Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Deutsche Telekom AG,	)	
T-Mobile USA, Inc. and MetroPCS	)	WT Docket No. 12-301
Communications, Inc.	)	
	)	
For Consent To Assign or Transfer Control of	)	
Licenses and Authorizations	)	

COMMENTS OF

THE FREE STATE FOUNDATION[1]

I. Introduction and Summary

These comments are submitted in connection with the review of the applications for assignment of licenses resulting from T-Mobile's proposed transaction to combine with MetroPCS.

The Commission should evaluate proposed mergers involving transfers of wireless spectrum licenses with a view towards recognizing the innovative forces that characterize the wireless market. This means acknowledging the competitive conditions as well as technological and market imperatives for delivering breakthrough products and services, including ongoing migration to next-generation 4G LTE and beyond networks. It also means the Commission's public interest analysis should acknowledge and take into account competing services offered by other national providers, regional and local wireless providers, mobile virtual network operators (MVNOs), as well as cross-platform wireline providers.

1. These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Research Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

The Commission should not use its powers to interfere with the terms of the proposed merger absent compelling evidence of potential anticompetitive conduct and consumer harm. To do otherwise means substituting the Commission's own judgments for those of the applicants. Nor should the Commission manipulate its review standards through *ad hoc*, arbitrary adjustments to its public interest analysis or spectrum screen. Moving the analytical goalposts in novel ways in the course of reviewing mergers undermines the integrity of the process.

By combining MetroPCS's spectrum, wireless infrastructure, and other resources with its own, T-Mobile seeks to speed up and expand its deployment of 4G LTE services to meet growing demands for data-rich wireless broadband services. Consumers stand to gain from a more rapid migration to next-generation wireless services resulting from the proposed merger.

Significantly, the transaction does not reduce the number of nationwide competitors. Nor does it appear to reduce the number of competitors in any local market in any significant respect. Meanwhile, T-Mobile/MetroPCS would likely not exceed the agency’s spectrum screen triggers.

In sum, considered in a proper analytical framework, this proposed combination will likely improve the competitive standing of T-Mobile/MetroPCS in reaching wireless consumers across the nation and thus serve the public interest.[2]

II. The Dynamism of the Market Should Inform the Commission's Analysis and Definition of Relevant Markets and Products

Today's wireless market should be examined with a dynamic market-minded outlook that accounts for market conditions conducive to continuing investment and innovation. Prevailing market dynamism should inform the Commission's definitions of the relevant product and service markets in its analysis of the proposed transaction's competitive effects.

[2] Consistent with our general practice, the purpose of these comments is not to specifically endorse the proposed transaction. Rather, it is to address the relevant principles and perspectives that ought to be considered by the Commission in evaluating T-Mobile/MetroPCS, or, for that matter, similar transactions.

A dynamic market analysis involves a forward-looking evaluation of the market's underlying competitive conditions and processes for delivering new generations of products and services. Underlying market conditions necessary for more rapid migration of competing wireless networks to next-generation standards include investment in network infrastructure upgrades and the achievement of spectrum efficiencies. 4G LTE network enhancements include increased capacity, lower latency, and stronger security – leading to reduced costs per megabit.

T-Mobile is one of four competing nationwide providers. Meanwhile, MetroPCS is a regional provider, a disruptor that offers lower-end innovations rather than high-end services to gain critical market share. Other regional and local wireless carriers, such as Cricket/Leap, C-Spire, and U.S. Cellular, offer 3G and even 4G LTE wireless services, often priced competitively compared to nationwide providers. Regional and local providers' wireless service offerings typically include unlimited bucket plans for voice, video, and data use when local, and provide out-of-territory coverage through roaming. All such providers are relevant to the Commission's analysis.

Similarly, the Commission should consider MVNOs in its competitive analysis regarding the T-Mobile/MetroPCS transaction. The prepaid market caters particularly to low-income, price sensitive, and low-usage consumers, including those who do not want data services or do not wish to become multi-year subscribers. As the Commission has recognized, "MVNOs often increase the range of services offered by the host facilities-based provider by targeting certain market segments, including segments previously not served by the hosting facilities-based provider."[3] These MVNOs serve millions of customers, with the number of TracFone subscribers

[3] Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Fifteenth Report*, WT Docket No. 10-33 (2011), at pg. 36, ¶ 33.

reportedly increasing from 14 million at the end of 2009 to approximately 21 million.[4] The Commission has previously acknowledged that "HHIs and other market concentration metrics that use subscriber connections or sales of facilities-based providers only may not fully reflect the effect of MVNOs on competition and consumer welfare."[5] Taking the competitive effects of MVNO's into account would remedy this particular analytical shortcoming.

Taking the dynamism of today's market into account should also mean considering inter-modal or cross-platform competition from wireline telecommunications, cable, and satellite providers. Such companies provide an array of voice, video, and data services that, in many respects, provide ready substitutes. Where a combination might possibly appear to have an anticompetitive impact on one market segment that is defined too narrowly, it may well have an overall benign or procompetitive impact when considered against the backdrop of ongoing cross-platform rivalry. By creating greater efficiencies that spur enhanced competition from cross-platform rivals, such mergers actually benefit consumers choosing from competing platforms.

III. Compelling Evidence Should Be Required to Justify Regulatory Interference

Existing market competition should bear on the Commission's analysis in important ways:

First, "the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign."[6] Therefore, any Commission finding that a proposed merger would lead to contrary results should be based on compelling evidence.

As the Commission has recognized, mergers provide a way for wireless service providers

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[4] *See id*. at pg 36, ¶ 34; Mike Dano, FierceWireless, "F.J. Pollack's TracFone: The Most Successful Wireless Provider You've Never Heard Of," *FierceWireless* (Oct. 4, 2012), *available at* http://www.fiercewireless.com/story/fj-pollaks-tracfone-most-successful-wireless-provideryouve-never-heard/2012-10-03.

[5] *Fifteenth Report*, at pg. 46, ¶ 49.

[6] Christine A. Varney, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.htm.

to extend network coverage and improve capacity.[7] Expansion of network coverage has been key to breaking down local and long distance calling distinctions, allowing today's consumers to obtain all of their desired voice services through a single subscription and a single bill. Such expansion has also led to the reduction of voice and data roaming, lowering costs for consumers.

Second, where a proposed merger will take place within the context of a market characterized by intense, ongoing competition, the less likely it is that a proposed merger will undermine consumer welfare. The presence of competitive alternatives makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

Third, when the Commission withholds its approval of a proposed merger or imposes conditions on that approval it means a government institution is substituting its own judgment for market actors. The Commission's substitution of its judgment for that of market actors can be justified only if there are specifically identified harms demonstrated by compelling evidence. And the Commission must target narrowly any remedies designed to address such harms.

Given the rapidly changing market landscape, the Commission must not freeze specific pricing options, network engineering decisions, or other business judgments into place through regulatory conditions imposed on proposed merges. And the Commission should not brush aside the likely consumer welfare-enhancing benefits of mergers as non-transaction specific simply because competitors or new entrants could conceivably benefit from additional spectrum or infrastructure. The Commission cannot cavalierly disregard the economic benefits of mergers proposed by wireless providers that actually bear the risks. Nor do hypotheticals in which

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[7] Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Fourteenth Report*, WT Docket No. 09-66 (2010), at pg. 52, ¶ 75.

competitors or new entrants instead acquire the spectrum licenses at issue provide basis for finding likely anticompetitive harm.

Fourth, the Commission's competitive analysis and overall review process should promote flexibility in spectrum use and in secondary market transactions. Flexible-use licensing is crucial to ensuring that wireless providers can adapt and expand services. In order to improve flexibility, the National Broadband Plan declared that "[t]he goal of the FCC's current secondary market policies is to eliminate regulatory barriers that might hinder access to, and permit more efficient use of, valuable spectrum resources."[8] Restrictions on spectrum use, particularly in the case of combinations posing no demonstrable consumer harm, have a chilling effect on the secondary market.

IV. The Transaction Poses Likely Consumer Benefits

T-Mobile and MetroPCS plausibly contend the merger will improve spectrum efficiency, increase network capacity, and reduce overhead costs. This includes a projected savings from network synergies of $6-7 billion.[9] The applicants also contend, again plausibly, that by combining resources the merger has the potential to facilitate faster and wider deployment of 4G LTE services beyond what either could achieve singly while reducing data roaming. This is particularly important given mobile data traffic demand growth and present difficulties obtaining new spectrum. The combined resources will enable customers to enjoy more robust, next-generation services using more advanced handsets. Additional capacity reduces risk of service disruption as spectrum is refarmed and customers migrate to more advanced networks.

[8] Connecting America: The National Broadband Plan, at 83 (Recommendation 5.7).
[9] Acquisition of MetroPCS, Inc. by T-Mobile, Inc.: Description of Transaction, Public Interest Showing, and Related Demonstrations (October 18, 2012), at 39.

If approved, the combined entity would continue to face competitive pressures to invest in and expand next-generation wireless network capabilities for offering new products and service options. Herfindahl-Hirschman Index (HHI) estimates and the spectrum screen should have little or no impact on the public interest analysis. The T-Mobile/MetroPCS transaction will not reduce the number of nationwide providers. The merger also appears likely to pass the Commission's spectrum screen. T-Mobile/MetroPCS does *not* appear trigger further spectrum screen analysis in any cellular marketing area (CMA).[10] Nor does the proposed merger significantly reduce choices in local markets, as four built-out providers would continue to operate in nearly every area affected by the merger.[11]

Rather, this combination will likely improve performance experiences of T-Mobile's and MetroPCS's existing customers and improve their competitive standing in the market, to the benefit of all wireless consumers and consistent with the public interest.

V. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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[10] *Id*. at 53.
[11] *Id*. at 54.