February 21, 2024

Ex Parte

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

Re: *Applications Filed for The Transfer Of Control Of Mint Mobile, LLC and UVNV, Inc. (d/b/a Ultra Mobile) To T-Mobile US, Inc,* **GN Docket No. 23-171**

AT&T Petition for Rulemaking and Mobile Spectrum Holdings Policy, ***WT Docket No. 23-319, RM-11966***

Dear Ms. Dortch:

Michael Calabrese, representing the Open Technology Institute at New America (OTI), and Harold Feld, John Bergmayer, and Nat Purser, representing Public Knowledge (PK), spoke (by video call) on February 16, 2024 about the above-listed proceedings with Joel Taubenblatt, chief of the Wireless Telecommunications Bureau, along with Susannah Larson (WTB), Catherine Matraves, Judith Dempsey, Lonnie Hofman of the Office of Economics and Analytics, and Joel Rabinovitz of the Office of the General Counsel.

With respect to T-Mobile's proposed acquisition of Mint Mobile and Ultra Mobile (hereinafter "Mint"), we summarized the proposal OTI and PK filed on February 5, with Consumer Reports and the Benton Institute for Broadband & Society, urging the Commission to adopt a handset unlocking condition if it approves the above-captioned transaction.[1] We noted that when the Commission approved Verizon's acquisition of MVNO TracFone in 2021, it imposed a handset unlocking condition and recognized that Verizon's commitment to unlock certain devices operating on the Verizon network 60 days after activation was in the public interest. Our groups opined that the ongoing loss of independent MVNOs is steadily undermining competition and consumer choice in the market for mobile data service.

[1] Letter from Open Technology Institute at New America, Public Knowledge, Consumer Reports and the Benton Institute for Broadband & Society, to Marlene H. Dortch, FCC, *Applications Filed for the Transfer of Control of Mint Mobile, LLC and UVNV, Inc. (d/b/a Ultra Mobile) To T-Mobile US, Inc,* GN Docket No. 23-171 (Feb. 5, 2024).

Consumer advocates have long argued that mobile phones should come unlocked by default, allowing users to more easily make choices about the device and service they purchase, as they can for most products.[2] Ofcom has required mobile phones to be sold unlocked in the UK since 2021.[3] Canada's Commission (CRTC) did so even earlier, in 2017.[4] The process for unlocking phones can be cumbersome and stifle consumer choice and hence, competition. We specifically pointed out Ofcom's finding that its "research shows that more than a third of people who decided against switching said having to get a handset unlocked put them off changing provider. This means they could be missing out on a better deal."[5]

In December, the Commission addressed a similar anti-competitive practice when it adopted a Notice of Proposed Rulemaking proposes to protect consumers and promote competition by prohibiting early termination fees (ETFs) charged by cable and DBS video subscription providers.[6] The NPRM states: "Because an ETF may have the effect of limiting consumer choice after a contract is enacted, it may negatively impact competition for services in the marketplace."[7] The Commission goes on to observe that this proposal aligns with President Biden's *Executive Order on Promoting Competition in the American Economy*, which "encouraged the Commission to consider 'prohibiting unjust or unreasonable early termination

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[2] *See, e.g.,* Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, FCC, *State of Competition in the Communications Marketplace*, GN Docket No. 22-203 (Sept. 16, 2022), https://regmedia.co.uk/2022/09/20/pk_letter.pdf. ("the practice of locking phones can reduce wireless competition by making it more difficult for consumers to change carriers, and by reducing the number of devices available on the secondary market").

[3] Ofcom, "Mobile Companies Now Banned from Selling Locked Handsets" (Dec. 17, 2021), https://www.ofcom.org.uk/news-centre/2021/mobile-companies-now-banned-from-selling-locked-handsets.

[4] *See* Canadian Radio-television and Telecommunications Commission, Telecom Notice of Consultation 2016-293, as amended (June 15, 2017), https://crtc.gc.ca/eng/archive/2017/2017-200.htm. Chile, Israel, Singapore and China similarly have made it illegal for providers to sell SIM locked devices.

[5] *Id*. Ofcom research has found that 35% of consumers who decided against switching mobile providers cited the time or cost of unlocking. Ofcom, "Mobile Firms to be Banned from Selling Unlocked Handsets" (Oct. 27, 2020), https://www.ofcom.org.uk/news-centre/2020/mobile-firms-banned-from-selling-locked-handsets.

[6] *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking, MB Docket No. 23-405 (rel. Dec. 14, 2023) ("ETF NPRM").

[7] *ETF NPRM* at ¶ 2.

fees for end-user communication contracts; enabling consumers to more easily switch providers' in order to promote competition and lower prices."[8]

Our groups believe the following conditions, modeled after Verizon's commitment in the TracFone proceeding, would align with and help to promote this pro-competition agenda:

Handset Unlocking: Within 30 days after closing, T-Mobile will unlock all devices purchased from its brands after closing and activated on the T-Mobile's network.

- Within 30 days after closing, T-Mobile will notify all customers of its new unlocking policies and, thereafter, notify customers of its unlocking policies upon activation of a new device that will operate on the T-Mobile network.

- For devices that operate on the T-Mobile network and are capable of unlocking automatically (e.g., Apple devices), they will unlock automatically 60 days after activation.

- For devices that operate on the T-Mobile network and lack an automatic unlocking capability, T-Mobile will provide customers with manual means to unlock the device 60 days after activation. When the 60-day period expires, T-Mobile will provide clear and easy to follow instructions to those customers as to how they can manually unlock their devices.

- T-Mobile will report the total number of locked devices and, of that number, the total number of devices that have the ability to automatically unlock within 60 days of closing and again on the first and second anniversary of the closing, after which time [2 years] all new devices provided through T-Mobile and activated on the network must be capable of automatic unlocking.

Additionally, OTI and PK noted that the Commission's Order approving the TMO/Sprint merger the Commission did not formally adopt the DoJ consent decree as FCC conditions and incorporate the requirements into the new TMO/Sprint license. The Commission should therefore, as a minimum, formally incorporate the current unlocking condition from the consent decree and make that a permanent condition of the licenses.

With respect to the Commission's pending proceeding related to updating its mobile spectrum holdings policy, OTI and PK summarized key points in the comments we filed on October 23rd. PK noted that the Commission has many tools at its disposal to further its public interest competition objectives in mobile spectrum, and spectrum broadly. Some of these tools include the strategic distribution or allocation of spectrum, policies that lower barriers to entry for new entrants, and policies that preclude unhealthy levels of entrenchment among incumbents.

[8] *Id*., citing Executive Order 14036, 86 FR 36987, §(l)(iv) (July 9, 2021), https://www.whitehouse.gov/briefingroom/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

Given the concentrated state of the industry and the unlikelihood of retroactive divestitures, the Commission should implement forward-thinking standards that not only preserve, but enhance, competition.

PK observed that auction-specific conditions and limits are a critical vehicle through which the Commission can advance its competition objectives. With smaller companies often unable to outbid incumbents, spectrum auctions generally result in the further entrenchment of the Big Three carriers – Verizon, AT&T, and T-Mobile. Given these dynamics, the Commission should shift from implementing pre-auction conditions (such as compelled divestitures or unlicensed spectrum allocation) on a case-by-case basis to a *default* posture of enacting pre-auction conditions. This is consistent with Section 309(j)(B) of the Communications Act, which requires that the Commission structure auctions to avoid excess concentration of licenses[9]. As with many economies of scale, spectrum's large margins between the high costs of initial infrastructure build out and minor costs of maintenance or slight expansions incentivize the aggregation of spectrum. Therefore, there must be policies in place to preclude the kind of concentration the market has seen over the last 20 years.

One such policy would be a revision to the spectrum screen used to determine if there would be competition issues with respect to spectrum holdings following a merger or spectrum swap. When the screen was initially implemented in 2004, there was a strong network of regional providers around the country, in addition to the major providers we know today.[10] The screen was structured to support three equal-sized providers per market, with the idea that the additional regional competitors would sustain ongoing market dynamism. However, rather than maintaining the screen at its initial level so spectrum could go to competitors and new entrants, the Commission also continuously raised the spectrum screen whenever it made new "usable spectrum" available in the marketplace. This decision, combined with other policies and market dynamics favoring incumbents, resulted in a whittled down market concentrated around the three giants. It is clear that the logic guiding the initial thresholds did not hold – the regional providers have not served as a competitive bulwark, rather they have been subsumed by the Big Three incumbents and will continue to be without significant reforms. Therefore, the Commission should begin by recognizing that if a spectrum screen is only activated by transactions that allocate a third of the spectrum to one carrier, that screen will inevitably facilitate three-way market control. As traditional antitrust theory, the Department of Justice's analysis, and the Commission's experience demonstrates, subscribers now need a minimum of four national providers to see robust competition between providers[11]. While the simplest way to remedy asymmetric spectrum allocation is to direct the Commission to restructure the screen to reflect

[9] 47 U.S.C. §§ 309(j)(3)(B)
[10] *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69, paras. 106-12.
[11] *See* Department of Justice, "Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile," Press Release (August 31, 2011). Available at: https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile#:

four-firm competition rather than three-firm competition, the Commission can also consider revisiting screen weighting to reflect changes in the value of spectrum as a result of changes in technology and business practices.

As each carrier's portfolio of spectrum holdings in part determines its capacity, it is critical to weigh the differing characteristics of spectrum – such as propagation across low, mid, and high-bands – in determining its contribution to a carrier's competitiveness. The screen should therefore reflect the existing holdings of incumbents, rather than a mechanical approach. For example, the Commission might consider whether the value of a carrier's low-band portfolio offsets the lack of mid-band spectrum. As PK has observed in prior comments, the value of a block of spectrum also depends on other factors, such as the availability of networking equipment and consumer devices that's compatible with that form of spectrum[12]. Since it takes years before original equipment manufacturers can accommodate new forms of spectrum, and each additional spectrum band class adds weight and cost to consumer devices, carriers often seek to meet their capacity needs with as few types of spectrum as possible. In addition to differences in propagation and device availability, spectrum can have a number of other characteristics that affect its value to a carrier, such as varying interference problems or regulatory obligations. These technological realities call for a more nuanced assessment of competitive advantage than the current regime allows for.

The Commission could also, alternatively, consider transitioning the existing spectrum screen to a hard cap. Currently, the screen merely requires the Commission to take a "hard look" at markets where carriers exceed their limits. But given that spectrum policy charges the Commission with the duty to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses," the Commission is statutorily equipped to change course and implement caps, which guard against the erosion of competition by triggering enhanced scrutiny of small market transactions. If the Commission implemented caps and conditioned future exemptions to said caps on public interest waivers, it would shift the burden of proof to those arguing that pre-auction limits or conditions affirmatively harm the public interest. At present, transactions that do not trigger the screen (and do not produce a significant change in the Herfindahl-Hirschman Index, or HHI) are presumed to serve the public interest[13]. Therefore, a compelled public interest waiver for transactions that put the firm over the designated cap would give the Commission heightened discretion to consider competitive harms, among others.

Finally, the Commission has a unique opportunity to enhance competition through supporting unlicensed spectrum and other forms of local and opportunistic access to shared

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[12] *See* Comments of Public Knowledge, *In re AT&T Petition for Rulemaking and Mobile Spectrum Holdings Policy*, WT Docket No. 23-319 RM-11966 (filed October 23, 2023)
[13] *See*, *e.g.*, *T-Mobile-Sprint Order*, 34 FCC Rcd at 10614-15, para. 87; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568, para. 106.

spectrum. The Commission and NTIA can go beyond increasing unlicensed spectrum for Wi-Fi and prioritize policies that promote shared spectrum; that adopt auction frameworks that make interference-protected spectrum available in much smaller geographic areas; and that identify additional underutilized bands that can provide local and shared spectrum access using either an unlicensed underlay or coordinated access on a lightly-licensed basis (as in CBRS.) As PK has noted in prior comments; a thorough assessment of the Commission's opportunities for competition reform requires us to consider mobile carrier spectrum holdings within the broader context of a balanced spectrum policy that opens up more mid-band spectrum to unlicensed, exclusively licensed, and shared or lightly-licensed use by a variety of providers[14]. America's 5G and future wireless ecosystems will rely on a combination of big national or regional carrier networks to achieve true mobile connectivity. Furthermore, these systems will depend on a far *larger* number of complementary and custom networks, built and maintained by individual enterprises, households, and communities, to meet their needs at a lower cost. In making more mid-band spectrum available on an unlicense, shared, and lightly-licensed basis, we can ensure that the nation's wireless ecosystem is not solely built out by dominant mobile carriers.

Another reason to make mid-band spectrum available on a licensed, unlicensed and shared or lightly-licensed basis is that a chief objective of the Communications Act is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." As evidenced by the persistent existence of rural and low-income digital divides, there is considerable distance between our current landscape and these ambitions. Rural towns, tribes, and historically marginalized communities continue to disproportionately find themselves on the losing side of the digital divide – but more unlicensed mid-band (in the 5.9, 6 and 7 GHz bands) and lightly-licensed shared spectrum (in the lower 3 GHz band and upper mid-band) can serve as the necessary public infrastructure for high quality, affordable service across every community.

Respectfully submitted,

/*s*/ Michael Calabrese
Director, Wireless Future Program
New America's Open Technology Institute
740 15th Street, NW Suite 900
Washington, DC 20005

/*s*/ Nat Purser
Government Affairs Policy Advocate
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036

[14] *See* Comments of Public Knowledge, *In re AT&T Petition for Rulemaking and Mobile Spectrum Holdings Policy*, WT Docket No. 23-319 RM-11966 (filed October 23, 2023)

cc: Joel Taubenblatt
Susannah Larson
Joel Rabinovitz
Catherine Matraves
Judith Dempsey
Lonnie Hofmann