

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
América Móvil, S.A.B de C. V., Transferor,)
)
and)
)
Verizon Communications, Inc., Transferee,)
)
Application for Consent to Transfer Control of)
TracFone Wireless, Inc. Pursuant to Section 2014)
of the Communications Act of 1934, as Amended)
)

IB File No. ITC-T/C-20200930-00173

**Opposition to Petition for Streamlining and
Motion to Dismiss Application as Incomplete of
Communications Workers of America**

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Introduction

The Communications Workers of America (CWA) submits these comments in opposition to the request of Verizon Wireless, Inc. (“Verizon”) and TracFone Wireless, Inc. (“TracFone”) (collectively, “Applicants”) for streamlined treatment of their application for a proposed transaction that would fundamentally impact both the wireless industry and the market for Lifeline services.¹ Applicants propose a \$7 billion transaction under which the largest facilities-based provider of mobile wireless services in the United States would acquire the fourth largest provider of wireless services by subscribership.

CWA represents private and public sector employees who work in telecommunications and information technology, the airline industry, news media, broadcast and cable television, education, health care and public service, manufacturing, and other fields.

CWA has long been a supporter of the Commission’s Lifeline program² and has serious concerns that this transaction could curtail service availability from one of the largest providers of Lifeline services in the country – and the only remaining independent Mobile Virtual Network Operator (“MVNO”) of substantial size – negatively impacting approximately 1.7 million low-income subscribers. As Chief Justice John Roberts, writing for the Supreme Court, stated, “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that

¹ Application for Consent to Transfer Control of International Section 214 Authorization, File No. ITC T/C-20200930-00173, at 18 (filed Sept. 30, 2020) (“Application”).

² See Comments of Communications Workers of America and the American Federation of Labor-Congress of Industrial Organizations, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Reply Comments of Communications Workers of America and the American Federation of Labor-Congress of Industrial Organizations, WC Docket Nos. 11-42, 09-197, 10-90 (Sept. 30, 2015); Comments of Communications Workers of America, WC Docket Nos. 17-287, 11-42, 09-197 (Feb. 21, 2018); Comments of Communications Workers of America, WC Docket No. 06-122 (July 29, 2019).

carrying one is indispensable to participation in modern society.”³ Given the importance of cell phone service and other forms of modern communications, we cannot afford to marginalize so many people from participating in today’s economy, society, and democracy.

The Commission has broad discretion under its regulations to deny streamlined treatment by “inform[ing] the applicant in writing, within 14 days after the date of public notice listing the application as accepted for filing, that the application is not eligible for streamlined processing.”⁴ Given the serious problems with the Applicants’ application and the potential implications of the proposed transaction, the FCC should do so here. First, the Application does not meet the regulatory requirements for streamlined processing. Second, the Applicants’ request for streamlined treatment must be denied given the transaction’s potential public interest harms, especially to Lifeline customers. Third, the transaction raises several significant antitrust concerns that warrant a full, public proceeding. Verizon, the leading Mobile Network Operator (MNO), is seeking to acquire TracFone, the leading Mobile Virtual Network Operator in an already concentrated mobile wireless industry. As T-Mobile, Public Knowledge, Open Technology Institute, and the Benton Institute for Broadband and Society have all noted in opposing this petition for streamlining the application, “following this transaction, all significant MVNOs will be integrated with a national facilities-based provider (or would-be facilities-based provider).”⁵ That raises multiple concerns under the Department of Justice and Federal Trade Commission’s 2020 Vertical Merger Guidelines.

³ *Carpenter v. United States*, 138 S. Ct. 2206, 2210, 201 L. Ed. 2d 507 (2018) (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

⁴ 47 C.F.R. § 63.12(c)(3).

⁵ See Letter from Kathleen Ham, Senior Vice President, T-Mobile, to Marlene S. Dortch, Secretary, FCC, IBFS File No. ITC-T/C-20200930-00173 (Oct. 13, 2020); Opposition to Petition

The Application currently is incomplete and should be dismissed. Even if the Application was amended to include the information required as a matter of law, the FCC’s review process should not be rushed. A careful review of the proposed transaction following public input is necessary to determine whether the Applicants have satisfied their burden of demonstrating that the proposed deal indeed serves the public interest.

I. The Commission Must Deny the Applicants’ Request for Streamlined Treatment Since the Application Does Not Meet the Regulatory Requirements for Streamlined Processing

As an initial matter, the Application does not meet the regulatory requirements for streamlined processing because (i) it fails to include a description of TracFone’s federal Eligible Telecommunications Carrier (“ETC”) designation, (ii) the proposed transaction involves a dominant foreign carrier, and (iii) it is unclear whether TracFone holds a domestic Section 214 license.

As Public Knowledge et al. note, the Application does not comply with Section 63.18(e)(3) of the Commission’s regulations, which requires an applicant to provide “a description of the facilities and services for which it seeks authorization” for those services not covered in section 63.18(e)(1) (global facilities-based authority) and 63.18(e)(2) (global resale authority). According to the FCC regulations, this disclosure must include “any additional information the Commission shall have specified previously in an order, public notice or other official action as necessary for authorization.”⁶ The Application violates section 63.18(e)(3)

for Streamlining and Motion to Dismiss Application as Incomplete of Public Knowledge, Open Technology Institute, and the Benton Institute for Broadband and Society, IB File No. ITC-T/C-20200903-00173 (Oct. 16, 2020) (“PK et al. Filing”).

⁶ 47 C.F.R. § 63.18(e)(3).

because it does not include TracFone’s federal ETC designation, which is a “service” for which the Applicant seeks authorization. Moreover, a substantive discussion of TracFone’s status as an ETC administered by the Commission is absent from the Application. On the contrary, the Application states that at some undetermined time after the approval of the Section 214 transfer, “Verizon will seek to transfer TracFone’s Eligible Telecommunications Carrier (ETC) designation for Lifeline.”⁷ Because all wireless ETC certifications must be approved before (or simultaneous with) Section 214 transfers, the Commission cannot grant Applicants’ request for streamlining.⁸

As Public Knowledge et al. also note,⁹ TracFone is currently an indirect wholly-owned subsidiary of América Móvil, a dominant carrier in Mexico, and the “9th largest phone company in the world.”¹⁰ The FCC regulations explicitly prohibit streamlining for applications where, as here, one of the applicants is affiliated with a dominant foreign carrier.¹¹ The Commission noted when adopting this rule in 1998 that such affiliations risk potential anti-competitive conduct for competing U.S. carriers trying to enter the foreign market.¹² Streamlined processing is impermissible unless the application “clearly demonstrates” that one of the six enumerated exceptions under Rule 63.12(c)(1) applies. Although Verizon discusses in its public interest

⁷ Application, 18.

⁸ *Wireline Competition Bureau Reminds Carriers of Eligible Telecommunications Carrier Designation and Compliance Plan Approval Requirements for Receipt of Federal Lifeline Universal Service Support*, Public Notice, 29 FCC Rcd 9144 (WCB 2014).

⁹ PK et al. Filing, 13-4.

¹⁰ SafeLink Wireless, About Us, <https://www.safelinkwireless.com/Enrollment/Safelink/en/Web/www/default/index.html#!/aboutUs>.

¹¹ 47 C.F.R. § 63.12(c)(1) (“The streamlined processing procedures . . . shall not apply where . . . [t]he applicant is affiliated with a foreign carrier in a destination market”).

¹² See 1998 Biennial Regulatory Review, Report and Order, 14 FCC Rcd. 4909.

statement that post-acquisition TracFone will no longer be affiliated, that is not one of the six exceptions. As the Commission understands, transactions may create business understandings or involve side-deals that have potentially anti-competitive effects. It is for this very reason that the Commission prohibits streamlining for any application where an applicant is affiliated with a dominant foreign carrier—not any application which results in affiliation with a dominant foreign carrier.

Finally, in 2013 TracFone acknowledged that it holds a domestic Section 214 license.¹³ If Verizon will acquire this domestic Section 214 authorization or any other domestic Section 214 authorization as a part of this transaction, it must be identified before the FCC can accept the application as complete.¹⁴

II. The Applicants’ Request for Streamlined Treatment Must Be Denied Given the Transaction’s Potential Public Interest Harms

The Applicants were required to include in their Application “information demonstrating how the grant of the application will serve the public interest, convenience, and necessity.”¹⁵ They failed to do so. Given the size, scale, and significance of the proposed transaction, a streamlined review is wholly inappropriate. With the elimination of the last significant independent MVNO, Lifeline users cannot rely on the meager competition that remains to protect them. A careful review of the proposed transaction following public input is necessary to

¹³ Application for Consent to Assignment of Customer Base and Related Assets of an Authorized Domestic Section 214 Carrier, TracFone Wireless, Inc., WC Docket No. 13-138 (2013); Domestic 214 Application Granted for the Acquisition of Assets of Start Wireless Group, Inc. d/b/a Page Plus Cellular by TracFone Wireless, Inc., Public Notice, 29 FCC Rcd. 93 (WCB 2014).

¹⁴ 47 C.F.R. § 63.18(e)(3).

¹⁵ 47 C.F.R. § 63.18.

determine whether the Applicants have satisfied their burden of demonstrating that the proposed deal serves the public interest.

In 2005, the Commission observed that only one-third of Lifeline-eligible households were subscribing to Lifeline services and “predicted that allowing non-facilities-based providers like TracFone to participate ‘should expand participation of qualifying consumers.’”¹⁶ The Commission was right. TracFone is now one of the largest providers of Lifeline services with approximately 1.7 million low-income subscribers in 42 states, or 22 percent of total Lifeline subscribers.¹⁷

In its Application, Verizon offers almost no information on its Lifeline plans and makes no commitments. It says that it “intends” to maintain TracFone’s ETC status, and that it “will continue to offer Lifeline service through TracFone where it will offer service through its own network.”¹⁸ That one sentence is insufficient to ensure the continuity of these critical services to existing and future customers, and clearly does not show how the Application will serve the public interest. Continuation of service is critical, especially now as the pandemic is locking down our nation, where many states are experiencing or overcoming record unemployment, and when consumers are more reliant than ever on communications services. This transaction creates the risk that Verizon, which does not generally offer its mobile wireless service to Lifeline customers, could relinquish TracFone’s ETC designations and eliminate a Lifeline competitor, or incrementally diminish services relied on by low-income consumers.

¹⁶ Nat’l Lifeline Ass’n v. Fed. Commc’ns Comm’n, 921 F.3d 1102, 1108 (D.C. Cir. 2019) (quoting In the Matter of Fed.-State Joint Bd. on Universal Serv., 20 F.C.C. Rcd. 15095 (2005)).

¹⁷ Lifeline Participation, Universal Service Administration Co., <https://www.usac.org/lifeline/learn/program-data/> (accessed Nov. 10, 2020).

¹⁸ Application at 18.

As Public Knowledge et al. noted: “Verizon could well decide for business reasons to limit availability of 5G or new devices to non-Lifeline customers to discourage participation in the program. Alternatively, Verizon could—even consistent with its promise not to force any of its customers into more expensive plans—withhold these promised benefits from low-cost plans whether or not they participate in Lifeline.”¹⁹ For example, Public Knowledge et al. add, if TracFone becomes part of Verizon, then Verizon will have the “incentive to limit low-cost customers to ‘no frills economy’ plans while reserving the ‘first class’ devices and services for those willing to pay more.”²⁰

These concerns are real. Many Americans currently work and study at home, so internet access is critical to meaningfully participate in society and our democracy. As Congressman John Lewis said, “Access to the Internet...is the civil rights issue of the 21st century.”²¹ But despite the long-standing Congressional goal of universal service, millions of low-income American households still lack smartphones and broadband wireless service.²² Despite the compelling need and demand to close the digital divide, Verizon does not generally offer its mobile wireless service to Lifeline customers. Despite being the nation’s largest wireless

¹⁹ PK et al. Filing, 7.

²⁰ PK et al. Filing, 8.

²¹ Reverend Al Sharpton, FCC Commissioner Geoffrey Starks, Vanita Gupta, Marc Morial and Maurita Coley, “Broadband Access Is A Civil Right We Can’t Afford To Lose—But Many Can’t Afford To Have,” *Essence* (June 17, 2020), <https://www.essence.com/news/broadband-access-is-a-civil-right-we-cant-afford-to-lose-but-many-cant-afford-to-have/>

²² *Id.*; Monica Anderson & Madhumitha Kumar, “Digital Divide Persists Even As Lower-Income Americans Make Gains In Tech Adoption,” *Pew Research Center* (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> (“Roughly three-in-ten adults with household incomes below \$30,000 a year (29%) don’t own a smartphone. More than four-in-ten don’t have home broadband services (44%) or a traditional computer (46%).”).

provider, Verizon still limits its wireless Lifeline program to North Dakota and three other states.²³ Verizon in 2020 said it had no intention of expanding its Lifeline home internet program beyond 10 states and Washington, DC.²⁴

Nor can we expect the other MNOs to pick up the slack. As the U.S. Court of Appeals for the D.C. Circuit stated in 2019, millions of people rely on TracFone and other non-facilities-based providers precisely “because the largest facilities-based providers are unwilling to participate in a program that is unprofitable for them.”²⁵ Commissioner Geoffrey Starks similarly observed how the T-Mobile-Sprint merger would harm Lifeline customers:

Relatedly, the loss of competition in the MVNO market will negatively affect the Lifeline program, which provides communications services to the most vulnerable in our society. Except for Sprint (now alleged to have committed the largest set of Lifeline violations in FCC history), none of the four largest mobile wireless carriers is a nationwide Lifeline provider. Thus, most Lifeline participants are MVNOs and will be impacted by the above issues – rising prices and lack of access to infrastructure sharing arrangements.”²⁶

T-Mobile previously expressed no interest in participating in the program as a facilities-based carrier, eliminated T-Mobile’s Lifeline participation in seven states, referred to Lifeline as “non-

²³ Verizon, Lifeline, <https://www.verizon.com/support/residential/account/manage-account/lifeline-discount> (offering services to wireless customers in Iowa, New York, North Dakota, and Wisconsin).

²⁴ Ry Crist, “Verizon Extends Discounted Internet Plans Through 2020,” *CNET* (July 9, 2020), <https://www.cnet.com/news/verizon-extends-discounted-internet-plans-through-2020/>; Jon Brodtkin, “Verizon Refuses to Give DSL Users Its Low-Income Deals During Pandemic,” *Ars Technica* (Apr. 7, 2020), <https://arstechnica.com/tech-policy/2020/04/verizon-refuses-to-give-dsl-users-its-low-income-deals-during-pandemic/>

²⁵ *Nat’l Lifeline Ass’n*, 921 F.3d at 1113.

²⁶ Statement of Commissioner Geoffrey Starks, Dissenting, *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197 (Nov. 5, 2019), 16, <https://docs.fcc.gov/public/attachments/FCC-19-103A6.pdf>.

sustainable,” and has stated that the company would look to phase out its current Lifeline customers.

If Verizon does not promote, or even worse curtails, TracFone’s Lifeline programs, the mobile and digital divide will only worsen. Low-income consumers will be denied desirable offers, as it is unlikely that the other MNOs will compete for the low-margin accounts. Instead, their focus, like Verizon’s, would likely be to attract higher-income, higher-margin customers.

But even if Verizon promised to treat TracFone’s Lifeline customers well after the merger, our country’s policy is not to rely on the beneficence of powerful firms. Instead, we rely on competition and regulatory oversight. Given the Lifeline program’s critical role in closing the digital divide for low-income Americans, TracFone’s role in expanding Lifeline service to approximately 1.7 million customers, and the MNOs’ unlikelihood of vigorously promoting Lifeline post-merger, the Commission simply cannot rely on the Applicants’ vague one-sentence offering. In doing so, the Commission would abdicate its responsibility. The FCC must carefully review the proposed transaction to ensure that millions of low-income consumers will not be harmed and that Lifeline services will not be interrupted, discontinued, or diminished.

III. The Applicants’ Request for Streamlined Treatment Must Be Denied Given the Transaction’s Significant Risks of Anticompetitive Harm

Besides eliminating an important independent option for approximately 1.7 million low-income subscribers, the proposed Verizon-TracFone transaction may substantially lessen competition in several other important ways: First, in acquiring the leading MVNO, Verizon could have the incentive to disadvantage other MVNOs that currently rely on its services. This was a significant concern when T-Mobile acquired Sprint. Second, the transaction could diminish competition by increasing entry barriers to the MVNO market. Third, the transaction

can soften competition as Verizon will now have access to competitively sensitive information. Fourth, the transaction, in eliminating a maverick MVNO, can soften competition for mobile wireless services.

Since consumers ultimately would be harmed, the Commission’s review of the proposed transaction cannot be done on the fly. The belief that vertical mergers are inherently pro-competitive is not sound as a matter of economic policy; nor does it reflect the intent of Congress.²⁷ Indeed, the competition agencies have recently replaced the dated Vertical Merger Guidelines with a new set of guidelines that state, “vertical mergers are not invariably innocuous.”²⁸ Under these new Guidelines, this transaction raises several potential concerns that warrant, as others have urged, the Commission carrying out a thorough, public review of the proposed transaction.

²⁷ See *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary 395 (Oct. 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (recommending that “Congress explore presumptions involving vertical mergers, such as a presumption that vertical mergers are anticompetitive when either of the merging parties is a dominant firm operating in a concentrated market, or presumptions relating to input foreclosure and customer foreclosure”); Rep. Ken Buck et al., House Judiciary Committee Subcommittee on Antitrust, Commercial, and Administrative Law, *The Third Way* 15 (2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf (“The new agency guidance on vertical mergers may change enforcement activity against vertical mergers and shift the current thinking that vertical mergers are presumptively pro-competitive in all but the rarest instances.”).

²⁸ U.S. Department of Justice & Federal Trade Commission, Vertical Merger Guidelines at 2 (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (hereinafter “VMG”).

A. The Current Dependency of MVNOs on MNOs, and Insufficient Competition on the Wholesale Level

As the Commission knows, healthy competition in the wireless market depends on a diverse ecosystem of both MVNOs and MNOs. The courts and agencies in assessing competition in the market distinguish between those that have built and operate their own mobile networks (MNOs) and MVNOs, which lease radio access network (RAN) access from the MNOs. The three current MNOs – AT&T, Verizon, and T-Mobile – sell mobile wireless services either under their brand names or through subsidiaries, and customers pay in arrears (“post-paid” customers) or in advance of receiving services (“pre-paid” customers). The three MNOs also sell mobile wireless service wholesale to MVNOs, which then resell service on the nationwide networks under a variety of pre-paid brands.

While adding welcome competition on the margins, the MVNOs cannot meaningfully constrain anticompetitive behavior by the three MNOs. Considering the totality of the evidence, one district court recently concluded that “MVNOs face significant constraints on their ability to compete independently with MNOs and thus lack the ability to significantly constrain the MNOs.”²⁹ As the court explained, MVNOs are dependent on MNOs, as “they do not have the RAN necessary to support the provision” of retail mobile wireless telecommunications services.³⁰ If TracFone, with approximately 21 million subscribers, cannot meaningfully compete with MNOs on network quality because it lacks a network of its own to invest in, then all the other upstart MVNOs are likewise dependent on the three MNO wholesale suppliers. Consequently, one cannot expect other MVNOs to prevent either Verizon or the two other

²⁹ *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 201 (S.D.N.Y. 2020).

³⁰ *Id.* at 195.

MNOs from behaving anti-competitively, given the MVNOs' "remarkably small market shares and the fact that they would continue to rely on MNOs to provide network access to the MVNOs' growing customer base."³¹ Instead, MVNOs have a vertical relationship with the MNOs: "MNOs can be considered wholesalers of their network access, which MVNOs then resell to their retail subscribers."³²

With only 4.08 million pre-paid customers currently, Verizon has an incentive to provide wholesale services to numerous MVNOs, including the leading MVNO TracFone and MVNOs Comcast and Charter. In 2017, Comcast began offering a wireless voice and data service, using its MVNO rights to provide the service over Verizon's wireless network.³³ Charter's Spectrum mobile service also relies on Verizon's wireless network.

As the *Wall Street Journal* reported, "New wireless plans from cable operators Comcast Corp. and Charter Communications Inc., which also resell network bandwidth provided by Verizon, have added more competition for TracFone."³⁴ When these MVNOs currently compete against each other in the pre-paid segment, Verizon presumably has little reason to favor one client over another.

But in acquiring TracFone, the largest MVNO, Verizon's incentives can change. Verizon will now become both the largest pre-paid provider with about 25 million customers and the largest post-paid provider. Verizon's share in the pre-paid segment would rise from 5 percent to

³¹ *Id.* at 202.

³² *Id.*

³³ Comcast Corp., Form 10-K for the Fiscal Year Ending December 31, 2019 at 16, <https://www.cmcsa.com/static-files/d3de7993-a16b-42bf-bebd-a45b938dcbfc>.

³⁴ Drew FitzGerald, "Verizon to Buy TracFone in Deal Valued at Nearly \$7 Billion," *Wall Street Journal* (Sept. 14, 2020).

about 34 percent compared with an estimated 28 percent for T-Mobile and 25 percent for AT&T.³⁵ Verizon will also dominate the post-paid segment, with an estimated 41 percent share, versus 29 percent for T-Mobile and 28 percent for AT&T. Accordingly, the transaction raises several antitrust risks.

B. The Commission Must Assess Verizon's Incentive to Disadvantage Rival MVNOs through Foreclosure and Raising Their Costs

One risk is Verizon, post-merger, would have a greater incentive to favor its own MVNO TracFone and disadvantage the other MVNOs that currently rely upon Verizon for wholesale mobile wireless services. The 2020 Vertical Merger Guidelines recognize that a merger “may increase the vertically integrated firm’s incentive or ability to raise its rivals’ costs by increasing the price or lowering the quality of the related product” and that the merged firm “could also refuse to supply rivals with the related products altogether.”³⁶

Before this proposed transaction, Verizon had less incentive to foreclose the pre-paid rivals as it would not significantly benefit from sales being diverted to its own pre-paid service (or its more expensive post-paid subscription plans).

But its acquisition of the leading pre-paid MVNO could very well change Verizon’s incentives to now foreclose or raise the costs of those maverick MVNOs, as Verizon potentially stands to gain if other MVNO users switch to TracFone. By becoming the leading competitor in the pre-paid segment, Verizon could potentially alter the terms by which it provides its wholesale mobile wireless services to one or more of its pre-paid rivals that rely upon its wholesale

³⁵ Jason Leigh, “U.S. Postpaid and Prepaid Wireless Forecast, 2019-2023,” International Data Corporation (IDC) (Dec. 2019), <https://www.idc.com/getdoc.jsp?containerId=US44687219>.

³⁶ VMG at 4.

services. Besides raising its rivals' costs, Verizon post-merger could also degrade the quality of services to the competing MVNOs. By raising the MVNOs' costs, reducing the quality of their services, or denying them other important wholesale services, Verizon could cause the other MVNOs that depend on its wholesale services to (a) lose significant sales in the pre-paid segment (for example, if they are forced out of a geographic market; if they are deterred from innovation, entry, or expansion, or cannot finance those activities; or if they have incentives to pass on higher costs through higher prices) or (b) otherwise compete less aggressively for pre-paid customers' business.

Consequently, the Commission must assess whether Verizon, post-merger, has the incentive to foreclosure independent MVNOs. That entails a careful review of whether Verizon, as a result of the merger, "would likely find it profitable to foreclose rivals, or offer inferior terms for the related product, because it benefits significantly in the relevant [pre-paid] market when rivals lose sales or alter their behavior in response to the foreclosure or to the inferior terms."³⁷ Thus, the merger warrants scrutiny for its potential to induce foreclosure and raise rivals' costs since post-merger Verizon could benefit from a reduction in actual or potential competition with users of the independent MVNOs' pre-paid products.

C. The Concern Is Not Conjectural as the United States Found that Competition Among the Three MNOs Was Too Weak to Prevent Anticompetitive Harm to the MVNOs and Their Customers

The degradation of service, raising rivals costs, and foreclosing their expansion or competitiveness would not be a concern if, as the Vertical Merger Guidelines provide, "rivals could readily switch purchases to alternatives to the related product, including self-supply,

³⁷ VMG at 5.

without any meaningful effect on the price, quality, or availability of products or services in the relevant market.”³⁸ But that is not the reality in the wholesale market for mobile wireless services.

The MVNOs cannot self-supply as the costs are significant and it would take years to accomplish.³⁹ Nor is it clear that the independent MVNOs can easily switch to the two remaining MNOs, “without any meaningful effect on the price, quality, or availability of” their pre-paid services.⁴⁰

The other two MNOs may lack the capacity or interest to provide the independent MVNOs with wholesale services. Only roughly 3 million TracFone subscribers are estimated to use AT&T’s network, while around 4 million are on T-Mobile’s. So if these seven million subscribers were transferred to Verizon, that, by itself, would not free up much wholesale capacity for the other two MNOs.

Even if the two other MNOs have the capacity, they too may have similar incentives to favor their own pre-paid services (and not lose customers to the maverick MVNOs). This concern is not conjecture.

³⁸ *Id.*

³⁹ In the Matter of the Joint Application of Sprint Commc'ns Co. L.P. (U5112) & T-Mobile USA, Inc., A Delaware Corp., for Approval of Transfer of Control of Sprint Commc'ns Co. L.P. Pursuant to California Pub. Utilities Code Section 854(a) & Related Matter., No. 18-07-011, 2020 WL 2487298, at *103 (Apr. 16, 2020) (Charter explaining that “substantial barriers exist to entering the mobile services market as a facilities-based service provider, including high spectrum license acquisition costs, significant network deployment costs, tower site acquisition or leasing and construction costs, costs of purchasing network equipment, backhaul costs, and the costs of interconnection and roaming agreements”).

⁴⁰ VMG at 5.

Even before the proposed merger, Verizon could limit the MVNOs' ability to compete, when it was in Verizon's interest. For example, Verizon allowed Comcast "to offer wireless services only as part of a bundle package with its non-wireless services, which eliminates its ability to attract customers who are uninterested in those other services."⁴¹ This is significant, as the MVNOs, before this proposed transaction, faced significant competitive constraints on their ability to compete independently against the MNOs.

When T-Mobile acquired Sprint, DISH estimated, based on a Vertical Gross Upward Pricing Pressure Index (vGUPPI) analysis, that as a result of the proposed transaction, New T-Mobile would have an incentive to raise the wholesale rates it charged TracFone "by a substantial amount."⁴² This enhanced market power was also a concern of the United States in fashioning the consent decree in the T-Mobile-Sprint merger, including the divestiture of the MVNO Boost to DISH. As DISH is currently an MVNO seeking to become an MNO, it too will be dependent on T-Mobile for the next seven years for wholesale services. One concern was that T-Mobile could thwart DISH's competitive significance by raising its costs. To mitigate this risk, the Court required T-Mobile after it acquired Sprint to "permit DISH to operate as an MVNO on the merged firm's network on commercially reasonable terms and to resell the merged firm's mobile wireless service."⁴³ Not only must the terms be commercially reasonable, but the terms

⁴¹ *Deutsche Telekom*, 439 F. Supp. 3d at 201.

⁴² FCC Sprint/T-Mobile Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification at 129 (Nov. 5, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf>.

⁴³ United States' Competitive Impact Statement at 11, *filed in* United States v. Deutsche Telekom, Case No. 1:19-cv-02232-TJK (D.D.C. filed July 30, 2019), <https://www.justice.gov/atr/case/us-et-al-v-deutsche-telekom-ag-et-al> [hereinafter "Deutsche Telekom CIS"].

must also be “acceptable to the United States, in its sole discretion, after consultation with the affected Plaintiff States.”⁴⁴ As a result of this court order, T-Mobile is obligated to provide access “at wholesale rates significantly lower than those provided under typical MVNO agreements.”⁴⁵

Besides DISH, other MVNOs that relied on T-Mobile and Sprint for wholesale services were also concerned that the merger would leave them with only three MNOs, which would have less incentive to provide competitive wholesale services post-merger.⁴⁶ The economic reality was that competition from the remaining two MNOs would not protect the MVNOs dependent on T-Mobile post-merger. Accordingly, the Court ordered T-Mobile to extend the pre-existing agreements it and Sprint had with these MVNOs for seven more years, subject to certain conditions.⁴⁷

So, a review of the record shows that neither DISH, the MVNOs, the United States, nor the Court believed that competition on the wholesale level was sufficiently robust to protect DISH and the MVNOs from anti-competitive actions by T-Mobile after it acquired Sprint. The district court, while expressing skepticism about this gamble of relying on behavioral remedies to

⁴⁴ Final Judgment at 19, entered in *United States v. Deutsche Telekom*, Case No. 1:19-cv-02232-TJK (D.D.C. filed April 1, 2020), <https://www.justice.gov/atr/case-document/file/1333826/download> [hereinafter “Deutsche Telekom Final Judgment”].

⁴⁵ *Deutsche Telekom*, 439 F. Supp. 3d at 227.

⁴⁶ FCC Sprint/T-Mobile Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification at 129 (noting how “[s]ome parties argue that a combined New T-Mobile would have stronger incentives to raise prices driven by the combined firm’s larger share of the retail market, its greater profits per retail consumer due to realizing lower overall costs per connection, and the greater benefit it would realize by impeding the ability of MVNOs (which rely on upstream wholesale inputs) to compete effectively to provide downstream retail services”).

⁴⁷ *Deutsche Telekom Final Judgment* at 20-21.

prevent harm in this highly concentrated industry, nonetheless relied on these safeguards in the Tunney Act proceeding.⁴⁸

With only three MNOs left, the wholesale market is too concentrated to protect independent MVNOs from anti-competitive actions. If the threat of switching to Verizon and AT&T could not protect MVNOs that relied on T-Mobile, why should the Commission now expect competition to somehow protect the independent MVNOs that rely on Verizon after it acquires TracFone, the leading pre-paid MVNO provider? If Verizon, post-acquisition, decides to engage in the same type of anticompetitive behavior that concerned the United States in the Sprint-T-Mobile merger, such as raising the costs of rival MVNOs and degrading their service, there is no court order, like the one entered in the T-Mobile/Sprint merger, to protect them. The harm here, of course, would not simply be to the independent MVNOs but the consumers who rely on these providers for lower prices, better services, and greater choices.

D. The Commission Must Assess the Transaction's Potential to Increase Entry Barriers and Thereby Lessen Competition

Entry barriers are already significant in the MVNO segment. The proposed Verizon/TracFone merger could increase entry barriers by requiring two-level entry. As the Vertical Merger Guidelines provide, “two-level entry may be more costly and riskier than entering the relevant market alone,” which may deter any prospective MVNO from entering.⁴⁹

If each MNO favors its MVNO, and if the pre-paid segment is split among the three MNOs, then any entrant in the pre-paid segment would have to become an MNO as well, an

⁴⁸ United States v. Deutsche Telekom AG, No. CV 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020).

⁴⁹ VMG at 8.

expensive and risky undertaking. With fewer MVNOs entering the market, consumers would ultimately pay the price from the fewer options and less innovation.

D. The Commission Must Assess the Transaction's Potential to Soften Competition Given Verizon's Access to Competitively-Sensitive Information

The Vertical Merger Guidelines state:

In a vertical merger, the transaction may give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger. For example, a downstream rival to the merged firm may have been a premerger customer of the upstream firm. Post-merger, the downstream component of the merged firm could now have access to its rival's sensitive business information. In some circumstances, the merged firm can use access to a rival's competitively sensitive information to moderate its competitive response to its rival's competitive actions. For example, it may preempt or react quickly to a rival's procompetitive business actions. Under such conditions, rivals may see less competitive value in taking procompetitive actions. Relatedly, rivals may refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information as described above. They may become less effective competitors if they must rely on less preferred trading partners, or if they pay higher prices because they have fewer competing options.⁵⁰

Verizon currently provides wholesale services to many independent MVNOs. One concern is that Verizon in providing wholesale services to MVNOs can glean competitively-sensitive information which it can supply the MVNOs' rival, TracFone. This information may include data usage metrics across various geographic markets.

Another concern is that TracFone, through its current MVNO deals with AT&T and T-Mobile, can glean competitively-sensitive information from those MNOs, which it can share with Verizon. This can include the rates and terms at which the two rivals offer access to

⁵⁰ *Id.* at 10.

MVNOs. This sharing of competitively sensitive information can soften competition among the three MNOs, and consumers ultimately would pay the price.

Again this concern is real. In T-Mobile's supply of MVNO wholesale services to DISH post-merger, the United States sought "firewall procedures to prevent either company's confidential business information from being used by the other for any purpose that could harm competition."⁵¹ As the United States explained,

These measures are necessary to ensure that the implementation and execution of the obligations in the proposed Final Judgment and any associated agreements between T-Mobile and DISH do not facilitate coordination or other anticompetitive behavior during the interim period before DISH becomes fully independent of T-Mobile.⁵²

Again, there is no court order here, like the one entered in the T-Mobile/Sprint merger, to require these firewall procedures and prevent the likely anticompetitive harm post-merger.

E. The Commission Must Assess the Transaction's Potential Horizontal Anticompetitive Effects

As the Vertical Merger Guidelines provide:

A vertical merger may enhance the market's vulnerability to coordination by eliminating or hindering a maverick firm that otherwise plays or would play an important role in preventing or limiting anticompetitive coordination in the relevant market. For example, the merged firm could use its control over a related product or service to harm the ability of a non-merging maverick to compete in the relevant market, thereby increasing the likelihood of coordinated interaction among the merged firm and rivals participating in that market.⁵³

At the margin, MVNOs can provide some competitive pressure on the MNOs' subscription plans, especially as millions of Americans are currently unemployed, and more

⁵¹ Deutsche Telekom CIS at 14.

⁵² *Id.*

⁵³ VMG at 10.

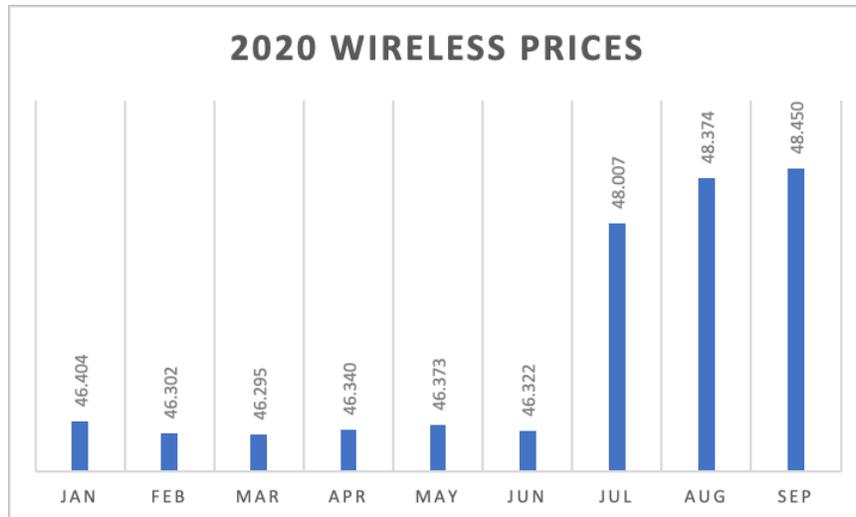
consumers are turning to MVNOs.⁵⁴ MVNOs can offer far greater choices to lower-income consumers.

Post-merger, the leading MVNOs will now be aligned with, or controlled by, the three current MNOs. TracFone will no longer be an independent maverick. In such a highly concentrated market, one can expect the risk of tacit collusion to increase.

Indeed, Americans may be paying the price of tacit collusion. For years, wireless prices were declining. But many were concerned that the Sprint-T-Mobile merger would lead to higher prices. But the regulators were more confident. Besides the behavioral and structural remedies, T-Mobile committed “to maintain prices at current levels for three years following the closing of the transaction.”⁵⁵ But in mid-2020, after one district court ruled against the states that challenged the Sprint-T-Mobile merger, and after another district court approved the government’s consent decree, wireless prices began to increase.

⁵⁴ Drew FitzGerald, “Verizon to Buy TracFone in Deal Valued at Nearly \$7 Billion,” *Wall Street Journal* (Sept. 14, 2020) (noting how the “coronavirus pandemic helped boost TracFone’s subscriber numbers”); Bevin Fletcher, “Verizon Swoops Into Prepaid with \$6.9B Tracfone Acquisition,” *Fierce Wireless* (Sept. 14, 2020) (“While postpaid customers are usually seen as the main prize, Fierce reported in late July that prepaid had somewhat of a resurgence in the second quarter as consumers turned to more affordable choices. Tracfone led the pack, reporting 214,000 net additions for its prepaid services in the U.S. during Q2, compared to 135,000 at AT&T and 12,000 at Verizon.”).

⁵⁵ In the Matter of the Joint Application of Sprint Commc'ns Co. L.P. (U5112) & T-Mobile USA, Inc., A Delaware Corp., for Approval of Transfer of Control of Sprint Commc'ns Co. L.P. Pursuant to California Pub. Utilities Code Section 854(a) & Related Matter., No. 18-07-011, 2020 WL 2487298, at *248 (Apr. 16, 2020).



Source: US Bureau of Labor Statistics: Wireless telephone services in U.S. city average, all urban consumers, not seasonally adjusted

The Commission gambled the wallets of millions of Americans in allowing the Sprint-T-Mobile merger. Only time will tell if wireless prices will decline or continue to increase. The Commission can ill-afford to make another gamble in allowing the leading MNO Verizon in a highly concentrated wholesale market to acquire the leading MVNO and pre-paid provider TracFone without a thorough public review. Without such an in-depth review, many Americans, including the millions who rely on Lifeline, might very well pay the price.

Conclusion

The Commission must do the job entrusted to it by the public: deny streamlined treatment of the Verizon-TracFone Application, dismiss the Application as incomplete, and after the Applicants provide the necessary information, conduct a careful public interest review.

Respectfully submitted,

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