RECENT PROPOSED JUDGMENT

ANTITRUST — HORIZONTAL MERGERS — DOJ APPROVES T-MOBILE/SPRINT MERGER UNDER DISH NETWORK–ENTRY THEORY. — Proposed Final Judgment, *United States v. Deutsche Telekom AG*, No. 19-cv-02232 (D.D.C. July 26, 2019).

Section 7 of the Clayton Act[1] prohibits mergers and acquisitions that "substantially lessen competition" in "any line of commerce."[2] "Horizontal mergers" between direct market competitors often implicate section 7 and are reviewed by the agencies in charge of federal antitrust enforcement, the Department of Justice (DOJ) and the Federal Trade Commission (FTC).[3] The proposed horizontal merger between T-Mobile and Sprint, two of the four major national wireless carriers in the United States,[4] prompted such a DOJ review when it was announced in April 2018.[5] Recently, on July 26, 2019, the DOJ proposed a consent decree with T-Mobile, Sprint, and the cable provider DISH Network.[6] According to the DOJ, the agreement would offset the merger's potential anticompetitive effects by permitting DISH to replace Sprint as a fourth wireless competitor.[7] The decree's terms, however, do not satisfy the requirements for "entry" defenses to section 7 challenges outlined in the DOJ's enforcement policy guidebook, the Horizontal Merger Guidelines.[8] This inconsistency casts doubt on the decree's chances of surviving future legal challenges.

There are two types of wireless service providers in the U.S. wireless market: facilities-based carriers and mobile virtual network operators (MVNOs).[9] Facilities-based carriers own the network infrastructure and

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[1] Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2012) and at 29 U.S.C. §§ 52–53).

[2] *Id.* § 7, 38 Stat. at 731 (codified as amended at 15 U.S.C. § 18).

[3] *See* DOJ & FTC, HORIZONTAL MERGER GUIDELINES 1 (2010) [hereinafter GUIDELINES]; PHILLIP E. AREEDA & HERBERT HOVENKAMP, 4 ANTITRUST LAW ¶ 901 (4th ed. 2016).

[4] *See* ANNA-MARIA KOVACS, COMPETITION IN THE U.S. WIRELESS SERVICES MARKET 4 (2018), https://cbpp.georgetown.edu/publications/publications-policy-papers/ [https://perma.cc/55HY-3HCN].

[5] Letter from Scott Scheele, Chief, Telecomms. & Broadband Section, Antitrust Div., DOJ, to Kris Monteith, Chief, Wireline Competition Bureau, FCC 1 (Apr. 30, 2018) [hereinafter Scheele Letter], https://ecfsapi.fcc.gov/file/10501383928 31/2018%20Kris%20Monteith%2C%20Esq.%2C%20Chief.pdf [https://perma.cc/3J6U-56BJ].

[6] Proposed Final Judgment, United States v. Deutsche Telekom AG, No. 19-cv-02232, at 1 (D.D.C. July 26, 2019).

[7] *Id.*

[8] GUIDELINES, *supra* note 3, § 9.

[9] *See* Twentieth Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 32 FCC RCD. 8968, 8975–76 (2017) [hereinafter Wireless Competition Report].

wireless spectrum they use to provide wireless service.[10] MVNOs, in contrast, do not own their own spectrum or network infrastructure.[11] Instead, an MVNO purchases spectrum and network services from facilities-based carriers wholesale and then resells those services under its own brand.[12] Currently, the wireless market is dominated by four national facilities-based carriers: Verizon, AT&T, T-Mobile, and Sprint, who compete for subscribers both directly and through their MVNO resellers.[13]

On April 29, 2018, T-Mobile and Sprint agreed to a merger.[14] Under the proposed deal, T-Mobile agreed to merge with Sprint in an all-stock transaction that would unite the two companies under the T-Mobile name.[15] The combination would give New T-Mobile approximately 130 million subscribers,[16] roughly equal to the size of Verizon or AT&T, the current market leaders.[17] T-Mobile and Sprint claimed that the new company would "[d]eliver [l]ower [p]rices, . . . more competition and unmatched value for customers across the country."[18]

Antitrust officials had a different view. Almost immediately after the merger's announcement, the DOJ's Antitrust Division and several state attorneys general opened investigations of the deal under section 7 for its effects on the concentration of the wireless market.[19] The regulators feared that the loss of Sprint as a fourth competitor would enable price increases, heighten the risk of market coordination, and stifle innovation.[20]

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[10] *Id.* at 8975.

[11] *Id.* at 8976; Philip Kalmus & Lars Wiethaus, *On the Competitive Effects of Mobile Virtual Network Operators*, 34 TELECOMM. POL'Y 262, 262 (2010).

[12] Wireless Competition Report, *supra* note 9, at 8976; Kalmus & Wiethaus, *supra* note 11, at 262.

[13] Wireless Competition Report, *supra* note 9, at 8975–76; KOVACS, *supra* note 4, at 2–4. MVNOs are rarely seen as independent from their facilities-based hosts. *See, e.g.*, Wireless Competition Report, *supra* note 9, at 8988 n.99 (explaining that the FCC counts MVNO subscribers as part of the host carrier's market share).

[14] Press Release, T-Mobile, T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition (Apr. 29, 2018), https://www.t-mobile.com/news/5gforall [https://perma.cc/3XK6-22QN].

[15] *Id.*

[16] *See id.* For clarity, the postmerger T-Mobile is referred to as "New T-Mobile."

[17] *See* Second Amended Complaint ¶ 16, United States v. Deutsche Telekom AG, No. 19-cv-02232 (D.D.C. Oct. 2, 2019).

[18] Press Release, T-Mobile, *supra* note 14.

[19] *See, e.g.*, Sarah Krouse and Corinne Ramey, *New York Attorney General Probes T-Mobile-Sprint Deal's Impact on Prepaid Services*, WALL ST. J. (June 27, 2018, 5:34 PM), https://www.wsj.com/articles/new-york-attorney-general-probes-t-mobile-sprint-deals-impact-on-prepaid-services-1530135272 [https://perma.cc/6HHL-H5SM]; Scheele Letter, *supra* note 5.

[20] *See, e.g.*, Competitive Impact Statement at 7, *Deutsche Telekom AG*, No. 19-cv-02232 (D.D.C. July 30, 2019).

Despite these concerns, the DOJ approved the merger on July 26, 2019, in a proposed consent decree filed in district court.[21] In the complaint filed as part of the proposed decree, the DOJ argued that if the merger proceeded unremedied, it would lessen wireless competition, violating section 7.[22] The DOJ's complaint pointed out that the postmerger wireless market would be controlled almost entirely by three carriers of virtually equal size and competitive strength, which would, in the DOJ's view, lead to price increases[23] and the potential for increased coordination.[24]

The DOJ maintained, however, that these consequences could be avoided through the entry of the satellite-cable provider DISH Network into the wireless market.[25] Entry is a hallmark defense to section 7 merger challenges that is based on the idea that a merger will not have anticompetitive effects because a new firm will enter the market and replace the lost competition.[26] On this reasoning, the proposed consent decree outlined three critical conditions the DOJ believed would allow DISH to replace Sprint as a fourth national facilities-based wireless carrier.[27]

First, the DOJ's proposed decree would mandate certain divestitures from T-Mobile and Sprint to DISH, including Boost Mobile and Virgin Mobile, Sprint's two largest MVNOs, and all Sprint-branded prepaid subscribers.[28] DISH will acquire "all tangible and intangible assets" owned by the Boost and Virgin Mobile businesses.[29] The divestitures would give DISH an initial base of about 9.3 million prepaid subscribers.[30] Additionally, the proposed decree would direct New T-Mobile to divest to DISH all cell sites and retail locations that it decommissions within a five-year period following the merger's approval.[31] DISH must

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[21] Proposed Final Judgment, *supra* note 6, at 2. A consent decree is a judicially enforced settlement agreement. *See Consent Decree*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[22] *See* Second Amended Complaint, *supra* note 17, ¶¶ 3–6, 16–22, 29–30.

[23] *Id.* ¶¶ 16–21 (noting that New T-Mobile "would have the incentive and the ability to raise prices" without Sprint as a competitor, *id.* ¶ 21).

[24] *Id.* ¶ 21. Market coordination occurs when firms in the same market interact or collude either expressly (such as by price fixing) or tacitly. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶¶ 916–18.

[25] *See* Proposed Final Judgment, *supra* note 6, at 2.

[26] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990); GUIDELINES, *supra* note 3, § 9; *see also* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 798–99 (2006) (concluding entry is the "most important" defense, *id.* at 799).

[27] *See* Proposed Final Judgment, *supra* note 6, at 2.

[28] *Id.* at 4, 7–11 (detailing the prepaid divestiture terms).

[29] *Id.* at 4 (including all of the companies' subscribers, licenses, branding, retail locations, employees, and facilities).

[30] T-Mobile US, Inc., Current Report (Form 8-K) Ex. 99.1, at 2 (July 26, 2019). The divested subscribers will receive legacy service on the New T-Mobile network under "transition services agreements." Proposed Final Judgment, *supra* note 6, at 10.

[31] Proposed Final Judgment, *supra* note 6, at 13.

use these divested assets to establish nationwide postpaid wireless service within one year of the deal's closure.[32]

Second, the proposed decree would order New T-Mobile to offer to sell all of Sprint's 800 MHz–spectrum holdings to DISH.[33] Spectrum licenses give wireless carriers rights to transmit wireless voice calls, text messages, and mobile data over certain radio frequencies.[34] Sprint's 800 MHz holdings are at a "low band" or "coverage" frequency, meaning that they can be deployed over larger geographic areas with fewer cell sites than other types of spectrum holdings.[35] Under the proposed decree, DISH would use this spectrum to expand its facilities-based coverage nationwide to become competitive with the incumbent carriers.[36] If the court approves the decree and DISH does not buy the spectrum, DISH will pay a $360 million penalty to the U.S. government unless it has already deployed a facilities-based network covering more than twenty percent of the U.S. population within a three-year period.[37]

Finally, the decree would require New T-Mobile to provide DISH access to its network via a seven-year "Full MVNO Agreement."[38] Like a standard MVNO, DISH would be able to provide its subscribers mobile service on New T-Mobile's nationwide network while DISH builds its own facilities-based network.[39] DISH wireless subscribers would be able to "roam[]" between DISH's emergent network and the New T-Mobile network, giving DISH's subscribers nationwide mobile coverage at the outset[40] — a necessity for a major wireless competitor.[41] The agreement would require New T-Mobile to refrain from treating DISH's "customers differently than [its] own similarly situated customers" and to "use reasonable best efforts to provide" DISH with adequate service.[42] For

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[32] *Id.* at 17.

[33] *Id.* at 11.

[34] *See* Second Amended Complaint, *supra* note 17, ¶¶ 12–13. *See generally* GSMA, INTRODUCING RADIO SPECTRUM (2017), https://www.gsma.com/spectrum/wp-content/uploads/2016/06/Introducing-Radio-Spectrum-Online-HighRes.pdf [https://perma.cc/CB9A-L6ZP] (providing an introductory overview of spectrum).

[35] *See Access to Low-Band Spectrum Is the Key to Wireless Competition*, RURAL WIRELESS ASS'N (June 4, 2015), https://ruralwireless.org/wp-content/uploads/2015/06/RWA-Grassroots-Blog-2-June_4_20151.pdf [https://perma.cc/LL5J-3NTU].

[36] *See* Competitive Impact Statement, *supra* note 20, at 2–3.

[37] Proposed Final Judgment, *supra* note 6, at 12.

[38] *Id.* at 19.

[39] *See* Competitive Impact Statement, *supra* note 20, at 11; Proposed Final Judgment, *supra* note 6, at 19.

[40] T-Mobile US, Inc., *supra* note 30, Ex. 99.1, at 2.

[41] Competitive Impact Statement, *supra* note 20, at 7.

[42] Proposed Final Judgment, *supra* note 6, at 19. The proposed decree would also make New T-Mobile's support of "eSIM" for DISH devices mandatory. *Id.* at 21–22. eSIM allows devices to switch between mobile networks without requiring the user to manually replace their SIM card. *See generally* GSM ASS'N, EMBEDDED SIM REMOTE PROVISIONING ARCHITECTURE V1.1

its part, DISH must use the divested assets and the MVNO agreement to build a nationwide facilities-based wireless carrier that will "deter or counteract [any] competitive effects of concern" the merger raises.[43]

The DOJ and the federal courts review mergers using the Horizontal Merger Guidelines, a manual of DOJ enforcement policy that has traditionally been a persuasive "benchmark of legality" in merger analysis.[44] Under the Guidelines, entry must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[45] However, the DISH Network entry that the proposed consent decree contemplates would not meet the Guidelines' "sufficiency" or "timeliness" requirements.[46] The new carrier would face structural and reputational barriers that would make achieving Sprint's "scale and strength" doubtful,[47] and its buildout period would not meet the Guidelines' entry deadline.[48] This tension between the proposed decree and the Guidelines makes it unlikely that the decree will be upheld under judicial review.

First, DISH's initial entry as an MVNO of New T-Mobile likely fails the Guidelines' "sufficiency" standard, which requires that the new entrant be able to "replicate at least the scale and strength of one of the merging firms" in terms of competitive impact.[49] A DISH MVNO could not be an effective replacement for Sprint. Indeed, as a general rule, MVNOs are not competitive with their host facilities-based carriers.[50] This is because MVNOs have little or no independent control over their

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(2014), https://www.gsma.com/newsroom/wp-content/uploads//SGP.01-v4.0.pdf [https://perma.cc/CQ7J-5UST] (providing a technical overview of eSIM technology).

[43] GUIDELINES, *supra* note 3, § 9; *see* Competitive Impact Statement, *supra* note 20, at 2 (noting that the decree "obligates" DISH's entry).

[44] Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 434 n.13 (5th Cir. 2008) (quoting United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J., dissenting)); *see* Greene, *supra* note 26, at 781–89 (concluding that the Guidelines exert outsized influence).

[45] GUIDELINES, *supra* note 3, § 9 at 28.

[46] *Id.* The other condition for an entry defense under the Guidelines is "likelihood," which focuses on whether the new competitor will actually enter the market. *Id.* § 9.2. This standard is not at issue here because the decree mandates that DISH enter the market. Proposed Final Judgment, *supra* note 6, at 23.

[47] GUIDELINES, *supra* note 3, § 9.3.

[48] S*ee id.* § 9.1. For a series of arguments against the proposed decree's ability to offset the merger's competitive harms, see Nicholas Economides et al., *Assessing DOJ's Proposed Remedy in Sprint/T-Mobile: Can Ex Ante Competitive Conditions in Wireless Markets Be Restored?* 9–12 (NET Inst., Working Paper No. 19-14, 2019), http://www.netinst.org/Economides_19-14.pdf [https://perma.cc/Y8Q7-9CA9].

[49] GUIDELINES, *supra* note 3, § 9.3; *see* FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 67 (D.D.C. 2018); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 58 (D.D.C. 1998).

[50] The FCC does not treat MVNOs as separate competitors in market share calculations, choosing instead to count their subscribers as subscribers of the host network. *See* Wireless Competition Report, *supra* note 9, at 8988 n.99.

networks,[51] and their service quality is nearly always inferior to that of the host carrier because the host privileges its own subscriber traffic over that of the MVNO subscribers during periods of network congestion.[52] Although the proposed decree provides that New T-Mobile will not "discriminate" against DISH's MVNO customers relative to "similarly situated" customers,[53] this language likely refers to customers of New T-Mobile's other MVNO, Metro, a budget prepaid carrier with inferior service quality.[54] A DISH MVNO in a similar position as Metro would obviously be at a competitive disadvantage to New T-Mobile and the other main carriers.[55] Lastly, the fact that DISH's carrier would depend on New T-Mobile for its core network services likely makes true competition between the firms insufficient as a rule.[56]

The DOJ makes clear that a facilities-based competitor, rather than an MVNO, is ultimately needed to replace Sprint.[57] But a DISH facilities-based carrier would still fall short of the Guidelines' sufficiency and timeliness requirements. For one thing, DISH's nascent facilities-based carrier would be hard-pressed to match Sprint's competitive "scale and strength" given DISH's lack of "intangible assets" such as brand reputation or industry-specific name recognition.[58] Reputation can be a

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[51] *See* Charter Communications, Inc., Comments on Applications of T-Mobile US, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations 5–6 (Aug. 27, 2018), https://ecfsapi.fcc.gov/file/10827168171115/Comments%20of%20Charter%20Communications%20(Dkt.%2018-197).pdf [https://perma.cc/DN66-CXTW] (describing the "significant limitations" of its MVNO agreement, *id.* at 5, due to lack of network control); *see also* White Consol. Indus., Inc. v. Whirlpool Corp., 781 F.2d 1224, 1227–28 (6th Cir. 1986) (requiring a "willing, *independent* competitor," *id.* at 1228 (emphasis added)).

[52] *See* TUTELA, US MOBILE LTE NETWORK QUALITY 2018, at 2 (2018) https://www.tutela.com/hubfs/Assets/Tutela%20USA%20LTE%202018.pdf [https://perma.cc/MY9T-AFVQ] (noting twenty-three percent lower speeds for MVNOs compared to their facilities-based hosts); Kalmus & Wiethaus, *supra* note 11, at 263 (concluding that facilities-based carriers host MVNOs only if they can "differentiate[]" quality of service).

[53] Proposed Final Judgment, *supra* note 6, at 19.

[54] *See Terms and Conditions: Network Disclosure*, METRO BY T-MOBILE (June 7, 2019), https://www.metrobyt-mobile.com/content/metro/en/desktop/metro/terms-conditions/network-disclosure.html [https://perma.cc/56PV-P7S4] (noting that data of T-Mobile-branded customers "ha[ve] precedence" over Metro data).

[55] *See* Economides et al., *supra* note 48, at 11–12; *cf.* Charter Communications, *supra* note 51, at 5–6.

[56] *See White Consol. Indus.*, 781 F.2d at 1227–28; *see also* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 77–78 (D.D.C. 2015) (finding that a licensing agreement created an anticompetitive dependency relationship); Economides et al., *supra* note 48, at 12 (claiming that the "ongoing entanglements . . . create[] ongoing competitive concerns").

[57] *E.g.*, Competitive Impact Statement, *supra* note 20, at 2, 8, 12; *cf.* Proposed Final Judgment, *supra* note 6, at 23 (ordering DISH to serve subscribers on its own network rather than New T-Mobile's network whenever possible).

[58] GUIDELINES, *supra* note 3, § 9; *see* PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, 2B ANTITRUST LAW ¶ 421g (4th ed. 2014); Malcolm B. Coate, *Theory Meets Practice: Barriers to Entry in Merger Analysis*, 4 REV. L. & ECON. 183, 197 (2008).

significant barrier to new entry, especially where the market is characterized by aggressive advertising and branding, as is the wireless industry.[59] To compete with the incumbents, DISH would need to build a positive reputation while combating the reputational consequences of second-rate MVNO service — a considerable lift given the incumbents' extant brand equity.[60] These reputational barriers to entry are magnified by high "switching costs."[61] That is, switching wireless carriers involves high transaction costs, which cause customer inertia or "lock-in" and make drawing customers away from the incumbents difficult for new competitors.[62] The DOJ recognized this in ordering New T-Mobile to permit DISH to support eSIM, a technology that makes it easier for consumers to switch carriers.[63] But the fact that the DOJ feels that DISH must exploit a relatively new technology to gain market share only underscores the point that the necessary subscriber growth will be difficult for the new company.[64]

Second, the DISH facilities-based mobile carrier would take too long to build to satisfy the Guidelines' "timeliness" requirement. The Guidelines require entry to be "rapid enough that customers are not significantly harmed by the merger."[65] Entry defenses typically will be considered only if the entrant will achieve sufficient competitive strength within "two to three years."[66] But developing a nationwide wireless network will be a much longer-term project.[67] For instance, the 800 MHz "coverage" spectrum DISH will use to grow its network

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[59] *See* Coate, *supra* note 58, at 196–97; John B. Kirkwood & Richard O. Zerbe, Jr., *The Path to Profitability: Reinvigorating the Neglected Phase of Merger Analysis*, 17 GEO. MASON L. REV. 39, 57–58 (2009); *see also* Wireless Competition Report, *supra* note 9, at 9013–14 (describing the facilities-based carriers' advertising expenditures and strategies).

[60] *See* Wireless Competition Report, *supra* note 9, at 9013–14.

[61] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476 (1992); *see id.* at 476–78; *see also* FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 49–55, 65–66 (D.D.C. 2009) (explaining customer switching costs as entry barriers).

[62] *E.g.*, KALPANA TYAGI, PROMOTING COMPETITION IN INNOVATION THROUGH MERGER CONTROL IN THE ICT SECTOR 39 (2019), https://link.springer.com/book/10.1007/978-3-662-58784-3 [https://perma.cc/ZZB9-2337]; *see, e.g.*, *id.* at 39–41; Peter D. Lunn, Commentary, *Telecommunications Consumers: A Behavioral Economic Analysis*, 47 J. CONSUMER AFF. 167, 172–74 (2013).

[63] *See* Proposed Final Judgment, *supra* note 6, at 21–22.

[64] *See* TYAGI, *supra* note 62, at 39; Lunn, *supra* note 62, at 174–79.

[65] GUIDELINES, *supra* note 3, § 9.1.

[66] FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 67 (D.D.C. 2018) (quoting FTC v. Staples, Inc., 190 F. Supp. 3d 100, 133 (D.D.C. 2016)); *see* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 55–56 (D.D.C. 1998); *see also* AREEDA, HOVENKAMP & SOLOW, *supra* note 58, ¶ 422b (describing the deadline as varying from one to three years).

[67] *See* Economides et al., *supra* note 48, at 11; Letter from Jeffrey H. Blum, Senior Vice President, Pub. Policy & Gov't Affairs, DISH Network Corp., to Donald Stockdale, Chief, Wireless Telecomms. Bureau, FCC 2–3 (July 26, 2019), https://www.fcc.gov/sites/default/files/dish-letter-07262019.pdf [https://perma.cc/NAF7-MH4A] (requesting that the FCC extend DISH's spectrum utilization deadlines to June 14, 2023, and describing this as an "accelerated timeline," *id.* at 3).

will not be transferred until at least three years after the merger closes,[68] meaning that DISH will not possess a fundamental building block of the facilities-based network until after the Guidelines' timeframe expires. In addition, the proposed decree tacitly admits that a three-year deadline is unrealistic by waiving DISH's non-compliance penalties if DISH's network is capable of covering "at least 20% of the U.S. population" within a three-year period.[69] Setting twenty percent nationwide coverage — clearly insufficient to compete with the three nationwide carriers[70] — as a three-year goal implies that building a full-coverage network is unrealistic within two to three years.[71]

The proposed decree's incongruence with the Guidelines is particularly significant in light of the remaining hurdles the T-Mobile/Sprint merger faces. First, under the Tunney Act,[72] a federal court must determine the decree is in the public interest for it to go into effect.[73] Although the DOJ is accorded "significant" deference in Tunney Act judicial review,[74] its departure from the Guidelines may endanger the proposed decree. Second, numerous states have filed suit to enjoin the merger in the Southern District of New York,[75] and the DOJ's break with the Guidelines may blunt the persuasive thrust of the DOJ's approval in the upcoming trial. If the Guidelines' "benchmark of legality"[76] is observed in these cases, the DOJ may not be able to save T-Mobile and Sprint's deal after all.

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[68] Proposed Final Judgment, *supra* note 6, at 11–12 (ordering divestiture "within three (3) years . . . or within five (5) business days of the approval by the FCC . . . , whichever is later," *id.* at 11).

[69] *Id.* at 12.

[70] *See* Competitive Impact Statement, *supra* note 20, at 7.

[71] Clearly, the feasibility of the three-year deadline varies by industry, but allowing an exception because the industry has high entry barriers would undermine the rule, which is designed to sort out cases where belated or difficult entry would permit consumer harms. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 941g; AREEDA, HOVENKAMP & SOLOW, *supra* note 58, ¶ 422b.

[72] 15 U.S.C. § 16(b)–(h) (2012).

[73] *See id.* § 16(e)(1).

[74] Rachel Frank, Comment, *Still Mocking Judicial Power? Determining Deference Accorded to the Justice Department in Review of Consent Decrees in Horizontal Mergers*, 9 ELON L. REV. 171, 206 (2017).

[75] Redacted Amended Complaint, New York v. Deutsche Telekom AG, No. 19-cv-5434 (S.D.N.Y. June 21, 2019); Press Release, N.Y. State Office of the Att'y Gen., AG James: T-Mobile/Sprint Megamerger Remains a Bad Deal for Consumers, Innovation, and Workers (July 26, 2019), https://ag.ny.gov/press-release/ag-james-t-mobilesprint-megamerger-remains-bad-deal-consumers-innovation-and-workers [https://perma.cc/A2XM-W25F].

[76] Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 434 n.13 (5th Cir. 2008) (quoting United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J., dissenting)).