

Congress of the United States
House of Representatives
Washington, D.C. 20515
December 16, 2019

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

We have serious concerns regarding the troubling lack of transparency and an apparent lack of appropriate process leading up to the Federal Communications Commission's (FCC) approval of T-Mobile U.S., Inc.'s purchase of Sprint Corporation.

We are particularly concerned that the underlying analysis drafted by the merger task force based on the evidence submitted into the docket was altered by the Commissioners and replaced with an analysis that downplays the competitive harms of the merger. Commissioner Rosenworcel wrote in her dissent that “[s]ignificant parts of the initial draft decision were rewritten in the eleventh hour and behind closed doors to suggest less harm to competition and prices than initially found; adopt the merging companies’ arguments in place of more balanced discussion about where those arguments were unconvincing; and *even replace the underlying data used to analyze marginal cost efficiencies with more merger-friendly data supplied by T-Mobile.*”¹ To the extent that changes were made to the draft decision based on data supplied by the parties after the draft was first circulated to the Commissioners, we are concerned that there was insufficient notice and opportunity for public review and comment.

In addition, the failure to seek additional public comment after the parties entered into a consent decree with the Department of Justice raises additional procedural concerns. The consent decree involved a number of conditions, including the transfer of assets to Dish. Dish also made a series of commitments to the FCC in relation to this merger. The FCC’s failure to seek additional comment on those developments troubles us for several reasons.

First, between July 26, 2019, and October 16, 2019, no fewer than 25 *ex parte* conversations took place between representatives of T-Mobile and the FCC Commissioners, and

¹ Statement of Commissioner Jessica Rosenworcel, Dissenting, *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations; Applications of American H Block Wireless L.L.C., DBSD Corporation, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, 0008741789 et al. (“Rosenworcel Dissent”), at 3.

nine organizations have alleged that T-Mobile's *ex parte* filings did not comply with the FCC's *ex parte* rules.² The Administrative Procedure Act (APA) prohibits *ex parte* communications relevant to the merits of a proceeding between the agency and interested parties outside the agency without the parties disclosing the substance of those communications.³ Furthermore, the FCC has its own *ex parte* rules, which were updated in 2011 to "require[e] all oral *ex parte* communications to be documented, and their content described."⁴ The rules require that the person who makes the oral *ex parte* presentation must submit a memorandum that summarizes all "arguments made" as well as "a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed."⁵

Despite the clarity in the FCC's rules, many of the filings documenting those 25 *ex parte* conversations only include a listing of the subjects discussed. In five of the meetings with Commissioner Carr's Office, "the representatives of T-Mobile referenced the draft order on circulation and discussed several issues raised in the Applicants' previous submissions and relevant to the Commission's public interest and competition analysis."⁶ These words are repeated almost verbatim in each disclosure submission and provide the sole explanation of what was discussed during the conversation. In another eight of the conversations with that office, the parties discussed, verbatim, "several issues addressed in the Applicants' previous submissions regarding their network and economic modeling."⁷ These descriptions are devoid of

² Supplement to Petition to Deny of Rural Wireless Association, Inc., *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 19-197 (Oct. 3, 2019) at 4 (joined by Communications Workers of America, Consumer Reports, New America's Open Technology Institute, NTCA – The Rural Broadband Association, Institute for Local Self-Reliance, The Greenlining Institute, Open Markets Institute, and Public Knowledge).

³ Administrative Procedure Act (APA), 5 U.S.C. § 557(d)(1)(c)(ii) (1976) ("In any agency proceeding . . . a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding . . . memoranda stating the substance of all such oral communications.").

⁴ Federal Communications Commission, *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, Report and Order and Further Notice of Proposed Rulemaking, GC Docket No. 10-43 (Feb. 1, 2011), at para 1.

⁵ 47 C.F.R. § 1.1206(b)(1).

⁶ Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Aug. 19, 2019); Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (Aug. 23, 2019); Letter from Edward "Smitty" Smith, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Aug. 27, 2019); Letter from Edward "Smitty" Smith, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Aug. 29, 2019).

⁷ Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Sept. 6, 2019); Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket

“arguments,” as required by 47 C.F.R. § 1.1206, and run counter to the letter and spirit of the FCC’s *ex parte* rules.

Second, the failure of the parties to disclose the contents of these conversations, all of which took place after they had entered into a consent decree with the DOJ, made it impossible for interested parties that were absent from these phone calls to participate meaningfully in the process. Simply from a public policy perspective, permitting the parties to provide such scant reporting in the record is a gross abrogation of FCC responsibility, and undermines the critical transparency that is a necessary part of this process.

As Commissioner Starks noted in his dissent to the order approving the merger, the Commission has “departed from agency practice by failing to solicit public comment on two rounds of significant changes to one of the largest wireless transactions in FCC history.”⁸ Commissioner Rosenworcel also specified in her dissent that “[t]he settlement raised substantial new issues involving the state of competition and the public interest, including the waiver of Dish’s build-out obligations, new license and deployment conditions, and significant transfers of spectrum and other assets. . . [a]s such, the FCC should have sought public comment on what was fundamentally a new transaction.”⁹

We therefore seek answers to the questions below.

1. Did the FCC seek the opinion of the Office of General Counsel regarding the possible need to provide the public with an additional comment period after the DOJ announced its consent decree, yes or no? If so, please provide all communications during the pendency of the FCC’s merger review—covered by the Federal Records Act—between officials at the FCC regarding the need to seek an additional comment period regarding the merger review.
2. Is the FCC investigating T-Mobile’s compliance with the *ex parte* rules, yes or no? If so, when does the FCC expect to complete the investigation? If not, does the FCC plan to open an investigation, yes or no?

No. 18-197 (filed Sept. 11, 2019) (referencing phone calls that took place on September 9th and 10th, 2019); Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Sept. 13, 2019) (referencing phone calls that took place on September 11th, 12th, and 13th, 2019); Letter from Nancy Victory, Counsel for T-Mobile US, Inc., WT Docket No. 18-197 (filed Sept. 18, 2019) (referencing phone calls that took place on September 16th and 17th, 2019).

⁸ Statement of Commissioner Geoffrey Starks, Dissenting, *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations; Applications of American H Block Wireless L.L.C., DBSD Corporation, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time*, WT Docket No. 18-197, ULS File Nos. 0008741236, 0008741420, 0008741603, 0008741789 et al., at 1.

⁹ Rosenworcel Dissent, at 3.

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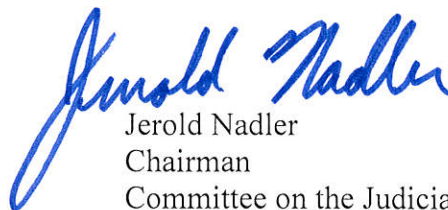
3. Please provide all drafts of the merger order, including the draft originally circulated to the Commissioners, and each subsequent draft.

We appreciate your attention to this important matter. Please provide your responses to the questions above by January 6, 2020. Should you have any questions, please contact AJ Brown of the Committee staff at (202) 225-2927.

Sincerely,



Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce



Jerold Nadler
Chairman
Committee on the Judiciary