UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

DEUTSCHE TELEKOM AG, *et al.*,

Defendants.

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New York, N.Y.

19 Civ. 5434(VM)

January 15, 2020
10:04 a.m.

Before:

HON. VICTOR MARRERO,

District Judge

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(Trial resumed; in open court)

THE COURT: Good morning. Thank you. Welcome. Be seated. We're back.

I understand that the plaintiffs have brought out some big guns to this proceeding, the named plaintiff and New York State Attorney General Letitia James. Welcome.

Are the defendants expecting an appearance by Attorney General Barr?

(Laughter)

All right. I take it that that is a no. The idea is laughable.

All right. I hope that after the long and strenuous trial of this matter, you've had some opportunity to rest and relax and reflect that, in fact, there is life beyond the merger of T-Mobile and Sprint, and that that prospect might temper, if not entirely do away with, further proceedings in this matter.

Insofar as proceedings, in recent days, the Court has received submissions of the findings of fact and conclusions of law proposed by both sides. I received and reviewed also defendants' response to the Justice Department's statement of interest that was filed on behalf of the United States and the plaintiffs' response as well.

I received an application from the State of Washington to submit an amicus brief in response to the Justice

Department's statement of interest, and I also received an application from a group of economists to submit an amicus brief in support of the plaintiffs' case here. Both of these amicus submissions I've granted.

So let's then go into the closing arguments that the Court allowed in this matter scheduled for today. You may recall that plaintiffs and the defendants asked for roughly two hours each, and I granted that and will honor that. Although, I must say that, given the amount of submissions already made in this case, including all of what I've just indicated, which I have read very carefully, I am not so sure that you really need two hours to say the same things you already said a dozen times in these submissions.

I have heard it all and give you my assurance that I will continue to review all of that record very closely. So perhaps you might bear that in mind insofar as how long you believe, honestly, that you need in order to make your case.

So are plaintiffs ready?

MR. POMERANTZ: Yes, your Honor.

THE COURT: Defendant.

MR. GELFAND: Yes, your Honor.

THE COURT: All right. Please proceed.

MR. POMERANTZ: Your Honor, I have a small notebook for your Honor.

THE COURT: Yes.

MR. POMERANTZ: Your Honor, before I get started, if I could just ask one lawyer from each state that is here today to introduce themselves so that the record is clear as to which states are present.

MR. BUFFIER: Good morning, your Honor. Beau Buffier on behalf of the State of New York.

MS. BLIZZARD: Good morning, your Honor. Paula Blizzard for the people of the State of California.

THE COURT: Anyone else?

MR. POMERANTZ: I think we have some in the back.

MR. MATLACK: Good morning, your Honor. Bill Matlack for the Commonwealth of Massachusetts.

MR. DURST: Good morning. Arthur Durst for the District of Columbia.

MS. WERTZ: Tracy Wertz for the Commonwealth of Pennsylvania.

MR. NAOUM: Wisam Naoum for the State of Michigan.

MR. POMERANTZ: Thank you, your Honor.

I would like to reserve, hopefully, 30 minutes to respond in rebuttal to the other side; so I'll try to keep this to 90 minutes or less. I am here today, your Honor, speaking on behalf of 13 states and the District of Columbia, but more importantly, your Honor, I'm here speaking on behalf of 130 million consumers who live in these States and in the District.

These consumers rely on wireless services for so many

things, and if this merger goes forward, they're at risk of paying billions of dollars more every single year for those services, for services they can't do without. And, your Honor, there's absolutely no reason to take that risk because, here, the evidence at trial has shown that competition in the wireless market has been bringing consumers great benefits.

We didn't need a merger for these four national wireless carriers to roll out 2G, 3G and 4G, and competition will enable each of them to roll out 5G. In fact, your Honor, we've heard here at trial each of them is already rolling out 5G, and competition in the wireless market has brought us lower prices. Consumers have been paying lower prices for wireless services year after year after year, and that's largely because there's been two carriers, Sprint and T-Mobile, who have been the low-price leaders, leading those prices down.

This market is at serious risk of losing the benefits of declining prices if a low-price challenger like Sprint is eliminated from the market. Competition has also pushed T-Mobile to rise up from a company that had lots of problems to a company that now has an improved network and is taking market share from AT&T and Verizon, and Sprint can do the same thing.

In fact, they're already on a path to do so. Sprint invested $5 billion in their network last year, and they have plans to continue to make similar investments for the next few years. Competition doesn't need the government to try to help

DISH come in and replace Sprint. We already have Sprint as an important market participant, and we know it's important because 54 million people have chosen Sprint as their wireless carrier. For them, Sprint is the best choice, when you look at price and quality and customer service.

There are plenty of reasons to think that this DISH experiment will not work, and if it fails, it's not these defendants who are going to suffer. They're going to have their merger no matter what. It's consumers who will suffer because they will lose Sprint as a choice and with nothing there to replace it.

Now, the Congress and the courts have sent all of us a very loud and clear message, trust competition. We only have four national carriers, and we need to keep all of them, and we need to let them continue to compete.

Now, your Honor, the starting point for every single merger case is the same. It's the language I put on the board over there. It's the language of Section 7 of the Clayton Act, and one of the key words in the Clayton Act, in Section 7, is the word "may," "may be substantially to lessen competition." So what that means is that courts, like your Honor here, have to make a prediction about the future, and that's not something most of us are particularly comfortable doing, but the good news is that we have literally decades of case law that guide courts on how to make the predictions that are required by

Section 7.

Throughout my closing here today, I'm going to use that case law as the framework for evaluating the evidence that we all saw and heard during the trial.

Excuse me one moment to get my clicker.

This is the roadmap that I will use today for my closing argument, and so let's get going and start with the first point, that the merger is presumptively illegal.

The starting point for this merger case, like most, is the 1963 decision by the United States Supreme Court in *U.S. v. Philadelphia National Bank*. In that case, the Supreme Court established a presumption for District Courts to use to help them make the predictions that are required under Section 7, and it said that if a merger leads to an undue amount of market share, then courts should presume that that merger is likely to substantially lessen competition.

And the Supreme Court explained why, because it said that that presumption is based on basic economics. When market shares get to an undue level, well, then competition is usually reduced. And in *Philadelphia National Bank*, the court said that if the market shares get as high as 30 percent or more, then the market shares are undue and the merger is, therefore, presumed to be anti-competitive. So that is still one test for determining whether a merger is presumptively anti-competitive, are the combined shares of the merger parties 30 percent or

more.

We all know that since *Philadelphia National Bank*, a second test has been established by the courts, and that's the HHIs, and the HHIs are an alternative way of determining whether a merger leads to undue concentration. The HHI test is pretty straightforward. You look to see if the post-merger HHI is 2,500 or more, and you look to see if the increase in the HHIs caused by the merger is at least 200. And if it exceeds those two thresholds, then the merger is presumed to be anti-competitive because that is undue concentration.

So the first step we need to see is whether the presumption applies in this case, and we know that the first step to applying it is to say what's the market that we're evaluating. So here, now, I don't think we have any dispute as to what the product market is. The product market is mobile wireless services to retail consumers. Both sides agree with that, and there's also no dispute about one of the geographic markets. We both agree that these four wireless carriers compete in a national market. So I want to look at the national market first, since we agree that that's a market and then we'll come back to local markets.

So in this national market, these are the market shares and the HHIs, and this was testimony and analysis provided by Professor Shapiro. And if we focus on the elements that the case law says we should look at, you can see that the

combined share caused by this merger is in excess of the 30 percent threshold set forth in *Philadelphia National Bank*. So it's presumed to be anti-competitive under that test, and we can see that the HHI test is also satisfied, that the post-merger HHIs are over 2,500, well over 2,500, and the increases in the HHI are over 200. Again, well in excess.

So again, looking at the national market, the law requires this court to presume that the merger may substantially lessen competition and, your Honor, this presumption comes as no surprise to the defendants. This on the screen is an internal Deutsche Telekom document. They knew, as you can see in the heading here, that regulatory approval of this merger is difficult. They knew that a four-to-three merger in the mobile market was unlikely to be approved by the regulators. Your Honor, they knew that when you eliminate Sprint as an independent competitor and you have just three competitors left in the mobile market, the law and the economics say that that merger is likely to be anti-competitive.

Now, defendants have one primary response to this presumption of anti-competitive harm in the national market, and that's MVNOs. They say that if you treat MVNOs as independent competitors, then we're not entitled to the presumption. But, your Honor, there's two problems with that argument, the first is that the evidence clearly shows that

MVNOs are not independent competitors, and the second problem is even if we did treat MVNOs as independent competitors, we're still entitled to the presumption.

As this chart shows, MVNOs are simply resellers. They don't have any wireless services of their own. They're just reselling wireless services that they get from an MNO, Sprint, T-Mobile, Verizon, or AT&T. And what's happened here is that the MNOs have decided to offer their services in two ways. They sell it directly to the consumer, and they use MVNOs as an alternative distribution channel to sell indirectly to the consumer. That's the role of MVNOs, and again, the defendants' documents show this.

This is an internal T-Mobile document. It shows T-Mobile customers migrating from one internal brand to another, and if you look at the circle at the bottom of this chart, it shows that T-Mobile treats MVNOs as one of its internal brands, part of the internal migration.

Same with this document, this is another internal T-Mobile document, and you can see that what they're doing here is calculating the market shares of the four national wireless carriers. And if we look at this footnote, it says "all carriers include MVNO activity." The MVNOs are just part of the MNO's market shares. They're treating MVNOs exactly the same way Professor Shapiro did.

And Mr.~Legere and Mr. Ray made the same point in

their trial testimony. Both of them, in the testimony on the screen, said that T-Mobile, that "we" had 84 million total customers. And the record is clear that 84 million includes the customers of T-Mobile's MVNO partners. They are included in the "we" that Mr.~Legere and Mr. Ray are referring to.

And here's Sprint. This is a statement by Mr. Kalinoski, who is the head of Sprint's MVNO group. He says, "The success and growth of our MVNOs is success to Sprint." You wouldn't say that about your competitor. You wouldn't say Verizon's success is Sprint's success.

And, your Honor, as important as the evidence is that I was just showing you, what's also important is the evidence that we didn't see at trial. We didn't see a single document that showed that Sprint or T-Mobile reacted to an offer of an MVNO, not TracFone, not Comcast, not any MVNO. And why didn't we see that evidence? It's because the MNOs don't view MVNOs as independent competitors.

So I've put on the screen testimony by Professor Shapiro about MVNOs, and this testimony, your Honor, when you read it, is entirely consistent with the evidence about how the parties themselves treated MVNOs. The MVNOs are not independent competitors. They're resellers.

And the FCC, also excludes MVNOs from its calculations of initial concentration measures. This is a paragraph from the FCC opinion in this very transaction.

So coming back here, then, to these market shares and HHIs, these are the market shares and HHIs when you do not treat MVNOs as independent competitors but, rather, as the partners of the MNOs. But here, your Honor, even if you don't attribute MVNOs to MNOs, even Professor Katz's calculations show that this merger is presumptively anti-competitive when he included MVNOs as independent competitors and calculated market shares based on revenue. He concluded that the merger exceeded the thresholds for the presumption, greater than 2,500, greater than 200 change. And this is true, your Honor, even if you consider the Boost divestiture, as Professor Katz says in the footnote to this chart. So that shows that the presumption clearly exists for the national market.

I now want to turn to the issue of local markets. The Supreme Court has made clear -- and the quote I put at the top of this slide -- that a merger may affect both a national market and local markets. And the bottom quote is from Sprint back in 2011, and Sprint made precisely the same point when it was opposing the merger of AT&T and T-Mobile.

And Professor Katz, this is very important testimony, he agrees that there is competition that takes place at the local level, and the evidence tells us about the key aspect of competition that's occurring at the local level. It's quality. Your Honor, there was a lot of discussion about quality in this case, and consumers do care about the quality of their wireless

services, just like they care about price, and quality varies at the local level.

That's what Mr. Solé is saying in this testimony, and there's several reasons why quality varies at the local level. Spectrum varies from location to location. Towers vary from location to location. Technology, like small cells, vary from location to location, and the number of subscribers that may cause congestion varies from location to location.

And so we see the companies competing against each other at the local level using these differences in local quality to try to compete against each other. This is a competition in Boston that we see on this slide, and we saw it also here in New York. You see this kind of competition playing out at the regional level.

Now, defendants try to say that quality may vary from neighborhood to neighborhood or street to street, and that could be true, your Honor, but we're looking at where competition plays out. And actual competition, based on quality, we can see, is playing out at the regional level. It doesn't matter if the person who's making the decision where to buy spectrum or where to put the new tower or new small cell, it doesn't matter whether they're officed in a regional office or back in national headquarters in Seattle or Kansas. It doesn't matter. What matters is where is the competition occurring, and the competition is occurring in local regions.

We see the impact of this local competition by the variety of market outcomes that we see. I put on the screen here the various combined shares in various local markets in this country. Take California, in the rural market of Imperial County, Sprint and T-Mobile have a combined share of 63 percent, but in San Luis Obispo, it's only 21 percent. And here in New York, the New York region will have a combined share of 58 percent, but in Rochester, it's only 23 percent. If competition was occurring only at the national level, we wouldn't expect to see this kind of dramatic variation.

So we know that competition is occurring locally; so the question is whether CMAs are a reasonable way of defining that local market. And, in fact, the evidence shows that CMAs are the local market that are most often used to define the local markets in which wireless carriers compete.

This is the FCC, and we see here that they are using CMAs to define the local geographic markets. This is T-Mobile itself in front of the California Public Utility Commission, and they are defining the relevant local markets as CMAs. This is a Verizon business plan document, in the ordinary course of business document. They're relying on CMAs, and even Professor Katz himself looked at CMAs as the relevant market in 2012, when assessing local competition for wireless services.

Now, if we look at the case law on how to define a relevant market for antitrust purposes, the Second Circuit

tells us that the hypothetical monopolist test is often used to define the relevant antitrust markets, and here, Professor Shapiro used that test and determined that CMAs are a relevant market by using the hypothetical monopolist test, and Professor Katz agreed; so the legal test is also satisfied here.

So, your Honor, we gave you pages and pages of the combined shares and HHIs for the local markets, and in the binder that I handed to you, it's behind tab 1258. That's at the very back of the binder. And in that, these are the analyses, the combined shares and HHIs that Professor Shapiro provided and they're organized by state.

And what you see when you look at these market shares and HHIs, is that the post-merger HHIs for many, many CMAs exceed 3,000, some exceed 4,000 and I think there's even one in there that exceeds 5,000, and the increases in HHIs are also really, really high.

In Los Angeles, the increase is 1,200 points. Here in New York, it's 1,300 points. In Chicago, it's 1,400 points, and in rural Imperial County, California, it's 1,600 points. Your Honor, when HHIs are as high as we're seeing here, the law is clear is that the presumption of antitrust harm is even stronger, and the defendants' burden on rebuttal is even higher.

So now, let's go to the second step of the analysis. We've gone through the presumption, and now the next step is

whether the merger will lead to anti-competitive effects, and it clearly will. Under the law, we have a burden-shifting approach. We have to first establish our prima facie case, which we have done through the presumption. The burden then shifts to the defendant, and they need to offer evidence to rebut that presumption. And if they do so, then the ultimate burden comes back to us, and we have to meet our burden.

In other words, what's going on here is that, in most markets where the market shares get to an undue level, then competition is presumed to be substantially lessened. And so the essence of this burden-shifting test is that when the burden shifts to them, they have to show that this market is unusual because the typical market would have anti-competitive effects. That's why we have a presumption, is because typically there are anti-competitive effects, and so their burden is to show that there's something about this market that means that the presumption is not predictive because this market is unusual.

Now, before we get to the evidence that we saw at trial on unilateral and coordinated effects, I want to briefly discuss defendants' intent in pursuing this merger. The law is clear that we don't have the burden to show that the defendants intended the merger to lead to anti-competitive effects. But the law is also clear that if there is evidence of anti-competitive intent, then the Court should give it weight.

And, your Honor, we have that kind of evidence here.

Your Honor will remember this document. I discussed it with Mr. Hottges of Deutsche Telekom. When Deutsche Telekom was considering merging its T-Mobile subsidiary with Sprint back in 2010, it expressly and unambiguously admitted that one of the purposes of the merger was to reduce price competition. That's Deutsche Telekom's rule of three. You can't get much clearer about anti-competitive intent than this document, reduce price competition. And Mr. Hottges testified that the reasons for the merger today are the same as they were in 2010; they want to reduce price competition.

Here's another internal document from Deutsche Telekom, and it's another very telling document. It says here that four-to-three is in the interest of all mobile players. Well, if the reason for this merger is to help T-Mobile build a better network, which is what they've been saying here in the courtroom, well, that doesn't help all mobile players. That helps T-Mobile. But if the reason for this merger is to reduce price competition, that does help all mobile players, and Deutsche Telekom's anti-competitive intent is obvious from this document.

And it wasn't just Deutsche Telekom that put the anti-competitive effect of this merger in writing; so did Mr. Solé of Sprint. Mr. Solé of Sprint is not some lower-level employee. He's the chief marketing officer of Sprint, and he's

here texting with the CEO of Sprint, Mr. Claure.

Mr. Solé realized that this merger was creating incredible value through consolidation of the market into fewer players, the benefit of a consolidated market, and he said that this benefit is the same for AT&T and Verizon as it is for T-Mobile. They are all benefiting from the price increases that he is discussing in this text message. Your Honor, seeing such clear expression of anti-competitive intent and effects is not that common in a merger case; so when you see it, the law tells you to put weight on it.

Let's now go to unilateral effects. These are separate from coordinated effects, and I'll get to that second. We're just going to look at unilateral effects right now, which is the harm to competition when T-Mobile no longer faces Sprint as a competitor. It's not based on anything that AT&T or Verizon do or don't do. I've put together this chart to explain the concern here about unilateral price effects.

Assume today that Verizon and AT&T are charging $40 and T-Mobile and Sprint are charging 35, t-Mobile and Sprint being the low-price leaders. T-Mobile thinks about raising its price to $38, but it worries that if it does so, then its price-conscious customers are going to switch to Sprint, and raising their price to $38 won't be profitable.

Now, assume that Sprint's no longer there. Assume that T-Mobile decides it wants to raise its price from 35 to

$38. It doesn't have to worry about whether price-conscious consumers will switch to Sprint because Sprint's been eliminated, and it still happens to be a notch below Verizon and AT&T.

Now, T-Mobile says this won't happen, its prices won't be any higher after the merger than they would have been without the merger. But, your Honor, when they made that statement, they usually qualified it. What they said was quality adjusted prices wouldn't be higher. In other words, nominal prices might be higher, but the consumer is getting better quality in exchange for that higher price, and that's a very important point for what's going on here.

Let's use automobiles as an example. Assume today we have a market with four manufacturers, Cadillac, Lexus, Ford and Hyundai. Each one is offering consumers a different value proposition, a different combination of price and quality and customer service, and consumers have choices. And some of them choose to buy a Ford and others choose to buy a Cadillac. Well, today, wireless consumers have four choices, they can choose Verizon or AT&T or T-Mobile because that would be the right choice for them, and they can choose Sprint because for them Sprint's the right choice.

T-Mobile is free to try to improve the quality of its services. That's good competition. It can try to be more like Verizon. It can try to be a Cadillac, but it can't do so by

eliminating Sprint as a choice that tens of millions of people are currently choosing.

So let's look at the head-to-head competition that we've seen, particularly on the price level between Sprint and T-Mobile. I reviewed this particular deck, it's a board deck, with Mr. Hottges, and what this deck shows is that Sprint's price competition is taking customers away from T-Mobile, and T-Mobile is worried about it. And this price competition continued with offering, after offering, after offering. It wasn't just limited to the 50 percent-off offering that was part of the last slide. This is one in 2018, and this T-Mobile deck, board deck, notes that Sprint is still the most aggressive competitor, and here, it's referring to a Sprint offer of $15 per month per line for unlimited data.

Another great example of the head-to-head competition that we saw in this case between T-Mobile and Sprint is their race to be the first to offer an unlimited data plan. T-Mobile, as this e-mail reflects, realized that Sprint may be about to launch an unlimited data plan and T-Mobile wanted to beat them to the punch. That's what Mr. Sievert is saying right here in this e-mail. And what ended up happening is they both ended up launching the same day, August 18, 2016.

Competition made them try to beat the other. And look at this e-mail, the very next day, Mr. Langheim, of Deutsche Telekom, writes to Mr. Ewens of T-Mobile: People are freaking

out here in Bonn. Isn't that unlimited data plan needlessly aggressive? If it ain't broke, why fix it? And look at Mr. Ewens' response: We believe Sprint was moving to unlimited data within days anyway.

With Sprint in the market, T-Mobile was forced to move quickly with an offer that its parent company thought was needlessly aggressive, and if it ain't broke, why fix it? This is the kind of competition that we're going to lose with this merger when Sprint is no longer pressing T-Mobile.

Economists have developed a way to assess the harm that arises when you lose this kind of head-to-head competition. You look at data sources to determine and to assess how many customers choose between the two merging companies, here, at T-Mobile and Sprint. And that's what Professor Shapiro did here and presented that in his testimony. And what he showed was that no matter what source of data you look at, about 40 percent of the customers that leave T-Mobile switch to Sprint, and about 50 percent of the customers that leave Sprint switch to T-Mobile. This is far in excess of their market shares, and it shows just how closely they compete.

Your Honor, that's the evidence on unilateral effects. I'd like to now move to coordinated effects. The law recognizes a very simple economic concept. If you have fewer firms, it's easier to coordinate. That's the underpinning of

the coordinated effects concern, and this has nothing to do with doing anything illegal. We're not talking about them picking up the phones and fixing prices. Rather, we're talking about something entirely lawful, a company deciding on its own to accommodate what one of its competitors is doing.

Here's a simple example that we put together to try to explain the coordinated effect that we're concerned about here. Assume that we have two gas stations across the street from each other, and assume that they're both charging $3 a gallon, and then one of the stations thinks about cutting the price to 2.95. That price cut could get them some additional business for a short period of time, but then the other station may cut their price to 2.95, as well, and then both stations would be worse off because now they're only getting 2.95 a gallon instead of $3 a gallon. And so the first station will pull its punch. It won't lower the price to 2.95. That's the coordinated effect that we're concerned about.

Now, there's certain aspects of a market that would make it more susceptible, I believe, to coordination. This is the list of factors that Professor Shapiro put on the screen and discussed during his testimony. These are factors that make a market susceptible to coordination, and when Professor Katz testified, he didn't disagree. He agreed that these are the relevant factors to look at and, your Honor, the evidence shows that every one of these factors is present in this

market.

After the merger, we're only going to have three national wireless carriers, and each one is going to have roughly a third of the market, which means that T-Mobile's economic incentives will be more similar to AT&T's and Verizon's economic incentives after the merger than they were before the merger, when it was a smaller challenger. To put it in your Honor's terms, the flower child is going to more likely turn into the investment banker because of these similarities of incentives.

Now, your Honor properly asked during trial: What about DISH, won't it come in and disrupt the coordination? Well, the answer is only if it successfully enters and becomes a significant competitor. If it doesn't successfully enter and become a successful competitor, it can't disrupt the coordination. I'm going to get to DISH when I get to their defenses, but that's the issue with coordination.

Your Honor also asked, in effect, will AT&T and T-Mobile just sit on their hands and stop competing? How likely is it really that T-Mobile is going to be willing to pull any of its punches? You asked those questions during the trial. And, your Honor, the answer from the evidence is that T-Mobile is likely to pull its punches and coordinate with AT&T and Verizon because it's done so in the past. Not all the time but sometimes. More than it used to.

These are Mr. Langheim's notes from a board meeting, and it says that T-Mobile has been signaling price increases. Signaling your competitor about price increases is a form of coordination. This is an e-mail between Ms. Wright and Mr. Bischoff of Sprint. They're in their competitive intelligence unit. And it's at a time when T-Mobile raised its price for its T-Mobile 55-Plus offering by $10, after Verizon announced its higher price.

And Mr. Bischoff of Sprint noticed what T-Mobile and Verizon were doing, and he saw it as a good example of industry signaling. He said that if the leader, Verizon, announces a high price and T-Mobile follows and moves its price higher, then the price increases stick. That's coordination. That's pulling a punch.

Here's another example from T-Mobile. It concerns something called GS6 pricing. That refers to T-Mobile's pricing on a new Samsung Galaxy 6 cell phone. Mr. Roettgering of T-Mobile says: You may recall that our preferred tactic on pricing is to wait for competitors to signal before we lock. Waiting for competitors to signal, that's coordination.

One more example from T-Mobile. T-Mobile was launching an iPhone price promotion, and this e-mail says that Mike, and that's referring to Mr. Sievert, wanted to make sure that the promotion had a clear end date. Why would Mr. Sievert care if the promotion had a clear end date? Well, this e-mail

tells us. So that T-Mobile could signal to our competition that it was really just our turn, and there's no need for the competitors to panic. Just our turn. That's coordination. It's not illegal, but it shows that T-Mobile is a rational, economic actor, and just like the economics and the law predicts, it will, at times, pull its punches.

And we know that T-Mobile is already pulling some of its punches. We see it in all of the signaling documents we just went through, and the concern here is that when you don't have the potential for Sprint to come in and disrupt that coordination, T-Mobile and AT&T and Verizon are going to pull their punches more often. That's the coordinated effect that the economics and the law teaches us arises when you get down to just three competitors, and that's something to be concerned about here.

I want to now move from the anti-competitive effects to the defendants' defenses that they've offered here. They've offered three primary defenses, and we think each of them fail as a matter of law and as a matter of fact.

Defendants have argued repeatedly here from the pretrial conference, in the middle of trial and probably here today, that we have the initial burden on their defenses. That's not true. The law is clear that efficiencies is a defense, and that defendants bear the burden. It is the defendants that have the burden to show, must demonstrate

efficiencies.

And the same is true for their defense that Sprint is a weak competitor. Again, the law is clear that the weakened competitor defense places the burden on the defendant, and the same is true for any proposed remedy here, the DISH fix. The burden is on the defendants to show that that remedy would negate any anti-competitive effect of the merger.

So let's start with their efficiencies defense. The defendants basically argue that if you combine Sprint and T-Mobile, you're going to get a better network; that the combination of the spectrum of the two companies and the towers is going to give a better network for their customers. You're going to have more lanes for more cars to drive down.

But let's step back. What if AT&T and Verizon decided to merge? Well, you would definitely have a better network. You have more spectrum, and you'll have more towers. You'd have even more lanes for more cars to drive down. But, of course, no one would say that AT&T and Verizon can get together and merge. There's got to be something more than allowing a merger just because you can build a better network, and that's where the law on efficiencies comes into play.

The first question on the law on efficiencies is, is that even a defense? The only time the Supreme Court has spoken about whether that is a defense is in the *Procter & Gamble* case. And the Supreme Court has never recognized an

efficiencies defense. To the contrary, in *Procter & Gamble*, the Supreme Court cast serious doubt about the viability of such a defense.

In the Appellate courts, several have raised similar concerns after looking at *Procter & Gamble*. This is the Ninth Circuit in the *St. Alphonsus* case. The Third Circuit and the DC Circuits have raised similar concerns about the viability of the defense. The Second Circuit has not yet addressed the question, but there are some courts that have permitted the defense.

But even these courts recognize that the hurdle for the defense is very, very high. The hurdles include that the defendant must show that the efficiencies are verifiable and not just speculative; that they're merger specific; that you can't accomplish the efficiencies through some other way; and that the efficiencies will actually turn out to benefit consumers. And some courts have gone farther saying that the efficiencies have to be extraordinary before they're going to be deemed to offset the anti-competitive concerns of a highly concentrated market.

Because of these kinds of requirements, even for those courts that have recognized that there could be a defense, there isn't a single court that has yet found that efficiencies are sufficient to overcome a merger that is presumptively anti-competitive. They're asking you to be the first one to do

so. And, your Honor, I would submit that the trial record does not support it for many reasons, and I'm going to focus on just four of them today.

These are the four, and I'll go through them quickly, one by one. The first one is that they assume no additional spectrum for the standalone Sprint and the standalone T-Mobile, and this isn't in dispute. This is Professor Katz, and what he said was that his efficiencies model that he presented assumes that if there is no merger, T-Mobile will not acquire any new spectrum for the next five years. If that assumption is unreasonable, their efficiencies model collapses. And the trial evidence shows that this assumption is totally unreasonable.

If your Honor looks in the binder again at Exhibit 1121, it's at the back, and although the type is small, if you just flip through the pages, this is page after page, line after line of spectrum acquisitions by T-Mobile. And you can see that there are multiple spectrum acquisitions in every single year starting in 2008. Some of them are very small acquisitions. You just need a little additional spectrum for Greensboro, North Carolina. And some of them are much bigger acquisitions, where you're buying spectrum at a much broader geographic level.

And this is Mr.~Legere, and he testified that T-Mobile has acquired a lot of spectrum over the years. First, they got

some spectrum from AT&T through the breakup fee, but that was just the tip of the iceberg. Then they got spectrum when they acquired MetroPCS, and did a deal with Verizon, and through FCC auctions, and through many, many private transactions.

But notwithstanding the fact that the record is crystal clear that T-Mobile has bought or swapped or exchanged spectrum every single year for the last decade, they have a model that assumes that all of that just stops, no more spectrum acquisitions or exchanges or swaps by T-Mobile for the next five years. That's unreasonable on its face.

And that assumption is even more unreasonable when we look at the evidence about the future. Here's Mr. Langheim, and he's admitting that if this merger does not occur, T-Mobile's going to go out and bid for more spectrum. And they know that if they don't merge, they're going to go out and find some more spectrum. It's unreasonable to assume otherwise.

And we know that there's going to be more spectrum available. This is from the FCC just a few months ago. What it says in the top line that I highlighted: "Making more spectrum available for the commercial marketplace is a central plank of the commission's 5G FAST strategy," and then it refers to the 3.5 gigahertz auction that is upcoming. That's mid-band spectrum, your Honor. That auction is coming up. Mid-band spectrum is what T-Mobile says it needs to further grow its business, and it's going to be available soon through that FCC

auction.

And, of course, the FCC auction isn't the only place that T-Mobile can go to in the future to get more spectrum. It can go to DISH. If this merger doesn't go forward, then DISH is still sitting there with a lot of low-band and mid-band spectrum. And Mr. Hottges conceded here that if the merger doesn't go forward, one option that is available for T-Mobile is to lease spectrum from DISH.

And, of course, DISH isn't the only private party out there holding spectrum. T-Mobile could go to AT&T or Verizon or Sprint and try to work out a deal where they swap or exchange spectrum. You'll see from that exhibit that I showed you, that happens on a regular basis. And they could also go to regional carriers and seek and get some spectrum, or to other private parties who hold licenses for spectrum.

And this is a demonstrative that comes from Professor Scott Morton's testimony, and her testimony shows that if you correct this no-new-spectrum assumption, most of their efficiencies just go away.

Now, defendants made two points about this, and about T-Mobile's future spectrum acquisitions that I just want to briefly address. First, they pointed to Dr. Kolodzy's testimony, where he says, I don't know which option T-Mobile is going to choose in the future to get spectrum. He doesn't know if they're going to win an FCC auction or do a deal with DISH

or do a deal with some other private party.

But, your Honor, we don't have the burden of showing which option T-Mobile's going to choose in the future. All we need to show is it has options, and it is defendants' burden to show that their assumption that all of these spectrum acquisitions would suddenly stop is a reasonable one and, your Honor, it's clearly not.

The second thing that defendants argue, and it's in paragraph 33 of their proposed findings, is that these other spectrum options, they're not equivalent to the spectrum they're getting if they merge with Sprint. But, your Honor, equivalency is not the relevant question under the law. If these other spectrum options can accomplish most of the efficiencies that defendants are suggesting, that doesn't matter if they're equivalent or not. What it shows is that the merger -- that the efficiencies are not merger specific, and that's what Professor Scott Morton's chart and her testimony shows.

So, your Honor, the bottom line here is that the assumption of no new spectrum is not verifiable, and it's not merger specific. T-Mobile can get their spectrum in other ways.

Let's go to the second failure in their efficiencies theory, and that's with respect to business plans. The defendants' efficiencies model makes another key assumption.

It has to. What are T-Mobile and Sprint going to do in the future if they stay independent? What's their independent business plans? And Professor Katz testifies here that these business plans are a major part of their model. So let's look at the business plans that he relied on.

First, Sprint -- the defendants' model, their efficiencies model relies on a Sprint business plan from 2018, but as Mr. Bluhm testified, Sprint's materially changed that plan. It no longer plans to implement it, but they never revised their model to adjust to Sprint's new business plan. The new plan will be different in very significant ways. It plans on having different network improvements, different priorities and timelines, and different technologies. This means that defendants' efficiencies model is just wrong. It's not verifiable.

And T-Mobile -- Professor Katz's assumption about T-Mobile is problematic for a different reason. As Mr. Langheim says here, T-Mobile doesn't even have a business plan beyond one year. So they don't know a key input that Professor Katz says is a major part of his model. What will T-Mobile do over the next several years? Again, the model is not verifiable.

The third failure in their efficiencies theory, the model speculates about the value of extreme speed. This is a demonstrative that, again, was prepared by Professor Scott

Morton. On the right-hand part of this slide are the speeds that Professor Katz's model projects for the standalone T-Mobile, for the standalone Sprint and for new T-Mobile for 2021. That's the three bars over there, 127, 220 and 380 megabits.

And what this shows is that even without the merger, Professor Katz's modeling shows that standalone T-Mobile is going to greatly improve its speed, and standalone Sprint is even going to more greatly improve its speed. Sprint, for example, is projected to have speed nine times faster than it has today if it remains as a standalone company.

Now, defendants' efficiency model places a lot of value between the standalone numbers for speed, the 127 and 210 megabits and the 380 megabit speed that they project for new T-Mobile. But they then never explain why consumers would place significant value on the difference between 210 megabits and 380 megabits of speed. What can a consumer do with 380 megabits that they can't do with 210 megabits? The answer is it's not in the record.

And, yet, even though they never explained what the consumer can do with that extra speed, they place a huge value on that difference. Mr.~Legere gave us a useful comparison. Many of us would pay for a car that went a hundred miles an hour instead of 25 miles an hour. We would get real value out of that additional speed. But how much more would we pay for a

car that went 600 miles an hour instead of 100 miles an hour? Defendants' efficiencies model just speculates about the value of extreme speed. This is another reason why the model is not verifiable.

And their fourth failure in their efficiencies model relates to the issue of ordinary course. The merger guidelines are clear, projections of efficiencies may be viewed with scepticism, particularly when generated outside of the usual business planning process.

Here, there really isn't any dispute that the model they ended up using to project efficiencies was not used or created in the ordinary course. This is a letter from T-Mobile's counsel at Cleary Gottlieb to the Department of Justice, and this letter expressly admits that the model they used to project efficiencies is not an ordinary course model.

It's not an ordinary course in three respects. The model that T-Mobile actually uses in its business revises the inputs to the model every six to 12 months, and the reason why they revise the inputs every six to 12 months is because this market changes a lot. Whether it's spectrum or other issues, they change a lot.

And the guidelines and the law are very skeptical about projections that go out five years, particularly in a dynamic market like the one we have here and particularly when the company itself feels the need to revise and update those

projections every six to 12 months.

(Continued on next page)

MR. POMERANTZ: (Continuing) There is a second reason why this is an ordinary course, and that is because they are using the model here to make predictions about 5G. They never used this model for 5G. They had to create that. And that portion of their model has never been tested through ordinary course.

The same with Sprint. They used the model that T-Mobile uses to make predictions and projections about the Sprint network. They had to create that. They had to make that up for this case. It's never been tested through the ordinary course. And the merger guidelines say that that's a problem, that that raises skepticism about whether it really is making any projections that the Court should rely upon. That's yet another reason why their efficiencies model fails.

Let me now go to the weakened competitor defense.

There is a lot of merger law out there addressing the kind of weakened competitor argument that the defendants are making here in this case. The courts refer to argument about the merging -- one of the merging parties being weak as the "hail Mary" pass of presumptively doomed mergers. They have said that it is the weakest ground of all for justifying a merger.

Now, T-Mobile's own experience is a very good example of why courts are loath to allow a merger because one of the merging parties is weak. Remember what Mr. Legere said was the

State of T-Mobile when he joined the company in 2012. It had astonishingly high churn, he said, 2.55 percent. Significantly higher than Sprint's is today. It was losing two-and-a-half million customers a year. Way more than Sprint is losing today. It was in financial distress, and it had a network that needed improvement.

And before Mr. Legere arrived, Deutsche Telekom and T-Mobile took these argument to the DOJ when it tried to merge with AT&T. And it said to the DOJ that T-Mobile lacked a clear path to LTE.

And this is all in the record, your Honor.

It said to the DJ that T-Mobile faced spectrum exhaust. It said that Deutsche Telekom would not invest in T-Mobile. It said that T-Mobile is struggling to remain a strong competitor and is steadily losing market share.

Well, your Honor, we now know that all of these predictions turned out to be inaccurate. T-Mobile did find a path to LTE without merging with AT&T. It didn't need AT&T to figure out how to deal with spectrum. Spectrum was not exhausted. Deutsche Telekom did decide to invest billions and billions of dollars into T-Mobile so that it can improve its network, and T-Mobile did grow its revenue and its market share.

And your Honor knows, you are hearing the same arguments today. This time it's: No path to 5G. We're

running out of spectrum. SoftBank won't invest any more money in Sprint. Sprint is struggling to remain a strong competitor.

Your Honor, these arguments have no more merit today than they had in 2011. Sprint simply needs to roll up its sleeves and compete, just like T-Mobile did.

Now, to sustain a weakened competitor defense, the defendants are going to need to prove two things: First, that the decline in Sprint's market share -- that there will be a decline in Sprint's market share that undermines our prima facie case, and the second is any weakness in Sprint can't be resolved by any other means.

Well, your Honor, there is no reason to believe that Sprint's market share is going to decline when it has been stable for years, as you see on this slide, and when its financial performance has been stable for years, as Mr. Solomon testified.

And Sprint's CEOs, both Mr. Claure and Mr. Combes, have made public statements over and over again that Sprint is stable and has a strategy for the future. Here's a couple of examples from 2008 of Mr. Claure. And here is Mr. Combes in 2019.

And there is another very important reason to believe that Sprint's market share will not decline over the next few years. Its senior executives have said that Sprint has a real advantage now, as we move into 5G, because of the spectrum it

holds. This is Mr. Claure in 2017: I would say that we're positioned the best in terms of our spectrum holdings. We are greatly, greatly positioned for 5G.

Here is Mr. Claure and Mr. Combes in 2018: I am very confident in Sprint's future -- it doesn't sound like a weakened competitor to me. I am very confident in Sprint's future based on the competitive advantage that we will have with the deployment of 5G on our 2.5 gigahertz spectrum.

And Mr. Combes: I believe that Sprint has the best spectrum assets of any carrier I have seen in my career.

And in 2019, in a lawsuit that was pending in this court, Sprint said, under oath, that it has a once-in-a-lifetime opportunity to leapfrog its competitors.

But now, in this court, Sprint's here claiming that what they said to investors and to this Court for the last two years is not true. They claim that they don't have a good chance to leapfrog their competitors because of their spectrum.

Mr. Bluhm, if you recall, said I'm not sure that we are going to be viable in two years. Mr. Claure didn't accept that, but he said that we may become a regional carrier. Then he never explained what he meant by a "regional carrier." But we have evidence of what Sprint actually plans on doing in the future, what it will do if it doesn't merge with T-Mobile. It's in the record. I would ask your Honor to look at Exhibit 1202 in considering this argument.

And what this shows is that Sprint has no plans to withdraw from any of the 93 percent of the U.S. population that it currently covers. And it shows that Sprint plans to invest $5 billion a year to improve its network, just like T-Mobile did a few years back, and that it intends to prioritize 48 markets that comprise 70 percent of the U.S. population.

So now let's turn to the second prong of the weakened competitor test. If Sprint really were weak, does it have any options other than this anticompetitive merger? The evidence shows that it does have other options. One option is a transaction with DISH. DISH is sitting there with a you lot of spectrum, and if there is no merger, Sprint could buy or lease spectrum from DISH, or it could try to merge with DISH.

We know from the testimony and from this document that DISH and Sprint actually considered such a merger in early 2018. And in this email, Mr. Crull, of Sprint, says that if these two companies merged, they could become the Verizon network of 5G.

Another option is for Sprint to do a deal with a cable company. The documents and testimony in this case show that Sprint has previously considered a deal with cable companies, like Comcast or Charter. Here is Mr. Claure talking about a possible merger with a cable company, and he says here that such a merger would create enormous synergies for Sprint. It has options.

And, in fact, one of the reasons that T-Mobile wants to acquire Sprint is to make sure that Sprint doesn't merge with a cable company, because then Sprint would become an even stronger competitor. And that's precisely what Mr. Langheim said in the testimony that's now on the screen.

Your Honor, Sprint hasn't come close to satisfying either prong of the weakened competitor test.

Now, let me address one more point before I go on to DISH.

T-Mobile has argued that it needs to merge in order to compete with Verizon and AT&T. It says that AT&T and Verizon have been a duopoly, and that T-Mobile and Sprint have really been meaningless competitors. Well, your Honor, this argument is hard to understand and it is totally inconsistent with the evidence. Today 84 million people are choosing T-Mobile to be their network, and 54 million people are choosing Sprint. That's over 130 million subscribers. About one third of this country is choosing either T-Mobile or Sprint. So it's hard to understand why Sprint and T-Mobile aren't already very meaningful competitors in this market.

In fact, T-Mobile itself has boasted about its ability to compete against AT&T and Verizon without a merger. What I have on the screen here is something that T-Mobile's CFO said in January 2018. What he said here is very telling. He said, T-Mobile is still a significant growth company and that it has

several spectrum options, several spectrum opportunities. And right there at the end: We believe AT&T and Verizon will shrink. We'll come up and there will be an equilibrium.

He's saying this without any merger with Sprint. We don't need to worry about a duopoly here. What we need to worry about is keeping these four national competitors out there competing.

And that brings us to their third defense, the so-called DISH fix.

The DOJ filed a complaint alleging that this merger violated Section 7, and if your Honor reads that complaint, you'll see that the DOJ reached many of the same conclusions that we, the plaintiff states, have reached regarding this merger. There likely will be coordinated effects; that's what they say in their complaint. And these anticompetitive effects will cause billions and billions of dollars of harm to consumers. That's what the DOJ says. And they say that defendants do not have a viable efficiencies defense.

But the DOJ then disagreed with us on what to do with this problem. The DJ chose to do a deal with DISH and with the defendants. Well, your Honor, we think this DISH remedy is inadequate to restore competition both as a matter of the evidence here at trial and as a matter of law.

Here's the relevant law. Entry of a new potential competitor like DISH is only to be credited if it is timely,

likely, and sufficient. In other words, will DISH enter the market in a timely way, in a way that will restore the competition that's lost when Sprint is eliminated as a competitor?

So let's begin with the timely factor, whether DISH's entry will be timely.

The case law says that the appropriate metric for measuring timeliness is two -- maybe two to three years. So let's look at the evidence of what will happen with DISH over the next two to three years.

This is day one. On day one, DISH is going to be essentially an MVNO with 9 million customers. As your Honor can see, it pales in comparison to Sprint. And I want to look out two to two-and-a-half years, and this should not be on the public screen.

If we look out two to two-and-a-half years, you can see that DISH is still nowhere close to where Sprint is today. It is still largely an MVNO. Most of its customers are not on its own network, and it still will have only a very small fraction of subscribers when compared to the subscribers that Sprint has today. And DISH's own network will cover only a small fraction of the United States, compared to the 93 percent of the population that Sprint covers today.

And, your Honor, just to be clear -- and I should have made this clear -- this is assuming that DISH does everything

that it has committed it will do when it commits to doing it. I'm assuming that in these slides.

So now let's go out one more year, three to three-and-a-half years out. And you'll see here, in this comparison, DISH is still lagging way behind where Sprint is today. It's clear that their entry will not be timely.

Let's go now to the sufficiency prong of the test. I'll skip likelihood and come back to it. Let's go to whether DISH's entry will be sufficient.

There is a big problem with the DISH remedy under the sufficiency prong. In order for the entry to be sufficient, you want the company that is buying the divested asset to be independent of the other competitors in the market. What the law doesn't want is for there to be a continuing relationship between the merged company and the buyer of the divested asset. That creates a huge conflict of interest.

And we have that huge conflict of interest here. We have that continuing relationship. It is called the MVNO agreement. When DISH first enters the market, the only way it's going to be able to sell anything to anyone is by relying on new T-Mobile. And they're relying on new T-Mobile for the very product that they're offering to potential customers.

And what this dynamic means is that DISH and new T-Mobile can't act like normal competitors. Ordinarily, if you are a company and you want to take market share from one your

competitors, one thing you might try to do is improve your product. But DISH can't do that. Because DISH isn't in control of the quality of the product it is offering. New T-Mobile is.

And pricing incentives are also distorted by this long-term MVNO relationship between new T-Mobile and DISH. Because every single time DISH gets a new subscriber, new T-Mobile makes money, and that distorts competition.

And what's going to happen if DISH happens to get a little more successful than new T-Mobile likes? Well, new T-Mobile has every incentive to use its continuing relationship to try to thwart DISH. Mr. Ergen acknowledged exactly this problem when your Honor asked him this question: "why is there not an incentive for them to work competitively within the rules to put you out of business?" And Mr. Ergen said, "I think they'll try. I think they'll try."

But then when he was questioned by defendants' counsel, he gave an explanation. He said, "I think if they could do it, they would try to get away with it, but it would be very difficult because of the court monitor."

But monitors can't fix everything. And disputes take time to resolve. And perhaps even more important, this monitor concept highlights the very problem with the divestiture -- when the divestiture does not create an independent competitor. The antitrust law wants competitors to go out there and pursue

their independent economic self-interests. They don't want competitors to be constrained by a monitor. That's why the law strongly disfavors the kind of remedy we see here, a remedy that involves behavior.

Now I want to go back to the likely prong -- timely, likely, and sufficient.

Is it likely that DISH is actually going to do what it has committed to do? Well, the trial evidence, I would submit, your Honor, raises serious doubts.

We know from the evidence that it's really hard to enter the retail wireless market. Several witnesses have testified that among the things you need are experience, scale, and a recognized brand.

Let's look at DISH's experience. They had never been a wireless company before. They are a satellite TV company.

Let's talk about scale. Mr. Hottges said that even with 84 million subscribers, T-Mobile doesn't have sufficient scale. If he is wrong by a magnitude of two or three, DISH still doesn't come close to that kind of scale for many, many, many years, if ever.

And let's talk about brand. We know you need a brand that make consumers want to buy wireless services from you. DISH may be a very good brand if somebody wants satellite television services, but no one has ever heard of DISH as a wireless brand. And Boost may be a good brand for prepaid

wireless services, it's recognized in that area, but Boost is not recognized as a post-pay brand. Most subscribers are post-paid customers, and DISH won't have a post-paid brand.

And here's another reason why it is hard to find that DISH will successfully enter the market.

Your Honor, I put up here the business plan that Sprint -- that, I'm sorry, DISH presented in this case. And I put -- I'm only putting on the cover page because it has been designated confidential by DISH, but I included a copy at the back of your notebook; it is Exhibit 7199. And if you look at Exhibit 7199 in your binder, your Honor, you'll see that it's pages and pages of numbers, page after page with numbers on it. And this document doesn't contain any explanation of where those numbers came from. No explanation whatsoever.

Now, this business plan was shown to Mr. Ergen during his testimony when we were in the conference room down the hall in that confidential session. And while I can't tell you -- I can't say in open court what he did say, I can tell you what he didn't say. He didn't say anything about where any of these numbers come from. Not a word.

And so if you look, for example, on page 3, on page 3 here, at the very top line, he has numbers there for the end-of-period subscribers. How many subscribers will they have in 2020, 2021, 2022? Your Honor, we have absolutely no idea where any of these numbers came from. We have no idea whether

they are reasonable or just pie-in-the-sky projections.

This isn't a situation, your Honor, where you have to decide whether you believe the explanation offered by DISH or not, because they never offered an explanation. You can't find successful entries likely when DISH never offered an explanation for these rosy projections.

The evidence also casts serious doubt on whether DISH will live up to the commitments it's made to the FCC. Will DISH go back to the FCC in a year or two and say, Please give us an extension of time? Or, Please modify the deal? Is that what's going to happen? And if they do, what's the FCC going to do? The FCC could say, no, give us $2 billion and give us back some spectrum. But if the FCC did that, that won't help competition, that won't help consumers, that doesn't help to create a fourth national wireless carrier.

And Mr. Ergen is, if nothing else, a shrewd negotiator. He knows that the FCC is between a rock and a hard place, because he knows that the FCC is not going to want to just put $2 billion into the federal treasury and then leave competition -- forget competition in the wireless market. To find it likely that DISH is going to enter and replace Sprint, you're going to have to place a lot of trust in Mr. Ergen, and the evidence strongly suggests that your Honor shouldn't do so.

Look right here on the screen, the question that you asked Mr. Ergen, and his response. He chose his words very

carefully: "we've never missed a final milestone commitment for a terrestrial build-out, and we've met the ones we needed to."

Well, we know the record is clear that he has missed deadlines, interim deadlines, and he's missed satellite build-outs, not terrestrial. And what did he mean when he said we met the ones we needed to?

We know that two courts have already previously found that Mr. Ergen is not credible. They said this when Mr. Ergen had already testified under penalty of perjury. And Commissioner Pai of the FCC has concluded that DISH manipulated one of the agency's important spectrum programs. He said that DISH had made a mockery of the FCC program that was designed to help small businesses, not companies the size of DISH. He said that DISH had abused the program and that it engaged in shenanigans.

And even T-Mobile itself has publicly questioned DISH's efforts to game the regulatory system. T-Mobile made this statement less than a year ago.

And there is more. Defendants are here asking you to find that DISH's successful entry is likely even though they themselves have expressed serious doubts about DISH's plans. This is an email from Mr. Boorman of Deutsche Telekom to Mr. Langheim. It is written around the time that DISH was negotiating its deal with T-Mobile. And Mr. Boorman says that

Mr. Ergen is playing a game with the MVNO. And he says in the end, DISH might build something that the lawyers can use, but not something that customers can use.

Your Honor, Mr. Ergen has a track record, and based on that track record, we would submit it's very hard for your Honor to find that DISH is likely to enter the market in the way that Mr. Ergen has described.

The DISH fix fails on all three prongs of the entry test. It's not timely, it's not likely, and it's not sufficient.

And there is one other issue with respect to the DISH fix. Certain aspects of this remedy are not yet final with the FCC. I put them right here on the slide. And you will see in the fourth bullet point that one of the things that is not yet final with the FCC is the MVNO agreement. And that's a critical part of the remedy.

Now, we cited law, your Honor -- it is Footnote 8 of our proposed findings -- that makes clear that this Court cannot prejudge what the FCC will do on these competitors. And that's yet one more reason why this Court should not rely on the DISH fix.

So let me go to the last part of my closing, and that's our entitlement to an injunction.

Your Honor, we basically have briefed this issue, the standards for a permanent injunction. It is in our findings

and it is also in our response to the DOJ's statement of interest.

And in each of those submissions, we address the factors that are articulated in the eBay case for our entitlement to an injunction. I want to only discuss two issues here today on that subject. The first is how do the decisions that we have seen from the FCC and the DOJ relate to our right to obtain an injunction? And the second is how should your Honor consider the public interest factor in this case?

Your Honor, the Supreme Court made clear, almost 30 years ago, that the federal government does not have exclusive jurisdiction to challenge mergers. There is no question that the plaintiff States are entitled to seek an injunction when their consumers and their markets are threatened. And the American Stores case, which I have here on the screen, makes this crystal clear. In that case, the FTC had already negotiated a consent decree with the merging parties, just like the DOJ has done here. But the Supreme Court held in that case that the State of California was free to pursue a Section 7 challenge to the merger.

The defendants say in the brief that they filed just a couple of days ago that this Court should defer to the FCC's decision that this merger meets the public interest standard. But the law is clear, your Honor, that the courts have an

independent responsibility under the Clayton Act. In the Radio Corporation of America case, the RCA case, that I again have on the screen, the FCC approved a transaction under the same public interest standard that the FCC used in approving this transaction. And in that case, the Supreme Court said that a civil antitrust action challenging the transaction can go forward. It said that the Commission action -- that's the FCC action -- was not intended to prevent enforcement of the antitrust laws in federal courts.

And the Supreme Court reached the same conclusion in other cases. In the California v. Federal Power Commission case, the Court made a similar finding with respect to a transaction that had already been approved by the Federal Power Commission.

And in Philadelphia National Bank itself, the transaction had already been approved by the comptroller of the currency and, nonetheless, the federal courts analyzed the merger and found it to be anticompetitive and in violation of Section 7.

In each case, the Agency found that the transaction was in the public interest under the agency standards, and in each case the Supreme Court said that it was up to the federal court to evaluate the transaction on its own.

Now let me talk about the public interest in this case. Case after case has recognized that the central interest

is in the preservation of competition. Case after case after case recognizes that in enacting Section 7, Congress instructed the courts that competition was in the public interest. And case after case held that the plaintiffs are entitled to an injunction to bar an anticompetitive merger if it threatens competition.

In this case, Professor Shapiro testified that consumers are facing the threat of billions and billions of dollars in ongoing economic injury if this merger goes forwards. Avoiding this kind of harm is plainly in the public interest.

In the brief that they filed just two days ago, the defendants claim that this merger is in the public interest because it will create unprecedented efficiencies, because it will expand rural coverage, and because it will enhance the competition for in-home broadband. Well, we've already shown why the efficiencies are neither verifiable nor merger specific.

And as to the other two benefits, rural coverage and in-home broadband, what defendants are doing is they are asking this Court to weigh the anticompetitive effects in some markets and on some consumers against the claimed benefits of other consumers in other markets. And there are two problems with this approach. First, it is not supported by the trial evidence. They can't just walk into court here and throw out

public interest claims. There has to be evidence.

Defendants did not try to quantify the benefits of rural coverage for broadband. They didn't address whether any of these benefits are merger-specific, or whether they can be accomplished in a different way. They never tried to compare these benefits to the anticompetitive harms of the merger. They never asked Professor Katz to do that comparison or anybody else. And so their public interest argument fails because it is unsupported by any trial evidence.

But, your Honor, it's also unsupported by the law. The Supreme Court has cautioned courts against this very type of balancing. Again, we turn to Philadelphia National Bank. It's important guidance on this point. I have put it on the screen.

And what this guidance tells us is very appropriate in this case, because here we have a serious threat to competition that threatens billions and billions of dollars of harm to consumers every single year.

Your Honor, with that, I will stop and reserve the rest of my time for rebuttal.

THE COURT: All right. Thank you.

Wait. I think we should take a break at this point for 45 minutes for lunch, and then we will come back and hear the arguments from defendants. Thank you.

(Luncheon recess)

A F T E R N O O N S E S S I O N

12:32 p.m.

THE COURT: Thank you.

All right. Shall we proceed.

MR. GELFAND: Thank you, your Honor.

David Gelfand on behalf of the defendants. It is really a privilege to be back in this court and be able to provide summations in a case that is of critical importance to my client and the other defendants in this case and to consumers and to the industry.

If I could, your Honor, may I approach --

THE COURT: All right.

MR. GELFAND: -- and give you copies of the slides that we will be presenting?

THE COURT: Thank you.

MR. GELFAND: Your Honor, in these slides there is one confidential document that we just left in order in the slides. We did it a little bit differently from Mr. Pomerantz. When I get to that -- it's a Verizon confidential document -- it will be in your deck, but it will not come up on the screen. I am only going to be discussing it briefly, just to let you know.

Your Honor, the evidence presented at trial, including everything that Mr. Pomerantz just discussed, fell far short of carrying the plaintiffs' burden of proving that the merger of T-Mobile and Sprint will substantially lessen competition.

In fact, the evidence showed exactly the opposite. The merger will greatly improve competition and bring a new level of rivalry to the two industry leaders, AT&T and Verizon. And that will take the form of lower prices to win share from the two largest competitors in the market.

The Court heard testimony from T-Mobile's management team about how the company has disrupted the industry with its un-carrier strategy. There is no disagreement from the plaintiffs about this. Focused on winning business from AT&T and Verizon by changing the rules of the game, for leading paying points for customers, and lowering prices, the strategy has been hugely successful for T-Mobile and for consumers. The merger with Sprint gives the company a unique opportunity to continue its un-carrier strategy for years into the future and, as T-Mobile likes to say, supercharge that strategy.

The merger will double capacity and lower costs. It will lower prices to consumers from day one, and provide them faster speeds and broader and deeper network coverage at the same time.

Mr. Pomerantz says that we're arguing prices are going to go up but so is quality so don't worry about it. That is not our argument. We do not make that argument. To be clear, prices will go down from day one and quality will go up.

This merger will unleash into the market a trove of spectrum held by DISH that would otherwise not be deployed in

the retail market that's at issue in this case. It will force AT&T and Verizon to respond with pro-consumer initiatives of their own, and there is evidence in the record that that's already happening. Neither of these companies welcomes this merger.

It will accelerate the country's transition to 5G. It will bring new, best-in-class high speed wireless service to millions of Americans living in rural communities, helping to close the digital divide. Plaintiffs like to talk about that being some kind of out-of-market efficiency. Those are the same consumers that benefit from all wireless competition.

And it will create an entirely new competitor to the cable monopolies as new T-Mobile rolls out high-speed wireless for home Internet.

All of this is confirmed by the real-world evidence presented at trial. Witness after witness testified to it. The companies' business plans documented it. Network engineers and highly reliable models verified it. And no fact witness disputed it.

The plaintiffs' own expert, as seen in this testimony, Carl Shapiro, acknowledged that companies have an incentive to lower prices when they increase capacity and lower costs. He had to. That is econ 101. And that is exactly what new T-Mobile is going to do here.

The FCC and the DOJ concluded and have advised the

Court that the merger is in the public interest because of the enormous benefits it will bring to consumers throughout the country.

Importantly, the plaintiffs did not dispute at trial that the quality of the combined network will be light years ahead of where T-Mobile and Sprint are today. It is a matter of network physics.

And, your Honor, I think this bears repeating. The centerpiece of this case, the main reason that these parties are pursuing this merger, is to create a new world-class network with lower costs, increased capacity, bringing better service to customers. The plaintiffs don't dispute what that new network is going to look like. They didn't put evidence into the record. They didn't have an expert that said all your predictions about how great the network is going to be are wrong.

In fact, as Mr. Pomerantz said, one of their experts says we're going to make the whole network too fast. Consumers aren't going to want all that speed. There is nothing that they can do with that.

But they don't dispute that the network itself is going to be everything we say it will be. Instead, they speculate, and that's all it is, that T-Mobile and Sprint will somehow find ways to replicate, or achieve similar outcomes on their own.

The plaintiffs rely on a structural presumption, and it is a centerpiece of their case. They are hanging their entire case on this presumption. And it was based on flawed reasoning. It was not supported in the trial record. And it was overwhelmingly rebutted, in any event. And I'll get to that during my remarks.

The plaintiffs rely on snippets of mostly older documents that have no probative value in determining whether the merger now before the Court will substantially lessen competition. Mr. Pomerantz showed several of these documents. Mostly they are from 2015, 2016, and they are talking about topics that are just not before the Court.

What's before the Court is the current merger in its current form, with the current network plan, with the evidence that was put before your Honor, the divestiture to DISH. All of that is what's in this trial. That was not discussed in any of these documents. Those documents, we're talking about another time, another possible merger, another possible situation.

And they presented economic testimony. It was theoretical, incomplete, and untethered to real-world facts.

Your Honor, we have here an opportunity to bring together two extraordinarily complementary sets of assets, create a cutting-edge wireless network, introduce massive new capacity into the system, dramatically lower costs and prices,

while raising quality, enhance competition, including by introducing a disruptive new entrant, DISH, and advance the public interest in a way that two expert federal agencies and a dozen other states fully endorse. The plaintiffs' case fails on the merits, and the Court should enter judgment for the defendants, and I will explain why that is our view.

I have in front of your Honor on the screen just a roadmap of how I will proceed. Of course, if your Honor would prefer me to cover different topics or proceed in a different way, I will, but I will begin with a discussion of the framework for deciding a Section 7 claim. Mr. Pomerantz gave his view of that. I've got the defense view of that, which is different.

I will then review the evidence in three categories. And the categories will be how the merger will supercharge new T-Mobile and the un-carrier strategy, how Sprint is actually declining in competitive significance, how DISH will enter as a disruptive competitor from day one, and how plaintiffs failed to prove their substantial lessening of competition.

I will finish at the end with just a brief discussion of public interest.

But I'll note that at the end of his remarks, Mr. Pomerantz cited to the California v. American Stores case, and I think acknowledged that the States stand in the shoes of a private litigant here. They are not entitled to any special

treatment. They have to prove that it would be in the public interest to grant an injunction.

I know Mr. Pomerantz wants to shift all the burden in this case back to us, but that burden squarely stays with them. They have to prove that it would be in the public interest to enjoin this transaction in its entirety.

So I'll begin with the framework for analyzing a Section 7 claim.

I will talk at times today, your Honor, about this Baker Hughes case from the D.C. Circuit. It is a very well know case. I'm sure your Honor is familiar with it. It has been endorsed and were adopted by at least five other circuits that we can find. It provides the framework for analyzing an antitrust claim, a Section 7 claim.

And what it says is that the Court should consider two possible future worlds -- one with the merger and one without the merger -- and that the plaintiffs must prove that the world with the merger will be substantially less competitive than the world without it. That's also very consistent with the merger guidelines that the plaintiffs repeatedly rely on.

This means that the plaintiffs must prove that prices are likely to be higher or that quality would be lower in the merger world than in the nonmerger world.

Now, Mr. Pomerantz pointed to language of the statute and highlighted the word "may be." In fact, the cases have

consistently found that the standard is that they have to prove that the effect of the merger will likely be to cause prices to go up, or to likely cause a substantial lessening of competition.

And just for a couple of cites to that, your Honor, I point you to Fruehauf v. FTC, Second Circuit 1979, and to the Craft Food case from the Southern District of New York in 1995. Both of those are cited in our proposed conclusions.

Now, in considering whether the merger world will be substantially less competitive, courts consider all relevant factors. The factors discussed in the Baker Hughes case include excess capacity, a company's weak competitive structure, changing market conditions, and the possibility of entry by a new competitor. Those are all items that were mentioned in Baker Hughes, and they are all items that have some relevance to this case.

And, very importantly, these factors should not be considered in isolation. As noted in Baker Hughes, the Supreme Court has adopted a totality-of-the-circumstances approach for Section 7 claims. In other words, your Honor, you don't say, OK, there's concentration. So defendants have to come forward and say one particular thing completely offsets that. You look at all the factors, all the things that affect the world with the merger versus the world without the merger.

And we've tried to represent just a simple version of

what that will be. I appreciate that it's a rather busy slide. I am not going to read it all. I am not going to cover every one of these points here, but I think I will be hitting most or all of them as I go through my further remarks.

But, you know, the Court's job here is to look at each of these worlds, all of the facts with the merger, all of the facts without the merger, and it is the plaintiffs' burden to prove that that world on the left is substantially less competitive than the world on the right, all things considered. Not one at a time.

It is noteworthy that no expert for the plaintiffs made a realistic assessment of all of these factors and opined why, on balance, this will lead to higher prices or lower quality in the world with the merger. In fact, there is no expert testimony saying that quality will go down as a result of this merger. No witness came into this courtroom, as far as I know, and said that quality is going to go down as a result of this merger, all things considered.

Now, the plaintiffs had Professor Carl Shapiro, a prominent economist. I have very high regard for him. And I'm sure he did everything he could to help the plaintiffs build their case. And, for example, he didn't even look at whether there is any benefit, any efficiency, any cost savings, any benefits to consumers as a result of this world-changing network that will be created as a result of the merger.

MR. GELFAND: He only looked at half the facts. He delegated or relied on others to look at other facts, and then was told just assume that, for example, all of the cost savings are zero, just assume that in reaching your opinions because the plaintiffs haven't satisfied some burden of proof. An economist saying we haven't satisfied some burden of proof to show with some level of precision, that, I don't think is in the law, that to some decimal point we've got the calculation of cost savings down to the penny.

So Professor Shapiro, in doing his analysis, didn't look at any of that. He just said, well, there are some things about the merger that will have the effect of wanting the company to raise price. He didn't do a full analysis. No other expert did that either. No expert has taken a realistic look at all of these factors and given the opinion that the plaintiffs are asking the Court to use as the basis for a finding that would block this merger.

Now, I'd like to talk for a few minutes about the plaintiffs' alleged presumption. To begin with, the Court should be reluctant to apply a presumption here, given the lengthy and exhaustive reviews by the DOJ and the FCC and their well-reasoned conclusions, that the merger is pro-competitive and in the public interest, when considered with the divestiture and other commitments those agencies obtained. The plaintiffs are, in effect, asking the Court to presume that

both of those federal agencies, and all the States that join them, got it wrong.

But even putting that aside and just taking the presumption argument for what the plaintiffs present it to be, they support that presumption by making two invalid assumptions, and Mr. Pomerantz discussed them. We've joined issue on them. It's well known to both sides what they are.

The first mistake they make is they ignore the existence of the MVNOs and the cabling companies in calculating shares. They just don't include them as competitors; and secondly, they have these local geographic markets. I'd like to talk about each of those topics in turn and why the plaintiffs got it wrong. I just would remind the Court that they have the burden of proving these markets.

So with respect to MVNOs and cable competitors, plaintiffs picked the relevant market of retail wireless telecommunication services, and these companies sell into that market. They earn revenues in that market, to use the plain language of the horizontal merger guidelines that the plaintiffs themselves rely on. It could not be more clear.

The test for whether someone is in a market is whether they earn revenues in that market, and having chosen this as the relevant market that they wanted to litigate, plaintiffs cannot just pretend that certain competitors don't matter because they contract for access to network time from other

players. If they wanted to litigate based on a market that consisted of network operators of a certain size, maybe involve a wholesale market or something like that, then that's how they should have defined the market, but they defined it as retail.

And, in fact, the plaintiffs go even further than disregarding these retail competitors. They attribute their customers and their shares to the networks they contract with. Consider for a moment, your Honor, what this means. When Comcast wins a customer away from Verizon, maybe because they have a better device offer or an exclusive device, as Mr. Schwartz testified about, or maybe they offer a nice bundle where the consumer gets home internet and wireless service at the same time, and they win that customer away from Verizon, under the plaintiffs' theory, Verizon is given credit for that customer even though they lost the sale. That does not make sense.

Now, plaintiffs called executives from Altice and Comcast as witnesses. Those are two cable companies. And those witnesses confirmed that they are retail wireless competitors. They set their own prices. They have stores. They offer promotions. They offer devices. They bundle retail wireless services with other offerings, just like AT&T and Verizon do. And those things that I just mentioned are all elements of competition that the plaintiffs themselves have brought out during this case, selling devices, having stores,

et cetera.

And many of them are things that those competitors decide about and do on their own. They don't go to Verizon -- Comcast doesn't go to Verizon and say, hey, can I offer this device? So they compete in the retail market. The Comcast witness, Mr. Schwartz, he testified that Comcast wins customers from Verizon, which is the wireless network that Comcast contracts with. Verizon is actually Comcast's largest source of customers.

So your Honor might recall that we put up some data from a third-party source, and Mr. Schwartz acknowledged that this was data that Comcast sometimes relies on, and from this data, almost 50 percent of Comcast customers come from Verizon. Comcast is one of the fastest growing players in retail wireless, taking on net additions faster than the established players. Most of -- well, the lion's share coming from Verizon, and yet, the plaintiffs' methodology attributes all of that share to Verizon for having lost the sale.

Comcast has other advantages, like its network of 18 million Wi-Fi hot spots, which is infrastructure that it owns and operates itself. Many of its customers aren't even hitting the Verizon towers a lot of the times when they're using their phones. They're just hitting the Comcast hot spots, 18 million of them throughout the country, many major cities all over the place. What plaintiffs are saying is that a company which

added more subscribers, than some of the established network operators, Comcast, does not count.

Now, Mr. Pomerantz said, well, there's no evidence that the defendants ever react to these MVNOs. We put evidence in. I'd point your Honor to Exhibit 5303 and 5306, defense exhibits. Those exhibits were analyses of cable competitors and how big a threat they posed in this business, and there are many documents in the record where the company looks at the whole competitive landscape and consistently includes MVNOs like TracFone and the cable companies. An example of that would be Exhibit 5120.

I just want to respond to one other thing that Mr. Pomerantz said. He put up a slide, it was slide 17 in his book and it was a slide from an FTC document, and I just need to pull it up, if I could. And he pointed to a line that says: As in previous transactions, we will exclude MVNOs from consideration when computing additional concentration measures -- initial concentration measures. This is not a final analysis.

But he didn't read the next line: We find, however, that MVNOs, such as TracFone, Altice, Comcast or Charter, may provide additional constraints against any anti-competitive behavior, and we do take into account the role of such providers in our evaluation of the likely competitive effects.

The plaintiffs here do not take them into account.

They ignore them. They assign them to the other players in order to inflate the shares that they used to establish their presumption.

Now, with respect to local geographic markets, plaintiffs also failed to satisfy their burden of proof. Why do we define geographic markets? We define geographic markets so the Court can examine where prices might increase after a transaction.

Mr. Pomerantz showed the example of two gas stations at an intersection, and I've done a lot of work in the gas station sector. It's a sector where there are very local markets. I'm sure your Honor has been at intersections where there are four gas stations, and prices are relatively low because they're all competing with each other, and then you drive 20 miles away, and you get to a small town and there's only one station in town and the price is higher because there's not local competition. And that market, the station owner or a local manager or a regional manager sets the price at the station based on local competitive conditions.

It's logical to look at local markets in that kind of market because if you did a merger and it combined too much of the gas station competition in one local market, they'll be less inclined to discount in response to each other, perhaps. But that makes no sense here.

In the retail wireless telecommunications services

market, the market that the plaintiffs have defined, prices do not vary from one part of the country to the next. We put up here a map and just showed current HHI numbers, the concentration measure that the plaintiffs rely on for their presumption. And in Milwaukee, it's 2,000. I don't know why we put Milwaukee in the middle of one of the Great Lakes, your Honor. But Milwaukee, it's 2,000. In Miami, which is apparently underwater, we have an HHI of 3,500.

And the point I'm making here is that every one of the cities on this map and every other city in the country, every CMA gets that same deal that we put an example of up there. The pricing is the same throughout the country. They don't vary. This was uncontroverted evidence at trial and there was no dispute about it. All of the witnesses acknowledged it.

I won't dwell on this because Mr. Pomerantz didn't in his closing remarks, but at the time they filed their complaint, the plaintiffs promised the Court that they would prove that there are all these local promotions that made local pricing vary according to competitive conditions. That proof never came into the record of the case. There was a very small amount of local promotional evidence that was nothing more than trivial examples of subway ads and things like that. There is no evidence in the record of this case that there is any material variation of price from one local area to another.

Plaintiffs' experts did not even attempt any

prediction at all about how pricing in their alleged local markets would change after the merger. We got this list of HHIs and these calculations, but Professor Shapiro, he didn't come to the Court with an analysis saying, well, in Miami the price is going to go up 10 percent more because the concentration is so high there, but in Milwaukee, don't worry about it because the concentration is relatively low. That evidence never came into the record of the case.

Now, there also is no evidence in the record -- I appreciate that there are some prior statements about CMAs being a geographic market. That's sometimes for a different purpose, like when Professor Katz discussed it back in 2012 and was talking about spectrum auctions, which are often done with CMAs in mind. It's different from what we're talking about here, which is the market that the plaintiffs have defined.

And I appreciate that my client, as well, took the position 10 years ago that there are local markets in this industry. But that was 10 years ago, and there were more regional operators, and there was more local pricing and the showing could be made that pricing did vary from one part of the country to another. That's changed. That doesn't exist anymore. In the year 2020, pricing is national, which is undisputed in the record of the case.

So there really is no evidence, other than those prior statements, that CMAs in particular are a relevant market. And

again, the plaintiffs have the burden of proving the relevant market. They pick it, and then they have to prove it. And the evidence is undisputed that defendants' business people do not make decisions based on CMA geographies. I don't recall, I don't have a systematic analysis of it, but half of the business witnesses that appeared here, your Honor, didn't even know what CMAs were. They don't even think about it in the course of their business.

And Professor Shapiro acknowledged that his methodology, applying the hypothetical monopolist test the way he applied it, would lead him to be able to define any geographic market he wants, from a city block to a gerrymandered congressional district, to half of the United States, he could pick any one of those he wants and that would satisfy his test.

As your Honor noted just last year in the Caruso case, the market is not simply whatever the plaintiff wants it to be, and the hypothetical monopolist test used by the plaintiff here is not determinative. That was an observation your Honor made in Caruso.

The purpose of defining geographic markets is not to provide plaintiffs with carte blanche, to select any geography they want where they can obtain a presumption based on local shares and then use that to challenge a national merger with national pricing.

Now, I want to talk for a moment about this idea that we can somehow define local markets based on quality differences. Sure, there are some quality differences from one local area to another. This is a tough business, and you got to constantly invest and constantly upgrade that equipment and constantly put resources into the field to go do that.

But the plaintiffs' suggestion that local markets can be based on regional differences in network quality is without merit. In fact, T-Mobile maintains a nationwide standard for network quality. In other words, that same decision process is, get the standard to the same level everywhere we operate. It has nothing to do with local competitive conditions or concentration numbers.

And, in fact, there's no evidence that quality is correlated with these CMAs. Our expert, Professor Katz, did some work on this. He's the only expert to have done this work, and he tried to analyze, based on established speed data, which is often the way to measure quality, if the network is constantly congesting, then people get lower speeds, as your Honor heard throughout trial. And when he did that analysis, there was no correlation, no statistically significant correlation between concentration numbers in CMAs and what the quality was.

Moreover, the whole purpose of this transaction, your Honor, is to create a revolutionary network with quality that

is at a level this world has never seen, and that's a nationwide thing. Everywhere is going to get better speeds. Again, the plaintiffs don't deny what the post-merger world is going to look like, and the suggestion that somehow there's going to be local effects and they're going to, what, not implement these quality improvements in Miami and let Verizon and AT&T eat their lunch as they transition to 5G? It doesn't make sense.

And Professor Shapiro made no prediction about it. Just as he made no prediction about prices going up in local markets, he made no prediction that quality in any particular market -- he didn't model it; he didn't analyze it; he might have said something from which you can imply it, but he really didn't give an opinion -- that in his professional opinion, it is more likely than not that quality is going to go down in Miami, for example.

The evidence in the record is clear that both pricing and network quality in the industry are national. As the Supreme Court held in *United States v. Grinnell*, a market with national prices and national planning is a national market, even where some activities of the business are, in a sense, local, as the court said in Grinnell. This reflects the "reality of the way in which the parties conduct their business."

So the plaintiffs were wrong to exclude MVNOs and

cable companies. They were wrong to define local markets, and as Professor Katz testified, when the market is properly analyzed, based on national market and including all competitors in the market, the post-merger HHI is below 2,500, and there is no presumption.

The two things I want to note is the plaintiffs say, well, that's based on subscriber shares. If you use revenue shares, you can just eek out a presumption. You can just get above it. But the plaintiffs themselves, Professor Shapiro testified that subscriber share is the right measure. The plaintiffs have the burden to put forward a model from which the Court can reliable conclude that a presumption is justified.

And I would submit that they should not be entitled to change the rules of the game as they go and say, well, if you're going to correct those two things in our model and show that there's no presumption, then actually, we'd like to change something else to get it back. Their expert attempted to carry their burden by using subscriber shares and excluding MVNOs and cable companies. When we fixed that, they don't get a presumption. They shouldn't be heard to say, well, let's try revenue now.

The other thing they do is they say, well, there's also this 30 percent threshold. Professor Katz calculated that, too, and he calculated that based on revenue and on

subscriber share, and both numbers came out below 30. They didn't prove the 30 percent threshold getting tripped in this case. I think they introduced that to try to have a fallback, but they didn't prove that.

Now, by discussing these issues, your Honor, I do not mean to suggest that the outcome of this case depends critically on the existence or not of a presumption. Even if the Court were to assume, for the sake of argument, that a presumption applies, we easily rebutted it at trial with a large body of evidence, much of it undisputed, showing that the market shares are not indicative of a competitive problem.

Now, the plaintiffs argue that each of these points we raise, better network, declining Sprint, what they call weakened competitor, and the DISH entry -- which, incidentally, your Honor, is not pure entry. DISH is taking over the Boost brand with its nine million subscribers. It's kind of a hybrid of continuing part of the Sprint business independently and entering as a new entrant with a lot of assets, which I'll talk about in a few minutes.

But the plaintiffs contend that on each one of those three points, we are asserting what they call, I think, an affirmative defense or a defense and that we have a burden of proof. And they also suggest that the Court look at each one of those in isolation, like we have to prove at least one. We can't put before the Court undisputed evidence or convincing

evidence that this is what the world will look like with the merger and include all of that at the same time.

What Mr. Pomerantz basically said during his summation is that if they get that presumption, then we've got to win on at least one of those defenses, as he calls it, on a standalone basis, or they get to go home without proving a substantial lessening of competition. That is not the law. It's not even close.

First of all, that argument has been rejected by the courts in *Kaiser Aluminum v. FTC*. The Seventh Circuit rejected an argument that the so-called weakened competitor, under the *General Dynamics* case, is an affirmative defense on which the defendant bears a burden of proof. The court considered an argument exactly like the argument that Mr. Pomerantz is making here, and the court said that the government continues to bear the burden of proving that there will be a substantial lessening of competition. There's never a burden of proof on the defendants.

Similarly, in the *Baker Hughes* case that I mentioned, the court, the DC Circuit, rejected an argument that the defense has a burden of making a particular showing that entry will satisfy a particular standard. The court rejected that.

The burden that we have, if there is one, if they did establish a presumption, is to produce evidence, to come forward with evidence. It's a burden of production. It is

never a burden of proof, and that is what we did, with all three of these categories. Now, we proved an awful lot in the process. My point is just that we don't have that burden, and courts have rejected the view that the plaintiffs adopt here.

I display here two cases, Baker Hughes, again, and Arch Coal for this last point that I made that you can't just rely on the market share statistics and expect the defendants to prove anything. We just have a burden of coming forward with evidence to rebut the idea that the market concentration numbers accurately reflect some sort of competitive problem. So this is a rebuttable presumption and the burden of production that we have is to show, through evidence, that the market share, the concentration numbers overstate the competitive problem, which we've done time and again during the trial.

I'll talk about these things further, but it's the same list that I already gave your Honor, network capacity, lower costs, game-changing, quality improvement, DISH will acquire Boost, it will enter evidence that Sprint has been declining. All of that together satisfied our burden of production under the Baker Hughes burden-shifting framework.

And so now I'm going to move onto the evidence. If you can move forward a couple of slides, Mr. Klein.

I begin with a discussion about the evidence at trial about how the combination of T-Mobile and Sprint will lead to

network and cost improvements that, in turn, will lead to lower prices and greater competition. As I said, much of this is undisputed.

As an initial matter, plaintiffs' contention that our argument here is some kind of efficiencies argument, and it is efficiencies, I appreciate that, but the idea that it's unheard of or that courts are highly skeptical of it or it's never been accepted before, it's just not right. Professor Shapiro himself acknowledged that even in a four-to-three merger, efficiencies might leave the merger on balance to be not objectionable.

And Federal Courts have accepted efficiency arguments in merger cases before. We cite three of them here. One of them, the *Butterworth* case, in the middle of the slide from the Western District of Michigan, actually did find a presumption and actually did find that efficiencies rebutted the presumption, along with other evidence that was presented in that case, similar to what we're doing here. This is not novel. That was back in the 1990s.

And, of course, the federal agencies recognized the importance of considering efficiencies because they recognized it in the guidelines. The actual guidelines section that we talk about on efficiencies was written in 1997, around the time these cases were being decided, with the benefit of what the courts were deciding about this. And the idea is that when a

merger brings together two companies that create lower costs, better product, that that actually makes the transaction pro-competitive, and you have to balance that against the other impacts that the transaction might have.

It's part of the competitive effects analysis. It's not some kind of separate efficiencies. We're not saying this merger is going to raise price, but by the way, we're going to save a bunch of money in building our next corporate headquarters or something. These network improvements go to the core of how these companies compete. The costs are what are going to allow us to lower prices and take more share from Verizon, AT&T, the cable companies and others.

And evidence of how the merger will increase competition is not only relevant, it's a critical feature of this analysis. Now, Mr. Pomerantz said, well, if the defendants are right here, Verizon and AT&T, I guess they could merge. That's not what we're saying, your Honor. We're not saying that. We're not saying that this is some kind of absolute defense. If we can show any efficiencies, then it's game over, no matter what the other facts are.

In fact, our whole point from the beginning of this case, from the time we filed our answer, through the trial and through to today, is that the Court should look at both worlds in their entirety and look at all of the facts, including the network improvements. If Verizon and AT&T were to merge, that

would be a much higher market share. It would be a much better competitive effects case. It would actually be a competitive effects case that the plaintiffs would be able to make, and it would be perhaps very hard, I think almost certainly very hard, to defend based on some efficiencies from that. They've already got scale that's beyond our wildest imagination.

But this case is about T-Mobile and Sprint, given their circumstances at the moment, merging and the benefits that the uniquely complimentary spectrum and other assets bring to the ability of that company to improve its network.

So with the merger, new T-Mobile will have a vast amount of additional capacity, greatly reduce cost, dramatically improve network and extend an ability to supercharge the Uncarrier strategy. It will continue disrupting the industry and compete even more aggressively against AT&T and Verizon.

Without the merger, T-Mobile will face capacity constraints and will have to resort more and more expensive methods of increasing capacity to handle new customers and ever increasing demands for data, which will cause it in the relatively near term to pull back on its Uncarrier initiatives.

So how did we get here? Well, the Court heard testimony from T-Mobile's executives about the Uncarrier strategy. It is unambiguously good for consumers. It began when John Legere took over as CEO in 2012, and it has continued

to the present day under Mr.~Legere's and Mr. Sievert's leadership. The brand is built on this business strategy. The very identity of T-Mobile depends critically on this strategy, and it's centered around solving customer pain points and delivering more to customers for less.

T-Mobile cannot move away from that brand without jeopardizing its entire business model. And it's undisputed, I believe, that the competitive focus of the Uncarrier strategy is to take customers from the industry leaders, AT&T and Verizon. I think Mr. Pomerantz might have even acknowledged that during his remarks. He put up an example of when T-Mobile went to unlimited data, and he had an example of how there was a rumor that Sprint might be doing the same thing.

But that was an initiative that T-Mobile did to attack Verizon and AT&T. That was not something T-Mobile was doing to win customers away from Sprint. And that same document that Mr. Pomerantz put up, that had only one bullet showing. I don't recall the number, but that same document had eight other bullet points, your Honor, and one of them was about competing with Verizon and T-Mobile and how good this would be. And the cable companies were mentioned in there, these cable companies that supposedly never get mentioned.

So the focus of the strategy is on AT&T and Verizon, and it has been successful. T-Mobile grew its subscriber base from 26 million branded customers at the end of 2012 to 66

million branded customers at the end of 2018. Those customers are coming from AT&T and Verizon.

Now, a key to the strategy, and you heard a lot of evidence about this from Mr. Ray and others, is to be able to accommodate new customers in ever-increasing data demands with the available capacity that T-Mobile has. You can't just keep on-boarding customers. You have to always increase that capacity headroom as you bring on new customers, and you're doing that at the same time that data demands are going through the roof. So you can't just sit there with the network you've got. This is a living, breathing, dynamic industry, which is all about staying ahead of that curve, and T-Mobile has been able to do that. And I'll talk about that in a little while, but they're getting to the end of that runway.

Now, the evidence about this, I think, was pretty much undisputed, at least as to where they are now. Put aside for a moment the plaintiffs' speculation about the things that they will do in the future without this merger. But as T-Mobile's witnesses explained, and here we have Mr. Ray's testimony, the company is running out of headroom and will have to change course soon. The result will be lower quality or higher costs, and speed tests that the company conducts are already showing that it's losing its edge. This is already manifesting in its ability to compete.

This is not just us saying this, your Honor. Five

years ago -- and this was a document introduced into evidence from AT&T. It was industry analysis from September of 2015. It was predicted by AT&T at that time, five years ago, that T-Mobile had about four to five years left on its strategy of aggressive tactics and that as its network fills up, it will be forced to increase investment to meet increasing demand. This is exactly what happened.

We are now at that point where we have to increase investments because it's getting harder and harder, more and more expensive without that important capacity spectrum. We have to build more towers, do more cell splits, sector splits, more equipment, more maintenance, rather than putting spectrum on the towers, that can give you this multiplying effect of tremendous additional capacity.

Even the plaintiffs acknowledge that spectrum will bring costs way down. We have a fundamental disagreement, there's no question about it, your Honor, about whether there's likely to be spectrum available that can solve either of these companies' problems. We have joined issues squarely around that, and I'll talk about the evidence around that.

But one thing that's not disputed is that adding significant spectrum greatly reduces marginal costs. The plaintiffs, in putting up that bar chart, showing that if you can get more spectrum, your marginal costs will come down, in fact verified our efficiencies story. They verified that the

kind of spectrum that we can get through this merger will help us to bring down marginal costs.

We don't agree with the numbers. They weren't adequately explained by Professor Scott Morton. The underlying work is not valid. We didn't really engage very much on that; so I don't want to indicate that I'm embracing the actual numbers, but both sides agree that adding spectrum to the existing T-Mobile will relieve that capacity problem and greatly reduce marginal costs.

They did no similar analysis, incidentally, of the Sprint side. I think everybody agrees that Sprint is desperate to get low-band spectrum, and I can talk a little bit about that as well.

So AT&T predicted this five years ago. By the way, five years, same length of time that our network model goes out. Plaintiffs criticize us, how can you predict anything in five years? You guys can't even predict anything a year out. Well, when we go a year out, we're 99 percent accurate, and we have very good technology and very good insight into how demand is growing in this market and how equipment will be able to accommodate it, and I'll talk a little bit more about the network model as well.

Professor Katz confirmed, after his analysis of all the facts, that without the merger, T-Mobile will face substantially higher costs. And as I've said, the merger with

Sprint presents a perfect opportunity to address this issue and ensure that the disruptive Uncarrier strategy can continue even more effectively for years to come. They will give T-Mobile a new weapon to lower prices and steal share from its larger rivals.

Mr. Pomerantz mentioned the question that your Honor asked about the flower child. Because your Honor also asked about Rocky, about T-Mobile becoming Rocky and stepping into that ring with its bigger, more powerful competitors, and developing a new punch through this merger. And that is exactly what will happen, that is exactly what the evidence showed both in the business plans and in the testimony.

So I want to talk a little bit about that. As the Court heard at trial, Sprint holds a very large amount of mid-band, 2.5 gigahertz, spectrum that T-Mobile needs to increase its capacity. It's perfect. For its part, Sprint lacks low-band spectrum, which gives coverage and has huge challenges with its poor quality and higher ratings of consumer dissatisfaction. These companies are a perfect fit, absolutely perfect fit.

And Neville Ray and Ankur Kapoor explain how the combination will have a multiplying effect, one plus one equals four when it comes to capacity. When you're combining more towers and more spectrum in the same place, that's the network physics that is not really in dispute, not in dispute at all.

I didn't mean to say "really."

In fact, thousands of Sprint towers can be decommissioned and capacity greatly increased at the same time. Decommissioning towers is not taking capacity out of the market. It has been suggested earlier in this case that maybe that's removing capacity. No. When you have two towers right next to each other, and they're both broadcasting at different frequencies, you take one down, you combine the radios, you're still covering the same area, you've eliminated the cost of maintaining a tower.

You've just taken costs out of the system, and at the same time, by combining the spectrum on the same tower, you've greatly increased capacity. There's nothing about decommissioning towers in this case that should be understood to be a reduction of capacity. The overall capacity goes up and you decommission towers and the costs go down. Nobody from the plaintiffs denied that in trial.

So as a result of this, huge capacity increases, decommissioning towers, we're going to see huge reductions in our marginal costs. Combined network will generate 2.1 times more capacity than the combined standalones, and unleash more than $18 billion in annual consumer welfare gains by 2024. This is a calculation that Professor Katz made after considering all facts.

Lower marginal costs, lower prices, also considering

the loss of competition between T-Mobile and Sprint, to give the plaintiffs their due, that does have an effect in one direction, but the lower costs and the higher speeds and the better quality, that swamps it. And plaintiffs benefit to the tune of tens of billions of dollars a year, or over $10 billion a year indefinitely.

Your Honor heard from Mr. Ray, who confirmed the basic facts, twice the capacity, 15 times the speed, $26 billion cheaper he testified. The plaintiffs' only response is to say consumers don't want these speeds. They can't imagine why somebody would want to have a faster wireless connection in the future.

That analysis of the bar charts with the speeds that Professor Scott Morton presented, also completely unexplained to the Court what those speeds were, whether they were average speeds, tested speeds, how they work, but the one thing that she acknowledges in that slide is that there will be much faster speeds. And her only response is, well, the defendants must have some kind of burden to prove, to a decimal place, what that's worth to consumers.

We can only do so much to calculate the value of something in the future, but we know from history. I think your Honor asked about Dick Tracy watches. They exist now. They have a lot of value to consumers. The applications of the future just boggle the mind.

And one thing we do know from history is whenever capacity increases and speeds increase, wonderful things happen. People figure out how to use it. There are startups all over the country, companies all over the country just chomping at the bit to develop new applications that can rely on much higher speeds, whether it's driverless cars or medical innovations or whatever else is going to come with it.

I think the plaintiffs saying that has no value just completely ignore it in any analysis of the case. I think that has no merit, your Honor, especially when they acknowledge the tremendous increase that we're going to achieve as a result of this merger.

By having additional capacity, we're going to deploy 5G quicker. We'll accelerate that. Both the FCC and the DOJ agree that that will happen. And, in addition, by lowering our costs, we're going to have more investment capital dollars to plow back into the network and further improve it. It's a virtual cycle that this merger presents that no other opportunity in the world presents for T-Mobile at the moment and in the foreseeable future.

And with these game-changing improvements in place, the plan for the merged company unambiguously calls for new T-Mobile to lower prices, increase quality and compete more aggressively with Verizon and AT&T. From the time T-Mobile management presented this proposed merger, to the board of

directors in September of 2017, the plan was to create a stronger, more competitive Uncarrier offering, transformative 5G with substantial cost savings passed back to customers in the form of even more aggressive wireless offers.

And each and every subsequent iteration of this plan has echoed those fundamental principles. We saw it in the deck presented to the T-Mobile board of directors when it approved the deal in April of 2018. We saw it in the deck presented to the rating agencies in April 2018 that allowed T-Mobile to raise tens of billions of dollars in investment grade debt. We saw it in the launch deck that went to the public, and we saw it in T-Mobile management's own internal business plan from June of 2018.

That deck, which was discussed in detail with Mr. Sievert, describes the new T-Mobile vision, create an unprecedented 5G network with capabilities and capacity that will lead to better service and lower prices, that will allow T-Mobile to continue its proven pro-consumer strategy. Mr. Sievert is running this company going forward. He's taking it through this integration. He's taking it into the future.

This business plan is what everybody in the company is rallying around. All of the people who are spending enormous amounts of time and energy planning for what's going to happen after these companies merge, this is their manifesto, lower costs, lower prices, improve service, beat AT&T and Verizon.

In fact, as a result of this additional capacity, T-Mobile announced in November that after the merger, the company will cut in half the price of its two gigabyte plan and significantly reduce the price of its five gigabyte plan. These initiatives are only feasible with the new capacity and lower costs that will come with the merger. The company is not doing this out of the goodness of its heart. Although, I know this company now, and they have a good heart, but they are doing this because it's the right thing to do competitively, lower price, take it to AT&T and Verizon, continue to win share from them. But they can only do that -- they can only come out with these kinds of earth-shattering offers if they get the additional capacity and cost savings that this merger will bring.

I want to go back for a minute, Mr. Klein. I skipped a slide, but I do want to just show it for a moment because all of the witnesses who testified here, your Honor, and we've got three examples here, did confirm during their testimony that the game plan for the merged entity is to lower price and get the benefit of these lower costs.

I want to talk for a minute about, I think it was three documents, that Mr. Pomerantz highlighted suggesting that somehow people see this merger as an opportunity to actually raise price, because none of those documents say that and none of those documents have any probative value for that

proposition.

He showed Exhibit 1034. It was a document that talked about the rule of three and the price competition may be decreased. That is a very old document. It was prepared by a third party, I think it was Morgan Stanley, and it was prepared in the context of considering a different world at a different time, a possibility of a merger eight years ago when the industry looked very different, when T-Mobile and Sprint were in very different circumstances. No DISH divestiture.

And that was one person from Morgan Stanley, or whoever it was because we don't really have an evidentiary record from the plaintiffs about how that one sentence came about, but that same document, your Honor, it shows time and again throughout that exhibit all of the things we're saying here, that even at that time a merger would solve spectrum problems and allow better competition with Verizon and AT&T. Even at that time, eight years ago, that there would be very large cost synergies and allow the company to be more competitive. So I think that document just has no probative value.

They also showed an Exhibit 339, which was from December of 2015, five years ago, four years ago. Again, no indication that that Morgan Stanley or third-party consultant in that document even had any authority to speak for T-Mobile about this topic or that he was thinking about anything like

the merger that's before the Court today with the divestiture and the network improvements.

And they also showed a text message from a marketing guy from Sprint. First of all, Mr. Solé was not involved in planning for this merger. He has no idea what T-Mobile plans to do with this merged company, and he even testified that this wasn't even a prediction on his part. He was kind of brainstorming as he was boarding an airplane, and he said, well, what if ARPUs go up $5 as a result of this merger? Wouldn't there be some great additional benefit to us in the industry from that, and shouldn't we negotiate a better merger contract as a result of that? That's not evidence of what's going to happen in this transaction.

There's no evidence that this company is planning to do anything other than what is shown in dozens of business documents and was consistently testified to in court at trial. And T-Mobile is confident that the merger integration will be a success and that these things will happen.

And one of the reasons that they're confident about that is because they've done it before. Your Honor heard testimony and evidence about the MetroPCS merger, which happened several years ago. It's a merger where T-Mobile merged with MetroPCS. That was an unqualified success both for the company and their customers, and it had a lot of parallels to this merger. The Court heard testimony about it from our

executives.

It included combining towers and combining spectrum in major metropolitan areas, which is the network challenge that we face with this transaction. Metro was a smaller company than Sprint, but it was not a small company. It passed population of something like a hundred million people. It was in a third of the country, major metropolitan areas. The integration was as big a challenge as we're going to have here, when you go city by city.

And, in fact, the integration challenge was even greater because they were in different technology standards and the handsets were not compatible. Mr. Ray and Mr. Kapoor oversaw that integration, and they used the same kind of modeling techniques and the same game plan that they're going to apply to the Sprint merger here.

The network efficiencies were achieved faster than expected and at a higher level than T-Mobile had anticipated with no material loss of customers. In fact, the customer base grew significantly after that merger. Consumers got lower prices and better quality, just as they will here.

Professor Shapiro agreed that a prior example like this can be used to verify merger efficiencies. Nevertheless, not one of the plaintiffs' experts, neither of their economists, not their technology expert, not their financial expert, none of them looked at that merger. The evidence about

what happened with MetroPCS is undisputed. The plaintiffs put no evidence in about it.

So how did T-Mobile quantify the network gains it will attain here? I talked briefly about this burden the plaintiffs were trying to put on us to somehow quantify it down to a decimal place. Obviously, predicting the future is not a perfect exercise, but this company does a superb job of it, and it has experts in the field who do it for a living decade after decade, and T-Mobile relies on them in making billions of dollars of network expenditures. And those are the people who put this model together and came into court and testified to your Honor about it and defended it and explained it.

The gains were projected by Mr. Kapoor, Ankur Kapoor. He developed the model based on his ordinary course model to evaluate the post-merger network. I want to talk about ordinary course for a minute. The plaintiffs use that as some kind of label. Well, this isn't really ordinary course because it was handed off to the economists at a certain point and, oh, by the way, you adapted it to 5G. That's not something you were already doing in the ordinary course.

Well, they use the model now, same thing, for 5G, but put that aside. The model itself, all of the technical information, the tower-by-tower analysis of where congestion is going to occur and what the costs are of solving it and what the technical solutions are, all of that was done by Mr. Kapoor

based on his ordinary course model.

What the economists did, and we have to do this -- if we hadn't done it, the plaintiffs would be criticizing us for that. What the economists did was took that model and said, okay, now what does that imply for these marginal costs that have to get fed into the competitive effects analysis? There's nothing suspicious about that. That's what merger parties have to do to show the agencies and then a court, if it gets to litigation, through expert testimony, what the implications are for the economics.

But Professor Katz and his team didn't interfere or change any of the core network functionality, and the plaintiffs have had this model forever. And they could have analyzed it, and they could have come to court and said, well, look, the lawyers put this code in and it rigs the game. They didn't do that. They had some other criticism of it, which were very transparent on the face of what we did. They criticized it because they said we should have modeled in certain things happening that we didn't, but they don't tie this to anything. They don't say, well, because lawyers or economists were involved or because it was adapted to 5G or because Sprint was put on the model, that it somehow renders the whole thing invalid.

And I just note that, you know, at the same time they're criticizing us for using it to look at 5G, Professor

Scott Morton sat on the stand and criticized us for not using it to look at all other kinds of technologies that their own expert, Dr. Kolodzy, said weren't in use or were speculative or in some cases, he didn't even testify about them, your Honor. And she said, well, it's not ordinary course because you used it for 5G, which is well known to the industry now and already in use, but you should have adapted it to all these other things. And so we're darned if we do, and we're darned if we don't. That's the critique of our network modeling that the plaintiffs brought forward through their expert.

I'm going to take a moment now, your Honor, to see if I can skip over some of this.

I do want to talk for a minute -- Mr. Klein, if you could go forward several slides, please, to the guidelines language.

These things that Mr. Pomerantz has talked about that we should have done in our modeling, or things that we should have figured out about spectrum and other ways that we could solve for these problems. The plaintiffs have the burden of proving this case, but even if you take the guidelines approach and say, well, the defendants need to come forward and show that the efficiencies that they're putting forward are so-called merger-specific efficiencies that can only be accomplished through the merger, the standard is not nearly as high as Mr. Pomerantz would lead the Court to believe.

The guidelines are clear that the only alternatives that one considers are practical alternatives, all the facts considered. You don't just look at theoretical alternatives. It's not our burden to show we can't possibly do any of this without the merger. The plaintiffs should be able to show that without the merger, here are things that are likely to happen, and this they were not able to do, your Honor.

And I'm going to skip over some prepared remarks about these Kolodzy assumptions and Professor Scott Morton's testimony on that. They're in the slides. They're in the record of the case. It was an invalid analysis.

But I do want to talk for a minute about the spectrum point that Mr. Pomerantz made, and I think if we can go forward, Mr. Klein, to the slide on Kolodzy on low-band and mid-band spectrum.

(Continued on next page)

MR. GELFAND: (Continuing) So their expert -- let me just come back for a minute, your Honor, just to remind the Court.

What this model does, that we used to calculate the cost savings, is it looks at what the merged network is going to be. It analyzes that first. And that I believe there is no dispute about, what we're going to create.

Then it says, well, the standalone companies, what are they likely to look like if we model them going forward? And then it simply looks at the difference going forward, and says, well, if the combined network is able to achieve these savings relative to the standalone companies, then that's a merger efficiency. You save costs. You have improved speeds.

So the plaintiffs' criticism is that in looking at those standalones, that we didn't allow for the possibility that these standalone companies would buy more spectrum. And they say, well, you've got to be able to solve it. There's got to be a way to go find this spectrum. T-Mobile needs mid-band spectrum, so go find some mid-band spectrum. Sprint needs low-band spectrum, so go find some low-band spectrum. There is no dispute that the merger brings together those two kinds of spectrum that we each need.

So I begin with Dr. Kolodzy's testimony about this.

There are no low-band spectrum options anticipated? And he said, "That's correct."

"So whether T-Mobile or Sprint could acquire any low-band or mid-band spectrum at auction is speculative, correct?" And he says, "Yes, it is speculative."

Now, the plaintiffs show this long list of spectrum acquisitions. It is one of the confidential exhibits I think they had in their book. If your Honor looks at that list, just about every one of those acquisitions was trivial. Some of them are in the thousands of dollars. Very few of them are more than a few million dollars. That is not what we're talking about here. What we're talking about with this merger is a transformative merger of companies with spectrum portfolios that take the whole network to a new level, not just solve certain local problems or fill in some gaps. That's really not probative of anything other than, yes, in the ordinary course of business, we do small transactions from time to time.

So we have Dr. Kolodzy acknowledging it. We asked Mr. Ray about this. And he said, well, look, there really isn't anything out there, but even if it became available somewhere down the road, it is only theoretical to suggest that T-Mobile and Sprint will get it. With history as a guide, Verizon and AT&T will do everything possible to outbid us for that spectrum. And AT&T and Verizon want spectrum right now. They also want to get ahead in this arms race that we are all in.

And so the problem -- one problem with the plaintiffs' argument is that even if you could find an auction coming up or some opportunity, we've got to go out and compete against our bigger rivals to buy it. And they have over 90 percent of the cash flow in this industry. They consistently outbid the parties for spectrum. Professor Scott Morton herself had a table in her report which we pulled up on the screen during her testimony that showed that Sprint has not won spectrum in an auction in ten years. So the idea that Sprint, with all of their difficulties, is going to be in a position to just go out and solve their spectrum problems by competing against AT&T and Verizon at auction is just not realistic.

Now, the FCC confirmed that we don't have an alternative available to us that matches what we can get with this merger. The FCC, the agency that runs the auctions, that licenses the spectrum, that oversees this industry, that regulates telecommunications, in their order approving this merger, they said that they agree with the applicants that the commenters, the people who are complaining about our transaction, have not identified forthcoming spectrum auctions or other sources that could enable the standalone companies to acquire the equivalent to what they each would gain through the proposed transaction. So, the FCC has confirmed it.

This merger solves both of the companys' spectrum problems with certainty and generates billions of dollars of

cost savings, not billions of dollars of outlays. T-Mobile's confidence in the network plan is reflected in its strong commitments to the FCC, which requires T-Mobile to build a network and deliver all these benefits at the risk of billions of dollars in fines.

The evidence relating to network improvement is compelling. The plaintiffs have the burden of proving that there will be a substantial lessening of competition notwithstanding all of those improvements, and they completely failed to meet their burden in that regard.

I would like to talk for a few minutes about Sprint's lack of competitive relevance.

With the merger, Sprint's current customers will immediately get cheaper wireless on a better network. The Boost business will continue to compete in the hands of DISH on a superior network from day one, and Sprint's mid-band spectrum will be put to productive use, and it's MVNO customers like Altice will benefit from a far better network. Without the merger, Sprint will continue to decline as a competitor, lacking critical low-band spectrum to the lower competitive coverage, inconsistency, and unable to sufficiently invest in improving the network. It will focus its deployment of 5G on select geographies and ultimately will not be an effective national competitor. That's what the evidence at trial showed.

Under General Dynamics, the Supreme Court case dealing

with sort of a declining competitor, the Court should not simply look at market shares of yesterday. And Professor Shapiro's analysis is based on market shares from 2018, two years ago. That it must evaluate the likely trajectory of Sprint looking forward. And I'll talk about that.

But one thing I want to -- one point I want to make, your Honor. The plaintiffs like to talk about this weakened competitor being a disfavored defense, or I think a couple of courts have said something like that. But what we're arguing about here is not just the financial predicament that Sprint is in. That's not our argument. That's an important part of what Sprint has to worry about as they try to solve their problems as a standalone company.

But what we're talking about here is something much more fundamental to competition than that. The network that they have, with the absence of low-band coverage spectrum, makes them an ineffective competitor going forward. It doesn't make them a nothing. They have lots of customers. A lot of those customers were won through the Boost brand, the value-conscious customers, that's going to be divested; but they have a fundamental problem with the network that they can't solve. And the testimony at trial talked about all the things they've tried to do to solve it and they can't solve it.

And that is very much like the facts in General Dynamics where you had this coal company that historically had

a pretty high share but the reserves were running out. And so the Court there said, well, a lot of their business is tied up in contracts, they don't really have a lot of reserve left over to go win new business, so they must not be very competitive going forward. It wasn't just about financial losses or a difficulty borrowing money or that sort of thing. That's always in the background. It's always an important part of it. But the argument we're making here is squarely within General Dynamics, that the impact to Sprint of the challenges that they're facing are things that go to the core of their ability to compete in the market at issue. They are not going to be as competitive and significant in the future as they have been at times in the past, and, therefore, looking backwards at historic shares is not informative of the prediction of the two worlds that I talked about.

So let's try to run through these quickly, if I can.

One of their structural weaknesses is the lack of low-band spectrum. We talked about it a lot. That is essential to create a national network with good coverage. Without access to that, they can't propagate over long distances, and the customers get frustrated and they end up losing customers and customers have a bad experience.

So if we go to the next slide. As a result of being unable to offer that coverage, customers actually do have a very negative perception of Sprint's network, and that

perception has declined over time. Your Honor might recall Mr. Bluhm and your Honor asked him about how that's measured.

And the Sprint executives testified that the poor network experience is a key contributor to their high industry churn. They have the highest churn in the industry. Customers leave them at twice the rate that they leave the other three players who the plaintiffs say are their only competitors. They have a very high churn rate. And they certainly can't be a maverick, as the plaintiffs suggest, when they are losing customers faster than anybody else.

Sprint's documents show the structural network challenges that have created this situation and losing relevance with customers and facing deteriorating operating metrics.

We go to the next slide with Mr. Combes testimony. The Court heard from Sprint's CEO, Mr. Combes, that the company is struggling across a number of these key metrics, which indicates that it is unlikely to be an effective competitor to Sprint going forward. And we talked about it -- poor product quality, increasing churn, declining service revenue, insufficient cash flow, insufficient funds for CapEx, a high debt burden, and a plan of record right now that is not achievable.

Plan of record.

One of the criticisms that Mr. Pomerantz made during

his closing remarks was that we had done our model based on the Sprint plan of record and they are not achieving it so maybe the model is not reliable. But that just means the savings are greater with Sprint not achieving their plan of record, and that's what we modeled into the model. That means they are doing even worse than what was projected, and so the savings from combining the companies will be even greater.

But, in any event, Mr. Combes testified to all of this. Your Honor heard from these witnesses. They were all credible. Your Honor can make that judgment for yourself, obviously. But these are serious people, and these are serious times for these companies, your Honor, and these are serious challenges that Sprint is facing.

Now, plaintiffs have repeatedly suggested that Sprint could turn itself around, and they point to various statements from Sprint promoting a turnaround. But the Court heard testimony from Marcelo Claure about Sprint's attempts to improve its financial and competitive position, that they have not remedied its core competitive shortfalls. It cut costs to the bone, took out $10 billion in costs, which certainly doesn't help when you are trying to improve a network. It attempted to implement a nontraditional network with different kinds of equipment, he testified, but that didn't work. They ran into permitting obstacles. It was a total failure, according to it testimony in the record in the case.

The company convened a leadership meeting, a document about being brutally honest with each other, and it reflected the brutally honest view that the turnaround efforts had not worked. It pulled itself from the brink of insolvency, but the turnaround did not fix its network quality or customer experience problems that created this ongoing challenge.

Your Honor heard testimony about these aggressive promotions, the 50 percent off offer. And, in fact, one of Mr. Pomerantz's documents was about that back in 2016. Yeah, in 2016, Sprint was trying a 50 percent off offer. Hard to say. And it got some attention. And it was a total failure. Sprint folks testified about how they were able to onboard more customers -- that got noticed in the industry -- but those customers left as quickly as they came because those offers were short-term offers, and when it reverted to normal pricing, those customers fled in droves. And the churn even went up as a result of that attempt to address their problems.

Plaintiffs have tried to claim that Sprint's 5G watch will solve all of its competitive problems. That's simply not the case. While Sprint certainly has a lot of mid-band spectrum -- we all agree on that, and that's useful for 5G -- it will continue to face the same lack of low-band spectrum that challenges it today. The move to 5G doesn't fix that.

They are going to have targeted places where they implement in a very spotty way and try to compete -- there is

no question they are doing that right now -- and trying to promote their 5G business model, but their executives explained why that is not a solution. And, in fact, it just makes the problems with their coverage shortfalls even worse, because customers who are going to be experiencing 5G on Verizon and AT&T are going to notice an even bigger gap in the network quality.

The plaintiffs like to talk about this so-called Plan B. Sprint's executives testified that in the absence of the transaction, Sprint would consider a scenario in which they retrench their investments to 48 regions of the country and increase prices. This is the opposite of a maverick. This is a retrenching competitor, and it actually proves our point. If this Plan B were implemented, Sprint would be a smaller competitor with less significance in the national market because customers move around and demand high quality everywhere.

I actually want to go ahead to a couple of slides. Let's go to the one that compares T-Mobile in 2011 to Sprint now. This is a big part of the plaintiffs' case, and it is without merit. The plaintiffs say, well, Sprint will be OK. T-Mobile did it. T-Mobile is in trouble in 2011. So let's use that example and just graft that onto Sprint today. It will explain how the circumstances are similar, but they say there must be a way out of this box.

The circumstances are completely different, your Honor. I'm just going to run through them quickly because I know the plaintiffs have made a big deal out of this.

In 2011, yeah, T-Mobile was in trouble. They attempted a transaction with AT&T. Part of that transaction involved billions of dollars of breakup spectrum and fees. That was a jump start. When that deal fell through, they got spectrum, they got capital.

Not long after that, they had the opportunity to merge with MetroPCS, the company I talked about before. That also took them to a new level. They followed the same plan they were going to follow with Sprint here, but it took them to a new level and solved a lot of their problems and made them more competitive than before.

They basically lucked into some low-band spectrum that was being divested by Verizon as a result of a forced sale due to one of Verizon's mergers. They sold all their towers -- all the players in the industry did this a number of years ago -- to raise cash, but they were able to raise cash by selling towers. Sprint did the same thing. Sprint doesn't have towers now to sell. And an interesting fact is that in 2011, T-Mobile did not have access to the iPhone. Apple had not given them a contract on that phone, on that device. But Sprint already has the iPhone. So none of these circumstances that existed for T-Mobile in 2011 exist for Sprint today. It is just apples and

oranges.

All right. I want to talk briefly about DISH.

Your Honor, if I might ask a question? Am I going to be held to an exact two hours, or will I have a little bit of a grace period at the end of this?

THE COURT: Two hours.

MR. GELFAND: OK.

THE COURT: Plus or minus minutes.

MR. GELFAND: I think I am at an hour and five minutes right now.

All right. Thank you, your Honor. He is timing me.

All right. DISH's entry, you know, you heard plenty of evidence about this. You had the witnesses on the stand. Your Honor knows the argument here. This is not a situation where we have to prove that somehow DISH is going to be exactly like Sprint. DISH is going to be a formidable entrant, taking over the Boost business and building out a 5G network. There is just no question about it, based on the evidence that was presented at trial, most of it completely undisputed.

And that's highly relevant for the reasons your Honor mentioned at the pretrial conference. Will entry be timely, likely, and sufficient? The plaintiffs agree on that standard. Like I said, this is a peer entry. Peer entry is usually will somebody come in if prices were to go up? This is a hybrid of DISH taking over an existing part of Sprint's business and also

entering pursuant to governmental commitments. The likelihood of entry is a hundred percent. That factor doesn't even need to be considered because -- well, maybe 99.9 percent, but that doesn't need to be considered because it will happen. The only reason that it is in the guidelines is because you are usually asking the question, "If prices were to go up a little bit, are people really going to enter?" But the mechanics of this transaction mean that DISH will enter.

And it's timely because it's going to happen right away. It's going to happen right after this merger closes.

So the only issue is whether it is sufficient in magnitude.

And part of it is already Boost. That part of it, by definition, is sufficient to address whatever issue exists as to a competitive overlap with Boost, because it is Boost. And that is actually most of the competitive overlap between these two companies that the federal agencies were concerned about, this prepaid competition for value-conscious customers. That's been solved. That's been completely solved.

So the entry that DISH is going to have with the new 5G network is completely on top of that, and it is going to be formidable, based on the evidence that was presented in this case. It obtained everything it needs to be a strong competitor from day one, and we list the things here: 9 million customers. They are getting spectrum. They can get

towers that aren't used, although they testified they don't need the towers because they've got their own towers. They are going to have this wholesale agreement.

The plaintiffs say this wholesale agreement with T-Mobile means we are not going to be competitive. That is the most advantageous wholesale agreement in the history of the industry, as far as we can tell. And my client is not happy about it. They were dragged to the bargaining table to agree to it. And the agencies that negotiated that negotiated it to make DISH a formidable competitor. TracFone has 22 million subscribers as a pure MVNO and it has a less favorable MVNO agreement than what DISH will have here.

So it got everything it needed. And Mr. Ergen testified at trial that it has everything it needs. And it will deploy 5G this year. It's going to start right away. Plaintiffs like to talk about the seven-year agreement. In seven years that agreement isn't even going to be in use. DISH is building this network the day we close this deal; they are going to start rolling it out.

In 2021 -- if we go to the next slide, I think -- DISH will have 20 percent of the United States, as the plaintiffs said, but just one year later they will cover 50 percent of the population, as they ramp up their development. And in 2022, they'll have 100 cities, just two years after the merger, while Sprint is retrenching to 48 places.

The business plan that Mr. Pomerantz apparently thinks we had a burden of proof to establish all of the underlying details, they had a chance to depose Mr. Ergen. He testified here. They could have asked him whatever questions they wanted. He explained to the Court what that business plan is based on. He's got a big team of engineers and very qualified people. And that business plan shows that they're going to have tens of millions of customers and tens of thousands of operational towers in only a few years.

They have established relationships with the tower companies. They have identified 30,000 towers that they can move on immediately. They already have agreements in place with those tower companies.

They have executives hired with enormous amounts of experience in this industry. They put out an RFP and they got 80 responses back from all the vendors that are chomping at the bit to do work with this company.

Your Honor heard in closed session about some of the amazing opportunities that the company has with some of the world's leading companies that are only doing that because they have confidence that DISH is going to be able to build this network.

Mr. Ergen testified that he is going to be a disruptive competitor. Of course he is going to be a disruptive competitor; he has got nothing but upside. He is

trying to fill a new network. He is going to be a disruptive competitor. He is going to charge lower prices; he also testified to that.

If you move on to the next slide.

And DISH faces $2.2 billion in fines and potential forfeiture of $12 billion in spectrum if they don't achieve this network that they've committed to build.

This refrain from the plaintiffs about them not having as many subscribers as Sprint in the first year or two, that's not the test. The test is not whether you have the same exact number of subscribers. The test is two worlds, all things considered. We are not comparing DISH and Sprint directly.

And, in fact, the guidelines note that entry can be effected even at a smaller scale than the competitor that's being eliminated by a merger as long as the entrant is not at a significant disadvantage. DISH has all kinds of structural advantages over Sprint: Substantial unused low-band spectrum and the ability to launch pure-play 5G network. Has access to the new T-Mobile network for seven years under the most advantageous agreement in history. It is already building out an IoT network. It has got the people, it has got hundreds of engineers. And it's got the protection of the federal government if anything goes wrong with its agreements.

So, once again, your Honor, I think the plaintiffs have failed to meet their burden in disproving that this is a

factor to consider on the right side and left side of the ledger.

I want to talk quickly about the plaintiffs' failure to prove their case. They repeatedly have fallen back on this characterization of this transaction as a four-to-three transaction and I think try to use that as a way to carry their burden of proof or to supercharge their presumption, I guess, your Honor.

To begin with, the characterization is wrong. In the market that they chose to litigate, retail, there are more than four competitors, for the reasons I've discussed, both before and after the merger. Moreover, DISH is going to enter this market as result of this merger and will surpass Sprint in competitive significance. So there is going to be the same number of players before and after.

But even putting that aside, as we noted in our pretrial memorandum, there is lots of experience of four-to-three mergers being found perfectly fine. The FTC had published a study we cited that of all of these transactions that it had reviewed over a 15-year period, many of them four-to-three, dozens of them approved with no remedy at all, many others approved with remedies. There is nothing inherently wrong with a four-to-three transaction. You have to do it case-by-case. That's the plaintiffs' burden.

And there is another feature here that I think has

gotten lost in the process, and that is that we're bringing together the number three and the number four player in the market. It is extremely rare for transactions involving a number three and a number four player to be challenged -- at all. None of the cases cited by the plaintiffs that we can tell -- and I apologize if we missed one -- but none of the cases cited by them in their pretrial memorandum or in their findings and conclusions involve the combination of a number three and a number four. And there's good reason for that. When you have two large players in a market, like we have with AT&T and Verizon, it's unlikely that the market is going to become substantially less competitive.

So they have these two theories, your Honor, coordinated effects and unilateral effects. I want to start with a premise that Professor Shapiro laid out that applies to both of these theories, and that is his premise that without this merger prices are just inevitably going down at some steep rate of decline. He bases that on ARPU data from 2014 to 2016 and 2017, which we show here on this slide.

And if your Honor looks, from 2016 to 2017, actually you already see a leveling off of prices in the market as of that time. Yet, Professor Shapiro projects that from that point forward there is going to resume a steeper decline in prices. And his conclusions are based critically on this prediction, for which he did no economic modeling, for which

there is no evidence in the record to justify, other than the fact that he had four years of past ARPU data from 2014/2017.

And his conclusions, when he says we're going to have all of this consumer harm from coordination, for example, he acknowledged that that's just kind of an "if." If prices were to keep going down in the nonmerger world and if we stopped that by having coordination, then I can calculate the area under that line. He doesn't predict that that's going to happen. These are not predictions. These are ifs. That is not evidence. That doesn't carry the plaintiffs' burden of proof. He doesn't quantify this in any scientific way.

Let me talk briefly about coordinated effects, and I'm going to run through this -- well, before I do that, your Honor, let me just point out two other pieces of evidence that we put into the record, which were published data, producer price index for wireless carriers and consumer price index for wireless telecommunications, both of which confirm this trend of prices leveling off in the industry, which undermines Professor Shapiro's prediction based on 2014 to 2017 ARPU data.

And this is not a prediction of what's going to happen in the future. Obviously, off to the right there are future years. But you can see, your Honor, that the prices have already leveled off if you measure it by either of these techniques. So this sort of theory that prices were going down without the merger but the merger will keep them up, that just

doesn't match the real-world evidence of what is already happening in the market. The prices have leveled off in the market.

Coordinated effects. Let me try to do this quickly. There are several reasons why that theory of competitive harm is invalid.

For example, Professor Shapiro acknowledged that efficiencies undermine incentives to coordinate. But, recall, he did not consider efficiencies; he just considered them to be zero. So he acknowledges that a factor makes coordination less likely, assumes it's zero, doesn't factor it into his analysis, and just looks at other factors. So, we have efficiencies here.

Second, he acknowledged that asymmetric capacity undermines coordination; it creates an incentive to compete. When one company has a lot more capacity available than others, it's got this incentive. Again, that's not just us saying that. Professor Shapiro acknowledges it, but also that same AT&T document, interestingly, from five years ago, recognized the same principle.

If you pull that document up, Mr. Klein, you will see even then -- and it says "Context through 2020," that prediction that this is going to end in 2020, the asymmetric capacity among carriers that existed was driving price pressure, and it was the extra capacity that T-Mobile had and

Sprint, although they also acknowledge that Sprint was in deep trouble.

And there is the Verizon document that's in your deck, your Honor. It's not going to be shown on the screen. But just to simplify, it shows that, no question, analyzing post this merger, a huge asymmetry in capacity. Verizon also recognizes that there is going to be this big uplift in new T-Mobile's capacity as a result of this transaction.

And it's fundamental, T-Mobile is going to have an incentive to fill that capacity. That's what they're investing in. That's why they're doing this transaction. They're going to fill it. They're not going to build it and then diminish it. And they're going to win customers from AT&T and Verizon using it.

Professor Katz explained that the opaqueness of investments in technology undermines coordination, because you don't really know what your competitor is doing in terms of technology investments, and that's particularly true when you are transitioning to 5G.

Pricing. There is all kinds of bundling in this industry, as your Honor knows. Different companies have different advantages. AT&T has Time Warner, a large entertainment conglomerate. Comcast is one of the biggest entertainment companies in the world, and they are also the biggest cable company in the country. And new T-Mobile will

have home Internet. This would be different things that different people can bundle. It undermines the ability to see what the actual pricing is; it is not transparent. In fact, when I asked Mr. Schwartz, from Comcast, "Where do you stand with your current offer relative to the competition?" he couldn't tell me. He didn't know whether he was above or below the competition because he said pricing is all over the map. This is not an industry that's coordinating or characterized by coordination or susceptible to coordination. This is a very dynamic, very competitive industry.

Third, we talked about Sprint's declining competitive significance. They are not a maverick. They are not going to be a maverick. So there is nothing that is being eliminated with the acquisition of Sprint that will somehow make coordination more likely. They are not stopping any coordination today. That is a myth.

And to the extent they have a low-cost part of their business in Boost, that's getting divested, and it is getting divested to DISH.

And that brings me to my sixth point, which is that DISH is not part of this coordination group. Professor Shapiro acknowledged that. And Mr. Ergen explained that any attempt by the other competitors to raise price, he'd jump on that in a minute to fill his network. He is going to take advantage of that. There is no dispute about that. So that undermines

coordination.

The actions of Verizon and AT&T undermine coordination. Verizon -- this is also in a Verizon document -- they already recognize the competitive threat that this merger holds. We've put that in the slides. And they are already planning for it. They are not planning to coordinate. They are planning to fight back, punch back. We have to meet that challenge once T-Mobile has a better network. That's what Verizon is up to.

AT&T, they're opposing this merger. They've been providing input to third parties, who are out trying to oppose the merger on various grounds. We introduced a couple of exhibits about that.

The DX7014 and DX7015.

Yet Professor Shapiro, in his coordinated effects analysis, suggests to the Court that these big companies would welcome the merger. They don't welcome the merger. They are planning to compete more vigorously, and they are opposing the merger.

And, again, Professor Shapiro did not pull it all together. He said -- and Mr. Pomerantz listed them -- there are some factors and they make coordination more likely. But he didn't give your Honor an expert opinion that said, well, I've carefully analyzed this factor, this factor, this factor. These kind of push in this direction, and then I also

analyzed these eight or nine factors that I concede make coordination less likely. And when I put it all together, here's why I can give you an expert opinion that prices are likely to go up as a result of coordination.

In fact, he never said prices are likely to go up as a result of coordination, as I read his testimony. It was an "if," and he said because of certain factors, coordination is more likely. He didn't quantify it. He didn't model it. He just did his downward sloping line and compared that to this hypothetical that maybe prices won't go down at all.

On unilateral effects he didn't do much better. And he did this UPP analysis that Mr. Pomerantz didn't even discuss in his closing remarks. But that's the only basis for his conclusion that you can calculate some kind of impact from this merger -- that model.

It is a screening tool, your Honor. And it is based on historic data, and it can't take into consideration the dynamics of a market like wireless communications. It doesn't look at how competitors like Verizon and AT&T are repositioning. It is oblivious to a company like DISH that is coming in and taking over a divestiture asset and building a 5G network. It is oblivious to a revolutionary change in the market like moving to 5G. It looks at ancient -- I'm sorry, that is an overstatement. It looks at old data, two years ago, and it says because of that, because of the way things looked

two years ago, just based on shares and divergent ratios, that Mr. Pomerantz pointed to -- which, by the way, your Honor, those divergent ratios, that included Boost. That wasn't teased out by Mr. Pomerantz, but Boost is being divested. And when you look at the nature of competition between branded Sprint and branded T-Mobile, it is much less than that in the evidence, in the data.

And so it doesn't take these things into consideration, your Honor, and it is not reliable for calculating something like a price impact. And, most importantly, it doesn't take -- it has to take into consideration, but Professor Shapiro did not take into consideration the network improvements and the cost savings. Like I said, he passed the buck to Professor Scott Morton.

And she didn't calculate efficiencies. She didn't analyze that. She didn't look at the business plan or figure out how much money is going to be saved. She put this burden of proof on us and said, well, you guys have to prove it to me, to my satisfaction. And then she said, well, I'm going to rely on Dr. Kolodzy to tell me some things that maybe you didn't model into your -- into your model.

And I don't know, James or Mr. Klein, how easily you can get back to that slide with the five elements, but I will show you something in a moment, your Honor. She said, if you were to change the model based on five assumptions that I got

from Dr. Kolodzy, actually your cost savings go down a lot compared to where you say they are going to be.

THE COURT: Mr. Gelfand.

MR. GELFAND: Yes.

THE COURT: Five-minute warning.

MR. GELFAND: Sorry, your Honor.

THE COURT: Five-minute warning.

MR. GELFAND: OK. Thank you, your Honor.

I just want to say very quickly, this is a slide that shows a bar chart that Professor Scott Morton presented. These were the five things on the right that Dr. Kolodzy told her she could criticize us for, and Dr. Kolodzy didn't even testify about three of them. When I asked Professor Scott Morton did you hear any testimony about this at trial, she couldn't even say. And the other two, he said, well, it will be speculative, I don't know what T-Mobile is going to do in a standalone world; I just can't figure that out.

This is a model that was built by engineers with decades of experience in this industry. These are serious people. And they bring in an expert who turns around and relies on another expert, who doesn't know what's going to happen, and then she tells Professor Shapiro just assume zero for all of these efficiencies, just write them off, and then Professor Shapiro says, well, with his UPP I'm really supposed to consider those efficiencies but Professor Scott Morton told

me not to, just assume zero. They are not even zero on her analysis on this bar chart.

So I come back, your Honor, to the basic principle that this was not expert testimony that was taking into consideration all of the evidence in this case.

Now, how do we know that prices are going to go down after this merger? If I could present a concluding slide, your Honor?

All of these categories of evidence should give the Court an enormous amount of comfort that prices are going to go down after this merger. And we don't have to prove that they are going to go down as a result of this merger. That's the plaintiffs' burden to prove the opposite. But we did prove it. And we proved it through twelve categories of evidence:

The un-carrier brand.

Our business plan, time and time and time again.

Our testimony from T-Mobile executives. Your Honor can judge their credibility.

The competitive response that we already see from Verizon and AT&T in their documents and their reactions to this merger.

Ongoing competition from cable companies, who are growing faster than some of the established players.

Ongoing competition from MVNOs: TracFone, 22 million subscribers. Half the size of Sprint, almost.

The DOJ commitments -- legally enforceable.

FCC commitments -- legally enforceable.

DISH entering as an aggressive new competitor and building out a pure-play 5G network, with none of the disadvantages and costs that the rest of us have about converting equipment over, just brand new, brand-spanking-new 5G network.

Economic analysis performed by our experts that did take into consideration all of the evidence on both sides of the ledger.

The MetroPCS experience. We've done it before; we'll do it again. Unrebutted. Undisputed.

And the fact that we've already gone into the market and announced price reductions.

And so, to conclude, I come back to a world with the merger, and we also talk about the public interest, but world with the merger and without the merger. The plaintiffs want to pick the world on the right, the one with the declining Sprint, with DISH spectrum not entering the market. The world with the merger holds tremendous promise, your Honor, to revolutionize this industry with lower costs and help consumers throughout this country.

Thank you very much, your Honor.

THE COURT: Thank you.

Mr. Pomerantz.

MR. POMERANTZ: Yes, your Honor.

I guess I was hoping that we might be able to take a short break both so that I can put my notes together and also so that I can give my colleagues a break

THE COURT: We will take a five-minute recess.

MR. POMERANTZ: That would be great, your Honor. Thank you.

(Recess)

THE COURT: Welcome back. Thank you. Please be seated.

Mr. Pomerantz.

MR. POMERANTZ: Thank you, your Honor.

I want to start my rebuttal on DISH, because your Honor started with DISH when we talked -- when you gave us your questions at the pretrial conference. And DISH is a good starting place because the two antitrust regulators that have looked at this -- that is, the DOJ and the States -- they've looked at this transaction very much the same way, and DISH is the only difference. Both the DOJ and the States said this is a four-to-three merger.

They sit there and say look at this Footnote 8 in their pretrial memorandum and see where the regulators have exercised their discretion to not challenge various four-to-three mergers. Well, there is plenty of law -- and we cite it in our brief -- that agencies make decisions for

discretionary reasons that courts cannot and should not rely upon, and we have cited that.

But here, the DOJ has looked at this very industry twice where there was a four-to-three merger, as the DOJ alleges --

Mr. Nickels, can you bring up slide 104 -- closing slide 104.

-- and each time that the DOJ looked at this market, where there was a four-to-three merger, they said it violates Section 7. That's what they said. They said there was going to be a risk of coordination, a risk of unilateral effects, and that the consumer was at risk of losing billions of dollars, consumers, over the years.

So we need to look at this four-to-three merger and the AT&T/T-Mobile four-to-three merger, and we can see that antitrust regulators look at it the same way. So on DISH, counsel quickly skipped over the timeliness element of the entry test. He said, well, DISH is -- it's so likely they are going to enter -- he backed off from 100 percent to 99.9 -- because we know they got Boost and they're going to enter.

But that's not the entry we're talking about, and that's the not entry that the DOJ was talking about right here on paragraph 5 that I put up on the screen. The merger would eliminate Sprint as an independent competitor, reducing the number of national facility-based mobile wireless carriers from

four to three. We're talking about the national carriers that have their own networks.

When DISH enters, they are on MVNO 100 percent. And over time, they say we're going to try to build out our own network. And when I went through the timeliness factor, the two to three years, we're trying to see if DISH is going to enter in a timely way to replace what's being lost when Sprint is eliminated. When Sprint is eliminated, we're losing a national facilities-based MNO. And that's what we're looking to replace. That's what's lost.

And so all of this, you know, quickly skirting over the timeliness element of the entry test is missing the essence of the competition that both the States and the DOJ find is the relevant focus.

If we could look at slide 108 -- and this is confidential so please keep it on -- closing slide 108. Please keep it off the public screen.

If we look at the likelihood here, we can see what the evidence is.

And, your Honor, the evidence I have on the screen here is assuming DISH does everything it has committed to do. I'm assuming that in this slide.

And we're looking at exactly the time period that the law says we should look at, two to three years. And your Honor can look at this. I won't go through the specific numbers.

And your Honor can see that DISH is nowhere close to replacing Sprint within the time period that the law says we should look at.

Now, if we could go back to the roadmap slide, Mr. Nickels, from our deck. It is slide 2 of the initial.

Your Honor, I want to make it clear what we are arguing, because I think counsel suggested that we are taking positions that we are actually not taking. Our prima facie case is established by showing that the merger meets the undue standard for establishing the presumption. And we've gone through that. And I'll go to MVNOs in a second, which is one of the issues they raised.

Then the burden shifts to them. No dispute about that, I think, between us.

Now, they say that we are saying that they have a burden of proof, that it is an affirmative defense. That is not our view. And I didn't say that this morning, and if I did, I will take it back. That's not our view.

They have a burden, though, of coming forward and showing the elements that the law requires them to show.

So step number two here, before you get to their three defenses, the burden has shifted and they have a burden, and here's their burden. They have to show that this market is an unusual one, because the law on the presumption says that most markets are likely to have anticompetitive effects if you have

undue concentration. So we know how to measure undue concentration. It is either the 30 percent combined share or the HHIs.

So what they had to do in this case, your Honor, was to come forward with evidence that says this market operates differently than most markets. And although you would expect coordination with the kind of market share, the undue concentration we're going to have, for some reason this market's different, and for some reason in this market, we won't expect that kind of coordination. And so that's what we did here is we responded to their evidence. They tried to show that this market was maybe a little unusual. But I don't see where they prove that. And they didn't even suggest that or show it. I don't want to say prove; they don't even show it. Because we saw the list of factors that Professor Shapiro identified as the kinds of factors that one would expect in a normal market where coordination can occur and we went through them. And the prices are transparent. I can just go on the Internet and see anybody's prices. And it's not just the headline price, $30, but you can see what is part of the bundle. You can see, oh, there is this fee. You can see it includes Hulu. You can see that it is two lines or three lines. It is all out there. The evidence shows that.

So we have the indicia here that shows that this market is not unusual when it comes to coordination, and it's

not unusual when it comes to unilateral effects. And so before you even get to step three in this roadmap slide, we've already shown that this market is presumptively -- I'm sorry, this market is presumed to have anticompetitive results after this merger and there is nothing unusual about it. That's what we're trying to show in step one, in step two.

Then they can say, well, OK, but we have some defenses here, and their defenses put the initial burden on them. I've put the cases up on the screen, and I don't think there is really any doubt. And when you look at the kind of cases that they're citing, Baker Hughes and General Dynamics, and all the cases we're citing, they basically say that it is up to them. We'll take efficiencies. They have to come in on efficiencies and show not just here's the efficiency we're talking about of a better network, more capacity, more speed, they have to show that that particular efficiency is merger-specific. So they have to show: And you see the speed, well, the only way to get it is through this merger. You can't get it some other way.

That is their initial burden here. They have to show that.

And they also have to show verifiability, that all of these numbers that we're putting out there that we claim are our efficiencies, well, judge, it's not just speculation, we can verify it, we can prove it, we can show you evidence.

And so when we had Professor Scott Morton come up and

explain why a lot of what they did is either not merger-specific or not verifiable, your Honor can look at it in one of two ways. You can either look at it and say, well, they didn't show it, they didn't meet their initial burden of showing that evidence; or your Honor can say, OK, they've put the ball up in the air, it is in play. But Professor Scott Morton comes in and shows, wow, yeah, that really isn't merger-specific, there really is spectrum out there that they can get from someplace else. The FCC is going to make midband spectrum available. DISH is sitting there with a lot of spectrum that they can lease. Mr. Hottges said that. We can lease, it is an option for us.

So Professor Scott Morton explains why it is not merger-specific. And then she also explains why it is not verifiable. But you can't just come in here and say we're going to have a lot of speed. You've got to show that the way you're valuing that speed is not just speculation, that there is some underlying support for it. And they never came in here and said why speed above a certain level is still valuable in the way that they value it. And whether that's a failure of showing on their part, which I think it is, or whether it is that we responded to it in a persuasive way, which I also think we did, either way, they don't get their defense.

So I put this out here just so it's clear what we're saying is each side's respective burdens. They, after we meet

the presumption, have a burden to show certain things, and then we get to respond to it.

For a number -- I don't know, I'm not exactly sure why but a number of times they say that Professor Shapiro didn't look at efficiencies. He didn't, your Honor. He didn't. Professor Scott Morton did.

So what? We have an expert who looked at efficiencies. And I don't really understand the point there. What Professor Scott Morton showed was that the efficiencies they're pointing to are neither merger-specific nor verifiable.

And if they are not merger-specific or verifiable, then you don't count them in the equation because they are not cognizable under the law. And if they are not cognizable under the law, then Professor Shapiro's analysis is complete, because there is no offsetting efficiencies that are cognizable under the law.

Let me, if I could, talk for a moment about MVNOs.

Again, to place this in context, the reason why MVNOs matter is because if they are included -- I'm sorry, if they are treated as independent competitors, then they take the position that we have not met our presumption. So that's the framework of the MVNO discussion.

(Continued on next page)

MR. POMERANTZ: If we could put up slide, rebuttal slide 18. So counsel put up this, the top box there, Section 5.1 of the merger guidelines, to say, well, clearly MVNOs must be treated as independent competitors for market share calculations because they are currently earning revenue in the relevant market. But section 5.2, the very next section of the guidelines, actually is the one that looks at market shares. How do you calculate market shares? And that one says that the agencies normally calculate market shares for all firms that currently produce products in the relevant market.

Now, clearly, an MVNO isn't producing anything, they're just resellers. But, your Honor, it's not a matter of twisting the words here of section 5.1 or 5.2.

Let's go to the next slide, Mr. Nickels, slide 19. So this is --

MR. GELFAND: Your Honor, I apologize for interrupting. Is there a separate set of slides that you're using here?

MR. POMERANTZ: Well, we anticipated what you might argue.

MR. GELFAND: Do you have a copy for me?

MR. POMERANTZ: I guess. I don't know if we do. I don't know if we have an extra set of -- actually, I do, but I'm not going to use them all.

MR. GELFAND: I apologize, your Honor. I'm just

accustomed to getting copies of what my adversary is using.

MR. POMERANTZ: We were trying to anticipate what they might do, your Honor; so we got certain extra slides created.

So this is the FTC speaking in a matter called Matter of the Echlin Manufacturing Company, and FTC, remember, is one of the authors of the merger guidelines. And what they say is it is appropriate to include a firm's sales to resellers in the firm's market share for the purposes of market share analysis; that is, that you include it in the producer's share, not the reseller's share. That's exactly what T-Mobile did in that internal document that I showed your Honor in my closing, and that's exactly what Professor Shapiro did in this case.

Now, Mr. Gelfand also referred to the success that Comcast has had as an MVNO.

If we could have rebuttal slide 23, please.

Now, this is Mr. Schwartz. Your Honor met him during the trial. He's from Comcast, and this success that counsel was referring to is talking about the fact that right now Comcast has, I think, something like two million customers. Your Honor, this market has 300 million customers right now. That means that Comcast has one-half of 1 percent, and as you can see from Mr. Schwartz's testimony, it would take many, many, many years for them to ever get to the kind of size that Sprint is today.

And Mr. Gelfand referred to some exhibits that he says

shows that the MNOs were actually looking for competitive reactions. The point I had made about MVNOs was that there was evidence you didn't see. What you didn't see was Sprint or T-Mobile seeing an offering by Comcast or TracFone and saying, wow, look at that low price; we better go down and beat it and go lower. And we saw that between Sprint and T-Mobile, but you didn't see it between Sprint or T-Mobile and any MVNO.

And they gave you some exhibit numbers. I wrote them down, 5303, 5306. I think there was a third one, but I ask your Honor to look at those. I don't think what they're doing is showing that Sprint or T-Mobile lowered their price, came out with a competitive offer in response to an MVNO. They may analyze MVNOs, but they don't respond to them because they're not independent competitors.

Mr. Nickels, if we could put up Professor Katz's analysis of market shares and HHIs with the way they treat MVNOs, slide 19 of the closing.

So, your Honor -- and maybe we could click it through to the next one -- this is Professor Katz's HHI calculations assuming that he treats MVNOs as independent entities, and here's the issue that's going on between the two of us. Professor Katz wrote in his report, and he said, I think, revenue share is the right way to look at how to calculate market share and HHIs. And Professor Shapiro said, no, I think it's subscribers. And so what Professor Shapiro did is he

looked at it both ways. He said if you look at it subscribers or you look at it revenue, the presumption is satisfied either way.

Professor Katz came back in his report and said, I think it's revenue. And so if he looks at revenue, the presumption is satisfied. This is the national market, by the way, your Honor. And --

MR. GELFAND: Your Honor, just to note, it's not in evidence.

MR. POMERANTZ: It is, your Honor. It came in through Professor Shapiro's rebuttal testimony. And so this is in evidence, by the way.

And so what happened then was when Professor Katz took the stand here, he didn't offer this testimony. What he said to your Honor was, I'm going to look at subscribers, not revenue, and I come up with the numbers that Mr. Gelfand showed you this morning, a little below the presumption. And he never told your Honor that he, in fact, didn't do it that way. He thought the right way was revenues. He never told your Honor that.

So when Professor Shapiro came back at the end of the case on rebuttal, we went through this chart, and we showed that Professor Katz was keeping something from your Honor, keeping the way he thought you should do it.

So their argument here is, well, let's take Professor

Shapiro's way of doing it, basing it on subscribers, but then let's reject everything else about Professor Shapiro's arguments on MVNOs, like that they're not independent competitors. They basically cherry picked that one thing, and what we're showing you here is that if you accept Professor Katz's way of looking at market shares, the presumption is satisfied even if you treat MVNOs as independent competitors.

Efficiencies. If we could put up slide 62 from the closing. I want to start with the law. So what they say, your Honor, is that look at the merger guidelines, look at some case law, you should consider efficiencies. Well, your Honor, economists do consider efficiencies. That's the way economists look at things, and it's in the merger guidelines. Most of the merger guidelines, most of the way that economists look at things is embedded in the antitrust law.

This is one area where it's not. At least this is one area where the law is not entirely consistent, but we all know what happens when the law is not entirely consistent. You start at the top. You start with the U.S. Supreme Court, and this is the guidance from the U.S. Supreme Court. What they're saying here, in essence -- and you'll see this in some of the other cases I showed you in some of the other slides, some of the circuit court cases -- is that as a matter of competition policy, Congress has placed a thumb on the scale in favor of competition, in favor of decentralization, against

concentration. There's a thumb on the scale.

Because of that, although it might be more efficient if we let mergers happen, if we merged all the way to monopoly, that would be maybe an efficient way to get something done, but it's contrary to congressional policy. And that's why there's this debate going on in efficiencies, and I think right now, with where the law stands, is that the Supreme Court has never indicated that there was an efficiencies defense. And we cited three circuit court cases that also call it into question, but we've analyzed it because there are other courts that have looked at it.

And there's the merger guidelines, but there will be a threshold question for your Honor, if you decide they've otherwise satisfied their burden of showing the elements of an efficiencies defense, as to whether the defense even exists. There will be that question for your Honor, if you get to that point. We don't think you'd ever get to that point because the elements are -- that they have to show is that the efficiencies are merger-specific and verifiable, and we don't think they've shown that.

Now, there has been some discussion about T-Mobile in 2011 versus today, and I want to make sure we don't confuse the two things. There's no question that T-Mobile had problems in 2011, and there's no question that they addressed those problems thereafter. The point I was making when I was

comparing 2011 to today is the position they took to the DOJ and FCC in 2011, and compare that to today because merging parties have an incentive to make arguments that are trying to persuade the regulator to let the merger through.

And in 2011, they said, don't know how to get to 4G from here, we're running out of spectrum, Deutsche Telekom won't invest in us, and we're struggling to figure out a way to compete. And we know that every one of those statements was an inaccurate prediction. I'm not going to stand here and say they were lying to the regulators. You don't need to get there. It was an inaccurate prediction.

And now here we are, and your Honor's hearing the same arguments, we don't have a path to 5G, we're running out of spectrum, SoftBank won't invest in Sprint, and Sprint is struggling.

Your Honor, let them compete. Let them compete. There's ways that they can compete. You can look at their business plans. You can see that they realized, maybe a few years later than they should have, we better put billions of dollars into making our network better. And that's what they did last year, and they plan on doing it this year and the year after and the year after, and they're going to be able to succeed, and indeed, as you saw, they're not sitting there.

They said that they're somehow going to cave because they don't have low-band spectrum, but your Honor saw the

statements about where they are on 5G. They have the best 5G spectrum in the industry. They're sitting there with this fantastic 2.5 spectrum, and they think it's going to allow them to leapfrog their competitors. So tell them to go out and compete. Do what T-Mobile did. They're not in a dire situation. They're in an advantageous position, and they just need to invest in their business and compete.

Your Honor, Mr. Gelfand from time to time referred to old evidence. He almost got to saying obsolete or ancient, I forget which word he was going to use. But, your Honor, Mr. Hottges testified that the reasons why T-Mobile and Deutsche Telekom is doing this merger today is the same as they did back in 2010. And the key evidence in this case, they say it's not 2015, 2016, 2017 evidence; it's more recent evidence.

But, your Honor, the more recent evidence is after they did their merger deal. They did their agreement in April of 2018 and everything they did after that is influenced by the shadow of the merger. It's in the documents. It's in the evidence. We've pointed it out during trial. So the evidence in 2018 and 2019 has a shadow. They're doing it because of the merger.

Remember the e-mail exchange with Mr. Claure, or text exchange, where he said, hey, we've got a Senate hearing in two weeks. We can't do that kind of a promotion. They're going to think that we're an important low-priced competitor. And

Mr. Combes responded, you want me to reduce it? That's in the evidence, your Honor.

The last year-and-a-half has been influenced by the shadow of the merger, but the evidence in 2015, 2016 and 2017, the so-called obsolete evidence, that's right before the merger. That's what's going on, and that's what the merging parties are seeing when they're deciding whether to merge. That's very, very relevant evidence.

And let me end, your Honor, where I ended my closing, and that's with the public interest element. Counsel said that the States stand in exactly the same shoes as a private party. Well, that's not right. The States are suing in their role as *parens patriae*. They're suing on behalf of the consumers in their states, and they said that we didn't show that other public interests wouldn't be affected but, your Honor, our burden is to show that competition is likely to be harmed, and we've shown that.

The law is clear. We've cited a lot of cases that competition is an overriding public interest in a Clayton Act case. If they thought there were other public interests that were properly to be considered, it was up to them to offer evidence and to show that those particular public interests outweighed the overarching public interest in protecting competition. As a legal matter, under the *Philadelphia National Bank* case, as I showed in my last slide in the

closing, I don't think they're allowed to do that. But certainly as an evidentiary matter, they can ask your Honor to weigh these other public interests, rural coverage or in-home broadband, against the overarching value of competition without at least putting in some evidence.

We have shown that consumers across this country are likely to be harmed to the tune of billions and billions of dollars. Thank you, your Honor.

THE COURT: Well, thank you very much. The Court will close this hearing and, of course, give a full consideration to all of the material that has been put into the record, including the arguments that have been made today in a very professional way on both sides; so I thank you. We will endeavor to decide as promptly as possible. Thank you.

May I ask counsel to meet me in the robing room.

(Adjourned)