

August 26, 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 22, Debbie Goldman and Hooman Hedayati of the Communications Workers of America (“CWA”), Phillip Berenbroick of Public Knowledge, Amir Nasr of New America's Open Technology Institute, George Slover of Consumer Reports, and Matt Wood and Leo Fitzpatrick of Free Press (collectively “public interest and labor representatives”) held a meeting with Commissioner Geoffrey Starks and William Davenport, legal advisor to Commissioner Starks, to discuss the above-captioned proceeding.

On August 23, the individuals above, as well as Charlotte Slaiman of Public Knowledge, and Allen Grunes, CWA outside counsel, held an additional meeting with William Davenport.

Administrative Procedure Act. The public interest and labor representatives reiterated their prior statement that the DISH Network Corporation’s (“DISH”) waiver and extension requests, deployment commitments, Department of Justice (“DOJ”) Consent Decree, and related developments should be put out for Public Comment.¹

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 party to whom the assets will be divested; enforcement provisions; economic incentives; and jobs. The MVNO and related commercial agreements between DISH and T-Mobile are central to the analysis of the purported public interest benefits of the transaction, yet these commercial agreements have not been submitted into the record and have not been subject to public comment.² In two prior instances in this docket, the Commission ensured compliance with the Administrative Procedure Act (APA) by seeking Public Comment when new developments and evidence were introduced into the record.³

¹See Letter from Debbie Goldman to Marlene H. Dortch, Secretary, Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, Aug 13, 2019.

² 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...”).

³ Public Notice, *Commission Announces Receipt of Supplemental Analysis from T-Mobile; Establishes Comment Deadline*, DA 18-1155, WT Docket No. 18-197 (Nov. 13, 2018) (seeking public comment on the Applicants’

Given the extraordinary nature of these interrelated developments, failure to seek public comment on their impact on the transaction would be a violation of the APA. 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.”⁴ This is fully applicable to adjudications, including license application proceedings, as well as rulemakings.⁵ To ignore the fundamental changes to this proceeding that have resulted from the consent decree and DISH’s requests to the Commission would be the epitome of arbitrary and capricious decision making. To ensure a full record with adequate opportunity to comment on fundamental changes in this transaction, the Commission should seek Public Comment on the DISH waiver request and related developments.

T-Mobile Commitments. The public interest and labor representatives also discussed T-Mobile’s and Sprint’s (“Applicants”) commitments detailed in their February 4, 2019 and May 20, 2019 letters to the Commission.⁶ Those proposed commitments fail to address the significant anti-competitive harm, price increases, and loss of tens of thousands of jobs that would result from the merger. The Applicants’ unverifiable rural deployment commitments are woefully insufficient to offset these clear harms, even if the Applicants fulfill them. Further, the so-called “voluntary contributions” the Applicants proffer for failure to meet deployment commitments are toothless; not only are they tax-deductible as “voluntary contributions” to the U.S. Treasury, they represent an infinitesimal portion of the \$74 billion 2018 pro forma revenue of the combined T-Mobile/Sprint.

Rural Commitments. The public interest and labor representatives emphasized that the Applicants’ rural promises are overstated, unverifiable, and don’t hold up to scrutiny. T-Mobile provides no explanation for its revised rural numbers, offers no updated coverage maps, and provide no updated version of the engineering model. Even if the Commission were to accept the unverifiable new 5G deployment numbers, the best-case scenario would still leave much of rural America without higher capacity mid-band coverage. As detailed in Attachment 1 to the May 20 Commitment Letter, 25 percent of the population –81.7 million Americans –would not have mid-band coverage three years after the merger and 12 percent of the population – 39.2 million Americans – would not have mid-band coverage six years after the merger.⁷

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 (Mar. 7, 2019) (seeking comment on new economic simulations, engineering, and home broadband commitments).

⁴ 5 U.S.C. § 706(2)(A).

⁵ See, e.g., *Press Communications v. FCC*, 875 F.3d 1117, 1121 (D.C. Cir. 2017) (quoting Section 706(2)(A)).

⁶ See Letter from Regina M. Keeney and Nancy J. Victory to Marlene H. Dortch (May 20, 2019) (“May 20 Commitment Letter”); see also Letter of T-Mobile and Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-197 (filed Feb. 4, 2019) (“Pricing Letter”).

⁷ May 20 Commitment Letter, Attachment 1 at 1. Section I(A)(2) and Section I(B)(2) state that “within three years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with ... a Mid-band 5G Coverage Area covering at least 75% of the U.S. Population” (leaving 25% uncovered) and “within six years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with...a Mid-band 5G Coverage Area covering at least 88% of the U.S. Population” (leaving 12 percent without coverage). CWA calculation of population without mid-band coverage is based on U.S. population of 327 million (U.S. Census Bureau, 2018).

Moreover, the Applicants cannot claim low-band 5G coverage of the merged entity as a merger-specific benefit. Table 9 in the Applicants' Public Interest Statement ("PIS") shows that low-band coverage will be relatively constant regardless of whether the merger happens. The New T-Mobile's low-band network would only service an additional 1.7 million users three years after the merger and an additional 1.1 million users by 2024 compared to stand-alone T-Mobile's coverage.⁸

The Applicants' speed predictions are overly optimistic. The Applicants promise to deliver 50 Mbps or higher to at least 90 percent of the rural population by year six, but would deliver mid-band 5G to only 33.3 percent of that rural population⁹—so even taking the spectrum commitment at face value without revised maps or engineering models, 33.3 percent of the rural population would only be served with low-band spectrum. For those people, 50 Mbps would be highly optimistic.¹⁰ Furthermore, the Applicants' proposed in-home broadband service would only be available to a tiny fraction of all U.S. households, many in areas where there are already two or more competing broadband services. The overwhelming majority of rural households will remain unserved by the in-home broadband service.¹¹

The Applicants also propose to verify the speed benchmarks within nine months of the third and sixth anniversaries of merger closing through drive tests.¹² As a first matter, nine months after the third and sixth anniversary misses the promised benchmarks by nine months. Second and more significant, the Applicants do not describe the drive test methodology they propose to use, nor do they commit to an independent third-party verification. It is critical to have the appropriate testing criteria. To verify the speeds obtained by actual consumers, the tests must take place in the actual conditions where the service would be used and with the same devices. Since actual conditions may include indoors, outdoors, and obstructed areas, the tests must occur at the cell edge and indoors. The commitment letter is silent on all of these criteria.

Pricing. The public interest and labor representatives explained that the record compiled by the Commission shows in extensive detail that permitting T-Mobile to acquire Sprint would substantially reduce competition and lead to higher prices. In its own recognition of the transaction's likelihood of raising prices, T-Mobile filed a letter on February 4, 2019 alleging it would make available the same rate plans or better rate plans than those offered by T-Mobile or Sprint (as of February 4, 2019) for three years following the merger.¹³ On May 20, 2019, T-Mobile filed a letter reiterating its pricing claims, amongst other commitments.¹⁴ Specifically, T-Mobile and Sprint pledged (with a caveat) that their "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."¹⁵ As the companies also explained, "[t]he

⁸ CWA Comments at 49-50. The CWA analysis is based on Table 9 page 47 in the Applicants' Public Interest Statement (June 18, 2018).

⁹ May 20 Commitment Letter, Attachment 1 at 2 (II(B)(5) and (6)).

¹⁰ See CWA's Response to Conditions, Letter from Allen P. Grunes to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-197 (filed May 31, 2019).

¹¹ *Id.* at 8-9.

¹² May 20 Commitment Letter, Attachment 1 at 3.

¹³ See Pricing Letter.

¹⁴ May 20 Commitment Letter at 6; *see also id.* at Attachment 3 (resubmitting the February Pricing Letter).

¹⁵ Pricing Letter at 2-3.

retained legacy rate plans may be adjusted to pass through cost increases in taxes, fees and surcharges.”¹⁶

However, the docket details that despite this pricing “commitment,” New T-Mobile retains the ability under its February 4, 2019 letter to leverage its increased market power to raise prices. For example, New T-Mobile would be free to raise prices and eliminate lower-priced legacy rate plans even for minimal improvements in network quality. New T-Mobile also reserves the flexibility to raise prices by increasing the costs of handsets, devices, surcharges, fees; by eliminating existing benefits; or by introducing new fees or increasing existing fees for benefits customers currently enjoy.¹⁷ New T-Mobile could also take steps, within the letter of its pricing claims, to reduce the quality of service customers experience on lower-priced, legacy rate plans to induce customers to “voluntarily” pay more for new plans.¹⁸

Despite T-Mobile’s implausible claims that it will not raise prices, even if those promises were credible they would still likely leave wireless customers worse off than they would be if the merger were not consummated. Due to the benefits of four-firm competition and the innovative and competitive service offerings by standalone T-Mobile and Sprint, Commission reports suggest that prices across the wireless industry have been dropping (on a quality adjusted basis at very least) and that consumers have seen benefits from this competition.¹⁹ The Commission has suggested that wireless prices have been decreasing significantly in recent years. The wireless telephone services consumer price index (“CPI”) decreased by approximately 17% between 2013 and 2017 (while overall CPI rose by 5%), and average revenue per unit (“ARPU”) decreased 7% in 2017 (from \$41.50 to \$38.66).²⁰ Mobile broadband service has specifically seen dramatic declines in the cost per megabyte (“MB”) of data used in recent years. Across the four nationwide wireless carriers, the Commission found a 10% reduction in the cost per MB in 2017, “approximately 29% compared to 2016, and a decrease of approximately 72% to approximately 83% compared to 2013.”²¹ Across the wireless industry, ARPU decreased approximately 18% from the fourth quarter of 2014 to the fourth quarter of 2017, and Sprint’s ARPU fell about 20%, from \$40.44 to \$32.49.²² Even if New T-Mobile held to its claim that its prices post-merger would remain static for the next two-and-a-half years, consumers could be left paying significantly higher prices than they likely would without the merger. The current competitive dynamics of the wireless industry have kept price increases in check and potentially even forced prices lower, at very least on a quality adjusted basis; T-Mobile’s pricing claims promising no better than the status quo all but guarantee that these positive trends will not continue post-merger.

Prepaid Divestiture. The public interest and labor representatives stressed that the divestiture of Sprint’s prepaid business is wholly insufficient as a remedy. Sprint’s prepaid business, with about nine million subscribers, would not replace Sprint as a market participant

¹⁶ *Id.* at 3.

¹⁷ *Ex Parte* Letter of Dish Network, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-197, at 1-3 (filed Feb. 7, 2019).

¹⁸ *Id.* at 4-6.

¹⁹ *See, e.g.*, Petition to Deny of Free Press, WT Docket No. 18-197, at 25 (filed Aug. 27, 2018).

²⁰ Communications Marketplace Report, The State of Mobile Wireless Competition, et al., GN Docket No. 18-231, WT Docket No. 18-203, *et al.*, Report, 33 FCC Rcd 12558, 12574-75 ¶¶ 19-20 (2018).

²¹ *Id.* at 12576 ¶ 22.

²² *Id.* at 12575-76 ¶ 21, Fig. A-14.

with 32 million postpaid and 13 million wholesale subscribers.²³ It does not involve the sale of an ongoing business that would operate independently from the merged firm. Rather, Applicants propose to sell selected assets, and to transfer customers, who would be under no obligation to remain customers of whoever they were “transferred” to. The Federal Trade Commission has concluded in its merger retrospectives that limited asset sales, of the type proposed by the Applicants, are at increased risk of failure.²⁴

Additionally, ongoing entanglements between a divestiture buyer and seller create a significant risk that the buyer would pull its competitive punches or that the seller would use its leverage to disadvantage the buyer. The Applicants themselves have identified a few of these levers. In the May 20 Commitment Letter, Applicants stated that the agreement with a divestiture buyer would include promises not to engage in “unwanted discriminatory throttling, de-prioritization, or limitations on access to new network technology.”²⁵ Thus, even as they propose what appears to be a structural remedy, the Applicants implicitly admit that this proposal will be insufficient to limit their merger-enhanced market power without significant behavioral conditions.

Furthermore, in early 2018, senior Sprint management did an analysis of a potential transaction involving Boost.²⁶ The analysis was done before the Applicants entered into the proposed transaction. The analysis raises serious questions about Boost’s value and competitive significance as a divestiture in this case.

Voluntary Contributions. The public interest and labor representatives emphasized that the Applicants’ “voluntary contributions” are not automatic penalties, but rather are subject to the discretion of the Applicants in several aspects. The voluntary contributions to the U.S. Treasury are tax-deductible, thereby significantly reducing any financial consequence to the New T-Mobile for non-compliance. Furthermore, the Applicants themselves are responsible for data reporting. There is no provision for independent audit of the Applicants’ self-reported data. The

²³ See Press Release, Sprint Reports Fiscal Year 2019 First Quarter Results (Aug. 2, 2019).

The Commission excludes MVNOs from its evaluation of market concentration in the mobile telephony/broadband services market. See *Twentieth Wireless Report* (Sept. 26, 2017) at 21 n.99 (“Following widespread industry practices, the Commission generally attributes the subscribers of MVNOs to their host facilities-based service providers, including when it calculates market concentration metrics.”); see also *AT&T-Leap Order*, WT Docket No. 13-193, ¶ 37 (Mar. 13, 2014) (“As in previous transactions, we will exclude MVNOs and resellers from consideration when computing initial concentration measures, and thus, facilities-based service providers will only be taken into account in our calculations of market concentration.”).

²⁴ Federal Trade Commission, *The FTC’s Merger Remedies 2006-2012*, at 5 (Jan. 2017) (“[T]he more limited scope of the asset package increases the risk that a remedy will not succeed”)

https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; Federal Trade Commission, *A Study of the Commission’s Divestiture Process*, at 12 (1999) (“[D]ivestiture of an on-going business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets.”)

<https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>.

²⁵ See May 20 Commitment letter, Attachment 2 at 2.

²⁶ See SPR-FCC-11655063 through SPR-FCC-11655069.

Applicants also have access to a broad “get out of jail free” card to avoid any financial consequence for failure to meet promised benchmarks. The May 20 Commitment Letter allows the Bureau to “reduce the metric, extend the deadline or reduce the contribution amount” for circumstances beyond the company’s control, including “law or order of any government body” or “significant interruptions in the supply chain.”²⁷ Lastly, the “voluntary contribution” rates are so small that they cannot serve as an effective deterrent.²⁸ To take just one example, the Applicants commit to deploy within three years (plus nine months) broadband at 50 Mbps speed to 66.7 percent of the rural population – or 40 million people.²⁹ If the New T-Mobile only reaches 50 percent of the rural population, or 30 million people, it will have missed the milestone by 16.7 percentage points (66.7 minus 50). According to the “voluntary contribution” table in the commitment letter, each one percent shortfall for failure to meet the rural milestone counts as only 0.5 percent.³⁰ Therefore, the missed percentage is divided in half and becomes 8.35 (16.7 divided by 2). The contribution scale in the May 20 Commitment Letter calls for a “voluntary contribution” in that case of \$25 million. Thus, the “voluntary contribution” for missing a rural broadband deployment commitment by 10 million people represents only 0.34 percent of the combined companies’ 2018 pro forma revenue of \$74 billion.

Jobs. Ms. Goldman reiterated that the Applicants’ commitments and conditions do nothing to address CWA’s concerns about the impact of this merger on T-Mobile and Sprint workers and consumers. The merger will still result in elimination of tens of thousands of U.S. jobs as the new T-Mobile shuts down duplicative retail stores and consolidates headquarters functions. T-Mobile has made no written, verifiable commitments to the FCC to protect jobs.³¹

Conclusion. To ensure a full record with adequate opportunity to comment on fundamental changes in this transaction, the Commission should seek public comment on the DISH waiver requests, the July 26 commitments to the Commission, and related developments, including the DOJ Consent Decree. The harms to competition are substantial and solid, yet the Applicants’ February 4, 2019 and May 20, 2019 commitments are simply a wish list of shaky, unverifiable promises. The Commission should not approve the proposed transaction.

Sincerely,



Debbie Goldman

²⁷ May 20 Commitment Letter, Attachment 1 Section V(D) at 5.

²⁸ The proposed voluntary contributions are very confusing. It is not clear how a “missed percentage” is calculated. It is not clear whether this means a missed percentage of population covered, a missed percentage of promised speeds, or something else.

²⁹ *Id.*, Attachment 1 Section II(A)5.

³⁰ *Id.* Section V(A)3.

³¹ See CWA Reply Comments, WTB Docket No. 18-197, at 2-13 (Oct. 31, 2018).

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