



**STATEMENT FOR THE RECORD OF**

**GEORGE P. SLOVER  
SENIOR POLICY COUNSEL**

**JONATHAN SCHWANTES  
SENIOR POLICY COUNSEL**

**CONSUMER REPORTS**

**BEFORE THE**

**SUBCOMMITTEE ON ANTITRUST,  
COMMERCIAL, AND ADMINISTRATIVE LAW**

**HOUSE COMMITTEE ON THE JUDICIARY**

**ON**

**THE 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**

**MARCH 12, 2019**

Consumer Reports submits this statement to assist the Subcommittee in its examination of the proposed merger of T-Mobile and Sprint, to explain our concerns regarding how the merger would 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.

Since our founding more than 80 years ago, Consumer Reports has worked to ensure that the marketplace works for consumers. One key to that is ensuring that consumers get the benefit of competition that empowers them with meaningful choice, so 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 days, we have been strong supporters of the antitrust laws, including effective merger enforcement as an essential protector of competition.

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

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.<sup>3</sup> Still, with these four alternatives, and especially with the maverick pressure flexed by T-Mobile and Sprint, consumers are currently benefiting from a substantial amount of competition.<sup>4</sup> 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-Hirschman Index calculation – widely used for half a century in merger investigations – 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. Under the antitrust agencies' Horizontal Merger Enforcement Guidelines, 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.<sup>5</sup> This merger would increase the number by more than twice that amount – by more than 400. These concentration levels are well into the red zone.

---

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

<sup>2</sup> *Id.*

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

<sup>4</sup> 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>.

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

The merging corporations are attempting to overcome that strong presumption by explaining why those numbers don't really tell the story. And that's what T-Mobile and Sprint are attempting to do, with the Justice Department, the Federal Communications Commission, this Subcommittee, and the public.

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

- First, a claim that their merger will provide important new benefits to the marketplace – ultimately, to consumers.
- Second, a claim that their merger will create cost-saving efficiencies – or, as merging companies often refer to them, synergies – that they say will flow, ultimately, to consumers.
- Third, a claim 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), a claim that other market players are so big and so dominant that these two firms also need to get bigger in order to stay in the game.

- Fourth, a claim that even after the merger, the market will remain open to new competition that will come from others, as yet unseen.
- And fifth, a claim 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 other competitors are poised to jump in and offer meaningful new choices.

Or a variation on (5), a claim 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.

And indeed, Sprint and T-Mobile have been making all of these claims. But their claims 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. That motivation is not inappropriate for a business; but it needs to be taken into account in evaluating, with all due skepticism, the claims being made by Sprint and T-Mobile.

We'll briefly address each of these claims.

**Promised benefits are uncertain, and may not require the merger, and the harm to competition seems all-too-clear.**

First, promised benefits always lead the justifications that are put forward for a merger under scrutiny. 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 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 three 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.<sup>6</sup>

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 the customers they have and try to get even more. Their hope is that they don't have to adjust too much; but competition generally pushes them to offer more than they otherwise would. 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."<sup>7</sup> 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 combined 89 percent market share.<sup>8</sup> And there are strong indications of competitive complacency and "accommodating reactions." Canada's mobile phone rates are among the highest in the world.<sup>9</sup> 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

---

<sup>6</sup> 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>.

<sup>7</sup> See Horizontal Merger Guidelines, section 7.

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

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

saw happen in our country.<sup>10</sup> As one tech analyst put it, the Canadian carriers raise prices “because they can.”<sup>11</sup>

The big benefit Sprint and T-Mobile are promising with this merger is development and deployment of 5G wireless network technology. But that’s just the latest shiny new object. And there’s no indication that Sprint and T-Mobile need to merge in order to give it to us. Tellingly, 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.

Furthermore, a merger is forever. Consumers need the benefits of competition in spurring the development of future innovations – 6G, 7G ... and beyond.

### **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 already had a similar experience with the challenges and frustrations of integrating two networks, following its 2005 merger with Nextel, later referred to in hindsight as the “deal from hell.”<sup>12</sup> Sprint eventually had to write off nearly \$30 billion in relation to those integration costs, essentially the entire price it paid for Nextel.<sup>13</sup>

But even assuming that some – or even all – of the efficiencies envisioned are actually achieved, who benefits from that besides 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, in order for claimed efficiencies to register, the antitrust agency has to determine that they are real. And for another, that the merger is the only way to achieve them.

And for another, it must be confident 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.

---

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

<sup>11</sup> *Id.*

<sup>12</sup> 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/>.

<sup>13</sup> *Id.*

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 – and routinely are. But they are harder to substantiate.

And it should be noted that here, a substantial part of the supposed efficiencies are cost savings resulting from eliminating jobs that T-Mobile and Sprint expect to become redundant after the merger. But those jobs are not “redundant” in any sense that resonates with either consumers or competition. In fact, the opposite is true. The jobs in question are an essential manifestation of the existence of two companies competing with each other. The jobs can be eliminated only as a by-product of eliminating that competition and harming consumers.

**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 actually revive T-Mobile’s claim in 2011 that it needed to merge (then, it was a merger with AT&T) in order to survive. Making such a claim would be quite a stretch. And even if a claim of imminent demise could be proved, merging with a competitor would not be automatically justified under antitrust law. The merger would have to be the absolute last resort, after proving that every less harmful option was attempted. That’s what the “failing firm” defense actually requires, as a legal matter.

So instead of claiming that they need to merge in order to *survive*, Sprint and T-Mobile are trying to make a similar-sounding but actually different 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.<sup>14</sup> They don’t need to combine forces to do that.

---

<sup>14</sup> 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).

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. The T-Mobile and Sprint 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, have been seriously disputed and are being held up to scrutiny by other technical experts. The Justice Department and the FCC will ultimately determine if those claims hold any water.

But even assuming their accuracy, as a technical matter, that still leaves the question about whether the two of them combining in order to be able to get a more rapid deployment of 5G is of as much importance to consumers as it is to their own business plan. It's not clear that consumers need or want their wireless carrier to have 5G coverage – much less wanting to pay extra for it.

Sprint and T-Mobile might want it. 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 something more 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, T-Mobile and Sprint do not have to be as big as AT&T and Verizon in order to have a significant impact in the marketplace. 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 T-Mobile and Sprint have each been a particular 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, and can be appropriately factored in based on reliable evidence – on facts. It is premature to count on it now.

Moreover, any new competitor that might arrive at some point would need to connect with and make use of the existing national networks, especially in getting off the ground. That will be far more difficult – and less likely – to accomplish if there has been a major reduction in the networks available to provide competing options.

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

Other potential providers of equivalent service may be coming. As just explained, it is premature to count on that now; and this merger would make that development more difficult, and more unlikely.

**Special concerns about harm to prepaid wireless consumers.**

Alongside the broader concerns about harm to wireless competition generally, the impact on prepaid service consumers would likely be particularly severe. 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, last year Sprint's own Boost Mobile MVNO announced it was offering two months' free service to any customer of T-Mobile's MetroPCS MVNO who switched. Hours later, MetroPCS made the same offer.<sup>15</sup>

---

<sup>15</sup> 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/>.



AT&T and Verizon have shown to be 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 would be expected to sharply reduce incentives to offer low wholesale rates.<sup>16</sup>

### **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 to raise prices to consumers, cut corners on quality, cut off or impair access by other mobile service providers, or harm competition and consumers in other ways. 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 inherent incentives would 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.<sup>17</sup> That's simply not sustainable.

### **Conclusion**

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

T-Mobile and Sprint describe a number of supposed benefits they see coming from this merger. And those claimed benefits are being weighed carefully by the FCC and the Antitrust Division, and a number of State AGs, in the course of a thorough investigation – against the backdrop of a presumptively unlawful merger. To us, it has become increasingly evident that the claimed advantages from giving Sprint and T-Mobile a shortcut to supposed increased capabilities are not enough to overcome the harms to competition and consumers that would result.

---

<sup>16</sup> 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>.

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