CWA

January 21, 2021

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: File No. ITC-T/C-20200930-00173

Dear Ms. Dortch:

This letter responds to Verizon and TracFone's (Applicants) most recent filing in the above-cited proceeding.[1]

A fundamental tenet of the FCC's public interest review is whether the transaction will enhance competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.[2] By enacting Section 7 of the Clayton Act, Congress also "declared that the preservation of competition is always in the public interest."[3] Accordingly, 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."[4]

This they have not done. Nor have the Applicants provided evidence to specifically address the multiple concerns raised about their acquisition.

Instead, Verizon and TracFone continue to avoid providing detailed plans for TracFone – and its millions of Lifeline customers – post-merger. They argue that greater concentration in this industry, where the nation's largest facilities-based provider of mobile wireless services would acquire the fourth largest provider of wireless services by subscribership, would somehow

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[1] Joint Reply to Comments of América Móvil, S.A.B. de C.V., TracFone Wireless, Inc., and Verizon Communications Inc., IB File No. ITC-T/C-20200930-00173 (Dec. 28, 2020) [hereinafter Verizon/TracFone Reply].
[2] Memorandum Opinion and Order and Declaratory Ruling, in In re Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Transfer of Control of Licenses and Authorizations, WT Docket No. 12-301, Federal Communications Commission (Adopted March 12, 2013), at 6-7 [hereinafter FCC T-Mobile/MetroPCS Opinion].
[3] *United States v. Tribune Publ'g Co.*, No. CV1601822ABPJWX, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016) (quoting *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989)); *see also Fed. Trade Comm'n v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws ....").
[4] 47 C.F.R. § 63.18.

benefit consumers when many cash-strapped Americans are now paying the price from the last merger. Verizon and TracFone dismiss the concerns that CWA and others have raised as speculative when both the United States and the court recognized these concerns and the need for these safeguards in the Sprint/T-Mobile merger.

While courts are skeptical of efficiencies claims in highly concentrated industries, the Applicants do not even meet the minimum requirements under the Merger Guidelines.

Finally, Verizon and TracFone decline to answer questions in the proceeding that go to the heart of whether this transaction is in the public interest. The Commission needs answers to the essential questions Applicants declined to reply and should issue a standard Request for Information (RFI) seeking documents and narrative responses addressing the transaction's probable harms.

Far from assuaging concerns detailed in Communications Workers of America's comments on this transaction,[5] the Applicants' most recent filing underscores the serious implications of their proposed transaction. At a minimum, the Commission should, if it considers approving the transaction, impose conditions that protect the millions of Lifeline consumers and MVNO market consumers, along the lines CWA outlined.[6]

I. Verizon Continues to Avoid Providing Detailed Plans for TracFone Post-Merger

Verizon and TracFone point to their Amended Compliance Plan as evidence that Verizon will maintain TracFone post-merger: "The Amended Compliance Plan conveys Verizon's intent to acquire TracFone and TracFone's ETC designation and provides granular detail on TracFone's compliance with Lifeline rules and policies, consistent with guidance from the Wireline Competition Bureau."[7]

Applicants are correct that the Amended Compliance Plan describes the measures that TracFone has implemented to comply with the obligations outlined in the Commission's Lifeline rules. This plan, however, does not provide specific details regarding Verizon's plans for TracFone, which has been the concern of CWA and other commenters.[8] Instead of describing Verizon's plans for TracFone's Lifeline services post-merger, the Amended Compliance Plan simply repeats the single sentence in its Application, which is Verizon's vague intention – not any

[5] Comments of Communications Workers of America, IB File No. ITC-T/C-20200930-00173 (Dec. 18, 2020) [hereinafter "CWA Comments"].
[6] For detailed condition recommendations specific to the probable harms of this transaction, see *ibid* at 4-5.
[7] Verizon/TracFone Reply at 15.
[8] CWA Comments; Comments of Public Knowledge, Open Technology Institute, the California Center for Rural Policy, Next Century Cities, Access Humboldt, Tribal Digital Networks, and the Benton Institute for Broadband and Society, IB File No. ITC-T/C-20200930-00173 (Dec. 18, 2020).

specific commitments.[9] These intentions were inadequate in the Application and are inadequate in the Amended Compliance Plan. Simply repeating them does not make them adequate.

Verizon claims a strong track record with Lifeline and states that "in any event, the Communications Act and Commission rules already impose a backstop should any provider seek to cease Lifeline offerings."[10] As Verizon knows, this backstop is not meaningful. Under 47 U.S.C. § 214(e)(4), the Commission "shall permit" an ETC to relinquish its designation "in any area served by more than one" ETC so long as "the remaining [ETCs] ensure that all customers served by the relinquishing carrier will continue to be served." So once the requesting ETC makes this showing, a state commission or the Commission must grant the request for relinquishment. The problem is this backstop has neither protected Lifeline subscribers nor has it prevented the largest wireless carriers and ILECs from exiting Lifeline in many states; it appears the Commission accepts the carriers' word that its subscribers will still have other options, rather than conducting an independent analysis of any impact on consumer options and prices. In Missouri for example, "the number of companies with ETC status is declining."[11] Missouri had seven companies relinquish ETC status (including T-Mobile, Cricket Communications, and AT&T) and had only four companies apply for ETC status.[12] In addition, "AT&T's exit from the Lifeline program left only wireless resellers offering Lifeline service within AT&T's service in Missouri."[13]

Moreover, Verizon's track record with Lifeline is not as strong as it would like the Commission to believe. In 2015, for example, about 62,000 New Yorkers – about 62 percent of Verizon's landline customers receiving the Lifeline benefit that year – were deemed ineligible for the program, many in error due to administrative problems. "They are torturing us," one Brooklyn resident said of Verizon in response to repeated attempts to correct Verizon's mistake and have her father participate in the Lifeline program through Verizon.[14] As the *Wall Street Journal* reported at the time: "TracFone Wireless, a large provider of wireless phone services to Lifeline subscribers in New York, doesn't appear to have similar problems."[15]

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[9] TracFone Wireless, Inc. Amended Compliance Plan, WC Docket Nos. 09-197, 11-42; CC Docket No. 96-45 (Dec. 15, 2020) at 5-6 ("As set forth in the Parties' application for transfer of TracFone's international section 214 authorization, Verizon intends to maintain TracFone's ETC status and will continue to offer Lifeline service through TracFone where it will offer service through its own network.") (citing Verizon/TracFone's Application for Consent to Transfer Control of International Section 214 Authorization, File No. ITC T/C-20200930-00173, at 18 (filed Sept. 30, 2020) [hereinafter "Application"] ("Verizon intends to maintain TracFone's ETC status and will continue to offer Lifeline service through TracFone where it will offer service through its own network.")).

[10] Verizon/TracFone Reply at 3.

[11] Comments by Missouri Public Service Commission, In re Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, WC Docket Nos. 17-287, 11-42, & 09-197, at 3.

[12] *Ibid*.

[13] *Ibid*. at 6.

[14] Yuliya Chernova, "Verizon Drops Customers from Low-Income Program," *Wall Street Journal* (Apr. 23, 2015).

[15] *Ibid.*

Furthermore, Verizon states that its "Lifeline offerings are administered differently within Verizon to comport with Lifeline obligations."[16] Verizon should explain why, and how, if at all, it intends to integrate TracFone's Lifeline services. And, if Verizon administers Lifeline separately, the Commission should consider whether this undermines Verizon's claimed efficiencies from the merger.

Verizon and TracFone surmise that their "transaction will be a benefit to the Lifeline program because it will introduce another major facilities-based provider to compete for that segment of the marketplace."[17] This assertion is questionable given Verizon's failure to make firm commitments to maintain Lifeline service.

Verizon also acknowledges that it "has a limited wireless Lifeline offering in parts of Iowa, New York, North Dakota, and Wisconsin."[18] One must ask if the competition is as fierce as Verizon claims, why hasn't the leading MNO sought to compete for more Lifeline wireless customers? As the U.S. Court of Appeals for the D.C. Circuit found 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."[19] Consequently, competition for Lifeline customers will likely lessen when Verizon acquires the maverick that aggressively courted these subscribers.

When, as here, the applicants provide "very little in the way of detailed description of their customer transition plans, and the steps it plans to take to transition . . . Lifeline customers," the Commission has found the information on customer migration "insufficient under its public interest review."[20] Without this information and firm commitments, the Commission could not conclude that the transaction's benefits outweighed the harm.[21]

Accordingly, the Commission in the past has requested, or the merging parties have offered, objective, verifiable commitments designed specifically to ensure that the benefits of the merger extend to low-income residential customers throughout all of the merging parties' regions.[22] That is especially important here when TracFone accounts for 22 percent of total Lifeline subscribers.

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[16] Verizon/TracFone Reply at 17 n. 64.
[17] Verizon/TracFone Reply at 16 n. 57.
[18] Verizon/TracFone Reply at 17 n. 64.
[19] Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n, 921 F.3d 1113, 1108 (D.C. Cir. 2019).
[20] In the Matter of Applications of Cricket License Co., LLC, et al., Leap Wireless Int'l, Inc., & AT&T Inc. for Consent to Transfer Control of Authorizations Application of Cricket License Co., LLC & Leap Licenseco Inc. for Consent to Assignment of Authorization, 29 F.C.C. Rcd. 2735, 2736 (2014).
[21] *Ibid.*
[22] *See, e.g.,* Closing Statement of FCC Comm'r Mignon L. Clyburn Washington, DC, 2018 WL 3046986, at *1 (OHMSV June 6, 2018) ("Historically, a Lifeline phone was the backstop connection for millions of low-income households, but we have also made strides in bringing affordable broadband connectivity through merger

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At a minimum, to mitigate the significant risks that this transaction poses to over a million Lifeline customers, the Commission should require conditions, which, at a minimum, should include:

- 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.

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commitments and updates to the Lifeline program."); Domestic Section 214 Application Filed for the Acquisition of Certain Assets of Budget Prepay, Inc. d/b/a Budget Phone by Glob. Connection Inc. of Am. Streamlined Pleading Cycle Established, 30 F.C.C. Rcd. 11727 (2015) (merging parties noting that a significant number of customers receive Lifeline services through Budget, and that, "post-close, they will continue to receive these benefits through GCOIA at the same rates, terms, and conditions as prior to the transaction"); In the Matter of Applications of Cricket License Co., LLC, et al., Leap Wireless Int'l, Inc., & AT&T Inc. for Consent to Transfer Control of Authorizations Application of Cricket License Co., LLC & Leap Licenseco Inc. for Consent to Assignment of Authorization, 29 F.C.C. Rcd. 2735, 2736 (2014) (AT&T committing to offer specific rate plans targeted to help value-conscious and Lifeline customers); In Re Application of GTE Corp., 15 F.C.C. Rcd. 14032, 14184–86 (2000) (requiring Bell Atlantic/GTE, among other things, to (i) offer a low-income Lifeline universal service plan modeled after the Ohio Universal Service Assistance (USA) Lifeline plan that Ameritech and Ohio community groups negotiated in 1994 and incorporating elements from the December 1998 Ohio Commission Order addressing the Ohio USA plan, including providing "a discount equal to the price of basic residential measured rate service, excluding local usage, in each state, up to a maximum discount of $10.20 per month (including all federal, state and company contributions);" (ii) permit a Lifeline customer with past-due bills for local service to restore local service after payment of no more than $25 and an agreement to repay the balance of local charges in six equal monthly payments; (iii) not requiring Lifeline customers to pay a deposit for toll service if they elect toll restriction service, (iv) allow easier means for prospective Lifeline customers to verify their eligibility and subscribe to the Lifeline program, (iv) "publicize the program in each state with an annual promotional budget that is proportional to the annual promotional budget in Ohio;" and (v) automatically upgrade current Lifeline customers to the merging parties' new programs where it is evident that doing so will unambiguously improve the customer's situation); In the Matter of Applications Filed by Qwest Commc'ns Int'l Inc. & CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control, 26 F.C.C. Rcd. 4194, 4211 (2011) (Commission accepting the commitments of CenturyLink to, inter alia, make discounted broadband Internet access service available to households that qualify for Lifeline service and meet certain other eligibility criteria and offer discounted computer equipment to these customers and making the commitments binding and enforceable conditions of its approval); FCC Approves SBC-Ameritech Merger Subject to Competition-Enhancing Conditions, 15 F.C.C. Rcd. 8652 (1999) (imposing conditions on merging parties to, inter alia, offer enhanced Lifeline plans, including offering a low-income Lifeline universal service plan to low-income residential subscribers in each of its states); In the Matter of Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations from S. New England Telecommunications Corp., Transferor to SBC Commc'ns, Inc., Transferee, 13 F.C.C. Rcd. 21292 (1998) (noting that among the conditions imposed involved the promotion of Lifeline service).

- 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.

II. Verizon and TracFone Concede the Transaction's Risk of Anticompetitive Harms

Verizon and TracFone argue that further concentration in this already highly concentrated industry is necessary to compete against T-Mobile and AT&T:

> The vertically-integrated 'flanker brands' of Verizon's mobile network operator ('MNO') rivals – T-Mobile's Metro and AT&T's Cricket – enjoy integrated advantages, including lower costs and access to better equipment offerings. As a result, these flanker brands have substantially increased their subscriber base in the last several years while standalone TracFone's subscriber count has declined. The proposed transaction will make a combined Verizon/TracFone a stronger competitor for prepaid customers against AT&T and T-Mobile, as well as DISH.[23]

They argue that the primary competitors in the pre-paid segment are the two other vertically-integrated MNOs. Thus, a stand-alone MVNO, even the nation's leading pre-paid wireless provider, TracFone, cannot meaningfully compete against AT&T's and T-Mobile's flanker brands.

So, rather than a diverse ecosystem of MVNOs and MNOs, the Applicants instead argue that Verizon, the leading Mobile Network Operator must acquire TracFone, the leading MVNO in an already concentrated mobile wireless industry, in order to effectively compete.

In making this argument, Verizon and TracFone implicitly concede that the merger will increase entry barriers by requiring two-level entry. If TracFone, the largest pre-paid provider with approximately 21 million subscribers, cannot meaningfully compete against the vertically-integrated T-Mobile and AT&T, how can any other pre-paid entrant, as an MVNO, effectively

[23] Verizon/TracFone Reply at 3.

compete against the MNOs' flanker brands? As CWA notes, and as the Vertical Merger Guidelines recognize, "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."[24]

What is undisputed is that post-merger Verizon's share in the pre-paid segment would rise from approximately 5 percent to about 34 percent compared with an estimated 28 percent for T-Mobile and 25 percent for AT&T. 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.

It is also undisputed that DISH is not an MNO. Its prepaid products remain dependent on T-Mobile for the next few years. It remains uncertain whether DISH will ever become a meaningful independent competitor for mobile wireless services.

The only hope for more competition in the pre-paid segment, according to the parties, is to allow the last remaining independent MVNO of any significance to be acquired by the dominant MNO. That, by itself, is contrary to basic competition policy. But it also rests on the questionable assumption that the three vertically integrated MNOs would compete, rather than tacitly collude.

III. If the Wireless Industry Is Not Susceptible to Coordination, as Verizon and TracFone Claim, Why Are Millions of Cash-Strapped Americans Now Paying More for Their Wireless Services?

Verizon and TracFone ask the Commission to believe that there is no risk of coordination, post-merger, in a market dominated by three nationwide providers:

> Nor are there risks of coordinated effects: the transaction will increase retail competition by reducing TracFone's costs and enabling more robust competition; AT&T and T-Mobile will have incentives to make up for the TracFone traffic they could lose to Verizon; and DISH soon plans to be a fourth MNO with wholesale services as a significant part of its business plan.[25]

We heard these arguments before when in 2019 and early 2020 Sprint and T-Mobile argued that the wireless industry was not susceptible to collusion. Many at the time disagreed, noting that coordination was already happening in the mobile wireless industry and would simply be

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[24] CWA Opposition to Petition for Streamlining and Motion to Dismiss Application as Incomplete of Communications Workers of America at 18-19 (Nov. 16, 2020); U.S. Department of Justice & Federal Trade Commission, Vertical Merger Guidelines 7-8 (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"].

[25] Verizon/TracFone Reply at 3.

worsened by the transaction.[26] Others argued, "that the presence of standalone T-Mobile and Sprint reduces the possibility of anticompetitive coordination that otherwise would occur, but the transaction would make future harms from coordination more likely."[27] Others identified the negative effects of four-to-three mergers across Europe, noted how past mergers in the U.S. that increased market concentration and reduced the number of national competitors had harmful effects and pointed "to the higher prices and lower quality of mobile wireless services in Canada and other countries with only three nationwide providers."[28]

But a divided Commission found the contrary, by giving credence to the merging parties' claim that the 4 to 3 merger would increase competition and lower prices. Moreover, the divestiture of Boost Mobile was supposed to effectively prevent any coordinated price increases by the larger firms post-merger.[29] The Commissioners added, "Concerns about price effects are also mitigated by the Applicants' commitment to maintain prices at current levels for three years following the closing of the transaction."[30]

Millions of Americans, now under-employed or unemployed as a result of the pandemic, have paid the price for that flawed assessment. As Table 1 reflects, after T-Mobile was allowed to acquire Sprint, mobile wireless prices increased suddenly by a small, but significant, non-transitory amount. The average price of mobile services in the last six months of 2020 was 4.3 percent higher than the average price for the first six months.

[26] In the Matter of Applications of T-Mobile Us, Inc., & Sprint Corp., for Consent to Transfer Control of Licenses & Authorizations, Applications of Am. H Block Wireless L.L.C., DBSD Corp., Gamma Acquisition L.L.C., & Manifest Wireless L.L.C. for Extension of Time, 34 F.C.C. Rcd. 10578, 10657 (2019).
[27] *Ibid* at 10657.
[28] *Ibid* at 10658.
[29] *Ibid* at 10661.
[30] *Ibid* at 10731.

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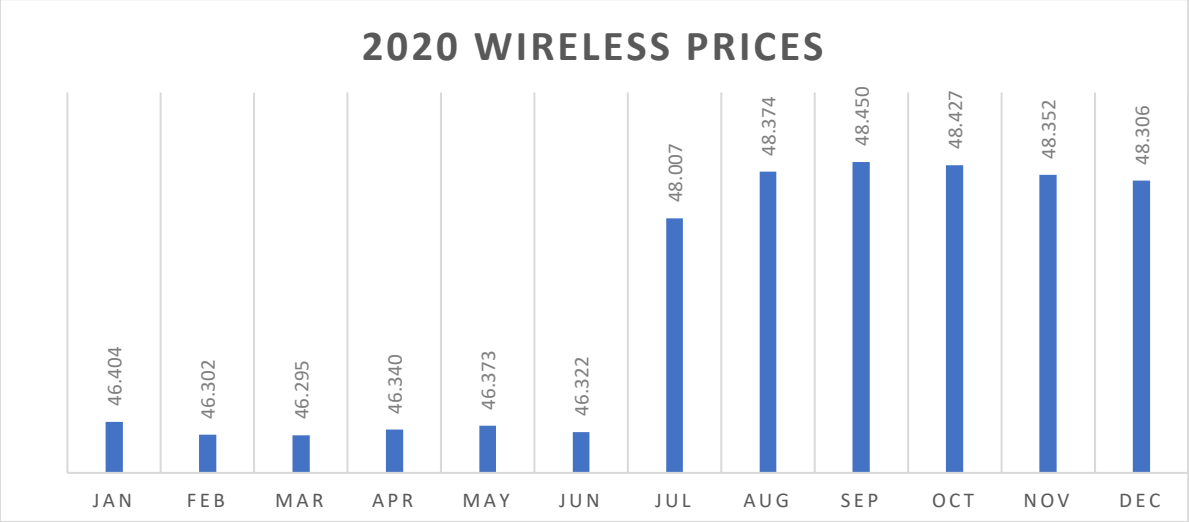
Table 1



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

The price hike is especially troublesome given T-Mobile and Sprint's promise not to increase prices post-merger, and that wireless prices before the merger were steadily declining every year for at least a decade.

Table 2
Wireless Telephone Services in the U.S. for Urban Consumers (2010-2020)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Average Price	Percentage Decline
2010	63.114	62.551	62.551	62.544	62.515	62.423	62.489	62.490	62.466	62.219	62.040	61.339	$62.40	
2011	60.572	60.437	60.351	60.353	60.341	60.340	59.902	59.889	59.860	59.895	59.895	59.931	$60.15	-3.74%
2012	59.919	59.919	59.935	59.953	60.008	60.005	59.582	59.138	59.294	59.492	59.445	59.447	$59.68	-0.79%
2013	59.357	59.202	59.139	58.577	58.577	58.566	58.430	58.363	58.332	58.331	58.276	58.249	$58.62	-1.81%
2014	58.137	57.852	57.775	57.872	57.709	57.677	57.677	57.653	57.599	56.507	56.179	55.894	$57.38	-2.16%
2015	55.614	55.406	54.975	54.902	54.537	54.555	54.711	55.194	55.388	55.514	55.908	55.883	$55.22	-3.92%
2016	55.850	55.267	55.280	55.294	54.967	54.989	54.848	54.786	54.033	53.739	53.578	53.522	$54.68	-0.98%
2017	53.435	52.679	49.002	48.153	48.118	47.735	47.580	47.550	47.730	47.944	48.090	48.066	$48.84	-11.96%
2018	47.972	47.712	47.822	47.835	47.887	47.874	47.872	47.657	47.656	47.701	46.633	46.534	$47.60	-2.61%
2019	46.465	46.399	46.342	46.427	46.400	46.458	46.431	46.368	46.322	46.299	46.387	46.412	$46.39	-2.59%
2020	46.404	46.302	46.295	46.340	46.373	46.322	48.007	48.374	48.450	48.427	48.352	48.306	$47.33	1.98%

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

Both Verizon and TracFone are aware of this data; CWA in each submission noted this disturbing trend. But the merging parties never explain this sharp price hike, which is inconsistent with their proffered economic theory. To add insult to injury, the merging parties primarily rely on a February 11, 2020 decision, where the district court rejected the concerns of multiple states, discounted the evidence that the T-Mobile-Sprint merger would foster collusion, and denied the states' request to enjoin that merger.[31] Verizon and TracFone now ask the Commission to disregard the economic harm and rely instead on the district court's pre-merger prophesy that this "industry is not particularly vulnerable to coordination."[32]

Millions of Americans are struggling economically, and must now spend more each month for their wireless services. The Commission must now consider what steps it must undertake to inject competition into this industry. The solution is certainly not allowing further concentration by enabling the leading MNO to acquire the only significant maverick remaining in this industry absent conditions to protect Lifeline and wireless consumers. It cannot rely on Verizon's and TracFone's empirically-bereft assurance that their merger, in further increasing concentration, would somehow benefit consumers.

IV. The Harm from the Increased Concentration in the Wireless Industry May Have Also Harmed Workers Upstream

One concern that has been gaining attention since raised by the Obama administration is monopsony power.[33] Several independent groups of economists have published research papers examining the degree of concentration in U.S. labor markets and the impact of concentration on wages, employment, and output.[34] The key findings of the emerging literature on labor market monopsony power are the following:

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[31] Verizon/TracFone Reply at 14 (quoting *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 235 (S.D.N.Y. 2020)).
[32] *Ibid*, 439 F. Supp. 3d at 235.
[33] Council of Economic Advisers, Issue Brief, Labor Market Monopsony: Trends, Consequences, and Policy Responses (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf; U.S. House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets 304-305 (2020), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429 [hereinafter "House Antitrust Report"] (noting that despite the loss of jobs and economic activity in the wake of the COVID- 19 pandemic, Amazon's monopsony power has likely increased).
[34] *See, e.g.*, Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (Nov. 28, 2019), https://ssrn.com/abstract=3146679 or http://dx.doi.org/10.2139/ssrn.3146679; José Azar, Ioana Marinescu, & Marshall I. Steinbaum, *Labor Market Concentration*, J. HUMAN RESOURCES (published online May 12, 2020), doi: 10.3368/jhr.monopsony.1218-9914R1.

- Labor markets in the U.S. are already highly concentrated.[35]
- Otherwise similar workers are paid lower wages in more concentrated labor markets.[36]
- Collective bargaining substantially reduces the negative effect of labor market concentration on wages.[37]

As a result, scholars recommend that any competitive analysis of mergers include identifying the various labor markets affected by the mergers and assessing the merger's effect on concentration in these labor markets.[38] This includes calculating the pre-merger and post-merger HHI levels of these labor markets, and recognizing "a presumption against a merger if the postmerger absolute level of concentration and/or the increase indicate too high a risk of wage suppression."[39]

In its influential 2020 report, the Congressional antitrust subcommittee made two recommendations along these lines. First, it recommended strengthening antitrust law's structural presumption, whereupon "mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be presumptively prohibited under Section 7 of the Clayton Act."[40] Under this structural presumption, the merging parties would bear the burden of proof "to show that the merger would not reduce competition. A showing that the merger would result in efficiencies should not be sufficient to overcome the presumption that it is anticompetitive."[41] Second, the Congressional antitrust subcommittee noted that to assess the merger's impact upstream on workers a lower market share than the 30% established by the Supreme Court may be warranted for monopsony or buyer power claims.

As the Applicants have not addressed the concentration in the downstream wireless markets, they unsurprisingly have not addressed how their merger would improve (or affect) competition upstream in the labor markets.

Consequently at a minimum, the Commission should:

- 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

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[35] Azar et al., Labor Market Concentration at 1-2.
[36] *See* Azar et al., *Labor Market Concentration* at 23; *see also* Benmelech et al., *Strong Employers and Weak Employees* at 12.
[37] *See* Benmelech et al., *Strong Employers and Weak Employees* at 3.
[38] *See, e.g.*, Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, Hamilton Project, Policy Proposal 2018-05, at 12 (Feb. 2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.
[39] *Ibid*.
[40] House Antitrust Report at 394.
[41] *Ibid*.

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.[42]

V. Verizon's and TracFone's Remaining Claims Lack Empirical Support

1. If Verizon and TracFone's Claim that No Firewalls Are Needed Were True, Why Did the United States and District Court Require Firewalls in Sprint/T-Mobile?

CWA outlined why the Commission must assess the transaction's potential to soften competition given Verizon's access to competitively-sensitive information post-merger. At a minimum, CWA argued that the Commission should require the Applicants to implement and maintain reasonable firewall procedures, similar to the protections in Section XIII of the Deutsche Telekom Final Judgment.[43]

Verizon and TracFone reply that no firewalls are needed: "there is no merit to concerns about the sharing of sensitive information given robust safeguards and procedures that Verizon has in place."[44] They do not describe, however, what those safeguards are and why they are robust. Presumably, T-Mobile and Sprint had similar safeguards; nonetheless, the Final Judgement mandated "firewall procedures to prevent either company's confidential business information from being used by the other for any purpose that could harm competition."[45]

Consequently, at a minimum, the Commission should 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

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[42] *See, e.g.*, In the Matter of Applications Filed by Frontier Commc'ns Corp. & Verizon Commc'ns Inc. for the Partial Assignment or Transfer of Control of Certain Assets in California, Fla., & Texas, 30 F.C.C. Rcd. 9812 (2015) (noting that after CWA reached an agreement with Frontier providing for "employment security protections, the addition of 150 jobs in California and 60 jobs in Texas, a commitment to a 100 percent U.S. based workforce, operational flexibility to enhance the service experience for customers, and two-year extension of the collective bargaining agreements," the Commission based on "Frontier's commitment to existing Verizon employees and commitment to local services and management in the affected states, [found] that Frontier has provided sufficient assurances that the transaction is unlikely to result in public interest harms related to loss of employment").

[43] *United States v. Deutsche Telekom*, Case No. 1:19-cv-02232-TJK (D.D.C. filed Apr. 1, 2020), https://www.justice.gov/atr/case-document/file/1333826/download [Deutsche Telekom Final Judgment].

[44] Verizon/TracFone Reply at 3.

[45] United States' Competitive Impact Statement at 14, 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.

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.

2. If Verizon and TracFone's Claim of Robust Wholesale Competition Were True, Why Did the United States and District Court in Sprint/T-Mobile Find Otherwise?

Other industry participants have voiced concerns about this merger, including Boost's founder Peter Adderton:

> One of the big advantages for MVNOs historically is the ability to negotiate terms with more than one facilities-based operator. Sprint for years served as a network partner for entrepreneurs wanting to offer a wireless service without building their own network. Without Sprint in the picture, they're left with only three from which to choose, lessening their bargaining power. That's a problem, according to Adderton. . . .
>
> A longtime critic of how the U.S. treats MVNOs compared to other countries, Adderton wants to see regulations that require facilities-based operators offer fair, reasonable access to wholesalers that want to offer services to consumers. "There has to be some level of protection and some level of regulation for MVNOs," he said.
>
> Verizon and Tracfone need to explain how their merger is going to be good for consumers, he added. "People can't look at this as a traditional MVNO, this is a large mobile operator selling it to another large mobile operator," he said. "I think it's going to be a lot harder to get this thing approved than anyone is giving it credit for."[46]

T-Mobile and several public interest groups also urged the Commission to scrutinize the proposed deal, in part because of these foreclosure concerns.

Verizon and TracFone, however, argue that "no commenter seriously challenges these benefits, and the competitive concerns they [CWA and others] offer up are speculative and lack merit."[47] Without providing the Commission any evidentiary support, the Applicants claim that that "the transaction should increase AT&T's and T-Mobile's incentives to pursue agreements with other MVNOs to make up for TracFone traffic they could lose to Verizon."[48]

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[46] Monica Alleven, "Boost founder bucks waves, fights new MVNO battle," *Fierce Wireless*, Sept. 21, 2020, https://www.fiercewireless.com/operators/boost-founder-bucks-waves-fights-new-mvno-battle.
[47] Verizon/TracFone Reply at 5.
[48] Verizon/TracFone Reply at 13.

These foreclosure concerns are not only real but reflect the concerns in the Final Judgment in T-Mobile/Sprint. Under Verizon and TracFone's theory, T-Mobile could not have harmed the MVNOs it and Sprint serviced because of the competition from AT&T and Verizon. The United States and district court, however, found otherwise. With only three MNOs left, the wholesale market was too concentrated to protect an independent MVNO from anti-competitive actions by the MNOs. Accordingly, the Final Judgment extended protections to those MVNOs reliant on Sprint's and T-Mobile's wholesale services.

The problem is that these protections do not extend to the MVNOs currently serviced by Verizon. The Applicants never address this; instead, they argue that no MVNO has publicly complained. But the economic reality is that competition on the wholesale level is weak and there is nothing in the Final Judgement to protect MVNOs who currently rely on Verizon if it seeks post-merger to raise the MVNOs' costs or degrade their service. The harm here, of course, goes beyond the independent MVNOs and affects the consumers who rely on them for lower prices, better services, and greater choices.

Consequently, at a minimum, the Commission should require commitments that are similar to the protections in Part VII.A of the Final Judgment entered in *United States v. Deutsche Telekom* 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.

3. Verizon and TracFone's Purported Efficiencies Flunk the Merger Guidelines' Standard

Verizon and TracFone claim that a "combined Verizon/TracFone will eliminate inefficiencies, lower TracFone's costs, expand device lineups and substantially increase the number of distribution outlets. This will enable TracFone to compete aggressively for prepaid customers against rival providers' thriving flanker brands."[49] Applicants claim four efficiencies.[50]

One issue is whether an efficiencies defense exists under the federal antitrust law. The D.C. Circuit and two other circuits have recently cast doubt on any efficiencies defense.[51] Even those courts that apply the efficiencies defense do so cautiously in evaluating mergers in highly concentrated industries. As the D.C. Circuit noted, mergers that lead to highly concentrated industries "complicate the determination of whether [any efficiencies defense] should be

[49] Verizon/TracFone Reply at 7-8.
[50] *Ibid* at 8-9.
[51] *United States v. Anthem, Inc*., 855 F.3d 345, 353 (D.C. Cir.), *cert. dismissed*, 137 S. Ct. 2250, 198 L. Ed. 2d 676 (2017); *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr*., 838 F.3d 327, 347–48 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).

permitted."[52] Where the court finds high market concentration levels, the merging parties must present "proof of extraordinary efficiencies" to rebut the presumption of anticompetitive harm.[53]

But the Applicants' claimed efficiencies never even reach this stage, as they flunk the basic standard laid out in the Department of Justice & FTC's Merger Guidelines. Under the Vertical Merger Guidelines, "Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. The Agencies do not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market."[54]

Under the efficiencies defense set out in the Merger Guidelines, the merging parties must first show that the efficiencies are merger-specific, that is, the firms cannot reasonably achieve these efficiencies by other means.[55]

Second, the efficiencies must be independently verifiable.[56] As the Merger Guidelines recognize, "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized."[57] Consequently, the merging parties have "to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." [58]

Third, the merging parties must show that the efficiencies will benefit consumers. The antitrust agencies will inquire whether the cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market (for example, by preventing price increases in that market).

Verizon and TracFone never quantify or substantiate their claimed efficiencies nor do they demonstrate why each claimed efficiency is merger-specific (and cannot be accomplished through other means, such as contracting). Further, Verizon and TracFone do not show the magnitude of their claimed efficiencies and why they are likely to prevent anticompetitive effects

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[52] *Fed. Trade Comm'n v. Heinz, H.J. Co.*, No. 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) (citing PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 971f (1998) (supporting efficiencies defense but requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100")).
[53] *Fed. Trade Comm'n v. Sysco Corp*., 113 F. Supp. 3d 1, 81–82 (D.D.C. 2015).
[54] VMG at 11.
[55] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 10 (Aug. 19, 2020), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [hereinafter "HMG"].
[56] HMG § 10.
[57] *Ibid.*
[58] *Ibid.*

(especially when the evidence shows that retail wireless prices are increasing). Accordingly, the Applicants have not met the bare minimum required for an efficiencies defense, if such a defense even exists.

VI. The Commission Needs Answers to Other Essential Questions That Applicants Have Avoided Answering

As discussed above, Verizon and TracFone have steadfastly avoided answering many key questions that are essential to understanding the public interest of the transaction. Accordingly, the Commission should issue a standard Request for Information (RFI) seeking documents and narrative responses addressing the transaction's probable harms.

Also, 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, has the capacity to comply, has trained staff thoroughly in compliance, and has structural safeguards in place to detect non-compliance and report any non-compliance to the Commission.

The Applicants respond that the Commission's "International Bureau can grant an application to transfer a Section 214 authorization irrespective of the timing of Wireline Competition Bureau approval of the Amended Compliance Plan and the transfer of TracFone's ETC designation."[59] The Applicants provide one example where the International Bureau and the Wireline Competition Bureau have approved applications to transfer Section 214 authorizations before granting associated ETC designations.[60]

But in the case that the Applicants cite, the Bureau, unlike the case here, had not received any comments in opposition to a grant of the application.[61]

Moreover, the Applicants are putting the cart before the horse. Under sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed assignment and transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity. In making this assessment, the Commission "must first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules."[62]

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[59] Verizon/TracFone Reply at 18.
[60] Verizon/TracFone Reply at 18 n. 69.
[61] Application Granted for the Transfer of Control of Glob. Connection Inc. of Am. to Odin Mobile, LLC, 33 F.C.C. Rcd. 6058, 6058 (2018).
[62] In the Matter of Applications of AT&T Inc. & Cellco P'ship d/b/a Verizon Wireless, 25 F.C.C. Rcd. 8704, 8716 (2010).

So, if the Applicants have not complied with the Commission rules and obligations, including the disclosure requirements involving TracFone's federal ETC designation, then the Commission cannot approve the Applicants' Section 214 transfer.

But even if the Applicants had complied with all the applicable rules, which they haven't, the Commission must still consider under its public interest analysis whether and how the proposed transaction will affect the quality of communications services under the Lifeline program or will result in the provision of new or additional services to Lifeline customers.

For example, in *In the Matter of Applications of AT&T Inc. & Cellco P'ship d/b/a Verizon Wireless*, AT&T, unlike Verizon here, made specific commitments regarding Lifeline.[63] AT&T represented that it would seek ETC status from the Commission similar to the ETC status held by Western Wireless concerning tribal members residing on the reservation. AT&T also committed to continue to offer comparable voice rate plans for at least three years. The Commission specifically found that these commitments by AT&T addressed its concerns: "Implementation of the AT&T commitments will ensure that current tribal members living on the Reservation will continue to have access to wireless services as a primary means of communications."[64] So, the Commission conditioned its consent to the proposed transaction "on AT&T's fulfillment of its commitments reflected in the AT&T Commitment Letter with respect to the provision of wireless services on the Reservation."[65]

Here, Verizon never offered any specific commitments to protect TracFone's 1.7 million low-income subscribers in 42 states. So, without these commitments, the Commission cannot grant an application to transfer a Section 214 authorization before granting associated ETC designations.

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?

The Applicants do not answer these questions. Instead, they argue that "TracFone provides only CMRS services, the Commission has forborne from exercising its Section 214 authority for domestic CMRS service, and no domestic Section 214 application is required for Verizon's acquisition of TracFone."[66]

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[63] 25 F.C.C. Rcd. 8704, 8764 (2010).
[64] *Ibid.*
[65] *Ibid.*
[66] Verizon/TracFone Reply at 25.

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.

* * *

The Applicants note that the DOJ, under the Trump administration, granted early termination to this acquisition. This would not be the first time that the antitrust agencies have allowed anti-competitive mergers to sail through,[67] thereby contributing to America's current market power problem.[68] But it is also important to note that the FCC's review differs from the antitrust agencies. The FCC's competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles. The DOJ's review, for example, is limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.[69]

Moreover, the Commission's competitive analysis under the public interest standard "is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market."[70]

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[67] The antitrust agencies, for example, allowed many "killer acquisitions" by the dominant tech platforms, and the uneven, and at times, lax antitrust enforcement has drawn widespread criticism in recent years. *See, e.g.*, House Antitrust Report at 11 ("In the overwhelming number of cases, the antitrust agencies did not request additional information and documentary material under their pre-merger review authority in the Clayton Act, to examine whether the proposed acquisition may substantially lessen competition or tend to create a monopoly if allowed to proceed as proposed. For example, of Facebook's nearly 100 acquisitions, the Federal Trade Commission engaged in an extensive investigation of just one acquisition: Facebook's purchase of Instagram in 2012."). Moreover, Professor John Kwoka, in collecting and analyzing the recent post-merger reviews, noted that the data suggest that the U.S. competition agencies are inadequately enforcing the competition laws. Of the 53 post-merger reviews with price estimates in 16 different industries, "40 or 75.5 percent report post-merger price increases." As Kwoka concluded, "[c]ollectively, these results suggest that merger control in these studied cases may overall be too permissive, that the remedies chosen may be inadequate to the task of preserving competition, and that conduct and conditions remedies may be especially ineffective." John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 644 (2013); John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L. J. 837 (2017) (examining FTC merger data between 1996 and 2011, finding significant decline in enforcement of mergers in industries with a HHI below 3000, and finding that reliance on a lower bound of concentration below which mergers should be approved may be misplaced, since there are numerous mergers below that bound that are anticompetitive); JOHN E. KWOKA, JR., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

[68] *See, e.g.,* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595 (2020); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. FORUM 960 (2018).

[69] FCC T-Mobile/MetroPCS Opinion at 7.

[70] FCC T-Mobile/MetroPCS Opinion at 8.

Despite multiple opportunities, the Applicants have not proven that their merger is in the public interest. Absent significant offsetting efficiencies or other substantial public interest benefits, a transaction that increases the concentration in an already highly concentrated industry and eliminates a significant remaining maverick is unlikely to serve the public interest.

Accordingly, 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, as detailed above.

Respectfully submitted,

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