



POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF

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BEFORE THE

**SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY AND CONSUMER RIGHTS
SENATE COMMITTEE ON THE JUDICIARY**

ON

**GAME OF PHONES: EXAMINING
THE COMPETITIVE IMPACT OF
THE T-MOBILE – SPRINT TRANSACTION**

JUNE 27, 2018

Chairman Lee, Ranking Member Klobuchar, Subcommittee Members, thank you for the opportunity to appear before you today to explain our concerns regarding how the proposed merger of Sprint and T-Mobile will impact the hundreds of millions of American consumers who increasingly rely on access to mobile phone service to conduct their lives, stay in touch with friends and family, get information they need, find goods and services, and get help in an emergency.

Consumers Union is the advocacy division of Consumer Reports. Our mission is to work for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. One key to empowering consumers is working to ensure they have the leverage of meaningful choice, through effective competition.

When consumers have meaningful choice, businesses are motivated to provide more affordability, better quality, and new innovative thinking, in response to consumers' wants and needs.

That is why, from our founding over 80 years ago, we have been strong supporters of the antitrust laws, including effective merger enforcement. The antitrust laws are an essential protector of competition, a necessary ingredient in making the marketplace work for consumers.

Cell phones are now virtually ubiquitous – 95 percent of American adult consumers have a mobile phone, and 77 percent of them have a smart phone.¹ One in five of them use their phones for all their internet access.²

The wireless marketplace is dominated by four giant nationwide carriers: Verizon, AT&T, T-Mobile, and Sprint. The Big Four account for over 98% of the market.³ Still, with these four alternatives, and especially with the maverick pressure flexed by T-Mobile and Sprint, consumers are currently getting the benefits of effective competition, in lower prices and attractive service plans.⁴

We are concerned that this merger would significantly curtail this competition, leaving consumers paying more and getting less.

By the usual measurements, the proposed merger of Sprint and T-Mobile is presumptively anti-competitive in violation of the Clayton Act. Under the Herfindahl-

¹ Mobile Fact Sheet, Pew Research Center, Feb. 5, 2018, <http://www.pewinternet.org/fact-sheet/mobile/>.

² *Id.*

³ <https://www.statista.com/statistics/199359/market-share-of-wireless-carriers-in-the-us-by-subscriptions/>.

⁴ U.S. Wireless Price Wars Having A Big Impact On Consumers, Forbes, June 27, 2017, <https://www.forbes.com/sites/greatspeculations/2017/06/27/u-s-wireless-price-wars-having-a-big-impact-on-consumers/#56ec136a60ca>.

Hirschman Index calculation, taking the sum of the squares of all the market shares, a number above 2500 shows the market is highly concentrated – the highest designation the agencies use, short of absolute monopoly. The wireless telecommunications market is already above 2800. In a highly concentrated market such as this, any merger that would increase that number by more than 200 is presumed to cross the line. This merger would increase the number by more than twice that amount – by more than 400.⁵

That's not the end of the investigation, and the merging corporations have a chance to try to explain why those numbers don't really tell the story. And that's what Sprint and T-Mobile are attempting to do, with the Justice Department, the Federal Communications Commission, this Subcommittee, and the public.

Typically, the arguments of merging corporations fall into five or six categories:

- First, that their merger will provide important new benefits to the marketplace – ultimately, to consumers.
- Second, that their merger will create cost-saving efficiencies – or, as merging companies often refer to them, synergies – that will flow, ultimately, to consumers.
- Third, that unless their merger is allowed, one or both of the companies is going to fail and go out of business anyway, so allowing or denying their merger will not ultimately make any difference in the amount of competition;

Or a variation on (3), that the other market players are already so big and so dominant that these two firms also need to get bigger in order to stay in the game.

- Fourth, that even after the merger, the market will remain open to new competition that will come from others, as yet unseen.
- And fifth, that the market is actually bigger, and the market shares actually smaller, because consumers have other choices that are not being taken into account.

Or a variation on (5), that there is actually vigorous competition that defies the usual real-world experience reflected in the high market share numbers, and that that vigorous competition will survive the merger, and will not be harmed by the further market concentration that will result.

⁵ See Horizontal Merger Guidelines, section 5.3, <https://www.justice.gov/atr/file/810276/download>.

And indeed, Sprint and T-Mobile are making most or all of these arguments. But they need to be held up to scrutiny – with a healthy skepticism that recognizes that a corporation is ultimately in business to make profits, and that increasing profits is its objective in seeking a merger. Under its obligations to shareholders, that has to be its objective in any business decision.

We'll briefly address each of these.

Promised benefits are uncertain, and may not require the merger, and the loss to competition seems clear.

First, promised benefits always lead the justifications put forward for a merger. But the promises need to get a hard look. To begin with, there needs to be a hard look at whether these promised benefits really cannot be achieved without the merger. The bedrock premise of the Clayton Act, and of free market competition, is for companies to strive independently. A merger can be a convenient shortcut for the companies, but it comes at the expense of eliminating one of those independent strivers.

And here the loss to competition seems clear. Sprint and T-Mobile have, by turns spurred rivalry that eventually spread as the other of them, and then Verizon and AT&T, were forced to respond. Just two years ago, for example, in August 2016, T-Mobile jumped out in front to offer unlimited voice, text, and data plans. The very next day, Sprint upped the ante with its own unlimited voice, text, and data plan, priced at \$100 for two lines. Six months later, Verizon and AT&T began offering similar plans.⁶

As the Horizontal Merger Enforcement Guidelines explain, in a competitive marketplace, companies are always watching each other in assessing whether they need to adjust and offer a better deal to keep their customers and get even more. Their hope is that they don't have to adjust too much. But as the number of major competitors gets down small enough, the actions and reactions of the handful of companies gets easier for each other to predict, and anti-competitive coordination begins to kick in, through what the Guidelines refer to as "accommodating reactions."⁷ When Sprint and T-Mobile no longer have to watch each other, the rewards of becoming an accommodating reactor will get stronger and harder to resist.

We can see real-world evidence of this playing out just across our northern border, in Canada, where three wireless companies, Bell, Telus, and Rogers, dominate the market, with a

⁶ Cecilia Kang and Michael J. de la Merced, How Would a T-Mobile-Sprint Merger Affect Your Cellphone Bill?, NY Times, Apr. 30, 2018, <https://www.nytimes.com/2018/04/30/business/t-mobile-sprint-cellphone-bill.html>; *see also* FCC 19th Annual Wireless Report, <http://wireless.fcc.gov/competition-reports/mobile-wireless/mw-19/index.html>.

⁷ *See* Horizontal Merger Guidelines, section 7.

combined 89 percent market share.⁸ And there are strong indications of competitive complacency and “accommodating reactions.” Canada’s mobile phone rates are among the highest in the world.⁹ And when Bell hiked its monthly plans by \$5 per month in January 2016, Telus and Rogers followed suit with their own hikes within a week – the opposite of what we saw happen in our country.¹⁰ As one tech analyst put it, the Canadian carriers raise prices “because they can.”¹¹

The big benefit Sprint and T-Mobile are promising with this merger is development and deployment of 5G wireless network technology. And we all want that, of course. But that’s just the latest shiny new object. And it’s far from clear that Sprint and T-Mobile need to merge in order to give it to us. AT&T and T-Mobile gave the same pitch for why they needed to merge in 2011 – except then it was 4G. The merger was challenged, and dropped, and as we know, 4G ended up being built anyway – not only by AT&T, and Verizon, but by T-Mobile and Sprint.

Cost-saving efficiencies are uncertain and may not be shared.

Second, the cost-saving efficiencies that Sprint and T-Mobile are envisioning may not be so easy to achieve. Completely integrating two separate networks into one presents a lot of technological challenges that can be all-too-easily discounted in the corporate boardroom until the actual hard work has to begin. Sprint has had a similar experience with the challenges and frustrations of integrating two networks, following its 2005 merger with Nextel, later referred to as the “deal from hell.”¹² Sprint eventually had to write off nearly \$30 billion in relation to those integration costs, essentially the entire price it paid for Nextel.¹³

But even assuming some or even all of the efficiencies envisioned are actually achieved, who benefits from that besides Sprint/T-Mobile? Why would any of those savings be shared with consumers, unless competition forces that?

Although efficiencies are recognized in the Merger Guidelines as potentially relevant, rarely if ever in practice are they deemed sufficient to justify a merger that would otherwise harm competition in violation of the Clayton Act.

For one thing, the antitrust agency has to be persuaded that the efficiencies are real. And for another, that the merger is the only way to achieve them.

⁸ <https://www.statista.com/statistics/460099/total-number-of-mobile-subscribers-by-provider-canada/>.

⁹ <https://mobilesyrup.com/2017/12/12/international-telecom-pricing-study-shows-canadians-still-pay-more-than-everyone-else/>.

¹⁰ <http://nationalpost.com/news/canada/why-canadian-cell-phone-bills-are-among-the-most-expensive-on-the-planet>.

¹¹ *Id.*

¹² Heidi N. Moore, Sprint Nextel: Officially a ‘Deal From Hell,’ Wall St. J., Feb 28, 2008, <https://blogs.wsj.com/deals/2008/02/28/sprint-nextel-officially-a-deal-from-hell/>.

¹³ *Id.*

And for another, it must be persuaded that net benefits will actually reach consumers. That means more than just that consumers will get some short-term cost savings – and even that won't happen unless there is still enough effective competition for consumers to have leverage. But it also means there must be broader, enduring benefits for consumers in the post-merger marketplace, into the future.

Efficiencies are easy to claim, but hard to substantiate.

Sprint and T-Mobile are not headed for failure, and do not need to get bigger to provide attractive choices to consumers.

Third, neither of these companies is headed for imminent failure. They have both been competing fiercely, and setting the bar for Verizon and AT&T. They each have tens of millions of subscribers, and assets valued at tens of billions of dollars.

In fact, neither seems to be seeking to revive, at least not publicly, T-Mobile's claim in 2011 that it needed to merge (then, with AT&T) in order to survive. And making such a claim would be quite a stretch. And even were a claim of imminent demise made and proved, merging with a competitor would not be automatically justified; it would be a last resort.

Instead, Sprint and T-Mobile are making a variation on that claim, that they need to merge in order to *thrive*, that they are stuck in a 4G world, and are going to be left behind in the race to 5G, unless they can combine assets and forces.

But both carriers have made clear that they are each independently committed to building a full 5G network. In fact, their plans are already well underway.¹⁴ They don't need to combine forces to do that.

Granted, doing it together might give them a convenient shortcut to create wider 5G coverage faster – or it might not, depending on whether the integration challenges turn out to be a bigger impediment than they expect. They have laid out in some degree of technical detail their claims about the limits of their current spectrum and other assets, why combining them would speed up the 5G process, and how the integration would be managed. Those claims will need to be closely evaluated by technical experts.

¹⁴ See, e.g., Kris Holt, Sprint is bringing 5G to New York, Phoenix and Kansas City in 2019, The first wave of Sprint's 5G rollout will now extend to nine cities, Engadget, May 15, 2018, <https://www.engadget.com/2018/05/15/sprint-5g-new-york-phoenix-kansas-city/> (Sprint's announced initial 5G rollout now includes Atlanta, Chicago, Dallas, Houston, Kansas City, Los Angeles, New York, Phoenix, and Washington, D.C.; T-Mobile's announced plans to launch 5G service in Dallas, Las Vegas, Los Angeles, and New York City in early 2019).

But regardless of their accuracy as a technical matter, that still leaves the question about whether the two of them combining in order to get the most rapid and robust nationwide deployment of 5G possible is of as much importance to consumers as it is to their own business plan. It's not clear that a particular consumer needs his or her own wireless carrier to have 5G coverage everywhere in the country.

Sprint and T-Mobile want it, of course. But the whole premise of merger enforcement under the Clayton Act is that it is better for consumers, and for the economy, for companies who want it to *build* it, not *buy* it – to *compete* with each other, not to *combine* with each other. Making a company stronger faster does not justify making the marketplace weaker.

From the competition perspective, Sprint and T-Mobile do not have to be as big as AT&T and Verizon in order to have a significant impact. Both have nationwide networks and, as we have seen, each of them can – and has – forced AT&T and Verizon to pay more attention to consumers and to offer better and more affordable service. And each has been a competitive spur to the other.

We can't assume we can count on new competition coming; we need to keep the competition we've got.

Fourth, instead of resting our hopes on new competition appearing later, better to keep what we've got. If these two giant companies, who have the experience and know-how that comes from competing in the wireless marketplace for many years, tell us that it's just too hard to make a go of it on their own, how can they say we should expect a new upstart to start from scratch and climb up to where they already are?

Sprint and T-Mobile say a revolutionary market convergence is upon us, with tech giants poised to enter and completely upend mobile phone service as we know it. "Here comes Comcast! And Google!" Maybe. Let's see. We've heard those same kinds of confident predictions offered to justify telecom mergers at various times over the past 30 years. Some of those predictions have come to pass, though generally not on the predicted schedule.

We should not let go of the bird in hand of competition we *are* benefitting from now, for the speculative prospect of convergence that *could* bring new competition should it arrive sometime in the future. Better to wait till that future is here, or is close enough that it is no longer speculative. It seems premature to count on it now.

Again, the understandable desire of Sprint and T-Mobile to get bigger and stronger, and deliver more for their shareholders, does not necessarily translate into benefits for consumers, or for the economy as a whole.

The market is four wireless carriers; there is no substitute for mobile phone service.

And fifth, we know the metes and bounds of this market. There is no substitute for mobile phone service. And we know that even with Sprint and T-Mobile both aggressively looking for new plays, competition is not always as vigorous as we'd like, and it would only be harmed by the exit of one of the four main choices now available.

Special concerns about harm to prepaid wireless consumers.

In addition to our concerns about harm to wireless competition generally, we would like to highlight concerns about the impact on prepaid service consumers specifically. There are roughly 50 million of these consumers. Many of them have trouble affording the cost of a regular monthly mobile phone plan, and depend on the lower cost of prepaid service with limited use. The resellers, referred to as “mobile virtual network operators,” or MVNOs, buy network access from the Big Four carriers at negotiated wholesale rates.

Sprint and T-Mobile are the lowest-cost sellers of network access to MVNOs, and also the dominant sellers, with almost 60 percent market share between them. Currently, they compete vigorously in the prepaid market. For example, Sprint's own Boost Mobile MVNO recently offered two months' free service to any customer of T-Mobile's MetroPCS MVNO who switched. Hours later, MetroPCS made the same offer.¹⁵

AT&T and Verizon are apparently not as interested in pursuing the prepaid resale market, which means that, perhaps even more than with monthly plans, Sprint and T-Mobile are each other's main competitors. If they merge, that could sharply reduce incentives to offer low wholesale rates.¹⁶

Conditions are not likely to be effective.

Finally, we don't see how the serious competitive concerns with this merger can be addressed with pledges that a merged New T-Mobile will refrain from using its new power in ways that harm competition. What matters is not what T-Mobile and Sprint will promise, even if we grant them the best of present intentions. What matters is what the merged corporation's

¹⁵ Edward C. Baig, Boost Mobile founder is against the T-Mobile-Sprint merger: Here's why, USA Today, May 22, 2018, <https://www.usatoday.com/story/tech/columnist/baig/2018/05/21/boost-mobile-founder-and-ex-ceo-says-no-t-mobile-sprint-merger/624708002/>.

¹⁶ See Capitol Forum, T-Mobile/Sprint: Deal Would Raise Prices in Wholesale Markets, MVNO Executives Say, May 22, 2018, <http://thecapitolforum.cmail20.com/t/ViewEmail/j/65DA39A25D6324622540EF23F30FEDED/6061584FF3F54908A0F01D70678E0DEE>.

inherent incentives will be, how they would be altered by the merger from what they are now. And that change will be deep, and enduring.

As Assistant Attorney General Makan Delrahim has noted – and he was far from the first – when there are significant concerns with a merger, expecting that imposing behavioral requirements can fix those concerns unrealistically depends on the merged corporation making daily business decisions, day in and day out, and over the long haul, that run counter to its profit-maximizing incentives – that run counter to its basic business DNA.¹⁷ That’s simply not sustainable.

Conclusion

Vigorous competition from – and between – Sprint and T-Mobile have brought tremendous benefits to consumers, in greater choice and affordability. We want to preserve and protect that.

Sprint and T-Mobile describe a number of supposed benefits they see coming from this merger, and they describe them in some detail in the Public Interest Statement they filed with the FCC. And those claimed benefits should all be weighed thoughtfully, in the course of a thorough investigation by the FCC and the Antitrust Division. But to us, the claimed advantages from giving Sprint and T-Mobile a shortcut to increased capabilities do not seem enough to overcome the harms to competition and consumers that we believe would result.

¹⁷ <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.