

**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

**Comments of  
Communications Workers of America**

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## **Introduction**

The Communications Workers of America (CWA) submits these comments in response to the application of Verizon Wireless, Inc. (“Verizon”) and TracFone Wireless, Inc. (“TracFone”) (collectively, “Applicants”) for a proposed transaction that would fundamentally impact both the wireless industry and the market for Lifeline services.<sup>1</sup> 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. The Commission properly denied Applicants’ request for streamlined treatment of the Application.<sup>2</sup> Despite the diversity of questions about their business and operations raised by CWA and others related to this transaction, Applicants have provided no new information since their initial Application. To fully understand the details of this transaction, the Commission should request more information from Applicants and, if the Commission considers approving the transaction, impose conditions that protect the public interest.

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 program<sup>3</sup> and has serious concerns that this transaction could curtail service availability from one of the largest providers

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<sup>1</sup> 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”).

<sup>2</sup> On September 30, 2020, the International Bureau received the above-referenced Application and request for streamlining. Several parties opposed the request to streamline treatment. *See* Communications Workers of America Opposition to Petition for Streamlining and Motion to Dismiss Application as Incomplete, File No. ITC-T/C-20200930-00173 (Oct. 16, 2020). *See also* Public Knowledge, Open Technology Institute, and the Benton Institute for Broadband and Society, Opposition to Petition for Streamlining and Motion to Dismiss Application as Incomplete, File No. ITC-T/C-20200930-00173 (Oct. 16, 2020).

<sup>3</sup> *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

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 carrying one is indispensable to participation in modern society.”<sup>4</sup> 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.

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 Verizon’s 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).”<sup>5</sup> That raises multiple concerns under the Department of Justice and Federal Trade Commission’s 2020 Vertical Merger Guidelines.

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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).

<sup>4</sup> *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)).

<sup>5</sup> 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 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”).

## **Recommendations**

An adequate review of this transaction requires more information and, should the Commission then consider approving the transaction, it should impose conditions that protect Lifeline customers as well as customers in the MVNO market from anticompetitive harms.

### **A. The Commission Needs More Information.**

First, Applicants have not provided the Commission with Verizon's ETC certification plan, which the Commission must approve before the transfer of section 214 licenses. Before approving the ETC certification plan, the Commission must be satisfied that the ETC understands the nature of the Lifeline program, that it has the capacity to comply, that it has trained staff thoroughly in compliance, and that it has structural safeguards in place to detect non-compliance and report any non-compliance to the Commission.

Second, Applicants have not said whether TracFone holds a domestic section 214 authorization. If TracFone once held a domestic section 214 authorization but no longer does, did the company seek prior Commission approval to transfer the authorization or discontinue operations as the Commission's rules require? And if TracFone continues to hold a domestic section 214 authorization, does the company intend to transfer it to Verizon?

Third, Applicants have refused to answer questions about Verizon's side relationships with América Móvil, TracFone's foreign parent based in Mexico. The Application omits details about arrangements between the two companies. These issues not only implicate the Commission's rules, but also have broader ramifications on economic and national security.

Because the Applicants have declined to answer essential questions related to their Application, the Commission should issue a standard Request for Information (RFI) seeking documents and narrative responses addressing the transaction's probable harms.

## **B. Conditions to Protect Lifeline Consumers and MVNO Market Consumers.**

Given the serious implications of the proposed transaction, the Commission should, if it considers approving the transaction, impose conditions that protect Lifeline consumers and MVNO market consumers. Conditions to mitigate both the threat to Lifeline customers and to MVNO customers (whether offered by the Applicants or demanded by the Bureau) should, at a minimum, include the following:

- A commitment by Verizon to participate in the Lifeline program for a minimum of 5 years with at least the same level of geographic and service offerings as TracFone currently provides.
- A commitment to make 5G networks and equipment available to Lifeline and pre-paid customers on the same basis as made available to Verizon's post-paid customers.
- A commitment to maintain the existing packages available to Lifeline customers for a minimum of 5 years.
- A commitment to continue to market to, and provide customer services for, Lifeline and pre-paid customers, including non-English speaking customers, at least at the same level as TracFone provides today.
- A commitment by Verizon to assume liability for any forfeitures or restitution that may be imposed by the Commission on TracFone, unless such liability has been resolved by TracFone before the closing of the transaction.
- Whatever other conditions the record demonstrates are necessary to protect Lifeline and other low-income pre-paid subscribers.
- Require that the Applicants provide additional information and analysis about the impact the merger would have both downstream on consumers as well as upstream in the labor markets, including the effect that reducing the number of independent MVNOs will have on wages in geographic markets where their operations currently overlap.
- Require the Applicants to submit their internal analysis of projected employment growth as part of the record in this proceeding so that the Commission and the public can properly evaluate this transaction's impact on jobs and wages.

- Require the Applicants to ensure that the transaction does not cause a reduction in U.S. employment and that no employee of Verizon Wireless or TracFone loses a job or that their benefits and wages are reduced as a result of this transaction.
- Require commitments that are similar to the protections in Part VII.A of the Final Judgment entered in *United States v. Deutsche Telekom*<sup>6</sup> to protect MVNOs that are currently obtaining services from Verizon and that ensure that Verizon’s current MVNO partners remain viable competitive options for the consumers who currently use their wireless services. The Commission should obligate Verizon to extend, at the MVNO’s option, its current MVNO agreement for at least five years.
- Require the Applicants to implement and maintain reasonable firewall procedures, similar to the protections in Section XIII of the *Deutsche Telekom* Final Judgment, to prevent competitively sensitive information from competing MVNOs or MNOs from being disclosed to Verizon and TracFone individuals involved in the marketing, distribution, or sale of competing services or being used for any purpose that could harm competition.

#### **I. The Commission Must Adopt Conditions to Mitigate the Transaction’s Threat to the Lifeline Program**

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.”<sup>7</sup>

They failed to do so. With the elimination of the last significant independent MVNO, Lifeline users cannot rely on the meager competition that remains to protect them. If the Commission approves this transaction, it should impose conditions that will protect Lifeline customers.

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.”<sup>8</sup> But despite the long-

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<sup>6</sup> 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”].

<sup>7</sup> 47 C.F.R. § 63.18.

<sup>8</sup> 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*

standing Congressional goal of universal service, millions of low-income American households still lack smartphones and broadband wireless service.<sup>9</sup>

The wireless marketplace is essential to the Lifeline program with more than 80 percent of Lifeline participants subscribing through wireless service as of 2018.<sup>10</sup> 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.’”<sup>11</sup> TracFone is now one of the largest providers of Lifeline services with approximately 1.7 million low-income subscribers in 43 states and the District of Columbia, or 22 percent of total Lifeline subscribers.<sup>12</sup> By contrast, Verizon does not generally offer its mobile wireless service to Lifeline customers. And despite being the nation’s largest wireless provider, Verizon still limits its wireless Lifeline program to parts of Iowa, North Dakota, New York, and Wisconsin.<sup>13</sup> Verizon in 2020 said it had no

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(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/>

<sup>9</sup> *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%).”).

<sup>10</sup> 2018 Lifeline Subscribers Average Universal Service Administration Co., <https://www.usac.org/lifeline/learn/program-data/> (accessed Dec. 16, 2020). *See Ex Parte* Presentation of National Lifeline Association, WC Docekt Nos. 17-287, 11-42, 09-197, 10-90 (filed Aug. 17, 2020).

<sup>11</sup> 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)).

<sup>12</sup> Lifeline Participation, Universal Service Administration Co., <https://www.usac.org/lifeline/learn/program-data/> (accessed Nov. 10, 2020).

<sup>13</sup> 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).

intention of expanding its Lifeline home internet program beyond 10 states and Washington, DC.<sup>14</sup>

Major MNOs are not substantially participating in the Lifeline program, nor are they substantially growing their participation in the program. For example, Verizon had fewer wireless Lifeline subscribers in January 2020 than it did in January 2018.<sup>15</sup> In January 2020, the number of Verizon’s wireless subscribers was approximately 44,206. AT&T Mobility’s wireless subscribers increased from 2018 to 2020, but the number of subscribers now stands at only about 10,000 customers. T-Mobile does not participate in Lifeline. As the major MNOs are not substantially offering wireless service within the Lifeline program, the program increasingly relies on the MVNO marketplace. Indeed, TracFone customers make up a significant market share of Lifeline customers in many states. As of August 2020, in Illinois and Virginia, for example, almost 40 percent of the state’s Lifeline customers subscribe through TracFone. The percent of Lifeline subscribers using TracFone service is 46 percent in Tennessee, 36 percent in North Carolina, 32 percent in Massachusetts, 32 percent in Florida, 30 percent in Connecticut, 29 percent in New Jersey, and 28 percent in New York.

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

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<sup>14</sup> 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/>

<sup>15</sup> Universal Service Administration Co., Lifeline Disbursement Tool, <https://opendata.usac.org/browse?category=Lifeline>, accessed December 16, 2020.

network.”<sup>16</sup> 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. Neither does TracFone’s late-filed compliance plan provide any substantive assurances.<sup>17</sup> 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.

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.”<sup>18</sup> 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.”<sup>19</sup>

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

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<sup>16</sup> Application at 18.

<sup>17</sup> TracFone Wireless, Inc., *Amended Compliance Plan*, WC Docket Nos. 09-197, WC Docket Nos. 11-42, CC Docket No. 96-45 (filed Dec. 15, 2020).

<sup>18</sup> PK et al. Filing, 7.

<sup>19</sup> PK et al. Filing, 8.

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.

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. If the Commission approves this transaction, it must impose conditions that will protect Lifeline customers to ensure that millions of low-income consumers will not be harmed and that Lifeline services will not be interrupted, discontinued, or diminished.

## **II. The Commission Must Adopt Conditions to Mitigate 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.<sup>20</sup> 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.”<sup>21</sup> Under these new Guidelines, this transaction raises several potential concerns that warrant a Commission Request for Information.

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

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<sup>20</sup> 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](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](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.”).

<sup>21</sup> 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](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”).

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.”<sup>22</sup> 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.<sup>23</sup> 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 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.”<sup>24</sup> 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.”<sup>25</sup>

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

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<sup>22</sup> New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 201 (S.D.N.Y. 2020).

<sup>23</sup> *Id.* at 195.

<sup>24</sup> *Id.* at 202.

<sup>25</sup> *Id.*

its MVNO rights to provide the service over Verizon’s wireless network.<sup>26</sup> 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.”<sup>27</sup> 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 about 34 percent compared with an estimated 28 percent for T-Mobile and 25 percent for AT&T.<sup>28</sup> 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

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<sup>26</sup> 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>.

<sup>27</sup> Drew FitzGerald, “Verizon to Buy TracFone in Deal Valued at Nearly \$7 Billion,” *Wall Street Journal* (Sept. 14, 2020).

<sup>28</sup> 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>.

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.”<sup>29</sup>

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). As Verizon noted last month in an investor call, Verizon wasn’t “that successful” in the pre-paid market, while TracFone was: So “we want to be the #1 in our premium market. We want to be the #1 in the value market. So that was the whole idea about it and it's straight up in the line of the network service strategy that we outlined.”<sup>30</sup> (There was no mention of Lifeline on the call.)

Thus its acquisition of the leading pre-paid MVNO could very well change Verizon’s incentives. To be “number one” in both the pre-paid and premium markets, Verizon has a greater incentive to 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 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,

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<sup>29</sup> VMG at 4.

<sup>30</sup> Verizon Communications Inc. Sellside Analyst Meeting (Virtual), FD (Fair Disclosure) Wire, November 11, 2020.

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."<sup>31</sup> 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, without any meaningful effect on the price, quality, or availability of products or services in the relevant market."<sup>32</sup> But that is not the reality in the wholesale market for mobile wireless services.

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<sup>31</sup> VMG at 5.

<sup>32</sup> *Id.*

The MVNOs cannot self-supply as the costs are significant and it would take years to accomplish.<sup>33</sup> 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.<sup>34</sup>

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.

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.”<sup>35</sup> This is significant, as the MVNOs, before this proposed transaction, faced significant competitive constraints on their ability to compete independently against the MNOs.

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<sup>33</sup> 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”).

<sup>34</sup> VMG at 5.

<sup>35</sup> *Deutsche Telekom*, 439 F. Supp. 3d at 201.

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.”<sup>36</sup> 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.”<sup>37</sup> Not only must the terms be commercially reasonable, but the terms must also be “acceptable to the United States, in its sole discretion, after consultation with the affected Plaintiff States.”<sup>38</sup> 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.”<sup>39</sup>

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.<sup>40</sup> The economic reality was

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<sup>36</sup> 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>.

<sup>37</sup> 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”].

<sup>38</sup> Deutsche Telekom Final Judgment at 19.

<sup>39</sup> *Deutsche Telekom*, 439 F. Supp. 3d at 227.

<sup>40</sup> 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

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.<sup>41</sup>

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 prevent harm in this highly concentrated industry, nonetheless relied on these safeguards in the Tunney Act proceeding.<sup>42</sup>

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

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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").

<sup>41</sup> Deutsche Telekom Final Judgement at 20-21.

<sup>42</sup> United States v. Deutsche Telekom AG, No. CV 19-2232 (TJK), 2020 WL 1873555, at \*7 (D.D.C. Apr. 14, 2020).

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.<sup>43</sup>

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

*E. 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

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<sup>43</sup> VMG at 8.

they must rely on less preferred trading partners, or if they pay higher prices because they have fewer competing options.<sup>44</sup>

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 that 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 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."<sup>45</sup> 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.<sup>46</sup>

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.

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<sup>44</sup> *Id.* at 10.

<sup>45</sup> Deutsche Telekom CIS at 14.

<sup>46</sup> *Id.*

F. *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.<sup>47</sup>

At the margin, MVNOs can provide some competitive pressure on the MNOs' subscription plans, especially as millions of Americans are currently unemployed, and more consumers are turning to MVNOs.<sup>48</sup> 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.

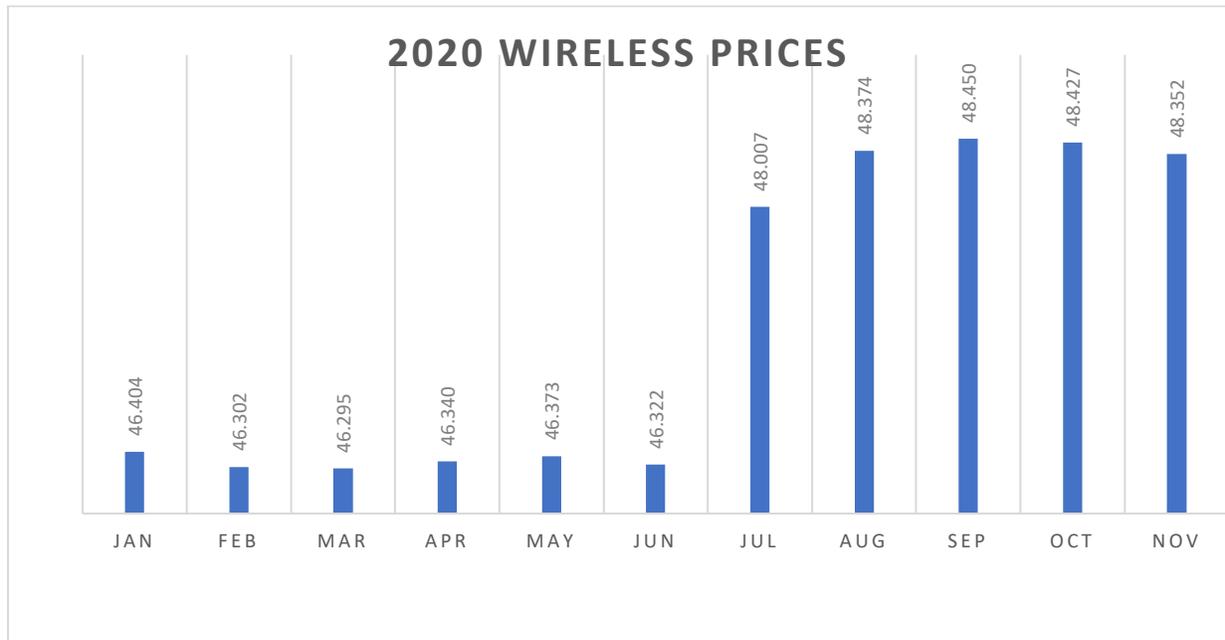
Indeed, Americans may be paying the price of tacit collusion. For years, wireless prices were declining. But many were concerned that the Sprint-T-Mobile merger would lead to higher prices. But the regulators were more confident. Besides the behavioral and structural remedies, T-Mobile committed "to maintain prices at current levels for three years following the closing of

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<sup>47</sup> VMG at 10.

<sup>48</sup> 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.").

the transaction.”<sup>49</sup> But in mid-2020, shortly 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 increased.<sup>50</sup>



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

<sup>49</sup> 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).  
<sup>50</sup> The price increase in mobile phone services was nearly 5 percent, whereas from November 2019 to November 2020, the Consumer Price Index for All Urban Consumers increased by only 1.2 percent. Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Consumer prices increase 1.2 percent for the 12 months ending November 2020 at <https://www.bls.gov/opub/ted/2020/consumer-prices-increase-1-2-percent-for-the-12-months-ending-november-2020.htm> (visited December 17, 2020).

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: protect the public interest. Because the Applicants have declined to answer essential questions related to their Application – their ETC compliance plan, whether or not TracFone holds a domestic section 214 authorization, Verizon’s relationship with América Móvil – the Commission should issue a standard Request for Information seeking documents and narrative responses addressing the transaction’s probable harms. Given the serious implications of the proposed transaction, if the Commission considers approving the transaction, it should, at a minimum, impose conditions on the transaction that protect Lifeline customers, workers, and MVNO market consumers, detailed above in the Recommendations section.

Respectfully submitted,

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