NEW YORK LAW SCHOOL

January 28, 2025

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

RE: Reply Comments Regarding Applications of T-Mobile, Inc. and United States Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Leases, GN Docket No. 24-286

Dear Ms. Dortch,

The ACLP at New York Law School respectfully submits the following reply comments in the above-referenced proceeding.

Should you have any questions, please do not hesitate to contact us.

Kind regards,

/s/
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/s/
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1. INTRODUCTION

In these reply comments, the ACLP respectfully recommends the following actions by the Federal Communications Commission (FCC or Commission):

- Given the significant public interest benefits associated with the transaction, swiftly approve the proposed merger of T-Mobile and U.S. Cellular (discussed in sections 2.1 and 2.2).

- Ignore the baseless claims of those who oppose this merger and refrain from attaching extraneous conditions to the transaction (discussed in section 2.3).

- Position this proceeding as an important further step towards curbing past FCC abuse of its merger review authority, which has consistently manifested itself in the imposition of burdensome conditions far beyond the scope of transactions of all kinds (discussed in section 3).[1]

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[1] *Cf. Application of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, 32 FCC Rcd 9581 at 9619 (2016) (Statement of Commissioner Brendan Carr), https://docs.fcc.gov/public/attachments/FCC-17-142A5.pdf ("[T]he Order emphasizes that the agency will only impose merger conditions that are narrowly tailored to remedy transaction-specific harms. We will not

These recommendations find significant support in the record of this proceeding, caselaw, and a variety of other sources discussed below.

2. The Many Public Interest Benefits Evident in the Proposed Merger of T-Mobile and U.S. Cellular Support Swift Commission Approval

To adequately judge the merits of the proposed merger of T-Mobile and U.S. Cellular, the Commission must endeavor to understand the context within which this transaction is occurring. Such an inquiry is critical when evaluating the public interest benefits highlighted by the parties and to deciding whether conditions are warranted.[2] As discussed below, the proposed transaction is well positioned to bolster competition, stoke innovation, and enhance consumer welfare gains.

2.1 *Context: The Robustly Competitive & Rapidly Converging Advanced Communications Marketplace*

Today's advanced communications marketplace is defined by robust intermodal competition among an ever-growing cadre of firms; rapid convergence; and insatiable consumer demand for high-speed internet access. Consequently, firms like T-Mobile, U.S. Cellular, and others are competing on multiple fronts for customers by offering a range of internet on-ramps and related services.

Until recently, wireless carriers were focused almost exclusively on offering mobile voice and data. Indeed, when T-Mobile and Sprint merged five years ago, the primary rationale for that transaction was the desire to combine assets and speed deployment of 5G mobile broadband.[3] The combination of those two firms succeeded in bolstering widespread deployment and adoption of 5G services.[4] Most importantly, consumers benefited immensely from that combination and subsequent competitive responses that occurred across the market.[5]

Since then, the bright lines that once separated discrete segments of the advanced communications market have blurred to the point of irrelevance. Now, most major ISPs offer, or seek to offer, triple- or quadruple-play options of voice, video, data, and/or mobile.

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be using them as a vehicle to extract extraneous concessions from parties. I am pleased to see the Commission adhering to this approach.") ("*Carr Level 3 Statement*").

[2] *See, e.g.*, *Applications of T-Mobile US, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, 34 FCC Rcd 10578 at 10495-19596 (2019) (discussing the role that the Commission's competitive analysis plays in informing its public interest assessment).

[3] *See generally id.*

[4] *See, e.g.,* Thomas Hazlett & Robert Crandall, *Competitive Effects of T-Mobile/Sprint: Analysis of a "4-to-3" Merger*, Proceedings of the TPRC 2024 (Feb. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4736059 ("*Competitive Effects*").

[5] *Id.*

T-Mobile and U.S. Cellular compete with a broader array of firms than at any time in the past. These firms include a growing number of cable companies that are competing for prepaid and post-paid mobile telephone and broadband customers.[6] They also compete with large and small fixed wireless firms for home internet customers in rural areas. And given the robustness of T-Mobile's 5G fixed wireless platform, it has succeeded in siphoning away a sizeable number of customers from wireline ISPs in a variety of markets.[7]

The consumer welfare gains from these market dynamics have been tremendous. Broadband speeds across every platform continue to rise, accommodating voracious data consumption by users. All the while, prices for broadband continue to decrease. This is evident both industry-wide – in real terms, home internet is cheaper today than it was in 2018[8] – and in the wireless segment, where the price per megabyte of wireless data has plummeted by 97% over the last decade.[9]

2.2 *How the Proposed Transaction Will Fuel Continued Consumer Welfare Gains & Further the Public Interest*

Some commenters in this docket have tried to convince the Commission that the merger will reverse the consumer welfare gains discussed above and undermine the public interest because the transaction will eliminate a competitor from the market.[10] Their arguments do nothing more than offer a simplistic understanding of wireless market dynamics, one where the number, and not the quality, of firms is all that matters. This reductive view is stale, inconsistent with sound economic analysis, and unmoored from the real world. Moreover, the prognostications of doom that often accompany these arguments – *i.e.,* that consumers

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[6] *See, e.g.,* Jeff Baumgartner, *U.S. Cable Could Reach Mobile 'Equilibrium' at 32.68M Lines – Analyst,* Sept. 12, 2024, Light Reading, https://www.lightreading.com/wireless/us-cable-could-reach-mobile-equilibrium-at-32-68m-lines-analyst.

[7] *See, e.g.,* Jeff Baumgartner, *Cable Could Return to Broadband Sub Growth in 2026 – Forecast,* Oct. 9, 2024, Light Reading, https://www.lightreading.com/cable-technology/cable-could-return-to-broadband-sub-growth-in-2026-forecast (detailing significant subscriber losses by cable due to the rise of 5G fixed wireless offerings).

[8] Alex Karras, Phoebe Kamber & Michael Santorelli, *Broadband Prices in Context,* Sept. 19, 2024, Broadband Expanded Blog, https://broadbandexpanded.com/posts/pricegrowth.

[9] *U.S. Wireless Data Use Skyrockets, Passing 100T Megabyte Milestone, CTIA Annual Survey Finds,* Sept. 10, 2024, CTIA, https://www.ctia.org/news/u-s-wireless-data-use-skyrockets-passing-100t-megabyte-milestone-ctia-annual-survey-finds.

[10] *See, e.g., Petition to Deny of Public Knowledge et al.,* GN Docket No. 24-286 (Dec. 9, 2024) ("*PK Petition*"); *Petition to Deny of The Rural Wireless Association, Inc.*, GN Docket No. 24-286 (Dec. 9, 2024) ("*RWA Petition*"); *Petition to Deny of EchoStar,* GN Docket No. 24-286 (Dec. 9, 2024) ("*EchoStar Petition*"); *Petition to Deny of CWA,* GN Docket No. 24-286 (Dec. 9, 2024) ("*CWA Petition*").

will be saddled with higher prices, have fewer choices for internet access, etc. – have failed to materialize.[11]

Moreover, the upshot of these arguments is that the naysayers appear to want to freeze U.S. broadband firms in place and eliminate the dynamism that defines this market. Short of that, these entities have proposed a variety of conditions that they want levied on the merged firm to further public interest (these are discussed and evaluated in section 2.3).

Impeding the ability of telecommunications firms to merge makes little sense given the speed with which the industry continues to evolve.

- New competitors are flooding the market, many of whom have developed business models that revolve around leveraging federal funding to fuel their entrance.[12] In addition, broadband offerings by low earth orbit (LEO) satellite firms are increasingly popular and could be poised for significant expansion in the years ahead.[13]

- Affordability remains a major concern for consumers and a policy imperative for many public officials.[14] Firms capable of leveraging economies of scale and offering a diverse menu of services to consumers will be better able to address these concerns than smaller firms offering fewer services in fewer markets.

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[11] *See, e.g.*, *Competitive Effects; An Economic Analysis of Mobile Wireless Competition in the United States*, Compass Lexicon (Dec. 2023), https://api.ctia.org/wp-content/uploads/2023/12/CL_Dec-2023.pdf.

[12] *See, e.g.*, Michael Santorelli, *Disaster Opportunism Does Not Enhance Broadband Connectivity. Established ISPs Do,* April 4, 2024, Forbes, https://www.forbes.com/sites/washingtonbytes/2024/04/04/why-policymakers-must-ignore-disaster-opportunists--trust-established-isps/.

[13] *See, e.g.*, Masha Abarinova, *Is Satellite Broadband Good Enough to Deliver Internet For All?*, Nov. 14, 2024, Fierce-Network, https://www.fierce-network.com/broadband/satellite-broadband-good-enough-deliver-internet-all; Karl Bode, *Maine, New Mexico Wants Starlink Part of the Mix: Balancing Trade-Offs and Concerns,* Dec. 15, 2024, Broadband Breakfast, https://broadbandbreakfast.com/maine-new-mexico-want-starlink-part-of-the-mix-balancing-trade-offs-and-concerns/; Blake Ledbetter, *Texas Opens Funding for Starlink, LEO Rivals,* Jan. 21, 2025, Broadband Breakfast, https://broadbandbreakfast.com/texas-opens-funding-for-starlink-leo-rivals/.

[14] *See, e.g.*, Kelly Wert, *Every State Identifies Broadband Affordability as Primary Barrier to Closing Digital Divide,* Oct. 4, 2024, Pew, https://www.pewtrusts.org/en/research-and-analysis/articles/2024/10/04/every-state-identifies-broadband-affordability-as-primary-barrier-to-closing-digital-divide; *cf.* Michael Santorelli, *Why It's Time To Get Over The Broadband Affordability Fixation,* Sept. 26, 2024, Forbes, https://www.forbes.com/sites/washingtonbytes/2024/09/26/why-its-time-to-get-over-the-broadband-affordability-fixation/.

- There is very little new spectrum in the U.S. pipeline, which will make it difficult for firms to bolster their networks unless they pursue opportunities on the secondary market.[15]

In this environment, some firms are well positioned to navigate these challenges and continue pushing the market to compete and innovate and deliver continued consumer welfare gains; others will likely fall behind or fail outright. The proposed transaction brings together both kinds of firms.

By every indication, T-Mobile is poised to remain a maverick firm in the U.S. broadband market. Its nonstop investment and innovation have yielded better networks, more diversified offerings, and industry-leading customer satisfaction.[16] It continues to boast the most robust and expansive 5G network;[17] its fixed wireless offering is increasingly popular and gaining market share across the country;[18] and it is fast becoming a major ISP on wireline networks, via partnerships on open-access fiber networks and on networks that it owns.[19]

U.S. Cellular, on the other hand, has become a laggard and will remain so unless it merges with another firm.[20] Some commenters attempt to downplay the downward spiral that U.S. Cellular has been in for the last several years.[21] Their conjectures are unpersuasive because they ignore the obvious signs that U.S. Cellular is fast becoming a failing firm and overlook benefits to consumers that a combination of the firms will yield.[22]

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[15] *See, e.g.*, Coleman Bazelon & Paroma Sanyal, *How Much Licensed Spectrum is Needed to Meet Future Demands for Network Capacity?*, Brattle Group (April 2023), https://api.ctia.org/wp-content/uploads/2023/04/Network-Capacity-Constraints-and-the-Need-for-Spectrum-Brattle.pdf.

[16] *See, e.g.*, *T-Mobile Named Best in Customer Care by J.D. Power for Seventh Straight Year*, Aug. 1, 2024, T-Mobile, https://www.t-mobile.com/news/un-carrier/t-mobile-named-best-in-customer-care-by-j-d-power-for-seventh-straight-year.

[17] *Mobile Network Experience Report – January 2025*, Open Signal, https://www.opensignal.com/reports/2025/01/usa/mobile-network-experience.

[18] *See, e.g.*, Ted Hearn, *T-Mobile: 1 Million Sitting on Fixed Wireless Waiting List*, Dec. 3, 2024, Broadband Breakfast, https://broadbandbreakfast.com/t-mobile-1-million-sitting-on-fixed-wireless-waiting-list/.

[19] *See, e.g.*, Corbin Davenport, *T-Mobile is Growing its Fiber Internet Network, Again*, July 24, 2024, Yahoo Tech, https://www.yahoo.com/tech/t-mobile-growing-fiber-internet-195417647.html.

[20] *See, e.g.*, Drew FitzGerald, *U.S. Cellular Owner Explores Sale*, Aug. 4, 2023, Wall St. Journal, https://www.wsj.com/articles/u-s-cellular-owner-explores-sale-746bd1d8.

[21] *See, e.g.*, *RWA Petition*.

[22] *See, e.g.*, *Comments of the International Center for Law & Economics*, GN Docket No. 24-286 (Jan. 2, 2025), https://www.fcc.gov/ecfs/document/1010293355377/1.

Combining T-Mobile and U.S. Cellular will ensure that the latter's customers benefit from more robust broadband access via a variety of platforms without price increases.[23] It will also ensure that U.S. Cellular's spectrum holdings and other resources are put to optimal use. As previously noted, with spectrum resources exceedingly tight because of federal inaction to open new portions of the airwaves, a merger like the one at issue here is a rational – and expected – response by firms ready, willing, and able to continue improving and expanding their networks.

The expected knock-on effects of the merger are also pro-competitive. For example, some of U.S. Cellular's remaining spectrum will be purchased by AT&T and Verizon, bolstering their respective 5G networks and ensuring that no single firm owns too much of the airwaves.[24] The MVNOs to whom these firms lease access on their networks (*e.g.,* cable companies; resellers) will also see improved and expanded 5G service, bolstering this very robust – and quickly growing – segment of the market.

In short, the pro-competitive and pro-consumer impacts of the proposed transaction, as well as those stemming from related transactions and expected responses from other firms in the broadband ecosystem, make clear that the merger will further the public interest.

2.3 *The Absence of Transaction-Specific Consumer Harm Obviates the Need for Levying Conditions on the Proposed Transaction*

The portion of the communications law that empowers the Commission to review transactions like the one at issue here also provides the FCC with the ability to attach conditions to a transaction that, "in its judgment the public convenience and necessity may require."[25] While this affords the Commission some discretion, both Commission[26] and judicial[27] precedent recognize that any conditions must be transaction-specific (that is, designed to address harms specifically resulting from the transaction). Unfortunately, however, as discussed more fully in section 3, the Commission has not always abided by this precedent. Consequently, it has become *de rigueur* for the Commission to impose sweeping and burdensome conditions on nearly every transaction that it reviews.

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[23] *Description of Transaction, Public Interest Statement, and Related Demonstrations,* at p. 24-25, GN Docket No. 24-286 (Sept. 13, 2024), https://www.fcc.gov/ecfs/document/109132166915081/10.

[24] *See, e.g.,* Paul Lipscombe, *AT&T Snaps Up $1 Billion Worth of Spectrum from U.S. Cellular,* Nov. 8, 2024, Data Center Dynamics, https://www.datacenterdynamics.com/en/news/att-snaps-up-1bn-worth-of-spectrum-from-uscellular/.

[25] 47 U.S.C § 214(c).

[26] *See, e.g., Application of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, 32 FCC Rcd 9581 (2016).

[27] *See, e.g., Competitive Enterprise Institute v. FCC,* 970 F.3d 372, 377 (D.C. Cir. 2020).

Here, some of those opposed to the transaction have proposed conditions that they want the Commission to impose to address assumed harms that are not even arguably attributable to the transaction. For some, the transaction represents a vehicle for recommending self-interested conditions that would benefit a particular constituency.[28] For others, transactions like the one at issue here have become vehicles for advancing broad policy and political agendas. For example, in this docket, some have proposed conditions that are tantamount to micromanaging the business model of the merged entity, with proposals for mandating "certain service speed thresholds to ensure that networks are reliable, consistent, and free from slow-downs;"[29] net neutrality obligations;[30] and handset unlocking requirements.[31]

These conditions stem from an alternative view of reality, one where consumers have few choices for internet access because the market is dominated by monopolists. In their view, government intervention, via onerous rules and deal conditions, is the only way to fix the market. This could not be further from the truth. As discussed above, ample data make clear that competition and innovation are flourishing across the U.S. and delivering significant benefits to consumers. The proposed transaction will further these gains.

Consumers across the country, including those currently unaffiliated with T-Mobile and U.S. Cellular, stand to gain significantly from this merger: U.S. Cellular's spectrum will be put to more impactful uses by other carriers; T-Mobile will extend the reach of its popular and robust network infrastructure; more rural customers will receive fast, reliable, and affordable broadband service; and intermodal competition will continue to flourish as other firms respond to these developments.

In sum, the public interest benefits of the proposed transaction are clear, thus obviating the need for any conditions.

3. The Commission Should Use This Proceeding as a Further Step Towards Curbing Abuse of its Merger Review Authority

The FCC has had the power to review and approve transactions involving the transfer of licenses since its creation in 1934.[32] It is well documented that, in many respects, Commission merger reviews overlap significantly with separate required reviews by the Department of Justice (DOJ).[33] However, it is also understood that merging parties must

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[28] *See, e.g., CWA Petition.*

[29] *PK Petition* at p. 14.

[30] *Id.* at p. 15.

[31] *Id. See also RWA Petition* at p. 21.

[32] 47 U.S.C. § 214; 47 U.S.C. § 310 (d).

[33] *See, e.g., Competitive Enterprise Institute v. FCC,* 970 F.3d at 377.

demonstrate to the Commission how their transaction will bolster the "public interest."[34] Moreover, the Commission "may attach to [its approval] such terms and conditions as in its judgment the public convenience and necessity may require."[35]

Despite precedent clearly establishing that any such conditions must address transaction-specific harms, unfortunately, for decades, the Commission has wielded this authority in ways that have consistently elicited complaints, lawsuits, and other challenges from frustrated parties, aggrieved customers, and FCC Commissioners. As discussed below in section 3.1, there is a clear need for FCC action to curb abuses evident in its merger reviews. Section 3.2 details why this proceeding offers the Commission a prime opportunity to unequivocally reaffirm the limited scope of its role in imposing conditions and implement necessary reforms to prevent further abuse of its merger review authority.

3.1 *The Need for Reform*

The amorphous nature of the "public interest" standard used by the Commission in its transaction reviews has been a major source of criticism for decades. In recent years, the Commission has attempted to provide some clarity about exactly what this standard means and how it is applied. For example, in 2014 the FCC's General Counsel wrote that:

> "[T]he FCC's [merger review] actions should be informed by competition principles. These principles look to the impact of practices on consumers and the public interest, not just on competitors. They are designed to be fact-based and data-driven...
>
> "But, the "public interest" standard is not limited to purely economic outcomes. It necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers."[36]

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[34] *See, e.g., Merger Review Authority of the Federal Communications Commission,* at p. 2-3, Congressional Research Service (Dec. 2009), https://www.everycrsreport.com/files/20091208_RS22940_15cb7faac8005895457c47c6d7928ced7778ca1d.pdf.

[35] 47 U.S.C. § 214(c).

[36] Jon Sallet, *FCC Transaction Review: Competition and the Public Interest,* Aug. 12, 2014, FCC Blog, https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.

The second paragraph of this statement highlights how self-interested parties, such as those seeking industry-wide rules in this transaction, have attempted to exploit an unduly broad conception of the "public interest" standard.

Despite the Commission's periodic reminders – as exemplified by its decision in the *Level 3* transaction and then-Commissioner Carr's accompanying statement[37] – that any conditions considered must be appropriately tailored to address transaction-specific harms – there is unfortunately ample evidence that the Commission has abused its discretion in recent years by imposing a range of merger conditions that, as many current and former FCC Commissioners have argued, go far beyond the scope and merits of the transactions being considered. Over the last 25 years, numerous Commissioners have taken the Commission to task for its "tendency to adopt conditions that [are] divorced from the perceived harms" of a particular merger.[38] As a result, the FCC merger review process has become a "vehicle for advancing [the Commission's] ambitious agenda to micromanage" segments of the modern advanced communications marketplace.[39]

The way the Commission develops and imposes conditions has also been criticized. Commissioners have chided the FCC for being "excessively coercive" during these reviews, an observation that reflects the significant power wielded by the Commission in these proceedings.[40] The Commission has developed a high-level framework that it says it "endeavors" to follow during merger reviews, but the FCC still possesses the seemingly unfettered ability to change things as it sees fit.[41]

Moreover, the Commission regularly employs a variety of tactics to strongarm parties to "voluntarily" accept conditions. For example, the Commission can offer take-it-or-leave-it terms to parties. In those situations, parties have only two options: they can either (1) accept the terms, which waives their right to challenge those terms later in court,[42] or (2) reject the terms, in which case the Commission must "vacate its original action upon the application and set the application for hearing in the same manner as other applications

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[37] *Carr Level 3 Statement*.

[38] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online Inc., Transferors, to AOL-Time Warner Inc., Transferee,* CS Docket No. 00-30 (Jan. 11, 2001) (Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part).

[39] *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327 at 6666 (2016) (Dissenting Statement of Commissioner Ajit Pai).

[40] *Application of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238 at 4513 (2011) (Joint Concurring Statement of Commissioners Robert M. McDowell and Meredith Attwell Baker).

[41] *Overview of the FCC's Review of Significant Transactions (last updated July 2014),* FCC, https://www.fcc.gov/reports-research/guides/review-of-significant-transactions.

[42] *See, e.g., Capital Tel. Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974).

are set for hearing."[43] It is widely understood that the second option "effectively kills" transactions without the Commission having to vote on them.[44]

In the absence of "self-limiting" principles vis-à-vis interpreting the scope of its merger review authority, "the potential to use the process to aggrandize authority and abuse it will be strong."[45] Unfortunately, the Commission has often given in to this urge, yielding a merger review process that operates more and more like a hostage negotiation that largely escapes public scrutiny because interactions between the FCC and parties take place entirely behind closed doors.

Oftentimes, the results of these negotiations are conditions that encompass obligations far beyond the scope of the transaction. As noted, if parties agree to these terms when accepting a radio license, they waive their right to challenge them in court. But courts can rule on merger conditions if consumers file a suit and demonstrate that the conditions have harmed them. The D.C. Circuit recently struck down several conditions attached to the merger of Charter and Time Warner Cable.[46] The court took seriously "several troubling objections" levied by the appellants, namely the cavalier attitude of the Commission when it "imposed conditions sweeping even beyond" the "focus of the entire merger."[47] The D.C. Circuit noted in passing that the "Supreme Court has described such non-germane conditions as "an out-and-out plan of extortion.""[48]

Other obligations imposed on parties constitute a body of pseudo-regulations applicable only to some firms. This unnecessarily cleaves the regulatory landscape while also providing the Commission with a backdoor for adopting enforceable rules without having to engage in formal rulemaking. Over time, this can result in economically inefficient asymmetries in markets where some firms are subject to merger obligations while others are not. In some cases, firms with certain obligations have asked the Commission to impose those burdens on all other firms to even the playing field. In other words, these firms have asked the Commission to "regulate up" to saddle competitors with similarly burdensome obligations. This happened recently with handset unlocking requirements that the FCC attached to

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[43] 47 C.F.R. § 1.110.

[44] *See, e.g.*, Sam Feder, *Proposals to Streamline Federal and State Regulatory Review of Transactions in the Communications Industry*, at p. 6, https://assets.morningconsult.com/wp-uploads/2017/10/Merger-Reform-Paper-Final.pdf.

[45] Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics From Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 CommLaw Conspectus 329, 344 (2010), https://scholarship.law.edu/cgi/viewcontent.cgi?article=1458&context=commlaw.

[46] *Competitive Enterprise Institute v. FCC*, 970 F.3d 372 (D.C. Cir. 2020).

[47] *Id.* at 388.

[48] *Id.* (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

several wireless mergers.[49] As the ACLP has argued, such requests are anti-competitive and should be resisted.[50]

Ultimately, none of these actions taken by the Commission during merger reviews promote competition, enhance consumer welfare, or further the "public interest."

3.2 *Using This Proceeding to Rein in Past Abuses*

This transaction presents the Commission with an ideal opportunity to send an unmistakable message that the concerning abuses discussed above will not be tolerated any longer. When approving the merger of T-Mobile and U.S. Cellular, the Commission should make clear that its rejection of conditions proposed by parties in this docket and its decision to refrain from attaching other extraneous conditions beyond the scope of the transaction is being done to underscore that it will exercise more restraint in these proceedings going forward.

As explained above, under the rubric of the somewhat open-ended public interest standard, the Commission has greatly expanded – and, unfortunately, often abused – its merger review authority. Going forward, the Commission can and should rein in these regulatory excesses by underscoring its commitment to and building on a more constrained view of its authority in the Order that approves this merger.

Chairman Carr has been a vocal critic of previous Commission abuses of its merger authority and has championed instead a process that is less intrusive and more forward-looking in nature.[51] For example, in the aftermath of the Commission's approval of the T-Mobile/Sprint merger, which included conditions that went beyond the scope of the transaction, then-Commissioner Carr noted:

> "...in performing a competition analysis, it would be a mistake to look backwards at the wireless industry as it is constituted today. It would be a mistake to lock the status quo in place and assume it's as good as we can hope. We are not yet living in the "golden era" of wireless. Fundamentally, our job at the FCC—and the job for competition authorities more broadly—is to see clearly the generational upgrade in communications that is taking place before us. It would be unwise for the expert telecom agency to blinker itself to the coming 5G convergence and what that means for everyday Americans. Analysis that looks backwards to the age of talk-and-text may

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[49] *See, e.g., Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies,* Comments of the ACLP at New York Law School, WT Docket No. 24-186 (Sept. 9, 2024), https://www.fcc.gov/ecfs/document/1090959508451/1.

[50] *Id.*

[51] *See, e.g., Carr Level 3 Statement.*

> prolong those dying use cases, but it lacks relevance to how consumers use high-speed connections today and, certainly, tomorrow.
>
> "From this perspective, the FCC didn't get the [T-Mobile/Sprint] merger completely right. Because while we formally approved it earlier this year, our analysis too often looked backwards and failed to see where the market is going."[52]

This perspective should form the foundation for an invigorated approach to FCC merger reviews that respects the limits on the Commission's statutory authority, enables and promotes economic growth, explicitly eschews extraneous conditions, and embraces a more holistic, future-oriented view of the communications market. This proceeding offers the Commission a prime opportunity to make these much-needed reforms.

4. CONCLUSION

For too long, the Commission has used transactions like the one at issue here as vehicles for advancing policy and political agendas far removed from the deal points of the mergers it reviews. Without robust changes to its merger review processes, the FCC will remain akin to a royal court to which its subjects must come, with hat in hand, offering gifts and demonstrating a willingness to accept whatever judgment is levied. For the myriad reasons discussed in these comments, the Commission should approve this merger and use this proceeding to delineate a more modest, coherent, and consistent approach to its merger reviews.

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[52] *Keynote Remarks of Commissioner Brendan Carr at the Phoenix Center's 19th Annual U.S. Telecom Symposium, "Keeping Pace with Dynamic Industries,* Dec. 3, 2019, https://docs.fcc.gov/public/attachments/DOC-361147A1.pdf.