

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Applications of T-Mobile, US, Inc. and)	GN Docket No. 24-286
United States Cellular Corporation)	
)	
For Consent to Transfer Control of Licenses,)	
Authorizations, and Leases)	

COMMENTS OF TECHFREEDOM

TechFreedom, pursuant to Sections 1.415 and 1.419 of the Commission’s rules,¹ hereby files these Comments in response to the proposed transaction between T-Mobile and United States Cellular Corporation (UScellular).² In general, TechFreedom supports the transaction, and here highlights problems with the merger review process at the FCC.

I. About TechFreedom

TechFreedom has filed comments supporting mergers and acquisitions at the FCC where market forces support consolidation.³ We have also objected to the imposition of conditions on such transactions that are not warranted.⁴

¹ 47 C.F.R. §§ 1.415 & 1.419.

² Public Notice DA 24-1115, released October 30, 2024 (“Public Notice” or “PN”). The Public Notice set the date for the filing of petitions to deny as December 9, 2024, oppositions as January 8, 2025.

³ *See, e.g.*, Joint Comments of CEI, ICLE and TechFreedom in MB Docket 15-149 (Oct. 15, 2015), http://docs.techfreedom.org/CEI_ICLE_TF_comments_charter-twc.pdf (Charter/Time Warner merger).

⁴ *See, e.g.*, Press Release, TechFreedom, FCC Uses TWC-Charter Merger to Push Unrelated Agenda (Apr. 26, 2016), <https://techfreedom.org/fcc-uses-twc-charter-merger-to-push-unrelated/> (“Regulation by extortion has long been standard operating procedure at the FCC. The FCC has held yet

II. The Parties Have Made a Strong Case for Approval

The Public Interest Statement filed by T-Mobile,⁵ the Declaration of Laurent Therivel, President and CEO, UScellular,⁶ and the study submitted by the International Center for Law and Economics (ICLE),⁷ all paint a bleak future for UScellular, and more importantly, for UScellular customers, without approval of the acquisition by T-Mobile. While the seventh largest mobile wireless service provider by subscriber count, UScellular is nonetheless a regional carrier lacking the necessary subscriber and financial resources to fund the full deployment of 5G services.⁸ Far from being a “maverick” that can disrupt even local markets,⁹ UScellular is losing the economic battle to remain solvent and relevant.¹⁰ In a

another merger hostage so it could extort the companies into ‘voluntarily’ agreeing to do things the FCC couldn’t legally require by regulation.”).

⁵ Description of Transaction, Public Interest Statement, and Related Demonstrations, filed by T-Mobile (Sept. 13, 2024), <https://www.fcc.gov/ecfs/document/109132166915081/10> [hereinafter T-Mobile Public Interest Statement].

⁶ Declaration of Laurent Therivel, President and CEO, UScellular (Sept. 13, 2024), <https://www.fcc.gov/ecfs/document/109132166915081/5> [hereinafter LT Declaration].

⁷ The Competitive Effects of the Proposed T-Mobile/UScellular Transaction [revised] (Jan. 2, 2025), <https://www.fcc.gov/ecfs/document/1010293355377/1> [hereinafter ICLE Report].

⁸ LT Declaration at 1, 10. *See also* ICLE Report at 1 (“UScellular is a struggling regional carrier with significant structural disadvantages compared to national carriers like AT&T, Verizon, and T-Mobile. Its disadvantages include a lack of economies of scale and density, high operational costs, and limited resources to keep up with the capital expenditures required for 5G deployment and other critical network upgrades. As a result of these disadvantages, UScellular has experienced declining subscriber numbers, market share, and revenue.”).

⁹ ICLE Report at 1-2 (“Given its small size, limited footprint, and uncompetitive pricing, UScellular plays no role as a ‘maverick’ disrupting the market and is unlikely to do so into the foreseeable future.”).

¹⁰ *See* LT Declaration at 18 (“The short story is: we continue to lose subscribers. The incremental revenue from growth areas is too small to offset the revenue pressure from our subscriber losses. Our most recent SLRF shows a Return on Capital that is currently [redaction in public copy] and is projected, through 2029, to improve slightly but remain well below our near-term target of

highly competitive market where natural market forces have essentially required providers to become national carriers to obtain the necessary economies of scale to roll out 5G (and beyond) services,¹¹ UScellular has little choice but to be acquired. T-Mobile is the acquiror that can provide the maximum public interest benefits, especially in rural areas.¹²

III. Festivus is a Fictional Holiday, Not an FCC Invitation to Air Grievances or Ask for Gifts

With the pleading cycle for this transaction coming at the end of the year (and with a change in administrations looming), some petitioners are treating this like Festivus,¹³ the fictitious holiday where the airing of grievances are heard.¹⁴ Others view this proceeding as

[redaction in public copy], let alone our target Weighted Average Cost of Capital of [redaction in public copy]. If the business is not returning its cost of capital, then the business cannot be sustained—let alone keep pace with the investments required to give customers the connectivity they deserve. Our competitiveness in our footprint will only decrease to the detriment of our customers and, as discussed below, there is no organic/operational/tactical path that will change that course.”).

¹¹ See ICLE Report at 8.

¹² *Id.* at 12.

¹³ See *The Origins of Festivus*, <https://festivusweb.com/origin-of-festivus.php> (last visited Jan. 6, 2025).

¹⁴ For example, the petition to deny filed by Mark O’Connor and Sara Liebman has at its core allegations of fraud perpetrated by UScellular in several FCC auctions, some dating back more than 20 years. Petition to Hold in Abeyance, Deny, or Dismiss, Applications of T-Mobile US, Inc., and United States Cellular Corporation for Consent to Transfer Control of Licenses and Authorizations, GN Docket No. 24-286 (Dec. 9, 2024), <https://www.fcc.gov/ecfs/document/1209129005618/1>. The FCC considered and rejected these claims as far back as 2009, and while O’Connor and Liebman have continued to litigate for decades, their latest attempt was rejected by a federal district court in DC in 2023, not even surviving a motion to dismiss. *United States ex rel. O’Connor and Leibman v. United States Cellular Corp, et al.*, No. 23-7041 (D.D.C. Mar. 22, 2023). It has long been FCC policy that it will not adjudicate such private claims unless sufficient evidence exists to designate the matter for hearing. *Applications of Liberty Latin America Ltd. & AT&T Inc. for Consent to the Transfer of Control of the Licenses, Authorizations, & Spectrum Lease Held by AT&T Mobility Puerto Rico Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 36 FCC Rcd. 2328, 2332-33 ¶¶ 10, 14 (2020) (“The Commission generally does not reevaluate the qualifications of transferors unless issues related to basic qualifications have been sufficiently raised in petitions to warrant designation for hearing.”).

an opportunity to ask the FCC for the gift of conditions that have little to do with the transaction, instead a wish-list of how petitioners would like the marketplace to operate. The FCC should reject these requests and deal with the fundamental merits of the transaction.

IV. Reliance on the Department of Justice and Federal Trade Commission 2023 Merger Guidelines Is Misplaced

Three of the petitions to deny rely, at least in part, on the U.S. Department of Justice and Federal Trade Commission 2023 Merger Guidelines to argue for denial or imposition of conditions. The Communications Workers of America (CWA), for example, cite the 2023 Merger Guidelines some 29 times, arguing that the FCC should consider “wages, non-wage compensation, working conditions, the individualized needs of workers in the market in question, the frictions involved in changing jobs, and the industry in which they work.”¹⁵ CCIA cites the 2023 Merger Guidelines to claim that “a transaction that eliminates a direct competitor may be considered anticompetitive if competition is substantially eliminated or the risk of coordination would be meaningfully increased.”¹⁶ Public Knowledge relies on the 2023 Merger Guidelines for the proposition that the “failing firm” defense is narrow.

The 2023 Merger Guidelines represent a radical departure from traditional antitrust orthodoxy, dating back to the 1992 Horizontal Merger Guidelines,¹⁷ reaffirmed in the 2010

¹⁵ Petition to Deny of the Communications Workers of American, 1, <https://www.fcc.gov/ecfs/document/120973502037/1> (quoting U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines 34 (Dec. 18, 2023)).

¹⁶ Comments of the Computer and Communications Industry Association (CCIA), 2, <https://www.fcc.gov/ecfs/document/1209008422186/1>.

¹⁷ U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines (1992), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf>.

Horizontal Merger Guidelines.¹⁸ TechFreedom noted the abandonment of traditional notions of antitrust analysis in favor of protecting market structures, competitors rather than competition, and labor markets in comments filed with the Department of Justice and the FTC.¹⁹ Reaction to this departure from antitrust norms was swift and widespread.²⁰

As it relates to the petitions cited above, the antitrust agencies rarely allege harm to markets for labor or workers in merger matters, because such markets almost always will be significantly broader than the market for product or services provided by the merging parties, and thus not likely to be affected by the merger. For example, in the FTC's recent challenge to Kroger's acquisition of Albertsons, the district court accepted the FTC's argument that the merger would lead to possible anticompetitive harm in the "supermarkets" market. However, the court also found that the FTC "[has] not presented

¹⁸ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Guidelines], <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

¹⁹ Comments of TechFreedom on Draft Merger Guidelines, FTC-2023-0043 (Sept. 18, 2023), <https://techfreedom.org/wp-content/uploads/2023/09/Bilal-Sayyed-Merger-Guidelines-Comments-9-18-2023.pdf>.

²⁰ See, e.g., JAY B. SYKES, CONG. RESEARCH SERV., LSB11138, THE 2023 MERGER GUIDELINES: ANALYSIS AND ISSUES FOR CONGRESS 2 (Mar. 28, 2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11138>, ("This is a meaningful departure from the 2010 HMGs, which downplayed the significance of structural factors relative to previous guidelines. To the extent that the new Guidelines prioritize deconcentration over economic welfare, they also diverge from how courts have construed the Sherman Act, which the Supreme Court has characterized as a 'consumer welfare prescription.'"); Michael A. Salinger, *The 2023 Merger Guidelines and the Role of Economics*, 65 REVIEW OF INDUSTRIAL ORGANIZATION 243, 243 (2024) <https://link.springer.com/article/10.1007/s11151-024-09957-x> ("the 2023 Merger Guidelines argue for a fundamental shift in antitrust enforcement that places more emphasis on protecting competitors and less on protecting the beneficiaries of competition."); Steven C. Sunshine et al., *DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook*, SKADDEN (Dec. 21, 2023), <https://www.skadden.com/insights/publications/2023/12/doj-and-ftc-release-final-2023-merger-guidelines>; Ted Bolema, *Decoding the 2023 FTC & DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement*, MERCATUS CENTER (Feb. 15, 2024), <https://www.mercatus.org/research/policy-briefs/decoding-2023-ftc-and-doj-merger-guidelines-insights-shifting-antitrust>.

sufficient evidence to establish a prima facie case that the proposed merger will substantially lessen competition for union grocery labor.”²¹ Moreover, while the FCC may be the expert agency when it comes to telecommunications markets, it lacks the expertise necessary to understand and assess labor markets as part of its merger review process. It should not accept the invitation to review markets it does not understand.

As it relates to Public Knowledge’s claim that the 2023 Merger Guidelines somehow narrowed the definition of “failing firm,” in early 2024, a district court enjoined the proposed merger of Jet Blue and Spirit Airlines.²² The court recognized that Spirit Airlines had “cumulative operational and financial challenges” and, in response to these challenges, was abandoning routes and otherwise curtailing service.²³ Notwithstanding these current difficulties and no apparent prediction of when Spirit would again be profitable, and rejecting the merging parties claims of future efficiencies associated with the merger, the court enjoined the merger. In November of 2024 – less than a year after the court enjoined the merger – Spirit Airlines filed for bankruptcy.²⁴

Ultimately, in addition to these guidelines having no force of law, it is highly likely that the new administration will revisit, possibly rescind, or highly revise the 2023 Merger

²¹ Fed. Trade Comm’n v. Kroger Co. & Albertsons Co., 2024 U.S. Dist. Lexis 223077, *137-38 (D. Oregon, Dec. 12, 2024).

²² United States v. Jet Blue Airways Corp., 712 F. Supp. 3d 109 (D. Mass. 2024).

²³ *Id.* at 131.

²⁴ Spirit Airlines, Form 8-K (Nov. 18, 2024), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001498710/1faeff84-3a37-4b0f-b427-6875f2315ca4.pdf> (discussing filing of chapter 11 petition).

Guidelines.²⁵ The FCC, in analyzing this transaction, therefore, should not stray from its traditional analysis (discussed below), in favor of the outgoing administration’s soon-to-be short-lived dalliance with “hipster antitrust.”²⁶

V. The FCC Should Resist the Temptation to Layer on Conditions That Having Nothing to do with Demonstrated Harms

Returning to our holiday theme, petitioners and commenters come seeking gifts from the FCC in the form of a variety of conditions in exchange for approving the transaction.²⁷ Yet most, if not all, of these requested conditions would not remedy demonstrated public harms caused by the transaction, but rather would appease petitioners’ desires to manipulate the way natural market forces work in ways they don’t like.

²⁵ See, e.g., Michael A. Salinger, *The 2023 Merger Guidelines and the Role of Economics*, 65 REVIEW OF INDUSTRIAL ORGANIZATION 243 (2024), <https://www.wsgr.com/en/insights/whither-antitrust-enforcement-under-trump-20.html> (“We expect that a new administration will revisit the 2023 Merger Guidelines, either by issuing revisions, replacing them altogether with Guidelines more consistent with the 2010 Merger Guidelines and their forebears, or by making policy statements that suggest they will not enforce some of the more controversial aspects of the Guidelines.”); *Antitrust Enforcement in Trump’s Second Term*, LEXOLOGY (Nov. 18, 2024), <https://www.lexology.com/library/detail.aspx?g=a312f457-6601-4db5-87fe-a035610a4377> (“a Republican-led FTC will likely roll back many of Chair Khan’s initiatives, such as the FTC’s Section 5 statement on unfair competition and the non-compete rulemaking. It is also likely that the 2023 DOJ and FTC merger guidelines could be abandoned or altered.”).

²⁶ See Daniel Francis, *After Neo-Brandeis*, PROMARKET (Nov. 25, 2024), <https://www.promarket.org/2024/11/25/after-neo-brandeis/>.

²⁷ See, e.g., Comments of the Rural Wireless Association (RWA), 16-21 <https://www.fcc.gov/ecfs/document/1209925623915/1> (seeking five sets of conditions ranging from reallocating legacy mobile high-cost support to requiring T-Mobile to unlock customer handsets); Petition of Public Knowledge, 14-15 (“impose an unlocking requirement, maintain a service speed threshold, commit to pro-labor policies, require that traffic is treated open and fairly, carry over or recoup legacy funding for 5G support, and ensure that customers have access to the Lifeline program.”); Comments of Red Zone Wireless, LLC, <https://www.fcc.gov/ecfs/document/1209154095262/1> (requesting a condition on the grant that T-Mobile abide by the field strength limitations set forth for the 2.5 GHz spectrum in Section 27.55(a)).

TechFreedom has consistently warned against such conditions, which create three distinct harms to the market: (1) Conditions force merging parties to accept additional costs on the transactions based on bureaucratic whim;²⁸ (2) the review process allows competitors to saddle competitors with onerous conditions in “moat building” exercises;²⁹ and (3) conditions allow the Commission to create de facto regulations without going through the normal notice and comment rulemaking procedures required by the Administrative Procedure Act.³⁰ All three ultimately harm, not enhance, competition, and all three of these harms ultimately land at the feet of consumers who must bear the additional costs imposed by these conditions and the merger review that generates them.

A. The FCC’s Standard of Review in Mergers and Acquisitions

It is important for the FCC to adhere to the stated process for M&A review. That process first considers whether the transaction complies with the specific provisions of the Communications Act.³¹ Next, the FCC must determine whether the transaction poses significant public interest harms.³² If such harms are demonstrated, the Commission may then impose “narrowly tailored, transaction specific conditions” that specifically address

²⁸ See *supra* note 3 at 6-9.

²⁹ *Id.*

³⁰ Administrative Procedure Act, 5 U.S.C. § 555 (2006). See also Comments of TechFreedom and ICLE in GN Docket 14-28, 102-03 (July 17, 2014), https://laweconcenter.org/wp-content/uploads/2017/08/tf-icle_nn_legal_comments.pdf (“We believe it is inappropriate for the FCC to use merger conditions as a means of circumventing the normal rulemaking process, and that merger conditions should be imposed only to address harms specific to a merger.”).

³¹ Applications of Liberty Latin America Ltd. & AT&T Inc. for Consent to the Transfer of Control of the Licenses, Authorizations, & Spectrum Lease Held by AT&T Mobility Puerto Rico Inc., Memorandum Opinion and Order and Declaratory Ruling ¶ 9, 36 FCC Rcd. 2328, 2332-33 (2020).

³² *Id.* ¶ 10.

those harms.³³ It then considers the public interest benefits, including “the clear public interest benefits in a license or authorization holder being able to assign or transfer control of its license or authorization freely.”³⁴ That is how the process is *supposed* to work.

B. Conditions Should be Imposed Only to Correct Documented Harms, Not Force Market Corrections the FCC Deems Appropriate

Unfortunately, what happens in so many M&A reviews is that the Commission then decides what *it* wants to get out of the transaction – conditions that it concludes would enhance the public interest benefits of the transaction. Make no mistake, the agency usually couches the conditions in allegations of harm, but in actuality, it is substituting its judgement as to what would have made the transaction better. Knowing this, public interest groups and competitors line up with their list of grievances and seek gifts from the Commission. This practice is particularly pernicious when the conditions sought are already subject to pending rulemaking proceedings. Such is the case with the request for conditions by PK and RWA, seeking to require T-Mobile to unlock consumer handsets.³⁵ That issue is currently teed up in Docket 24-186.³⁶ Unilaterally imposing such a requirement on T-Mobile would completely undercut the APA process.

Similarly, mandating that a party agree to conditions that go beyond the current rule requirements represents bad governance. For example, if the transaction meets the current

³³ *Id.* (citing T-Mobile-Sprint Order ¶ 40, 34 FCC Rcd at 10595).

³⁴ *Id.* ¶ 11.

³⁵ See PK Petition, *supra* note 17, at 14; RWA Comments, *supra* note 27, at 21.

³⁶ Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies, WT Docket No. 24-186, Notice of Proposed Rulemaking (July 19, 2024), <https://docs.fcc.gov/public/attachments/FCC-24-77A1.pdf/>

spectrum holding and spectrum screen requirements, the Commission should not effectively change those rules for these licenses as a license condition. Finally, conditioning approval of a transaction on a substantive adjudication of private disputes,³⁷ even if that pending dispute involves interference issues (fundamental to the FCC's statutory authority),³⁸ diverts the analysis away from core antitrust and public interest principles and turns it into a resolution of intramural private party disputes. That *should* not be the function of the M&A review process.

VI. Conclusion

T-Mobile and UScellular have made a strong case that the acquisition will enhance competition and bring strong consumer benefits, especially to rural America. The Commission should resist the urge to tinker with the transaction by attempting to extract concessions through conditions that do not directly relate to documented harms.

Respectfully submitted,

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³⁷ See *supra* note 14.

³⁸ See *supra* note 27.