

**UNITED STATES OF AMERICA BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

**In the Matter of Applications of T-Mobile US, Inc.     )  
and Sprint Corporation For Consent to Transfer     ) WT Docket No. 18-197  
Control of Licenses and Authorizations             )**

**PETITION TO DENY OF THE  
AMERICAN ANTITRUST INSTITUTE**

In response to the Federal Communications Commission’s (“FCC’s”) Public Notice, and pursuant to section 1.939 of the rules, the American Antitrust Institute (“AAI”) hereby files this Petition to Deny (“Petition”) the proposed combination of T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”).<sup>1</sup> For the numerous reasons discussed in this Petition, T-Mobile and Sprint have failed to meet their burden of proof that the proposed transaction would benefit the public interest under Sections 214 and 310(d) of the Communications Act of 1934 (as amended).<sup>2</sup> The AAI therefore urges the FCC to deny their application to merge. A merged Sprint and T-Mobile would harm competition and consumers in U.S. wireless markets, with no credible or creditable benefits.

The AAI is an independent, nonprofit organization. The AAI’s mission is to promote competition that protects consumers, businesses, and society.<sup>3</sup> We serve the public through education, research, and advocacy on the benefits of competition and the use of

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<sup>1</sup> T-Mobile US, Inc., and Sprint Corporation Seek FCC Consent to the Transfer of Control of the Licenses, Authorizations, and Spectrum Leases Held by Sprint Corporation and its Subsidiaries to T-Mobile US, Inc., and the *Pro Forma* Transfer of Control of the Licenses, Authorizations, and Spectrum Leases Held by T-Mobile US, Inc. and its Subsidiaries, WT Docket No. 18-197, Public Notice, DA 18-740 (rel. July 18, 2018). *See also* T-Mobile and Sprint Description of Transaction, Public Interest Statement, and Related Demonstrations, WT Docket No. 18-197 (filed June 18, 2018) (“Public Interest Statement”). *See also* 47 U.S.C. § 1.939.

<sup>2</sup> 47 U.S.C. §§ 214, 310(d).

<sup>3</sup> The AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see <http://www.antitrustinstitute.org>.

antitrust enforcement as a vital component of competition policy. AAI has advocated for competition in the U.S. telecommunications markets since its founding more than 20 years ago, including in-depth legal, economic, and institutional analysis of mergers, problems involving collusion and market division, and spectrum allocation.

## **I. Communications**

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## **II. Introduction**

A well functioning, competitive telecommunications sector is fundamental to the workings of an open and democratic society, the public well-being, economic productivity, and citizen engagement. Vigorous competition between rivals produces products and services that enhance consumer welfare and promote innovation and market entry. This vision of the U.S. wireless industry is quickly receding. Consolidation has, in less than a decade, restructured the national U.S. wireless market. In 2002, the market featured seven major wireless carriers. By 2009, the number of significant national rivals fell to four. A Sprint-T-Mobile deal would further reduce the number of rivals from four to three, stoking even higher concentration in the U.S. wireless market and contributing to growing concerns

over a broader systemic decline in competition, market entry, and equality in the U.S. economy.<sup>4</sup>

If approved, a Sprint-T-Mobile merger deal would complete the roll-up of the national U.S. wireless market. The 4-3 merger would create an oligopoly that would promote the market “stabilization” that is coveted by large players that grow tired of the rough and tumble of competition and the disruptive rivals that pressure them to compete. At the same time, the deal would eliminate important head-to-head competition between Sprint and T-Mobile, the two disruptive wireless carriers in the U.S. Either way, the competition eliminated by the merger would likely result in higher prices, less choice, lower quality, and slower innovation—to the detriment of U.S. wireless subscribers.

In 2011 the FCC anticipated denying, and the U.S. Department of Justice (DOJ) rejected, AT&T’s effort to swallow maverick T-Mobile. These actions led to significant gains for consumers, just as the DOJ had predicted.<sup>5</sup> It should not sacrifice those gains now by allowing a merger that would create the Big 3. And nothing is different now, relative to four years ago, that would change then Assistant Attorney General Bill Baer’s observation that “It’s going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers.”<sup>6</sup>

The AAI strongly urges the FCC to deny the applications of Sprint and T-Mobile to merge. An FCC order denying the transaction should include five straightforward arguments, none of which requires the support of sophisticated economic or legal analysis.

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<sup>4</sup> See, e.g., *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward*, AM. ANTITRUST INST. (Sept. 28, 2016), <http://www.antitrustinstitute.org/sites/default/files/AAINatCompPolicy.pdf>.

<sup>5</sup> See, e.g., Patrick DeGraba & Gregory L. Rosston, *The Proposed Merger of AT&T and T-Mobile: Rethinking the Possible*, Case 1 in *THE ANTITRUST REVOLUTION* (John E. Kwoka & Lawrence J. White eds., 6th ed. 2014).

<sup>6</sup> Diane Bartz & Alina Selyukh, *Sprint, T-Mobile Deal to Face Fierce U.S. Antitrust Headwinds*, REUTERS (June 5, 2014), <https://www.reuters.com/article/tmobile-sprint-corp-antitrust-idUSL1N0OM1R420140605>.

- Sprint-T-Mobile is a highly concentrative merger that fails to satisfy the FCC’s public interest standard. If allowed, it would virtually guarantee harm to competition and consumers through higher retail and wholesale prices, lower quality and variety, less choice, and slower innovation.
- By reducing the field of rivals from four to three, the deal is a textbook set-up for anticompetitive coordination between the remaining Big 3 carriers: Verizon, AT&T, and Sprint-T-Mobile. The merged firm would undoubtedly find that maintaining a competitive “peace” with its rivals would be more profitable than trying to gain market share by competing aggressively on price, quality, and innovation.
- Compelling economic evidence from consummated mergers and antitrust enforcement in the U.S., together with experience in wireless sectors in other countries, strongly supports concerns over the anticompetitive and anti-consumer effects of highly concentrative 4-3 mergers.
- The merger eliminates head-to-head competition between the two disruptive rivals in the national U.S. wireless market. The proposed AT&T-T-Mobile merger failed in large part because it eliminated T-Mobile as a disruptive competitor, or a “maverick.” Sprint also competes hard on price to woo consumers away from rival carriers. Such competition, and the benefits it delivers to consumers, would be lost by the merger.
- No claimed cost savings or consumer benefits from the merger outweigh the merger’s likely harmful effects. The major “efficiency” claimed by Sprint and T-Mobile—that they need the merger to roll out 5G network technology—is meritless. Indeed, the potential difficulties of integrating the different Sprint and T-Mobile networks could actually increase costs and create inefficiencies for consumers.

### III. The Troubled History of U.S. Wireless Consolidation

In 2002, there were seven national wireless carriers in the U.S.: AT&T, Verizon, Sprint, T-Mobile, Nextel, AllTel, and Cingular. In a consolidation spree that began in 2004, Cingular acquired AT&T. This was followed by Sprint’s acquisition of Nextel in 2005—a merger that has been called one of the “worst acquisitions ever.”<sup>7</sup> At the time of the merger, Sprint and Nextel operated parallel networks using different technologies and maintained

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<sup>7</sup> Marc Paul Daniels, *Was Sprint Buying Nextel One of the Worst Acquisitions Ever at \$35b?*, FORBES (Nov. 29, 2012, 12:05 PM), <https://www.forbes.com/sites/quora/2012/11/29/was-sprint-buying-nextel-one-of-the-worst-acquisitions-ever-at-35b/#669e23fe48e3>.

separate branding after the deal was consummated. The company lost millions of subscribers and revenue in subsequent years in the wake of this costly and confused strategy.<sup>8</sup>

In 2009, Verizon bought All-Tel. This was followed by AT&T's unsuccessful attempt to buy T-Mobile in 2011 and T-Mobile's successful acquisition of mobile virtual network operator (MVNO) Metro PCS.<sup>9</sup> The DOJ and the FCC forced the abandonment of the AT&T-T-Mobile deal. Like Sprint-T-Mobile, it was also a 4-3 merger that would have eliminated T-Mobile, a smaller, efficient, and innovative player that set the industry bar high for the remaining rivals. AT&T's rationale that the merger with T-Mobile was essential for expanding to the then-impending 4G LTE network technology also did not pass muster. In August of 2014, two years after the abandoned attempt, Forbes magazine concluded that there would have been "no wireless wars without the blocked AT&T-T-Mobile merger."<sup>10</sup>

#### **IV. A Sprint-T-Mobile Merger in Not in the Public Interest**

There are five reasons why the Sprint-T-Mobile merger should not survive the FCC's public interest test. All of these are firmly grounded in precedent and supported by common-sense economics and evidence that puts consumer welfare front and center under the FCC statute and the U.S. antitrust laws.

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<sup>8</sup> Letter from American Antitrust Institute to the U.S. Department of Justice and the Federal Communications Commission *Re: Potential Merger between Sprint and T-Mobile* (Jan. 7, 2014), available at [http://www.antitrustinstitute.org/sites/default/files/AAI%20Letter%20Concerning%20Potential%20Merger%20Between%20Sprint%20and%20T-Mobile\\_0.pdf](http://www.antitrustinstitute.org/sites/default/files/AAI%20Letter%20Concerning%20Potential%20Merger%20Between%20Sprint%20and%20T-Mobile_0.pdf).

<sup>9</sup> *Wireless Company Mergers Since 2002*, WASH. POST (Mar. 21, 2011), [http://washingtonpost.com/business/economy/wireless-company-mergers-since-2002/2011/03/21/ABYLkf9\\_graphic.html?utm\\_term=.f463b71119f8](http://washingtonpost.com/business/economy/wireless-company-mergers-since-2002/2011/03/21/ABYLkf9_graphic.html?utm_term=.f463b71119f8).

<sup>10</sup> Mark Rogowsky, *There'd Be No Wireless Wars Without the Blocked T-Mobile Merger, So Where Does That Leave Comcast-TWC?*, FORBES (Aug. 27, 2014, 7:52 AM), <http://www.forbes.com/sites/markrogowsky/2014/08/27/t-mobile-and-sprint-continue-to-battle-thanks-to-the-government/#57d21f083160>. See also James Stewart, *Brash C.E.O. Keep the Giants of Mobile Off Balance*, NY Times (Nov. 29, 2013), [https://www.nytimes.com/2013/11/30/business/brash-ceo-revives-a-moribund-t-mobile.html?rref=collection%2Fbyline%2Fjames-b.-stewart&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=search&contentPlacement=12&pgtype=collection](https://www.nytimes.com/2013/11/30/business/brash-ceo-revives-a-moribund-t-mobile.html?rref=collection%2Fbyline%2Fjames-b.-stewart&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=search&contentPlacement=12&pgtype=collection) (T-Mobile's competitive response to the failed AT&T merger – which included eliminating two-year contracts, unbundling phone and service payments, cutting prices, and offering free unlimited roaming – “enabled the Justice Department's Antitrust Division to take a rare victory lap”).

**A. The Merger Is Both Presumptively Illegal Under the U.S. Antitrust Laws and Not in the Public Interest Under the Communications Act**

The antitrust laws and regulatory statutes protect competition and consumers. Certain types of mergers are presumptively illegal under Section 7 of the Clayton Act because they are likely to stifle competition, raise prices, lower quality, and slow innovation.<sup>11</sup> These concepts have a strong ally in and partnership with the principles and standards underlying public interest regulation. The bedrock concept underlying U.S. merger law—that deals which “may substantially lessen competition” should be stopped in their incipiency—only confirms the illegality of mergers such as Sprint-T-Mobile. And some deals are not only illegal, they are also “too big to fix.” For this class of perniciously anticompetitive mergers, a government move to block them is the only way to prevent and deter the lessening of competition.

The Sprint-T-Mobile merger is one of those mergers that is “too big to fix.”<sup>12</sup> Like the abandoned AT&T-T-Mobile proposal, it is a 4-3 merger. It combines the third and fourth significant competitors in the market, creating a national market share for Sprint-T-Mobile of about 32%.<sup>13</sup> Next in the lineup is AT&T, with a share of about 32%. Verizon follows with a share of about 35%.<sup>14</sup> These three carriers would make up the vast majority (almost 99%) of the national U.S. wireless market with smaller MVNOs accounting for the remaining one percent. These carriers include TracPhone, Republic Wireless, and Jolt Mobile, Boost Mobile, and Cricket Wireless, which purchase access to wireless infrastructure such as cell towers and spectrum at wholesale from the large players and resell at retail to

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<sup>11</sup> Clayton Act § 7, 15 U.S.C. § 18 (1996).

<sup>12</sup> Diana L. Moss, *Realigning Merger Remedies with the Goals of Antitrust*, AM. ANTITRUST INST. (Apr. 9, 2018), [http://antitrustinstitute.org/sites/default/files/AAI\\_Merger%20Remedies.4.9.18.pdf](http://antitrustinstitute.org/sites/default/files/AAI_Merger%20Remedies.4.9.18.pdf).

<sup>13</sup> Shares based on number of subscribers. Sprint has a national market share of 14%, while T-Mobile’s is 17%. Mike Dano, *How Verizon, AT&T, T-Mobile, Sprint and More Stacked Up in Q1 2017: The Top 7 Carriers*, FIERCEWIRELESS (May 8, 2017), <https://www.fiercewireless.com/wireless/how-verizon-at-t-t-mobile-sprint-and-more-stacked-up-q1-2017-top-7-carriers>.

<sup>14</sup> *Id.*

wireless subscribers.

Concentration in the national wireless market is considered “high” under the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines (GUIDELINES), even before the merger.<sup>15</sup> The merger would boost concentration by almost 500 HHI points, to about 3,250 HHI in the post-merger market. The GUIDELINES explain that “Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.”<sup>16</sup> A Sprint-T-Mobile merger results in concentration that exceeds this upper GUIDELINES threshold by an order of magnitude.

Any argument advanced by Sprint and T-Mobile that the markets for wireless telecommunications services are local, not national, should not be credited by the FCC. The DOJ alleged a national wireless market in its complaint to block to the AT&T-T-Mobile deal.<sup>17</sup> Nothing has changed since then. Competition among the national carriers is nationwide, as illustrated by the billions of dollars spent on national wireless advertising.<sup>18</sup> Even the Big 4 carriers themselves acknowledge a national wireless market. In its acquisition of the regional carrier Centennial, for example, AT&T claimed that “the predominant forces driving competition among wireless carriers operate at the national level. . . . AT&T establishes its rate plans and pricing on a national basis . . . .”<sup>19</sup>

In sum, a Sprint-T-Mobile merger is presumptively illegal under Section 7 of the

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<sup>15</sup> U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010) (“HORIZONTAL MERGER GUIDELINES”).

<sup>16</sup> *Id.*

<sup>17</sup> See *The Effects of AT&T’s Acquisition of T-Mobile is Likely to Substantially Lessen Competition*, AM. ANTITRUST INST. (August 2011), <http://www.antitrustinstitute.org/sites/default/files/White%20paper.pdf>.

<sup>18</sup> Local market shares of wireless carriers are unlikely to differ materially from their nationwide market shares.

<sup>19</sup> Description of Transaction, Public Interest Showing and Related Demonstrations 28-29, Merger of AT&T Inc. and Centennial Commc’ns Corp., WT Dkt. No. 08-246 (Nov. 21, 2008) (“AT&T/Centennial Public Interest Statement”). AT&T stated it “focuses on the other national carriers in its competitive decision-making and does not consider Centennial in deciding on pricing and service offerings.” *Id.* at 37.

Clayton Act and fails the FCC's public interest test under the Communications Act. It would increase concentration in an already highly concentrated national wireless market, increasing the risk of higher prices, lower variety and quality, less choice, and slower innovation. The companies are unlikely to present any "persuasive evidence," demonstrating that their merger is unlikely to enhance market power.<sup>20</sup>

**B. The Merger Would Likely Lead to Anticompetitive Coordination Among the Big 3 Carriers**

A Sprint-T-Mobile merger would leave three roughly equal size firms in the national wireless market. Such market structures are highly conducive to anticompetitive coordination (or collusion), rather than hard-nosed competition. Sprint and T-Mobile have demonstrated strong incentives to be aggressive competitors. By reducing prices and improving service quality, for example, the two firms can attract new subscribers and capture market share from AT&T and Verizon. In contrast, a merged Sprint-T-Mobile would have a much larger market share. With a bigger piece of the national wireless pie, the merged entity would likely find that maintaining a competitive "peace" with Verizon and AT&T is more profitable than aggressively trying to gain market share from them.

The law on the risks of post-merger anticompetitive coordination is clear and well-settled. The D.C. Circuit explained in 1986, for example, that an acquisition may violate Section 7 of the Clayton Act where "increased concentration raises a likelihood of 'interdependent anticompetitive conduct.'"<sup>21</sup> The court explained, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."<sup>22</sup> In 2001 the same court explained, "[t]he combination of a concentrated market and barriers to

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<sup>20</sup> HORIZONTAL MERGER GUIDELINES § 5.3.

<sup>21</sup> *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

<sup>22</sup> *Id.*



entry is a recipe for price coordination.”<sup>23</sup>

In AT&T-T-Mobile, *both* the DOJ and FCC found that the wireless market was conducive to coordinated interaction. The government’s complaint noted, “Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyer-side market power, and high barriers to entry and expansion, make them particularly conducive to coordination.”<sup>24</sup> The complaint concluded that the “substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will lead to lessened competition due to an enhanced risk of anticompetitive coordination.”<sup>25</sup> The FCC explained similarly that “[c]oordinated effects are of particular concern here because the retail mobile wireless services market, being relatively concentrated and hard to enter, appears conducive to coordination.”<sup>26</sup>

Several private antitrust cases also highlight the perils of anticompetitive coordination in the wireless industry. These concerns range from: (1) alleged collusion between AT&T and Verizon to thwart eSIM technology,<sup>27</sup> (2) coordination of text message pricing as an “exemplar” of lawful tacit collusion,<sup>28</sup> (3) alleged parallel conduct with respect to leasing of common short codes,<sup>29</sup> and (4) alleged parallel tying.<sup>30</sup> Moreover, the DOJ recently opened an investigation into collusion by the two largest carriers, Verizon and AT&T, and an industry standards organization to inhibit consumer switching between

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<sup>23</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001).

<sup>24</sup> Complaint ¶ 36, *United States v. AT&T*, No.1:11-cv-01560 (D.D.C., filed Aug. 31, 2011).

<sup>25</sup> *Id.*

<sup>26</sup> *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16200, ¶ 75 (2011).

<sup>27</sup> *See, e.g.*, Complaint, *Allen v. Verizon Communications, Inc.*, No. 3:18-cv-08918 (D.N.J., filed May 8, 2018).

<sup>28</sup> *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).

<sup>29</sup> *In re A2P SMS Antitrust Litig.*, 972 F.Supp.2d 465 (S.D.N.Y.2013).

<sup>30</sup> *In re Wireless Telephone Services Antitrust Litig.*, 385 F.Supp.2d 403 (S.D.N.Y. 2005).

wireless carriers.<sup>31</sup>

If collusion is possible in a 4-firm market, then it only gets easier in the 3-firm market that would result from a Sprint-T-Mobile combination. Coordinated conduct in the Big 3 oligopoly of remaining carriers could arise in any number of ways. The Big 3 would have stronger incentives to fix prices or “follow” each other on pricing for wireless service plans and/or equipment. The Big 3 could collectively discontinue certain types of plans or forbear from introducing new, cheaper and better plans. The Big 3 would also have stronger incentives to divide up geographic markets within the U.S. or agree on “rules” that govern competition in the industry.<sup>32</sup> Potential anticompetitive coordinated conduct would not be limited to retail wireless subscribers. It could extend to fixing wholesale prices for MVNOs, jointly developing rules governing MVNO access to infrastructure, or even a group boycott of MVNO resellers in gaining access to the resources necessary to compete at retail.

Post-merger, MVNOs would be both the target of anticompetitive conduct by the Big 3 and yet still be dependent on them for access to the resources. MVNOs could therefore hardly be expected to “take up the slack” in the competitive vacuum left by the merger. MVNO resellers could not provide an alternative for wireless consumers faced with the specter of more expensive unlimited plans.<sup>33</sup> And industry sources have noted the improbability of a regional wireless carrier “filling the hole left by Sprint, which has positioned itself as a low-cost carrier among the Big 4 carriers.”<sup>34</sup> Finally, much like the electricity, pipeline, and cable industries, the enormous fixed costs for wireless infrastructure and regulatory permissions create high barriers to entry. As one industry source noted, “If

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<sup>31</sup> Cecilia Kang, *U.S. Investigating AT&T and Verizon Over Wireless Collusion Claim*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/technology/att-verizon-investigate-esim.html>.

<sup>32</sup> Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 950 (2000).

<sup>33</sup> Jacob Passy, *Why a T-Mobile-Sprint Merger Could be ‘Devastating’ for Consumers*, MARKETWATCH (Apr. 30, 2018), <https://www.marketwatch.com/story/how-a-t-mobile-sprint-merger-would-hurt-consumers-2017-09-20>.

<sup>34</sup> *Id.*

Sprint goes away, you're starting from scratch trying to build out a network. . . . That's really difficult because of spectrum licensing and the cost of building a network.”<sup>35</sup>

In sum, the Sprint-T-Mobile merger would create a post-merger national wireless market that would dramatically reduce incentives for the remaining Big 3 carriers to compete and strengthen incentives for them to engage in anticompetitive coordination. Such mergers have long been recognized as particularly damaging to competition and consumers, for which reason the FCC should deny their application to merge.

### **C. 4-3 Mergers Raise Documented Competitive and Consumer Problems**

As concentration has crept up in myriad markets and sectors over the last few decades, the focus on antitrust's many measures and warning signs that competition is waning has escalated. Market shares, HHIs, and numbers of competitors all provide uniquely and collectively important information about the effect of a merger on competition and consumers. The anticompetitive perils of 4-3 mergers feature prominently in the economic analysis of mergers and enforcement decisions. This evidence should weigh heavily in the FCC's analysis of the proposed Sprint-T-Mobile merger.<sup>36</sup>

It is well known, for example, that three national carriers dominate the Canadian market—Bell, Rogers, and Telus.<sup>37</sup> A study by the Canadian government indicates that average prices for mobile service for smartphone users remained flat or increased from 2014-2015.<sup>38</sup> One commentator wrote that earlier in 2018, the Canadian equivalent of the U.S. FCC “noted a lack of low-cost data-only plans, and asked the three national wireless

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<sup>35</sup> *Id.*

<sup>36</sup> HORIZONTAL MERGER GUIDELINES § 5.

<sup>37</sup> Can. Radio-television & Telecomm. Comm'n, Communications Monitoring Report, at 301 (2017), available at <https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2017/cmr2017.pdf>.

<sup>38</sup> *Id.* at 325-27.

carriers to submit proposals to fix it. What they came back with was embarrassing, and harrowing for anyone considering a future in the US with just three wireless carriers.”<sup>39</sup>

European competition enforcement provides additional perspective on 4-3 wireless mergers.<sup>40</sup> In 2016, the European Commission (EC) blocked the 4-3 merger of the United Kingdom’s Three and O2 mobile operators.<sup>41</sup> EC competition chief Magrethe Vestager noted, “We want the mobile telecoms sector to be competitive, so that consumers can enjoy innovative mobile services at fair prices and high network quality.”<sup>42</sup> The EC also forced the abandonment of the 4-3 merger of Danish wireless carriers Telenor and TeliaSonera by requiring conditions that were unpalatable to the companies.<sup>43</sup>

Concerns over concentrative mergers extend far beyond the wireless industry, for which empirical work provides important support. Research by economist John Kwoka buttresses the concern that highly concentrative mergers have produced post-merger price increases.<sup>44</sup> For example, analysis of multiple merger “retrospectives” (studies of consummated mergers) shows that deals resulting in post-merger HHIs of 3,000 produced price increases in 88% of cases. For deals with post-merger HHIs of 3,500 this statistic was 92.9%. This is also true of mergers that meet the GUIDELINES’ criterion for deals that are “presumed likely to enhance market power.”<sup>45</sup> For example, mergers with post-merger HHIs

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<sup>39</sup> The Canadian sector regulator is the Radio-television and Telecommunications Commission. Chris Mills, *Canada’s Embarrassingly Bad Data Plans Are Another Reason to Hate the T-Mobile-Sprint Merger*, BGR (May 2, 2018), <http://bgr.com/2018/05/02/t-mobile-sprint-merger-competition-regulation-canada-example>.

<sup>40</sup> For example, Europe maintains a robust field of wireless rivals, with nine competitors with market shares above 10%, and an overall market concentration of about 1,100 HHI. *Leading telecommunication operators in Europe by Revenue in 2016 (in Billion Euros)*, STATISTA, <https://www.statista.com/statistics/221386/revenue-of-top-20-european-telecommunication-operators>.

<sup>41</sup> David Meyer, *Here’s Why the EU Just Blocked a Major Telecoms Merger*, FORTUNE (May 11, 2016), <http://fortune.com/2016/05/11/o2-three-merger-blocked>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also Kalpana Tyagi, *Four-to-Three Telecoms Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector*, 49 INT’L REV. OF INTELLECTUAL PROP. & COMPETITION L. 185 (February 2018).

<sup>44</sup> John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?* 81 ANTITRUST L.J. 837, 860-61 (2017).

<sup>45</sup> *Id.*

of 3,000, coupled with merger-induced changes in concentration of greater than 200 HHI points, produced price increases in 88% of cases. For mergers with post-merger HHIs of 3,500, coupled with a change of 200 HHI points, prices increases were observed in 92.9% of cases. Moreover, for consummated mergers in which there were five or fewer remaining significant competitors, prices increased in 100% of cases. The Sprint-T-Mobile deal falls squarely within these measurement categories, indicating that similar consummated mergers resulted in price increases.

Moreover, empirical work shows that the agencies have typically challenged highly concentrative mergers like Sprint-T-Mobile. Kwoka also examines whether agency merger “investigations” (as defined by whether a second request was issued) into highly concentrative mergers resulted in enforcement actions. Enforcement actions include lawsuits, remedies, forced abandonments, and substantial modifications to their deals by the parties in the face of government opposition.<sup>46</sup> Based on FTC merger data from 1996 to 2011, Kwoka shows that investigations involving post-merger markets between 3,000 and 3,999 HHI resulted in enforcement actions in 71.5% of cases. For mergers involving an increase in HHI between 500 and 799, the agency took enforcement actions in 72.5% of cases. And for 4-3 mergers, the FTC took enforcement action in 77.3% of cases. Again, the Sprint-T-Mobile deal falls squarely within all of these measurement parameters, indicating that the deal is surely the type of case where enforcers would almost always take action.

Together with anecdotal evidence from non-U.S. enforcement actions and concentrated wireless markets, the highly predictive nature of empirical evidence provides strong support for the concern that highly concentrative mergers are harmful. The likely

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<sup>46</sup> *Id.* at 866.

outcomes of a Sprint-T-Mobile merger should be viewed within the context and implications of this evidence, which buttresses a government challenge of the proposed merger.

**D. The Merger Would Eliminate Head-to-Head Competition Between the Wireless Industry’s Two Disruptive Wireless Carriers**

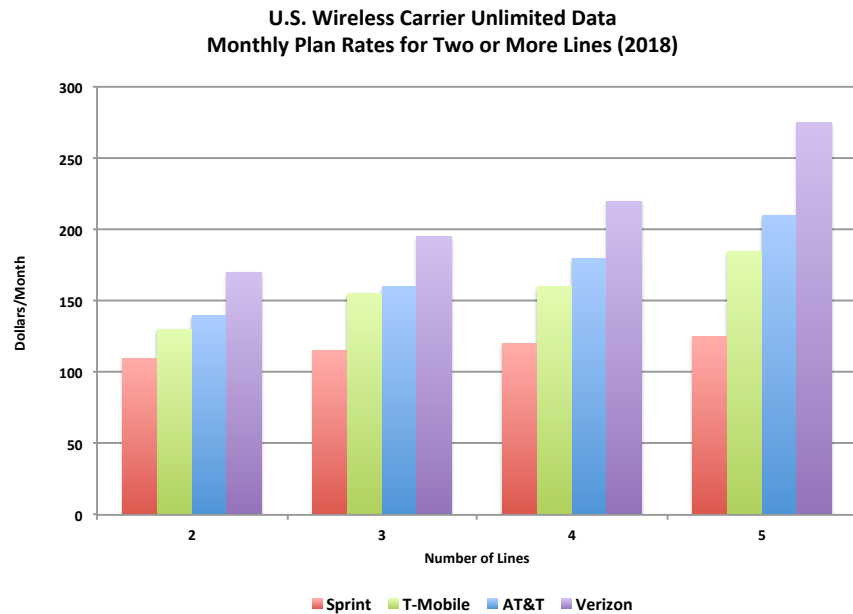
Preserving the positive competitive dynamics that a disruptive rival creates was the major reason why the DOJ opposed the merger of AT&T and T-Mobile in 2011. Mergers that eliminate such mavericks are particularly likely to result in anticompetitive post-merger coordination. As the DOJ’s complaint noted “T-Mobile in particular—a company with a self-described ‘challenger brand,’ that historically has been a value provider, and that even within the past few months had been developing and deploying ‘disruptive pricing’ plans—places important competitive pressure on its three larger rivals. . . . AT&T’s elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market.”<sup>47</sup>

The loss of “disruptive rivalry” that a merger of Sprint and T-Mobile would entail is equally important here, but for a *different* reason than in the AT&T-T-Mobile case. As the third and fourth largest carriers in the Big 4, both Sprint and T-Mobile have differentiated themselves from Verizon and AT&T through aggressive price and non-price competition. They compete head-to-head for consumers that may not be able to afford more expensive Verizon and AT&T plans or who do not need the more extensive variety of plans offered by the two largest carriers. Pricing data on monthly wireless plans offered by the Big 4 illustrate this important dynamic and its implications for the potential loss of head-to-head competition between Sprint and T-Mobile.

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<sup>47</sup> Complaint ¶ 3, *United States v. AT&T*, No.1:11-cv-01560 (D.D.C., filed Aug. 31, 2011).

For example, 2018 data for plan rates indicate that Sprint offers the cheapest, limited 2 GB data plan for one line.<sup>48</sup> For unlimited data, as shown in the figure below, Sprint and T-Mobile are consistently the lowest cost carriers for a plan with two or more lines. Eliminating competition between Sprint and T-Mobile would dull the merged company’s incentives to compete hard, creating upward pressure on retail plan prices. Moreover, as the two major wholesale providers for MVNOs seeking access to wireless infrastructure and spectrum, the elimination of competition between Sprint and T-Mobile would put upward pressure on wholesale prices. This would hamper competition from MVNOs.



A Sprint-T-Mobile merger raises the specter of two types of competitive harm: (1) creating a tight oligopoly of the Big 3 and raising the risk of anticompetitive coordination and (2) eliminating head-to-head competition between Sprint and T-Mobile. Both types of harm should be considered by the FCC in deciding to deny their petition to merge.

<sup>48</sup> Bree Fowler, *Best Low-Cost Cell-Phone Plans*, CONSUMERREPORTS (Mar. 16, 2018), <https://www.consumerreports.org/u-s-cell-phone-carriers/best-cell-phone-plans-save-money>.

**E. The Merger Is Not Necessary to Expand to 5G and Could Impose Additional Costs on Consumers**

Cost savings and consumer benefits (“efficiencies”) claimed by merging parties get close antitrust scrutiny. The reason for this is that merging parties will invariably argue that efficiencies will overwhelm any anticompetitive effects and a proposed deal should thus be allowed to move forward. Such claims, if accepted when they prove to be false, could lead to a very wrong decision—an outcome that runs counter to the incipency goal of merger law. The importance of skepticism surrounding efficiency “defenses” in merger enforcement cannot be overstated. For example, once a deal is consummated, enforcers and courts have no way to hold the merged company’s “feet to the fire” on the promise of delivering the claimed benefits. Moreover, research shows that 70% of mergers fail to achieve claimed synergies, due in large part to the fact that the “average acquirer materially overestimates the synergies a merger will yield.”<sup>49</sup>

The efficiencies claimed by many merging parties do not meet the rigorous requirements of government antitrust enforcers and sector regulators. That is, efficiencies must be achievable *only* through the merger. If they can be gotten by each firm on a standalone basis, they cannot be credited to the merger. Moreover, the parties must prove (i.e., verify) that the merger will generate the claimed efficiencies. This appropriately high burden falls on the merging parties. That burden includes, importantly, the requirement that the more anticompetitive a deal, the greater must be the efficiencies that are claimed to result from it.<sup>50</sup> Moreover, for highly concentrative mergers, such as Sprint and T-Mobile, enforcers and courts become less and less willing to consider *any* efficiency justifications for

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<sup>49</sup> Scott A. Christofferson, Robert S. McNish & Diane L. Sias, *Where Mergers Go Wrong*, MCKINSEY & COMPANY (May 2004), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong>.

<sup>50</sup> HORIZONTAL MERGER GUIDELINES § 10; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-22 (D.C. Cir. 2001).



the deal.

For all of these reasons, it is vital for the government to scrutinize the efficiencies claim(s) put forward by Sprint and T-Mobile. Their major argument for the merger is that it will enable the companies to build out a “broad and deep nationwide 5G network,”<sup>51</sup> with “[n]etwork capabilities and capacity [that] will lead to better service and lower prices.”<sup>52</sup> They cite the companies’ “early leadership in 5G [that will] capture [a] wave of innovation and disruption, benefiting customers and the nation’s economy.”<sup>53</sup>

The claim that two wireless companies need a merger to expand or upgrade their networks to the next generation of technology is well worn and meritless. The argument did not hold any water when AT&T-T-Mobile advanced it in 2011 and the same is true here. The FCC should reject it, particularly in light of the merger’s presumptive illegality and almost certain anticompetitive and anti-consumer effects. Both AT&T and T-Mobile expanded their networks in the wake of their abandoned merger. And T-Mobile became a vigorous challenger to its larger rivals. Sprint-T-Mobile’s investor presentation notes, for example “T-Mobile deployed nationwide LTE twice as fast as Verizon and three times as fast as AT&T.”<sup>54</sup>

Similar to AT&T-T-Mobile, it is clear that both Sprint and T-Mobile are capable of expanding their networks as standalone firms. Both Sprint and T-Mobile stated well before they proposed to merge that they had the intent and ability to, and were already engaged in, 5G network expansion as standalone competitors.<sup>55</sup> If Sprint and T-Mobile can each achieve

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<sup>51</sup> *Creating Robust Competition in the 5G Era*, T-MOBILE (Apr. 29, 2018), <http://investor.t-mobile.com/Cache/1001236130.PDF?O=PDF&T=&Y=&D=&FID=1001236130&iid=4091145>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Roger Cheng, *Sprint: We're in a Unique Position to Deliver Broader 5G*, CNET (Feb. 28, 2018), <https://www.cnet.com/news/sprint-were-in-unique-position-to-deliver-broader-5g-now-mwc-2018/>; *see also* T-

5G network expansion alone, then the merger is not necessary to achieve it and they cannot claim it as a merger-related efficiency. Moreover, even if Sprint-T-Mobile's claim that they need the merger to expand to 5G networks were viable, it would not be credited under the GUIDELINES because it is not a sufficient justification for a merger that significantly reduces competition in an already highly concentrated market.<sup>56</sup> Sprint and T-Mobile therefore cannot credibly advance the argument that the merger is necessary to expand to 5G.

Rather than reduce costs for the benefit of consumers, a proposed Sprint-T-Mobile combination may also *create* costs or inefficiencies for consumers. The integration of operations in any large merger is typically a major undertaking, a process that distracts the parties from the marketplace, leading to diminished service and an exodus of customers. Consider, for example, the amalgamation of fleets, workforces, and information systems in recent airline mergers, the experience in Sprint-Nextel, and in other key infrastructure-, technology- or information-intensive mergers.<sup>57</sup> A Sprint-T-Mobile deal would likewise face significant technological hurdles, particularly since the company must transition from two different network technologies (Sprint uses CDMA while T-Mobile uses GSM) to one.<sup>58</sup>

In sum, the major reason offered by Sprint and T-Mobile for why their merger would benefit consumers is highly suspect. It does not justify allowing this harmful 4-3 merger that is presumptively illegal and will likely lead to enhanced coordination among the

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*Mobile Building Out 5G in 30 Cities This Year ...and That's Just the Start*, T-MOBILE (Feb. 27, 2018), <https://newsroom.t-mobile.com/news-and-blogs/mwc-2018-5g.htm>.

<sup>56</sup> *The Effects of AT&T's Acquisition of T-Mobile is Likely to Substantially lessen Competition*, AM. ANTITRUST INST. (August 2011), <http://www.antitrustinstitute.org/sites/default/files/White%20paper.pdf>; *see, e.g., cf., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) ("Appellees do not contend that they are unable to expand . . . by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.").

<sup>57</sup> Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, AM. ANTITRUST INST. (Nov. 21, 2013), [http://www.antitrustinstitute.org/sites/default/files/AAI\\_USAir-AA\\_Efficiencies.pdf](http://www.antitrustinstitute.org/sites/default/files/AAI_USAir-AA_Efficiencies.pdf).

<sup>58</sup> The merged company would need to transition to one form of technology. That change would take time, slowing down the expansion of coverage, and leaving Sprint customers without a compatible phone. As one analysis noted, "Sprint customers would be pushed to upgrade to something new just to stay on the network." Jacob Passy, *supra* note 33.

Big 3 and eliminate head-to-head competition between the two lowest cost carriers, to the detriment of competition and consumers. Accordingly, the FCC should deny the application of Sprint and T-Mobile as not in the public interest.

Respectfully submitted

August 27, 2018