For example, in the *Sinclair/Tribune* merger proceeding, the parties filed their original merger application, then nearly one year later, proposed to divest several more stations. Rather than immediately proceeding with a decision, the Commission issued a Public Notice asking for public comment on the revised deal and directing the parties to provide more details about the divestiture.³⁹ Nor is such treatment unique to broadcast divestitures. In the *USWest/Qwest Merger Order*, the Commission sought another round of public comment where divestitures materially changed the nature of the proposed transaction.⁴⁰ And it has done so in its review of other major transactions as well.⁴¹ Even in this proceeding, the Commission has twice sought public comment on new information in the record,⁴² and has recognized that it “has a strong interest in ensuring a full and complete record upon which to base its decision in this proceeding.”⁴³

The Order dismisses the need for formal public notice and comment on the parties’ commitments because the Order supposedly adequately discusses these issues. As the U.S. Court of Appeals for the D.C. Circuit has stated, however, notice and comment “reintroduce public participation and fairness to affected parties after governmental power has been delegated to unrepresentative agencies,” and “assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.”⁴⁴ By skipping formal notice and comment on critical changes to the original merger proposal – modifications that the Order itself states are dispositive

³⁸ *CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015).

³⁹ *Media Bureau Establishes Consolidated Pleading Cycle for Amendments to the June 26, 2017 Applications to Transfer Control of Tribune Media Co. to Sinclair Broadcasting Group, Inc. Related New Divestiture Applications and Top-Four Showings in Two Markets*, MB Docket No. 17-179, Public Notice, 33 FCC Rcd 4960 (MB 2018).

⁴⁰ *See Qwest Commc’ns Int’l Inc. and US WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, 15 FCC Rcd 53276, 53278, para. 3 (2000).

⁴¹ *See, e.g., Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commissions Licenses and Lines Pursuant to Sections 214 and 301(d) of the Communications Act and Parts 5, 22, 25, 25, 63, 90, 95, and 101 of the Commission’s Rules*, CC Docket No. 98-141, 14 FCC Rcd 14712, paras. 349, 351 (1999); *Commission Seeks Comment on Proposals Submitted by AT&T and BellSouth Corp.*, WC Docket No. 06-74, Public Notice, 21 FCC Rcd 11490 (WCB 2006).

⁴² *Commission Announces Receipt of Supplemental Analysis from T-Mobile; Establishes Comment Deadline*, WT Docket No. 18-197, Public Notice, 33 FCC Rcd 11157 (WTB 2018) (seeking public comment on the Applicants’ Cornerstone economic study); *Commission Announces Receipt of Additional Analysis and Information Requests from T-Mobile and Sprint; Establishes Comment Deadline*, WT Docket No. 18-197, Public Notice, 34 FCC Rcd 1122 (WTB 2019) (seeking comment on new economic simulations, engineering, and home broadband commitments).

to the outcome here – the majority ignores these important policy objectives.⁴⁵

Second, while the Order points out that the parties’ commitments to both the Commission and the Justice Department have been publicly available in the record, such an argument undermines the point of public notice and comment in the first place. Simply having a document in the public record is not the same as a formal Public Notice describing the new information and identifying the questions on which the Commission is seeking public input. If this were the case, we could dispense with issuing Public Notices in the first place, and simply open a docket whenever we consider a policy issue. By their nature, Public Notices draw heightened attention from the media, Congress and other stakeholders and therefore are more likely to result in useful comments than no announcement at all. They focus attention on a given issue, and often describe the questions on which the Commission seeks feedback. Moreover, as noted above, any Public Notice could also direct the merging parties to provide additional information to clarify the nature of their commitments.⁴⁶ Instead, T-Mobile, Sprint and other interested parties simply engaged in the continued filing of *ex partes* without any guidance from the Commission.

Finally, these procedural problems are not cured by the Order’s claim that its decision does not rely on the *DOJ Proposed Final Judgment* commitments and that the public will have adequate opportunity to comment on the license modifications and transfers of control reflected therein. Notwithstanding the Order’s claims to the contrary, the decision repeatedly cites the *DOJ Proposed Final Judgment* commitments for support of its conclusion of the public interest benefits of the transaction.⁴⁷ And even if the public can someday comment on aspects of the DOJ commitments, that opportunity will come too late to prevent any public interest harm, as the transaction likely will have closed by the time the Commission issues its decision on the proposed license modifications and transfers of control.

The Sprint/T-Mobile Merger Will Harm Competition—Boost Mobile Divestiture. Turning to the substance of the commitments, the parties have agreed to divest Sprint’s Boost Mobile business, including its stores, employees, and current subscribers, as well as to provide the buyer with a wholesale

⁴³ Letter from David B. Lawrence, Director, T-Mobile/Sprint Transaction Task Force, FCC, to Kathleen O’Brien Ham, T-Mobile US, Inc. and Vonya B. McCann, Spring Corporation (Sept. 11, 2018) (on file in 18-197), <https://docs.fcc.gov/public/attachments/DOC-354053A1.pdf>.

⁴⁴ *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) and *Guardian Federal Savings & Loan Insurance Corp.*, 589 F.2d. 658, 662 (D.C. Cir. 1978)).

⁴⁵ Moreover, it deprives the Commission of a complete record on which to premise its findings, a fact which has not gone unnoticed by the parties. For example, DISH has noted that the various economic analyses submitted into the record do not pertain to the current form of the transaction. See Letter from Jeffrey H. Blum, Senior Vice President, Public Policy & Government Affairs, DISH Network Corp. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197, at 2 (Aug. 1, 2019).

⁴⁶ See, e.g., *infra* n.64.

⁴⁷ See, e.g., *Sprint/T-Mobile Order* at paras. 292, 374, 381 (referring approvingly to the commitments contained in the DOJ Proposed Final Judgment: “[w]e expect that combining DISH’s 5G deployment commitments with the assets it is receiving from and agreements it has reached with T-Mobile and Sprint, pursuant to the *DOJ Proposed Final Judgment*, will advance the deployment of advanced 5G wireless services. We anticipate these arrangements will promote competition;” “the divestiture and wholesale-related provisions in the Applicants’ commitments to the Commission, and in the *DOJ Proposed Final Judgment*, give us further confidence that the transaction is unlikely to cause competitive harm due to impacts on wholesale providers;” “in addition to our imposing DISH’s commitments as conditions of our approval, we note that the *DOJ Proposed Final Judgment*, to which DISH has been joined as a defendant, would require DISH comply with these commitments, and provides for appointment of a monitoring trustee”).

agreement containing rates and terms that “will ensure that New Boost will be an aggressive competitor.”⁴⁸ The Order concludes that the Boost divestiture conditions will create a strong competitor that will address the potential competitive harms raised by the merger, “particularly in the densely-populated areas where the transaction raises the greatest risk of net competitive harm.”⁴⁹

But this divestiture will do little to address the harmful effects of the proposed merger.⁵⁰ First, as the Order acknowledges, Boost will not be a wholly independent, facilities-based competitor. Instead, it will be an MVNO, wholly dependent on New T-Mobile’s spectrum and network, making it a weak check on anticompetitive behavior. Non-facilities-based operators have no ability to create capacity, upgrade their networks, or extend their network coverage. Moreover, as industry observers have noted, even well-funded MVNOs from established telecom companies do not pose a competitive threat to facilities-based carriers in the same manner as AT&T and Verizon.⁵¹

Moreover, Boost Mobile will not even be a strong MVNO. At nine million customers, Boost Mobile is not even the largest pre-paid brand involved in this transaction—T-Mobile’s Metro business has more than twice as many customers.⁵² As internal Sprint documents from 2018 show, even Sprint executives have questioned Boost’s value and potential competitiveness.⁵³ Analysts claim that Boost Mobile has a churn rate of five percent per month, meaning that over the course of a year, it must replace 60 percent of its customers just to stay at existing subscriber levels.⁵⁴ Compare that to T-Mobile, which has a churn rate of about one percent for its post-paid service.⁵⁵ In addition, due to poor performance over the last year,⁵⁶ Sprint’s pre-paid business, including Boost Mobile, has lost about 3,000 retail outlets at Target,⁵⁷ Best Buy, and Meijer.⁵⁸

The Order Overstates the Public Interest Benefits of the 5G Deployment Commitments, Particularly for Rural America. The Order also places tremendous importance on another major

⁴⁸ Sprint/T-Mobile Commitments Letter at 5-6.

⁴⁹ *Sprint/T-Mobile Order* at para. 196.

⁵⁰ See CWA Commitments Response Letter at 3-5.

⁵¹ Susan Crawford, *Why an Army of Small Companies Is Defending the Sprint/T-Mobile Merger* (Sept. 11, 2018), <https://www.wired.com/story/sprint-t-mobile-merger-army-of-telecom-defenders/>.

⁵² John Legere, *Delivering on Our Promises: From MetroPCS to the New T-Mobile* (Apr. 24, 2019), <https://www.t-mobile.com/news/delivering-on-promises-metropcs>.

⁵³ See Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197, at 2 (filed May 23, 2019) (citing SPR-FCC-11655063 through SPR-FCC-11655069).

⁵⁴ Mark Davis, *Sprint Struggles in Prepaid Competition* (Jan. 27, 2016), <https://www.kansascity.com/news/business/technology/article56889863.html>.

⁵⁵ See, e.g., *Sprint/T-Mobile Order* at para. 86 n.273; T-Mobile, *T-Mobile Posts Its Best Customer Results Yet, Reports Lowest Ever Q4 Postpaid Phone Churn, Beats Customer Guidance for FY 2018* (Jan. 9, 2019), <https://www.t-mobile.com/news/t-mobile-customer-results-q4-2018>; Mike Farrell, *Dishing Sprint T-Mobile* (June 17, 2019), <https://www.multichannel.com/blog/dishing-sprint-t-mobile>; and Jon Tenebruso, *T-Mobile Earnings Jump on Subscriber Gains, Lower Churn* (May 1, 2019), <https://www.fool.com/investing/2019/05/01/t-mobile-earnings-jump-on-subscriber-gains-lower-c.aspx>.

⁵⁶ Roger Entner, *Industry Voices-Entner: The Skinny on the T-Mobile/Sprint/Dish Deal* (Aug. 2, 2019), <https://www.fiercewireless.com/wireless/industry-voices-entner-sorting-out-good-and-bad-t-mobile-sprint-DISH-deal>.

component of T-Mobile and Sprint's commitments—buildout of a nationwide 5G network.⁵⁹ The record is replete with upbeat statements by T-Mobile and Sprint executives about the companies' plans to deploy 5G in the absence of a merger.⁶⁰ But the Commission's Network Build Model suggests that the merger isn't necessary to fuel 5G deployment or U.S. leadership on 5G,⁶¹ and the Order admits that it can neither quantify nor verify various network efficiency and complementarity claims from T-Mobile and Sprint.⁶² Notwithstanding this evidence, however, the Order concludes that this merger "will enable deployment of a more robust, nationwide 5G network than either standalone company could deploy on its own."⁶³ Once again, the Order bases this conclusion largely on the strength of the commitments from the parties, pointing to the buildout commitments, which lay out the timetable and scope of a nationwide 5G buildout.

T-Mobile and Sprint's deployments under these commitments are unable to be verified. T-Mobile and Sprint claim that New T-Mobile will provide mid-band coverage to 6.5 million more rural Americans three years after the merger, and an additional 6.1 million rural Americans six years after the merger. But T-Mobile and Sprint have not explained how they calculated the numbers attached to the commitments, have offered no updated coverage maps, and have failed to provide an updated version of the engineering model, all of which leave unresolved questions in my mind.⁶⁴

The Merger Will Undermine Rural Service by Making Roaming Agreements More One-Sided.

On the subject of rural broadband, the Order ignores the impact of this transaction on the roaming agreements that have been critical to providing service to rural America. Without the low-band spectrum necessary to provide coverage outside of urban areas,⁶⁵ Sprint has been forced to enter into roaming agreements with rural carriers, allowing them to more effectively provide services to their communities.⁶⁶ T-Mobile and the other major facilities-based carriers, however, have ample low-band spectrum and therefore offer roaming on less favorable terms, as they can service these areas on their own.⁶⁷ With respect to T-Mobile specifically, commenting parties allege that the carrier charges roaming rates as high as 20 times those of Sprint,⁶⁸ has been slow or unwilling to adopt Voice-over-LTE (VoLTE) roaming

⁵⁷ See, e.g., Diana Goovaerts, Sprint Checks Out of Target (Mar. 28, 2019), <https://www.mobileworldlive.com/featured-content/top-three/sprint-checks-out-of-target/> (noting that Sprint pulled both Boost Mobile and Virgin Mobile brands from Target in mid-2018).

⁵⁸ The fact that the majority finds that the *DOJ Proposed Final Judgment* provides "further confidence" on top of their approval strikes me as topsy-turvy. See *Sprint/T-Mobile Order* at para. 36 n.110. To the contrary, the mere fact that the Justice Department sought further concessions from T-Mobile and Sprint despite their promise to divest Boost Mobile demonstrates DOJ's judgment that the original divestiture plan did not adequately protect competition. It is not altogether clear to me that the current shortcomings in this transaction are remedied by DISH's proposed acquisition of Boost Mobile and Sprint's other pre-paid assets, i.e., Virgin Mobile and the Sprint-branded pre-paid business. Given Boost Mobile's rapidly disappearing retail presence and its high churn rate (5.4 million customers per year for a company with only nine million subscribers), once its acquisition of the Sprint pre-paid businesses is complete, DISH will hit the starting line, in my opinion, at a significant disadvantage. The company will need to invest substantial resources simply to maintain its position and, according to press accounts, has nearly \$15 billion in debt today, is obligated under the *DOJ Proposed Final Judgment* to pay as much as \$5 billion for Sprint pre-paid and spectrum assets, and will invest another \$10 billion in building out a nationwide 5G network by 2023. See Motley Fool, *DISH Network Corp Q2 2019 Earnings Call Transcript* (July 29, 2019), <https://www.fool.com/earnings/call-transcripts/2019/07/30/dish-network-corp-dish-q2-2019-earnings-call-trans.aspx>; Nabila Ahmed et al., *DISH Agrees to \$5 billion Deal for Wireless Assets* (July 23, 2019), <https://www.bloomberg.com/news/articles/2019-07-24/dish-is-said-to-agree-to-5-billion-deal-to-buy-wireless-assets>; Simply Wall St., *Here's Why DISH Network Has a Meaningful Debt Burden* (July 31, 2019), <https://finance.yahoo.com/news/heres-why-dish-network-nasdaq-120652551.html>.

DISH will need to make those investments as well as those required for building out a retail presence (estimated at \$2-3 billion, see Roger Entner, *supra* note 56) and maintaining and improving its network year-to-year, given that the existing facilities-based carriers invest \$10 billion or more each year on such expenses. For example, the

agreements with rural carriers, and has a history of turning off outbound roaming for its own customers when they travel out of network, depriving those customers of service and rural wireless carriers of their roaming fees.

New T-Mobile will have plenty of low-band spectrum and therefore will have no incentive to serve rural carriers in the way that Sprint does today. But the parties claim that their network improvements will allow New T-Mobile to offer better terms to roaming partners. They also have agreed to permit parties with existing roaming agreements with both Sprint and T-Mobile to pick what rates will govern their relationship with New T-Mobile.⁶⁹

But these short-term commitments do not address the concerns raised by commenters about the long-term impact on their roaming arrangements. As commenters have pointed out, there is nothing in these commitments governing future roaming agreements, including what happens when existing agreements expire. With respect to 5G services, where existing agreements are silent, rural carriers will have no guarantees of access to roaming for such advanced services, and the Order doesn't deal with this issue. I am left with serious concerns about the impact of this transaction on rural carriers and service to rural Americans.

The Sprint/T-Mobile Merger Will Harm Competition—Pricing. As noted above, the Order finds that the proposed merger would likely result in increased consumer prices, particularly in the first few years after the transaction closes.⁷⁰ To address concerns about price increases, T-Mobile and Sprint have promised that New T-Mobile “will make available the same or better rate plans as those offered by T-Mobile or Sprint as of [February 4, 2019] for three years following the merger.”⁷¹ The parties have clarified that the phrase “better plans” refers to “the same plan with a lower price; the same plan with more data for the same price; or the same plan with a lower price and more data.”⁷² The Order finds that

merging parties claim that New T-Mobile will invest “nearly \$40 billion within three years of closing to deliver a more robust nationwide 5G network.” Sprint/T-Mobile Commitments Letter at 1.

Further, if DISH marshals the financial resources to fund its new business, there are technical and logistical challenges presented by its buildout deadlines. DISH has committed to deploying a “nationwide 5G network” using the latest 5G standard covering 70 percent of the U.S. population by June 14, 2023 – about 3 ½ years from now. *See* Letter from Jeffrey H. Blum, Senior Vice President, Public Policy & Government Affairs, DISH Network Corp. to Donald Stockdale, Chief, Wireless Telecommunications Bureau, FCC, DBSD Corporation, AWS-4, Lead Call Sign T070272001, et al., at 3 (filed July 26, 2019) (DISH Commitments Letter). The obstacles to meeting such a commitment are daunting and will require a start-from-scratch deployment at an unprecedented pace, using resources that have not been arranged, technology for which the standard has not yet been finalized, at sites that have not yet been voluntarily decommissioned by New T-Mobile. Indeed, in an earlier proceeding regarding its AWS-4 commitments, DISH claimed that it needed at least 4 years to deploy a 4G network covering only 20 percent of the population. *See* Comments of DISH Corporation, WT Docket No. 12-70 at 22-23 (filed May 17, 2012) (“Even at four years, a 30 percent POPs coverage requirement is aggressive and likely unrealistic.”).

Finally, even if DISH somehow evolves from the Boost and other Sprint assets into a facilities-based competitor, I am concerned that that the new “Big 3” wireless carriers will use the buildout period between now and 2023 to divide up the market, capture the most lucrative customers, and leave DISH at a significant financial disadvantage. Four years is a long time.

⁵⁹ Notably, this isn't the first time that the Commission has reviewed a proposed wireless carrier merger where the parties promised broadband deployments that would take place only if the merger was approved. Eight years ago, AT&T and T-Mobile promised their merger would deliver “a significant expansion of LTE-based mobile broadband coverage” that would result in the “upgrading of the entirety of [New AT&T's] wireless footprint within six years of closing.” *See AT&T/T-Mobile Staff Report* at para. 245. Like here, AT&T and T-Mobile further argued that rural Americans would experience much of the benefits of the transaction, including higher speeds and lower latency. *Id.*

“the price commitment will help to address some of the predicted static harms arising from the proposed transaction in the first three years [after the merger]” and that “it would help offset, in concert with other commitments, the prospective harms associated with the predicted unilateral effects [of the merger].”⁷³

Mobile wireless prices in the United States have steadily declined in the last few years.⁷⁴ As the Order acknowledges, this is due in large part to the efforts of “maverick” carriers like T-Mobile and Sprint, who have sought to compete with larger carriers by introducing innovative pricing plans and features that the larger carriers have been forced to match.⁷⁵ Elimination of one of these maverick carriers—as the Order also acknowledges—will remove these incentives and encourage the remaining carriers to increase prices.⁷⁶ Given that prices have been declining due to competition, promising to keep prices flat does not address the harm to competition resulting from the merger. Moreover, a time-limited pricing guarantee is not a substitute for preserving the competition that will be lost with the permanent elimination of Sprint as a nationwide facilities-based carrier, particularly regarding the promotions and device deals that T-Mobile and Sprint have used to attract customers.

Moreover, as DISH pointed out when it was in opposition to the merger, the parties’ pricing commitment raises numerous questions, including the definitions of the phrases “same plan” and “same price.”⁷⁷ For example, what happens if New T-Mobile introduces a non-monetary benefit (e.g., Netflix) to a legacy plan? May it change the price at that point? In addition, the parties admit that the pricing commitment does not include device or handset offerings, which would allow New T-Mobile to impose a

at para. 247. Nevertheless, in that proceeding, the staff rejected the parties’ claims that only merger approval would adequately fuel broadband deployment.

⁶⁰ See *Sprint/T-Mobile Order* at para. 225 n.760.

⁶¹ *Id.* at para. 250. See also *id.* at para. 236 n.816.

⁶² *Id.* at para. 240 (“Although we do not have a basis in the record to precisely quantify this [network complementarities] effect, we acknowledge that it provides additional reason to credit the substantial network deployment claimed by the Applicants and imposed as a condition of our approval.”); *id.* at 241 (“There remain disputes regarding the verifiability of particular benefit claims because the Applicants’ claimed benefits involve 5G technologies and marketplaces that will continue to develop over time—rather than long-established technologies and services.”).

⁶³ *Id.* at para. 217.

⁶⁴ See CWA Commitments Response Letter at 6.

⁶⁵ *20th Mobile Wireless Competition Report*, 32 FCC Rcd at 8996, Tbl. II.E.3. While Sprint licenses a total of 188.3 population-weighted MHz, only 13.9 MHz is in low-band spectrum. By comparison, AT&T, T-Mobile, and Verizon, hold 148.4 MHz, 109.7 MHz, and 114.9 MHz respectively, of which 55.4 MHz, 40.7 MHz, and 46.9 MHz is low-band. The merged Sprint and T-Mobile would hold 54.6 MHz.

⁶⁶ See, e.g., Marina Lopes & Alina Selyukh, *Sprint Grabs Lifeline with Rural U.S. Roaming Deals* (Aug. 29, 2014) (“Sprint’s . . . CEO Marcelo Claure said that the networks of rural carriers ‘are really important in places where we haven’t and don’t intend to build our network.’”).

⁶⁷ See, e.g., Petition to Deny of the Rural Wireless Association, Inc., WT Docket No. 18-197, at 6-9, 11-16 (filed Aug. 27, 2018) (RWA Petition). See also Petition to Deny of the Greenlining Institute, WT Docket No. 18-197, at 8 (filed Aug. 27, 2018), (Greenlining Petition); Petition to Deny of NTCA-The Rural Broadband Association, WT Docket No. 18-197, at 8-9 (filed Aug. 27, 2018); Petition to Deny of Union Telephone Co. et al., WT Docket No. 18-197, at 39-41 (filed Aug. 27, 2018); RWA Reply at 3; Union Telephone Reply at 14-16; and Letter from Eric Steinmann, Development Manager, NTCH, Inc. and Thomas Wise, President, Wise Electronics, Inc., to Hon. Ajit Pai, Chairman, FCC, WT Docket No. 18-197, at 2 (filed June 12, 2019).

fee on customers using certain handsets or increase the cost to purchase or upgrade a new phone. As it deploys 5G service, it might even require 5G-enabled phones to be on a new plan. The parties also state that New T-Mobile “can cancel or modify benefits under legacy plans if those benefits are provided by third-party services.” This would allow the carrier to terminate benefits like free in-flight Wi-Fi service and free subscriptions to streaming services and restrict or eliminate third-party promotions. For me, this is entirely too many loopholes to a merger commitment.

The Sprint/T-Mobile Merger Will Harm Resellers and their Customers. As stated earlier, MVNOs offer mobile wireless service by reselling service purchased wholesale from facilities-based carriers like T-Mobile and Sprint. According to one estimate, T-Mobile and Sprint “provide network service for more than 60% of MVNOs’ subscribers through the wholesale network hosting contracts between the MVNOs and the merging firms.”⁷⁸ Sprint, in particular, has a record of favorable MVNO agreements, and is the only facilities-based carrier that has granted MVNOs “core control,” allowing an MVNO to use its own spectrum and facilities in addition to Sprint’s. Through such arrangements, an MVNO can reduce its wholesale costs and provide customers with new and improved services.

For example, Sprint has an innovative “iMVNO” arrangement with Altice, under which Sprint has granted Altice “core control” in exchange for the use of Altice’s sites and services to install its own radio equipment and efficiently densify its network in areas where necessary.⁷⁹ This has benefited both Altice and Sprint, which “advertises that it has increased download speeds in Long Island . . . by 135% and is now the ‘most improved network’ in New York City and on Long Island.”⁸⁰ Such arrangements are particularly advantageous for cable providers, which already have extensive infrastructure in addition to some spectrum holdings. Indeed, before the merger announcement, Sprint had entered negotiations to grant core control with both Comcast and Charter.⁸¹

⁶⁸ RWA Petition at 13.

⁶⁹ Public Interest Statement of T-Mobile US, Inc. and Sprint Corporation, WT Docket No. 18-197, at 69 (filed June 18, 2018) (Public Interest Statement); Joint Opposition of T-Mobile US, Inc. and Sprint Corporation, WT Docket No. 18-197, at 98-99 (filed Sept. 17, 2018) (Joint Opposition); Letter from R. Michael Senkowski, Counsel to T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197, at 2 (filed Nov. 19, 2018) (T-Mobile Nov. 19, 2018 *Ex Parte* Letter).

⁷⁰ *Sprint/T-Mobile Order* at para. 163 (finding consumer price increases to be likely for each year modeled through 2024).

⁷¹ Letter from Nancy Victory, Counsel to T-Mobile US, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket. No. 18-197, at 2 (filed Feb. 4, 2019).

⁷² Letter from Nancy Victory, Counsel to T-Mobile US, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket. No. 18-197, at 3 (filed Feb. 12, 2019).

⁷³ *Sprint/T-Mobile Order* at para. 212.

⁷⁴ *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, 33 FCC Red 12558, 12574-75, paras. 19-20 (2018).

⁷⁵ *Sprint/T-Mobile Order* at para. 181.

⁷⁶ *Id.* at para. 179.

Sprint has entered into these favorable MVNO agreements for reasons similar to its roaming arrangements – it simply lacks enough low-band spectrum. As noted previously, Sprint has the least amount of low-band spectrum of the four nationwide facilities-based carriers. Arrangements like the Altice iMVNO agreement allow Sprint to avoid the difficult choice between incurring the expense of building more facilities to utilize its mid-band spectrum or allowing its service to suffer. By contrast, however, New T-Mobile has no plans to grant MVNOs core control.⁸² Reducing the options available to MVNOs will reduce the quality of service they can provide, stifle innovation, and increase prices to consumers.

The Order dismisses these concerns as “speculative,” and claims that MVNOs will benefit from New T-Mobile’s expanded network capacity.⁸³ Consistent with the overall approach in the decision, the Order even comes to the counterintuitive conclusion that “even though the number of providers would be fewer, the market for wholesale services could become more competitive.”⁸⁴ Finally, to the extent concerns remain, the Order notes that the parties have agreed that New T-Mobile will honor their existing MVNO agreements, including the deal with Altice.⁸⁵

But if an extensive network were the key to providing service to MVNOs, the larger facilities-based carriers like AT&T and Verizon would already be doing so. Instead, however, these large carriers have little incentive to enter into agreements like the iMVNO agreement between Altice and Sprint – they simply don’t need Altice’s infrastructure to obtain sufficient coverage. Instead, they are more likely to regard such arrangements as cannibalizing their own customer base.⁸⁶ This is consistent with the concerns raised by the Justice Department in its Complaint challenging the merger, even after the parties’

⁷⁷ See Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (filed Feb. 7, 2019); Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (filed Feb. 14, 2019).

⁷⁸ Declaration of Joseph Harrington et al., Exh. B to Petition to Deny of DISH Network Corp., at 11 (Harrington/Brattle Decl.). See also *id.* at 38 (“Based on our estimates of the number of the wholesale connections, Sprint and T-Mobile (combined) account for more than 60% of wholesale connections (i.e., 26.6 million of the estimated 42.5 million connections.”).

⁷⁹ Altice states that it “rel[ies] critically, but minimally, on mobile network operator (‘MNO’) partners, utilizing only the radio access network (‘RAN’) of the MNO . . . [while] supply[ing] all other aspects of the mobile offering, including the SIM, roaming and network partners, data and Internet access, voice messaging, rate charging, customer care, and billing.” Altice Reply at 2 (rec. Oct. 31, 2018).

⁸⁰ Altice Information Request Response, Exh. 1, Declaration of Michael Cragg and Eliana Garcés at 35 (Jan. 28, 2019).

⁸¹ State AG Complaint ¶ 89.

⁸² *Id.* ¶ 90.

⁸³ *Sprint/T-Mobile Order* at para. 290.

⁸⁴ *Id.* at para. 291.

⁸⁵ See *Sprint/T-Mobile Order* at para. 289; Sprint/T-Mobile Commitments Letter at 7, Attach. 4 (commitment to amend existing agreement, subject to good-faith negotiations, to expand Altice’s access to New T-Mobile’s 5G and other network facilities).

⁸⁶ See Roger Linguist, Chairman and CEO, MetroPCS Communications Inc., Remarks at the Sanford C. Bernstein Strategic Decisions Conference (June 4, 2010) (“[A reseller is] completely at the mercy of the carrier that’s selling you the bits and the -- or the bytes and the minutes. So I think it’s really the question about what the -- it’s not a

May 20, 2019 commitments. As the Complaint states:

Competition between Sprint and T-Mobile to sell mobile wireless service wholesale to MVNOs has benefited consumers by furthering innovation, including the introduction of MVNOs with some facilities-based infrastructure. *The merger's elimination of this competition likely would reduce future innovation.*⁸⁷

At a minimum, New T-Mobile is likely to seek higher prices from new MVNO agreements.⁸⁸ And existing MVNO agreements are unlikely to be renewed on the currently favorable terms.⁸⁹ By raising prices for MVNO providers, this merger is likely to both discourage new infrastructure based carriers like Altice and result in higher prices to consumers that rely on such providers, including 45 percent of pre-paid service customers, who tend to have lower incomes.⁹⁰

Harm to Lifeline Customers. Relatedly, the loss of competition in the MVNO market will negatively affect the Lifeline program, which provides communications services to the most vulnerable in our society. With the exception of Sprint (now alleged to have committed the largest set of Lifeline violations in FCC history), none of the four largest mobile wireless carriers is a nationwide Lifeline provider.⁹¹ Thus, most Lifeline participants are MVNOs and will be impacted by the above issues – rising prices and lack of access to infrastructure sharing arrangements.

But the harm to the Lifeline program could extend beyond the harm to Lifeline MVNOs. T-Mobile currently offers Lifeline service in nine states through its Metro pre-paid brand, while Sprint offers Lifeline nationwide through both Virgin Mobile (as its Assurance brand) and Boost Mobile. While the parties have committed that New T-Mobile will “continue the Lifeline services currently offered by T-Mobile and Sprint,”⁹² that commitment provides no specifics about the duration of this commitment and

question of what TracFone does, it's a question of what does Verizon, AT&T, and T-Mobile and Sprint do. And that question can only be answered by how many degrees of separation do they want so that the cannibalization of their more treasured contract business doesn't get impacted by what they end up doing selling minutes and bytes to the -- to these resellers.”).

⁸⁷ DOJ Complaint ¶ 22 (emphasis added).

⁸⁸ Harrington/Brattle Decl. at 11-12. (“We calculate increases in vertical ‘upward pricing pressure’ index values of 22.7% for T-Mobile’s current wholesale contracts and 48.0% for Sprint’s current wholesale contracts.”).

⁸⁹ See Declaration of Michael Cragg and Eliana Garcés, Exh. 1 to Altice Information Request Response, at 41, Appx. 1.

⁹⁰ See Harrington/Brattle Decl. at 37, 54, Tbl. 13. These concerns are unlikely to be remedied by the *DOJ Proposed Final Judgment*. The Order argues that DISH, as a facilities-based provider, will provide an excellent counterweight to any reduction in competition for the provision of wholesale services caused by this transaction. The DOJ agreement also requires New T-Mobile to extend its existing MVNO agreements until seven years after consummation of the merger. As with the pricing guarantee, time-limited commitments regarding the MVNO agreements are no substitute for the structural protections inherent in the current robust competition.

⁹¹ T-Mobile currently offers Lifeline service in nine states. Greenlining Petition at 10.

⁹² Public Interest Statement at 51 n.177. T-Mobile also has publicly stated that “New T-Mobile will maintain the existing T-Mobile and Sprint Lifeline program throughout the country indefinitely, barring fundamental changes to today’s program.” Eli Blumenthal, *T-Mobile Promises to Support Low-Income Lifeline Program 'Indefinitely' if Merger Approved* (Mar. 11, 2019), <https://www.usatoday.com/story/tech/2019/03/11/t-mobile-well-keep-low-income-offers-indefinitely-merger/3129108002/>. Notably, however, the Order does not expressly condition its approval of the transaction on New T-Mobile’s continued support to the Lifeline program. See *Sprint/T-Mobile*

is ambiguous at best about the scope. What we do know is that T-Mobile previously expressed no interest in participating in the program as a facilities-based carrier, eliminated T-Mobile's Lifeline participation in seven states, referred to Lifeline as "non-sustainable," and has stated that the company would look to phase out its current Lifeline customers."⁹³

In-Home Broadband Service. T-Mobile's CEO has promised to use New T-Mobile's 5G network to offer in-home broadband service and create a strong alternative to cable and other fixed broadband service.⁹⁴ The Order finds that this in-home broadband service will constitute a significant public benefit weighing in favor of the transaction. On this aspect of the transaction, I too am excited. However, I am unable to assign much weight to the parties' claims. First, even the Order admits both that it "cannot verify the Applicants' quantification of benefits," and that it makes no "determinations or assumptions regarding [New T-Mobile's in-home broadband service] substitutability with particular competitors' fixed broadband offerings."⁹⁵ Second, the benefits of New T-Mobile's in-home broadband service cannot be ascribed to the transaction. Specifically, T-Mobile already has plans to offer such services.⁹⁶ And third, according to DISH, New T-Mobile will lack the millimeter wave spectrum after the merger necessary to provide fixed wireless broadband at the speeds necessary to compete with fixed wireline providers.⁹⁷

This Merger Will Result in Fewer Overall Jobs. As the Order states, job losses and gains are relevant to the Commission's assessment of whether a transaction is in the public interest.⁹⁸ Notwithstanding the fact that the bulk of the savings realized through this merger will undoubtedly come from consolidating operations and thereby reducing staffing,⁹⁹ the Order only grudgingly concedes that "the transaction has 'the potential to lead to store closings'" and that "some job losses are possible"¹⁰⁰ But the record contains evidence that between 20,000 and 30,000 U.S. jobs could be lost as a result of this transaction, the bulk of them in retail, with the remainder in "overhead" positions at the

Order at paras 387-400. To the extent New T-Mobile honors this promise, the phrase "barring fundamental changes to today's program" creates a significant loophole that the company can utilize at its sole discretion. For example, the Commission is currently considering elimination of resellers from the program. *See Bridging the Digital Divide for Low-Income Consumers*, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, WC Docket Nos. 17-287, 11-42, and 09-197, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, 10499 para. 67 (2017). Would that constitute a "fundamental change to today's program"?

⁹³ Petition to Deny of Common Cause et al., WT Docket No. 18-197, at 29 (filed Aug. 27, 2018) (citing Joan Engebretson, *CFO: 'Non-Sustainable' T-Mobile Lifeline Business to be Phased Out* (June 8, 2017), <https://www.telecompetitor.com/cfo-non-sustainable-t-mobile-lifelinebusiness-to-be-phased-out/>). I also note that the *DOJ Proposed Final Judgment* says nothing about DISH continuing to offer Lifeline service following its acquisition of Boost Mobile.

⁹⁴ *See* John Legere, *New T-Mobile: Creating a True Alternative to Fixed Broadband* (Mar. 7, 2019), <https://www.t-mobile.com/news/new-t-mobile-fixed-broadband-alternative> ("With the New T-Mobile and our unique 5G capabilities, we'll be able to offer a fast and reliable alternative for in-home broadband – yes, a real alternative option! And we aren't just going to offer a new alternative. No. We're the Un-Carrier! – and if there's ever been an industry more in need of disruption than wireless, it's the Cableopoly. So we are going to change it the same way we changed wireless! Aggressive prices, rapid innovation, listening to customers and fixing what's broken. That's just what we do – we are not going to simply do more of what the other guys do!").

⁹⁵ *Sprint/T-Mobile Order* at para. 282 & n.978.

⁹⁶ *See* T-Mobile, *T-Mobile Home Internet FAQ*, <https://www.t-mobile.com/isp/FAQs> (last visited Oct. 3, 2019).

headquarters of T-Mobile and Sprint.¹⁰¹ While much of our work on this proceeding has focused on abstract issues of competition, I am very concerned about the direct impact that this transaction will have on thousands of workers around the country.

CONCLUSION

Despite claims that 5G hangs in the balance, I find that this merger is fundamentally no different than past attempts to consolidate the wireless market that the Justice Department and the FCC have rejected. In this respect, today's decision represents an inflection point in the history of mobile wireless competition. In 2003, there were eight major national wireless carriers, with the largest being Verizon with a 23.4% market share. Since then, the large carriers have steadily acquired smaller wireless carriers while shunting off less-profitable wireline assets. Consummation of this merger will leave only three national facilities-based wireless carriers, each with more market share than even the largest carrier in 2003.¹⁰²

In short, I believe that T-Mobile and Sprint have not proven that their merger will benefit the public interest. Vague promises do not change what was true when this deal was first proposed and what remains true today – the harms from this merger are not overcome by any condition imposed in the majority's order. While I hope for the sake of consumers that I am wrong, I fear that we will one day look back at this decision and recognize it as a moment that forever changed the U.S. wireless industry, and not for the better.

⁹⁷ See DISH Reply at 89-91 (rec. Oct. 31, 2018).

⁹⁸ *Sprint/T-Mobile Order* at para. 321.

⁹⁹ Petition to Deny of DISH Network Corp., WT Docket No. 18-197, at 42 (filed Aug. 27, 2018) (DISH Petition).

¹⁰⁰ *Sprint/T-Mobile Order* at paras. 329, 330.

¹⁰¹ See Communications Workers of America, Methodology for Estimating Job Losses from T-Mobile/Sprint Merger (2018), https://www.cwaunion.org/sites/default/files/tmobile_sprint_estimating_job_losses_20180626.pdf; Karl Bode, *The Jobs-and-Competition-Killing T-Mobile/Sprint Merger Is Back On* (Apr. 13, 2018), https://motherboard.vice.com/en_us/article/gymm3w/sprint-t-mobile-merger-can-stillhappen.

¹⁰² DISH Petition at 58-59.