



April 4, 2022

Re: Request for Information on Merger Enforcement
Federal Trade Commission and Department of Justice
Docket No. FTC-2022-0003

I. Introduction

The Communications Workers of America (CWA) submits these comments to the Federal Trade Commission (FTC) and Department of Justice (DOJ) in response to the request for comment on how the agencies can modernize enforcement of the antitrust laws regarding mergers.¹ As economists and regulators have increasingly recognized, fairness in labor market competition matters deeply to overall economic prosperity. Merger review is one critical intervention point to address abusive dominance by corporations over workers and the crisis of inequality in our economy. We offer a retrospective on the T-Mobile-Sprint merger as one example of courts interpreting the narrow consumer welfare standard to permit mergers that are per se illegal under statute, causing serious harm to workers, consumers, and small businesses in the process. We then summarize key principles for revision of the guidelines to address labor market impacts and suggest conditions to remediate harm where merger review does not result in a structural remedy and therefore a consent decree is imposed.

II. Communications Workers of America

The Communications Workers of America represents working people in telecommunications, customer service, media, airlines, health care, public service and education, manufacturing, tech, and other fields. CWA has long advocated for workers' rights to be considered as part of merger review and antitrust enforcement, ranging from the 1980s break-up of AT&T to the merger of T-Mobile and Sprint in 2020, discussed below.

During the divestiture of AT&T and the Bell System in the early 1980s, CWA requested the court consider measures to preserve "continued national bargaining in telecommunications following the reorganization of AT&T," but in its Tunney Act opinion the court found no need to address

¹ Press release, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers," January 18, 2022.
<https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

labor market impacts, despite CWA's three decade fight to establish national bargaining in the national telecommunications market.² The result was elimination of 200,000 jobs in the decade following divestiture and decimation of union representation in the long distance market, with union density at AT&T falling from 62 to 25 percent from 1984 to 1995 as the company cut union jobs, moved many technical jobs out of the bargaining unit, and walled off acquisitions and new subsidiaries from union representation.³ Here, divestiture was part and parcel of a larger deregulatory shift.⁴ As retired CWA Telecom Policy Director Debbie Goldman writes, "it was policymakers' faith in neoliberal ideology that grounded their decision to abandon New Deal era public oversight of infrastructure industries, including telecommunications, in favor of deregulation and free market competition."⁵

This prologue to the current era of corporate concentration demonstrates that antitrust enforcement has failed to consider worker impacts, circumscribing the conception of competitive and *fair* markets, and even view job cuts as positive merger efficiencies. Cases like the AT&T divestiture helped enshrine efficiency and the consumer welfare standard as touchstones of antitrust analysis. Permissive merger review has since become our default, despite a deep disconnect with Congressional intent underlying the Clayton Antitrust Act and its amendments that sought to limit corporate growth via mergers and acquisitions.⁶

III. Corporate consolidation is no accident: the 21st century crisis of inequality

In recent decades, the antitrust agencies and judiciary have narrowed the scope of merger review to prioritize the consumer welfare standard over any other conceptions of fair competition and market governance, a selective myopia induced by the same Chicago School forces that led the charge to deregulate infrastructure industries and end enforcement of the Robinson-Patman Act to restrain buyer power over supply chains.⁷ The result has been a laissez-faire alignment of federal policy with Wall Street control over the real economy, facilitating high profits for mega firms that distribute gains to a tiny segment of wealthy shareholders while eliminating the checks

² Hiba Hafiz "Rethinking Breakups," Duke Law Journal, Vol. 71, 2022.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892326

³ Debbie Goldman, "Resistance in the Digital Workplace: Call Center Workers in Bell Telephone Companies, 1965-2005," dissertation, University of Maryland, 2021, at 105.

⁴ In telecom, the deregulatory policy framework codified in the 1996 Telecommunications Act relied on the false promise of multi-modal competition to spur innovation and achieve universal service, but has actually resulted in a deep digital divide. See, for example, Marshall Steinbaum and Andrew Hwang, "Crossed Lines: Why the AT&T-Time Warner Merger Demands a New Approach to Antitrust," February 21, 2017, <https://rooseveltinstitute.org/publications/crossed-lines-att-time-warner-merger-antitrust/>.

⁵ Goldman op. cit., at 101.

⁶ Sandeep Vaheesan, "Two-and-a-Half Cheers for 1960s Merger Policy," Harvard Law School Antitrust Association, December 12, 2019.

<https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/>

⁷ See, for example, Brain Callaci and Sandeep Vaheesan, "How an Old U.S. Antitrust Law Could Foster a Fairer Retail Sector," February 9, 2022.

<https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector>.

on corporate enrichment previously available through widespread collective bargaining and robust antitrust enforcement.⁸

Whereas workers in sectors like telecommunications were able to establish sectoral bargaining in the mid-twentieth century, which “channeled employers’ competitive struggles away from brute squeezing of workers’ wages towards the generation of more efficient production processes,”⁹ today’s profit-maximizing corporations face few of the constraints that would restrain cash extraction and encourage productive investment.

A comprehensive approach to merger review – one that returns to statutory intent – would take seriously the structure of markets, because this approach considers the distribution of power within a market. The 1968 Merger Guidelines took this approach, which enabled a serious assessment of both horizontal and vertical consolidation, including the dangers of exclusion and foreclosure in supply markets.¹⁰

Horizontal concentration paired with vertical disintegration has defined many industries in the past forty years, including telecommunications, where the labor market is heavily fragmented through subcontracting. The “fissuring” of the workforce described by David Weil has created a winner take all environment:

With more of the workers responsible for creating economic value operating outside the walls of the lead companies – whether through subcontracting, outsourcing, franchising, or other organizational forms – more of the gains flowed to executives in lead companies and their investors... [C]apital markets increasingly place pressure on companies to use downturns as opportunities to restructure employment. That means greater incentives for lead businesses to cut their own workforce and diminished incentives to rehire workers coming out of a recession.¹¹

⁸ The antitrust turn towards consumer welfare and efficiency can be viewed within a broader neoliberal trend in policy-making. CWA offers an educational curriculum to our members called “Reversing Runaway Inequality” that pinpoints the 1971 Powell Memo as a turning point in coalescing big business and right-wing political interests to wage a scholarly and public relations campaign countering widespread youth support for greater democratic control of the economy and essential industries. The success of Powell’s plan is manifest in the corporate capture of public policy and political narrative. CWA’s Reversing Runaway Inequality curriculum can be found at the following website:

<https://runawayinequality.org/reversing-runaway-inequality-workshop-materials>

For descriptive statistics on wealth inequality in the United States over time, see Federal Reserve Bank of St. Louis, “Has Wealth Inequality in America Changed over Time? Here Are Key Statistics,” December 2, 2020, <https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics>; Inequality.org, “Facts: Wealth Inequality in the United States,”

<https://inequality.org/facts/wealth-inequality/>.

⁹ Ibid.

¹⁰ Department of Justice, “1968 Merger Guidelines,”

<https://www.justice.gov/archives/atr/1968-merger-guidelines>.

¹¹ David Weil, *The Fissured Workplace: How Work Got So Bad for So Many*, Harvard University Press, 2014. Also see Brian Callaci, “The Historical and Legal Creation of a Fissured Workplace: The Case of

The vertical restraints corporations use to control their supply chains and external workforce are the other side of the coin to the risks presented by vertical mergers – in the former case, lead firms impose abusive and anticompetitive terms on captive suppliers, while in the latter case, lead firms foreclose access for rivals to key markets or inputs, using raw market power in both scenarios to capture rents.

While recent actions by the Biden administration and Congressional leaders suggest we may see old-fashioned trust-busting back in style, labor organizations are understandably wary that the assumptions of neoclassical economics run so deep that progressive policy makers may still seek a false ideal of unfettered competition without due attention to the ways corporate interests have influenced legal and policy regimes to serve their interests. Fair market competition should be our goal, which comes with a recognition that the handful of mega-corporations dominating concentrated industries must be restrained by stronger labor laws, consumer protection regimes, and restraints on unfair methods of competition – a whole-of-government approach promised by this administration.

As described below, we recommend consideration of labor market impacts as part of merger review, by assessing whether a merger may enable the combined firm to abuse its market dominance over workers, including through suppression of wages, foreclosure of exit opportunities, and denial of workers’ ability to exercise their legal rights. Limiting mergers whose “synergies” come from pecuniary efficiencies like job cuts will benefit all of society by prioritizing productive investment. In order to understand the urgency of reorienting merger review toward shared prosperity, we first examine the case of T-Mobile’s acquisition of Sprint and the harm it has caused to the public interest.

IV. The Case of T-Mobile-Sprint

A. Introduction

As the FTC and DOJ consider revisions to the Merger Guidelines, individual merger case studies offer evidence that recent antitrust orthodoxy has resulted in serious harm to the public, including workers and small businesses. The final judgment that permitted T-Mobile and Sprint to close their merger has been criticized for failing to establish a fourth competitor and allowing the combined company to degrade customer service while raising prices and eliminating jobs.¹²

Franchising,” dissertation, University of Massachusetts Amherst, 2019.
https://scholarworks.umass.edu/dissertations_2/1696/.

¹² See, for example, Melody Wang and Fiona Scott Morton, “The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal From the Start,” ProMarket, Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business, April 23, 2021, <https://promarket.org/2021/04/23/dish-t-mobile-sprint-merger-disastrous-deal-lessons/>; Scott Moritz, “T-Mobile Customer Service Is Getting as Bad as All the Others,” Bloomberg, December 6, 2021,

B. Final judgment and merger commitments

Judge Victor Marrero entered a proposed final judgment on April 1, 2020 giving effect to the settlement reached by the Department of Justice and various states with the merging parties and Dish Network Corporation (DISH) allowing the T-Mobile-Sprint merger to proceed. The judgment required the merging parties to divest to Dish the following: Sprint’s prepaid business (including the Boost Mobile, Virgin Mobile, and Sprint prepaid brands), “substantial spectrum assets,” at least 20,000 cell sites, and hundreds of retail locations. Perhaps most importantly, T-Mobile was required to provide Dish with “robust access to the T-Mobile network for a period of seven years while Dish transitions the business and builds out its 5G network.”¹³ Along with this access came a commitment not to sunset Sprint’s 3G CDMA network until mid-2023.¹⁴

T-Mobile also agreed not to raise rate plan prices for three years, to provide 5G wireless delivering 100 Mbps wireless broadband to 90 percent of the U.S. population (67 percent of rural populations) by 2026, and to roll out an in-home broadband service.¹⁵ T-Mobile further committed it would be “a job creator from Day One” and promised 3,500 additional full-time U.S. employees in year one, followed by 11,000 more employees by 2024.¹⁶

Several states entered settlements with the merging parties yielding additional commitments. T-Mobile’s agreement with Florida, Mississippi, Colorado, and the California Public Utilities Commission included commitments on 3-year and 6-year 5G and rural network build, and in-home internet service. T-Mobile also agreed to continue to operate a call center in Florida in addition to opening 20 new retail stores in the state.¹⁷ T-Mobile also signed an agreement with

<https://www.bloomberg.com/news/articles/2021-12-06/t-mobile-customer-service-is-getting-as-bad-as-all-the-others>; Hal Singer, “The Terrible T-Mobile/Sprint Merger Must Be Undone,” *Wired*, February 25, 2021, <https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/>.

¹³ U.S. Department of Justice, “Court Enters Final Judgment in T-Mobile/Sprint Transaction,” April 1, 2020. <https://www.justice.gov/opa/pr/court-enters-final-judgment-t-mobilesprint-transaction>.

¹⁴ Jon Brodtkin, “Dish switching network to AT&T after calling T-Mobile anticompetitive,” *ARS Technica*, July 19, 2021. <https://arstechnica.com/information-technology/2021/07/dish-to-pay-att-5-billion-for-network-access-amid-feud-with-t-mobile/>.

¹⁵ The FCC approved the transaction in May 2019 based on some of these commitments. Federal Communications Commission, Chairman Pai Statement on T-Mobile/Sprint Transaction, May 20, 2019. <https://www.fcc.gov/document/chairman-pai-statement-t-mobilesprint-transaction>.

¹⁶ T-Mobile, “T-Mobile and Sprint win in court; Companies moving to finalize merger to create new supercharged un-carrier,” February 11, 2020. <https://www.t-mobile.com/press/t-mobile-sprint-merger-court-win>.

¹⁷ Agreement between T-Mobile and Florida Attorney General Ashley Moody, September 27, 2019, [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGKM5Q/\\$file/TMobile+agreement.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGKM5Q/$file/TMobile+agreement.pdf); T-Mobile and Sprint pledged commitments in Mississippi, <http://www.ago.state.ms.us/wp-content/uploads/2019/10/MS-T-Mobile-agreement-executed.pdf>; See T-Mobile and Colorado Office of Attorney General Assurance of Voluntary Compliance, October 18, 2019. <https://coag.gov/app/uploads/2019/10/TMO-Colorado-AG-AVC-Fully-Executed.pdf>; California Public Utilities Commission, Decision Granting Application and Approving Wireless Transfer Subject to

the California Emerging Technology Fund that included commitments on pricing, low-income and Lifeline participation, and school-based programs.¹⁸

C. Labor outcomes

While the states' unsuccessful challenge to the T-Mobile-Sprint merger presented ample evidence of consumer harm flowing from the transaction, none of the antitrust enforcers examined the labor impacts of this deal seriously and thereby sentenced workers to loss of bargaining power without any countervailing protection.

1. Massive job cuts follow close of T-Mobile-Sprint merger

Despite promises to grow as an employer post-merger, T-Mobile has taken a typical approach to achieving cost synergies, reducing jobs at the combined company by more than 5,000 employees since the deal closed.¹⁹ These cuts appear to have fallen disproportionately on low-wage retail workers: T-Mobile has closed 32 percent of its corporate operated stores, 13 percent of its T-Mobile third party licensee stores, and 18 percent of its Metro by T-Mobile prepaid stores.²⁰ This represents an estimated total of 19,840 jobs eliminated.²¹ Meanwhile, T-Mobile's competitors have cut store count by less than 7 percent over the same period.²²

2. Some evidence suggests the big three wireless carriers are exercising increased monopsony power

The result of the merger for wireless retail workers, who often move between wireless carriers, is fewer job options and less bargaining power. A December 2018 study estimated that the

Conditions, Rev. 1, March 11, 2020,

<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M333/K177/333177640.PDF>.

¹⁸ See Joint motion of joint Applicants and the California Emerging Technology Fund to modify positions in proceeding to reflect memorandum of understanding between the California Emerging Technology Fund and T-Mobile Usa, Inc., California Public Utilities Commission, Applications 18-07-011 and 18-07-012, April 8, 2019. https://www.cetfund.org/wp-content/uploads/2020/09/CETF_T-Mobile_MOU.pdf.

¹⁹ See Iain Morris, "Despite pledge, T-Mobile has cut 5K jobs since Sprint merger," *Light Reading*, March 1, 2021.

<https://www.lightreading.com/aiautomation/despite-pledge-t-mobile-has-cut-5k-jobs-since-sprint-merger/d-id/767735>.

Also see T-Mobile Inc., Form 10-K for the year ended December 31, 2021, at 8. The company's employment has remained flat at 75,000 employees over the past year.

<https://investor.t-mobile.com/financial-performance/sec-filings/sec-filings-details/default.aspx?FilingId=15557736>.

²⁰ Analysis based on store lists on file with Communications Workers of America.

²¹ Estimate based on workers per store documented by CWA in its comments to the Federal Communications Commission on the proposed merger. See, CWA, "CWA to FCC: Proposed T-Mobile/Sprint Merger Will Cost 28,000 Jobs and Should Be Opposed as Currently Structured," Aug 27, 2018.

<https://cwa-union.org/news/releases/cwa-fcc-proposed-t-mobilesprint-merger-will-cost-28000-jobs-and-should-be-opposed>.

²² CWA analysis of store location data.

T-Mobile-Sprint merger would cause wage suppression on the order of one percent to seven percent of weekly wages for these retail workers, costing workers in some geographic markets upwards of \$3,200 per year.²³ While the COVID-19 pandemic has limited the utility of traditional labor market data due to unusual shocks, anecdotal accounts from workers across the country indicate wireless carriers are suppressing variable compensation (commissions) and hiring many part-time workers, which limits eligibility for benefits.²⁴

D. Consumer outcomes

The merger of T-Mobile and Sprint resulted in negative consumer outcomes, including possible contribution to a sustained increase in consumer prices for wireless service, T-Mobile's failure to keep promises to DISH that would enable it to compete effectively, and unilateral changes to contractual terms with dealer companies that operate Metro prepaid retail stores.

1. Elevated CPI for wireless

Since the close of the merger, the US has seen a sustained increase in the CPI price of wireless service, the longest sustained increase in more than a decade.²⁵ Prior to the merger, the average urban city wireless telephone services CPI continuously dropped from \$59.92 in January 2012, to \$46.32 in June, 2020. However, in July 2020, within two months of the merger closing, the CPI increased by 3.6% to \$48, a rate increase that has remained constant to this day.²⁶ Thus T-Mobile and Sprint's claim that the merger would increase competition and reduce prices has yet to materialize.²⁷

²³ Adil Abdela and Marshall Steinbaum, Economic Policy Institute, "Labor Market Impact of the Proposed Sprint-T-Mobile Merger," December 17, 2018.

<https://www.epi.org/publication/labor-market-impact-of-the-proposed-sprint-t-mobile-merger/>.

²⁴ Wireless worker reviews on GlassDoor criticize changes to commission structure that result in lower take-home pay. T-Mobile:

https://www.glassdoor.com/Reviews/T-Mobile-commission-structure-Reviews-EI_IE9302.0.8_KH9.29.htm, Verizon Wireless:

https://www.glassdoor.com/Reviews/Verizon-commission-structure-Reviews-EI_IE89.0.7_KH8.28.htm;

Linda Hardesty, "Verizon wants 1,000 new retail workers, faces executive compensation vote," *Fierce Wireless*, May 12, 2021.

<https://www.fiercewireless.com/operators/verizon-wants-1-000-new-retail-workers-faces-executive-compensation-vote>.

²⁵ Bureau of Labor Statistics, Consumer Price Index, "Wireless telephone services in U.S. city average, all urban consumers, not seasonally adjusted."

https://data.bls.gov/timeseries/CUUR0000SEED03?output_view=data.

²⁶ Ibid.

²⁷ <https://www.fiercewireless.com/wireless/t-mobile-s-pricing-commitment-backfires-unifies-critics> (for example, T-Mobile CEO John Legere had stated that "New T-Mobile rates are not going to go up. Rather, our merger will ensure that American consumers will pay less and get more.").

2. DISH's challenges in standing up as a viable competitor

The DISH experience in the T-Mobile merger illustrates both the limits of court-imposed conditions to attempt to create a viable competitor and the unreliability of merging parties' promises to similarly remedy an anticompetitive merger. DISH has failed to stand up a viable wireless carrier competitor, despite its receipt of Boost's 9 million subscribers, an MVNO agreement with T-Mobile, spectrum assets, and post-merger acquisitions of Ting Mobile, Republic Wireless, and Gen Mobile.²⁸ Since entering the wireless business, DISH has struggled with a high churn rate.²⁹ Further demonstrating the limits of court-imposed conditions to support a fourth carrier, DISH decided in July 2021 to switch to AT&T as its MVNO because of T-Mobile's premature sunset of its 3G network, which DISH terms "anti-competitive conduct" in violation of its agreement with T-Mobile.³⁰ In the fourth quarter of 2021, DISH lost 245,000 retail wireless subscribers, which analysts partly attributed to the T-Mobile 3G shutdown.³¹

3. Metro PCS dealers protest against unfair terms imposed post-merger

Shortly after the close of the merger, T-Mobile terminated its relationship with many third party wireless dealers, including hundreds of nonexclusive dealers, eliminated certain dealer compensation, and required all "Metro by T-Mobile" dealers to purchase accessories from one T-Mobile selected vendor.³² A Metro Dealers Unity Group online petition against these changes

²⁸ PR News Wire, "DISH Network reports fourth quarter, year-end 2021 financial results," Feb. 24, 2022, <https://www.prnewswire.com/news-releases/dish-network-reports-fourth-quarter-year-end-2021-financial-results-301489270.html>; Telecompetitor, "Dish's Boost Mobile to Acquire Another Prepaid Wireless Provider", Sep. 21, 2021, <https://www.telecompetitor.com/dishs-boost-mobile-to-acquire-another-prepaid-wireless-provider>.

²⁹ Fierce Wireless, "Dish loses 121K wireless subs in Q3," November 4, 2021, <https://www.fiercewireless.com/operators/dish-loses-121k-wireless-subs-q3>; PR News Wire, "DISH Network reports fourth quarter, year-end 2021 financial results," Feb. 24, 2022, <https://www.prnewswire.com/news-releases/dish-network-reports-fourth-quarter-year-end-2021-financial-results-301489270.html>.

³⁰ DISH Network Corporation, Form 8-K, July 19, 2021, <https://dish.gcs-web.com/static-files/b9c16400-74bd-401e-af81-76346c5cbf6a>; Jon Brodtkin, "Dish switching network to AT&T after calling T-Mobile anticompetitive," ARS Technica, July 19, 2021. <https://arstechnica.com/information-technology/2021/07/dish-to-pay-att-5-billion-for-network-access-amid-feud-with-t-mobile/>.

³¹ PR News Wire, "DISH Network reports fourth quarter, year-end 2021 financial results," Feb. 24, 2022, <https://www.prnewswire.com/news-releases/dish-network-reports-fourth-quarter-year-end-2021-financial-results-301489270.html>. New Street Research, "4Q21 Quick Take: Results soft; network deployment progressing and poised to accelerate; CDMA shutdown remains an overhang," Feb. 24, 2022.

³² Joe Paonessa, "Metro By-T-Mobile Ends Relationships With All Non-Exclusive Stores, Online Sales Have Returned," Best MVNO, April 6, 2020, <https://bestmvno.com/metropcs/metro-by-t-mobile-terminates-non-exclusive-dealers-online-sales/>; Monica Allevan, "Metro by T-Mobile dealer concerns 'not going away,'" Fierce Telecom, October 5, 2020, <https://www.fiercewireless.com/operators/metro-by-t-mobile-dealer-concerns-not-going-away>; @metropcscommunity March 1, 2020. https://twitter.com/metro_community/status/149874308943479194.

generated over 2,400 signatures.³³ The dealers remain unsatisfied nearly two years after the close of the merger, and at least four Sprint dealers in four states have recently sued T-Mobile for “unlawful”, “anti-competitive,” and “predatory conduct.”³⁴

E. Conclusion

Merger review in this case was flawed because it failed to examine evidence of potential job losses and wage suppression, or to consult with worker representatives. Further, antitrust authorities misguidedly attempted to prevent identified potential harms by creating a competitor in the market and did so by relying on promises of inclusive conduct by merging parties. The result is a highly concentrated wireless sector that is squeezing consumers, workers and small businesses.

V. Recommendations to address labor market impacts of mergers

While merger review has not often examined the effect proposed mergers would have on labor markets, labor market concentration is at high levels across the economy, and the effects are severe and ubiquitous, leading to wage stagnation and depression.³⁵ As the Treasury Department acknowledged in its report on labor market competition, economists and policymakers are increasingly recognizing “that market power may be inherent in the firm-worker relationship.”³⁶ This imbalance in power is recognized in labor law and should also be acknowledged in competition law and practice.³⁷

In the absence of collective bargaining agreements for any groups of workers at merging parties, the DOJ and FTC should enjoin mergers that may substantially increase concentration in labor markets and thereby substantially reduce wages, degrade benefits and working conditions, or reduce innovation and investment in developing workers’ skills. To establish a section 7 violation in labor markets, the United States need not predict with precision the extent to which

³³ Change.org petition, “Protect the Prepaid Industry- stop T-Mobile from making negative changes to Metro Dealers,” <https://www.change.org/p/department-of-justice-stop-t-mobile-from-making-negative-impacts-to-metro-by-t-mobile-dealer-stores>.

³⁴ Monica Allevan, “Former Sprint wireless dealers file suit against T-Mobile,” Fierce Wireless, February 23, 2022, <https://www.fiercewireless.com/wireless/former-sprint-dealers-file-suit-against-t-mobile>.

³⁵ See, for example, Ioana Elena Marinescu and Eric A. Posner, “Why Has Antitrust Law Failed Workers?” February 14, 2019, <https://ssrn.com/abstract=3335174>; Efraim Benmelech, Nittai Bergman and Hyunseob Kim, “Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?,” Nat’l Bureau of Econ. Research, Working Paper No. 24307, 2018, <https://www.nber.org/papers/w24307.pdf>; José Azar, Ioana Marinescu, and Marshall Steinbaum, “Antitrust and Labor Market Power,” Economics for Inclusive Prosperity Research Brief, May 2019, <https://econfip.org/wp-content/uploads/2019/05/Antitrust-and-Labor-Market-Power.pdf>.

³⁶ U.S. Treasury Department, “The State of Labor Market Competition,” March 7, 2022.

³⁷ See 29 U.S.C. § 151, preamble to the National Labor Relations Act.

the merger will lower wages or diminish benefits, but must show only that the merger will likely increase the firms' market power that risks this harm to workers.

Moreover, mergers that may worsen labor monopsony and constrain the elasticity of labor supply cannot be justified by their potential benefits to purchasers downstream with lower prices. Indeed individual consumers may also be the affected workers. A merger that may substantially lessen competition in any relevant market is illegal even if, "on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963). Consequently, when evaluating a proposed merger, the FTC and DOJ should evaluate the merger's potential effects on wages and other terms of employment and, when necessary, go to court to enjoin these mergers that threaten to reduce competition in labor markets.

Regulators should examine both indirect and direct evidence of market power in assessing potential merger harms. Direct evidence of employer market power includes imposition of noncompete and similar job-switching restrictions as well as nondisclosure restrictions, misclassification, and forced arbitration and class action restrictions. Where a firm seeking to merge is able to impose one or more of these restrictions on its workers, the presence of these restrictions should be recognized as direct evidence that the firm has market power in the labor market where it is imposing the restrictions.

The importance of collective bargaining for mitigating employer market power should be recognized and incorporated in the merger review process. Merger guidelines should be revised to require that existing collective bargaining agreements (CBAs) be preserved in the course of mergers and that, where CBAs are not present, mergers should be enjoined if they threaten to reduce competition in labor markets. Further, where merger review does not allow for a structural remedy and therefore a consent decree is imposed, the FTC and DOJ should look to collective bargaining as a tool to counterbalance the effects of labor market concentration, by considering provisions that advance worker free association among the conditions that the agencies may place on mergers to allow them to proceed where a proposed merger would increase employer market power and likely result in substantial harm to workers.

There are also a number of other provisions that may be appropriate for consent decrees to offset anti-competitive labor market power, including:

- Prohibition on non-compete clauses and similar restrictive contracts for workers (to the extent these contracts are not prohibited across the board under federal law);
- Provisions addressing informational asymmetries regarding wages, for example to prevent sharing of non-public information about wages among rival employers;
- Protections for employees to pursue employment claims on a joint, class, or collective basis in whatever forum;

- Provision for individual contractual guarantees of the requirements under the final judgment for all covered workers and categorization of workers as third-party beneficiaries of the final judgment with the right to enforcement.
- Where collective bargaining exists at some business units of the merging parties but not others, and the merger threatens to harm labor markets, agencies may consider requiring parties to engage in pattern bargaining as a condition for merger approval.³⁸

In addition to consent decree provisions, the agencies should establish consultation opportunities for worker representatives to ensure that remedies do not harm workers and to oversee consent decree enforcement. If structural remedies are considered, worker representatives should be consulted as part of a Divestiture Review Task Force to evaluate the impact on the parties' workforce. The agencies could also expand the use of "monitoring trustees" to include worker representatives, an approach that has been used in other consent decrees, such as those related to police department oversight.³⁹

VI. Conclusion

CWA appreciates the opportunity to respond to this request for information and looks forward to an expeditious revision of the Merger Guidelines, as workers and our communities face continued rapid consolidation in many sectors. The need to address labor impacts in merger review is urgent and we hope the antitrust agencies will continue to consult with workers and their representatives as critical stakeholders.

³⁸ This final item has been suggested by Professor Hiba Hafiz in her recent article, "Rethinking Breakups," Duke Law Journal, Vol. 71, 2022. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892326.

³⁹ *Id.*