

May 3, 2021

Jessica Rosenworcel
Acting Chairwoman
Federal Communications Commission
45 L St., NE
Washington, DC 20036

Dear Acting Chairwoman Rosenworcel:

The undersigned organizations (Collectively, “Public Interest Spectrum Coalition” or “PISC”)¹ write to express our concern with regard to the potential impact of the shutdown by T-Mobile of its 3G CDMA network relied upon by DISH to provide voice and text service for millions of prepaid wireless customers subscribed to Boost Mobile, and roaming to other, unaffiliated rural carriers.² Rather than consider this exclusively as a question of enforcing merger conditions, as framed by the parties, we urge the Commission also to exercise its general authority under Section 201(b)³ and its general authority under Title II, Title III and other relevant provisions⁴ to protect Boost and rural carrier subscribers from disruption and potential loss of service. As explained below, this is a separate matter from determining the issue disputed between DISH and T-Mobile on the meaning of the merger conditions and resolution of their contractual dispute. Rather, we urge the Commission to require both licensees to work together to establish a reasonable transition schedule that allows T-Mobile efficiently to re-farm valuable spectrum for 5G services while simultaneously protecting subscribers and promoting competition.

The PISC observes that this current flashpoint is likely only the first dispute to come before the Commission as a consequence of the ongoing efforts by carriers to sunset their 2G and 3G networks.⁵ To be clear, the undersigned generally welcome the benefits that will accompany

¹ The Public Interest Spectrum Coalition (PISC) is an unincorporated *ad hoc* coalition of non-commercial public interest organizations. Specific organizations signing on to this letter are listed at the end.

² The Rural Wireless Association, a PISC member, has reported that its rural wireless carrier members are also impacted by T-Mobile’s current shut down of Sprint’s CDMA network, as described below.

³ 47 U.S.C. §201(b).

⁴ *See, e.g.*, 47 U.S.C. §151 (responsibility to ensure service to all citizens of the United States).

⁵ The recent Tech Transition proceeding and the previous Analog Sunset offer a guide to the types of conflicts that may emerge. Competitors who rely on 3G roaming may have objections, alarm services and others that rely on 2G or 3G wireless may have difficulty transitioning -- especially in light of COVID. No matter how diligently carriers reach out to their customers, consumers may dismiss carrier outreach as typical advertising rather than notice of a genuine

a well-executed “2G/3G Sunset.” Phasing out obsolete networks and repurposing the spectrum will provide significant public interest benefits to the public. At the same time, as with past transitions, the Commission has primary responsibility to ensure that the transition serves the public interest and to protect vulnerable stakeholders. The Commission would do well to consider how best to monitor the ongoing carrier efforts, and what stakeholder outreach may be necessary to facilitate a smooth transition to the benefit of all Americans.⁶

T-Mobile’s Shut-Off of Its CDMA Network Will Bring Public Interest Benefits in the Long Run, But Must Not Harm Vulnerable Customers or Undermine Competition.

DISH accuses T-Mobile of engaging in deliberate anticompetitive practices aimed at hobbling DISH’s efforts to compete as a national mobile provider.⁷ T-Mobile responds that its decision to shut down its 3G CDMA network is part of a broader initiative by the wireless industry generally to shut down increasingly obsolete 2G and 3G networks and repurpose this spectrum for 5G.⁸ While freely acknowledging the benefits cited by T-Mobile, the Commission cannot allow these benefits to come at the cost of the fundamental values that have consistently guided the Commission’s actions in each technology transition: universal service, consumer protection, competition and public safety.⁹ Commission action here does not require a finding that T-Mobile is acting for the express purpose of sabotaging DISH’s competitive entry. Rather, a review of the current reality, shaped by the equipment shortages and other difficulties created by the COVID pandemic, reveals that the Commission must mediate between T-Mobile and DISH to protect these fundamental values.

need to change equipment. Ultimately, the Commission may need to impose an official deadline, as it did in the 2G Analog Sunset.

⁶ To be clear, PISC does not mean to suggest that the Commission must initiate a formal process at this time. But the Commission has a responsibility to remain informed on matters under its jurisdiction. Additionally, PISC anticipate that, as with the DTV Transition, the Analog Sunset, and other significant industry wide changes, the Commission will need to play an important role in educating the public and facilitating coordination among carriers and other stakeholders. This is especially the case where, as here, there is a significant public safety concern raised by the prospect of millions of consumers losing service.

⁷ See Letter from Jeffrey Blum to Acting Chairwoman Jessica Rosenworcel, Applications of T-Mobile USA, Inc. and Sprint Corporation for Consent to Transfer Licenses and Authorizations, WT Docket No. 18-197 (April 14, 2021) (“DISH April 14 Letter”). Letter from Jeffrey Blum, DISH, to Marlene H. Dortch, FCC, *Facilitating Shared Use in the 3100-3550 MHz Band*, WT Docket No. 19-348, at 5-6 (April 1, 2021). (“DISH April 1 Letter”).

⁸ See Letter from Kathleen O’Brien Ham, Senior Vice President Government Affairs, T-Mobile USA, Inc. to Acting Chairwoman Jessica Rosenworcel, *Facilitating Shared Use in the 3100-3550 MHz Band*, WT Docket No. 19-348 (April 11, 2020) (“T-Mo April 11 Letter”).

⁹ See *In re Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, et al. Order, Report and Order, and Further Notice of Proposed Rulemaking*, GN Dockets 13-05, 12-353, et al. 29 FCC Rcd 1433, 1446-59.

Setting aside allegations in regard to motivations and various accusations of supposed mismanagement or misconduct, the filings of both parties reflect a fairly consistent view of the history. As part of the purchase of Sprint, the Department of Justice (DOJ) required T-Mobile/Sprint to sell Boost to DISH and agree to other conditions to facilitate DISH's entry into the broader mobile market as a significant fourth national carrier.¹⁰ Although the Commission did not incorporate the conditions imposed by the DOJ consent decree as conditions of the license transfer, the Commission noted the value of DISH offering nationwide 5G service and modified multiple DISH licenses to allow DISH time to build its own facilities-based, 5G network.¹¹ Today, Boost has approximately 9 million subscribers, nearly all of whom purchase low-cost prepaid plans in accordance with Boost's previous marketing and business plan.

At this point, the parties' narratives sharply diverge. DISH states that between 4-5 million of these customers are currently on T-Mobile's CDMA network.¹² DISH states that many of these CDMA-reliant customers own older equipment that cannot connect to LTE networks without modification or creation of a new network interface. These customers cannot be migrated to either T-Mobile's or DISH's more advanced networks without significant consumer education, effort and expense. Even using its best efforts, DISH argues, it is unclear how many customers may be impacted if T-Mobile shuts off its CDMA network on December 31, 2021.

T-Mobile, in its April 11 letter, disputes DISH's description of the current state of facts. T-Mobile argues that relatively few customers will be impacted, and that DISH should have no difficulty providing needed handsets to its customers in a timely manner. Similarly, the companies disagree is over who is responsible for the current state of affairs and who has the legal responsibility to fix it. Both T-Mobile and DISH point to past statements and agreements they consider dispositive, and cast aspersions on each other's behavior. DISH argues that T-Mobile made repeated statements that it would maintain its CDMA network for at least 3 years after closing the sale of Boost to DISH. As this did not take place until July 1, 2020, DISH argues that T-Mobile must continue to operate its CDMA network until at least July 2023. T-Mobile replies that the contract DISH negotiated (under the auspices of the DOJ) merely requires T-Mobile to provide at least 6 months' notice before shutting down the CDMA network, and that DISH agreed to bear the cost of transitioning its customers. T-Mobile also argues that extending

¹⁰ See *Applications of T-Mobile US, Inc., and Sprint Corporation, For Consent To Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, 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*, ULS File Nos. 0008741236, 0008741420, 0008741603, and 0008741789 et al., WT Docket No. 18-197, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578, 10739-10745 (2019) (“*TMO-Sprint Merger Order*”).

¹¹ *Id.*

¹² DISH April 14 Letter.

the CDMA network life for 3 years will interfere with T-Mobile's own commitments under the merger agreement to upgrade its networks, diverting valuable capital and other resources from 5G deployment.

These disputed facts have relevance to the question of who should compensate whom, but they do not bear on the most critical questions before the Commission: To what extent (if any) will T-Mobile's planned shutdown of its CDMA network on January 1, 2022, disrupt communications for Boost customers, and if so for how many? Will this impact fall disproportionately on vulnerable low-income stakeholders? Will this significantly undermine DISH's ability to become a significant fourth national competitor? If the answer to these questions is "yes," the next question that arises is how to prevent this disruption from happening. Any solution should consider what steps *both* licensees can do to prevent any service disruption. PISC emphasizes that, even if there had been no merger, and this were simply a dispute concerning an existing MVNO agreement, the Commission would have the responsibility to assess whether it must take action to avert hardship to Boost's customers from a premature transition which lacks adequate consumer education provisions.

Furthermore, the impact of T-Mobile's scheduled shut down has already had disruptive impacts outside the T-Mo/DISH/Boost networks. Rural Wireless Association members report that T-Mobile's ongoing shut down of portions of the CDMA network that is now in process has already prevented the ability of rural customers to roam when they leave their home networks. Because they are unable to connect to a network, these roaming customers cannot make 911 calls, other emergency related calls or participate in the Wireless Emergency Alert system – a clear public safety issue. The Commission must inform itself and consider these potential impacts as well.

Only the Commission Can Determine the True State of Affairs.

PISC stresses that the responsibility of the Commission to assert jurisdiction over the situation, evaluate the potential harm to the public interest, and, if necessary, take appropriate action, does not dictate any specific result. To the contrary, the first responsibility of the Commission in this instance is to *fully inform itself of the situation for the purpose of determining whether it must take action to protect subscribers and to advance the public interest*. Neither T-Mobile nor DISH can accurately assess the situation with regard to a rival's network operation, or with regard to the other's ability to obtain needed equipment and manage customer relationships. It may be that T-Mobile is correct that DISH could do more, for example, but that it still would not be enough to prevent disruption for a significant number of customers. Alternatively, the Commission may find that DISH may need only an additional month or two to completely transition its customers, not three years. Finally, only the Commission can accurately determine an accurate number of other rural network operators actually and potentially impacted

by the T-Mobile CDMA shut down, and whether protecting their customers requires any additional action. Only once the Commission has command of the facts can it responsibly take whatever action is necessary to protect potentially impacted customers.

In considering what action may be necessary, PISC urges the Commission to balance the following: (1) the reality of equipment shortages and general disruption in the ability to communicate with and upgrade customers as a result of the pandemic and the recent shut down of the Suez canal, and how these impact the ability to migrate customers;¹³ (2) that the majority of Boost customers are particularly vulnerable low-income and Lifeline recipients;¹⁴ (3) the value to the public of shutting down Sprint's increasingly obsolete and expensive to maintain network so that T-Mobile may repurpose these resources for 5G deployment; (4) the importance of protecting customers on other networks dependent on CDMA roaming, and, (5) the importance of restoring four-firm national competition to the mobile market, without undermining T-Mobile's ability to compete with Verizon and AT&T.

The Commission Should Require DISH and T-Mobile to Negotiate a Reasonable Transition Schedule in Light of Covid-19 and the Public Interest in Efficient Spectrum Management.

In creating the Commission, Congress gave it the power to ensure that in situations such as this, members of the public do not find their access to vital services at the mercy of the commercial marketplace. Ideally, the Commission can resolve the situation by forcing the parties to work together. The Commission is uniquely situated to mediate the dispute between the parties rather than arbitrate. The Commission can, and should, require the licensees to come together to negotiate a schedule that reflects the realities faced by both network operators and the real world constraints imposed by the pandemic and pandemic-related equipment and labor shortages. The Commission is uniquely situated to require the parties to share information with Commission staff while protecting highly confidential and proprietary information from commercial rivals.

Hopefully, the Commission's actions as an "honest broker" can bring the parties together on an understandably contentious issue. Indeed, without such action by the Commission, there appears little hope that the licensees can resolve their differences in a way that adequately protects Boost's customers and otherwise protects the public interest. As the Commission has recognized since the beginning of the pandemic and its outreach to ISPs, all providers have an obligation to work together in this time of national crisis to protect affordable access to communications – particularly for the poorest and most vulnerable.

¹³ Indeed, because of concerns about supply chains in general and silicon chips in particular, President Biden has issued an Executive Order to assess the problem and to adopt long term solutions. Executive Order 14017, 86 Fed. Reg. 11849 (March 1, 2021).

¹⁴ See *TMO-Sprint Merger Order*, 34 FCC Rcd at 10729-31.

Additionally, the Commission is uniquely situated to help secure information or help from third party stakeholders. For example, the Commission is in the position to ask equipment manufacturers for assessments as to the impact of events such as a potential next wave of Covid infections or the lingering effects on availability from the temporary closing of the Suez Canal. Even if DISH is correct that these shortages raise issues, the Commission may be able to expedite matters. In short, the Commission can reasonably hope to resolve the situation without the need to take direct regulatory action – in a manner that is fair to both network operators.

The Commission Has Clear Authority to Protect Vulnerable Subscribers Without Regard to the Merger Order or Other Conditions.

Although PISC hopes that the Commission can resolve this situation by bringing the parties together, PISC recognizes that the Commission may ultimately need to exercise regulatory authority over the parties – or even over other relevant stakeholders – to protect subscribers. PISC therefore observes that the Commission’s authority here does not hinge exclusively on whether or not the Commission imposed relevant merger conditions on the T-Mobile/Sprint transaction and associated DISH license modification.

T-Mobile’s CDMA network is a Title II CMRS network. The services at issue are largely traditional Title II voice service – including 911 access.¹⁵ Voice roaming and wholesale voice are also Title II services.¹⁶ Because the Commission forbore from applying any market entry or exit requirements to CMRS services when implementing Section 332(c),¹⁷ T-Mobile does not need permission to shut down its network under Section 214(c).¹⁸ That does not mean that the Commission has relinquished its authority to act if necessary; the Commission retains authority over the network pursuant to Section 201(b), which prohibits any unjust or unreasonable practice by a Title II provider. Likewise, the Commission exercises the same Title II authority over Boost’s provision of Title II CMRS service. In addition to this expansive Section 201(b) authority, the Commission exercises broad regulatory authority over these wireless network providers pursuant to Title III. Finally, courts have long recognized the Commission’s general

¹⁵ PISC recognizes that the Commission reclassified mobile broadband as a Title I service in 2017, and reclassified text messaging services as Title I in 2018. Setting aside whether these decisions are correct, the Commission has clear Title II authority over the CMRS CDMA network pursuant to 47 U.S.C. § 332(c).

¹⁶ See *Re-Examination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report & Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

¹⁷ See *In re Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Report & Order*, 9 FCC Rcd 1411, 1415 (1994).

¹⁸ 47 U.S.C. § 214(c).

authority under Sections 1 and 4(i)¹⁹ to take necessary action to protect consumers from loss of vital services.²⁰

Again, PISC hopes that the Commission will not need to exercise its full regulatory powers to protect Boost's customers from disruption of service. But the Commission and the parties should recall that the Commission is not powerless here, or dependent on whether or not the Commission's previous merger order addressed this contingency. Congress conferred upon the Commission comprehensive powers of oversight to protect the fundamental values of the Communications Act. The Commission must not hesitate to use these powers when the situation requires.

Conclusion

The sunset of aging 2G/3G networks, like the Analog Sunset and other industry-wide transitions before it, has the potential to bring enormous benefits to the public. Also like the transitions before it, it will require the FCC to ensure that the transition does not result in unintended consumer harms. The current dispute between T-Mobile and DISH, and collateral impact on Rural Wireless Association members, illustrates why Congress created the Commission and invested it with broad powers to protect and promote the public interest.

¹⁹ 47 U.S.C. §§ 151, 154(i).

²⁰ See generally *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (power to create universal service fund pursuant to ancillary authority).

We urge the Commission to assert its authority over the current dispute and require the parties to negotiate a fair and practical plan to migrate Boost customers off of T-Mobile's CDMA network.

Sincerely,

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²¹ Benton, a non-profit, operating foundation, believes that communication policy – rooted in the values of access, equity, and diversity - has the power to deliver new opportunities and strengthen communities to bridge our divides. Our goal is to bring open, affordable, high-capacity and competitive broadband to all people in the U.S. to ensure a thriving democracy. These comments reflect the institutional view of the Benton Institute for Broadband & Society, and, unless obvious from the text, is not intended to reflect the views of its individual officers, directors, or advisors.