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COMMENTARY

T-MOBILE/SPRINT MERGER (FEAT. THE OPPOSITION)

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T-Mobile and Sprint are the third- and fourth largest wireless service carriers in the United States, and they want to merge to create a cellular giant to compete with Verizon and AT&T.¹ The two announced the plan in April 2018, when T-Mobile CEO John Legere announced that the two had reached an agreement on a \$26 billion deal, followed by an application for approval by the Federal Communications Commission in June 2018.² After about a year of review, the Department of Justice (DOJ) approved the merger in July 2019, which some thought signaled the end of the fight to complete the deal.³ However, 13 states filed a lawsuit to prevent the merger, and the DOJ-approved agreement between the companies is now currently before a D.C. federal judge for his approval.⁴ According to the agreement, on which the judge appeared ready to rule, Sprint would have to divest its prepaid business, along with Spectrum and Boost Mobile, to Dish Network.⁵ Dish is poised to become essentially a replacement market player when the two companies become one.⁶

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¹ Christian de Looper, *The T-Mobile/Sprint Merger: Everything you need to know*, DIGITAL TRENDS, (July 26, 2019) <https://www.digitaltrends.com/mobile/t-mobile-sprint-merger/>.

² *Id.*

³ *Id.*

⁴ Hailey Konnath, *T-Mobile/Sprint Tie-Up Judge Opens Door to Amicus Briefs*, LEXISNEXIS (Jan. 10, 2020) <https://advance.lexis.com/document/?pdmfid=1000516&crd=20515b01-5584-47f6-98a3-837cdfbceed1&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5XYC-NPG1-JN6B-S1N5-00000-00&pddocid=urn%3AcontentItem%3A5XYC-NPG1-JN6B-S1N5-00000-00&pdcontentcomponentid=122080&pdteaserkey=sr0&pditab=allpods&ecom=spnqk&earg=sr0&prid=587ac64a-f23b-4ee7-b996-8839eb7e111a&cbc=0>.

⁵ Clare Duffy, *Sprint and T-Mobile make a final argument for why their massive merger should be allowed to go through*, CNN BUSINESS (Jan. 15, 2020) <https://www.cnn.com/2020/01/15/tech/sprint-tmobile-dish/index.html>.

⁶ *Id.*

The D.C. judge appeared to be ready to rule on the DOJ's deal approving Sprint and T-Mobile's tie-up, but decided to allow for outside parties to file amicus briefs in support or opposition of the merger.⁷ Before considering the briefs, though, it is important to know the basic arguments that T-Mobile and Sprint made in order to obtain the DOJ's approval. The companies' main argument is that the merger will create a world-class network that will provide customers both better service and lower costs.⁸ Additionally, the two companies have claimed that they are facing problems in the current market, especially trying to keep up with Verizon and AT&T, and that those problems have made this merger pretty much necessary to maintain competition.⁹ T-Mobile and Sprint are also both generally thought to be a step below Verizon and AT&T, and both T-Mobile and Sprint told the DOJ that this merger, and the significant investment the new company would gain, is necessary to fully build a sustainable 5G network.¹⁰ Lastly, and maybe most importantly, the companies argue that this merger actually serves to increase competition in the market, as Dish Network would receive a substantial portion of Sprint's current assets and become a brand new market participant.¹¹ The DOJ found these arguments compelling, but the D.C. judge reviewing the agreement decided to allow other parties to offer their perspectives.

The briefs from third parties will essentially allow competitors, as well as companies that could benefit from the merger, to weigh in and give the judge a more complete perspective before ruling on such a massive merger. The arguments, from a bird's eye view, will fall into one of two categories: those for the merger, and those against it. First, the states that have filed lawsuits to prevent the merger have been instructed to file one consolidated brief.¹² The contents of that brief will likely mirror the arguments that they have made in their own trial: that the merger is in direct violation of antitrust law as it seeks to eliminate competition and attempt to monopolize the cellular service market.¹³ T-Mobile and Sprint, however, have opposed the idea of letting the states weigh in on the proposed agreement, accusing the states of trying to have two bites at the apple should they lose their own challenge in court.¹⁴ The arguments of the other parties opposing the merger will not vary greatly. The proposed merger would create a third cellular services behemoth and will limit competition by reducing the number of big providers from four to three. It is important to note, though, that these are the exact arguments that the companies originally had to defeat when obtaining regulatory approval in the first place, and Sprint especially was forced to make concessions in the form of divestitures to curb those concerns.

As for the briefs in favor of the merger, it is reasonably likely that companies that currently compete with Sprint in the prepaid cellular services market will argue that this merger would actually greatly benefit their market. Sprint's divestiture of its prepaid services to Dish would allow companies already established in the market but lacking the infrastructure and capital resources of a big cellular services company, to gain market share as Dish tries to get started in the prepaid market. Other briefs will likely resemble the very rationale that federal regulators used in approving the merger in the first place: that the unloading of assets to Dish would essentially allow

⁷ Konnath, *T-Mobile/Sprint Tie-Up Judge Opens Door to Amicus Briefs*.

⁸ Duffy, *Sprint and T-Mobile make a final argument for why their massive merger should be allowed to go through*.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Konnath, *T-Mobile/Sprint Tie-Up Judge Opens Door to Amicus Briefs*.

¹³ *Id.*

¹⁴ *Id.*

Dish to enter the market as a nationwide provider, thus curing any anticompetitive effects, and would allow T-Mobile and Sprint to innovate within the cellular services market and provide a better product for their millions of customers.

Essentially, allowing the amicus briefs likely will not have much an effect in terms of strengthening the arguments for the merger. With regard to the arguments against it, however, the potential briefs may raise concerns that the judge or the DOJ had not previously considered, though that seems unlikely. It seems unlikely, though possible, that the briefs will persuade the judge of anything new.

Ultimately, the million (more like tens of billions) dollar question at play in this proposed agreement is: Have T-Mobile and Sprint convinced the judge that the terms of the agreement are sufficient to avoid anticompetitive effects? It's important to pay attention to the fact that the companies, and their lawyers, have already had to find innovative ways to change their current business model in a way such that the DOJ is satisfied.