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Investigating a Mega-Merger: Contextualizing the T-Mobile Merger to the Consumer Welfare Standard and the Competition Standard

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NOTE

**INVESTIGATING A MEGA-MERGER:
CONTEXTUALIZING THE T-MOBILE MERGER TO
THE CONSUMER WELFARE STANDARD AND THE
COMPETITION STANDARD**

*Rahul Sukesh**

This Note explores the ruling of the U.S. Judge Victor Marrero in favor of the merger between T-Mobile and Sprint in terms of the specifics of the merger itself, and more broadly, the two dominant schools of antitrust thought: the consumer welfare standard and the competition standard and the specifics of the merger itself. Highlighting issues of antitrust law, this Note will first outline certain background concepts necessary to understand legal precedence around antitrust law. This Note will then trace the merger overtime and focus on how various opposition forces, citing violations of antitrust law, amassed a large body of supporters and later settled their claims. Specifically, the Note will outline why there was opposition to the merger and what was done to alleviate it. Fourthly, this Note will elaborate on the facts used by Judge Marrero that helped him approve the merger. The Note will then explore a hypothetical of what would have happened, had the merger failed, to better contextualize the argument around the merger and understand the merits of its approval. The Note will lastly focus on how this case plays into the larger context of two dominating schools of antitrust policy. Defining both schools, this Note will conclude that it stands apart as satisfying metrics outlined and suggests it, tentatively, satisfies both schools.

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I. INTRODUCTION

On April 29th, 2018 John Legere, CEO of T-Mobile, posted a video on twitter with Marcelo Claure, former CEO of Sprint, announcing the two companies had come to an agreement and were going to merge. Highlighting the fact they would become America's first "nationwide 5G network," the two, then, CEOs implied the jump to a 5G network would be even bigger and better than when "America's early 4G leadership added millions of jobs in this country [United States] and billions that created jobs and added billions in US GDP."²²¹ Although the "New T-Mobile," as they coined it, was looking seemingly positive, the merger caught the attention of State Attorney Generals after the two companies filed for a protective order to "limit access to proprietary or confidential information" on June 15th, 2018.²²² Almost four months later, on September 4th, 2018, a public notice was released explaining that pursuant to the protective order, the New York State Attorney General had requested information and intended "on sharing those materials with other state attorneys general," acknowledging the State Attorney General of California.²²³ A year later, by September of 2019, the lawsuit against T-Mobile's majority shareholder Deutsche Telekom AG. and Sprint's parent company Softbank Group Corp was supported by 18 states, citing the merger would violate antitrust laws and raise prices for consumers.²²⁴

However, less than a year after amassing a coalition, in February of 2020, the T-Mobile merger was approved.²²⁵ But the questions of why it was

²²¹Legere, John. "I'm Excited to Announce That @TMobile & @Sprint have Reached an Agreement to Come Together to Form a New Company – a Larger, Stronger Competitor That Will Be a Force for Positive Change for All US Consumers and Businesses! Watch This & Click through for Details." *Twitter*, Twitter, 29 Apr. 2018, twitter.com/JohnLegere/status/990622865522348035?s=20.

²²² See Applications of T-Mobile US, Inc. and Sprint Corporation: Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, DA 18-624 (June 15, 2018), <https://docs.fcc.gov/public/attachments/DA-18-624A1.pdf>.

²²³ See Notice of Request by Offices of State Attorneys General To Review Submissions in Docket NO. 18-197 that contain NRUF and LNP Data, DA 18-908 (September 4, 2018), <https://docs.fcc.gov/public/attachments/DA-18-908A1.pdf>.

²²⁴ See Deutsche Telekom AG, T-Mobile US, INC., Sprint Corporation v. State of New York (11 June, 2019), https://ag.ny.gov/sites/default/files/6.11.19_new_york_attorney_general_james_moves_to_block_t-mobile_and_sprint_megamerger.pdf.

²²⁵ Laurel Wamsley, Judge Rules In Favor Of T-Mobile Takeover Of Sprint, NPR, (Jan 11, 2020), <https://www.npr.org/2020/02/11/804848534/judge-rules-in-favor-of-t-mobile-takeover-of-sprint>.

objected and how the merger passed remains. Looking closer at antitrust laws, what does this merger mean not only for the future of wireless industries in the U.S. but for consumers who will be affected by it? More significantly however, is the question of ethics that should be addressed. Chiefly, is the creation of such a goliath ethical? Who does it benefit and who does it harm?

II. OUTLING ANTITRUST LAW

As the basis for the lawsuit and pending concern against the merger between T-Mobile and Sprint cited issues of antitrust law, having a general understanding of antitrust law will shed light on the breath of the issue. In practice today, there are three core antitrust laws: the Sherman Act of 1890, and the more recent Federal Trade Commission Act (FTCA) and Clayton Act both of 1914.²²⁶ The Sherman Act and Clayton Act are more significant to the implications of this case. In detail, the Sherman Act outlaws any attempt to restrict or monopolize trade within reasonable measure. Seemingly vague, this act applies to action that would hinder competition. Added to supplement the Sherman Act, the Clayton Act “addresses specific practices... such as mergers... the Sherman Act does not clearly prohibit” that would still hinder competition.²²⁷

With the merger of T-Mobile and Sprint as initially planned, T-Mobile and Sprint would merge with the promise of creating jobs, lowering prices, and providing good service to consumers. However, as is, the consummation would violate the Clayton Act. Outlined in Section 7, the Clayton Act elaborates on “prohibiting mergers and acquisitions where the effect ‘may be substantially to lessen competition, or to tend to create a monopoly.’”²²⁸ While the mega merger doesn’t threaten to create a monopoly, through consolidating two of four major companies it most certainly lessens the competition. Although the merger underwent one significant concession making DISH Network Corp., through the process various states picked sides for and against the union of T-Mobile and Sprint.²²⁹

²²⁶ See “The Antitrust Laws.” *Federal Trade Commission*, 15 Dec. 2017, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Press Release, The United States Department of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of

Following the legal skirmish between various states and T-Mobile sheds light on how the merger changed to become above board and why states became content. The last bit of legal history pertaining to this note is the Antitrust Procedures and Penalties Act, more commonly referred to as the Tunney Act. Central to any settlement between the United States (including the states and Department of Justice) and any private organization, the Tunney act is more of a formality for the court to “determine that the entry of such judgement [between the two parties] is in the public interest.”²³⁰ Keeping the people protected, the court evaluates, and later approves any settlement for antitrust cases.

III. THE OPPOSITION AND SUPPORT

From even before the initial lawsuit up until today, despite the recent verdict, the merger between T-Mobile and Sprint has been continually challenged and taken up in arms by various State Attorneys Generals. Among the first to support the merger were New Mexico and Utah. Announcing their approval in a joint letter dated July 10, 2018, much earlier than everyone else, Attorney General's Hector Balderas and Sean Reyes, from New Mexico and Utah respectively, didn't give much attention to whether the merger would violate antitrust.²³¹ The bulk of the letter addressed the benefits the merger would bring to these states citing “nationwide 5G... will greatly improve the lives of underserved Americans in rural areas, stimulate economic growth through investment and job creation, and increase competition in the converging internet market for mobile internet.”²³² Following an investigation conducted by the State Attorney General of New York after initially hearing about the merger in September of 2018, the chaos unleashed and over the next year and a half leading to the trial.²³³ States began picking

Divestitures to Dish, (July 26, 2019), www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

²³⁰See Antitrust Procedures and Penalties Act, 15 U.S.C. 16, § 782 (1974).

²³¹See Letter from Attorney General of Utah and Attorney General of New México to members of the Subcommittee on Antitrust, Competition July 10, 2018, <https://attorneygeneral.utah.gov/wp-content/uploads/2018/08/Joint-AG-Letter-to-Committee-7.10.18.pdf>.

²³²*Id.*

²³³See Notice of Request by Offices of State Attorneys General To Review Submissions in Docket NO. 18-197 that contain NRUF and LNP Data, DA 18-908 (September 4, 2018), <https://docs.fcc.gov/public/attachments/DA-18-908A1.pdf>.

sides either for or against the merger. The initial lawsuit against the merger coming from the collective action of the states led by New York and California included Colorado, Connecticut, Maryland, Michigan, Mississippi, Wisconsin, Virginia, and the District of Columbia and stood as a seemingly strong opposition force to the merger on June 11th, 2019.²³⁴ Understanding the four major mobile network operations, Verizon, AT&T, T-Mobile, and Sprint, (MNOs) served “at least 90% of the U.S. population,” the most pressing complaint was that the alleged merger would reduce competition from the four major competitors to three.²³⁵ While T-Mobile’s controlling shareholder Deutsche Telekom AG wanted to “earn a greater return on its investment” by merging two of the four MNOs, numerous State Attorneys General cited such a move would “lead to less competition.”²³⁶ Already breaking the Clayton Act, the suit noted the merger would, contingent on the merger raising consumer bills, “be particularly harmful to prepaid subscribers” who they defined as typically low-income subscribers who would not be able to pass a credit check making the prepaid service the only mobile wireless telecommunication service they can get.²³⁷ The trial was set for December 9th, 2019.

A little over a month later, on July 26th, 2019, five states, Kansas, Nebraska, Oklahoma, Ohio, and South Dakota followed in the footsteps of New York and California and filed a complaint brought a civil antitrust suit to DC.²³⁸ Although the actual complaint noted the same issues brought up in the case led by New York and California, the overall proceedings were drastically different. Mainly, instead of establishing a court date for the trial, just four days after, on July 30th, 2019, the five states alongside the Department of Justice (DOJ) filed a Competitive Impact Statement detailing that the five states had reached a settlement and dropped their suit.²³⁹

²³⁴ See Deutsche Telekom AG, T-Mobile US, INC., Sprint Corporation v. State of New York (11 June, 2019),

https://ag.ny.gov/sites/default/files/6.11.19_new_york_attorney_general_james_moves_to_block_t-mobile_and_sprint_megamerger.pdf.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See State of Kansas v. Deutsche Telekom AG, Press Release United States District Court for the District of Columbia (July 26, 2019), <https://www.justice.gov/opa/press-release/file/1187721/download>.

²³⁹ See United States of America, et al. v. Deutsche Telekom AG, (July 30, 2019), <https://www.justice.gov/opa/press-release/file/1189336/download>.

Addressing the reduction in major telecommunication players from four to three, the settlement called for the new T-Mobile to “divest Sprint’s prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to DISH Network Corp.”²⁴⁰ In addition to other concessions, this would, in theory, give DISH support and more stake in the telecommunications industry. With no objections during the court’s review under the Tunney Act, the settlement was deemed worthy in the interest of T-Mobile, and more importantly, the public. The basic idea was to “provide DISH with the assets and transitional services required to become a facilities-based mobile network operator that can provide a full range of mobile wireless services nationwide.”²⁴¹ In other words, the settlement introduced DISH as a fourth competitor restoring balance to the issue the merger would create. As precedent with any case filed by the DOJ, the proposed settlement

With numerous states sticking with their lawsuit and numerous states settling or coming out in favor, other states started getting involved. On September 18th, Pennsylvania’s Attorney General Josh Shapiro became the 18th, and last, to join the lawsuit against the merger.²⁴² In response to the settlement between five states, the DOJ, and T-Mobile and Sprint, Connecticut AG William Tong, speaking on behalf of the then 13 state (and the District of Columbia) lawsuit, commented that the concessions made to grow DISH would still be insufficient to create a fourth competitor, because to them, “DISH [was] simply not a viable or serious alternative for consumers, and this contrived agreement [did] nothing to ensure healthy competition.”²⁴³

The following table details a timeline of when states joined the lawsuit, when states dropped the lawsuit or joined the settlement, and when other key

²⁴⁰ See Press Release, The United States Department of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish., 26 July 2019, www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

²⁴¹ *Id.*

²⁴² See Press Release, NYS Attorney General, AG James: Pennsylvania Addition To T-Mobile/sprint Lawsuit Keeps States' Momentum Moving Forward, (September 18th 2019), <https://ag.ny.gov/press-release/2019/ag-james-pennsylvania-addition-t-mobilesprint-lawsuit-keeps-states-momentum>.

²⁴³ See Press Release, Office of the Attorney General Connecticut, AG Tong: T-Mobile/Sprint Megamerger Remains A Bad Deal for Consumers, Innovation and Workers (July 26, 2019), <https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-TONG-TMOBILE-SPRINT-MEGAMERGER-REMAINS-A-BAD-DEAL-FOR-CONSUMERS-INNOVATION-AND-WORKERS>.

actors like the FCC and DOJ came out in support for the merger:

Apart of the Multi-State Lawsuit		Publicly Supports the Merger OR Settled	
When	Who	When	Who
		July 2018	Utah & New Mexico show support ²⁴⁴
		May 20 2019	FCC shows initial support ²⁴⁵
June 11 2019	New York, California, Colorado, Connecticut, District of Columbia, Maryland, Michigan, Mississippi, Virginia, & Wisconsin initiate lawsuit ²⁴⁶		
June 21	Hawaii, Massachusetts, Minnesota, & Nevada join lawsuit ²⁴⁷		

²⁴⁴ See Letter from Attorney General of Utah and Attorney General of New México to members of the Subcommittee on Antitrust, Competition July 10, 2018, <https://attorneygeneral.utah.gov/wp-content/uploads/2018/08/Joint-AG-Letter-to-Committee-7.10.18.pdf>.

²⁴⁵ See Press Release, FCC, Chairman Pai Statement on T-Mobile/ Sprint Transaction, (May 20, 2019), <https://docs.fcc.gov/public/attachments/DOC-357535A1.pdf>.

²⁴⁶ See Deutsche Telekom AG, T-Mobile US, INC., Sprint Corporation v. State of New York (11 June, 2019), https://ag.ny.gov/sites/default/files/6.11.19_new_york_attorney_general_james_moves_to_block_t-mobile_and_sprint_megamerger.pdf.

²⁴⁷ See Stempel, Reuters, Four More U.S. states join lawsuit to stop T-Mobile-Sprint deal (June 21, 2019), <https://www.reuters.com/article/us-sprint-corp-t-mobile-us/four-states-join-lawsuit-to-stop-t-mobile-sprint-deal-idUSKCN1TM1ZA>.

		July 26	Kansas, Nebraska, Oklahoma, Ohio, and South Dakota settle with the Department of Justice ²⁴⁸ and Arizona shows support ²⁴⁹
August 1	Texas joins lawsuit ²⁵⁰		
		August 14	Formal FCC Support ²⁵¹
August 16	Oregon joins lawsuit ²⁵²	August 16	Louisiana joins settlement ²⁵³
September 3	Illinois joins lawsuit ²⁵⁴		

²⁴⁸ See United States of America, et al. v. Deutsche Telekom AG, (July 30, 2019), <https://www.justice.gov/opa/press-release/file/1189336/download>.

²⁴⁹ See Press Release, Attorney General State of Arizona, Attorney General Brnovich Statement on DOJ-T-Mobile/Sprint Merger Settlement, (July 26, 2019) <https://www.azag.gov/press-release/attorney-general-brnovich-statement-doj-t-mobilesprint-merger-settlement>.

²⁵⁰ See Press Release, NYS Attorney General, Attorney General James Announces Texas Joins Lawsuit To Block T-Mobile and Sprint Megamerger, (August 1, 2019) <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-texas-joins-lawsuit-block-t-mobile-and-sprint>.

²⁵¹ See Press Release, FCC, Chairman Pai Formally Recommends Approval of T-Mobile/Sprint Merger (August 14, 2019) <https://docs.fcc.gov/public/attachments/DOC-359080A1.docx>.

²⁵² See Press Release, NYS Attorney General, General James Announces Oregon Joins Lawsuit to Block T-Mobile and Sprint Megamerger <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-oregon-joins-lawsuit-block-t-mobile-and-sprint>.

²⁵³ See Alex Wagner, Louisiana comes out in support of T-Mobile and Sprint's Merger, (August 16, 2018), <https://www.tmonews.com/2019/08/louisiana-t-mobile-sprint-merger-support/>.

²⁵⁴ See Press Release, Illinois Attorney General, Attorney General Raoul Announces Lawsuit Blocking T-Mobile/ Sprint Megamerger (September 3, 2019), https://illinoisattorneygeneral.gov/pressroom/2019_09/20190903.html.

September 18	Pennsylvania joins lawsuit ²⁵⁵		
		September 27	Florida joins settlement ²⁵⁶
		October 9	Mississippi joins settlement ²⁵⁷
		Oct 28	Colorado joins settlement ²⁵⁸
		Nov 8	Arkansas joins settlement ²⁵⁹
		Nov 25	Nevada ²⁶⁰ and Texas ²⁶¹ join

²⁵⁵ See Press Release, NYS State Attorney General, AG James: Pennsylvania Addition to T-Mobile/ Sprint Lawsuit Keeps States' Momentum Moving Forward, (September 18, 2019) <https://ag.ny.gov/press-release/2019/ag-james-pennsylvania-addition-t-mobilesprint-lawsuit-keeps-states-momentum>.

²⁵⁶ See Press Release, Attorney General State of Florida, T-Mobile and Sprint Pledged Commitments in the State of Florida, (September 27, 2019), [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGKM5Q/\\$file/T-Mobile+agreement.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGKM5Q/$file/T-Mobile+agreement.pdf).

²⁵⁷ See David Sheaprdsn, Reuters, Mississippi will back Sprint, T-Mobile merger and drop court challenge, (October 9, 2019), <https://www.reuters.com/article/us-sprint-corp-m-a-t-mobileus/mississippi-will-back-sprint-t-mobile-merger-and-drop-court-challenge-idUSKBN1WO2Q3>.

²⁵⁸ See Press Release, Department of Justice, Justice Department Welcomes Colorado Joining T-Mobile/Sprint Settlement, (October 28, 2019), <https://www.justice.gov/opa/pr/justice-department-welcomes-colorado-joining-t-mobilesprint-settlement>.

²⁵⁹ See Press Release, Department of Justice, Justice Department Welcomes Arkansas Joining T-Mobile/Sprint Settlement, (November 8, 2019), <https://www.justice.gov/opa/pr/justice-department-welcomes-arkansas-joining-t-mobilesprint-settlement>.

²⁶⁰ See Press Release, Nevada Attorney General, Attorney General Ford Negotiates Settlement for T-Mobile-Sprint Merger Prioritizing Nevada Jobs, (November 25, 2019), https://ag.nv.gov/News/PR/2019/Attorney_General_Ford_Negotiates_Settlement_for_T-Mobile-Sprint_Merger_Prioritizing_Nevada_Jobs/.

²⁶¹ See Press Release, Attorney General of Texas, AG Paxton Announces Settlement Agreement with T-Mobile on Sprint Merger, (November 25, 2019),

		settlement
	March 11 2020	Pennsylvania, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Oregon, Virginia, and California join settlement 262

Almost a year after New México and Utah came out in support of the merger,²⁶³ Arizona came out concluding, from their own investigation, that the merger would benefit the people of Arizona.²⁶⁴ Louisiana and Arkansas joined the settlement citing the creation of jobs in rural areas would greatly

<https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-settlement-agreement-t-mobile-sprint-merger>.

²⁶² See Press Release, Maryland Office of the Attorney General, Attorney General Frosh Announces Settlement Ending the State's Challenge to T-Mobile/Sprint Merger, (March 11, 2020), <https://www.marylandattorneygeneral.gov/press/2020/03/11/20a.pdf>. See also Press Release, The Office of Minnesota Attorney General, AG Ellison Wins Protections for Minnesota consumers and jobs in T-Mobile settlement, (March 11, 2020), https://www.ag.state.mn.us/Office/Communications/2020/03/11_T-Mobile.asp. See also Press Release, Office of Attorney General Commonwealth of Pennsylvania, Attorney General Shapiro Announces T-Mobile, Sprint Merger Settlement, (March 11, 2020), <https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-shapiro-announces-t-mobile-sprint-merger-settlement/>. See also Press Release, Office of the Attorney General California Department of Justice, Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger, (March 11, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state's-challenge-t-mobile>.

²⁶³ See Letter from Attorney General of Utah and Attorney General of New México to members of the Subcommittee on Antitrust, Competition July 10, 2018, <https://attorneygeneral.utah.gov/wp-content/uploads/2018/08/Joint-AG-Letter-to-Committee-7.10.18.pdf>.

²⁶⁴ See Press Release, Attorney General State of Arizona, Attorney General Brnovich Statement on DOJ-T-Mobile/Sprint Merger Settlement, (July 26, 2019), <https://www.azag.gov/press-release/attorney-general-brnovich-statement-doj-t-mobilesprint-merger-settlement>.

benefit them.²⁶⁵ Nevertheless, after five states settled with the DOJ, others joined the settlement. One big factor helping state settle was the FCC formally supporting the merger. Citing the numerous benefits including increased coverage for all Americans, the FCC said “the network benefits of the transaction are particularly important for the nation’s underserved rural areas”²⁶⁶ Dealing directly with the states themselves, as opposed to addressing the multi-state suit, T-Mobile reached out to states promising state specific benefits. In one such case, Nevada was offered 5G coverage for 64% of the state within three years of closing, a “low-price mobile commitment,” jobs for the locals, and “free connectivity and equipment to households with school-age children.”²⁶⁷ Although the promises themselves were essentially the same for each state, each state became more inclined to join the settlement knowing they themselves would be taken care of.

The polarity between the two sides was over the same two points: violation of antitrust laws, and consequently the realistic probability that DISH would become a competitive fourth MNO, and the creation of jobs. Those who sided with the settlement valued the creation of jobs over any potential violation of the Clayton Act and were more optimistic in the promisingly strong future of DISH whereas those who sided with the lawsuit didn’t.

IV. THE VERDICT

With a large opposition group, and an almost equally large support group, any verdict would surely upset someone. Aside from the states’ stake in the game, the biggest parties involved were T-Mobile and Sprint. One cited reason the two telecommunication companies initially sought to merge was

²⁶⁵ See Monica Allevan, Fierce Wireless, Louisiana joins DoJ, backing T-Mobile/Sprint deal, (August 19, 2019), <https://www.fiercewireless.com/wireless/louisiana-joins-doj-states-backing-t-mobile-sprint-deal>. See also, Press Release, Department of Justice, Justice Department Welcomes Arkansas Joining T-Mobile/Sprint Settlement, (November 8, 2019), <https://www.justice.gov/opa/pr/justice-department-welcomes-arkansas-joining-t-mobilesprint-settlement>.

²⁶⁶ See Applications of T-Mobile US, INC., and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, FCC 19-103, (November 5, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf>.

²⁶⁷ See Press Release, Nevada Attorney General, Attorney General Ford Negotiates Settlement for T-Mobile-Sprint Merger Prioritizing Nevada Jobs, (November 25, 2019), https://ag.nv.gov/News/PR/2019/Attorney_General_Ford_Negotiates_Settlement_for_T-Mobile-Sprint_Merger_Prioritizing_Nevada_Jobs/.

to save Sprint. Despite being the fourth largest MNO, “Sprint’s trajectory over the past decade [had] been largely downward.”²⁶⁸ “Failing to earn net income for eleven straight years,” the company needed something, like the T-Mobile merger, to keep them in the game.²⁶⁹ Although this issue was brought up in both the settlement and the suit against the merger, it wasn’t an issue most, besides Sprint, cared about. Instead, the issue revolved around whether or not the U.S. District Judge Victor Marrero would allow the consumption of two tech goliaths -- as we know, on February 11th, 2020, he did.

In a three-part argument, Judge Marrero rejected the suit to block the merger. First, speaking to the antitrust concerns, the decision stated, “the Court concludes that the proposed merger is not reasonably likely to substantially lessen competition.”²⁷⁰ Second, addressing the future of Sprint, “while Sprint has made... attempts to stay competitive” the decision said, “Sprint is falling short... to remain relevant as a significant competitor.”²⁷¹ Lastly, introducing DISH as the new fourth NMO, Judge Marrero wrote that, “DISH’s statements at trial persuade the Court that the new firm will take advantage of its opportunity.”²⁷²

Knowing the merger would be difficult, if not impossible to appeal, five days later New York’s Attorney General addressed the press saying New York would not pursue an appeal and would instead “work with all the parties to ensure that consumers get the best pricing and service possible.”²⁷³ Around a month later, on March 11th, 2020, California and all those remaining in the suit settled with T-Mobile and Sprint.²⁷⁴ In addition to the benefits the states who previously settled had, the merged company would reimburse up to \$15 million in litigation fees to all the states, guarantee the creation of jobs and provide free Wi-Fi for low-income households in

²⁶⁸ See State of New York v. Deutsche Telekom AG, (February 11, 2020), <https://assets.documentcloud.org/documents/6773582/TMO.pdf>.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See Press Release, NYS Attorney General, Attorney General James’ Statement on T-Mobile/Sprint Appeal, (February 16, 2020) <https://ag.ny.gov/press-release/2020/attorney-general-james-statement-t-mobilesprint-appeal>.

²⁷⁴ See Press Release, Maryland Office of the Attorney General, Attorney General Frosh Announces Settlement Ending the State’s Challenge to T-Mobile/Sprint Merger, (March 11, 2020), <https://www.marylandattorneygeneral.gov/press/2020/031120a.pdf>.

California.²⁷⁵

What's concerning is the entire case is about the future, so no matter how many facts or cases either side can cite as opposition, no one will be able to tell how this story unfolds and whether or not antitrust laws will be violated.

V. ENDORSING THE HYPOTHETICAL

In the introduction of the case it was noted that the “adjudication of antitrust disputes virtually turns the judge into a fortuneteller” and that remark seems logical.²⁷⁶ The entire basis of the case is on what *can* happen in the future. It is, at the best, speculative of the current market, historical precedent, and past business mergers and acquisitions. While the verdict Judge Marrero would inevitably upset some people, through reading the facts of the case and conducting research, there is one other factor I wanted to consider that most others ignored: what would the antitrust concerns be if the merger was blocked and Sprint inevitably ran itself into the ground? The number of NMO competitors naturally reduces to three. What then would the various State Attorneys Generals do about their antitrust concerns? Granted a hypothetical case, I only suggest this issue because the entire case itself was a huge “what if.” Before indulging in this, it's worth noting the suit briefly mentioned this. Chiefly, one of the plaintiff's arguments against the suit was that Sprint “made several attempts to improve its network perception and demonstrate that it could be a disruptive competitor” but even after Claire joined the team in 2014, his plans to reinvigorate Sprint and increase network coverage “failed miserably.”²⁷⁷ The question of Sprint coming back into the game as a realistic competitor was, at this point, out of question. Therefore, what would have happened had Sprint run its course and eventually dissolved? In short, nothing. The number of NMOs would have gone down

²⁷⁵ See Press Release, Office of the Attorney General California Department of Justice, Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger, (March 11, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state's-challenge-t-mobile>. See Settlement Agreement and Release of Claims, (March 9, 2020), <https://oag.ca.gov/system/files/attachments/press-docs/CA%20Settlement%20Agreement%20%283.9%20fully%20executed%29.pdf>.

²⁷⁶ See *State of New York v. Deutsche Telekom AG*, (February 11, 2020), <https://assets.documentcloud.org/documents/6773582/TMO.pdf>.

²⁷⁷ See *State of New York v. Deutsche Telekom AG*, (February 11, 2020), <https://assets.documentcloud.org/documents/6773582/TMO.pdf>.

to three leaving the same antitrust concerns brought up in the suit. The only difference between the three companies in this case and the real world is that now T-Mobile, instead of being third to AT&T and Verizon, can very easily have a hand up on both if they deliver on their promise for nationwide 5G network.

Incorporating the inclusion of DISH Network as a fourth possible NMO, the merger passing seems best for everyone. Albeit the question of DISH's reliability is a huge question but had the merger been blocked, DISH would not have the resources the settlement with the DOJ mandated, and DISH would have little to no chance to enter this competitive arena. Essentially another way of coming to the same verdict as Judge Marrero, the merger seemingly worked out for the "new" T-Mobile *and* those in fear of antitrust violations.

VI. SCHOOLS OF ANTITRUST THOUGHT

In the case of antitrust policy, there has been considerable debate as to whether or not the status quo of the consumer welfare standard has been adequate in determining whether or not certain trusts were deemed dangerous, and therefore undemocratic. Specifically, there have been two main schools of thought: those supporting, and therefore embodying the consumer welfare standard, and those who don't think it's sufficient, following the newly coined competition standard. Understanding these schools of thought, especially in terms of the T-Mobile merger will help understand the concerns all those State Attorney Generals had, and if they were right to drop their concern.

The consumer welfare standard has been "the bedrock of American antitrust law" for a long time.²⁷⁸ What's interesting about this standard is that it doesn't necessarily look out for what's best for the consumer, it just ensures the consumer won't be harmed. Going further, the consumer welfare standard evaluates trusts based on their economic impact first, and uses that as a metric to see how the consumer will be affected. Notable for being the "most famous defense" of the consumer welfare standard is Robert Bork's 1978 book *The*

²⁷⁸ See Joe Kennedy, House of Representatives, Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy, (October, 2018), <https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf>.

Antitrust Paradox.²⁷⁹ Aside from the importance of the consumer, Bork’s book “instead [stressed] the importance of maximizing overall public welfare and economic efficiency in general” and went so far to extend the term to a ‘total welfare standard.’²⁸⁰ Looking at the bigger picture, while mergers might harm the consumer in the short run, the welfare standard would consider their overall economic value and could possibly allow them to merge. For the consumer, this would be “in the form of higher tax revenues and wages.”²⁸¹ Using similar terminology, when the verdict came out Free State Federation President Randolph May made a statement about how the new merger was “likely to increase competition and overall consumer welfare.”²⁸² Contrary to the name, the consumer welfare standard, on paper, essentially prioritizes big corporations while also ensuring the consumers aren’t hurt on the side. But it is important to recognize that although proponents of the welfare standard might first look at the economic value of any merger, it doesn’t mean that it is inadequate in protecting the people.

But with an intense focus on economics, others have questioned whether the competition standard can best serve the American people. Looking to encompass a wider variety of issues and target a different problem, the competition standard comes into play. It should be noted the term “competition standard” is not the only name for this school of thought. More widely known as neo-Brandeisians, adapting the thought of Louis Brandeis from the early 20th century,²⁸³ the people in this school target the issue of “bigness,” ensuring a focus on maintaining competition; hence the name “competition standard.” By targeting competition, this school suggests the government can promote “a variety of aims, including... open markets, the

²⁷⁹See Ryan Young and Clyde Wayne Crews, Jr., Competitive Enterprise Institute, (April, 2019), https://cei.org/sites/default/files/Wayne_Crews_and_Ryan_Young_-_The_Case_against_Antitrust_Law.pdf.

²⁸⁰ See Joe Kennedy, House of Representatives, Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy, (October, 2018), <https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf>.

²⁸¹ *Id.*

²⁸² See Bruce Walker, The Center Square, U.S> District Court blocks Nessel, other AGs, allows Sprint/T-Mobile merger to proceed, (February 11, 2020), https://www.thecentersquare.com/national/u-s-district-court-judge-blocks-nessel-other-ags-allows/article_55a51f44-4d13-11ea-a984-d7b0d4643751.html.

²⁸³See Ryan Young and Clyde Wayne Crews, Jr., Competitive Enterprise Institute, (April, 2019), https://cei.org/sites/default/files/Wayne_Crews_and_Ryan_Young_-_The_Case_against_Antitrust_Law.pdf.

protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control.”²⁸⁴ Among many prominent neo-Brandeisians, Timothy Wu, a professor at Columbia University school of Law, rejects the consumer welfare standard for what it has become as principally “measuring the harms of price collusion.”²⁸⁵ Wu argues the competition standard is “more realistic and suited to the legal system,” he further contends that the welfare standard has taken a step away from the core issue and, in many ways, become negligent to antitrust.²⁸⁶ Comparing the “wealth,” “health,” and “competitiveness” of the economy to other abstract, and consequently controversial terms when it comes to applying them in legal settings, Wu suggests the consumer welfare is “unmeasurable” suggesting the way we should prevent it is by protecting the competitive process.²⁸⁷

Understanding both popular schools, it is interesting to see how the T-Mobile merger plays into both; especially since it was allowed under the consumer welfare standard. And in accordance with the DOJ settlement and FCC report mandated by the Tunney Act, there doesn’t seem to be any issue with the Welfare Standard.²⁸⁸ But what about the competition standard? Would the T-Mobile merger satisfy neo-Brandeisians? Understanding their principal concerns as more than economic welfare, I found it interesting how the numerous concessions T-Mobile made satisfied some of the issues the competition standard brings up. Specifically, in propelling DISH as a fourth competitor, the merger didn’t change the number of key players in the telecommunications industry. Although that might be true at face value, when considering the bulk of settlement, in regard to DISH being Sprint’s prepaid business, one could argue that while DISH might be in telecommunications, they aren’t in the same sort of industry as T-Mobile, Verizon, and AT&T. Not to say DISH can’t become a powerful fourth MNO, just that, by analyzing the settlement, DISH isn’t one just yet.

²⁸⁴ See Lina M. Khan, “Amazon’s Antitrust Paradox,” *Yale Law Journal*, vol. 126 (2017), 743.

²⁸⁵ See Tim Wu, Columbia Law School, The “Protection of the Competitive Process” Standard, (2018), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3293&context=faculty_scholarship.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See Press Release, FCC, Chairman Pai Formally Recommends Approval of T-Mobile/Sprint Merger (August 14, 2019), <https://docs.fcc.gov/public/attachments/DOC-359080A1.docx>.

In addition to actually targeting competition, the competition standard also highlights the actual consumer. And looking at the promises T-Mobile made to various states, as they settled alongside the DOJ, it seems fair to assume the American population is being taken care of. Not just in terms of jobs, but in terms of coverage. By providing free connectivity for school-aged children,²⁸⁹ and expanding connections to more rural areas and ensuring more Americans get connections the public seem to be in good shape.²⁹⁰ In addition, T-Mobile's promise of low prices, for the first few years at least, suggest another area the competition standard wrongfully believed the consumer welfare standard could adequately address.

VII. CONCLUSION

Whether or not neo-Brandiesians believe the T-Mobile merger satisfied holes allegedly left by the consumer welfare standard, this merger is interesting to analyze because it is a recent case that sheds light on what the consumer welfare standard can accomplish. In terms of creating artificial competition, noting the difference between the stipulations this merger created and the lack of a fourth MNO, had the merger failed, regardless of its tentative strength, this case alludes to satisfying both parties, and both schools of thought, involved throughout this two-year process. What is especially interesting is that although the consumer welfare standard was chief antitrust policy throughout the last two years, the issues cited by numerous state Attorney Generals were about both the competition standard than the welfare standard. Additionally, knowing that so many states joined the settlement in exchange for state-specific benefits we can further suggest the influence of the competition standard. While the future of the merger will better dictate how successful the decision was, the prevalence in citing both schools cannot be overlooked.

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²⁸⁹ See Press Release, Nevada Attorney General, Attorney General Ford Negotiates Settlement for T-Mobile-Sprint Merger Prioritizing Nevada Jobs, (November 25, 2019), https://ag.nv.gov/News/PR/2019/Attorney_General_Ford_Negotiates_Settlement_for_T-Mobile-Sprint_Merger_Prioritizing_Nevada_Jobs/.

²⁹⁰ See Press Release, FCC, Chairman Pai Formally Recommends Approval of T-Mobile/Sprint Merger (August 14, 2019), <https://docs.fcc.gov/public/attachments/DOC-359080A1.docx>.