1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

March 11, 2019

The Honorable David N. Cicilline
United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust,
Commercial and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust,
Commercial and Administrative Law
2449 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee:

In light of the rescheduled hearing of the United States House of Representatives Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law to gather information on the state of competition in the wireless market, I re-submit for your consideration the attached letter from February 14 by my colleague, research fellow and regulatory counsel Ryan Radia.

Radia makes clear, "Economic theory, empirical evidence, and the record materials submitted by T-Mobile and Sprint to the FCC all demonstrate that the proposed transaction has a substantial likelihood of enhancing consumer welfare." Indeed, I would emphasize two points as you collect information to inform policy discussions on the wireless communications marketplace.

1. The critical element of analysis is not concentration, it is the measure of competitive effects seen by consumers. Concentration is not the same as competition, nor are the two terms economic opposites. Do not be fooled. In the market at issue, consumers come out ahead when policies increase the probability of significant network investments.

2. In any discussion where "the public interest" is invoked, I urge you to quickly and clearly demand a definition for such an open-ended invitation to government intervention. In the case of the proposed merger of T-Mobile and Sprint, the market is succeeding by likely bringing new resources to bear for consumer benefit. Government interventions – in the form of a merger denial or conditions placed on the merger – are likely to produce long-term market distortions and failures.

Please do not hesitate to contact me if I, or any of my colleagues at the Competitive Enterprise Institute, can be of further assistance.

Respectfully,

Kent Lassman

1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

February 14, 2019

The Honorable David N. Cicilline
United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust,
Commercial and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust,
Commercial and Administrative Law
2449 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee:

The United States House of Representatives Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law plans to hold a hearing on "[t]he State of Competition in the Wireless Market: Examining the Impact of the Proposed Merger of T-Mobile and Sprint on Consumers, Workers, and the Internet."[1] The Competitive Enterprise Institute, a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise, writes to inform the Subcommittee of our position that the U.S. Department of Justice and the Federal Communications Commission should approve the proposed T-Mobile and Sprint transaction.

Promptly allowing the firms to consummate their merger without conditions will likely benefit consumers by hastening the deployment of advanced mobile services while fostering competition and dynamism in the wireless marketplace. Although we cannot say with certainty whether this transaction will deliver the benefits touted by the merging firms, the Justice Department and FCC can best serve consumers by approving the transaction and allowing the firms to try their hand at building a more effective counterweight to Verizon and AT&T.

T-Mobile and Sprint explained at length in the Public Interest Statement they submitted to the FCC how the merged firm will be able to rapidly build a high-capacity nationwide 5G network that neither firm would be able to construct on its own.[2] The merged firm plans to invest "nearly $40 billion" to construct this network, which the firm anticipates will enable it to offer 5G speeds "four

1. Subcomm. on Antitrust, Commercial and Admin. Law of the Comm. on the Judiciary of the U.S. House of Representatives, *Notice of Subcommittee Hearing, available at* https://docs.house.gov/meetings/JU/JU05/20190214/108892/HHRG-116-JU05-20190214-SD001.pdf.
2. *See* T-Mobile and Sprint, Description of Transaction, Public Interest Statement, and Related Demonstrations, at 15–50, Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations (2018), *available at* https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-J%20(Public%20Redacted)%20.pdf.

to six times" faster than what the firms could achieve independently.[3] Building a large 5G network requires, among other things, a substantial portfolio of spectrum licenses, a dense network of cell sites, and access to considerable capital. The merged firm's combined spectrum holdings and cell-site footprint would enable the deployment of a 5G network that is far superior to what either company could build by itself.[4] And the merged firm's free cash flow and EBITDA will come significantly closer to the two leading U.S. mobile carriers—Verizon and AT&T—than either T-Mobile or Sprint comes today.[5]

This proposed transaction comes at a precarious time for Sprint, which has been struggling for years as the nation's fourth-largest wireless carrier. As the most highly leveraged S&P 500 company, with $32 billion of net debt, Sprint faces an uncertain future as a nationwide wireless carrier capable of competing with larger rivals.[6] Sprint's overall revenue and revenue per user have fallen considerably in recent years, forcing the company to reduce its network investment to what it describes as "historically low levels."[7] Merged with T-Mobile, however, Sprint's improved liquidity profile would likely result in the combined firm enjoying a higher credit rating and, with it, access to more affordable capital.[8] This, in turn, would enable the combined carrier to continue to borrow money as needed to finance the construction of its nationwide 5G network. Conversely, if the proposed transaction is not consummated, whether Sprint will remain viable as a nationwide wireless carrier in the coming years as consumers begin to expect 5G service is far from certain.

Although the merger of T-Mobile and Sprint would reduce the number of nationwide wireless carriers in the United States from four to three, at least for the foreseeable future, this decrease would not necessarily reduce competition among the major carriers. Some commenters argue that the transaction would harm consumer welfare by increasing concentration in the U.S. national wireless market,[9] thus creating an "oligopoly" that would depress competition and disruption.[10] But the presence of market concentration, by itself, is not a basis to conclude that consumer harm is likely; indeed, "[t]he evolution of unilateral effects analysis in modern merger thinking is that market concentration is not a good predictor of effect."[11]

---

3. *Id.* at 72.
4. *Id.* at 17–20.
5. *Id.* at 86.
6. *See id.* at 97.
7. *Id.*
8. *See, e.g.*, Molly Smith, *T-Mobile's Tie-Up With Sprint Would Make Junk-Bond Behemoth*, BLOOMBERG (Apr. 30, 2018, 1:45 PM), https://www.bloomberg.com/news/articles/2018-04-30/t-mobile-s-tie-up-with-sprint-would-create-a-junk-bond-behemoth.
9. *See, e.g.*, Petition to Deny of Free Press at 25, *available at* https://ecfsapi.fcc.gov/file/10830804104889/18082902-4.pdf.
10. *See* Petition to Deny of American Antitrust Institute at 3, *available at* https://ecfsapi.fcc.gov/file/1082877863636/AAI_Sprint-T-Mobile_FCC%20Petition%20to%20Deny.pdf.
11. Geoffrey A. Manne, *Assuming More Than We Know About Innovation Markets: A Review of Michael Carrier's* Innovation in the 21st Century, 61 ALA. L. REV. 553, 555 (2010).

Empirical evidence on the relationship between prices and concentration in the wireless marketplace in particular suggests that a reduction in the number of competing firms does not threaten consumer welfare. In a 2011 study, the economists Gerald R. Faulhaber, Robert Hahn, and Hal Singer examined the U.S. wireless marketplace, concluding that no "statistically significant relationship" existed between wireless prices and market concentration.[12] Given the presence of an important input constraint in the wireless market—the limited quantity of spectrum available for flexible, licensed use—economic theory suggests that an increase in concentration may actually *improve* the industry's performance by enabling the remaining competitors to invest in higher-capacity networks and offer lower prices.[13]

Economic theory, empirical evidence, and the record materials submitted by T-Mobile and Sprint to the FCC all demonstrate that the proposed transaction has a substantial likelihood of enhancing consumer welfare. If the carriers must remain separate, however, there is a real risk of consumer harm—not only because of the serious impediments each firm faces in deploying its own nationwide 5G network, but also due to the realistic prospect that Sprint will not remain a viable nationwide wireless carrier as the next generation of mobile broadband networks are rolled out.

In numerous recent transactions involving large telecommunications providers, the FCC has approved merging firms' applications while tacking on a variety of conditions.[14] In some of these transactions, the accompanying conditions have addressed policy matters unrelated to alleged transaction-specific harms.[15] When the FCC routinely saddles such transactions with conditions that the merging parties have little meaningful choice but to accept, it can effectively regulate entire sectors without regard to the statutory limits placed by Congress on the agency's authority.[16] And when the agency places conditions on license transfer applications, it often does so by issuing a final

---

12. Gerald R. Faulhaber, Robert W. Hahn & Hal J. Singer, *Assessing Competition in U.S. Wireless Markets: Review of the FCC's Competition Reports*, at 1 (2011), *available at* http://ssrn.com/abstract=1880964.

13. T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wireless Competition Under Spectrum Exhaust*, PHOENIX CENTER POLICY PAPER SERIES, No. 43, at 4 (2012), *available at* http://www.phoenix-center.org/pcpp/PCPP43Final.pdf ("our analysis finds that under a binding spectrum constraint, competition among few firms will produce lower prices and possibly increase sector investment and employment than competition among many firms.").

14. *See, e.g.*, Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, Appendices F–H, 26 FCC Rcd 4238, 4430–4509 (2011), *available at* https://transition.fcc.gov/FCC-11-4.pdf.

15. *See, e.g.*, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, *Memorandum Opinion and Order*, 31 FCC Rcd 6327, 6529, para. 452 (2016), *available at* https://docs.fcc.gov/public/attachments/FCC-16-59A1_Rcd.pdf (conditioning Charter-Time Warner Cable-Bright House transaction on a "low-income broadband program" after finding that the proposal was not a "transaction-specific benefit").

16. For an extensive discussion of the FCC imposing conditions on media and telecommunications mergers, see Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49 (2000), and T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, at 14–31 (Phoenix Ctr. for Advanced Legal & Econ. Pub. Policy Studies, Phoenix Center Policy Paper No. 49 2015), *available at* http://www.phoenix-center.org/pcpp/PCPP49Final.pdf.

order without first publicly proposing a list of conditions under agency consideration. This tactic sidesteps public participation and circumvents the notice-and-comment process prescribed by the Administrative Procedure Act.[17] Here, the FCC has not suggested imposing any conditions on the applications of T-Mobile and Sprint, nor has the agency sought comment on whether any particular conditions are desirable.[18] In approving the parties' applications, therefore, the agency should not require the merged company to abide by specific conditions. Nor should the Department of Justice threaten to seek to enjoin the transaction as a violation of U.S. antitrust laws unless the merging firms agree to divestitures or other merger-related commitments.

Respectfully submitted,

Ryan C. Radia
Research Fellow & Regulatory Counsel
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, D.C. 20005
(202) 331-2281
ryan.radia@cei.org

17. 5 U.S.C. § 553–554 (administrative procedure governing agency rulemaking and adjudication).

18. *See generally* 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, *Public Notice* (2018), *available at* https://docs.fcc.gov/public/attachments/DA-18-740A1.pdf.