

August 13, 2019

BY ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

RE: Ex Parte Notice. 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:

On August 12, Debbie Goldman and Hooman Hedayati of the Communications Workers of America (“CWA”), Phillip Berenbroick of Public Knowledge, Jill Canfield of NTCA – The Rural Broadband Association (“NTCA”), Leo Fitzpatrick of Free Press, Yosef Getachew and Corian Zacher of Common Cause, and Josh Stager of Open Technology Institute (collectively “public interest and labor representatives”) held meetings with Will Adams and Andrew Magloughlin, legal advisor and intern to Commissioner Brendan Carr, and Umair Javed, legal advisor to Commissioner Jessica Rosenworcel, to discuss the above-captioned proceeding. Carri Bennet of Rural Wireless Association, Inc. (“RWA”) joined the second meeting by telephone.

The public interest and labor representatives expressed their support for the NTCA/Rural Wireless and Wireless Internet Service Providers Association (“WISPA”) letters urging the Commission to seek public comment on significant recent developments related to the T-Mobile/Sprint transaction.¹ These developments include the series of agreements that T-Mobile and Sprint have entered with the U.S. Department of Justice (“DOJ”), including, among other things, the proposed divestiture of certain spectrum assets to DISH Network Corporation (“DISH”).² Separately, DISH filed applications for waiver and extension of time to complete construction of certain spectrum licenses, and agreed to certain commitments contingent upon

¹ Letter from Michael R. Romano and Jill Canfield, NTCA, and Caressa D. Bennet, Daryl Zakov, and Michael R. Bennet, Rural Wireless Association, Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, DBSD Corporation, AWS-4, Lead Call Sign T070272001; Gamma Acquisition L.L.C., AWS-4, Lead Call Sign T060430001; Manifest Wireless L.L.C., Lower 700 MHz E Block, Lead Call Sign WQJY944; American H Block Wireless L.L.C., H Block, Lead Call Sign WQTX200; ParkerB.com Wireless L.L.C., 600 MHz, Lead Call Sign WQZM232; August 5, 2019 (“NTCA/Rural Wireless Letter”); Letter from Louis Peraertz, WISPA, to Ms. Marlene H. Dortch, Secretary, Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-19, Aug 8, 2019 (“WISPA Letter”).

² *U.S. v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., and Sprint Corporation*, Stipulation and Order, Case 1:19-cv-02232, Document 2-1, filed July 26, 2019, U.S. District Court for the District of Columbia; *U.S. v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., Sprint Corporation, and Dish Network Corporation*, [Proposed] Final Judgment Case 1:19-cv-02232, Document 2-2, filed July 26, 2019, U.S. District Court for the District of Columbia (collectively, “Consent Decree”).

Commission approval of the construction extension requests.³ The Commission has appropriately consolidated the merger proceeding with the DISH extension requests.⁴

The DOJ Consent Decree and the DISH waiver and extension requests represent significant changes to the original transaction and raise new and important public interest and competition issues related to execution risk; operational, technical, managerial, and financial capability of the divested party; enforcement provisions; economic incentives; and jobs. The MVNO and related commercial agreements between DISH and T-Mobile are central to the analysis of the transaction, yet the MVNO Agreements have not been submitted into the record and have not been subject to public comment.⁵

Given the extraordinary nature of these developments, failure to seek public comment on these inextricably interrelated developments would be a violation of the Administrative Procedures Act (APA). Under the APA, agency action is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem.”⁶ Earlier this year, the D.C. Circuit ruled in *National Lifeline Association v FCC* that Commission failure “to provide an adequate opportunity for comment” on “a fundamental change” was “arbitrary and capricious” in violation of the APA.⁷ And just last week, the DC Circuit found the Commission in violation of the APA for “arbitrary and capricious” rulemaking in the small wireless cell proceeding.⁸ Given the significance of this instant merger proceeding, which will fundamentally restructure the wireless market, the Commission must protect the integrity of the merger review process by putting the DISH waiver and extension request, deployment commitments, and the associated DOJ Consent Decree out for public comment.

The suggestion that there is no requirement in the APA to obtain comment from interested parties because the APA applies only to rulemakings borders on the preposterous.⁹

³ See Application for Extension of Time of American H Block Wireless L.L.C., ULS File No. 0008741236 (filed July 26, 2019); Application for Extension of Time of Gamma Acquisition L.L.C., ULS File No. 0008741603 (filed July 26, 2019); Application for Extension of Time of Manifest Wireless L.L.C., ULS File No. 0008741789 (filed July 26, 2019). See also Letter from Jeffrey H. Blum, DISH Senior Vice-President, Public Policy & Government Affairs to Donald Stockdale, Chief, Wireless Telecommunications Bureau, *re: DBSD Corporation, AWS-4, Lead Call Sign T070272001; Gamma Acquisition L.L.C., AWS-4, Lead Call Sign T060430001; Manifest Wireless L.L.C., Lower 700 MHz E Block, Lead Call Sign WQJY944; American H Block Wireless L.L.C., H Block, Lead Call Sign WQTX200; ParkerB.com Wireless L.L.C., 600 MHz, Lead Call Sign WQZM232* (filed July 26, 2019) (“DISH Letter”).

⁴ See Public Notice, *Wireless Telecommunications Bureau Consolidates Proceedings on DISH Applications for Extension of Time to Construct Facilities with Docket of T-Mobile/Sprint Transaction*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789, DA 19-747, Aug. 7, 2019.

⁵ DISH has acknowledged that the economic studies that it submitted into the record in this proceeding have changed as a result of the DOJ Consent Decree. See Letter from Jeffrey H. Blum, DISH Senior Vice-President to Marlene H. Dortch, Secretary, WT Docket No. 18-197, Aug. 1, 2019 (noting that “these studies do not apply to the recently entered into set or arrangements...”).

⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷ *Nat’l Lifeline Ass’n v. Fed. Communications Comm’n*, 921 F.3d 1102, (D.C. Cir. 2019).

⁸ *United Keetoowah Band of Cherokee Indians in Oklahoma, individually & on behalf of all other Native Am. Indian Tribes & Tribal Organizations, et al., Petitioners v. Fed. Communications Comm’n & United States of Am., Respondents Nat’l Ass’n of Tribal Historic Pres. Officers, et al., Intervenors*, No. 18-1129 (D.C. Cir. August 9, 2019).

⁹ See Joint Opposition of T-Mobile US, INC. and Sprint Corporation to Requests for Commission Delay, WT Docket No. 18-197 (August 9, 2019).

Decisions of federal agencies, including the FCC, are governed by the APA, which establishes the scope of review and directs courts to set aside decisions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...”¹⁰ This is fully applicable to adjudications, including license application proceedings, as well as rulemakings.¹¹ It is a fundamental tenet of administrative law that an agency decision is arbitrary and capricious if it “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹² To ignore the fundamental changes to this proceeding that have resulted from the consent decree and DISH’s request to the Commission would be the epitome of arbitrary and capricious decision making. As the D.C. Circuit has said, “Regardless of the formal status of a party, or the technical merits of a particular petition, the FCC ‘should not close its eyes to the public interest factors’ raised by material in its files. We have noted that, as a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They ‘should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent.’”¹³

The Commission routinely seeks public comments on construction extension requests. In two prior instances in which DISH requested a waiver and extension of time, the Commission put the request out for public comment.¹⁴ The Commission sought public comment on the request for waiver and extension of time by Multichannel Video Distribution and Data Service (MVDDS) in 2009 and by Skybridge in 2012.¹⁵ Indeed, the Commission has established a high standard for granting a waiver and construction extension request. Section 1.946 of the Commission’s Rules provides that a request for extension of time “may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”¹⁶ The Commission should seek public comment to determine if the DISH waiver and extension request meets this high bar.

To date in this proceeding, the Commission has ensured compliance with the APA by twice seeking Public Comment on new developments and new evidence introduced into the

¹⁰ 5 U.S.C. §706(2)(A).

¹¹ See, e.g., *Press Communications v. FCC*, 875 F.3d 1117, 1121 (D.C. Cir. 2017)(quoting Section 706(2)(A)).

¹² *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹³ *Retail Store Employees Union v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970)(footnotes and citations omitted).

¹⁴ Public Notice, *Wireless Telecommunications Bureau Opens Docket to Seek Comment on Dish Network Corporation's Petition for Waiver and Request for Extension of Time*, 28 F.C.C.R. 12987 (September 13, 2013); Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Dish Request for Waiver of AWS-4 and H-Block Emission Limits*, 33 F.C.C.R. 7482 (August 3, 2018).

¹⁵ See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Applications by Multichannel Video Distribution and Data Service (MVDDS) Licensees for Waiver and Extension of Time to Demonstrate Substantial Service*, DA 09-1306 (June 10, 2009); Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Requests by Skybridge Spectrum Foundation and Telesaurus Holdings GB, LLC for Waiver and Extension of Time to Construct 900 Mhz Multilateration Location And Monitoring Service Licenses*, 27 F.C.C.R. 9594 (August 16, 2012).

¹⁶ 47 CFR Sec. 1.946(e)(1).

record¹⁷ and should continue to do so in its evaluation of the DISH waiver request and related developments. Certainly, there is Commission precedent for seeking public comment on a divestiture proposal, as the Commission did in the *Sinclair/Tribune* merger review.¹⁸

Finally, the Joint Applicants response to the NTCA/RWA and WISPA requests fails to address the substantive issues raised by the rural providers. Contrary to the Joint Applicants' assertion, the record in this proceeding is not "comprehensive and complete."¹⁹ The record does not include the T-Mobile/DISH MVNO and related commercial agreements, it does not include public comment on the public interest and competition impact of the substantial changes that result from the Consent Decree, the DISH deployment commitments, and the related waiver and construction extension request. To ensure a full record with adequate opportunity to comment on fundamental changes in the transaction, the Commission should seek Public Comment on those changes.

Sincerely,



Debbie Goldman
Telecommunications Policy and Research Director
Communications Workers of America

cc: Kathy Harris
Jim Bird
Linda Ray
David Krech
Catherine Matraves
Will Adams
Umair Javed

¹⁷ Public Notice, *Commission Announces Receipt of Supplemental Analysis from T-Mobile; Establishes Comment Deadline*, DA 18-1155, WT Docket No. 18-197 (November 13, 2018) (seeking public comment on the Applicants' Cornerstone economic study); Public Notice, *Commission Announces Receipt of Additional Analysis and Information from T-Mobile and Sprint; Establishes Comment Deadline*, DA 19-161, WT Docket No. 18-197 (March 7, 2019) (seeking comment on new economic simulations, engineering, and home broadband commitments).

¹⁸ Public Notice, *Media Bureau Establishes Consolidated Pleading Cycle for Amendments to the June 26, 2017, Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., Related New Divestiture Applications, and Top-Four Showings in Two Markets*, DA 18-530, MB Docket No. 17-179, May 21, 2018.

¹⁹ See Joint Opposition of T-Mobile US, Inc and Sprint Corporation to Requests for Commission Delay, WT Docket No. 18-197 (August 9, 2019).