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By ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197**

Dear Ms. Dortch:

T-Mobile's latest answer to the consensus that this merger will lead to higher prices—a consensus reluctantly joined by the Applicants' experts themselves—is a supposed "rate plan" freeze. This pledge is especially ineffective to remedy the merger's demonstrable harms, as it is less a commitment than a roadmap of the dozens of ways in which it can be evaded. With this latest move, T-Mobile appears to be trying to have its cake and eat it too: raise prices and say that it is not doing so.

Among many other loopholes in T-Mobile's proffer, one looms large: it does not seem to apply to the very services the Applicants say they need the merger to offer. According to the Applicants, this merger is all about offering consumers more and claiming that these assumed quality improvements outweigh the price hikes they themselves have conceded. In the words of Compass Lexecon, T-Mobile's first set of economists: "network quality . . . improvements might be more important to consumers than modest changes in the level of their monthly bill."¹ Yet, in a merger that is about offering more, the price commitment does not extend to "better plans" that offer "more data." And, even if the commitment could be rewritten to apply to such plans, and a price benchmark for them could somehow be extrapolated, acceptance of this pledge would immerse the Commission in a world of price regulation the likes of which has not been seen since the 1970s.

¹ Declaration of Compass Lexecon ¶ 125 (Sept. 17, 2018) (Appendix F to Opposition, WT Docket No. 18-197).

I. T-Mobile Could Still Raise Prices Under the Terms of its Pledge to Retain “Rate Plans”

By its *own* terms, the Applicants’ pledge to maintain existing T-Mobile and Sprint “rate plans” is an empty promise that leaves gaping loopholes, effectively rendering the pledge meaningless. Below are just a few examples.

Loophole #1: small improvements in network quality can justify eliminating a less expensive legacy plan.

“T-Mobile and Sprint legacy rate plans will continue as New T-Mobile plans for three years after the merger *or until better plans that offer a lower price or more data are made available*, whichever occurs first.”²

The italicized phrase ensures that virtually any network improvement—no matter how small—will allow New T-Mobile to replace a legacy rate plan with a more expensive one. T-Mobile states in a footnote that, “[w]hen a better post-merger plan is offered, New T-Mobile may discontinue a less appealing legacy plan.”³ The determination of what constitutes a “better” or “less appealing” plan will reside solely with New T-Mobile—little solace for those customers who would like to keep their existing plans, but will be forced by New T-Mobile to switch to a more expensive “better” plan. And for a plan offering “more data,” all bets appear to be off: more data will presumably make the plan “better” in New T-Mobile’s mind, and New T-Mobile will be able to price it as it wishes, in line with the claim made by T-Mobile’s economists that consumers are willing to pay extravagantly more for a little more in speed.⁴

Loophole #2: New T-Mobile can increase bills through handset or device costs.

“Device/handset offerings are not included in this pricing commitment.”⁵

This exclusion means that an increase in the price of a handset or other device, or a price increase effected through the imposition of a device or handset fee, would be exempt from T-Mobile’s pledge.

² Letter from Nancy Victory to Marlene Dortch at 2-3 WT Docket No. 18-187 (Feb. 4, 2019) (emphasis added) (“Pricing Commitment Letter”). The commitment does not even state that the legacy plans will be available to new customers.

³ *Id.* at 3.

⁴ See John Asker, Timothy F. Bresnahan, and Kostis Hatzitaskos, *Economic Analysis of the Proposed Sprint/T-Mobile Merger* ¶ 63 (Nov. 6, 2018), (Attachment A to letter from Nancy Victory, to Marlene Dortch, WT Docket No. 18-197 (Nov. 6, 2018)).

⁵ Pricing Commitment Letter at 3 n.10.

Loophole # 3: New T-Mobile can still increase bills by raising fees.

“The retained legacy rate plans may be adjusted to pass through cost increases in taxes, fees and surcharges[.]”⁶

While T-Mobile would like the public to believe that “customers will pay the same or less. Period.”⁷ by the terms of the commitment offered, New T-Mobile will be able to increase customers’ bills through additional “fees and surcharges.”

Loophole #4: New T-Mobile can cancel benefits enjoyed by current customers.

“The legacy plans may also be adjusted to modify or discontinue third party partner benefits based on changes in the terms of the offering initiated by the third party partner[.]”⁸

Even if New T-Mobile does not raise its “top-line” rates, it could increase the effective rate paid by customers by raising the cost of bundled services. For example, T-Mobile currently offers a free subscription to Netflix’s standard plan through its “Netflix On Us” promotion.⁹ After Netflix raised prices, T-Mobile indicated that it would not modify the promotion, but that it would instead try to “work[] with Netflix.”¹⁰ New T-Mobile would be unconstrained from increasing prices associated with this or any other promotion, increasing its overall effective rates, despite the commitment to maintain legacy rate plans for three years.

It is therefore no surprise that T-Mobile has “no objection to this representation being included as a formal merger condition”¹¹—such a toothless condition would be a boon to New T-Mobile by giving it virtual free rein to raise effective prices while consolidating its position post-merger to the detriment of consumers and competition. And once whatever meager protection the commitment provides expires after 36 months, customers will be left at the mercy of New T-Mobile to raise their base rates as well.

⁶ Pricing Commitment Letter at 3.

⁷ John Legere (@JohnLegere), Twitter (Feb. 5, 2019 12:08 PM), <https://twitter.com/JohnLegere/status/1092877574068289536>.

⁸ Pricing Commitment Letter at 3.

⁹ T-Mobile, Netflix On Us, <https://support.t-mobile.com/docs/DOC-36253> (last visited Feb. 5, 2019) (for customers who have at least two T-Mobile lines on a postpaid plan).

¹⁰ John Legere (@JohnLegere), Twitter (Jan. 15, 2019 6:11 AM), <https://twitter.com/JohnLegere/status/1085177560512614400>.

¹¹ Pricing Commitment Letter at 3.

II. The Loopholes in T-Mobile's Commitment are a Roadmap for a Multitude of Evasive Strategies

Below is an illustrative sample of tactics by which New T-Mobile could raise prices for customers while adhering to the letter of its proposed condition:

1. **Decrease data caps:** Sprint and T-Mobile both currently have 50GB data caps for their unlimited plans.¹² To drive consumers off their existing plans and to newer, more expensive plans, New T-Mobile could simply lower the data cap, making it more difficult for “legacy” customers to use their plans for popular streaming services. As T-Mobile recognized, as streaming quality continues to improve, customers will naturally use more data.¹³
2. **Increase penalties for exceeding the cap:** T-Mobile currently penalizes customers who go over their data cap by throttling the data.¹⁴ Sprint similarly throttles users who exceed its cap.¹⁵ New T-Mobile could further increase the penalties for going over the data cap, driving customers off their legacy plans to newer, more expensive plans.
3. **Decrease streaming quality:** T-Mobile and Sprint currently allow users to stream in HD (defined as either 720p or 1080p) on their T-Mobile One Plus and Unlimited Plus plans.¹⁶ New T-Mobile could decrease the quality of these streams (for example to 480p) for legacy plans while maintaining HD streaming quality for newer, more expensive plans.
4. **Increase cost to purchase or upgrade a new phone:** T-Mobile currently has several trade-in offers for new phones. For example, a customer can obtain a Samsung Galaxy S9 for \$10 a month with a qualifying trade-in.¹⁷ New T-Mobile could restrict such offers and allow them only for customers who purchase newer, more expensive plans.

¹² See *Important Service/Product Specific Terms*, Sprint, <https://www.sprint.com/en/legal/service-and-product-terms> (last visited Feb. 7, 2019); *Cell Phone Plans*, T-Mobile, <https://www.t-mobile.com/cell-phone-plans> (last visited Feb. 7, 2019).

¹³ Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, at 52 (June 18, 2018).

¹⁴ *Cell Phone Plans*, T-Mobile, <https://www.t-mobile.com/cell-phone-plans> (last visited Feb. 7, 2019).

¹⁵ *Important Service/Product Specific Terms*, Sprint, <https://www.sprint.com/en/legal/service-and-product-terms> (last visited Feb. 7, 2019).

¹⁶ *T-Mobile One™ Plus*, T-Mobile, <https://support.t-mobile.com/docs/DOC-37075> (last visited Feb. 7, 2019); *Unlimited Plus*, Sprint, <https://www.sprint.com/en/shop/plans/unlimited-cell-phone-plan> (last visited Feb. 7, 2019)

¹⁷ T-Mobile, *Unlimited Plan With Samsung Galaxy S9 Included. Just \$40/Line*, <https://www.t-mobile.com/offers/samsung-phone-deals> (last visited Feb. 7, 2019).

5. ***Increase down payment for a new phone:*** Both Sprint and T-Mobile adjust the required down payment for a new phone, depending on the phone's expense and the customer's credit score. For example, a subscriber who has excellent credit can buy an iPhone Xs Max for \$349.99 down and financing.¹⁸ But to drive customers away from legacy plans, and to newer, more expensive plans, New T-Mobile could raise the down payment for legacy plans.
6. ***Make it more difficult to upgrade devices:*** Currently, both Sprint and T-Mobile provide several ways to upgrade devices. Sprint offers "iPhone Forever" and "Galaxy Forever" plans, which allow a subscriber to upgrade their phone every 12 months.¹⁹ T-Mobile has its "Jump!" and "Jump! On Demand" programs, which allow customers to upgrade their devices as frequently as every month.²⁰ New T-Mobile could either end these plans or restrict the devices available for upgrade for legacy plans.
7. ***Decrease or eliminate benefits:*** T-Mobile and Sprint currently offer various benefits to consumers. These benefits include free Wi-Fi calling, free international data, free in-flight WiFi, and free subscriptions to Netflix or Hulu, among others.²¹ New T-Mobile could decrease or even eliminate some or all of these benefits on legacy plans.
8. ***Restrict promotions to new plans or eliminate promotions for legacy customers:*** T-Mobile currently offers subscribers a weekly benefit called "T-Mobile Tuesdays."²² This benefit includes various free or discounted items such as free Taco Bell tacos,²³ or \$10 off a ride on Lyft. Past promotions included free food from Panera Bread, Smoothie King, Dunkin' Donuts, and White Castle or other gifts, such as free rentals from

¹⁸ *Apple iPhone XS Max*, T-Mobile, <https://www.t-mobile.com/cell-phone/apple-iphone-xs-max> (last visited Feb. 7, 2019).

¹⁹ *FAQs about iPhone Forever*, Sprint, <https://www.sprint.com/en/support/solutions/services/faqs-about-iphone-forever.html> (last visited Feb. 7, 2019); *FAQs about Galaxy Forever*, Sprint, <https://www.sprint.com/en/support/solutions/services/faqs-about-galaxy-forever.html> (last visited Feb. 7, 2019).

²⁰ *Upgrade to the Latest Device*, T-Mobile, <https://www.t-mobile.com/devices/jump-phone-upgrades> (last visited Feb. 7, 2019).

²¹ *T-Mobile One™ Benefits*, T-Mobile, <https://www.t-mobile.com/brand/benefits> (last visited Feb. 5, 2019); *Unlimited for 5 Lines for \$20*, Sprint, <https://www.sprint.com/en/shop/plans/unlimited-cell-phone-plan.html> (last visited Feb. 7, 2019).

²² *T-Mobile Tuesdays*, T-Mobile, <https://www.t-mobile.com/offers/t-mobile-tuesdays> (last visited Feb. 7, 2019).

²³ Press Release, T-Mobile, *T-Mobile & Taco Bell Announce Free Tacos for Un-Carrier Customers* (Feb. 3, 2019), <https://investor.t-mobile.com/news-and-events/t-mobile-us-press-releases/press-release-details/2019/T-Mobile--Taco-Bell-Announce-Free-Tacos-for-Un-carrier-Customers/default.aspx>.

Redbox.²⁴ T-Mobile estimates the annual value of T-Mobile Tuesdays as up to \$966 a year.²⁵ New T-Mobile could curtail these promotions for customers using legacy plans, decreasing the utility of those plans.

9. ***Eliminate unlimited video streaming for legacy plans:*** Through its Binge On program, T-Mobile customers can use various popular streaming services such as Netflix, Amazon Prime, and Hulu, without it being counted against their data cap.²⁶ To push consumers to newer, more expensive plans, New T-Mobile could remove popular services from its Binge On program, or even eliminate BingeOn for legacy plans.
10. ***Require new plans for 5G-enabled phones:*** New T-Mobile could require 5G-enabled phones to be on a new plan. This would force users, as they upgrade, to leave their legacy plans.
11. ***Remove ability to use phone as a hotspot:*** Both Sprint and T-Mobile allow customers to use their phones as personal hotspots.²⁷ The unlimited plans for each carrier allow a certain amount of data to be at LTE speeds before being throttled. New T-Mobile could either remove the ability to use a phone as a hotspot or restrict the amount of data that can be used for a hotspot.

III. Behavioral Remedies, Including Rate Regulation, are Disfavored

It is in large part because of all the ways a company can evade restrictions on its conduct that behavioral remedies are disfavored. As the Department of Justice Antitrust Division Chief, Makan Delrahim has explained: “In telecommunications, as in other industries, we strongly favor structural remedies. If a structural remedy isn’t available, then, except in the rarest of circumstances, we will seek to block an illegal merger.”²⁸

²⁴ See *Tag Archives: T-Mobile Tuesdays*, TMO News, <https://www.tmonews.com/tag/t-mobile-tuesdays> (last visited Feb. 7, 2019).

²⁵ *Questions? We’ve Got Answers.*, T-Mobile, <https://www.t-mobile.com/offers/t-mobile-tuesdays> (last visited Feb. 7, 2019) (“You can get up to as much as \$966 in free stuff a year for every T-Mobile ONE customer.”).

²⁶ *Unlimited Video Streaming with Binge On™*, T-Mobile, <https://www.t-mobile.com/offers/binge-on-streaming-video> (last visited Feb. 7, 2019).

²⁷ *Unlimited for 5 Lines for \$20*, Sprint, <https://www.sprint.com/en/shop/plans/unlimited-cell-phone-plan.html> (last visited Feb. 7, 2019); *T-Mobile One™ for Phones*, T-Mobile, <https://support.t-mobile.com/docs/DOC-36931> (last visited Feb. 7, 2019).

²⁸ Makan Delrahim, Assistant Attorney General, Department of Justice, *Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunications Institute’s Conference in Mexico City* (Nov. 7, 2018) <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute>; see also John E. Kwoka and Diana L. Moss, *Behavioral Remedies: Evaluation and Implications for Antitrust Enforcement*, The Antitrust Institute, at 5 (Nov. 3, 2011), <https://www.antitrustinstitute.org/wp->

Mr. Delrahim further points out:

When competition policy works well, it maintains economic liberty and leaves decision-making to the markets . . . Unfortunately, behavioral remedies often fail to do that. Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning . . . Another problem with behavioral remedies is determining their expiration. A short-term remedy is a Band-Aid, not a fix, and as FTC Commissioner McSweeney said last year, “the relief at best only delays the merged firm’s exercise of market power.”²⁹

As one leading antitrust economist observed, “[c]ompetition is a better tool than price controls for protecting consumers[.]”³⁰

IV. The Proposed Condition Will Not Prevent Price Increases for Resellers or MVNOs

By its terms, the proposed price condition will not prevent New T-Mobile from raising prices for its MVNO or resale partners – another substantial harm from the merger. In fact, the existence of the pricing condition will make it more likely that New T-Mobile will raise prices on resellers to offset any lost revenue from its own subscribers.

V. CONCLUSION

The supposed price commitment confirms the anticompetitive effects of the proposed merger while doing nothing to remedy them.

[content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf](#) (“[A]llowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve.”).

²⁹ Makan Delrahim, Assistant Attorney General, Department of Justice, *Keynote Address at American Bar Association’s Antitrust Fall Forum* (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

³⁰ Fiona M. Scott Morton, *The Problems of Price Controls*, Regulation: The Cato Review of Business and Government, at 53 (Spring 2001), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/morton.pdf>.

