

The Not So Good, Very Bad and Really Weird Merger of T-Mobile and Sprint

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Thank you Carri – It's so great to be speaking before NTCA again. I greatly enjoyed our conversations when I worked at the FCC and I love having you on my side on matters like the Sinclair-Tribune merger and the proposed cap on universal service. And of course, I love Shirley Bloomfield because, who doesn't?

With Thanksgiving just over a week away, our thoughts turn to the three Fs – family, football and food. And no Thanksgiving dinner is complete without the big bird – the turkey that reflects the meal shared by the Mayflower Pilgrims and the Wampanoag people at the “First Thanksgiving” in 1621. Speaking of turkeys, I'd like to talk to you today about one of the biggest in town – the proposed merger of T-Mobile and Sprint.

For those of you unfamiliar with the merger, 17 months ago, in April 2018, T-Mobile and Sprint announced that they would merge in a deal valued at around \$26 billion dollars and sought permission from the Justice Department to do so. The companies filed their license transfer application and public interest statement with the FCC two months later. They argued that the combined company – the New T-Mobile - would be better able to compete with the number 1 and 2 mobile wireless carriers, AT&T and Verizon, making this not a 4 to 3 merger, but a 2 to 3 merger. They argued that cable companies like Comcast and Charter should be considered to be competitors in the market. But knowing that wouldn't be enough, the companies made a lot of promises. Among other things, the companies vowed to accelerate the rollout of the first nationwide 5G mobile wireless network, better serve rural communities and create more jobs. This was followed by promises to freeze prices for 3 years and start a new in-home broadband service that would purportedly compete with cable TV.

The arguments against the merger, made by consumer groups, subscription TV companies like Dish and Altice, and broadband providers serving rural communities like your members were many and compelling. First and foremost, the merger would result in increased prices, by some models as high as 15% with even bigger increases for low-income users of pre-paid services. 4 to 3 wireless mergers in Europe resulted in similar double-digit price increases.

Combining two maverick firms that competed both against Verizon and AT&T and against each other, would result in another behemoth that would now be incentivized to act more like the big incumbents and less like the scrappy competitors that drove down prices, created new family friendly plans, eliminated two year contracts and unlocked phones.

Second, it's absurd to say that cable operators are real competitors in the mobile wireless market. Cable operators, combined, have no more than a few million subscribers, sell service only to their own cable customers and operate as Mobile Virtual Network Operators (MVNO), which means they use the networks of facilities-based carriers to provide service. Sprint, T-Mobile, AT&T and Verizon have tens of millions of customers each and control the access cable operators have to their customers.

Third, the companies' promises are speculative, unenforceable and not specific to the merger. Both Sprint and T-Mobile already had plans to roll out 5G service and Sprint has already done so in 9 cities. Sprint has never had great rural coverage and has instead partnered with rural wireless companies to extend its reach. Thus, Sprint adds nothing to the companies' promises to expand rural coverage. For its part, T-Mobile purchased \$8 billion dollars of mid-band spectrum at the broadcast incentive auction in 2017 to cure some of its rural coverage problems and it will certainly purchase more of that spectrum in the future, including at the newly announced C-Band auction.

The jobs claim, of course, is laughable. The merging parties promised to create "greater economies of scale" and "cost synergies," which inevitably result in closing duplicative retail stores and eliminating other "redundant" staff.

Finally, and critically for members of NTCA, the merger would reduce the opportunities for roaming and spectrum sharing agreements. Sprint has been a long and valuable partner to rural broadband companies, while T-Mobile has shown little interest in such partnerships. Thus, rather than increasing coverage in rural areas, the merger would likely result in reduced coverage.

You might think that with clear evidence of price increases and other consumer and competitive harms, and before a Justice Department that had sued to block the vertical merger of AT&T and Time Warner, and whose Antitrust Chief, Makan Delrahim, had made it abundantly clear multiple times that behavioral remedies were inadequate to resolve competitive harms, this 4-3 merger would have been blocked a long time ago. But you would be wrong.

Instead, we've witnessed one of the worst and weirdest cases of industrial policymaking I've ever seen in any Administration, Democratic or Republican.

The merger moved very slowly at first. The FCC had to stop its unofficial merger clock twice because the companies' documentation was inadequate. The Senate Judiciary Committee held a hearing in the summer of 2018, but it was too early in the process to garner much attention. Things began to heat up early this year, when both the House Energy and Commerce and House Judiciary Committees held hearings that included both T-Mobile's CEO, John Legere and the Executive Chairman of Sprint, Marcelo Claure. At that point, both executives were practically living in DC to visit with policymakers and made it a practice to tweet about their bromance, be it riding scooters around town or preparing for a jog near the Lincoln Memorial. But they and investors were getting nervous. By May 2019, nearly a year had passed since the parties officially asked the FCC to approve the deal, and the end seemed nowhere in sight.

That's when things started to get very strange. On May 20, FCC Chairman Pai issued a statement saying that he would circulate an order to his fellow commissioners "in the coming weeks" that would recommend approval of the merger, touting a number of 5G, rural buildout, pricing and home broadband promises made by the companies. That was followed, almost immediately, by a statement from Pai's Republican colleague Commissioner Brendan Carr that he too would vote to approve the merger. The third Republican Commissioner, Mike O'Rielly, waited several hours before tweeting his support. Their support came despite the fact that neither had seen an order because it didn't exist.

Many of us thought that it was only a matter of time before the Justice Department announced that it too, would approve the merger. After all, didn't the FCC and DoJ decide telecommunications and media mergers together? That certainly has been my experience. The only exception I can think of was in 2002, when the FCC blocked the proposed merger of Dish Network and the Justice Department took another three weeks to announce the same.

But no DoJ announcement came. Nor did the FCC circulate an order to approve the merger, indicating that the sole purpose of Pai's statement was to put pressure on Assistant Attorney General Delrahim to make a decision. The only announcement that came in the weeks that followed was that of 10 state attorneys general announcing a lawsuit to block the merger, filed in the US District Court for the Southern District of New York.

The states' complaint echoes many of the same arguments the merger opponents have made, including, among other things, that the merger will increase prices, reduce innovation and substantially lessen competition in both the retail mobile wireless market and in the sale of access to MVNOs. Moreover,

the complaint alleges, the claimed efficiencies and other promises made by the companies will not ameliorate the competitive harm of the merger.

This pre-emptive strike by the states was unprecedented in this field, and I would venture to say rare in *any* field. States work collaboratively with the Justice Department on mergers, and they were doing so here – attending the same depositions, meeting with the same interested parties, reviewing the same evidence. To act too quickly could risk alienating the DoJ on this and future antitrust matters. But the states felt that they couldn't let the Pai announcement go without a response – they too wanted to put pressure on Delrahim – to ignore Pai's invitation and join them in blocking the deal.

I had hoped that Delrahim would stick to his principles and listen to his staff, which was widely reported to have recommended that DoJ block the merger. I compared the pressure Delrahim was getting to the pressure that Reagan's Assistant Attorney General for Antitrust, William Baxter got from powerful Administration officials to drop the antitrust lawsuit that would eventually result in the breakup of AT&T. The pressure Baxter received was far more intense and public and came from far higher above. Indeed, Secretary of Defense Caspar Weinberger, Commerce Secretary Malcom Baldrige and Counselor to the President Edwin Meese even went so far as to approach President Reagan, who demurred, ending the effort to change Baxter's mind.

Even though Delrahim had publicly embraced Baxter as one of his role models, he nonetheless gave in. And what he did defied both common sense and his own beliefs about behavioral conditions. On July 26, over two months after Pai announced his intention to approve the merger, DoJ did the same, although it took a much different approach. It found the 4-3 merger as proposed to be anticompetitive and in violation of the antitrust laws. However, it declared that it would nonetheless approve the merger because the companies had agreed to both structural and behavioral conditions that could potentially create a new fourth "competitor," Dish Network. Put most simply, the arrangement would work like this – Dish would get Boost Mobile and its 9 million prepaid customers and would share T-Mobile's network for 7 years, reselling T-Mobile service under the Dish name until Dish builds its own facilities-based network. In addition, within 5 years, the New T-Mobile would have to make decommissioned cell sites and retail stores available to Dish.

I call this arrangement a "Mobile Frankenstein," because DoJ has cobbled together a creation that may never stand on its own. Where AT&T has about 160 million subscribers, Verizon has about 120 million and the New T-Mobile would have nearly 140 million, Dish would start with just 9 million *prepaid* Boost customers. If you think about it, that's like starting with zero customers, since

prepaid subscribers can drop your service at any moment. Dish would then have to rely on the good graces of its competitor, T-Mobile, for use of its network and other logistics, such as operational, customer and billing support. What is T-Mobile's incentive to make sure that Dish succeeds? It has none. As 7 noted economists said in a recent court filing, the deal gives T-Mobile opportunity to engage in "strategic pricing, slowdown of provision, alteration of terms or quality of assets and services." Anybody who remembers the days when dominant telecoms had to make their networks available to competitors will also remember the many ways the incumbents threw up roadblocks to competition. And as for decommissioned cell sites and stores, do you think New T-Mobile will make the best or worst of these available to Dish?

Finally, and critically, Dish has to actually build and operate the network. On top of the \$5 billion Dish must pay for the divested T-Mobile and Sprint assets, estimates are that it will cost at least \$10 billion more to build the network, which means that Dish will have to find investors. Over the past 8 years, Dish's track record for building networks hasn't been promising. During that time, it has repeatedly told the FCC that it would build out its vast spectrum holdings, and instead of doing so, it has repeatedly sought waivers. Moreover, Dish has never operated a mobile wireless network.

I disagree with those who say that Dish and its CEO Charlie Ergen don't actually want to build this network and instead want only to sell the large amount of spectrum it has. I think they want to build and operate a network, and in fact Dish tried to buy Sprint a few years ago. But wanting to build a network is different from being **able** to build a network. DISH hasn't been able to build its network in favorable conditions. It is now asking for permission to do so while its 3 competitors get bigger and stronger and hold immense power over its ability to gain customers. The bottom line is that American consumers and competitors, like your companies, should not have to bear the risk of Dish failing.

The story doesn't end there. On August 14, 3 weeks after the Justice Department announced the settlement, the FCC finally circulated the order that Chairman Pai promised in May. The expectations were that the Republican Commissioners would cast their yes votes right away, forcing the Democrats to vote shortly thereafter. Yet again, expectations were dashed. Commissioner Carr's staff engaged in weeks long conversations with T-Mobile's attorneys that only they were privy to. T-Mobile's attorneys met no fewer than 9 times with the Carr office, ostensibly to shore up what was reported to be a weak order that wouldn't withstand scrutiny from the trial judge.

Despite drastic changes to the merger agreement and the changes resulting from the opaque communications between T-Mobile and the Carr office, Pai refused to

put the new arrangement out for public comment. This defies both the Administrative Procedure Act and recent precedent. When Sinclair proposed divestitures for its failed merger with Tribune, the FCC put the revised merger out for public comment. But none of this stopped the Commission from moving forward in approving the merger.

The FCC's final order was no surprise. The majority said that the Dish deal wasn't necessary to make the merger in the public interest; a 4-3 combination was just fine, thanks to the numerous promises the companies made on 5G and rural broadband deployment, pricing and in-home broadband. Thankfully, Commissioners Rosenworcel and Starks fervently opposed the merger, authoring dissents that should be very helpful in the states' lawsuit. For a former Wheeler staffer like myself, the majority's hypocrisy was particularly galling – when we allowed the AT&T-DirectTV and the Charter-Time Warner Cable mergers with conditions that, among other things, would connect millions more Americans, the howls from the Pai and O'Rielly offices were long and loud.

And that's where we are today – just weeks from the trial, which starts on December 9. With the Justice Department's admission that the merger as proposed can only be fixed by propping up Dish as a potential competitor, the states' challenge in court is to refute the DoJ's argument that the Dish fix is “timely, likely and sufficient.” As I discussed earlier, I believe that the states have a strong response to that argument. Meanwhile, T-Mobile has been trying desperately to pick off states attorneys general with meager promises that largely match what the FCC is already requiring. They succeeded in convincing two states to drop off the lawsuit – Mississippi and Colorado, though the number of states' attorneys general now suing has grown to 16, covering more than half of the US population.

As has been the norm for this merger, every week brings with it a new, strange twist. Last week it was the apparently false rumor that Legere was a candidate to become CEO for WeWork, the collaborative working space company that was recently bailed out by Sprint's parent company Softbank, whose Executive Chairman is, you guessed it, Marcelo Claure. And two days ago, T-Mobile announced that Legere will step down as CEO in April. This news is far from benign, since one of T-Mobile's arguments from the beginning has been that Legere, ever the maverick, would ensure that all of the New T-Mobile's promises are kept and that it would continue to battle Verizon and AT&T even as it approached their size and power.

So, who knows what next week will bring? I know what it will bring for me, and probably for most of you. Lots of turkey. Thanks again for inviting me to speak today.