

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL,
DISSENTING**

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

Our economy thrives on competition. Over history, it has inspired innovation, increased choice, and improved our resourcefulness and efficiency. It is the reason the United States has birthed some of the most dynamic companies in the world.

The proposed tie-up of T-Mobile and Sprint will reduce competition. This merger will combine two of the four nationwide competitors in the wireless industry in the United States. As a result, three companies will control 99 percent of the wireless market. By any metric, this transaction will raise prices, lower quality, and slow innovation, just as we start to deploy the next-generation of wireless technology.

We've all seen what happens when market concentration increases following a merger. A condensed airline industry brought us baggage fees and smaller seats, even as the price of fuel fell. A condensed pharmaceutical industry has led to a handful of drug companies raising the prices of lifesaving medications, taking advantage of those struggling with illness.

There's no reason to think the mobile-phone industry will be different. Shrinking the number of national providers from four to three will hurt consumers, harm competition, and eliminate thousands of jobs. In deciding to overlook these harms, the Federal Communications Commission and the Department of Justice have been wooed by a few unenforceable concessions and hollow promises from the two companies involved.

The T-Mobile-Sprint merger will end a golden age in wireless that helped bring to market lower prices and more innovative services. It will mean an end to the competitive rivalry that reduced prices by 28 percent during the last decade. Similarly, the pressure to support unlimited data plans and free international roaming will fade. Offers to pay early termination fees to help families switch to plans that fit their lives will fall by the wayside. And the network improvements that will bring us the next generation of wireless service, known as 5G, will proceed more slowly and yield fewer jobs without the fuel of competitive pressure.

In short, our existing wireless market will devolve into a cozy oligopoly dominated by just three carriers. This will do nothing to make it easier for Americans to stay connected. After all, our wireless phones are how we communicate, pay for all kinds of services, seek out jobs, keep up on the news, and stay in touch with the world around us. Arguably, no service is now more central to our daily lives. But for all this connectivity, we pay a price. Most households now spend over \$1,000 a year on wireless service. Moreover, that figure probably understates the true cost because it does not include the expanding range of devices, applications, and content we use with this service. So it's no small problem that, according to the Department of Justice's complaint and the FCC's own analysis, this merger is likely to raise consumer rates.

Why are the two agencies so eager to approve this blatantly anticompetitive deal? T-Mobile and Sprint have promised that if they are allowed to merge, they will hold off on raising prices for three years. They have committed to deploying 5G networks nationwide within six years. In addition, they have agreed to divest some assets to help prop up Dish Network as a new wireless competitor to replace Sprint.

But as I discuss below, these promises do little more than camouflage the competitive problems with this transaction. They do nothing to reign in the merged company's market power, which is what really counts. The Editorial Board at the New York Times likens the parties' promises to "pay[ing] the government what amounts to a minor toll on the road to bigger profits."

Moreover, the remedies the FCC and the Department of Justice design around these promises betray the free-market principles that for decades have made us the world's leader in wireless. Instead of promoting vigorous competition among providers, today's order justifies increased concentration by jerry-rigging a new provider dependent on the government dictating who sells what to whom and when. In addition, the agency retreats from nimbler and more decentralized approaches to spectrum management—like flexible use licenses and technology-neutral rules—that have served us so well in the past. To add insult to injury, it made these choices behind closed doors with a remarkable lack of transparency.

Both the FCC and Department of Justice should know better than to think that tinkering around the edges of this deal can save it. Across our economy and across our geography, we are already struggling with the consequences of a seemingly never-ending wave of mergers and lax enforcement. So many of America's most pressing economic and political problems can be traced back to this kind of market consolidation. This includes dwindling opportunity in rural America as farmers struggle against agriculture conglomerates. It includes plunging rates of entrepreneurship as concentrated markets choke off small businesses. It includes falling wages as mergers reduce the need for employers to compete to keep their workers. And it includes income and wealth inequality that are higher than they've been in a hundred years.

The FCC and the Department of Justice should know what is fundamental: with less competition, rates rise and innovation falls. All the evidence demonstrates this is true here, too, and consumers will pay the price. In fact, with 5G on the horizon, our dependence on wireless connectivity is bound to grow. It will extend beyond our phones, creating new opportunities with wearables, video, and more in sectors like healthcare, transportation, and manufacturing. It's not the time to count on higher prices and less vigorous competition to help the benefit of this new technology reach us all.

So I dissent to the FCC's decision to consolidate the wireless market in the hands of three companies. I dissent to the process the agency used to reach this result, which hid too much of the negotiations and this decision out of view from the public. And I dissent to the remedies the FCC adopts that gamble our 5G future on a new wireless entrant and put all the risk of this merger on the backs of American consumers.

I address these aspects of today's decision below.

I.

So many people already think that Washington is rigged against them. It saddens me when on too many occasions this agency proved them right. At every twist and turn in the FCC's year-long review of the T-Mobile-Sprint merger, this agency's decision-making overlooked the work of expert staff, undermined other agencies with oversight authority like the Department of Justice, and deprived the public a meaningful opportunity to participate. Rather than inspire confidence that our laws were being scrupulously administered, the agency's brazenness throughout this proceeding was Kafka-esque: "[t]he law is whatever the nobles do."

Three of my colleagues agreed to this transaction months ago without having any legal, engineering, or economic analysis from the agency before us. They agreed to this transaction before the Department of Justice could finish its review, ending a longstanding practice of coordinating efforts between the agencies. Consumers deserve better from Washington authorities charged with reviewing this transaction.

But that was only the first troubling sign in the review process. On July 26, 2019, the Department of Justice announced that it reached a settlement with T-Mobile and Sprint that fundamentally changed the underlying transaction as originally proposed. The settlement raised substantial new issues involving the state of competition and the public interest, including the waiver of Dish's build-out obligations, new license and deployment conditions, and significant transfers of spectrum and other assets. These new facts were central to the agency's analysis of the public interest benefits of the merger. As such, the FCC should have sought public comment on what was fundamentally a new transaction. In fact, more than seven groups representing a mix of rural, labor, and other interests asked this agency for an opportunity to participate in the FCC's review. But they were all shut out.

Then, on September 24, 2019, the FCC announced that Sprint may have fraudulently received tens of millions of dollars in federal subsidies by falsely claiming it provided Lifeline service to 885,000 inactive subscribers. This represents nearly one-third of Sprint's Lifeline subscriber base and nearly 10 percent of the entire Lifeline program. Given the seriousness of the allegation and the importance of making the Lifeline program whole, the FCC should have paused its review of the merger while it investigated Sprint's alleged fraud. Nine organizations filed a petition asking for exactly that. That request also fell on deaf ears.

Once the agency finally had legal, engineering, and economic analysis produced by expert staff, key parts of it were rewritten by the FCC's political leadership behind closed doors. While it is not unusual for a draft document to change once it is circulated for review, this effort went far beyond what is routine. Significant parts of the initial draft decision were rewritten in the eleventh hour and behind closed doors to suggest less harm to competition and prices than initially found; adopt the merging companies' arguments in place of more balanced discussion about where those arguments were unconvincing; and even replace the underlying data used to analyze marginal cost efficiencies with more merger-friendly data supplied by T-Mobile.

What is most troubling is that these changes were made after no less than nine *ex parte* meetings between FCC leadership and the merging companies that took place after the agency denied other parties a further public comment period and after the Department of Justice expert that had been tapped to lead our review had left the building. Moreover, Nine organizations filed a petition with this agency pointing out that these meetings were not sufficiently disclosed on the record pursuant to the FCC's rules. Yet no effort was made to fix this problem.

Sunlight is the best disinfectant. That is why I think the FCC should make public the initial draft of this decision that was prepared by our expert staff and circulated for review in the agency in addition to the decision we release today. Congress, the courts, and the public should know what was changed and why.

Finally, in June, nine states filed a lawsuit to block the merger of T-Mobile and Sprint after finding that the merger would reduce competition and drive up the cost of cellphone service. Since then, the list of states suing to block this deal has grown to fifteen plus the District of Columbia. The discovery being undertaken for this litigation has revealed that the merging companies may have improperly withheld thousands of pages of responsive, non-privileged documents from the FCC's review. Specifically, the states found that the companies withheld 38 percent of more than 25,000 documents that

were produced as privileged. In fact, the companies now are turning over some these documents to the states after acknowledging that they may have been improperly withheld.

We should have these documents too. In fact, I don't think our review is complete without them. We also need to investigate whether the companies' failure to turn over these documents to the FCC violated our rules. Otherwise, we are simply rubber stamping this deal without the oversight the public deserves.

Ensuring that the public has a say in what happens in Washington matters, because trust in public institutions matters. Expert agencies like the FCC are duty bound to hear from everyone, not just the merging parties that have applications pending before us. Our merger reviews should be transparent and participatory and in critical respects this one was not.

II.

There is widespread consensus that the merger of T-Mobile and Sprint will substantially reduce competition. This will mean higher prices for consumers, as confirmed by economic analysis and empirical evidence. While the FCC tries to soften these competitive harms in today's decision in order to justify blessing this transaction, its efforts ultimately prove unavailing.

The Department of Justice acknowledged the serious harm this merger would cause to competition in the United States in its complaint to block the merger as it was originally proposed. According to the Department of Justice, "by combining two of the only four national mobile facilities-based wireless carriers . . . the merger of T-Mobile and Sprint would extinguish substantial competition." This would "cause the merged T-Mobile and Sprint . . . to compete less aggressively." Additionally, it would "make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings." For American consumers, this means "increased prices and less attractive service offerings."

Another lawsuit filed by a bipartisan group of attorneys general from 15 states and the District of Columbia recognizes that the merger, even as conditioned, will eliminate direct, head-to-head competition between T-Mobile and Sprint "that has led to lower prices, higher quality service, and more features for consumers." According to the states' case, "[p]reliminary estimates based on the submissions made by economists for Sprint and T-Mobile show that the merger could cost Sprint and T-Mobile subscribers at least \$4.5 billion annually and the harm to all retail mobile wireless telecommunications subscribers could be even larger."

Similarly, in today's decision even the FCC concedes—using the merging parties' own data—that this four-to-three merger "would likely lead to significant price increases." How much? Well, regrettably the agency keeps that information highly confidential. I don't think that's fair to consumers. After all, they bear the burden of the higher prices that will result from this decision. They should know what they are in for.

The experience in other countries is a helpful guide. A 2016 study of mobile prices in 25 countries by the United Kingdom's communications regulator found that removing a carrier in a four-competitor market could raise prices by 17.2 percent to 20.5 percent, on average. Another study by the Centre on Regulation in Europe Market Consolidation in Mobile Communications that looked at 33 countries found that an average four-to-three merger would lead to an increase in the bill of end users by 16.3 percent. This study further found that countries with four or more mobile operators generally see better service, quality, and price discipline than countries with three mobile operators. Canada, too, offers a cautionary tale. A study commissioned by the Canadian government found that Canada's three-carrier

wireless market had some of the highest mobile prices anywhere in the world. Today's decision does not address any of this literature.

In addition, four-to-three mergers create the potential for collusion and price signaling—which happens when a carrier raises its prices and it serves as a signal for others to do the same. We know from the past, for instance, that when traditional long distance phone services were dominated by three players, the price leader would set rates that the remaining two providers would simply match. But today's decision does not address this history either.

The FCC tries—unconvincingly—to soften some of these competitive harms in today's decision. In doing so, the agency finds itself at odds with the expert findings of the Department of Justice. I think it is worth highlighting where the FCC and the Department of Justice disagree—even after examining nearly the same record—and why.

First, the Department of Justice's complaint plainly asserts that the wireless market in the United States must have four competitors to ensure effective competition. The FCC's decision does not reach this same conclusion.

Rather, the FCC suggests that, while the competitive harms of a four-to-three merger are real, they might be offset by dynamic competition. Dynamic competition entails the prediction of future competitive outcomes, such as considerations of entry, investment, innovation, price, output, and quality. In this case, the FCC suggests that a bigger T-Mobile would engender bigger competitive responses from AT&T and Verizon Wireless—including in network investment and capacity growth. The FCC tries to fall back on dynamic (future) competition because the static (immediate) competition model shows clear harm to consumers.

So how much weight should we afford the FCC's argument? It bears noting at the outset that the static model of competition dominates modern antitrust analysis. This is for good reason. Agencies do not have anything like a reliable and consistent process for predictive fact finding. That's in large part because the complex relationship between static product market competition and the incentive to innovate is not well understood. One view suggests innovation stimulates competition. Another suggests that vigorous market competition is a precondition for innovation. In sum, nothing supports a confident conclusion as to which policies will elicit a higher rate of innovation or dynamic competition.

The reality is that T-Mobile already engenders the kind of competitive responses from AT&T and Verizon Wireless that the FCC now touts as a benefit of the merger—as demonstrated by its successful “Uncarrier” campaign. Moreover, there is overwhelming evidence that T-Mobile would have less incentive to actually act competitively against AT&T and Verizon Wireless in the first place in a three-carrier market. Perhaps this explains why even the FCC ultimately concedes that “it cannot confidently conclude” that new dynamic competition “will entirely outweigh the competitive harms . . . particularly for price sensitive customers in densely populated areas.”

Second, the Department of Justice's complaint concludes that this merger would facilitate anticompetitive coordination among the three remaining wireless carriers. Meanwhile, the FCC decides that it cannot conclude that this deal would make coordination more likely—even though the agency previously found in its order denying the proposed AT&T-T-Mobile merger that the wireless market already was conducive to coordinated action.

So who is right? The FCC's decision acknowledges that several factors make the wireless market more vulnerable to price-based coordination. After all, prices are set nationwide, can be readily

monitored, and are easily changed. Plus, as a related matter the Department of Justice already is investigating alleged collusion in the industry relating to eSIM technology and customer switching.

Then, the FCC throws cold water on all of this evidence by blindly suggesting that local network quality could mitigate concerns about this kind of coordination. There is no evidence to support this claim. The reality is that the merger of T-Mobile and Sprint would leave three roughly equal-size firms in the wireless market. In such an environment, the three remaining companies would have stronger incentives to fix prices or to follow each other on pricing—either explicitly or implicitly. They also could decide to act together to get rid of certain types of plans, like unlimited data plans, or to avoid bringing to market new and better service plans. In sum, the merged company might simply find that it is more profitable to settle in with its equals rather than compete aggressively on price or other metrics. All of this suggests more coordination, not less.

Third, the Department of Justice’s complaint finds unmistakable harm to the wholesale market, asserting that “the merger’s elimination of [wholesale] competition likely would reduce future innovation.” But in this decision, the FCC concludes that the merger will not harm the wholesale market.

Again, the Department of Justice gets it right. T-Mobile and Sprint are the two largest companies in the wholesale market, accounting for nearly 70 percent of all wholesale connections. The record also shows that these companies are more willing to enter into wholesale agreements for a variety of competitive reasons—not the least of which is they have less risk of losing share to a resale competitor. The merger would change these dynamics.

Finally, it bears noting that both the FCC’s Order and the Department of Justice ignores the harm that this merger poses to our already squeezed 5G supply chain. We face enormous challenges with network security, and with supply chain security in particular. The number of vendors supporting the wireless ecosystem has shrunk. Consider that at the turn of the century, there were 13 equipment vendors vying to serve carriers. In the run up to 4G, that number was down to seven. And now as we embark on 5G, it looks more and more like we could move to a world where there might be only one option for some 5G equipment—and that option could expose our networks to undue foreign influence. Further consolidating the wireless market means limiting the number of prospective purchasers. This will not make it any easier to induce new entrants into the equipment market—which we sorely need in order to build a more diverse market for more secure 5G equipment.

Ultimately, the procedural irregularities that have plagued the FCC’s review of this transaction make it difficult to ensure this agency’s findings are credible—especially when in so many key respects they are at odds with the findings of the Department of Justice. While the record evidence shows that the proposed merger of the nation’s third- and fourth-largest wireless providers will reduce competition, the FCC appears to have contorted facts and law to craft an approval where up is down, less is more, and bigger is better. As a result, this decision represents the end of a decade-long history of careful wireless merger review at this agency and the consumer benefits that have followed.

We deserve better and more accountable decision-making from our expert agencies. For this reason, I believe the FCC needs to develop a process for retrospective analysis of mergers of this magnitude. To this end, three years following this transaction the agency should assess whether or not the merger resulted in more competition and lower prices. This retrospective analysis also should assess just how the FCC’s predictions about dynamic competition—so fundamental to the approval of this merger—were borne out. We should deliver this report to Congress and make it publicly available. That way, we can form a stronger and more evidence-based foundation for our merger analyses going forward.

While competition is at the core of the assessment of this transaction by authorities in Washington, under the Communications Act the FCC's evaluation of this merger is broader. Under the law, the agency is charged with determining if this transaction is in the "public interest, convenience, and necessity."

As a starting point, I do not believe that a transaction that so obviously violates the Clayton Act can be in the public interest. Nevertheless, the FCC tries to sell this merger as producing one primary public interest benefit: 5G deployment. This effort is unavailing for the simple reason that this merger is by no means the best path to achieving nationwide 5G service.

As the FCC has recognized on many occasions, all four nationwide carriers already are upgrading their networks to 5G, without the merger. All four carriers also have backed up their 5G deployments with aggressive and independent capital build out plans. In fact, T-Mobile has already announced plans to spend \$25.9 billion to deploy 5G services through 2022. At the same time, Sprint has indicated that it planned to spend a total of \$26 billion on 5G deployment during the same period. So as these very public statements suggest, this merger is not a necessary prerequisite for either company's 5G plans.

That said, there is a kernel of truth in this decision's skepticism about ongoing 5G efforts in the United States. To date, 5G deployments are generally limited to our most densely populated and urban areas. That's because as a result of FCC policy decisions nationwide we've prioritized bringing high-band, millimeter wave spectrum to market to support early 5G efforts. Yet recent commercial launches of 5G service in the United States are confirming what we already know—that commercializing the millimeter wave will not be easy, given its propagation challenges. The network densification these airwaves require is costly. This is especially true in rural America, where the challenging economics of service presently do not support the high cost of high-band infrastructure.

If we want to serve everywhere in this country—and not create communities of 5G haves and have-nots—we need a healthy mix of airwaves that provide coverage and capacity, and we require them now. That means we need mid-band spectrum.

It bears repeating that sixteen countries have already auctioned mid-band spectrum specifically for the provision of 5G wireless service. They include Australia, Finland, Germany, Italy, Ireland, Japan, Kuwait, Latvia, Mexico, Oman, Qatar, Saudi Arabia, South Korea, Spain, the United Arab Emirates, and the United Kingdom. In addition, China allocated mid-band spectrum for 5G use last year. In the United States, we have yet to auction a single swath of mid-band spectrum. We have brought exactly zero megahertz of mid-band airwaves to auction in the 5G age. Instead, this agency auctioned two millimeter wave bands earlier this year and has plans to auction another three millimeter wave bands later this year—a total of five different bands newly available for 5G service.

At its core, the proposed merger is the market's response to the mid-band problem in the United States. If you spend time combing through the Technical Appendix, one detail stands out: the role of the 2.5 GHz band. It is front and center in every discussion about merger efficiencies.

Given the dearth of mid-band spectrum available for 5G in the United States, the 2.5 GHz band is arguably the nation's most valuable spectrum asset at the moment. And the Technical Appendix demonstrates that, given Sprint's financial hardships, this merger may be the most expeditious path to putting this spectrum to use for American consumers.

But all that means is that the FCC believes that this merger is the logical answer to a policy failure it created. I disagree. The right answer is to fix our policies to support competitive, nationwide

5G service. We can do that by pivoting now and making it a priority to bring more mid-band spectrum to market. Merging T-Mobile and Sprint might result in more comprehensive use of the 2.5 GHz band, but it means we lose out on years of head-to-head competition between the companies and with their rivals that could produce even greater investment in next-generation technologies.

Worse, the FCC's plan could backfire. There is good reason to think that removing a competitor actually could lead to less 5G investment—not more. That's because evidence in the record demonstrates that a combined T-Mobile-Sprint may not have the incentive to actually build the 5G network that they are promising. Instead, additional capacity gained from the merger could incentivize the companies to extend the life of their 4G networks rather than invest considerable resources in building out a low- or mid-band 5G network that offers only marginal improvements in speed.

This is not just an abstract concern. It's the reason why the FCC is forced to condition this merger on the companies agreeing to actually build the network they promised, or pay hefty fines if they do not. But as I discuss below, those commitments are fraught with their own problems. Moreover, we should care that we are creating a market that no longer incentivizes investment absent government mandate. It will have consequences for the future of the industry beyond 5G.

The FCC's Order ultimately includes a lot of hand waving about 5G to distract from the competitive harms of this transaction. Don't be fooled by that effort. The FCC's decision makes it less likely that carriers will invest in 5G—especially in rural areas—because it takes away the fuel that fires competition and powers greater deployment. The FCC's commitments then try to fix the very problem it creates. The public interest would be better served if the FCC pursued alternative paths to enabling 5G without the merger—including making critical mid-band spectrum available in at auction, so that companies like T-Mobile are not forced to look for it only in the secondary market.

IV.

This merger is anticompetitive, and its public interest benefits do not outweigh the harms it will cause to the wireless market in the United States. Nonetheless, the FCC suggests that a series of commitments from T-Mobile and Sprint can replicate the competition that is lost as a result of this merger. In critical part, these commitments include three things: a commitment to freeze prices for three years; a commitment to deploy a 5G network nationwide within six years, and a commitment to divest some assets to help prop up Dish as a new wireless competitor to replace Sprint.

But the commitments that T-Mobile and Sprint are making do little more than camouflage the damage this transaction will do to competition. And as camouflage goes, it is not all that compelling. That's because it is dressed up in a fundamentally flawed premise: that thanks to a mishmash of merger-related mandates, Dish will seamlessly slide in the marketplace to take over the position currently occupied by Sprint.

A.

First, T-Mobile's answer to the overwhelming evidence that this merger will lead to higher prices is a promise to “freeze” prices for three years. Specifically, T-Mobile promises to: “continue T-Mobile and Sprint legacy rate plans for three years after the merger or until better plans that offer a lower price or more data are made available, whichever occurs first. The retained legacy rate plans may be adjusted to pass through cost increases in taxes, fees, and surcharges as well as services from third party partners that are included in the rate plans, as these increased costs are not within the control of New T-Mobile. The legacy plans may also be adjusted to modify or discontinue third party

partner benefits based on changes in the terms of the offering initiated by the third party partner, as this is also not within the control of T-Mobile.”

Does that sound overly legalistic to you? It does to me. It is full of loopholes. It’s a promise that is tantamount to saying we won’t raise your prices unless we actually do.

This language provides the merged company with plenty of leeway to get out of its commitment to not raise prices. It could point to small improvements in network quality to get rid of cheaper rate plans. It could increase your bill through handset or device costs. It could also add fees and surcharges—and it has happened before, because not too long ago Sprint paid millions of dollars to settle allegations that it added bogus fees to customers’ bills. Finally, T-Mobile can bundle offerings together in creative ways that ultimately mean you pay more for wireless service.

Even if the merged company keeps its promise, keeping rates constant is not an especially good deal for consumers when wireless prices have been falling. According to data compiled by the Department of Labor, wireless prices in the United States fell by 28 percent over the last decade as consumers benefitted from intense price competition among the four nationwide carriers. According to data compiled by the FCC, the cost per megabyte of data declined even more dramatically over this time period—by between 72 and 83 percent. All indicators point to this trend continuing absent the merger. That means a price freeze meant to temporarily mask upward pricing pressure caused by industry consolidation isn’t an especially good deal for consumers.

Nor does it bode well for what comes next. Once this promise expires in 36 months, customers will be left at the mercy of the merged company—assuming it even waits that long before using any one of the loopholes set out above to raise rates.

B.

Second, the merged company’s commitment to serve rural and urban areas with next-generation 5G service may sound attractive for a nation struggling with the digital divide, but it ultimately falls flat. To gain the FCC’s sign off, T-Mobile has promised to deploy a 5G network covering 97 percent of the United States population within three years, and 99 percent within six years.

However, both carriers have already pumped out a stream of press releases promising to build this network before the transaction. In fact, according to Sprint itself, far from failing, its 5G network today covers more Americans than any other carrier. This is important—but today’s decision fails to make note of this fact. In addition, this decision ignores history because it was competition that spurred carriers to build 4G networks that today cover 99 percent of the population in the United States—and this competition would serve us best in the 5G era, too.

Moreover, if you scratch at the surface of this commitment, its 5G veneer is alarmingly thin. The 5G standard, as defined by the International Telecommunication Union, calls for gigabit speeds to start and gigabit-plus speeds in the future. But for much of the United States, the merging parties commit to speeds between 50 and 100 Mbps, with some portion of the country getting faster speeds. That is less than what is possible with today’s 4G networks. Even at 100 Mbps, the merged company will offer only one-tenth of the speeds we were promised with 5G. The parties’ commitments also do not offer anything regarding lower latency, another critical aspect of 5G capabilities.

On top of that, real questions remain about the willingness of the FCC to actually enforce these 5G build-out promises. In the year before last, the FCC let another company, Charter Communications, off the hook for new, competitive broadband networks that it agreed to deploy to get approval for its

merger with Time Warner Cable. The facts aren't much different this time around. When it comes to holding companies accountable for their premerger promises to build new infrastructure, history suggests this FCC will look the other way.

C.

Third, the centerpiece of the promises T-Mobile has made to justify this transaction is the creation of a new fourth carrier to fill the void left by Sprint. Under the settlement agreement negotiated by the Department of Justice, Sprint will divest certain assets to Dish so that it can enter the wireless market as a fourth competitor—first as a mobile virtual network operator reselling T-Mobile's service and eventually as a national facilities-based wireless carrier. This is important because the Department of Justice freely admits that competition in the wireless market requires four carriers. But try as it might, these two things ultimately prove incompatible: approving a four-to-three merger while acknowledging the need for a fourth carrier to ensure competition.

Ultimately, the proposed remedy fails for at least three reasons: (i) it accepts significant harm to competition in the short and medium term while adopting an unreasonably optimistic view of possible benefits in the long term; (ii) it requires ongoing entanglement between T-Mobile and Dish that undermines the notion that Dish will be a truly independent competitor; and (iii) it puts all the risk of failure on consumers if Dish is unable to build out a nationwide network and serve as a capable replacement for Sprint.

i.

At the outset, the proposed remedy fails because it accepts significant harm to competition in the near term while adopting an unreasonably optimistic view of competition in the long term.

Under the Department of Justice's Policy Guide to Merger Remedies, an effective merger remedy must quickly restore lost competition in the relevant market. In fact, according to remarks from the Assistant Attorney General for the Antitrust Division at the annual Antitrust Law Leaders Forum last year, the goal of a divestiture should be to preserve the status quo competitive dynamic in the market from "day one."

By any measure, the effort to replace Sprint with Dish in the marketplace fails that test.

The commitments secured by the Department of Justice and the FCC will not restore the status quo competitive dynamic for many years. Under the settlement agreement, Dish initially will enter the market only as a mobile virtual network operator reselling strictly prepaid wireless service. This means for the immediate future Dish will simply resell a rebranded version of T-Mobile's service using T-Mobile's facilities. As a result, when this transaction closes, even with the remedy in place, there will only be three facilities-based nationwide wireless competitors. During this time, the Department of Justice's concerns about a four-to-three merger will be realized.

Consequently, in the near term there is no way Dish can replace the competition lost as a result of this merger. In fact, both the Department of Justice and the FCC have long recognized that mobile virtual network operators do not meaningfully compete with facilities-based providers. To this end, in its wireless competition reports to Congress the FCC routinely excludes mobile virtual network operators from the same category as facilities-based providers and instead attributes their subscribers to their facilities-based hosts. This approach is entirely correct. Applied here, it means that for purposes of assessing wireless competition the FCC would continue to count Dish customers as T-Mobile customers.

If that is not telling enough, the decision approving this transaction itself acknowledges that it “consider[s] only facilities-based entities” in its competitive analysis and that it will continue to exclude mobile virtual network operators from consideration of market concentration measures.

Furthermore, we know that mobile virtual network operators can never be truly disruptive because they rely on competitors for their success. As a mobile virtual network operator Dish will be completely dependent on T-Mobile. It will require wholesale inputs for service from its retail competition. This is not an easy path to market success. The ability Dish has to compete will depend entirely on the margin between the wholesale price T-Mobile charges for service and the retail price it can offer to consumers. So what is that margin? We don’t know. At some point in the future, the parties will enter into a resale agreement that they will then submit to the FCC for approval. But that means we are being asked to vote this remedy without actual knowledge of the terms of the agreement that is supposed to protect Dish and protect competition. That not only makes no sense, it is irresponsible. If the companies fail to reach an agreement that passes muster, the harm to competition will already have been done.

On top of that, the FCC has no experience regulating wholesale rates in the modern and evolving wireless market. There’s no guarantee that we will get it right during the next seven years. That’s important, because the consequences of getting it wrong are tremendous for both companies and for consumers.

Then, within one year, Dish will start to provide a postpaid wireless service too, using cell sites and retail stores that are “decommissioned” by the merged company. This will mean that Dish will operate as an “infrastructure mobile virtual network operator.” The decommissioning of cell sites meant to support this limited facilities-based entry will take place gradually over five years. Meanwhile, the merged company will have to provide Dish with access to its cell sites.

Finally, if all goes as planned, Dish will emerge as a full-fledged facilities-based provider in seven years. At this point, Dish can start to replace the competition lost by the removal of Sprint from the marketplace.

Count me as skeptical. Seven years is an awfully long time to wait for full-fledged competition. It may never arrive. Moreover, in addition to the complexities of relying on wholesale inputs from T-Mobile in the short term, Dish has been provided with a limited set of assets from which to launch its entry into the wireless market. Specifically, Dish will acquire Sprint’s prepaid customers, retail locations, personnel, licenses, data, and other associated assets. As a result of these divestitures, Dish will have only 2.5 percent of all wireless subscribers in the United States. This set of subscribers is widely known to have one of the highest churn rates in the industry. Consequently, the subscribers Dish takes from Sprint could easily disappear long before the seven-year period in which the company launches its own network.

Finally, it is worth noting that a 2017 study of merger remedies by our colleagues at the Federal Trade Commission found that partial divestitures involving selected assets—like the prepaid divestiture here—pose greater risk of failure. The FTC found that in nine out of ten decisions where it required partial divestitures of key assets, the divestitures did not effectively maintain competition. The reasons why these divestitures failed vary. In some cases, the selected asset package was too limited, preventing buyers from competing with the merged company offering a wider range of products. In others, brand loyalty was greater than was anticipated and the divestiture of only selected assets was insufficient to persuade customers to switch. In one case, the buyer quickly exited the market. Finally, in another case, employees did not transfer with the selected assets, and the buyer was unable to hire the right employees under advantageous terms. What is striking is that every one of these risks is present here, too.

Ultimately, the parties' own words are the best evidence that Dish will not remedy the competitive harm of this merger in the short or medium term. On an investor call right after the settlement with the Department of Justice was announced, T-Mobile leadership acknowledged that Dish's entry would have no effect on the merged company's profitability: "It's important to point out that the target synergies, profitability and long-term cash generation have not changed for T-Mobile." These are their own words, and we should believe them.

ii.

The proposed remedy also fails because it requires ongoing entanglement between T-Mobile and Dish that undermines the notion that Dish will be a truly independent competitor.

Under the commitments in the settlement agreement, Dish would need to enter into numerous support agreements with T-Mobile that would leave it dependent on one of its biggest competitors to operate successfully. This kind of ongoing entanglement between the merged company and a divestiture buyer does not meet the requirements of Horizontal Merger Guidelines developed by the Department of Justice and it is not consistent with judicial precedent. For that reason, we should reject it.

Under the proposed settlement, Sprint will identify all employees of its existing prepaid operations so that Dish can vet, interview, and negotiate with those employees for renewed employment with Dish. Sprint also will identify retail locations that the merged company plans to decommission, so that Dish can inspect them, review environmental, zoning, or other permits, and begin the process of assignment. Over a period of five years, the merged company also is expected to provide Dish with access to its own cell sites while it undertakes the lengthy process of decommissioning redundant sites and making them available to Dish. The settlement also details a number of obligations that T-Mobile must observe in its resale agreement with Dish, including traffic and device non-discrimination. Finally, T-Mobile and Sprint must also provide certain "transition services" to Dish for three years, including billing, customer care, SIM card procurement, device positioning, and more.

When assessing a remedy, the Department of Justice's Policy Guide on Merger Remedies requires the agency to consider whether the buyer will be independent of the merging parties. Similarly, courts that have reviewed merger remedies have expressed that it can be a problem to allow continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the new entrant's vulnerability to the merged company's behavior. (*See, e.g., FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 59 (D.D.C. 2009) (finding that "[i]n order to be accepted, curative divestitures must be made to . . . a willing, independent competitor capable of effective production"); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015)). But that is exactly what the remedy here entails. At a minimum, for seven years, Dish will have the right to resell T-Mobile services under a resale agreement. On top of this, for three years, Dish will rely on the merged entity for a wide range of transition services. Dish, therefore, will not be a truly independent competitor for many years. That undermines the remedy proposed here and demonstrates its inadequacy under standards used by both the Department of Justice and the courts.

For its part, T-Mobile has no real incentive to help a competitor and will have opportunities to routinely handicap Dish's competitive impact. The remedy depends on the FCC managing this tense relationship from afar—but nothing in the decision suggests that we will do that effectively. In past transactions, the agency has identified an ombudsman to oversee implementation and ensure that parties abide by their commitments. We don't do that here, which brings into question our resolve to act as mediator. And while the Department of Justice at least creates a role for a trustee to manage its complex settlement with the parties, that person will be paid for by T-Mobile. In addition, he or she will be

restricted from doing little more than certifying disputes for the Department of Justice, where they will undergo a long, bureaucratic resolution process. By then, any competitive harm to Dish may already have been accomplished.

iii.

Finally, the proposed remedy fails because it places all the risk of failure on consumers if Dish is unable to build out a nationwide network and serve as a capable, competitive replacement for Sprint.

The remedy proposed by the Department of Justice and FCC carries enormous execution risk. In particular, the divestiture of many of the assets at issue—like subscribers, employees, and stores—cannot be assigned without the consent of other parties that are not part of the settlement agreement. Meanwhile, Dish will try to enter a market in which it has never competed, transition to a brand-new back office operation, and re-brand T-Mobile wholesale service at its own while also trying to compete with the merged firm and build out a first-of-its-kind 5G network. These stumbling blocks are not insubstantial.

Moreover, the idea that Dish can enter the wireless market by building its own nationwide network also deserves special scrutiny. As one analyst noted, over its now forty-year history, the wireless industry has never generated a return on invested capital meaningfully in excess of its cost of capital. The idea that Dish can build a new network and then slug it out in a mature wireless market suggests in this decision that the Department of Justice and FCC have ignored the facts on the ground.

Consider that existing facilities-based carriers like AT&T and Verizon have spent over \$100 billion on building up their own networks in the past decade. Verizon spends \$15 billion annually just to maintain a network they've already built. Given these facts, Dish's \$10 billion estimate for building its nationwide 5G wireless network does not seem serious. Like Sprint, Dish also is highly leveraged with significant debt maturing soon. Yet nothing in the FCC decision even discusses Dish's financial capability to build the network it has promised. This is an especially striking omission given the attention those who support this decision have given to noting Sprint's financial challenges.

Then, following the seven-year period in which Dish will rely on wholesale inputs from T-Mobile to provide service, should it emerge as a true facilities-based provider, Dish will be in a difficult competitive position. The company will lack important qualities that matter to wireless customers, such as nationwide coverage, a track record for effectively serving customers across the country, and the scale necessary to ensure a broad mix of services and devices. Even if the company is successful, under the proposed remedy, its plans call for covering only 70 percent of the population by 2023. That could leave 100 million Americans without a full range of competitive choice.

Given these challenges, as numerous parties have noted, Dish might be better off sticking to operation as a mobile virtual network operator. Under these circumstances the company would simply profit from whatever arbitrage opportunity is handed to them via a regulated resale agreement and then sell its spectrum at a later date instead of investing billions to compete with the largest operators and building a facilities-based 5G network from scratch. In fact, nothing prevents Dish from taking this route, save for a \$2.2 billion financial penalty that is laid out in a letter to the FCC. But that penalty may just be the cost of doing business. After all, the penalty sounds de minimis when compared to the upwards of \$10 billion Dish projects it will need to fully build out this network.

That's not fair. The risk of removing a competitor from the marketplace should not fall on consumers. That's fundamental. This is not just my opinion. It's one I share with the Assistant Attorney General for the Antitrust Division, who has said: "I believe the Division should fairly review offers to settle but also be skeptical of those consisting of behavioral remedies or divestitures that only partially

remedy the likely harm. We should settle federal antitrust violations only where we have a high degree of confidence that the remedy does not usurp regulatory functions of law enforcement, and fully protects American consumers and the competitive process. Decrees should avoid taking pricing decisions away from the markets, and should be simple and administrable . . . [.] We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so.”

Yet the remedy before us has all the hallmarks of a remedy that is interventionist, behavioral, and fails to fully protect competition or consumers. It should be rejected by the Department of Justice. It should be rejected by the FCC.

* * *

American consumers are savvy. They know what less competition looks like. This transaction makes the wireless market look more like the one they know with airlines and pharmaceuticals. When Washington blesses consolidation like this consumers routinely wind up with higher prices and lower quality services. It’s not fair. Moreover, it’s not smart. We are at an important point in the development of wireless technology, on the cusp of a new world of 5G wireless services connecting so much more in the world around us, and this decision denies that new world the powerful fire of competitive pressure to help ensure deployment to everyone, everywhere. This is a shame.

However, all is not lost. While Washington has failed to perform a fair review and stop this merger, states are stepping forward. A bipartisan group of attorneys general from 15 states and the District of Columbia are now suing to halt this transaction. They have determined that this merger results in an unacceptable loss of competition and that the remedies proposed fail to fix the harms that will befall wireless consumers. These state officials understand what Washington apparently does not: with less competition rates rise and innovation falls. All the evidence demonstrates this is true. Consumers should hope these state officials succeed. Count me among them.