

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
América Móvil, S.A.B. de C.V., Transferor,)
)
and)
) **IB File No. ITC-T/C-20200930-00173**
Verizon Communications Inc., Transferee,)
)
Application for Consent to Transfer Control of)
TracFone Wireless, Inc. Pursuant to Section 214)
of the Communications Act of 1934, as Amended)
)

**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**

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December 18, 2020

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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

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 (“Public Interest Parties”) submit these comments in response to the Federal Communications Commission’s (“FCC or Commission”) November 20, 2020, Public Notice¹ inviting comments in the above-captioned matter.²

I. INTRODUCTION AND SUMMARY.

The Commission properly withheld streamlined treatment of the Application.³ But even with this additional comment cycle, evaluating the merits of this complex transaction is

¹ *Non Streamlined International Applications/Petitions Accepted For Filing, Section 214 Applications (47 C.F.R. §§ 63.18, 63.24); Section 310(b) Petitions (47 C.F.R. § 1.5000)*, Report No. TEL-02056NS, at 1 (Nov. 20, 2020) (“November 2020 Public Notice”).

² Application for Consent to Transfer Control of International Section 214 Authorization, File No. ITC-T/C-20200930-00173, at 18 (filed Sept. 30, 2020) (the “Application”).

³ On September 30, 2020, the International Bureau received the above-referenced Application and request for streamlining. Several parties opposed the request to streamline treatment. *See* Public Knowledge, Open Technology Institute, and the Benton Institute for Broadband and Society, Opposition to Petition

premature because of the paucity of information the Applicants have provided about their transaction. Despite having faced a diverse array of questions about their business and operations, the Applicants have submitted no new information since filing the Application on September 30, 2020. Unless the Applicants respond to stakeholders' questions about whether this transaction serves the public interest, the Commission cannot make a reasonable determination based on the record before it. Because (as the Applicants themselves acknowledge) the burden lies with Applicants to show that grant of the application would serve the public interest, the Bureau should deny the Application as it currently stands.

First, the Applicants still have not addressed how Verizon will protect Lifeline and other low-income customers. With this transaction, TracFone—the single largest provider of wireless Lifeline service, holding 1.7 million Lifeline customers—will no longer exist as an independent entity. The Commission cannot assess the effects on Lifeline until the public has an opportunity to examine Verizon's ETC certification plan. It has been nearly 90 days since the Application was filed. But the ETC certification plan still does not appear in the record, and Verizon seems to have no intent to produce one before approval of the above-captioned transfer application. This alone is highly alarming. If Verizon genuinely intends to actively compete for Lifeline customers, why is it not moving as swiftly as possible to have the ETC plan approved?

Until applicants submit their ETC compliance plan, the application remains ungrantable. The Public Interest Parties further urge that the Bureau not accept the ETC plan or grant the

for Streamlining and Motion to Dismiss Application as Incomplete, File No. ITC-T/C-20200930-00173 (filed Oct. 16, 2020) (“Public Interest Opposition”); Letter from T-Mobile US, Inc. to Marlene H. Dortch, Secretary, FCC, IBFS File No. ITC-T/C-20200930-00173 (filed Oct. 29, 2020). The Applicants subsequently filed a response. *See* Letter from Verizon Communications, Inc., América Móvil, S.A.B. de C.V., TracFone Wireless, Inc., to Marlene H. Dortch, Secretary, FCC, IBFS File No. ITC-T/C-20200930-00173 (filed Oct. 23, 2020) (“Applicants’ Response”).

transfer unless it adequately protects Lifeline and low-income prepaid customers. Conditions (whether offered by the Applicants or demanded by the Bureau) should—at a minimum—include the following:

- A commitment to participate in the Lifeline program for a minimum of 5 years.
- A commitment to keep customers, particularly Lifeline customers, on non-Verizon networks if that is the only way to ensure adequate quality of service for Lifeline and pre-paid customers.
- A commitment to make 5G networks and equipment available to Lifeline and pre-paid customers on the same basis as made available to Verizon’s post-paid customers.
- A commitment to maintain the existing packages available to Lifeline customers for a minimum of 5 years.
- A commitment to continue to market to Lifeline and pre-paid customers, including non-English speaking customers, at the same level as Tracfone does 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 prior to the closing of the transaction.
- Whatever other conditions the record demonstrates are necessary to protect Lifeline and other low-income pre-paid subscribers.

The Applicants also have refused to answer questions about Verizon’s side relationships with America Movil, Tracfone’s foreign parent based in Mexico. The Application conspicuously 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. Similarly, the Applicants have failed to meet their burden to demonstrate that further consolidation in the wireless market will not raise prices, reduce output, or degrade the quality of service. These showings involve empirical questions requiring access to internal documents and the expert analysis of economists and business analysts. But no such analysis exists on the

record, nor have Applicants provided information so that the Bureau can conduct its own analysis.

Finally, the Applicants have not said whether or not 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?

Because the Applicants have repeatedly failed to provide evidence to answer these questions, the Commission should issue a standard Request for Information ("RFI") seeking documents and narrative responses addressing the transaction's probable harms. Even with sufficient information, the transaction is too complex and too important to be decided at the Bureau level; full Commission review is necessary to ensure the transaction serves the public interest.

II. CRITICAL QUESTIONS ABOUT THE PUBLIC INTEREST REMAIN UNANSWERED.

The standard of review for any authorization transfer is straightforward. The Commission must evaluate: (1) whether the transaction complies with federal statutes, including the Communications Act; (2) whether the transaction complies with the Commission's rules; (3) whether the transaction could result in public interest harms by substantially frustrating federal statutes; and (4) whether the transaction will benefit the public interest.⁴ As Applicants concede, this transaction requires consideration of all such domestic benefits and harms.

⁴ Application at 10 (citing *XO-Verizon Order*, 31 FCC Rcd at 12504-05, ¶ 7; *Frontier-Verizon Order*, 25 FCC Rcd at 5976-77, ¶ 9; *Qwest Communications Int'l Inc. and CenturyTel, Inc. d/b/a CenturyLink*, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4198-99, ¶ 7 (2011); *SBC-AT&T Order*, 20 FCC

In addition, the Commission has an obligation to fully understand the potential impact on the market before it can determine whether the transfer will serve the public interest. Unlike in Department of Justice antitrust reviews, the Applicants bear the burden of proof,⁵ and the Commission’s license-transfer process is designed to permit all interested stakeholders to challenge the claims of the Applicants.⁶ The process also allows stakeholders to raise concerns that the Commission might otherwise overlook.⁷

A. The Applicants Have Not Provided Enough Information About Protecting Lifeline Customers.

The Commission cannot authorize this transaction until Verizon files its ETC certification plan and the plan is approved. The Commission has long held that all wireless ETC certifications must be approved prior to (or simultaneous with) Section 214 transfers.⁸

Rcd at 18300-01, ¶ 16; *OnePoint Communications Corp. and Verizon Communications*, Memorandum Opinion and Order, 15 FCC Rcd 24165, 24167 ¶ 4 (CCB 2000)).

⁵ *China Mobile International (USA) Inc. Application for Global Facilities-Based and Global Resale International Telecommunications Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, 34 FCC Rcd 3361, ¶ 11 (2019) (“the applicant for an international Section 214 authorization...bears the burden of demonstrating that grant of its application would serve the public interest in accordance with Section 63.18 of the Commission’s rules”); *see also* 47 U.S.C. § 214(a) (“No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line”).

⁶ *See* 47 U.S.C. § 214.

⁷ *See Id.*

⁸ *Wireline Competition Bureau Reminds Carriers of Eligible Telecommunications Carrier Designation and Compliance Plan Approval Requirements for Receipt of Federal Lifeline Universal Service Support*, Public Notice, 29 FCC Rcd 9144 (WCB 2014) (“2014 Public Notice”) (“[T]he transfer of control of licenses and other authorizations from an entity already designated as an ETC to another entity that has not been designated as an ETC is insufficient for the transferee itself to assume the ETC status of the acquired ETC . . . any entity that is not offering Lifeline service over its own facilities, or a combination of its own and resold facilities, must submit and receive the Bureau’s approval of a compliance plan demonstrating to the Bureau’s satisfaction that the entity will comply with its obligations for offering Lifeline service, including the prevention of waste, fraud, and abuse and the maintenance of sufficient financial and technical capabilities to offer Lifeline services in compliance with these obligations”).

The ETC compliance plan is of particular importance here. Verizon admitted it has little experience operating a low-cost wireless provider.⁹ Compliance with the ETC safeguards is not simply a matter of character. The Commission must be satisfied that the ETC fully understands the nature of the Lifeline program, that it has capacity to comply, that it has trained staff thoroughly in compliance, and that it has structural safeguards in place to detect non-compliance and report any non-compliance to the Commission. A merger—particularly one on this scale, priced at nearly \$7 billion¹⁰—is an inherently challenging process, even for experienced companies such as Verizon and TracFone. Approval of the ETC certification is essential to making sure that compliance will not fall through the cracks.

The active FCC enforcement investigation against TracFone for intentional Lifeline violations provides another compelling reason to coordinate Verizon’s ETC eligibility status and review of this transaction.¹¹ In April 2020, the Commission proposed \$6,013,000 in forfeiture penalties against TracFone for “willfully and repeatedly violating the Commission’s rules governing the Lifeline program and making thousands of improper claims for Lifeline support during 2018, thereby receiving more than one million dollars more from the Universal Service Fund than it should have.”¹² Whatever enforcement remedy the Commission adopts will affect whether and how the Commission can approve this transaction and will also implicate Verizon’s ETC eligibility. In light of this NAL, the Commission cannot authorize Verizon’s qualifications to operate Tracfone without Verizon’s ETC certification plan.

⁹ Application at 4.

¹⁰ *Id.* at 9.

¹¹ *TracFone Wireless, Inc.*, Notice of Apparent Liability and Order, 35 FCC Rcd 3459 (2020).

¹² *FCC Publicly Releases More Detailed Version of Notice of Apparent Liability against Tracfone Wireless, Inc.*, Public Notice, 35 FCC Rcd 6280 (2020).

Even with the ETC compliance plan, the Commission must conduct a substantive review to ensure the plan protects Lifeline recipients and other low-income subscribers. Assuring universal, affordable access to all Americans is the first and most important purpose listed in Section 1 of the Communications Act.¹³ The Lifeline program is one of the most important statutory tools Congress required the Commission to use to achieve this goal.¹⁴ The Commission cannot simply credit an admittedly inexperienced Verizon on the basis of the few vague and unenforceable promises in the Application. Verizon says it “will not require any TracFone customers to move to a more expensive plan when the transaction closes.”¹⁵ This promise, even if true, guarantees nothing *after* the transaction closes.

For similar reasons, the Commission should scrutinize Verizon’s promises to make its 5G network and new devices available to TracFone customers.¹⁶ Verizon does not identify *which* Tracfone customers will receive this benefit and, tellingly, Verizon does not explicitly include Lifeline subscribers in this promise. Verizon could well decide for business reasons to limit availability of 5G or new devices to non-Lifeline customers to discourage participation in the program. Alternatively, Verizon could—even consistent with its promise not to force any of its customers into more expensive plans—withhold these promised benefits from low-cost plans whether or not they participate in Lifeline. This sort of market segmentation is routine in the business world. Because TracFone’s entire business model is structured around low-income, price sensitive customers, it has incentive to make the maximum variety of equipment and services available to its customers. Once TracFone becomes part of Verizon, however, Verizon

¹³ 47 U.S.C. § 151.

¹⁴ *See* 47 U.S.C. § 254.

¹⁵ Application at 3.

¹⁶ *Id.* at 11-12.

will have the incentive to limit low-cost customers to “no frills economy” plans while reserving the “first class” devices and services for those willing to pay more. Even now, Verizon is steadily upgrading customers to unlimited plans that provide the company with higher average revenue per customer.¹⁷

The Commission took these concerns seriously in *AT&T/Cricket*, which Verizon confusingly cites in the Application as relevant precedent. That decision required AT&T to submit multiple supplements to provide information on its transition plans for Lifeline customers.¹⁸ Even after AT&T provided far greater detail than Verizon has, the Commission found the level of detail and the commitments insufficient and imposed additional conditions to protect Lifeline subscribers. It required AT&T as a condition of the acquisition to make its LTE network available on equal terms to Cricket’s pre-paid and Lifeline customers.¹⁹ It also required AT&T to maintain Cricket’s ETC certification post-transaction and to offer an “equipment trade in credit” to make access to its LTE network affordable to Lifeline and other low-income customers.²⁰

The current transaction raises far more significant concerns than *AT&T/Cricket*. As noted above, TracFone is the single largest provider of wireless Lifeline service, and its business plan is entirely oriented to low-income customers. The same cannot be said of Verizon, however. By all accounts, Verizon seeks to expand to new markets while not cannibalizing its

¹⁷ Jason Aycock, *Verizon gains as MoffettNathanson sees 'simply too cheap' stock*, Seeking Alpha (Dec. 02, 2020), <https://bit.ly/3giIPXp>.

¹⁸ See, e.g., *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd. 2735, ¶ 110-16 (2014) (“*AT&T/Cricket/Leap*”).

¹⁹ See *id.* ¶¶ 168-71.

²⁰ See *id.* ¶¶ 172-77.

post-paid business.²¹ It will have incentive to move customers from pre-paid to the more lucrative post-paid business. Without a thorough examination of Verizon’s business strategy and commitment of resources to Lifeline the Commission cannot determine whether the transfer will produce the benefits Verizon claims or will eliminate a vital Lifeline participant.

But even if Verizon’s representations of its present intentions were taken at face value, nothing in Verizon’s preferred approach would stop the company from changing its business plans to the detriment of Lifeline customers. Verizon was undoubtedly serious about entering the streaming video market when it announced Go90 in 2015, but that seriousness of purpose did not prevent Verizon from shuttering the business a mere three years later.²² While such failures are not generally a cause for FCC concern, the consequences of a failure of the largest wireless Lifeline provider (and largest low-cost carrier) are far more serious for society than the failure of a would-be competing streaming service.

The Applicants’ Response confirms the Public Interest Parties’ skepticism whether Verizon will serve all TracFone Lifeline customers. The Applicants do not dispute that Verizon is an inexperienced Lifeline provider with little history or interest in serving these vulnerable communities.²³ Instead, in an attempt to assuage the Commission, the Applicants make the

²¹ See, e.g., GlobalData, *Verizon needs Tracfone to round out its wireless value proposition* (Sept. 15, 2020) (“Verizon has long needed a secondary brand and value proposition that it can use to serve the prepaid wireless market without cannibalizing its premium flagship brand.”); MSNBC, *Verizon CEO Hans Vestberg on acquisition of pre-paid phone provider Tracfone* (Sept. 14, 2020), <https://www.cnbc.com/video/2020/09/14/verizon-ceo-hans-vestberg-on-acquisition-of-pre-paid-phone-provider-tracfone.html> (quoting Verizon CEO Hans Vestberg: “We want to play in all the segments for the consumers of the United States....We can do that for different parts of the segments...The first year of operations we believe we’re going to be EPS accretive on this....In today’s environment, you see more potential when it comes to the prepaid....”)

²² Nick Statt, *Verizon is shutting down its original video app Go90*, THE VERGE (June 28, 2018), <https://bit.ly/2Iv9e7g>.

²³ See Applicants’ Response at 4.

highly qualified assertion that Verizon “plans to continue to offer Lifeline service through TracFone *where it will offer service over Verizon’s network.*”²⁴ This nebulous caveat could refer to any number of critical limitations that the Applicants would rather not address, namely: (1) the coverage footprints that might be lost if TracFone were to exclude the AT&T and T-Mobile networks; and (2) the types of service Verizon might provide to TracFone lifeline subscribers.

Other concerns exist, too. Applicants do not say whether post-transaction TracFone service will include roaming on other carriers’ networks. Nor do the Applicants specify which of the various Verizon networks TracFone will use. If the Applicants are referring to 5G, Verizon could effectively end TracFone’s offerings across the vast majority of the United States if the service benchmark is Verizon’s 5G network offering. If the Applicants are referring to 3G, Verizon could strap Lifeline consumers with inferior, if not unusable, services.

B. The Applicants Have Not Provided Enough Information About Protecting Consumers.

This transaction also raises significant competition concerns that the Commission could only address on a full record. After receiving expert reports, corporate performance data, and other evidence, the Commission may conclude that no conditions will cure the competition harms, or the Commission may find that Verizon could remedy the consumer injuries with appropriate conditions. Only two things can be said for certain at this time: (1) the burden of proving that the transfer serves the public interest lies with Applicants; and (2) the Commission cannot satisfy its obligation to ensure that the transfer serves the public convenience and necessity as required by Section 214(c) without additional information from the Applicants.

²⁴ *Id.* (emphasis added).

Competition is the cornerstone of a healthy wireless market, and a thorough review here ensures that the transaction will serve the “public interest, convenience, and necessity.”²⁵ The review process exists to investigate and prevent “potential competitive concerns when the post-transaction entity has the incentive and the ability, either by itself or in coordination with other service providers, to raise prices, lower quality, or otherwise harm competition in a relevant market.”²⁶ As the Public Interest Parties have previously noted, purchasing TracFone could give Verizon the incentive and ability to inflict competitive harm. MVNOs like TracFone help “increase the range of differentiated services offered to consumers within the broader mobile telephony/broadband services product market” and acquire capacity that allows them to “compete downstream against facilities-based service providers’ service offerings.”²⁷ In other words, MVNOs “provide additional constraints against any anticompetitive behavior.”²⁸ Verizon and TracFone are the largest facilities-based mobile wireless service provider and the largest MVNO in the country, respectively.²⁹ Verizon controls around 40% of the mobile wireless services market.³⁰ Likewise, TracFone has the fourth largest subscribership of wireless services in the United States.³¹ The Commission should analyze the changes in competitive dynamics that would arise under a combination of these companies.

²⁵ 47 C.F.R. § 63.18.

²⁶ See *Applications of SOFTBANK CORP., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd. 9642, ¶ 34 (2013).

²⁷ T-Mobile-Sprint Merger Order, ¶ 63 and n.196, 78.

²⁸ *Id.* ¶ 78.

²⁹ See Sascha Segan, *Verizon Buys Prepaid Carrier TracFone*, PC MAG (Sept. 4, 2020), <https://bit.ly/3djg77f>.

³⁰ See Michael Hodel, *Verizon’s Solid Wireless Position Should Create Near-Term Opportunities to Take Share*, MORNINGSTAR (Sept. 14, 2020), <https://bit.ly/36UCChD>.

³¹ T-Mobile-Sprint Merger Order, ¶ 75.

This transaction may also harm the public through further horizontal consolidation. Verizon already commands a prepaid presence through Verizon Prepaid and Visible.³² By Verizon’s own math, this Transaction would give it the largest prepaid retail business in the United States.³³ That change in share represents a sizable swing, and the Commission should determine whether eliminating the largest wholesale wireless service consumer and, in effect, giving Verizon the largest base of prepaid subscribers, could lead to higher retail prices and remove a significant source of wholesale business from the marketplace.

The resulting increase in concentration might additionally cause Verizon to charge higher rates to mobile network operators seeking to resell services to TracFone customers through a foreclosure strategy. And concentration could limit the capacity for MVNOs competing with TracFone and raise their prices, passing additional costs on to consumers. The Commission should examine each of these potential issues carefully.

The Commission’s competition review should also extend to potential vertical effects. MVNOs like TracFone do not own any network facilities, but instead purchase mobile wireless services wholesale from facilities-based service providers and resell these services.³⁴ Through wholesale agreements, MVNOs “often increase the range of services offered to consumers” by providing services to consumers that companies like Verizon do not serve.³⁵ The Commission should ask whether this Transaction would incentivize Verizon to raise wholesale prices or degrade the quality of wholesale services because of its newfound market share. Verizon points

³² *Id.* at 4.

³³ *Verizon to acquire TracFone Wireless, Inc.*, Verizon (Sept. 14, 2020), <https://vz.to/3743JHa> (announcing that TracFone currently has around 21 million customers); Application at 5 (noting that T-Mobile and AT&T have 20 million and 18 million prepaid customers, respectively).

³⁴ *Communications Marketplace Report et al.*, Report, 33 FCC Rcd. 12558, ¶ 7 (2018).

³⁵ T-Mobile-Sprint Merger Order, ¶ 285.

out that it already provides service to a majority of TracFone’s customers.³⁶ Verizon’s argument ignores the key distinction that TracFone, currently a company legally separate from Verizon and with its own market power, employs an independent strategy to purchase services not only from Verizon but also from AT&T, T-Mobile, and other providers. While roughly 13 million TracFone customers already use the Verizon network, the Application states repeatedly that Verizon will migrate the remaining 8 million TracFone customers from AT&T and T-Mobile to Verizon.³⁷

If this transaction is consummated, the wireless market will have fundamentally changed. All significant MVNOs will be vertically integrated with facilities-based carriers. Every facilities-based carrier will have incentive to exclude all other MVNOs, including potential new entrants, from its network. This consolidation will also increase the likelihood of coordinated effects, where MVNOs consciously adopt parallel strategies to protect their valuable post-paid customers from migrating to lower cost pre-paid. Rather than a source of price competition, the pre-paid market would become the equivalent of the airline “no frills economy class” while treating post-paid as “first class.”

The Applicants’ Response barely addressed the Public Interest Parties’ concerns. For many years, TracFone has claimed that “[MVNOs] are an integral part of the wireless services market, and their participation in that market should be considered by the Commission in assessing the competitiveness of that market.”³⁸ But now the Applicants dismiss these market effects.

³⁶ Application at 4.

³⁷ *Id.* at 3.

³⁸ See Letter from Mitchell Brecher, Counsel for Tracfone Wireless, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-287 *et al.*, at 1 (filed Oct. 16, 2018) (“2018 Tracfone Letter”).

First, the Applicants say that “while the filings suggest that the transaction could impact other MVNOs, this transaction will not impact the number of network-based carriers offering MVNO arrangements nor the business incentive for those carriers to offer wholesale services for resale.”³⁹ That claim proves too much—the same could be said for almost any acquisition of a retail distributor by a vertically integrated competitor. If Amazon were to acquire a book distributor like Barnes & Noble, the acquisition would not get a free pass just because Amazon is not acquiring Wal-Mart. It is elementary economics that even partial vertical integration will affect upstream suppliers.⁴⁰ As TracFone noted, the Commission has acknowledged that resellers often “ha[ve] better access to some market segments than the host facilities-based service provider and can better target specific market segments, such as low-income consumers[.]”⁴¹

Second, the Applicants mischaracterize the Public Interest Parties’ comments as “concerns about overall impacts to the prepaid segment resulting from broader shifts in the mobile telephony/broadband services market, those concerns are not specific to the transaction.”⁴² This characterization ignores the obvious—namely that when the largest facilities based carrier buys the largest independent MVNO, the acquisition *creates* the industry change.

³⁹ Applicants’ Response at 4.

⁴⁰ See Michelle Connolly, *Competition in Wireless Telecommunications: The Role of MVNOs and Cable’s Entry into Wireless*, at 14 (Sept. 2018), attached to 2018 Tracfone Letter (“The decision by upstream firms to not fully vertically integrate is based on many factors, including differences in economies of scale at different stages of production, specialization, contract and transactions costs, and the profitability of price discrimination. Resale moves any market closer to a competitive market equilibrium and lowers the costs of the overall vertical chain. In other words, resale—in any market—imposes price/quality discipline on upstream suppliers.”).

⁴¹ See generally Comments of Tracfone Wireless, Inc., WC Docket No. 17-287 *et al.*, at 8 (filed Feb. 21, 2018) (quoting *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, 32 FCC Rcd 8968 ¶ 15 (2017)).

⁴² Applicants’ Response at 4.

As the Public Interest Parties explained, Verizon’s acquisition risks accelerating and cementing the change to post-paid, higher-cost plans from the pre-paid, lower-cost plans that TracFone offers today. Simultaneously, it creates incentives for Verizon—and in response the other vertically integrated facilities based carriers—to deny access to their networks to new MVNOs, foreclosing emergence of any future independent MVNOs. Claiming that these potential harms to competition are not “transaction related” strains credulity.⁴³

The Public Interest Parties are not concerned about some grand historical metanarrative of wireless offerings, but on the very real, very present claims that the transaction Verizon proposes will directly and irrevocably harm consumers. TracFone’s entire business model is predicated on providing easy-to-use, pay-as-you-go, affordable wireless telecommunications services to consumers to whom wireless service would be otherwise unavailable or unaffordable. TracFone’s services do not require term contracts, minimum service periods or volume commitments, credit checks, or early termination fees. Verizon’s business model does not remotely resemble TracFone’s business model, and nothing in the Applicants’ Response refutes Public Interest Parties’ contention that Verizon intends to change TracFone’s focus from serving those communities in greatest need with affordable mobile service plans to something else that is less affordable, less flexible, and less widely available.

⁴³ Additionally, the extent to which harms must be “transaction specific” for FCC review is broader than that used in antitrust. As the Applicants concede, the relevant standard of review includes whether grant of the transaction would frustrate the goals of the Communications Act. Application at 10. If the transition would cause a fundamental change in the market structure that frustrates the pro-competition goals of the Communications Act, it is “transaction specific” for FCC review even if it would fall outside the scope of antitrust review. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8218-19 ¶¶ 25-26 (2006) (requiring access to regional sports networks, despite refusal of FTC to adopt a similar condition, to enhance MVPD competition).

The Commission must consider the dangers that such an outcome will occur if it allows the transaction to go forward regardless of Verizon's current intentions. This is not a matter of trust, but a matter of economic analysis and the Commission's responsibility to maintain what few sources of competition still exist in an already highly concentrated wireless market. Even if the FCC ultimately permits the transfer, it has a statutory responsibility to understand the markets it regulates so that it can ensure that granting the transfer will serve the public interest. Indeed, the highly complex nature of this transaction warrants the need for additional information from the Applicants.

C. The Applicants Have Not Provided Enough Information About Tracfone's Foreign Affiliations and Other Authorizations.

As stated in the Application, TracFone is currently an indirect wholly-owned subsidiary of America Movil, a dominant carrier in Mexico. As a result, America Movil could have an incentive with its newly acquired stake in Verizon following Verizon's acquisition of Tracfone to leverage market power in the U.S., Mexico, and throughout much of Latin America to discriminate against Verizon's rivals. In the Applicants' Response, Verizon dismisses America Movil's post-acquisition \$3.125 billion ownership interest in Verizon as inconsequential because it does not trigger FCC reporting requirements for foreign ownership.⁴⁴ The FCC's reporting thresholds are not dispositive of market effects, however, and this supposed irrelevance depends on whether America Movil's \$3.125 billion equity interest in Verizon following the purchase is as inconsequential as Verizon claims it will be.

Furthermore, Verizon and America Movil may have entered into contracts or developed understandings with each other that would leverage America Movil's dominance in Mexico to

⁴⁴ Applicants' Response at 2-3.

the detriment of United States carriers. Applicants neither affirm nor deny the existence of any such agreements or understandings in either the Application or Applicants' Response.

Applicants' silence speaks volumes, and the Bureau should request any documents related to any negotiations or agreements between Verizon and America Movil beyond the scope of the described transaction.

In addition, section 63.18(e)(3) of the Commission's rules requires an applicant to disclose any other authorizations if it intends to "acquire facilities or offer services not covered by paragraphs (e)(1) and (e)(2)."⁴⁵ In 2013, as part of its acquisition of Page Plus Cellular, TracFone acknowledged that it holds a domestic 214 license.⁴⁶ If Verizon will acquire this domestic section 214 authorization or any other domestic section 214 authorization as a part of this transaction, the Applicants must identify it. And even if Verizon complies with Rule 63.18(e)(3), the Commission should require the Applicants to account for this certification.

TracFone does not appear to have filed a notice discontinuing its domestic 214 authorization, and it seems implausible that an MVNO with more than 20 million subscribers could legally operate in the United States without such authority.

The Applicants concede that TracFone's 2014 acquisition of Page Plus Cellular involved a domestic section 214 authorization.⁴⁷ Still, they claim the pending transaction is exempt from

⁴⁵ 47 C.F.R. § 63.18(e)(3)

⁴⁶ *Application for Consent to Assignment of Customer Base and Related Assets of an Authorized Domestic Section 214 Carrier*, TracFone Wireless, Inc., WC Docket No. 13-138, at 2 (2013), <https://bit.ly/3ITJMaa> ("Upon grant of this Application and consummation of the proposed transaction, TracFone will relinquish the domestic Section 214 authority previously held by Page Plus and will provide service to the acquired customers pursuant to its own domestic Section 214 authorization."); *Domestic 214 Application Granted for the Acquisition of Assets of Start Wireless Group, Inc. d/b/a Page Plus Cellular by TracFone Wireless, Inc.*, Public Notice, 29 FCC Rcd. 93 (WCB 2014).

⁴⁷ Applicants' Response at 3, n.9; *Domestic 214 Application Granted for the Acquisition of Assets of Start Wireless Group, Inc. d/b/a Page Plus Cellular by Tracfone Wireless, Inc.*, Public Notice, 29 FCC Rcd 93 (WCB 2014).

domestic 214 obligations because TracFone only offers CMRS, citing a rule that appears to be inapplicable in this proceeding.⁴⁸ The Applicants conspicuously fail to explain what happened to the domestic section 214 authorization TracFone had just a few years ago.⁴⁹ If the authorization was discontinued, no discontinuance application appears to have been filed. If the authorization was transferred or assigned, no Commission grant seems to exist. If TracFone's business has changed such that a domestic section 214 authorization is no longer necessary, the Applicants do not say. The Applicants also fail to say what happened to TracFone's Letter of Assurance that accompanied the Page Plus transaction.⁵⁰ Whether Applicants need their domestic section 214 authorization at the moment is irrelevant to the question of whether they have it, whether they intend to transfer it, or what has otherwise become of it, questions that the Commission should specifically ask the Applicants as part of an RFI.⁵¹

⁴⁸ See Applicants' Response at 3 (citing 47 C.F.R. § 20.15(b)(3)). That rule relieves CMRS providers from submitting "applications for new facilities or discontinuance of existing facilities." 47 C.F.R. § 20.15(b)(3). The rule does not relieve providers of the obligation to file assignment or transfer of control applications.

⁴⁹ *Application for Consent to Assignment of Customer Base and Related Assets of an Authorized Domestic Section 214 Carrier, TracFone Wireless, Inc.*, WC Docket No. 13-138, at 2 (2013) ("Upon grant of this Application and consummation of the proposed transaction, TracFone will relinquish the domestic Section 214 authority previously held by Page Plus and will provide service to the acquired customers pursuant to its own domestic Section 214 authorization.").

⁵⁰ See Letter from F.J. Pollak, President and Chief Executive Officer, TracFone Wireless, Inc., to John Carlin, Acting Assistant Attorney General, U.S. Department of Justice, IBFS File No. ITC-ASG-20130522-00143, WC Docket No. 13-138 (filed Dec. 19, 2013).

⁵¹ See 47 C.F.R. § 0.91; 47 C.F.R. § 0.291 ("The Chief of the Wireline Competition Bureau or her/his designee is authorized to issue non-hearing related subpoenas for the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, schedules of charges, contracts, agreements, and any other records deemed relevant to the investigation of matters within the jurisdiction of the Wireline Competition Bureau. Before issuing a subpoena, the Bureau shall obtain the approval of the Office of General Counsel."). See, e.g., General Information and Document Request for T-Mobile, WT Docket No. 18-197 (Aug. 15, 2018).

III. THE COMMISSION SHOULD REQUEST MORE INFORMATION ABOUT THE POTENTIAL HARMS ARISING FROM THIS TRANSACTION.

Because the Application remains incomplete and inadequate despite multiple requests for more information, the Commission should issue an RFI to the Applicants that addresses the potential harms of the transaction. Similar to past proceedings involving MVNOs,⁵² the RFI should ask the Applicants to provide the following information under the penalty of perjury (among other things):

1. Provide an organization chart and personnel directory in effect, for Verizon as a whole and for each of Verizon's facilities or divisions involved in any activity relating to any relevant product or any relevant service.
2. Provide all plans, analyses, and reports, including any documentation, methodologies, and assumptions used in any underlying models, discussing the claimed network spectrum capacity challenges and the spectrum requirements of the Verizon in these areas.
3. Provide all plans, analyses, and reports (including any surveys conducted by Verizon or a third party) discussing how customers view and value Verizon's network quality, service plans, pricing, and promotions (including local promotions), including any competitive changes as a result of service offerings by Verizon, and any contemplated or actual competitive changes to Verizon's service plans, pricing or promotions as a response to other service providers' offerings.⁵³
4. Provide all merger simulations, econometric modeling, or similar analyses, including those regarding market concentration or pricing, that have been undertaken by the Applicants or any consultant or expert hired by the Applicants to analyze the effect of the proposed transaction, including all documents and data used in these analyses.⁵⁴
5. Provide Verizon's monthly data, including data on subscribers, additions, revenues, and costs.⁵⁵
6. Provide copies of any agreements that the Applicants have entered into related to the proposed transaction.⁵⁶

⁵² See Letter to T-Mobile, Information Request, WT Docket No. 12-301, at 1 (Dec 20, 2012).

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

7. Provide an answer to the question of whether TracFone holds a domestic section 214 authorization and, if so, does it intend to transfer it? If not, what became of it following TracFone's acknowledgement during the 2013 Page Plus transaction that it held a domestic 214 authorization?

IV. THE COMMISSION SHOULD STRONGLY CONSIDER IMPOSING LIFELINE AND OTHER CONDITIONS ON THIS TRANSACTION.

Based on the potential harms to the public, the Applicants' failure to provide new evidence and information, the Applicants' vague promises about Lifeline and other issues, the pending forfeiture proceeding against TracFone, and the importance of protecting Lifeline and pre-paid customers, robust conditions are necessary to protect the public interest if the Commission ultimately approves this transaction.

The Commission has ample authority to impose such conditions. As the Commission stated, "[o]ur public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction . . . [i]ndeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."⁵⁷ In virtually every merger of the size and scale presented here, "the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission's responsibilities under the Act and related statutes."⁵⁸ If the Commission finds that narrowly tailored, transaction-specific conditions can ameliorate any public interest harms and the transaction is in the public interest, it may approve the transaction as so conditioned. But if the transaction cannot serve the public interest with any

⁵⁷ *AT&T/Cricket/Leap* ¶ 16.

⁵⁸ *Id.*

set of conditions, or if the record presents a substantial and material question of fact, then the Commission must designate the Application for hearing.

The Commission has relied on this inherent authority to protect Lifeline and other vulnerable customers. In *AT&T/Cricket/Leap*, for example, the Commission imposed conditions on AT&T's acquisition of Leap Wireless, an MVNO with a significantly smaller market share than TracFone.⁵⁹ Indeed, the Commission referred to Leap Wireless as having a "modest market presence"; yet the Commission still imposed numerous conditions on that transaction.⁶⁰ The Commission also criticized AT&T's failure to discuss how it would transition Leap's customers, including its Lifeline customers.⁶¹

The transaction was approved only after AT&T agreed to the significant conditions to protect Lifeline and value-conscious consumers. First, AT&T committed to rate freezes and other rate plan commitments. Specifically, it committed to honor existing Leap rate plans during the 18-month transition process.⁶² For 18 months following the merger's close, AT&T committed to make available a nationwide pre-paid rate plan for feature phones that includes unlimited talk (local and long distance), text, and data, in accordance with published speed policies, and no roaming charges, at a rate that would not exceed \$40/month (including all taxes and fees).⁶³ And in certain other markets, AT&T committed to, for a period of at least 12

⁵⁹ *Id.* ¶¶ 155-87.

⁶⁰ *Id.* ¶ 66.

⁶¹ *Id.* ¶ 116.

⁶² *Id.* ¶ 169.

⁶³ *Id.* ¶ 170.

months after the merger's closing, offer at least one prepaid rate plan priced below the \$40 rate plan.⁶⁴

Next, to help Lifeline and value-conscious customers, AT&T committed to offer a device trade-in credit program and a feature phone device trade-in program to certain groups of Leap customers prior to discontinuing CDMA service in a particular area, and to offer CDMA voice and data roaming consistent with applicable Commission roaming rules for so long as AT&T operates Leap's CDMA network.⁶⁵

Finally, AT&T agreed to California-specific conditions: (1) Cricket would remain an ETC in California and would continue to offer the federal Lifeline discount to existing and new Lifeline-eligible customers who reside in the geographic area served by Cricket's facilities-based CDMA network at merger closing for a period of eighteen months after merger close; (2) in any application to relinquish Cricket's ETC status in California, the effective date would be no earlier than eighteen months after merger close; and (3) every six months for the following eighteen months, AT&T California executives, including AT&T California President, would meet with public-interest stakeholders to provide updates on AT&T's commitments.⁶⁶

The Public Interest Parties ask for a similar application of the Commission's authority to impose conditions here, albeit with additional conditions due to the size and scale of the proposed transaction. These conditions will protect customers from the potential harms by holding the Applicants accountable for the supposed benefits that they argue will result from the

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 158

⁶⁶ *Id.* ¶ 11, n.39.

transaction. At a minimum, conditions (whether offered by the Applicants or demanded by the Bureau) should include the following:

- A commitment to participate in the Lifeline program for a minimum of 5 years.
- A commitment to keep customers, particularly Lifeline customers, on non-Verizon networks if that is the only way to ensure adequate quality of service for Lifeline and pre-paid customers.
- 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.⁶⁷
- A commitment to freeze existing Tracfone rates, at the same terms and conditions as they currently exist, for a minimum of 5 years following the transaction and two years for new prepaid customers.
- A commitment to maintain the existing packages available to Lifeline customers for a minimum of 5 years.⁶⁸
- A commitment to continue to market to Lifeline and pre-paid customers, including non-English speaking customers, at the same level as Tracfone does 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 prior to the closing of the transaction.⁶⁹
- Whatever other conditions the record demonstrates are necessary to protect Lifeline and other low-income pre-paid subscribers.

V. THE FULL COMMISSION, NOT THE INTERNATIONAL BUREAU, MUST REVIEW AND APPROVE THIS TRANSACTION.

This transaction is too complex and too important for approval on delegated authority.

Although the International Bureau has delegated authority to act on matters “which are minor or

⁶⁷ See *id.* ¶¶ 166-67, 173-77.

⁶⁸ See *id.* ¶¶ 169-70.

⁶⁹ See *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd. 10578, ¶ 46 (Oct. 16, 2019) (“T-Mobile-Sprint Merger Order”).

routine or settled in nature and those in which immediate action may be necessary,”⁷⁰ the Bureau cannot pass on transactions “warranting the Commission’s consideration.”⁷¹ For example, the Bureau has no authority to act on matters:

- Involving “new or novel arguments”;
- Presenting “factors or arguments which appear to justify a change in Commission policy”; or
- “Cannot be resolved under outstanding precedents and guidelines.”⁷²

While any one of these factors is enough for full Commission review, this transaction includes all three. Most notably, Verizon claims —without precedent—that this transaction will not harm Lifeline subscribers, MVNOs, and the wireless market because more than 50% of TracFone subscribers already rely on the Verizon network.⁷³ The Commission has never made such a finding, and the argument seems dubious on its face. As one example, even if Verizon’s assertions are true, the remaining subscribers unserved by Verizon are in the millions. Worse, the Commission has never dealt with an MVNO purchase this large—and in smaller instances, the acquisition of an MVNO by an MNO has undergone full Commission review.⁷⁴ While the Bureau’s technical analysis certainly remains important, this transaction represents a seismic shift in the wireless industry ultimately warranting approval from Commissioners whose authority ultimately derives from the American public.

⁷⁰ 47 C.F.R. § 0.5(c).

⁷¹ 47 C.F.R. § 0.261.

⁷² 47 C.F.R. § 0.261(b)(i)-(iii).

⁷³ See Application at 5-6; Applicants’ Response at 2 n.4.

⁷⁴ See *Order and Declaratory Ruling Approving T-Mobile, MetroPCS Applications*, 28 FCC Rcd 2322 (2013); see also AT&T/Cricket.

VI. CONCLUSION

The Commission cannot evaluate the transaction on the record presented. What little information the Applicants have made available raises serious questions about the public interest harms and ostensible public interest benefits of the transaction. Accordingly, the Commission should issue an RFI to the Applicants that addresses the significant questions and uncertainty surrounding the transaction. This measure is necessary to satisfy the Commission's public interest mandate and ensure a full review of the transaction. In addition to the RFI, the Commission should impose the conditions described above to protect Lifeline and low-income customers.

Respectfully submitted.

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December 18, 2020

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