



November 1, 2024

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, D.C. 20554

Re: **WT Docket No. 24-186**, Promoting Consumer Choice and Wireless
Competition Through Handset Unlocking Requirements and Policies

Dear Ms. Dortch:

The Federal Communications Commission (FCC) unanimously announced through a Notice of Proposed Rulemaking (“NPRM”) on July 19, 2024, that the agency “tentatively conclude[s] that adopting a broadly applicable set of handset unlocking requirements for all mobile wireless service providers would serve the public interest.”¹ To achieve that end, the Commission proposes that “all mobile wireless service providers...unlock handsets 60 days after a consumer’s handset is activated with the provider,” subject to exemptions for fraud.²

With this move, the FCC relies on dubious legal authority to justify unsupported economic assertions, which threaten to undermine the pro-competitive consumer benefits the Commission seeks to achieve. Instead of empirically validating its claims with a cost-benefit analysis about pro-competitive market conditions from the rule, it simply asserts its conclusions as fact and then works backward from preordained outcomes to justify its decision.

The mistakes in the Commission’s NPRM start at the basics and grow in complexity. For one, the FCC fundamentally misunderstands, and even misrepresents, the economic incentives that deter consumers from switching providers. For instance, FCC Chairwoman Jessica Rosenworcel remarked in her NPRM statement, “You bought your

¹ Federal Communications Commission, “In the Matter of Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies,” Notice of Proposed Rulemaking, WT Docket No. 24-186, Adopted: July 18, 2024, p. 1, <https://docs.fcc.gov/public/attachments/FCC-24-77A1.pdf>.

² *Ibid.*

phone, you should be able to take it to any provider you want.”³ It is true that consumers that have already paid for their handsets in-full can usually take their phones to other providers. And it is also true that providers are increasingly making unlocking an automatic service that providers perform after the handset is completely paid-for.⁴ But handsets and mobile devices tend to be locked precisely because consumers have not yet paid in-full for devices. In exchange for those “locking” requirements, consumers are compensated with a subsidy from the provider until the device is paid off and unlocked—and for good reason. Without that locking mechanism, providers essentially agree to an uncollateralized loan for a product consumers use and possess but do not own.⁵ Put simply, providers lock handsets as a matter of financing and tend to grant consumers better rates in exchange for long-term financial security so that the loan will be repaid. It is a voluntary and mutually beneficial arrangement.

If providers can no longer enforce the terms of contract (or enter into them at all), they will spread the risk to consumers through higher prices, reduced service offerings, higher downpayments, and more stringent credit checks.⁶ Today, 15 percent of Americans are “smartphone-only internet users” that do not have access to in-home broadband.⁷ If forced unlocking regulations cause prices to rise, access to handset devices will shrink—further pushing internet access out of reach of lower income consumers. The FCC rightly acknowledged the public interest group perspective that lower income Americans will shoulder a disproportionate share of that burden, “since they may not have the resources to switch service providers or purchase new handsets.”⁸ But the FCC errs when it implicitly assumes—without economic or empirical analysis—that this tradeoff is worthwhile since a reduction in handset lock-ins will lower “switching” costs to such a degree that consumers benefit from increased competition on net.

³ Thomas Maxwell, “T-Mobile and AT&T Are Fighting Requirement to Unlock Smartphones,” Gizmodo, October 22, 2024, <https://gizmodo.com/t-mobile-and-att-are-fighting-requirement-to-unlock-smartphones-2000515091>.

⁴ This is typically the case, but currently not *always* the case. However, most providers already plan to *automatically* unlock phones after the handset is fully paid-for in the future. See, George S. Ford, PhD and Lawrence J. Spiwak, J.D., “FCC Overreach in Mobile Device Regulation? A Legal and Economic Analysis,” Phoenix Center Policy Bulletin No. 69, September 2024, p. 3, [PCPB69Final.pdf](#).

⁵ George S. Ford, PhD and Lawrence J. Spiwak, J.D., “FCC Overreach in Mobile Device Regulation? A Legal and Economic Analysis,” Phoenix Center Policy Bulletin No. 69, September 2024, p. 4, [PCPB69Final.pdf](#).

⁶ State Attorneys Generals Kris W. Kobach, et al., “In the Matter of Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies,” Comments of State Attorneys General, WT Docket No. 24-186, <https://www.fcc.gov/ecfs/document/10923673817695/1?ref=broadbandbreakfast.com>; and Ari Bertenthal, “GOP State AGs Oppose FCC’s 60-Day Mobile Phone Unlocking Plan,” Broadband Breakfast, September 24, 2024, <https://broadbandbreakfast.com/gop-state-ags-oppose-fccs-60-day-mobile-phone-unlocking-plan/>.

⁷ Pew Research Center, “Mobile Fact Sheet,” January 31, 2024, <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

⁸ Jon Brodtkin, “T-Mobile, AT&T Oppose Unlocking Rule, Claim Locked Phones are Good for Users,” Ars Technica, October 21, 2024, <https://arstechnica.com/tech-policy/2024/10/t-mobile-att-oppose-unlocking-rule-claim-locked-phones-are-good-for-users/#gsc.tab=0>.

As recent research from the Phoenix Center demonstrates, forced handset unlocking regulations threaten to harm, not help, consumers.⁹ First, the FCC overstates the costs of switching providers. Had switching costs been a significant barrier to changing providers, then companies that voluntarily unlock handsets would have experienced heightened churn rates as consumers became contractually free to select alternate providers—but that has not been the case. For example, Verizon has the most generous unlocking requirements due to a previously agreed upon deal with the FCC where the provider purchased 700MHz C-Block spectrum at roughly a 40 percent discount.¹⁰ Yet, recent data shows that Verizon has marginally lower churn rates than both AT&T and T-Mobile, which more frequently lock handset devices.¹¹ Such actions suggest that consumers pick and use providers for reasons other than voluntary handset locking decisions. That voluntary market activity casts doubt on the benefits of FCC proposed unlocking regulations even as the conceded costs of higher prices remain.

Second, providers operate in asymmetric, imperfectly competitive markets, and attempts by the FCC to force symmetry is far from guaranteed to lower prices for consumers as the NPRM explicitly assumes.¹² Although symmetry may benefit consumers under certain market arrangements, cost structures, and market positions, one hypothetical example in the Phoenix Center research shows how consumers can be harmed by market symmetry when firms (or providers) face symmetrically high costs but can leverage market power.¹³ Unfortunately, the NPRM will both raise costs on providers and apply those costs uniformly, potentially and inadvertently harming consumers in the process.¹⁴

Finally, the FCC relies on legally dubious argumentation to impose uniform, industry-wide unlocking regulations. In its July 19th NPRM, the FCC casts aside conventional legal wisdom¹⁵ and instead relies on perceived statutory authority in Title III of the Communications Act to promulgate its proposed rule. But nothing in Title III grants the FCC the legal authority to regulate the *financing* of telecommunications products. The Commission assumes more power than it possesses.

⁹ George S. Ford, PhD and Lawrence J. Spiwak, J.D., “FCC Overreach in Mobile Device Regulation? A Legal and Economic Analysis,” Phoenix Center Policy Bulletin No. 69, September 2024, [PCPB69Final.pdf](#).

¹⁰ *Ibid.*, p. 22

¹¹ *Ibid.*, p. 21-22

¹² Federal Communications Commission, “In the Matter of Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies,” Notice of Proposed Rulemaking, WT Docket No. 24-186, Adopted: July 18, 2024, p. 25, <https://docs.fcc.gov/public/attachments/FCC-24-77A1.pdf>.

¹³ George S. Ford, PhD and Lawrence J. Spiwak, J.D., “FCC Overreach in Mobile Device Regulation? A Legal and Economic Analysis,” Phoenix Center Policy Bulletin No. 69, September 2024, [PCPB69Final.pdf](#), p. 20-21, [PCPB69Final.pdf](#). The hypothetical example leverages a Cournot Competition model where rival companies select production quantity independently but simultaneously, as opposed to standard perfect competition examples where quantities are taken as given. See, Daniel Liberto, “What Is the Cournot Competition Economic Model?,” Investopedia, August 5, 2024, <https://www.investopedia.com/terms/c/cournot-competition.asp>.

¹⁴ George S. Ford, PhD and Lawrence J. Spiwak, J.D., “FCC Overreach in Mobile Device Regulation? A Legal and Economic Analysis,” Phoenix Center Policy Bulletin No. 69, September 2024, p. 20-21. [PCPB69Final.pdf](#).

¹⁵ *Ibid.*, p. 5-13.

Given the recent Supreme Court ruling in *Loper Bright Enterprises v. Raimondo*, regulatory agencies, including the FCC, can no longer rely on such broad Congressional delegation and vague statutory interpretations to pursue overbroad regulatory rulemaking.¹⁶ The Commission should seek more specific Congressional authorization to intervene in voluntary financial contracts before it assumes it simply has that power.

The FCC's NPRM regulating voluntary handset locking agreements is legally dubious and relies on economic conclusions that are not empirically supported. Had the Federal Communications Commission conducted a cost-benefit analysis of its Notice of Proposed Rulemaking, it may have reached a different conclusion: uniform handset unlocking requirements impose immense costs on consumers without a commensurate degree of consumer benefit. The Federal Communications Commission should withdraw its proposed rule.

Respectfully submitted,

Logan Kolas
Director of Technology Policy
American Consumer Institute
4350 Fairfax Drive, # 725 Arlington, VA 20003
Email: logan@theamericanconsumer.org

¹⁶ Anastasia P. Boden, Thomas A. Berry, and Isaiah McKinney, “Loper Bright Enterprises v. Raimondo”, Cato Institute Legal Brief, July 21, 2023, <https://www.cato.org/legal-briefs/loper-bright-enterprises-v-raimondo-0>.