

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations, Applications of American H Block Wireless L.L.C., DBSD Corporation, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time, WT Docket No. 18-197

Most rational market onlookers, from the Wall Street experts to individual users to the casual observer, will agree that some type of major transaction involving Sprint was inevitable. For a multitude of reasons, Sprint has struggled to keep pace with its competitors, and the record contains strong evidence that, going forward, Sprint would have been extremely unlikely to be able to compete on its own. While some will surely argue that the company is still making capital expenditures, its network has fallen behind others and the evidence suggests it is struggling to maintain its customer base, even while slashing prices. The application may not have been officially based on a failing firm defense, but the company's position suggests that would not be far from reality. And, the challenges – and expenses – for Sprint were only going to increase dramatically with the advent of 5G. In fact, Sprint admits that it is “unlikely to play a meaningful competitive role as a standalone company in the years to come” and that “[its] network is deficient, it is losing customers, and it cannot generate enough cash to invest in its network, pay its debt obligation, and compete effectively.”¹ I am amazed by how people speculate about the health and viability of a company for years, but, when an actual transaction comes to fruition, the company is suddenly made out to be some sort of industry juggernaut without which the vibrant and competitive marketplace as we know it will cease to exist.

Therefore, only after thoroughly reviewing the draft order, the docket materials, and considering the views of a wide range of participants, do I vote in support of the merger of T-Mobile and Sprint, as it is in the public interest, consistent with the provisions of the statute, and will result in a more competitive and dynamic marketplace. Contrary to some accusations, I did not vote or indicate my vote without doing the accompanying, and necessary, review. Substantively, combining spectrum holdings and networks, along with the efficiencies resulting from the combined company, will lead to improved quality, faster deployment of 5G and other new, innovative offerings, and cost savings that will benefit American consumers through greater choice, better service, and lower prices. It will also lead to a less leveraged company, which is an important factor from my viewpoint. Because of all of this, I am at a loss to see any merit in the collection of states challenging the transaction or to see their efforts as more than an influence campaign being driven by larger political motives.

While I am supportive of this transaction, there are portions of today's item and our merger reviews, in general, that are woefully out of date and need to be improved. That said, I acknowledge that these issues arise because of Commission precedent and policy that predate the current administration.

In particular, it's important to recognize that the communications sector has changed remarkably in the last few years. Discrete industry segments are now converging: mobile and fixed wireless are providing broadband speeds; video and audio content are carried over the Internet using various distribution paths; and satellite offerings have also improved, providing a viable alternative to traditional offerings. Americans have more options for receiving information and communicating than ever before. And, this is just the tip of the iceberg, the promise of 5G could revolutionize the role of wireless

¹ Ex Parte Letter from Regina M. Keeney, Lawler, Metzger, Keeney & Logan, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission 2-3 (Apr. 19, 2019).

networks, making them truly indistinguishable from their wired cousins, or perhaps even launching them well beyond traditional networks.

But, nonetheless, the Commission's merger review process still takes a very siloed view of competition. I frequently raise that the Commission and others, including the Department of Justice (DOJ), need to update and modernize their requisite market definitions. Even if you look solely at the myopic and out-of-date mobile broadband and telephony market used in this item, there isn't much consideration given to the cable offerings, unlicensed systems, or satellite services, among others. To act as if these services are not substitutes for one another is turning a blind eye to reality.

Unfortunately, this view permeates much of our merger analysis. It undergirds both our initial spectrum and competition, or HHI, screens. Although these metrics were initially set up as transaction tools to provide clarity to parties about those markets where the Commission would take a closer look and those that were presumed to have no competitive effect,² these artificial limits have instead been used to demarcate where the Commission will start imposing conditions or, worse yet, signal that a merger cannot be approved. These should be, at best, eliminated or, at a minimum, seriously reconsidered and modified accordingly.

Even more egregious is the seriously flawed enhanced factor review for transactions involving frequencies under 1 GHz, which was formally added to our spectrum screen, prior to the Broadcast Incentive Auction in 2014.³ This more stringent look at low-band spectrum aggregation has never had any effect whatsoever on the Commission's analysis, and it is still unclear exactly what it entails. I am pleased that others are now seeing its futility and requesting that the Commission reevaluate this extra hurdle, whatever it may be. There may be some merit in reviewing the competitive effects of a transaction and ensuring that it is in the public interest, but a loosey-goosey standard with no defined parameters is not transparent, leads to uncertainty, and can result in arbitrary and capricious findings.

Further, this item contains a lot of back and forth about the pros and cons of various economic models, and, in the record, interested parties spend a lot of time and effort ripping apart different submissions. Each and every model appears to have a flaw of some kind, and each and every input seems to be debated. In the end, determining the true effects of a merger is not an exact science. These models are informative, not determinative; we cannot predict the future. There is no model or metric that will take into account the benefits of upgraded 5G networks and new service offerings, greater capacity and lower costs, and the overall expense and resources that it takes to compete in the mobile sector.

Having a third, strong nationwide wireless competitor that is capable of more effectively competing with the two market leaders is in the public interest. For this reason and others, I am skeptical about whether the conditions imposed are absolutely necessary. The presence of AT&T and Verizon will act as a constraint on T-Mobile's ability to change its rates drastically. Further, there are other offerings, including other MVNOs and the entry of cable companies into the wireless space, that will also constrain pricing in urban markets. To the extent the merged company steps away from what the market will support, it merely invites new and expanded competitors to out-maverick it.

² *Applications of AT&T Wireless Inc. and Cingular Wireless Corporation For Consent To Transfer of Control of Licenses and Authorizations*, Memorandum Opinion & Order, 19 FCC Rcd 21522, ¶¶ 108-109 (2004).

³ *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket Nos. 12-269, 12-268, Report and Order, 29 FCC Rcd 6133, 6237-6240 ¶¶ 279-289 (2014).

I am also concerned any time I see conditions that appear to be an attempt to resolve larger policy issues of general applicability better suited for a Commission proceeding, such as requiring heightened construction requirements. Additionally, in response to critics, T-Mobile has made a three-year pricing commitment that they will maintain or offer better rate plans. During this three-year period, T-Mobile will experience huge cash outlays as it seeks to deploy 5G. I will be watching to see if this commitment hinders T-Mobile's upgrade or expansion plans. These various conditions were offered by the parties to ease an approval, so, while I don't think they are necessary, I will not object to them. As I have stated before, I cannot stop a company from stabbing itself in the foot.

As for the DOJ conditions and process, which I was not privy to, I am concerned about the precedent set when another agency takes an action that forces the Commission's hands. Unfortunately, these conditions are necessary to get another agency's approval and, as I am in favor of the overall merger, I am not in a position to realistically reject them. But, I worry that the applicant is divesting more than needed to mitigate the imaginary concerns of some other regulators. All told, however, that is not to suggest that I don't see the possibilities of DISH's expansive entry into the market as intriguing.

In closing, I fervently believe that there is no magical number of entities that make a marketplace competitive. It would be nice if it were that simple, but you also need to take into consideration the strength of the participants, the structure of the market, and the future demands placed on networks and providers as they seek to respond to consumer demand. Those who solely look at a number are taking the easy way out. This merger will lead to a more competitive marketplace, hasten the delivery of next-generation services, and improve the combined company's service quality and network reach beyond what either company can do on its own. Thus, I look forward to the new company meeting its commitments and bringing its fervent competitive style to bear on the market for the betterment of the American consumer.

I thank Chairman Pai for his work to bring the transaction to a conclusion at the Commission, his willingness to accommodate my edit suggestions, and his overall leadership on the matter. I approve.