

Congress of the United States
Washington, DC 20510

March 6, 2020

Makan Delrahim
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Assistant Attorney General Delrahim:

We write to express serious concerns about reports that you encouraged Dish Network Corporation's (Dish) Chairman to urge members of the Senate to contact the Chairman of the Federal Communications Commission (FCC) regarding its review of the proposed merger of T-Mobile US, Inc. (T-Mobile) and Sprint Corporation (Sprint).¹

As you know, the proposed T-Mobile/Sprint merger has raised significant antitrust concerns for many in Congress and for the public. Over the last two years, we have held hearings before the Senate and House Antitrust Subcommittees and sent letters to you and FCC Chairman Ajit Pai detailing our concerns with the transaction's likely harmful effects on wireless competition and consumers. Unfortunately, the Division chose not to challenge this acquisition in court, opting to negotiate a consent decree with the parties, designating Dish—a satellite television provider with no existing wireless business—as a divestiture buyer to replace Sprint in the wireless marketplace. Yet considerable doubts have been raised about whether the proposed remedy will cure the anticompetitive effects of this merger.

Recent reports have raised additional concerns as to whether the public can trust that the decisions of key executive branch officials in this case were based on an impartial assessment of the law and the facts. According to these reports, your text messages to Dish Chairman Charlie Ergen were entered into evidence by the state attorneys general seeking to block the merger in federal court. Of particular concern is your June 10, 2019 text to Ergen, advising "Today would be a good day to have your Senator friends contact the chairman[,]" referring to FCC Chairman Pai. Ergen later texted you to confirm that he had called lawmakers. In court, Ergen also testified that he had discussed the merger with two Republican Senators.

It is particularly troubling that these communications focused on an issue of such critical importance to the outcome in this matter, Dish's ability to operate as a facilities-based wireless provider capable of replacing the competition that would be lost by the elimination of Sprint as an independent company. Many legitimate questions have been raised about Dish's ability to become a viable, independent wireless competitor. "As a result of these divestitures, Dish will

¹ See, e.g., Erik Larson, "Texts Show DOJ Effort to Enlist Senators in T-Mobile Deal," Bloomberg (Dec. 18, 2019) at <https://www.bloomberg.com/news/articles/2019-12-18/doj-antitrust-head-told-dish-to-enlist-senators-in-t-mobile-deal>; Katie Benner & Cecilia Kang, "How a Top Antitrust Official Helped T-Mobile and Sprint Merge," N.Y. Times (Dec. 19, 2019) at <https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html>.

have only 2.5 percent of all wireless subscribers in the United States,”² compared to Sprint’s 12.6 percent,³ and Dish “will lack important qualities that matter to wireless customers, such as nationwide coverage, a track record for effectively serving customers across the country, and the scale necessary to ensure a broad mix of services and devices.”⁴ Commenters in the D.C. federal court proceeding to review the consent decree have noted, “Dish is not likely to ever be able to replace Sprint,” because “Dish would be starting from scratch with significant debt, no network infrastructure or wireless experience, in a business that the DOJ characterizes as having ‘high barriers to entry.’”⁵ These factors raise serious doubts about the effectiveness of the proposed remedy. That is why we were supportive of the efforts of numerous state attorneys general to block the transaction and are disappointed by the New York federal court’s recent decision to allow the transaction to proceed.

Law enforcement and regulatory decisions must be based on an objective assessment of the law and the facts, not on political pressure applied by one federal agency against another by way of private sector proxies. The Antitrust Division should focus on vigorous antitrust enforcement, not providing lobbying advice to private parties to influence the regulatory processes of other federal agencies.

Accordingly, we request that you provide answers to the following questions in writing by Monday, April 6, 2020.

- Why did you urge Dish’s Chairman to contact Senators on June 10, 2019?
- In your view, is it appropriate for Justice Department officials to advise or urge private parties to communicate with, lobby, or make representations to members of Congress for any reason? If yes, under what circumstances would it be appropriate?
- Are you aware of any other instances in which Justice Department officials advised or urged private parties to communicate with, lobby, or make representations to members of Congress for any reason? If yes, please describe the circumstances surrounding each of those instances.
- Was your June 10 text consistent with existing Justice Department or other executive branch policies?
- Are you aware of any existing Department or Division policies that relate to directing, requesting, or urging a private party to communicate with, lobby, or make representations to members of Congress? If yes, please describe them.

² 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*, WT Docket No. 18-197, Statement of Commissioner Jessica Rosenworcel, 34 FCC Rcd 10578, 10865 (2019) (“Commissioner Rosenworcel Dissent”).

³ Communications Marketplace Report, *The State of Mobile Wireless Competition*, et al, *Report*, GN Docket No. 18-231, WT Docket No. 18-203, et al, 33 FCC Rcd 12558, 12563-12565 ¶ 9, Fig. A-3 (2018).

⁴ Commissioner Rosenworcel Dissent at 10867.

⁵ See, e.g., Nicholas Economides et al., *Economists’ Tunney Act Comments on the DOJ’s Proposed Remedy in the Sprint/T-Mobile Merger Proceeding 12*, <https://www.justice.gov/atr/page/file/1214781/download> (citing Department of Justice Complaint, *U.S. et al v. Deutsche Telekom AG, T-Mobile US, Inc., Softbank Group Corp., and Sprint Corp.*, No. 1:19-cv-02232, at 8 ¶ 23 (D.D.C. Jul. 26, 2019) Case 1:19-cv-02232, July 26, 2019).

- Will you commit to reviewing the adequacy of existing Department and Division policies that relate to directing, requesting, or urging a private party to communicate with, lobby, or make representations to members of Congress?

In addition, we request that you submit all documents and communications, including text messages, voicemails, and e-mails, referring or relating to any Justice Department official advising or urging a private party to communicate with, lobby, or make representations to a member of Congress with respect to the proposed T-Mobile/Sprint merger to us by Monday, April 6, 2020.

Thank you for your prompt attention to this request.

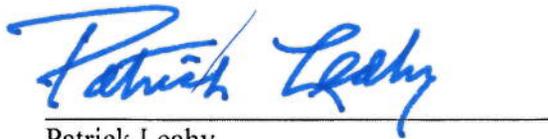
Sincerely,



Amy Klobuchar
United States Senator
Ranking Member
Senate Subcommittee on Antitrust,
Competition Policy and Consumer Rights



David N. Cicilline
Member of Congress
Chairman
House Subcommittee on Antitrust,
Commercial and Administrative Law



Patrick Leahy
United States Senator



Pramila Jayapal
Member of Congress



Richard Blumenthal
United States Senator



Val B. Demings
Member of Congress



Cory A. Booker
United States Senator



Lucy McBath
Member of Congress

Copy to: Chairman Mike Lee, Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights
Ranking Member Jim Sensenbrenner, House Subcommittee on Antitrust, Commercial and Administrative Law