Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of T-Mobile US, Inc.	)	WT Docket No. 18-197
and Sprint Corporation for Consent to	)	
Transfer Control of Licenses and	)	
Authorizations	)	

REPLY OF PUBLIC KNOWLEDGE, OPEN MARKETS INSTITUTE, WRITERS GUILD OF AMERICA, WEST, INC., COMMON CAUSE, & CONSUMERS UNION

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October 31, 2018

EXECUTIVE SUMMARY

The record compiled by the Federal Communications Commission clearly demonstrates that the proposed transaction will substantially reduce competition in the wireless market and harm consumers. Post-merger, New T-Mobile, along with AT&T and Verizon would dominate the wireless market. The transaction would leave customers facing the types of harms the FCC and Department of Justice identified in their review and ultimate rejection of the AT&T-T-Mobile transaction in 2011 – a market with higher prices, reduced variety in products and services, lower innovation, poorer quality of service, and reduced incentives to invest and compete.

The proposed transaction will also raise the already high barriers to new market entry in the wireless market, and making it more difficult for MVNOs and rural providers to grow and serve their customers. The tools the FCC and DOJ use to analyze the likely effects of transactions all indicate that this merger is highly anti-competitive and will harm consumers. Further, the public interest benefits alleged by the merging firms are either speculative or not merger-specific and should not be given credence. As structured, the T-Mobile-Sprint combination is illegal on its face under the antitrust laws, does not serve the public interest, and should be rejected.

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Public Knowledge; Open Markets Institute; Writers Guild of America, West, Inc.; Common Cause; and Consumers Union, the advocacy division of Consumer Reports, submit this Reply in response to the Federal Communications Commission's ("Commission" or "FCC") Public Notice,[1] and pursuant to section 1.939 of the Commission's rules.[2] Contrary to the statements of T-Mobile US, Inc. ("T-Mobile") and Sprint Corporation ("Sprint") (collectively, "Applicants"), the record clearly demonstrates that the Applicants' proposed combination would harm competition and consumers, does not serve the public interest, and should be denied.

I. THE RECORD DEMONSTRATES THE MERGER IS ANTICOMPETITIVE, WILL HARM CONSUMERS, AND UNNECESSARY FOR NEXT-GENERATION 5G NETWORK DEPLOYMENT.

A. The Record Clearly Demonstrates the Proposed Transaction is Anticompetitive and Will Harm Consumers.

The record compiled by the Commission clearly shows that the proposed transaction is a classic horizontal merger that would substantially reduce competition in the wireless voice and broadband market and harm consumers, and should be denied. The proposed combination of Sprint and T-Mobile would "likely result in higher prices, less choice, lower quality, and slower innovation—to the detriment of U.S. wireless subscribers."[3]

The Applicants contend that the Commission should approve the combination because additional wireless market competition is just around the corner. However, in reality, such

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[1] T-Mobile US, Inc. and Sprint Corporation Seek FCC Consent to the Transfer of Control of the
[2] 47 C.F.R. § 1.939.
[3] Petition to Deny of the American Antitrust Institute, WT Docket No. 18-197 (filed Aug. 27, 2018) ("AAI Petition"). *See also e.g.*, Petition to Deny of Union Telephone Company, Cellular Network Partnership, and Oklahoma Limited Partnership, Nex-Tech Wireless, LLC, SI Wireless, WT Docket No. 18-197, DA 18-740 at 35-36 (filed Aug. 27, 2018) ("Union Telephone, *et al*. Petition"), Petition to Deny of The Greenlining Institute, WT Docket No. 18-197, at 4-7 (filed Aug. 27, 2018).

market entry is actually very unlikely in the near- to mid-term, if ever.[4] As antitrust regulators have made clear, to deter the anticompetitive effects of a horizontal merger, new competitor entry "must be rapid enough to make unprofitable overall the actions causing those effects," and new market entry must be likely.[5]

Currently, there are no potential competitive wireless market entrants that could mitigate the harms resulting from the merger. The substantial barriers to entry in the wireless market are well established and understood.[6] As Charter explains,

> [t]he combination of very high spectrum license acquisition costs, significant network deployment costs, tower site acquisition or leasing and construction costs, costs of purchasing network equipment, back haul costs, and the costs of interconnection and roaming, all combine to create an extremely high barrier to entry for new mobile facilities-based participants.[7]

Sprint itself made similar claims regarding high barriers to entry in its opposition to the proposed 2011 combination of AT&T/T-Mobile, highlighting "the considerable time and expense of acquiring spectrum, building and supporting a network, developing handsets, building brand equity, and investing in new technology and network support.[8] Here, the proposed combination will actually make new competitive entry more difficult by concentrating the market for spectrum and roaming.

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[4] *See e.g.*, Petition to Deny of Dish Network Corporation, WT Docket No. 18-197, at 43-44 (Aug. 27, 2018) ("Dish Petition").
[5] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* §§ 9.1-9.2 (2010), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf ("*Horizontal Merger Guidelines*").
[6] *See* Petition to Deny of Free Press, WT Docket No. 18-197, at 45-47 (filed Aug. 27, 2018).
[7] Comments of Charter Communications, Inc., WT Docket No. 18-197 (filed Aug. 27, 2018).
[8] Complaint, Sprint Nextel Corp. v. AT&T, Inc., AT&T Mobility LLC, T-Mobile USA, Inc., and Deutsche Telekom AG, Case No. 11-cv-01600 ¶ 141 (D.D.C. filed Sept. 6, 2011).

The Applicants' proposed merger will result in spectrum holdings far in excess of the FCC's spectrum screen.[9] The combined firm would be left "controlling more than one-third of low- and mid-band spectrum… and more than one-third of mmW spectrum in significant parts of the country."[10] The resulting level of spectrum aggregation presents substantial public interest and competitive harms and would likely have a drastic impact on broadband competition by creating an even higher barrier to entry in an already highly concentrated wireless market.[11]

"On a national basis, 92% of the population of the United States – or more than 284 million people – live in counties in which the spectrum screen would be exceeded post-merger."[12] The Rural Wireless Association notes that New T-Mobile would exceed the Commission's spectrum screen in over 63% of U.S. counties, including all of the 130 most populous counties. In 37 of the 57 states and territories, New T-Mobile would exceed the spectrum screen in over half the counties, and "[i]n predominantly rural states, more than 80% of the counties in each state will exceed the 238.5 megahertz spectrum screen post-merger."[13]

As the Rural South Carolina Operators explain, "[i]n *all* but one county in South Carolina the New T-Mobile exceeds [the spectrum screen]. In Laurens County, SC and Calhoun County, SC… New T-Mobile would hold 342.5 MHz of low and mid-band spectrum – nearly *half* of all

[9] *See e.g.*, Dish Petition at 68-74, Petition to Deny of Communications Workers of America, WT Docket No. 18-197, at 21-23 (filed Aug. 27, 2018) ("CWA Petition"), Petition to Deny of Voqal, WT Docket No. 18-297, at 3, 17-18 (filed Aug. 27, 2018) ("Voqal Petition").
[10] Comments of Frontier Communications Corporation and Windstream Services, LLC, WT Docket No. 18-197, at 1 (filed Aug. 27, 2018) ("Frontier & Windstream Comments").
[11] *See id*. at 1-2, 4.
[12] CWA Petition at 23.
[13] Petition of the Rural Wireless Association, WT Docket No. 18-197, 18, 19-22 (Aug. 27, 2018) ("RWA Petition"). *See also* Voqal Petition at 17-18 ("Based on the data submitted by Sprint and T-Mobile… New T-Mobile would exceed the spectrum screen by a margin of 10% or more in 100% of the first 400 counties listed in Appendix L-1 [of its Public Interest Statement] and 65.4% of all 3228 U.S. Counties."), Frontier & Windstream Comments at 2.

the spectrum available for mobile services in those counties."[14] As a result, "the spectrum aggregation caused by the proposed merger… will ultimately lead to less broadband services in rural areas in South Carolina."[15] Even for large incumbent local exchange carriers like Frontier and Windstream, "access to sufficient spectrum at reasonable costs remains a significant challenge, and further spectrum concentration would exacerbate that problem."[16]

Congress, the Commission, and the Department of Justice ("DOJ") have each insisted that high levels of spectrum concentration are incompatible with healthy competition in the wireless market. For example, Congress has directed the Commission to ensure that spectrum transactions serve the public interest,[17] which the Commission has interpreted as a mandate to avoid an excessive concentration of licenses in both spectrum auctions and secondary market transactions.[18] In fact, Congress explicitly explained that "avoiding excessive concentration of licenses and…disseminating licenses among a wide variety of applicants," was critical for the agency to "promote economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people."[19] In the FCC's 2014 *Mobile Spectrum Holdings Order*, DOJ explained that the wireless marketplace is characterized by factors that make anticompetitive conduct more likely, including high levels of market concentration, high levels of spectrum aggregation by few firms, high margins, and high barriers

[14] Petition to Condition or Deny of Rural South Carolina Operators, WT Docket No. 18-197, at 4 (filed Aug. 27, 2018). ("Rural South Carolina Operators Petition").
[15] *Id*. at 2.
[16] Frontier and Windstream Comments at 4.
[17] 47 U.S.C. § 310(d).
[18] Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, GN Docket No. 12-268, *Report and Order*, FCC 14-63, 15 ¶ 27 n.84 (rel. June 2, 2014) ("*Mobile Spectrum Holdings Order*").
[19] 47 U.S.C. § 309(j)(3)(B).

to entry.[20] DOJ detailed that access to spectrum is a critical factor to ensure wireless competition.[21] In that proceeding, the FCC agreed with DOJ's description of the wireless market and explained that "spectrum is a limited and essential input for the provision of mobile wireless telephony and broadband services, and ensuring access to, and the availability of sufficient spectrum is critical to promoting the competition that drives innovation and investment."[22] The Commission concluded "[t]he Communications Act has long required the Commission to examine closely the impact of spectrum aggregation on competition, innovation, and the efficient use of spectrum to ensure that spectrum is allocated in a manner that serves the public interest… and avoids the excessive concentration of licenses."[23]

Some merger supporters essentially urge the Commission to use this proceeding to entirely undermine its findings, and those by the DOJ, in the FCC's *Mobile Spectrum Holdings Order* and disregard spectrum aggregation as a potential cause of harm to consumers and competition in the wireless marketplace.[24] The Applicants themselves have correctly rejected these arguments in prior FCC filings.[25] The Commission should continue to use its spectrum screen as a tool to promote competition and the public interest. In the present transaction, the

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[20] *See Ex Parte* of the U.S. Department of Justice, WT Docket No. 12-269, at 11 (filed Apr. 11, 2013), *Ex Parte* of the U.S. Department of Justice, WT Docket No. 12-269, at 2 (filed May 14, 2014).
[21] *See Ex Parte* of the U.S. Department of Justice, WT Docket No. 12-269, at 8 (filed Apr. 11, 2013).
[22] *Mobile Spectrum Holdings Order* at 35 ¶ 67.
[23] *Id*. at 35-36 ¶ 67.
[24] *See e.g.*, Comments of the International Center for Law and Economics, WT Docket No. 18-197, at 12-17 (filed Sept. 17, 2018).
[25] *See e.g.*, Comments of Sprint Nextel Corporation, WT Docket No. 12-269 (filed Nov. 28, 2012), Comments of T-Mobile USA, Inc., WT Docket No. 12-269 (filed Nov. 28, 2012), Reply Comments of T-Mobile USA, Inc., WT Docket No. 12-269, at 3 (filed Jan. 7, 2013) (explaining "the relative scarcity of spectrum compared to demand requires ongoing Commission oversight of spectrum holdings to prevent undue concentration." "T-Mobile agrees… that the burden of proof should be on the proponents to demonstrate the pro-competitive nature of any transaction for any markets that would result in spectrum holdings in excess of the screen." *Id*. at 17.).

Commission should reject the Applicants' merger because it would unduly concentrate spectrum holdings that are critical for competition.

Roaming is also a barrier to competitive entry. As Dish explains, only the four nationwide wireless providers offer any significant wholesale and roaming services, and post-merger, New T-Mobile would account for more than 60% of those connections. "Roaming is an essential input for a potential entrant's ability to compete in the mobile voice/broadband market. Therefore, an increase in concentration in that market is likely to raise the prices of these services, thereby raising the costs of additional market entry and reducing its likelihood."[26] Altice explains that the proposed transaction threatens its plans to enter the market as a hybrid MVNO because T-Mobile has refused to make any commitments regarding the combined firm's continued commitments to offer competitive lease terms and prices to MVNOs.[27] Other potential market entrants, particularly those with even less leverage than a cable provider with the scale of Altice, are likely to be similarly disadvantaged.

Not only is roaming critical for new market entrants, but it is also vital for the continued survival of smaller, regional and rural wireless carriers, as well as rural fixed broadband providers. The proposed transaction not only makes the emergence of new competition increasingly unlikely, but it also threatens to anticompetitively harm existing providers.

T-Mobile has traditionally not focused on rural consumers, and the loss of Sprint as a partner to rural broadband providers could be devastating. As NTCA notes, "[s]everal rural providers rely on their roaming and spectrum use relationships with Sprint to offer a seamless

[26] Dish Petition at 57. *See also*, Union Telephone, *et al*. Petition at 2, Petition to Deny of C Spire, WT Docket No. 18-197, ULS File No. 0008224209, *et al*., at 2-5 (filed Aug. 27, 2018) ("C Spire Petition").
[27] *See* Petition to Condition or Deny of Altice USA, Inc., WT Docket No. 18-197, at 2-3, 10-11, 14-18, 22 (filed Aug. 27, 2018).

mobile broadband product to rural consumers. There are no assurances that New T-Mobile will honor and extend current Sprint agreements or enter into future spectrum use agreements or reciprocal roaming arrangements…"[28] RWA similarly explains that "elimination of Sprint will not only remove a facilities-based LTE carrier…but it will completely remove a nationwide LTE roaming option for small rural carriers and a wholesale network option to MVNOs, M2M, and other IoT service providers."[29] C Spire details that Sprint has been the disruptive pro-competitive force and market leader regarding wholesale and roaming arrangements with competitive wireless carriers, explaining, "[t]he loss of Sprint as a potential roaming partner will be particularly harmful to rural CDMA carriers when the merger accelerates the dismantling of the wide-area CDMA network that many competitive carriers depend on for essential roaming services."[30]

While the Applicants allege that New T-Mobile will continue to be a wholesale and roaming partner with rural providers and MVNOs,[31] even T-Mobile and Sprint's current roaming partners that support the proposed transaction cannot verify that the combined firm will actually offer wholesale and roaming agreements that allow the MVNOs to continue serving their customers. Instead, these MVNOs can only say they hope, but cannot confirm that New T-Mobile will consider continuing to partner with them.[32] These half-hearted assurances are

[28] Petition to Deny of NTCA-The Rural Broadband Association, WT Docket No. 18-197, at 1 (filed Aug. 27, 2018) ("NTCA Petition").
[29] RWA Petition at 29.
[30] *Id*. at 3-4.
[31] Joint Opposition of T-Mobile US, Inc. and Sprint Corporation, WT Docket No. 18-197, at 93-94, 98-102 (filed Sept. 17, 2018) ("Joint Opposition").
[32] *See e.g.*, Comments of TracFone Wireless, Inc., WT Docket No. 18-197, at 2 (filed Sept. 13, 2018), Comments of Shenandoah Telecommunications, Inc., WT Docket No. 18-197, at 2 (filed Sept. 17, 2018) ("Shenandoah Comments"), Comments of Republic Wireless, WT Docket No. 18-197, at 2-3 (filed Sept. 7, 2018).

entirely insufficient to overcome the significant anticompetitive harm that New T-Mobile will have the capacity and incentives to inflict on smaller carriers, and thus ultimately, consumers.

In addition to increasing barriers to entry that shut off potential new market entry, the proposed transaction also triggers significant increase in the Herfindahl-Hirschman index ("HHI") in the wireless market, indicating substantial threats to competition and resulting harms to consumers.[33] As a result, "the proposed merger is presumptively anticompetitive under well-established antitrust case law."[34] Free Press conservatively estimates a national HHI increase of 467 points, resulting in a post-merger HHI of 3,342,[35] and the American Antitrust Institute ("AAI") estimates a post-merger HHI of approximately 3,250.[36] This level of "market concentration would vastly exceed the HHI that would have resulted from the rejected AT&T/T-Mobile merger."[37] In some local markets, HHI is likely to be even higher. For example, Free Press' analysis found the merger is likely to "increase the level of market concentration by more than one thousand points in many CMAs with very large low-to-middle-income populations, such as New York, Los Angeles, Chicago, Houston, and others."[38] Importantly, the proposed transaction eliminates the significant head-to-head competition between T-Mobile and Sprint, eliminating "not one, but two 'mavericks,' from the wireless marketplace."[39] Consequently, New T-Mobile would likely find that "maintaining a competitive 'peace' with its rivals would be more

[33] The Herfindahl-Hirschman Index, or HHI, is a commonly used measure of market concentration, calculated by taking the squares of the market share of each company in the market, and adding them together. *See Horizontal Merger Guidelines* § 5.3.
[34] CWA Petition at 17. *See also Id.* at 16-18, Dish Petition at 74-76, AAI Petition at 6.
[35] Free Press Petition at 24.
[36] AAI Petition at 7.
[37] Free Press Petition at 24 (citing Complaint, U.S. v. AT&T Inc. & T-Mobile USA, Inc., Case No. 11-01560 ¶ 25 (D.D.C. Sept. 30, 2011) ("AT&T/T-Mobile Complaint"), finding the national HHI post-merger of AT&T and T-Mobile would be 3,100).
[38] Free Press Petition at 24.
[39] C Spire Petition at 11. *See also id*. at 12-13, CWA Petition at 5, AAI Petition at 3-4, 14-15.

profitable than trying to gain market share by competing aggressively on price, quality, and innovation."[40] Because the proposed combination will raise barriers to competitive entry and further consolidate an already highly concentrated wireless market, the transaction can be expected to lead to higher prices for consumers.[41]

Rather than address the substantial likely harms to wireless market competition and consumers, the Applicants and the merger's proponents unpersuasively argue that the Commission should disregard its very recent prior findings under both current and former agency leadership, and drastically expand the definition of the relevant marketplace to include both wireless and fixed broadband services.[42] The Commission should reject this gambit. The FCC has previously found that there are salient differences between wireless and fixed broadband technologies, and clear differences in the consumer demand and preference for each type of service, and that they are not functional substitutes.[43] The Commission should not change its analysis in this proceeding to favor the Applicants.

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[40] AAI Petition at 4, *see also id*. at 8-11.
[41] *See e.g.*, Dish Petition at 76-78, AAI Petition at 3-4, 6-7, Union Telephone, *et al*. Petition at 7-18, C Spire Petition at 11.
[42] *See e.g.*, Joint Opposition at 65-71, Comments of Free State Foundation, WT Docket No. 18-197, at 3, 9-10 (filed Aug. 27, 2010), Opposition to Petitions to Deny of the Information Technology & Innovation Foundation, WT Docket No. 18-197, at 6-8 (filed Sept. 17, 2018).
[43] *See* Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 17-199, *2018 Broadband Deployment Report*, FCC 18-10, at 7 ¶ 18 (rel. Feb. 2, 2018) (explaining "we disagree with those that argue that mobile services are currently full substitutes for fixed service.... there are salient differences between the two technologies…. there are clearly variations in consumer prefernces and demands for fixed and mobile services."); Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Communications Act of 1996, Amended by the Broadband Data Improvement Act, GN Docket No. 15-191, *2016 Broadband Progress Report*, FCC 16-6, at 8-9 ¶ 17 (rel. Jan. 29, 2016) (finding "fixed and mobile broadband services are not functional substitutes for one another…. in today's society, fixed and mobile broadband are both critically important services that provide different and complementary capabilities, and are tailored to serve different customer needs.").

B. The Record Clearly Demonstrates the Proposed Transaction is Unnecessary for 5G Network Deployment.

Since its failed 2011 attempt to merge with AT&T, T-Mobile's success has shown that a diversified wireless market is a positive for consumers, innovation, and competition. Given T-Mobile's impressive track record of doubling its customer base, deploying a 4G LTE network, building a best-in-class customer service team, and introducing pro-consumer and innovative pricing and service plans, it appears that acquiring Sprint is unnecessary for T-Mobile to continue driving innovation and competition in the wireless market.[44]

The Commission should not give credence to any claims by the Applicants that 5G deployment is a merger-specific benefit.[45] As the Applicants have said repeatedly, pre- and post-merger announcement, both companies plan to deploy independent nationwide 5G networks and have the sufficient spectrum, financial resources, and incentives to do so.[46] Indeed, the record contains "ample evidence conclusively demonstrating that Sprint and T-Mobile each will deploy competitive 5G networks if they are not permitted to merge."[47] The Applicants continue to attempt to undermine these claims in this proceeding, but both firms continue to publicly state they will be deploying nationwide 5G networks. Finally, the Commission should not accept any claims that the proposed transaction is necessary for the United States to deploy a 5G wireless network. As AT&T explains, the "rush to deploy the best 5G service the fastest will continue with or without the T-Mobile/Sprint merger."[48]

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[44] *See e.g.*, Dish Petition at 12-14, CWA Petition at 38-40, Free Press Petition at 17-18, AAI Petition at 17, RWA Petition at 4-5.
[45] *See e.g.*, AAI Petition at 17-18.
[46] *See* Dish Petition at 22-35.
[47] *See* Free Press Petition at 7, Comments of AT&T Services, Inc., WT Docket No. 18-197 at 6-8 (filed Aug. 27, 2018) ("AT&T Comments").
[48] AT&T Comments at 3.

C. The Applicants' Purported Public Interest Benefits Remain Speculative, Unsupported by Evidence, and are not Merger-Specific.

The Commission should also quickly dispense with the Applicants' assertions that the proposed combination will facilitate competition with fixed broadband providers and spur additional rural broadband deployment. These claims are entirely speculative; are unsupported, other than the claims made by the merging parties and by other commenters who have accepted those claims at face value; and are not merger-specific because Sprint and T-Mobile (along with AT&T and Verizon) have each committed to deploy standalone 5G networks.[49]

As AAI correctly points out, competition authorities must be skeptical and give close scrutinty to any claimed public interest benefits and efficiencies claimed by the merging parties. Once a merger is consummated, competition authorities have little if any authority to hold a merged company accountable for the claims made to sell the deal to regulators.[50] Additionally, "research shows that 70% of mergers fail to achieve the claimed synergies, due in large part to the fact that the 'average acquirer materially overestimates the synergies a merger will yield.'"[51]

The merger's supporters in the record point, without any evidence other than the claims of the Applicants, that the transaction would lead to additional rural broadband deployment.[52] The Commission should be skeptical of these evidence-free assertions. First, Sprint's mid-band spectrum is unlikely to better help T-Mobile deploy wireless service to rural areas any better than

[49] *See* Dish Petition at 38-43.
[50] AAI Petition at 16.
[51] *Id*. (citing Scott A. Christofferson, Robert S. McNish, & Diane L. Sias, *Where Mergers Go Wrong*, McKinsey & Company (May 2004), *available at* https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong).
[52] *See e.g.*, Comments of TechFreedom, WT Docket No. 18-197, at 1, 16-17 (filed Sept. 17, 2018) ("TechFreedom Comments"), *Ex Parte* Letter of National Grange, WT Docket No. 18-197 (filed Sept. 12, 2018), Shenandoah Comments at 2.

deployment using the sub-1 GHz spectrum that T-Mobile already holds.[53] The record indicates that the Applicants' public interest statement is contradictory, because it both claims that standalone Sprint will only be able to offer 5G service to limited areas because of the limitations of the propagation characteristics of Sprint's 2.5 GHz spectrum; but at the same time, the Applicants argue the same 2.5 GHz spectrum will allow New T-Mobile to deliver improved service to rural areas. Both cannot be true. Either Sprint's existing spectrum has sufficient propagation characteristics to allow it to deliver 5G services to rural areas, or the spectrum's limited propagation characteristics do not enhance T-Mobile's rural coverage. Regardless, increased rural deployment is not a merger-specific benefit.[54]

Second, T-Mobile acquiring mid-band spectrum is not a merger-specific benefit. If T-Mobile needs mid-band spectrum to deploy its 5G wireless network, there are numerous options in the near- and medium-term that will allow it to acquire the necessary spectrum without eliminating a major competitor from the market. Just last week, the FCC approved changes championed by T-Mobile that eliminate the shortcomings of the CBRS spectrum raised by the Applicants in this proceeding.[55] Chairman Pai and Commissioner O'Rielly explained that the changes to the 3.5 GHz Priority Access Licenses ("PALs") will allow wireless carriers to use the 3.5 GHz spectrum to provide 5G services,[56] and T-Mobile has told both the FCC and investors that the 3.5 to 4 GHz range of spectrum (not Sprint's 2.5 GHz spectrum) is most important to the

[53] *See* CWA Petition at 47-52.
[54] *See* NTCA Petition at 8, n.23 (citing T-Mobile and Sprint Description of Transaction, Public Interest Statement, and Related Demonstrations, WT Docket No. 18-197, at 65 (filed June 18, 2018) ("Public Interest Statement")).
[55] *See* Promoting Investment in the 3550-3700 MHz Band, GN Docket No. 17-258, *Report and Order*, FCC 18-149 (rel. Oct. 24, 2018).
[56] *See Id*., Statement of Chairman Ajit Pai, at 94, Statement of Commissioner Michael O'Rielly, at 96.

company's 5G deployment efforts.[57] The Commission could make the PALs available for auction as soon as 2019 – not long after even the most aggressive expectations for the present transaction to close – and the agency is also teeing up efforts to free up spectrum for wireless 5G uses in the 3.7-4.2 GHz Band,[58] below 3.5 gigahertz,[59] and in the 2.5 GHz Band.[60] Access to mid-band spectrum is not a merger-specific benefit, and the Commission should dismiss claims that it is.

Last, NTCA rightly points out that the Commission should be dubious of claims that New T-Mobile will follow through on its claims regarding rural deployment. T-Mobile has had ample time to build out on its spectrum to rural communities, and

> T-Mobile's facilities based coverage is clearly focused on cities, towns, and the highways that connect them and it has not to date demonstrated a rural commitment. Vague statements about the transaction… making it 'easier to justify' rural investment offers nothing to support the assertion that this transaction would benefit rural consumers or competition.[61]

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[57] *See Ex Parte* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-258 *et al*., at 4 (filed Apr. 23, 2018) (arguing that both the 3.5 GHz and 3.7-4.2 GHz Band will be important for 5G operations), Monica Alleven, *T-Mobile CTO has 'huge interest' in 3.5 GHz*, FierceWireless, Jul. 20, 2017, https://www.fiercewireless.com/wireless/t-mobile-cto-has-huge-interest-3-5-ghz (quoting T-Mobile CTO Neville Ray on T-Mobile's Q2 2017 earnings conference call that T-Mobile has "huge interest" in the 3.5 GHz Band and that the 3.5-4 GHz range of spectrum "is the most formative block of spectrum emerging globally for 5G.")

[58] *See* Expanding Flexible Use of the 3.7 to 4.2 GHz Band, *et al*., GN Docket No. 18-122, *et al*., *Order and Notice of Proposed Rulemaking*, FCC 18-91 (rel. July 13, 2018).

[59] Commissioner Michael O'Rielly, Remarks at 7th Annual Americas Spectrum Management Conference (Oct. 2, 2018), https://docs.fcc.gov/public/attachments/DOC-354378A1.pdf ("there are opportunities to reallocate identified spectrum below the 3.5 GHz band in the United States. Specifically, the Commission needs to explore those frequencies between 3100 to 3550 MHz – and even more precisely the 3450 to 3550 band – to see if it could be made available for additional wireless uses.").

[60] *See* Transforming the 2.5 GHz Band, WT Docket No. 18-120, *Notice of Proposed Rulemaking*, FCC 18-59 (rel. May 10, 2018).

[61] NTCA Petition at 8 (internal citations omitted). *See also e.g.*, RWA Petition at 7-8, Rural South Carolina Operators Petition at 2.

As C Spire correctly sums up, "[c]learly, the lesson to be learned from the inconsistencies between the Applicants' prior public statements and their assertions in the Application is that the Commission cannot take the Applicants' current claims in support of the Transaction at face value. 'Trust Us' is not a sufficient public interest showing."[62]

II. THE COMMISSION SHOULD REJECT THE APPLICANTS' CONTINUED ATTEMPTS TO BOOTSTRAP A FAILING FIRM DEFENSE INTO THE MERGER REVIEW.

The Commission should reject the Applicants' continued claims that Sprint cannot effectively compete in the wireless marketplace.[63] Because the record overwhelmingly lays bare the fact that the proposed combination will produce significant likely harms to competition and consumers and scant verifiable, merger-specific public interest benefits, the Applicants and other merger supporters resort to making a half-hearted "failing firm" argument.[64] While Sprint points to the "challenges" it faces as an independent competitor, it fails to show how these challenges justify removing a major competitor from an already highly concentrated wireless market.

To overcome the substantial, demonstrable harms posed by the merger, the Applicants have repeatedly tried to sneak a version of the "failing firm" defense into the proceeding. Under

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[62] C Spire Petition at 11.

[63] *See e.g.*, Joint Opposition at 17-20. *See also e.g.*, Reply Comments of Free State Foundation, WT Docket No. 18-197, at 5 (filed Sept. 17, 2018), Comments of Consumers' Research, WT Docket No. 18-197, at 5 (filed Sept. 17, 2018), Reply Comments of the Competitive Enterprise Institute, WT Docket No. 18-197, at 2-4 (filed Sept. 17, 2018).

[64] *See e.g.*, Public Interest Statement at 94-98, *Ex Parte* Presentation of Sprint Corporation, WT Docket No. 18-197 (filed Sept. 25, 2018), Reply Comments of Free State Foundation, WT Docket No. 18-197, at 2-3 (filed Sept. 17, 2018), Comments of Advanced Communications Law & Policy Institute at New York Law School, WT Docket No. 18-197, at 23-26 (filed Sept. 17, 2018), Comments of Consumers Research, WT Docket No. 18-197, at 5 (filed Sept. 17, 2018), Reply Comments of the Competitive Enterprise Institute, WT Docket No. 18-197, at 2-4 (filed Sept. 17, 2018),
see generally Public Interest Statement, Appendix F: Declaration of Brandon "Dow" Draper, Chief Commercial Officer, Sprint Corporation, Joint Opposition, Appendix E: Declaration of Brandon "Dow" Draper, Chief Commercial Officer, Sprint Corporation (filed Sept. 17, 2018).

the failing firm defense, a merger that would otherwise be prohibited may be permitted in very limited circumstances. The Commission has a record of rejecting implicit failing firm arguments.[65] As the in prior merger proceedings, Sprint does not even approach meeting the failing firm defense's exacting requirements, which require a showing "(1) that [Sprint's] resources … were 'so depleted and the prospect of rehabilitation so remote that it faced the grave probability of business failure…,'[66] and (2) that there was no other prospective purchaser for it."[67] Or, as the DOJ and Federal Trade Commission's *Horizontal Merger Guidelines* explain, 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 furture; (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 to competition than does the proposed merger.[68]

While the *Horizontal Merger Guidelines* offer a clear and strict test for firms identified as "failing," Sprint has not attempted to argue that it meets these strict requirements, and indeed, it cannot. Sprint's various business challenges do not show that it risks business failure—prior to the announcement of the proposed merger it publicly discussed various paths forward that would enable it to continue offering service and upgrading its network. Even if these plans were to ultimately fail, Sprint has not shown that some form of reorganization would not be possible.

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[65] *See* Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, and EchoStar Communications Corporation, CS Docket No. 01-348, *Hearing Designation Order*, FCC 02-284, at 80 ¶ 216 (rel. Oct. 18, 2002) ("One possible interpretation of the Applicants' argument, though the Applicants themselves do not articulate it, is that absent the merger, [they] would be driven from the market or marginalized…If the applicants are implicitly making such a 'failing firm' argument, we do not find it to be persuasive.").
[66] International Shoe v. FTC, 280 U.S. 291, 302 (1930).
[67] United States v. Greater Buffalo Press, 402 U.S. 549, 555 (1971).
[68] *Horizontal Merger Guidelines* § 11.

Nor has it shown that there are no alternative paths forward, such as alternate buyers or partnerships that would not result in the loss of a competitor from the market.

Instead, the Applicants have argued that Sprint's weakness as a firm indicates that there would be no competitive harm to the transaction. As various federal courts have repeatedly found, "[f]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger."[69] The Sixth Circuit has called the weakened firm defense, "the Hail Mary pass of presumptively doomed mergers…"[70] "Courts 'credit such a defense only in rare cases, when the [acquiring firm] makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's *prima facie* case.'"[71]

It is implausible that Sprint and T-Mobile could make this substantial showing with regard to Sprint's financial health and future. Despite their multiple filings in the record, it remains unclear why Sprint's already-announced pre-merger plans to launch a 5G network in 2019 are an insufficient path forward for the carrier, particularly when in August 2018, Sprint described its recent market performance as a positive "inflection point" for the firm.[72] Little more than two months ago, Sprint reported results showing increasing wireless service revenue, a third consecutive quarter of net income, a tenth consecutive quarter of operating income, and

[69] Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324, 1339 (7th Cir. 1981); *accord* University Health, 938 F.2d at 1221; Arch Coal, 329 F.Supp. 2d at 154; Commissission Decision 2012, 28-35; ProMedica Health Sys. V. FTC, 749, F.3d 559, 572 (6th Cir. 2014); *cert denied*: ProMedica Health Sys. v. FTC, 135 S.Ct. 2049 (2015).
[70] ProMedica Health Sys., 749 F.3d at 572.
[71] *Id*. at 572, *quoting* University Health, 938 F.2d at 1221.
[72] News Release, Sprint Corporation, Sprint Reports Inflection in Wireless Service Revenue with Fiscal Year 2018 First Quarter Results (Aug. 1, 2018), http://s21.q4cdn.com/487940486/files/doc_financials/quarterly/2018/Q1/01_Fiscal-1Q18-Earnings-Release-FINAL.pdf.

its "highest adjusted EBITDA in more than 11 years."[73] In addition to its improving financial performance, Sprint reported that Q1 of FY2018 saw 87,000 postpaid phone net additions, making it twelve consecutive quarters of subscriber growth; seven consecutive quarters of postpaid phone net additions in the business market; and prepaid net additions for the sixth consecutive quarter.[74] Further, Sprint has sufficient spectrum to continue as a standalone wireless competitor, and its recent financial peformance shows it is a healthy, growing firm with significant assets from its parent company, SoftBank, at its disposal to invest in Sprint's planned 5G deployment.[75]

The record does not endorse any one particular alternative path Sprint might take to strengthening its competitive position and financial outlook. However, insofar as the Applicants make a failing or weakened firm argument to buttress the proposed transaction, the burden is on Sprint and T-Mobile to show that no other alternative is viable. The Applicants have failed to do carry that burden.

Short of making an actual failing firm argument, Sprint's related claims are perhaps more cognizable under the public interest standard that this merger is somehow nevertheless the *best* path forward for Sprint, or that it would lead to more rapid broadband expansion, and so on. However, these arguments can be dispensed with similarly.

At the outset, while the Commission has discussed the failing firm defense relatively few times, those references generally incorporate the standard used by the DOJ and Federal Trade Commission. Therefore, there is little reason to think that a defense that would fail under

[73] *Id*.
[74] *Id*.
[75] *See e.g.*, Dish Petition at 15-16, CWA Petition at 38-47, AT&T Comments at 10-11, Petition to Deny of Console Enterprises, WT Docket No. 18-197, at 3 (filed Aug. 27, 2018).

antitrust could succeed under the public interest test.[76] In fact, some of the merger's supporters urge the Commission to subsume the public interest standard within the DOJ's antitrust analysis entirely.[77]

Nor is there any reason for the FCC to recognize some alternative version of the failing firm doctrine under the public interest test. First, the failing firm defense and its strict limitations were judicially developed doctrines designed to ensure that consumers could continue to get the maximum benefit from competition. In the wireless market, competition is the only force that can be relied on that improves service quality and keeps prices low. Therefore, any alternative path forward for Sprint would not only be preferable under an antitrust analysis, but under a public interest analysis as well. Commissioner Carr put it succinctly in his testimony before the Senate Commerce Committee: "the public interest is best served by vigorous competition in the marketplace."[78] That is certainly true in this case.

Second, and similarly, one of the best ways to ensure broadband buildout in the long term is again, competition. As the FCC's staff found in analyzing the abandoned AT&T/T-Mobile transaction, competitive forces were more likely to drive AT&T's future LTE expansion than the

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[76] *See* Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations, CC Docket No. 01-150, *Report and Order*, FCC 02-78, at 15 ¶ 26 n.55 (rel. Mar. 21, 2002) (explaining the failing firm defense relies on the threat that an "imminent business failure that would cause the assets of one of the merging firms to exit the market", among other specified circumstances, and that as a result, "the merger is not likely to create or enhance market powr or facilitate the exercise of market power.").

[77] *See* TechFreedom Comments at 3-4.

[78] Nomination Hearing – FCC Before Senate Committee on Commerce, Science, and Transportation, 115th Cong. (2017) (written statement of Brendan Carr, Nominee to Serve as Commissioner, Federal Communications Commission, at 2, https://www.commerce.senate.gov/public/_cache/files/e4eaf6a8-01cd-408d-9cdf-5677f326aad0/271D53B97DDE59DC07D9DCC5F800AA5F.testimony-of-brendan-carr.pdf.)

various spectrum and network-related arguments put forth in that merger proceeding.[79] While the Applicants repeatedly attempt to distinguish this merger from the AT&T/T-Mobile transaction, and the conclusions reached by DOJ and the Commission regarding network deployment, consumer harm, competition, and innovation, the Applicants' arguments ultimately fail and the Commission should treat their claims with extreme skepticism.

III. THE COMMISSION SHOULD HEAVILY WEIGHT PRIOR FINDINGS BY U.S. AND INTERNATIONAL COMPETITION AUTHORITIES REGARDING THE HARMFUL EFFECTS OF FOUR-TO-THREE WIRELESS MERGERS.

Both in the U.S. and abroad, four-to-three mergers are regularly disfavored by competition regulators.[80] In fact, the real world experience of international four-to-three wireless mergers is that the level of consolidation proposed by the Applicants' transaction is extremely likely to lead to higher prices for consumers.[81]

Four-to-three mergers "are generally recognized to pose serious risks of enhancing post-merger unilateral and coordinated effects."[82] The DOJ reached this conclusion in its evaluation of the failed AT&T/T-Mobile transaction.

> The substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will lead to lessened competition due to an enhanced risk of anticompetitive coordination. Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyer side market power, and high barriers to entry and expansion, make them particularly conducive to coordination.[83]

The Applicants and others wrongly claim that prior insights the Commission and DOJ have gleaned from reviewing four-to-three mergers in the U.S. wireless market and in other industries

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[79] *See* Application of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, Staff Analysis and Findings, at 250 (rel. Nov. 28, 2011).
[80] *See* Dish Petition at 59-68.
[81] *See Id*. at 78-81.
[82] Voqal Petition at 17.
[83] AT&T/T-Mobile Complaint ¶ 36.

is entirely irrelevant—as if the principles of economics do not apply to Applicants' transaction.[84] The Applicants also contend that the proposed four-to-three transaction will somehow *increase* competition and lower prices to consumers. However, "throughout over one thousand pages… T-Mobile cites not a single instance where competition increased, prices were lowered, employment increased, and consumers were better served as a result of a horizontal merger reducing a marketplace from 4 to 3 competitiors."[85] At their clearest, the Applicants maintain that after upgrading its network to 5G, New T-Mobile "will have the incentive to use this additional capacity to gain subscribers… rather than settle into a coordinated effects outcome at a lower market share."[86] Similarly, they argue that "asymmetry between [New T-Mobile's] superior network quality and lower profitability will give [New T-Mobile] an incentive to grow its market share, rather than coordinate in a way that maintains the status quo."[87]

However, viewing these claims with the historical context provided by the previous network upgrades in the wireless industry, it becomes clear that these claims are not credible, and the Commission should not accept them. Despite the increased capacity provided by the 2G to 3G network upgrade, or the 3G to 4G LTE network upgrade, the nationwide wireless carriers typically settled into a pattern of similar plans and prices, with stable market shares. Temporary, generally technology-driven shifts in the marketplaces may have caused occasional shifts in relative market shares—for example, AT&T's brief iPhone exclusive. Even if such a temporary shift were to occur here, the true threat is of longer-term parallel behavior of the kind that

[84] *See e.g.*, Joint Opposition at 20-22.
[85] Union Telephone, *et al*. Petition at 6 (internal citations omitted). *See also id*. at 25.
[86] Public Interest Statement, Appendix H: Joint Declaration of Professor Steven C. Salop and Dr. Yianis Sarafidis, Charles River Associates, Coordinated Effects Analysis of the Proposed T-Mobile/Sprint Merger Transaction, at 18.
[87] *Id*.

frequently occurs in concentrated markets.[88] Other arguments advanced by the Applicants (e.g., dynamic pricing or differentiated service bundles), even if true, were also true when the DOJ and the FCC rejected the AT&T/T-Mobile merger, and should not be considered sufficient now to overcome the experience-verified presumption that coordination is more likely in oligopolistic market structures. Ultimately, the Applicants spend thousands of pages making the case why their proposed four-to-three merger is different, but their pitch can ultimately be reduced down to "trust us" and "because of 5G." The Commission should reject these arguments.

An Organisation of Economic Co-operation and Development ("OECD") examination of wireless markets in several different countries identified patterns consistent with the DOJ and Commission's contention that concentrated markets lend themselves to an increased likelihood of coordination. OECD found that markets with four or more wireless carriers tended to offer "more competitive and more inclusive offers and services that are generally not available in countries with three mobile operators."[89] The study also found that wireless carriers in countries with four or more competitors made pricing structures and product attributes more transparent to consumers and offered lower prices and more affordable roaming.[90]

IV. CONCLUSION.

For the above-stated reasons, the Commission should deny the Application, or refer the matter for a hearing pursuant to section 309(e) of the Commission's rules.[91]

[88] *See e.g.*, AAI Petition at 8-14, C Spire Petition at 5-13.
[89] Organisation for Economic Co-operation and Development, Wireless Market Structures and Network Sharing 17 (2015).
[90] *Id*. at 17-20.
[91] 47 C.F.R. § 309(e).

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