April 29, 2019

Via ECFS

Marlene H. Dortch
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation
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 and Sprint ("Applicants") have filed an *ex parte* letter in this proceeding ("Divestiture Opposition") opposing Voqal's proposal for divestiture of 2.5 GHz mid-band spectrum.[1] In their opposition, Applicants recite the same meritless objections already rebutted in Voqal's Reply to the Applicants' Joint Opposition.[2] In many instances, Applicants do little more than paraphrase their earlier arguments, leaving Voqal's explanations as to why those arguments are wrong wholly unaddressed. Applicants fail to raise new arguments because, as they have admitted both in this proceeding and in public statements, the competitive problems posed by this merger are *inherent* in the rationale for the proposed merger. Applicants claim that this merger will provide "massive consumer benefits" arising from "the combination of Sprint's 2.5 GHz mid-band spectrum assets with T-Mobile's 600 MHz spectrum and network."[3] But as Voqal has pointed out, the combination of these spectrum assets will deprive other carriers of vital mid-band spectrum necessary for deploying a robust, nationwide 5G network in the most cost-effective manner and EBS licensees would be beholden to strengthened monopsony power.[4]

[1] T-Mobile and Sprint, Written *Ex Parte* Presentation, WT Docket No. 18-197 (Mar. 29, 2019). Voqal laid out its proposed divestiture remedy in a March 4 *ex parte* filing in this docket. Voqal, Written *Ex Parte* Presentation, WT Docket No. 18-197 (March 4, 2019) ("Voqal Divestiture Proposal") (note that the March 4 *ex parte* filing contained confidential information; a redacted copy of the filing was resubmitted via ECFS on March 5 after Voqal's counsel learned of an issue with the redacted copy filed in ECFS on March 4).
[2] Reply of Voqal to Joint Opposition of T-Mobile US, Inc. and Sprint Corporation, WT Docket No. 18-197 (Oct. 31, 2018) ("Voqal Reply").
[3] Divestiture Opposition at 3.
[4] Voqal Reply at 5 ("New T-Mobile would be able to raise the costs its wireless rivals would incur to develop 5G service because, among other things, they would have to work around the absence of critical mid-band spectrum").

If the merger were to be approved without imposing a divestiture condition, 5G competitors would lack a key input for deploying 5G, anticompetitively raising their costs and EBS licensees would lose an opportunity for competition to come to the 2.5 GHz band.[5]

Applicants are not shy about bragging that the proposed transaction would give them a leg up on their 5G competition—indeed controlling the 2.5 GHz band is a key selling point of the deal. In their *ex parte* Divestiture Opposition, Joint Opposition, and public statements, Applicants have consistently touted the importance of the mid-band spectrum portfolio they would jointly hold as a result of the merger. But as Voqal has explained, the monopoly/monopsony on key mid-band spectrum that the merger would provide is exactly why the Commission should not allow it to go forward without imposing a divestiture condition like the one outlined by Voqal in its March 4 *ex parte*.[6]

Applicants do raise one new point in their Divestiture Opposition—they assert that Voqal's divesture proposal is a self-serving effort to hijack this merger proceeding to further its interests in ongoing contractual disputes with Sprint over its existing lease agreements.[7] One might think that the power of an idea lies in its force, not only its source, and Voqal's concerns deserve to be addressed by the Commission on their merits. But in any event, Applicants provide no context regarding the nature of these contractual disputes. In fact, the underlying litigation commenced years before this merger was announced in an effort by Voqal and others to secure the judicial enforcement of their contractual rights with respect to their EBS leases. Applicants have not, and cannot, draw any coherent connection between that contract dispute and the divestiture proposal Voqal has advanced in this proceeding. More importantly, Voqal does not do so.

I. The Proposed Merger Would Cause Transaction-Specific Competitive Harm

In their Divestiture Opposition, Applicants repeat their claims that Voqal has not made "a cogent case that a competitive problem exists" and that Voqal "fails to explain what harms will result from the merger or what problems would be solved through its proposed divestitures."[8] In fact, Voqal has been crystal clear on all three of these points at every stage. Simply put, the competitive problem is that the merged entity would hold nearly *all* of the key mid-band spectrum that is essential for deploying 5G.[9] The resulting competitive harm is twofold: (1) Applicants' competitors would face increased costs to deploy a robust 5G network competitive with New T-Mobile's, resulting in harm to broadband consumers[10]; and (2) New T-Mobile

[5] Petition to Deny the Above-Captioned Applications as Currently Proposed of Voqal at 17-19, WT Docket No. 18-197 (Aug. 27, 2018) ("Voqal Petition").
[6] *See* Voqal Divestiture Proposal.
[7] Divestiture Opposition at 4-5.
[8] Divestiture Opposition at 1, 3; Joint Opposition at 25, 27.
[9] Voqal Petition at 3 ("By combining, Sprint and T-Mobile would ensure that they, and only they, control the best, indeed perhaps the only, mid-band spectrum for nationwide 5G deployment"); Voqal Reply at 6 ("2.5 GHz is the indispensable 'sweet spot' for 5G . . . if divestiture is ordered, then the 2.5 GHz band needs to be at the center").
[10] Voqal Petition at 2 ("Deprived of access to the 2.5 band, competitors' efforts to develop 5G will be more costly and less effective, and wireless broadband customers will suffer as a result").

would possess both the ability and incentive to exploit its buyer market power in 2.5 GHz spectrum markets, harming EBS licensees and other holders of 2.5 GHz spectrum. Voqal's divestiture proposal would address these harms by requiring Sprint to sell some of its key mid-band 2.5 GHz spectrum to one or more other carriers, restoring balance to the market for buying and leasing 2.5 GHz spectrum and stimulating competition in the market for providing 5G to broadband consumers.[11]

Voqal's arguments are particularly salient in light of recent press coverage of the proposed merger, which has called attention to the paramount importance of mid-band spectrum to achieving 5G, and the fact that other carriers besides the Applicants do not have access to it.[12] For instance, a research note from MoffettNathanson argues that Verizon will have difficulty obtaining mid-band spectrum for its 5G deployment, and that millimeter spectrum is an inadequate substitute.[13] MoffettNathanson also concludes that Verizon lacks access to other viable mid-band substitutes for 2.5 GHz spectrum suitable for deploying 5G.[14] This conclusion is consistent with Applicants' rejection of viable substitutes for 2.5 in their Joint Opposition.[15]

T-Mobile itself confirms in a recent blog post that millimeter spectrum is an inadequate substitute for the mid-band spectrum required for a first-rate 5G network:

> millimeter wave (mmWave) spectrum has great potential in terms of speed and capacity, but it doesn't travel far from the cell site and doesn't penetrate materials at all. It will never materially scale beyond small pockets of 5G hotspots in dense urban environments.[16]

After convincingly explaining the shortcomings of millimeter spectrum as a 5G input, T-Mobile concisely states the unique advantages in deploying 5G that Applicants would enjoy as a result of the merger, including a "critical middle layer of 2.5 GHz mid-band spectrum, which provides the balance of coverage and capacity that enables a seamless and meaningful 5G experience."[17]

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[11] *See generally* Voqal Divestiture Proposal.

[12] *See e.g.* "Without the Right Spectrum, Is 5G All That?" Benton Weekly Digest (Apr. 26, 2019), https://www.benton.org/blog/without-right-spectrum-5g-all (summarizing recent press analysis explaining the difficulties with using millimeter spectrum for 5G and the general scarcity of mid-band spectrum)

[13] "Analysts Question Verizon 5G Spectrum Strategy: Company Needs Mid-Band Spectrum, But Where Will It Come From?" Joan Engebretson, Telecompetitor (Apr. 23, 2019), https://www.telecompetitor.com/analysts-question-verizon-5g-spectrum-strategy-company-needs-mid-band-spectrum-but-where-will-it-come-from/.

[14] *Id.* (dismissing C-band, AWS-4, and 1.6 GHz).

[15] Joint Opposition at 55-59.

[16] "The 5G Status Quo is Clearly Not Good Enough," Neville Ray, T-Mobile Newsroom (Apr. 22, 2019), https://www.t-mobile.com/news/the-5g-status-quo-is-clearly-not-good-enough.

[17] *Id.* In this respect, T-Mobile and Voqal are united in their view that 2.5 GHz is a critical input for 5G: "The use of the 2.5 GHz spectrum band . . .will be critical in the coming years. As a matter of physics and as result of past regulatory policy, the 2.5 GHz spectrum is a 'sweet spot' for developing 5G. Sitting in the 'mid-band' of spectrum frequencies, the 2.5 band offers a unique combination of propagation and data capacity advantages. Not too low in frequency, not too high, it's just right for the deployment of 5G. The proposed merger would ensure that the merged entity ('New T-Mobile') would control virtually all of this key spectrum, resulting in [anticompetitive harm]." Voqal Petition at 2.

Similarly, in their Divestiture Opposition, Applicants hail the "massive consumer benefits that will arise from the combination of Sprint's 2.5 GHz mid-band spectrum assets with T-Mobile's 600 MHz spectrum and network."[18] These promises fly in the face of fundamental economic principles regarding competitive markets, and for that reason are simply not credible. Applicants seemingly do not recognize that monopoly control of the prime 5G real estate (by their own description) would inevitably limit others' ability to offer nationwide 5G. True consumer benefits come from competition, not munificent management, and 5G competition will be harmed if adequate mid-band spectrum is not available to multiple networks, including T-Mobile.

II. The Contract Dispute Between Sprint and Voqal is Unrelated to Voqal's Divestiture Proposal

Applicants allude to a "long-running contractual dispute with Sprint" that they claim is the true motivation behind Voqal's divestiture proposal.[19] Applicants do not cite to or otherwise provide context for this dispute, nor do they explain how they believe Voqal's divestiture proposal will further its interests in the dispute. Indeed, Applicants fail to draw *any* connection between the litigation and this proceeding other than the fact that they both exist. Not only did the litigation commence *years prior* to any announcement of a merger between T-Mobile and Sprint, the dispute arose out of Voqal's and co-plaintiff NACEPF's effort to enforce the terms of *existing* lease agreements that Sprint acquired from Clearwire.[20] That case has nothing to do with securing rights beyond those granted to Voqal under its lease agreements, contrary to the Applicants' implications.[21] Applicants' reference to this unrelated contract dispute is a baseless attempt to divert attention from the merits of Voqal's divestiture proposal.

III. Applicants' Divestiture Opposition Recites the Same Unpersuasive Arguments Raised in Their Joint Opposition

[18] Divestiture Opposition at 3.

[19] Divestiture Opposition at 4 ("nothing more than an attempt to involve the Commission in a long-running contractual dispute with Sprint").

[20] Voqal undertook this litigation with co-plaintiff North American Catholic Educational Programming Foundation (NACEPF), as these entities are spectrum lessors under a common contract with a Sprint subsidiary. *See North American Catholic Educational Programming Foundation, Inc. et al., v. Clearwire Spectrum Holdings II LLC, et al.*, No. 15-3118 BLS2, 2015 WL 11121688 (Mass. Super. Nov. 9, 2015) (allowing motion for preliminary injunction preventing the shutdown of Clearwire's WiMAX network for a period of time and granting Plaintiffs' end users equivalent access to Sprint's LTE network that they had to Clearwire's network). Indeed, in issuing the preliminary injunction, the Court stated its "intent is to put plaintiffs in that position that they would occupy under their existing agreements with Clearwire."

[21] Divestiture Opposition at 4 (characterizing the divestiture proposals as both "a transparent attempt to abrogate a long-term lease arrangement and gain new rights that it does not have under its current arrangement" and "an attempt to involve the Commission in a long-running contractual dispute with Sprint," suggesting that the two are somehow related).

Applicants trot out several of the same tired arguments that they recited in their Joint Opposition. We summarize those arguments below, and restate our rebuttals (most of which Applicants have not bothered to address in their Divestiture Opposition).

Claim (1)—Applicants restate their claim that Voqal has not identified a merger-specific competitive effect because T-Mobile holds no "BRS or EBS licenses or leases" and so "after closing . . . New T-Mobile would have the exact same spectrum holdings in this band as Sprint has today."[22]

The Facts: As Voqal explained in its Reply, Applicants misunderstand the relevant issue. Applicants' own statements demonstrate that post-merger, they would "operate the 2.5 GHz band differently than Sprint does currently."[23] The merged entity would have both the resources and incentive to exploit its buyer market power in the 2.5 GHz band that Sprint lacks as a standalone company.[24] In a recent speech, Assistant Attorney General and head of the DOJ Antitrust Division Makan Delrahim made a similar argument regarding potential competitive concerns arising from the AT&T-Time Warner merger.[25] Delrahim explained that:

> Independently, each side of the merger may have had the incentive but not the ability to harm its horizontal rivals. Together, depending on the circumstances, the combined company may have both the incentive and the ability to harm its rivals, and ultimately consumers.[26]

Although the D.C. Circuit found that the DOJ had not satisfied its burden of proving future harm, it did not reject the government's case on the ground that there could be no merger-specific harm on the ground, for example, that HBO would still be HBO—the corollary to Applicants' argument in this proceeding that Voqal has not identified a merger-specific harm because the amount of 2.5 spectrum being held will not change (except, of course, that it would be controlled by a different corporation with greater strength and a different strategy).[27]

Indeed, it is not uncommon for mergers—including those reviewed by the Commission—to combine assets that are unchanged, except in the incentive and ability of a new company to use them to harm competition. Comcast's acquisition of NBCU did not create concern because NBC's video content would necessarily change; it caused concern because the new company

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[22] Divestiture Opposition at 2.
[23] Voqal Reply at 2; s*ee also* North American Catholic Educational Programming Foundation, Inc. and Mobile Beacon, Written *Ex Parte* Presentation, WT Docket No. 18-197 (April 2, 2019) ("NACEPF/Mobile Beacon *Ex Parte")* at 5-8.
[24] Voqal Reply at 4; s*ee also* NACEPF/Mobile Beacon *Ex Parte* at 5-8.
[25] "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.
[26] *Id.*
[27] *See United States v. AT&T*, No. 18-5214 at * 4 (D.C. Cir. 2019) (affirming district court's denial of an injunction against the merger because the government failed to meet its evidentiary burden to show future harm).

would have the incentive and ability to use NBC's content differently.[28] And that is why the Commission imposed conditions on that transaction, as it should impose a divestiture condition here to blunt the incentive and ability of New T-Mobile to burden 5G competition and exercise anti-competitive buyer power.[29]

Such incentives and abilities have been confirmed by the Applicants themselves. Applicants have "repeatedly argue[d] that combining T-Mobile's 600 MHz holdings with Sprint's 2.5 GHz holdings creates engineering possibilities that will make New T-Mobile's network qualitatively superior to those of the individual companies if their spectrum portfolios are held separately."[30] Consequently, "it is not viable for the Parties to argue simultaneously . . . that this spectrum combination is at the core of their proposed merger while New T-Mobile's acquisition of Sprint's 2.5 GHz spectrum is not merger specific."[31]

Claim (2)—Applicants repeat their purported defense that "Sprint's 2.5 GHz holdings fully comply with the Commission's spectrum aggregation rules and policies, and are the result of Commission approval of prior transactions."[32]

The Facts: As Voqal explained in its Reply, this assertion misunderstands the nature of the competitive concerns regarding this transaction (and review of mergers more generally): "the issue is not whether Sprint's 2.5 GHz spectrum holdings are permissible" but rather whether the transaction will impede nationwide competition unless remedied by divestiture.[33] Moreover, the FCC Orders that Applicants cite as support for this misdirected argument were issued under very different competitive conditions in spectrum markets. For instance, the Commission's Order approving the combination of Sprint and Nextel's 2.5 GHz spectrum holdings was approved in part because "the 2.5 GHz band [did] not appear to be a uniquely suitable input for any specific market." But the crux of Applicants' argument in favor of the merger is that "Sprint's 2.5 GHz holdings are unique and irreplaceable for 5G purposes."[34] Thus, Applicants' citations to these Orders underscore the very features of the markets for broadband spectrum that make their proposed merger competitively problematic, absent a divestiture condition such as Voqal's.

Claim (3)—Applicants assert that Voqal's Top Half divestiture proposal "would significantly degrade the high-capacity network that Sprint has deployed in the upper half . . . of the 2.5 GHz band . . . jeopardiz[ing] the benefits that Sprint has long provided to the educational community, including the very users that Voqal claims to support in its current arrangements with Sprint."[35]

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[28] Competitive Impact Statement at 23, *United States v. Comcast*, 1:11-cv-00106 (D.D.C. Jan. 18, 2011).
[29] *See* Memorandum Opinion and Order, *In the Matter of Comcast*, MB Docket No. 10-56 (Jan. 18, 2011).
[30] Voqal Reply at 5.
[31] *Id.*
[32] Divestiture Opposition at 2 n. 7. Applicants lifted this language word-for-word from their Joint Opposition. *See* Joint Opposition at 123-124.
[33] Voqal Reply at 7.
[34] *Id.*
[35] Divestiture Opposition at 4.

The Facts: New T-Mobile has submitted engineering plans to the Commission that involve moving all existing 4G operations out of the 2.5 GHz band, apparently without disruption to Sprint's existing high capacity network or to the educational community. The fact is that New T-Mobile is averse to mid-band spectrum divestiture of any kind. [36] Voqal believes that the spur of competition in the form of one or more competing networks powered by 2.5 GHz spectrum would produce better services to both the public and to EBS licensees.

Respectfully submitted,

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[36] That the Applicants reject the Top-Half proposal but then also reject its alternative is further evidence that the objections they raise in their Divestiture Opposition and the Joint Opposition are *ad hoc* justifications for their desire to control all of the 2.5 GHz band.