

**Before the
Federal Communications Commission
Washington, DC 20554**

In re Applications of)	
)	
T-Mobile US, Inc. and)	WT Docket No. 18-197
Sprint Corporation)	DA 18-740
)	
For Consent to Transfer Control of)	
Licenses and Authorizations)	

REPLY TO OPPOSITION TO PETITION TO DENY

**UNION TELEPHONE COMPANY
CELLULAR NETWORK PARTNERSHIP, AN OKLAHOMA LIMITED PARTNERSHIP
NEX-TECH WIRELESS, L.L.C.
SI WIRELESS, LLC**

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October 31, 2018

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TABLE OF CONTENTS

SUMMARY.....iii

I. THE STANDARD OF REVIEW AND RELEVANT MARKETS..... 1

II. ARGUMENT..... 3

A. Applicants Neither Respond to Extensive and Compelling Evidence that T-Mobile Has Put Competitive Pressure on AT&T and Verizon, Nor Articulate Persuasively Why Either Cannot Continue to Do So Absent a Merger. 4

B. Because the Merger Would be Inconsistent With the Merger Guidelines in Several Respects, the Applications Must be Denied or Subjected to Strong Conditions. 8

1. The Applicants Admit That the Merger Will Result in Only Three Facilities-Based Competitors Nationally and in Many Rural Areas—Creating An Even More Highly Concentrated Market..... 8

2. There Will Be Significant Harms to Consumers and Competition as a Result of Extraordinarily High Market Concentrations Post-Merger. 10

3. The Purported 5G Benefits are Speculative, Unquantified, and Not Merger-Specific..... 12

4. Applicants’ Arguments on Roaming Are Inconsistent and Contrary to the Public Interest. 14

5. New T-Mobile Seeks Far More Spectrum Than It Needs to Provide Rural 5G, While Denying Petitioners the Spectrum Needed to Provide Genuine Competition. 16

6. The Economic Arguments in the Joint Opposition Are Misleading at Best. 19

C. If the Commission Were to Approve the Proposed Transaction, It Must Impose Conditions to Preserve Competition..... 22

1. Roaming Conditions are Essential to Preserve Competition in Rural Areas..... 22

2. If Approval Is Granted, There Must Be Spectrum Divestitures Consistent with the FCC’s Well-Established Limits on Spectrum Aggregation. 27

3. There Must be Interoperability. 30

III. CONCLUSION..... 31

SUMMARY

In the largest merger in the wireless industry since the failed AT&T/T-Mobile transaction, Applicants propose that prices will fall, competition will increase, and consumers will be well served in a marketplace of only three nationwide carriers, having an unprecedented HHI score. Applicants cited no prior transaction, where a nationwide market went from four to three, where such public interest benefits accrued.

Applicants minimize or ignore Petitioners' evidence concerning T-Mobile's performance in recent years, the comparative performance metrics among the big four carriers, and the obvious and multiple paths forward that T-Mobile could pursue without the anti-competitive effects that will undoubtedly flow from the proposed transaction. Instead, T-Mobile trotted out the same arguments used in the failed AT&T merger, notably that it cannot compete unless the deal is approved. In fact, the hardest part, getting from where T-Mobile was in 2012 and today, has already been accomplished and there is now a clear path for T-Mobile to continue its "un-carrier" strategy and catch the market leaders on its own.

Applicants concede that the HHI will soar to over 3333 if this transaction is approved, claiming that new competitors either exist or are on the immediate horizon. In fact, neither big cable nor any other party identified in the Joint Opposition are anywhere near rolling out a 4G/5G mobile broadband network that could compete with the soon-to-be big three. Sensing that weakness, T-Mobile has attempted to redefine the relevant product market to include competition for fixed broadband services, creating an apples/oranges comparison with a mobile broadband market that the FCC has not found to be a substitute.

Applicants claim that increasing the supply of spectrum to New T-Mobile will reduce prices, when accepted economic theory posits that the substantial increase in market concentration will likely lead New T-Mobile to raise prices.

Applicants reject any enforceable conditions on roaming, even though the Commission imposed such conditions ten years ago when Verizon acquired a regional carrier. T-Mobile asks the Commission to trust that it will be a good roaming partner, yet it has put very little into the record to demonstrate that it has been to date, or since the merger was announced.

According to Applicants, they must be permitted to have all of the spectrum that the merged entity will accrue, or they will not be able to provide adequate 4G/5G mobile broadband services in rural America. If this were true, then surely the Petitioners, which have far less than 100 MHz of spectrum in many rural markets, have a much bigger problem. T-Mobile has failed to demonstrate that it needs more than about 100 MHz of spectrum to provide mobile broadband in rural areas, and Petitioners' suggestion that Applicants be cut back to the 238.5 MHz screen was quite modest.

In sum, Applicants have not carried the burden of proof required to demonstrate that the transaction would serve rural consumers. A hearing should be held to determine, as a matter of fact and law, whether the transaction is in the public interest. Finally, if the transaction is to be approved, stringent conditions must be imposed to ensure roaming is available to small rural carriers, that sufficient spectrum is disseminated to foster competition, and interoperability conditions are imposed on divested spectrum to ensure rural consumers can use their devices in a nationwide ecosystem.

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Union Telephone Company (“Union”), Cellular Network Partnership, an Oklahoma Limited Partnership, dba Pioneer Cellular (“Pioneer”), Nex-Tech Wireless, L.L.C. (“Nex-Tech Wireless”), and SI Wireless, LLC (“SI Wireless”) (collectively, “Petitioners”), by counsel, hereby reply to the Joint Opposition filed on September 17, 2018 by T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”) in the above-captioned proceeding.¹

I. THE STANDARD OF REVIEW AND RELEVANT MARKETS.

The Joint Opposition does not dispute the public interest standard as described in the Petition. Nor do Applicants deny that they bear the burden to prove by a preponderance of the evidence that granting the Applications would serve the public interest, convenience, and

¹ Joint Opposition of T-Mobile US, Inc. and Sprint Corporation (Sept. 17, 2018) (“Joint Opposition”).

necessity and otherwise be consistent with the Act.² However, numerous times the Joint Opposition implicitly and incorrectly attempts to shift that burden onto the Petitioners.³

In a docket that proposes an unprecedented reduction in competition, it is critically important that the Commission strictly hold the proponents to their burden of proof. In light of the massive amount of new evidentiary material submitted with the Joint Opposition, it is clear that Applicants believe that one or more of the petitions to deny raised material issues of fact. As discussed below, much of the new material is—like the case in chief—unprecedented and suspect. Given that Applicants have through their own filings implicitly acknowledged disputed fact issues, a hearing is needed to test all parties’ assertions and weigh the likely harms of the merger against the predicted benefits.

Similarly, the Joint Opposition accepts the Commission’s established definitions of relevant product and geographic markets. But again, despite admitting that the relevant product market is “mobile telephony/broadband services,”⁴ Applicants submitted a completely

² *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings, LLC*, 23 FCC Rcd 17444, 17460-61 ¶ 26 (2008) (“*Verizon-Alltel Merger Order*”).

³ *E.g.*, Joint Opposition at 26 (“[N]one of the opponents have provided evidence suggesting that any triggered local market has specific characteristics that would create the potential for anticompetitive harm”), 44 (“[The opponents] have provided no technical analysis or other basis to demonstrate that the standalone companies could successfully refarm their spectrum to 5G”).

⁴ Applicants do not address the relevant market directly, and they did not attempt to refute the Petitioners’ market definition. *See, e.g.*, Joint Opposition at 16, 33. Unquestionably the relevant market for this proceeding is comprised of mobile voice and data services, including services provided over advanced broadband wireless networks (mobile broadband services) and does not encompass fixed services. *E.g.*, *Verizon-Alltel Merger Order*, 23 FCC Rcd at 17469-70 ¶ 45. Indeed, as recently as this year the Commission held that mobile wireless services are not yet a full substitute for fixed service. *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, 1666-67 ¶ 18 (2018).

new study by Dr. Harold Furchtgott-Roth purporting to analyze the impact of the proposed merger on the fixed broadband market.

On one hand, Petitioners welcome Applicants' tacit admission that the harms to the mobile market demonstrated by several parties require offsetting public interest benefits. On the other hand, Applicants have failed to make a case for considering purported benefits that are outside the relevant product market. If the Commission is to give any consideration to the fixed broadband market, it needs to acknowledge that it is comparing apples to oranges, since the two markets have historically been considered separately in merger cases.⁵ Moreover, weighing the potential harms in one market against the alleged benefits in another market is a complicated undertaking, ill-suited to a paper proceeding. A hearing is needed.

II. ARGUMENT.

Petitioners identified and described significant issues and harms to competition, particularly in rural areas that they serve. Unanswered, harms identified by Petitioners are sufficient to deny the Application outright. At the very least, a hearing is needed so that the Commission and other parties can examine whether Applicants' broad-brush theories provide any meaningful and enforceable protections to ameliorate the likely harms Petitioners and others have identified.

⁵ See, *Verizon-Alltel Merger Order*, 23 FCC Rcd at 17469-70 ¶ 45; See also, *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp.*, 23 FCC Rcd 12463, 12483-84 ¶ 37 (2008); *Applications of AT&T, Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20308 ¶ 21 (2007); *Applications of Midwest Holdings, L.C.C. and ALLTEL Corp.*, 21 FCC Rcd 11526, 11541 ¶ 26 (2006); *Applications of Nextel Communications, Inc. and Sprint Corp.*, 20 FCC Rcd 13967, 13983 ¶ 38 (2005); *Applications of Western Wireless Corp. and ALLTEL Corp.*, 20 FCC Rcd 13053, 13068 ¶ 29 (2005); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCC Rcd 21522, 21558 ¶ 74 (2004).

A. Applicants Neither Respond to Extensive and Compelling Evidence that T-Mobile Has Put Competitive Pressure on AT&T and Verizon, Nor Articulate Persuasively Why Either Cannot Continue to Do So Absent a Merger.

A proper analysis of a highly concentrated market must focus on the harms and any offsetting benefits to the relevant market as a whole, and whether the public interest will be served.⁶ Petitioners extensively detailed T-Mobile's success over the past six years as it has developed 4G LTE service in a competitive market.⁷ While T-Mobile's competitive drive made it a leader in implementing 4G LTE, it would have the Commission believe that it will be hapless in the 5G market on a standalone basis.⁸

As shown in the Petition, T-Mobile has a strong balance sheet and several competitive advantages over its larger competitors.⁹ If this transaction is approved, New T-Mobile will amass a huge trove of spectrum while eliminating one of the two low-price competitors.¹⁰ Although this transaction may make it easier for New T-Mobile to roll out 5G, it could also successfully transition to 5G without this merger, avoiding all anti-competitive effects. The

⁶ See 47 U.S.C. § 310(d); *U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines* (Aug. 19, 2010) at § 6.4, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> ("Merger Guidelines") ("The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger-specific reason").

⁷ Petition at 5-19.

⁸ See, e.g., Joint Opposition at 37-55.

⁹ Petition at 22-23.

¹⁰ Indeed, the merged entity would hold more spectrum than New T-Mobile would likely ever need to provide 5G mobile services in many, if not most rural areas.

standalone challenges cited by T-Mobile are inherent in implementing any new technology, particularly when companies face effective competition.

The Commission's public interest analysis favors competition, even if it takes T-Mobile slightly longer to build out a 5G network than it would if it eliminates Sprint as a competitor.¹¹

The issue requiring close scrutiny is what are the harms to competition from eliminating one maverick competitor (or potentially two) and shrinking from four to three national carriers?

What if any incentive will New T-Mobile have to continue to compete as a maverick?

If the arguments in the Joint Opposition seem familiar, it is because they echo closely the ineffective arguments made in the failed AT&T takeover of T-Mobile. Then, T-Mobile asserted that it would not be able to compete effectively and roll out 4G LTE without the merger.¹² As Petitioners demonstrated in great detail, using T-Mobile's own SEC Reports, it could hardly have been more wrong than about how things would turn out. Yet, the Joint Opposition ignores T-Mobile's broad and deep successes, instead repeating the same erroneous predictions used to support the last transaction.¹³

¹¹ While Applicants seem to agree that post-merger there would be three viable companies serving the relevant market, certain statements confuse the count by suggesting New T-Mobile will have the capability to dominate 5G, at least for some time. *See, e.g.*, Joint Opposition at 37-38 ("In addition to these direct benefits to wireless customers, this network - which cannot be developed on standalone basis by either company - also will enable device designers and app developers to create platforms with capabilities that are not possible on the 5G network that Sprint or T-Mobile (or AT&T or Verizon) could offer on their own" (emphasis added)); Paul Kirby, TR Daily, *Industry Cites Need for Spectrum, Infrastructure Streamlining* (Sept. 12, 2018) (quoting Marcelo Claure, Executive Chairman of Sprint Corp.: "I want to be very clear: The only way the U.S. remains the leader in 5G is by allowing Sprint and T-Mobile to merge because the combined company is the only U.S. player that has the necessary spectrum assets and the financial strength to build the world's leading 5G network and allow the U.S. to continue its leadership position" (emphasis added)).

¹² *See generally*, International Section 214 Authorizations For Assignment Or Transfer Of Control, WT Docket No. 11-65, Description of Transaction, Public Interest Showing, and Related Demonstrations (Apr. 21, 2011), at <https://www.fcc.gov/ecfs/filing/6016478580>.

There are no unusual or insurmountable reasons that T-Mobile cannot and will not continue to implement its “Un-carrier” strategy if this merger is denied. As Petitioners demonstrated—and Applicants did not dispute—all of T-Mobile’s key metrics, postpaid customers, revenues, EBITDA margin, and EPS are trending in a positive direction, some dramatically.¹⁴ As shown in the Petition, T-Mobile has the strongest balance sheet of the big four carriers today. It is building cash reserves quickly and has capacity to borrow as needed to acquire spectrum and build out 4G and then 5G.¹⁵ It has the financial ability to acquire all of the 5G spectrum it needs to succeed.

While T-Mobile’s business is rapidly growing, AT&T continues to struggle. In addition to its wireless metrics flattening over the past several years,¹⁶ Moffett Nathanson observes that AT&T “has taken on enormous debt now, too, with a balance sheet levered to 3.9 times earnings before interest, taxes, depreciation and amortization—a ‘shocking level of debt for a company where Ebitda and revenues are shrinking even when GDP is growing.’”¹⁷

¹³ For example, “only the combined cell site and spectrum resources of the two companies will enable New T-Mobile to create a robust 5G network.” Joint Opposition at 37.

¹⁴ Petition at 15, 17.

¹⁵ See Petition at 15, 17-19, 23. Moreover, both Verizon and ATT have substantial declining legacy wireline business lines and unfunded pension obligations. *Id.* at 22-23.

¹⁶ See Petition at 16.

¹⁷ Elizabeth Winkler, *AT&T Has More Worries Than Tepid Results*, Wall Street Journal, October 24, 2018, at <https://www.wsj.com/articles/at-t-has-more-worries-than-tepid-results-1540397600>. According to its most recently quarterly report, AT&T’s interest expense now exceeds \$2 billion per quarter. See *AT&T 3Q 2018 Earnings Report* at p. 2, https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/quarterly-earnings/2018/3q-2018/master_3q18_.pdf.

In the most recent quarter, T-Mobile continued to outpace its two larger rivals by a wide margin, adding 774,000 postpaid subscribers, compared to 295,000 for Verizon and 69,000 for AT&T.¹⁸ In sum, T-Mobile is in terrific shape, it can challenge AT&T and Verizon, and it does not need this transaction to succeed in the 5G marketplace.

While Applicants point out that Sprint's financials are not as strong, they have never argued that Sprint cannot continue as a going concern.¹⁹ Nor should the Commission be concerned, even if such an argument were made. Under the Merger Guidelines:

Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.²⁰

¹⁸ See Drew FitzGerald, *T-Mobile Reports Surge in New Customers*, Wall Street Journal (Oct. 30, 2018) at <https://www.wsj.com/articles/t-mobile-reports-surge-in-new-customers-1540935651>; Dr. John Saw, Chief Technology Officer, Sprint Corporation, *Sprint Reaches Nationwide LTE Advanced Milestone and Delivers Gigabit-Class Performance in More than 225 Cities* (October 31, 2018) ("Sprint's Next-Gen Network build gains momentum in second fiscal quarter") at <https://newsroom.sprint.com/quarterly-network-update.htm>.

¹⁹ See, e.g., Joint Opposition at 18. Indeed, Sprint reported that wireless service revenue grew year-over-year for the first time in nearly five years, and it added 109,000 postpaid customers in its most recent quarter. See News Release, *Sprint Reports Year-Over-Year Growth in Wireless Service Revenue With Fiscal Year 2018 Second Quarter Results*, (Oct. 31, 2018) at <https://newsroom.sprint.com/sprint-reports-year-over-year-growth-in-wireless-service-revenue-with-fiscal-year-2018-second-quarter-results.htm>.

²⁰ Merger Guidelines, § 11 (failing firm exception is "an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero."); see also, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137 (1969) (requiring "evidence ... that the resources of one company were so depleted and the prospect of rehabilitation so remote that 'it faced the grave probability of a business failure'" (quoting *International Shoe Co. v. FTC*, 280 U. S. 291, 302 (1929))).

None of these circumstances have even been asserted by Applicants. Moreover, ongoing competitive pressure combined with Sprint’s own economic resources, could well push Sprint to become more innovative, or seek a sale to an entity that would not materially increase market concentration and could well provide an infusion of capital.²¹ Sprint has a nationwide network that would be attractive to any number of buyers if its stock price were to drop into “failing firm” territory. Alternatively, Sprint may seek reorganization under Chapter 11 of the bankruptcy code and emerge as a stronger competitor, as many companies have done.

In sum, Applicants have chosen to ignore compelling evidence of T-Mobile’s marketplace success, its opportunity to overtake its competition, and avoid confronting the far less anti-competitive alternative of both companies vigorously competing in a 5G world.

B. Because the Merger Would be Inconsistent With the Merger Guidelines in Several Respects, the Applications Must be Denied or Subjected to Strong Conditions.

1. The Applicants Admit That the Merger Will Result in Only Three Facilities-Based Competitors Nationally and in Many Rural Areas—Creating An Even More Highly Concentrated Market.

In many places where Petitioners serve, Applicants admitted that there will be only three operational facilities-based carriers post-merger, and that assumes that Petitioners survive in the post-merger market structure.²² Applicants also admitted that there will be only

²¹ See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969) (In an otherwise anticompetitive transaction, the merging parties must show that the acquiring company is the only available purchaser).

²² See Petition at Exhibit A.

be three nationwide genuine competitors.²³ Despite this, Applicants argued that although the HHI index will be well above 3,000 in many areas, such concentration is “not necessarily ... anticompetitive.”²⁴ That statement concedes that the proposed transaction should be closely examined and it attempts to improperly shift the burden of proof to Petitioners to demonstrate that the transaction would be anticompetitive. Moreover, it flies in the face of the Merger Guidelines, which state that transactions leading to such high levels of concentration cause “greater ... potential competitive concerns.”²⁵

In their Joint Opposition, Applicants continue to assert that big cable companies may soon be competitors,²⁶ despite the fact that they have never indicated an intent to provide facilities-based competition in rural America.²⁷ Until big cable acquires spectrum and builds facilities in rural areas, they cannot qualify as genuine competitors to Petitioners, as contemplated by the Merger Guidelines.²⁸ Accordingly, Applicants’ assertion that big cable will

²³ *E.g.*, Joint Opposition at 21-22.

²⁴ *Id.* at 11-12.

²⁵ Merger Guidelines § 5.

²⁶ Joint Opposition at 31-32.

²⁷ A recently released economic paper commissioned by T-Mobile and cited in the Joint Opposition admits as much. Michelle Connolly, *Competition in Wireless Telecommunications: The Role of MVNOs and Cable's Entry into Wireless*, at 40-42 (Sept. 2018). The premise of the paper is that big cable can compete with the big four (or three) national mobile carriers in urban areas because their 57 million customers are already on a robust fixed broadband network and therefore can use Wi-Fi in homes and urban hotspots. *See id.* at 4. That proffered environment, “urban hotspots,” simply does not exist in rural areas and the paper does not attempt to show that it does.

²⁸ Even in an urban context, the Commission held that there was, “no evidence in the record that Wi-Fi-only technology ... is a ‘mobile technology.’” *Bridging the Digital Divide for Low-Income Consumers: Fourth Report and Order, Order on Reconsideration, and Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry*, FCC 17-155, 2017 WL 6015800 (Dec 1, 2017) at *16, ¶ 49. *See also*, Merger Guidelines, § 9; Petition at 27-29.

have any effect beyond our nation's cities, or can be analyzed here as a genuine competitor, must be rejected.

Nor is DISH a genuine competitor that can be considered within this transaction. Its plans so far contemplate a small IoT network, and any true 5G broadband competition from DISH is likely years away.²⁹ DISH cannot be included in the competitive analysis here.

What the Commission needs to focus on is, (1) whether consumers will have only three or fewer genuine competitors going forward, as Applicants concede to be the case in many rural markets, and (2) whether approval of this transaction hastens the decline of competition and harms consumers in rural areas if small carriers are no longer viable as a result.

2. There Will Be Significant Harms to Consumers and Competition as a Result of Extraordinarily High Market Concentrations Post-Merger.

The Joint Opposition attempts to use new simulation models to show that despite going from four to three competitors, prices will not increase.³⁰ Simulations may be necessary, since

²⁹ T-Mobile cannot be permitted to argue here that DISH is a near-term competitor in the 5G mobile broadband market, while at the same time asserting to the Commission in a separate proceeding that, "DISH's build out plan is nothing more than a scheme for the company to further warehouse valuable spectrum assets it intends to continue to warehouse spectrum with no benefit to consumers." Letter from Kathleen O'Brien Ham, Senior Vice President, Government Affairs, to Donald Stockdale, Chief, Wireless Telecommunications Bureau (October 25, 2018). Either DISH is on the cusp of building a competitive 5G network or it is not – and T-Mobile needs to decide which side of the argument it is on.

³⁰ Joint Opposition at 11. Even that analysis is somewhat misleading, as the Joint Opposition continually talks about the "price [or cost] per Gigabit." *Id.* at ii, 2, 5, 82, 88, 100. In a market where new technology is enabling massive increases in the total data throughput, it is axiomatic that both the per unit cost and price are going to come down. 5G is expected to increase data traffic by orders of magnitude over the next six years. See, Ex parte presentation of T-Mobile US, Inc. and Sprint Corporation, WT Docket No. 18-197 (Oct. 11, 2018) at Att. B, p. 22, [https://ecfsapi.fcc.gov/file/101197457249/Oct%2011%202018%20Ex%20Parte%20\(Public\).pdf](https://ecfsapi.fcc.gov/file/101197457249/Oct%2011%202018%20Ex%20Parte%20(Public).pdf) ("T-Mobile October 11 ex parte"). If the price per Gb remained steady, 5G service would likely be priced out of reach, as consumers would not, or could not, continue to pay the same unit price to access massive amounts of additional data. Put another way, a lack of competition will hold the price per Gb higher than it would be in a competitive market.

actual evidence of competitive markets existing at an HHI of over 3333 is scarce. As Petitioners noted, Applicants have yet to cite a single instance where a horizontal merger that reduces a marketplace from four to three competitors has led to increased competition, lower prices, greater overall employment, and improved consumer welfare³¹—a point all but conceded among the hundreds of pages of comments, testimony and theories comprising the Joint Opposition.³²

Applicants purport to dismiss the sky-high HHI because 5G will be “disruptive.”³³ While the Merger Guidelines do permit new network technology to be considered,³⁴ alleged offsetting efficiencies must be merger-specific:

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.³⁵

³¹ Petition at 6.

³² See, e.g., Joint Opposition at Appendices F, I, and J.

³³ “[T]he technological transition from 4G LTE to 5G will disrupt the industry in ways that make coordination unlikely....” Joint Opposition at 15. Applicants ask the Commission to accept that the emergence of a new technology that is evolutionary, but not revolutionary, will somehow alter fundamental economics. The Joint Opposition dismisses the competitive concerns of rural carriers because Applicants currently have a low market share. If their arguments on the need for spectrum and how the merger will cause them to accelerate a 5G roll out in rural areas are true, the likelihood is they will quickly dominate rural markets, given their superior financial resources, and the fact that small rural carriers do not have the spectrum to compete in 5G in many areas, and no clear path to acquire spectrum available to the big four carriers.

³⁴ Indeed, Applicants rely almost exclusively on their supposed ability to offer 5G only as a combined entity. This is an “efficiencies” argument. See, e.g., Merger Guidelines, § 10 (“For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets”).

³⁵ Merger Guidelines, § 10.

The bar is very high when a transaction, “likely to cause adverse coordinated effects” is justified primarily on purported efficiencies, as here:

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.³⁶

* * * * *

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process.³⁷

As discussed in the Petition and below, the promised efficiencies are speculative, unquantified, and would almost certainly come to pass absent the merger.

3. The Purported 5G Benefits are Speculative, Unquantified, and Not Merger-Specific.

Applicants repeatedly emphasize that the merger will enable them to roll out 5G faster.³⁸ If that is true, and Applicants have not carried the burden of proof thus far,

³⁶ Merger Guidelines at § 7.1 (adverse effects are considered “likely” in an acquisition eliminating a “maverick firm” in a highly concentrated market).

³⁷ *Id.* at § 10.

³⁸ *E.g.*, Joint Opposition at 110.

deployment timing would be the only valid efficiency arising from this transaction. While the Joint Opposition is unclear on timing and priorities, Applicants have implied throughout that they would roll out 5G as fast or faster in rural areas as urban areas.³⁹

Real world history in the areas Petitioners serve would not support such an outcome.⁴⁰ For decades, Petitioners have often led in bringing new and expanded services to their licensed areas while the big four carriers have either focused on urban/suburban markets or contracted with Petitioners to build coverage for them. Moreover, all carriers construct mobile wireless networks consistent with basic business economics, which drives rational firms to expand services first to urban/suburban areas which yield higher margins. Even Petitioners, who operate in overwhelmingly rural areas, build facilities to serve towns and highways before remote areas. In Petitioners' experience, if small carriers have access to necessary spectrum, they are likely to roll out mobile 5G to rural America at nearly the same time as New T-Mobile, eliminating any argument that approving this merger will accelerate 5G in rural areas.

Petitioners and other parties discussed at length the Applicants' failure to establish that the 5G "efficiencies" will be merger-specific and pointed out other shortcomings in meeting the Merger Guidelines.⁴¹ Applicants responded with pricing simulations and a new alleged

³⁹ Public Interest Statement at 60 and App. G, Evans Decl., ¶ 256.

⁴⁰ Applicants have expressly acknowledged this fact, based on fundamental economics and a long history of how wireless networks have been constructed. *See, e.g.*, Public Interest Statement at 66-67 ("Sprint's current coverage compared to other carriers is particularly stark in rural areas where it is difficult to justify incremental network investment due to limited population density...[and 2.5 GHz spectrum]").

⁴¹ Petition at 35-39. *See also*, Petition To Deny of Dish Network Corporation at 22-42, Exh. A, Declaration Of Stephen Wilkus, ¶ 6 *et seq.* (Aug. 27, 2018).

offsetting benefit, outside of the relevant product market.⁴² This suggests the Applicants recognize that their efficiencies arguments fail to meet the Merger Guidelines.

Under the DOJ Guidelines, when “a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.”⁴³ Applicants have yet to detail or quantify how much of their asserted efficiencies come solely from timing advantages, let alone whether those limited merger-specific efficiencies sufficiently offset the increased risks of pricing coordination as a result of the merger. A hearing would give Applicants the opportunity to remedy those shortcomings and for other parties to test the validity of Applicant’s broad-brush conclusions.

4. Applicants’ Arguments on Roaming Are Inconsistent and Contrary to the Public Interest.

While claiming without any objective supporting evidence that it will be a good roaming partner and will continue Sprint’s tradition of providing preferred roaming arrangements with other carriers,⁴⁴ T-Mobile derides roaming arrangements:

[T]he customer experience cannot be guaranteed to be consistent for a roaming subscriber. This is because roaming would require handoffs to another network provider that may or may not support the features that are on the home network and these handoffs (from one network to another) may not always occur seamlessly. The data throughput experience would likely be different as there are significant costs associated with allowing a

⁴² The Joint Opposition shifts the focus to supposed benefits to the fixed wireless broadband market, even though the relevant market under review here is mobile, not fixed, broadband.

⁴³ Merger Guidelines, at n. 13.

⁴⁴ Joint Opposition at 93, 98.

subscriber to roam on another network. And, such costs will increase based on the amount of data used.⁴⁵

While T-Mobile's statements about roaming are inconsistent with SI Wireless, Pioneer, and Nex-Tech Wireless's experience with Sprint, they also divert attention from the far more productive and valuable strategic relationships the companies have developed with Sprint. These strategic partnerships include stringent network service level agreements to ensure subscriber service levels for high-quality voice and fast data speeds. These preferred partnerships can also guarantee that data usage will not be deprioritized, while allowing the nationwide carrier unrestricted usage at a cost lower than building and maintaining its own network in remote areas. This successful model also utilizes local employment resources within rural communities and extends high-quality coverage and advanced services into areas that might not receive them otherwise.

T-Mobile further claims that, "customers may suffer from being blocked from or throttled on the network on which they are roaming if traffic reached certain congestion thresholds."⁴⁶ In Petitioners' real world experience, it is T-Mobile that blocks and throttles its own customers when they roam onto other carrier networks. So, while Applicants promise to be the "preferred roaming partner" for rural carriers, these aspirational platitudes run counter to its detailed business and engineering plans which show that in the real world Applicants are not interested in roaming in rural America. For example, in asserting merger "synergies," the

⁴⁵ Joint Opposition at 60.

⁴⁶ *Id.*

Joint Opposition notes “reductions in legacy Sprint’s network marginal cost (from reduced roaming fees).”⁴⁷ This is probative evidence that New T-Mobile intends to limit roaming and preferred partner arrangements.⁴⁸

Absent access to nationwide roaming on reasonable terms, smaller carriers simply will not be capable of disciplining the New T-Mobile in their markets, as ongoing genuine competitors. If the transaction is to be approved, the Commission can still try to promote competition by ensuring that Petitioners have access to nationwide reciprocal roaming at reasonable rates. If the Commission fails to impose reasonable roaming arrangements in connection with this transaction, then the much needed spectrum divestitures discussed below will do little to help Petitioners survive in the coming 4G/5G world.

5. New T-Mobile Seeks Far More Spectrum Than It Needs to Provide Rural 5G, While Denying Petitioners the Spectrum Needed to Provide Genuine Competition.

Applicants assert that they cannot compete in rural areas unless they are permitted to close the transaction without divesting any spectrum, but they expect Petitioners to compete with the relatively small amount of spectrum they currently hold in rural areas.⁴⁹ Focusing on

⁴⁷ Joint Opposition at 15.

⁴⁸ As New T-Mobile reduces the need for roaming or cooperative arrangements, then it will be less willing to negotiate reasonable reciprocal roaming agreements than a standalone Sprint has been, and likely would be in the future. Plus, every roaming dollar New T-Mobile saves is a dollar lost by a roaming partner. That makes rural carriers less competitive and less able to afford 5G upgrades, putting upward pricing pressure on rural carriers to compensate.

⁴⁹ *Cf.* Joint Opposition at 29-30, 36.

the needs of T-Mobile, rather than those of rural consumers, Applicants boldly claim that, “If the Commission wants a cutting edge, nationwide, robust 5G mobile network deployed in the United States before in other countries, it should not rely upon the speculative availability of other mid-band spectrum.”⁵⁰ In fact, the availability of mid-band spectrum is not speculative and rural citizens are far better served by having competitive options, options that will be foreclosed if scores of megahertz of mid-band spectrum is warehoused by the merged entity.

If the transaction is to be approved, Petitioners ask why T-Mobile should be permitted to acquire far more spectrum than it needs in rural areas, while its much smaller competitors are relegated to the “speculative availability” of other spectrum at future auctions? T-Mobile blithely claims that, “various demands made for spectrum divestitures are not grounded in any legitimate public interest considerations.”⁵¹ In fact, Section 314 of the Communications Act of 1934, as amended (“Act”) requires the Commission to deny the Application if, “the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce.”⁵² Further, Section 307(b) of the Act directs that the Commission, “shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”⁵³

⁵⁰ *Id.* at 54.

⁵¹ *Id.* at iii.

⁵² 47 U.S.C. § 314.

⁵³ *Id.* § 307(b).

Given that mobile broadband has been reclassified as outside of Title II, Section 332 of the Act provides in relevant part:

In taking actions to manage the managing the spectrum to be made available for use by the private mobile services, the Commission shall consider ... whether such actions will - improve the efficiency of spectrum use ... **encourage competition and provide services to the largest feasible number of users**; or increase interservice sharing opportunities between private mobile services and other services (emphasis added).⁵⁴

Finally, for licenses distributed through competitive bidding, the Commission must promote, “economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”⁵⁵

Thus, Petitioners’ request for substantial spectrum divestitures is well-grounded in longstanding public interest considerations flowing directly from Congress and undertaken in every transaction review. In this case, spectrum divestitures will increase competition and avoid the excessive concentration of licenses. As for T-Mobile’s complaint that it should not be subject to the uncertainties of an auction, Petitioners respectfully state that it is the dominant carriers who should be relegated to auctions to acquire more spectrum, while small rural

⁵⁴ *Id.* § 332(a) (emphasis added).

⁵⁵ *Id.* § 309(j)(3)(B).

carriers should receive preferential access to spectrum in rural areas, in furtherance of the goals Congress set forth in Sections 307, 309, 314, and 332 of the Act.

Without so much as acknowledging the Petition, Applicants state that, “in the absence of any evidence of anticompetitive harm in any local market, spectrum divestitures would not serve any legitimate competitive purpose.”⁵⁶ Approval of this transaction would vest New T-Mobile with far more spectrum than it needs to provide 5G service in most or all areas where Petitioners serve, so much so that the effect would be to warehouse spectrum that Petitioners need to provide effective competition, or use it to further its business interests outside of the relevant product market. That is the very definition of anticompetitive harm, irrespective of T-Mobile’s intentions, harm that can be remedied by pro-competitive divestitures.

6. The Economic Arguments in the Joint Opposition Are Misleading at Best.

In addition to Applicants’ inconsistent arguments on efficiencies and roaming, the Joint Opposition makes broad economic statements on market concentration that are oversimplifications, or just plain wrong. For example: “As a matter of fundamental economics, significantly increasing the supply of available capacity puts substantial downward pressure on the per unit price of capacity.”⁵⁷ If a supply change increases output capacity on the retail side

⁵⁶ Joint Opposition at 25-26. Applicants once again try to reverse the burden of proof. It is the Applicants who must prove there will be no anticompetitive harm. “Absence of evidence” is not sufficient to support approval.

⁵⁷ *Id.* at 4.

in a competitive market, that would be true.⁵⁸ This is not at all what is occurring in this transaction.

The supply increase discussed in the Joint Opposition is increased capacity of an input to a finished service; *i.e.* more spectrum holdings in New T-Mobile. Few if any other carriers will have the same spectrum capacity as New T-Mobile in many rural areas and without divestitures non will enjoy a supply increase. Because the merger also comes with a substantial increase in market concentration, it is a great leap to conclude that New T-Mobile will necessarily be motivated to set a competitive price, *i.e.* close to its new costs.⁵⁹ Firms in concentrated markets are more likely to set an “optimal” price in coordination with the very few other competitors.⁶⁰

Next, the Joint Opposition attempts to bolster the argument that a capacity increase will motivate lower prices notwithstanding the reduction in competition and elimination of a maverick firm by stating its subjective post-merger intentions, “[W]e will compete aggressively

⁵⁸ See, *e.g.*, Merger Guidelines, § 5.3.

⁵⁹ See, *e.g.*, Merger Guidelines, § 2.2.1. Indeed, the opposite can be true. See *id.*, § 7.

⁶⁰ An optimal price is one that maximizes profits and may be well above cost. See *generally*, Nolan H. Miller, Ph.D., *Notes on Microeconomic Theory*, Ch. 9, at 236 (Aug. 2006) (<https://business.illinois.edu/nmiller/documents/notes/notes9.pdf>). The classic textbook case study is De Beers, which dominated diamond markets for decades and used its market power to restrict retail output despite a plentiful supply from its mines (the input) in order to keep prices high. See *generally*, A Project Report On Case Study Of “DE BEERS,” (<https://www.scribd.com/doc/97562543/case-study-on-DEBEERS-Diamond>); DeBeers’s Diamond Dilemma, McAdams and Reavis, (<https://mitsloan.mit.edu/LearningEdge/CaseDocs/07-5%20DeBeers%20Diamond%20Dilemma%20McAdams.pdf>) (“In order to keep prices high, therefore safeguard its market dominance, DeBeers was forced to both hold back a large portion of its diamonds from the market and purchase much of the excess supply from these producing countries often at inflated prices”). In a market with effective competition, optimum pricing is not possible as competition drives prices close to cost. See *generally*, *Notes on Microeconomic Theory*, *supra*, Ch. 7, 195.

with lower prices to take market share from Verizon and AT&T, allowing more customers to enjoy the benefits of our increased capacity.”⁶¹

Self-serving statements of future intentions must be disregarded in favor of an analysis grounded in fundamental economics.⁶² If Applicants’ statement that “excess capacity means lost revenue and wasted resources”⁶³ were true, there would not be an ocean of unused spectrum being held by the big four carriers in rural America today. In Petitioners’ experience in rural America, it is more accurate to say that excess capacity limits competition and helps to maintain above-market pricing.

The Merger Guidelines provide that going from four to three competitors is “presumed to be likely to enhance market power.”⁶⁴ Applicant’s newly created model simulations and generalized statements, that New T-Mobile will continue to act as an Un-carrier in a radically reduced competitive landscape, where it enjoys much greater market power than it does today, must be disregarded.⁶⁵

⁶¹ Joint Opposition at 4 (quoting Mike Sievert Declaration at 21).

⁶² *Cf.*, Merger Guidelines, § 2.2.1, § 5.

⁶³ Joint Opposition at 95.

⁶⁴ *See* Merger Guidelines at § 5.3.

⁶⁵ *E.g.*, Merger Guidelines, § 2.2.1 (“Documents created in the normal course are more probative than documents created as advocacy materials in merger review.”), § 5 (presumptive increase in likely coordination in highly concentrated markets).

C. If the Commission Were to Approve the Proposed Transaction, It Must Impose Conditions to Preserve Competition.

The Commission's challenge in evaluating the merger is predicting whether the level of competition that exists today would continue to exist in a marketplace much more concentrated than it is today. If the transaction is approved unconditionally and rural carriers can no longer act as genuine competitors, the public interest most assuredly will not be served. Accordingly, while Petitioners believe denial of the transaction would best serve the public interest, if the FCC were to grant approval, it must impose conditions to preserve competition.

1. Roaming Conditions are Essential to Preserve Competition in Rural Areas.

Petitioners and others discussed at length how in the current market rural carriers have difficulty entering into reciprocal roaming agreements with three of the four nationwide carriers, including T-Mobile.⁶⁶ The Petition and supporting declarations discussed how important roaming on Sprint's network is and will continue to be.⁶⁷ And Petitioners detailed how the proposed merger and possible elimination of Sprint threatens the loss of its only viable nationwide CDMA roaming partner.⁶⁸

While refuting none of the facts set forth in the Petition, Applicants nevertheless dismissed the obvious need for enforceable and meaningful conditions. Instead they offered

⁶⁶ Petition at 40-44. *See also*, Petition To Deny Of The Rural Wireless Association, Inc. at 11-15 (Aug. 27, 2018); Petition To Condition, Or In The Alternative, Deny Any Grant Of The Sprint/T-Mobile Application at 3-4 (Aug. 27, 2018).

⁶⁷ *Id.* at 41.

⁶⁸ *Id.* at 48.

nothing more than vague, non-substantive, and unenforceable promises to be a good roaming partner.⁶⁹ The promises are not just vague, but also not credible because they are inconsistent with the claimed merger benefits. For example, Applicants predict that the decommissioning of the Sprint CDMA network will save many millions of dollars.⁷⁰ Accordingly, economic motivations to shut down CDMA as soon as possible will be stronger than the self-serving but unsupported promise to extend “preferred roaming partner” arrangements.

Since the transaction was announced earlier this year, T-Mobile has had ample opportunity to strike new roaming arrangements or revamp existing agreements with Petitioners and others in the industry, to demonstrate that it will in fact be a strong roaming partner going forward. T-Mobile has so far publicly committed to honor existing roaming arrangements through the end of their terms and to offer roaming in the future.⁷¹ It has not committed to keep Sprint’s CDMA network in place beyond 2021,⁷² rendering those Sprint roaming contracts that expire thereafter useless, once the network is decommissioned. The decision to cut off CDMA earlier than Sprint’s original plan will harm Petitioners Pioneer, Next-Tech Wireless, and SI Wireless, each of whom have made long-term capital investments based on Sprint’s plan to maintain their CDMA network.

⁶⁹ Such as an empty promise to “offer” to be the “preferred roaming partner.” Joint Opposition at iv. And apart from failing to respond meaningfully to much of the Petition, almost everything else about the transaction and Applicants’ promised benefits is to the contrary, *e.g.*, New T-Mobile may not need and will not want rural roaming partners, as discussed above.

⁷⁰ *E.g.*, Joint Opposition at 43-44.

⁷¹ Joint Opposition at 100.

⁷² Joint Opposition at 98.

Petitioners pointed out that because data roaming has been classified as an information service, it is not subject to Sections 201 or 202 of the Communications Act prohibiting unreasonable practices and unreasonable discrimination.⁷³ In a footnote, the Joint Opposition does not dispute the state of the law, but instead cites the Commission rule allowing carriers to file complaints that any roaming terms dictated by New T-Mobile are not “commercially reasonable.”⁷⁴

Relegating small carriers to a complaint process is no substitute for a roaming condition if competition is to be preserved in rural America. Litigation takes time and is expensive, squeezing small complainants. And while there are years of administrative and court case law interpreting Sections 201 and 202, there is a dearth of precedent on what “commercially reasonable terms” means in the data roaming context.⁷⁵ What precedent there is suggests that whatever roaming terms New T-Mobile decides to offer may be considered “reasonable,” no matter how unworkable they may be, as long as long as they offer the same terms to all small carriers.⁷⁶

⁷³ Petition at 43.

⁷⁴ Joint Opposition at n. 384. It also contends that the Petitioners’ information service “argument is not merger-specific.” Not so. The merger will eliminate the Petitioners’ best roaming partner today and supplant it with a much more powerful competitor that states it will not need roaming. So, the expected roaming problems discussed in the Petition are certainly merger-specific.

⁷⁵ As one commenter noted, Section 20.12(e)(2) of the Commission’s rules (“Rules”) “is too vague to impose meaningful regulations.” Data Roaming Regulation, 23 *CommLaw Conspectus* 502, 526 (2015).

⁷⁶ See *Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless*, 2018 WL 3738339 (Aug. 3, 2018) at *4, ¶ 12. Moreover, in *Flat Wireless* the Commission expressly rejected complainant’s attempt to invoke the Title II “just and reasonable” and “not unreasonably discriminatory” standards. *Id.* at ¶ 14 (“We have previously expressly declined to apply these Title II standards to data roaming and see no reason to revisit that decision here”).

Looking back the Verizon-Alltel merger, some ten years ago, substantial roaming conditions were imposed to protect competition and rural citizens.⁷⁷ Here, in a merger consolidating the number 3 and 4 carriers, eliminating the primary nationwide CDMA roaming partner for small rural carriers, T-Mobile has offered just promises. Petitioners would like to believe that T-Mobile will turn out to be a “good partner,” however, there is nothing in the record to substantiate their assertion. Moreover, T-Mobile’s public filing ignored the fact that networks built as Sprint preferred roaming partners are threatened once T-Mobile decommissions CDMA and eliminates its need for partners. One logical and likely outcome of this merger is not just the elimination of Sprint as a competitor, but also Sprint’s partner networks, further reducing competition in rural America.⁷⁸

What’s needed are strong, lengthy, and enforceable roaming conditions, as set forth in the Petition,⁷⁹ to ensure that, (i) small rural carriers have a “good partner” to work with, (ii) rural consumers have access to other carrier networks, and (iii) small carriers can compete in the local marketplace for rate plans offering nationwide roaming. Each of Petitioners have 4G LTE roaming arrangements with other carriers that sometimes require payments that are several orders of magnitude higher than what consumers pay in retail rate plans. Were T-Mobile to insist on such rates, it would cripple small rural carriers, or force them to dramatically throttle customers’ roaming usage, diminishing the experience and driving Petitioners’

⁷⁷ See *Verizon-Alltel Merger Order*, ¶ 178, *et seq.*

⁷⁸ In Petitioners’ experience, Sprint has been a very good partner when it comes to leasing and sharing of spectrum in rural areas, oftentimes leading to far superior coverage and service than that offered by other big carriers. In Petitioners’ experience, T-Mobile rarely leases or shares spectrum and there’s nothing in the record demonstrating that T-Mobile will be a partner equal to Sprint.

⁷⁹ Petition at 43-44.

customers to competitors' networks. If T-Mobile is serious about being a good partner, it can do a lot to demonstrate that right now, and Petitioners would welcome the discussion. In the meantime, Petitioners reiterate the roaming conditions proposed in the Petition:

- New T-Mobile's commitment to honor Sprint's existing agreements with Petitioners to provide roaming on Sprint's networks and unthrottled/unrestricted roaming for its customers on Petitioners' networks.
- The option for each Petitioner that has a roaming agreement with Sprint to keep the rates and terms set forth in that roaming agreement in force for the full term of the agreement, notwithstanding any change of control or termination for convenience provisions that would give New T-Mobile the right to accelerate the termination of such agreement.
- The option for each Petitioner that currently has roaming agreements with both T-Mobile and Sprint to select either agreement to govern all roaming traffic between it and New T-Mobile.
- New T-Mobile may not unilaterally adjust the rates set forth in Sprint's existing agreements with each Petitioner for the full term of the agreement or for ten years from June 18, 2018, whichever occurs later.
- Upon New T-Mobile's shut down of Sprint's CDMA network, if there is no roaming agreement in place between Petitioners and New T-Mobile, New T-Mobile must provide Petitioners with a roaming agreement containing terms and conditions (i) identical to those in a Petitioner's roaming agreement with Sprint, or (ii) equivalent to or better than those then in place with AT&T for 4G LTE and 5G traffic.
- If New T-Mobile restricts its customers from roaming on Petitioners' networks, or throttles, caps, or blocks its customers' data throughput when roaming on Petitioners' networks, Petitioners will have the option to bypass Section 20.12 of the Rules and bring evidence of such conduct to the Wireless Telecommunications Bureau ("WTB") for mediation. If by a preponderance of evidence, Petitioners demonstrate that New T-Mobile has imposed restrictions or throttling on roamers using Petitioners' networks, the WTB shall be empowered to enjoin New T-Mobile from such conduct immediately, pending the resolution of a formal complaint pursuant to Section 20.12.

In sum, this merger cannot serve the public interest in rural areas like those served by Petitioners and other small carriers absent the strongest possible roaming conditions.⁸⁰

2. If Approval Is Granted, There Must Be Spectrum Divestitures Consistent with the FCC’s Well-Established Limits on Spectrum Aggregation.

Petitioners discussed in detail the critical need for sufficient spectrum to be able to compete with 4G today and 5G tomorrow, as well as the challenges and barriers they face to acquiring sufficient spectrum. Petitioners often have less than 60 MHz of low or mid-band spectrum, currently providing 3G and 4G services.⁸¹ Preserving competition for mobile voice and broadband services in rural America may largely depend on Petitioners’ and other small carriers having access to sufficient spectrum.

Applicants’ central argument for approving the merger is their need for spectrum. Over and over, they explain the critical role of acquiring sufficient spectrum needed to compete with AT&T and Verizon.⁸² Applicants thus concede that 20, 40, or 60 MHz of spectrum is not sufficient to compete in a 4G/5G world. Yet, even when Applicants will hold hundreds of megahertz of spectrum in rural areas where they may never need it, their only response to calls for divestiture is to point out something that nobody disagrees with and Petitioners did not argue - that the 238.5 MHz threshold is just a “screen,” not a “cap.”⁸³ They attempt to shift the

⁸⁰ Petition at 40-44.

⁸¹ *Id.* at Exh. A.

⁸² See Joint Opposition at 7, 17, 19-20, 24-27, 29-30, 32-36, 38-39, 43-46, 53-59, 86-88, 95-97.

⁸³ *Id.* at 26.

burden of proof by claiming that the existence of spectrum overages in local markets does not necessarily prove that the merger will harm competition in those markets.⁸⁴

Despite sworn statements detailing Petitioners' need for more spectrum to compete in a 5G world, and multiple citations to Congressional policies promoting competition and wide dissemination of licenses, Applicants proffer a string of unsupportable statements, such as claiming "petitioners are insisting on a 'solution' without demonstrating any problem, or even how this 'solution' would enhance consumer welfare."⁸⁵ Petitioners are fully confident that divestitures providing sufficient spectrum for Petitioners to build competitive 4G/5G networks will enhance consumer welfare and fulfill the multiple Congressional objectives cited above.

Applicants talk a lot about how great their 5G network will be in rural America (and hopefully for consumers it will be a lot better than their 4G network), while completely ignoring, (1) the certain benefits of increased competition if Petitioners gain access to additional spectrum, and (2) the certain harm if Applicants do not divest spectrum and small rural carriers are foreclosed from competing in 5G.⁸⁶ This is the Commission's central charge under the Act, to ensure that wide spectrum disparities (for example 300 MHz to 40 MHz) will not be permitted thwart "a fair, efficient, and equitable distribution of radio service" throughout our nation's rural communities.⁸⁷

⁸⁴ *Id.* at 36.

⁸⁵ *Id.* See also, *id.* at 100 ("T-Mobile and Sprint have demonstrated that the transaction will enhance retail competition and that other wireless providers will continue to exist and flourish").

⁸⁶ See, e.g., *id.* at 37-71. Applicants use unproven simulations to minimize potential harm to rural America if they hold hundreds of megahertz of spectrum more than their rural competitors. See *id.* at 10-12.

⁸⁷ 47 U.S.C. § 309(j)(3)(B).

Applicants state that their small market share in rural markets today necessarily suggests a lack of market power in the future.⁸⁸ If one were to accept all of Applicants' arguments about their need for excessive spectrum (and we do not),⁸⁹ it might actually be difficult for any other carrier to compete with New T-Mobile in rural areas. For example, T-Mobile's promise to build hundreds of new stores and customer care facilities in small towns and rural areas⁹⁰ surely depends on it having sufficient spectrum, but it might also depend on its ability to foreclose its smaller rural competitors from acquiring sufficient spectrum to compete. That's a material question of fact that should be the subject of a hearing.

Second, T-Mobile asserts that if it divests to the level of the screen, it will be less competitive with AT&T and Verizon⁹¹ and that all of the spectrum proposed to be acquired is needed to offer 5G services in rural areas.⁹² In rural areas having sparse populations, such as

⁸⁸ See Joint Opposition at 31, 66, 93-95.

⁸⁹ Applicants all but admit that their stated need for excessive spectrum to provide mobile voice and broadband services is unsupportable when they discuss at length how they will use their excess spectrum to compete outside of the relevant (mobile) market. While there is nothing wrong with consumers using a wireless service as a substitute for wired broadband, there is something very wrong with allowing a merger that will give the merged entity the advantage of holding much more spectrum than it needs, while relegating its direct competitors to much less spectrum than they need to compete in the relevant product market for mobile voice and broadband services.

⁹⁰ Joint Opposition at 93.

⁹¹ *Id.* at 36 (“[A]n FCC decision to force arbitrary divestitures of spectrum would be counterproductive because such divestitures would limit the pro-competitive benefits of the transaction. The engineering model demonstrates not only that New T-Mobile will intensively use the spectrum licensed to the company, but also that removing specific bands or decreasing its volume of spectrum will adversely impact the company’s capacity, speed, and/or coverage.”) Petitioners are constrained to note here that they do not seek “arbitrary divestitures,” but rather those that are well thought out and pro-competitive.

⁹² *Id.* at 29-30 (“The engineering model also documents...how **the full use of the spectrum** is necessary to deliver a 5G network with the consumer benefits documented in the PIS” (footnote omitted, emphasis added). See also, T-Mobile October 11 ex parte, at 3-4.

those served by Petitioners, 100 MHz of spectrum is sufficient to provide 4G and 5G services for many years to come. T-Mobile concedes this point in its own filing, when it proposes to offer “in-home” broadband services, “where available capacity exceeds mobile requirements”, which constitutes almost 85% of rural residents.⁹³ The ability to offer not only mobile, but also fixed, broadband to most of rural America is a powerful admission that Applicants would control far more spectrum than they need to serve the relevant market for mobile voice and broadband services. Just as important, excess spectrum that T-Mobile will use to compete in the fixed market will be unavailable to Petitioners and other small rural carriers, who could put it to use to compete in the mobile broadband market.

Accordingly, Petitioners request the following divestitures and procedures:

- The merged entity should not be permitted to hold more than 238.5 MHz of spectrum in any county. As stated above, the Commission should require the divestiture of a contiguous block of BRS/EBS spectrum and, if necessary, other spectrum, to bring the merged entity within the initial spectrum screen.
- Any divested spectrum must be auctioned, either by the FCC or a third party, on a geographic basis that permits small carriers to have a reasonable opportunity to acquire spectrum. The Commission must not allow divested spectrum to be sold to a single nationwide buyer, locking out small carriers from the opportunity.

3. There Must be Interoperability.

New T-Mobile must commit that its devices will be interoperable with all other carriers using the divested spectrum and that it will take no steps to throttle or interfere with any

⁹³ *Id.* at 65, 94-95. The extent of this excessive holding will be “in over 52 percent of zip codes” “to 52.2 million rural residents and covering 2.4 million square miles, which constitutes over 84.2 percent of rural residents.” In other words, New T-Mobile will have excess spectrum in most of rural America (over 84% of POPs).

consumer's ability to use roam on other carriers' networks.⁹⁴ The Joint Opposition objected to any divestiture, but otherwise did not address this requested condition. Since spectrum divestiture is essential to protecting the public interest if the merger is allowed, interoperability must also be a condition.

III. CONCLUSION.

For all of the reasons set forth above, the Commission should refer the Application for a hearing. Applicants' submission of multiple supplemental and reply declarations, including a veiled attempt to broaden the relevant market to include fixed wireless broadband, plus new economic, engineering, and accounting models, demonstrates that there are fact issues that need a thorough investigation. As it stands today, Applicants have not met their burden to demonstrate that a grant of the Application is in the public interest.

Respectfully submitted,

By:  _____

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⁹⁴ See Petition at 46.

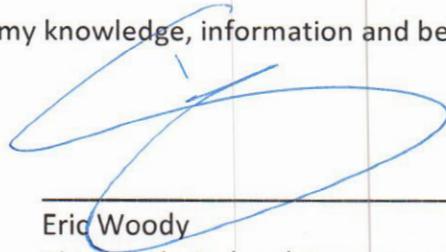
Petitioners' Reply Affidavits

AFFIDAVIT

I, Eric Woody, am the Chief Technical and Operations Officer of Union Wireless.

This statement is provided in connection with a petition to deny ("Petition") T-Mobile's proposed acquisition of Sprint Corporation's mobile voice and broadband business.

I have read the Opposition to Petition to Deny filed by T-Mobile US, Inc. and Sprint Corporation, and the foregoing Reply to Opposition to Petition to Deny ("Reply"), and declare under penalty of perjury that the statements set forth in the Reply to which this affidavit is made part of are true and correct to the best of my knowledge, information and belief.



Eric Woody
Chief Technical and Operations Officer
Union Wireless

October 31, 2018

AFFIDAVIT

I, Richard Ruhl, am the General Manager of Pioneer Cellular.

This statement is provided in connection with a petition to deny ("Petition") T-Mobile's proposed acquisition of Sprint Corporation's mobile voice and broadband business.

I have read the Opposition to Petition to Deny filed by T-Mobile US, Inc. and Sprint Corporation, and the foregoing Reply to Opposition to Petition to Deny ("Reply"), and declare under penalty of perjury that the statements set forth in the Reply to which this affidavit is made part of are true and correct to the best of my knowledge, information and belief.


Richard Ruhl, General Manager
Pioneer Cellular

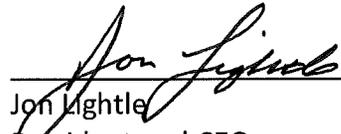
October 31, 2018

AFFIDAVIT

I, Jon Lightle, am the President and Chief Executive Officer of Nex-Tech Wireless.

This statement is provided in connection with a petition to deny ("Petition") T-Mobile's proposed acquisition of Sprint Corporation's mobile voice and broadband business.

I have read the Opposition to Petition to Deny filed by T-Mobile US, Inc. and Sprint Corporation, and the foregoing Reply to Opposition to Petition to Deny ("Reply"), and declare under penalty of perjury that the statements set forth in the Reply to which this affidavit is made part of are true and correct to the best of my knowledge, information and belief.



Jon Lightle
President and CEO
Nex-Tech Wireless

October 31, 2018

AFFIDAVIT

I, Michael Beehn, am the Chief Executive Officer of SI Wireless.

This statement is provided in connection with a petition to deny (“Petition”) T-Mobile’s proposed acquisition of Sprint Corporation’s mobile voice and broadband business.

I have read the Opposition to Petition to Deny filed by T-Mobile US, Inc. and Sprint Corporation, and the foregoing Reply to Opposition to Petition to Deny (“Reply”), and declare under penalty of perjury that the statements set forth related to the business of SI Wireless in the Reply to which this affidavit is made part of are true and correct to the best of my knowledge, information and belief.



Michael Beehn
CEO, SI Wireless

October 31, 2018

CERTIFICATE OF SERVICE

I, David LaFuria, certify that on October 31, 2018 a copy of the Reply to Opposition to Petition to Deny attached hereto was sent via US Postal Service mail to the following:

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