

T-Mobile/Sprint: DOJ Leaning Against Deal, Finding Pai-Endorsed Remedy Insufficient

T-Mobile (TMUS) and Sprint (S)—despite Federal Communications Commission Chairman Ajit Pai's endorsement of their proposed merger today—still have their work cut out for them in convincing the Department of Justice to clear the \$26.5 billion deal.

DOJ currently is leaning against the deal, unsatisfied with the Pai-backed fix proposed by the companies, a source familiar with the matter said. The agency's leadership still hasn't determined whether more conditions would remedy the antitrust harms, or if the deal is unfixable and the department should sue to block it, the source said.

DOJ's ongoing reservations put into perspective the carriers' unexpected victory in persuading Pai to approve the deal in exchange for T-Mobile and Sprint agreeing to 28 pages of conditions. The commitments include the divestiture of Sprint's Boost prepaid business and a pledge to create a 5G network serving 99 percent of the U.S. population within six years of the merger's completion. Pai was joined by his two fellow Republican commissioners, ensuring the deal has enough votes for FCC approval over Democratic objections.

The Pai announcement stunned deal opponents, whose confidence had grown in recent weeks as stories emerged about deep, longstanding concerns among the staffs of the FCC, DOJ and state attorneys general reviewing the transaction. The opponents scrambled to find out if DOJ and state AGs also had settled with the companies and were preparing to wave the deal through.

For now, DOJ remains unconvinced by T-Mobile's argument that the Sprint acquisition would allow the company to leapfrog the 5G expansion plans of wireless market leaders Verizon and AT&T, greatly expanding network capacity throughout the country.

A DOJ spokesperson didn't respond to a request for comment on continuing reservations at the department. DOJ typically investigates whether a deal violates Section 7 of the Clayton Act, while the FCC views mergers under a broader public interest standard.

Spokespeople for T-Mobile and Sprint didn't respond to requests for comment.

Bloomberg first reported on the department leaning against the deal.

A DOJ decision that diverges from the FCC's would be a further twist on the unique path the T-Mobile/Sprint review process has taken. In recent history, the two agencies always have agreed on whether to clear or block deals they review in parallel. The agencies are concerned about presenting

a united front to the companies, antitrust lawyers said. When DOJ challenges a transaction in federal court, it wouldn't want to answer a judge's questions about why the FCC, the government's expert telecommunications agency, decided to approve it, the lawyers said.

It's unlikely Pai's decision caught DOJ antitrust chief Makan Delrahim off guard. The two men are friends and David Lawrence, formerly one of Delrahim's senior aides, led the FCC staff's review of the transaction. The agencies have closely coordinated their reviews throughout the process, following the longstanding practice between the commission and the department.

FCC-backed commitments. The DOJ reservations could result from T-Mobile's promises having little to do with competition law concerns, and instead focus on promises involving 5G network construction, rural buildout and in-home broadband.

Pai endorsed the deal after T-Mobile and Sprint agreed to take steps to advance U.S. 5G leadership and close the digital divide—two top commission priorities—and to address concerns about transaction harms. “This is a unique opportunity to speed up the deployment of 5G throughout the United States and bring much faster mobile broadband to rural Americans,” he [said](#). “We should seize this opportunity.”

The companies' [commitments](#) are for T-Mobile post merger to “build a world-leading nationwide 5G network”; “provide high-speed service to rural America”; provide an “in-home broadband” service; divest Sprint's Boost Mobile prepaid service; not raise prices for three years; not exercise any termination rights under cable provider Altice's MVNO [mobile virtual network operator] agreement with Sprint that might be triggered by the merger,” and “engage in good faith negotiations to expand the existing Sprint/Altice agreement to the new T-Mobile 5G network.”

The commitments are backed by “verification processes” and an “even more exacting enforcement structure,” which a senior FCC official said would include penalties of up to \$2.4 billion a year for noncompliance.

Two of these commitments speak to more traditional antitrust issues.

The first involves a commitment that new T-Mobile will for three years “make available the same or better rate plans” both companies currently offer, thereby ensuring that prices can't increase post-merger.

But Delrahim has made opposition to conduct remedies a hallmark of his tenure, and his public statements show little appetite for replacing market forces with limited-duration price regulation.

Furthermore, the commitment wouldn't address the deal's potential non-price competitive effects, such as harm to service quality, product variety and innovation.

The three-year price freeze also might not seem like much of a concession to the DOJ antitrust chief because wireless service prices have been falling—in large part driven by Sprint and T-Mobile's aggressive promotions.

T-Mobile's only promise consistent with a traditional antitrust remedy involves its commitment to divest Sprint's Boost prepaid brand to a "serious and credible buyer." T-Mobile also will provide the buyer with a wholesale agreement that "meaningfully improve[s]" upon T-Mobile's existing wholesale contracts, therefore positioning Boost to compete effectively post-merger.

But multiple factors could render the Boost commitment insufficient to alleviate DOJ concerns.

Most importantly, the fix wouldn't address competition concerns in the postpaid market, where the deal combines two close competitors in a highly concentrated segment, or the wholesale market, where the deal combines the two leading players. Both markets have drawn significant DOJ scrutiny throughout the merger review.

Even on its own terms, the Boost offer raises significant questions.

Perhaps most importantly, the Boost buyer would rely on the new T-Mobile's network to offer wireless service. This relationship would create a significant ongoing entanglement between the buyer and seller, raising questions about whether the fix actually creates an independent competitor that would restore competition.

Bowing to this reality, T-Mobile's commitment letter promises that it won't treat Boost "in a discriminatory or anticompetitive manner" through "unwanted discriminatory throttling, de-prioritization, or limitations on access to new network technologies."

Such commitments are, of course, behavioral in nature. And the fact that T-Mobile would have the power to discriminate against a new, ostensibly independent competitor illustrates the ongoing entanglement the fix would create.

Litigation considerations. Although FCC approval could complicate Delrahim's political calculus, it's less clear the telecom regulator's sign-off would meaningfully affect a DOJ lawsuit's odds of success.

To be sure, FCC behavioral conditions could—in the most optimistic reading—not only indicate to a court that the deal had won some regulatory buy-in but also change the competitive facts on the ground, creating a moving target for a lawsuit to block the deal.

That said, the federal antitrust agencies have a strong recent track record of winning court challenges to horizontal mergers.

A DOJ court case against the deal could gain a new piece of evidence by virtue of the market's Monday reaction to Chairman Pai's announcement. Wireless market leaders Verizon and AT&T shares initially spiked on Chairman Pai's announcement, providing an indication that investors view the T-Mobile/Sprint deal's potential close as a positive development for AT&T and Verizon's wireless businesses.

The development will lend further ammunition to deal opponents' arguments that the T-Mobile/Sprint merger would actually increase the likelihood of anticompetitive coordination among the remaining three U.S. wireless carriers.

T-Mobile has pitched the Sprint tie-up as a threat to Verizon and AT&T, and described the deal as the best way to ensure heightened competition against the existing “duopoly.”

FCC voting process. Meanwhile, the FCC is preparing a draft order for the commissioners to consider in the coming weeks. Pai immediately picked up the support of fellow Republican Commissioner Brendan Carr, who [said](#) the combination would increase competition and accelerate 5G buildout. That was followed later in the day by the other GOP Commissioner, Mike O'Rielly, who [tweeted](#) he was “inclined to support T-Mobile/Sprint proposed merger, even if not convinced of the need for all the newly announced conditions being proposed.”

Democratic Commissioner Jessica Rosenworcel tweeted she had “[serious doubts](#)” about the deal and [said](#) the proposed deal and conditions should be put out for public comment. The other Democratic commissioner, Geoffrey Starks, didn't comment.

Pai said he would circulate a draft order to finalize the FCC's review “in the coming weeks.” When a draft has three votes and has been on circulation internally for 21 days, a vote deadline is triggered, though a commissioner can request a brief extension, said an FCC spokesperson.

The FCC has already issued the [tentative agenda](#) for its next open meeting on June 6. While at this point Pai couldn't force a vote June 6 on a T-Mobile/Sprint draft without the consent of all his colleagues, he could force a vote at the July 10 meeting by circulating a draft at least three weeks prior, by June 19. The FCC chairman is expected to issue a blog post announcing the preliminary agenda for that meeting on June 18.