

November 16, 2022

To: Jonathan Kanter
Assistant Attorney General, Department of Justice Antitrust Division

Jessica Rosenworcel
Chair, Federal Communications Commission

Lina Khan
Chair, Federal Trade Commission

The Open Markets Institute respectfully calls on your offices to fully investigate Elon Musk's takeover of the communications platform Twitter. The deal raises many fundamental questions about the independence and integrity of essential communications services in America.

No democracy can survive if its citizens allow one or few private individuals to seize control over the public square or public marketplace, or any platform or network essential to the ability of citizens to speak with and do business with one another. Citizens of democracies therefore have an absolute right and duty to protect the independence, neutrality, and economic wellbeing of every communications and commercial platform and network.

It is vital to move swiftly. The Twitter platform long ago proved it serves a unique and irreplaceable role in enabling citizens to communicate and to debate key issues of the day.¹ Twitter's character as a utility is even more clear when we look at how the platform has been used during emergencies such as Hurricane Ian in Florida, earthquakes in Mexico and Japan, floods in Pakistan, and fires in Australia. In the company's own words, "Over the years, Twitter has become a critical communication tool for responding to natural disasters."² One way it does so is by creating a "centralized source of credible information."³

Yet now, people in the United States and around the world are watching a single man radically alter this essential communications platform to favor his own personal interests and political views. And indeed, since Mr. Musk took control of Twitter on October 27, there are many well-documented reports that he or people working for him have interfered directly in public debate on that platform.⁴ Similarly, people across the United States and around the world are watching Mr. Musk potentially destroy – out of greed, recklessness, or incompetence – a service that has proven critical to their safety, and around which they have institutionalized entire systems of emergency response.

A second reason to move immediately is that Mr. Musk controls the satellite-based Internet service provider Starlink. Although as yet unfinished, Starlink in recent months has proven to be a highly effective technology, one that is of critical importance to the security of the United States, its citizens, and to allies such as the Ukraine and Taiwan.⁵ Over this same period,

however, Mr. Musk has repeatedly interfered in the normal operations of Starlink in ways that appear to promote his personal economic and political interests.⁶ It is therefore anything but inconceivable that Mr. Musk will manage Starlink in ways that disrupt Twitter, or vice versa.

We fully understand that this deal does not fit easily into some of the categories your agencies have relied on in recent years to determine when and how to investigate takeovers or certain corporate actions. But we are very confident that each of your agencies has ample authority to fully review this takeover, and if necessary to unwind or restructure the deal and/or regulate the actions of the combined corporations. The Department of Justice played exactly such a role with America's main telephone corporation, AT&T, in 1913, 1956, and 1982.⁷ The American people created the Federal Communications Commission precisely to guarantee the independence and integrity of our communications platforms and news and entertainment media⁸ (including, in 2018, Starlink).⁹ And the Federal Trade Commission has routinely acted to ensure that industries vital to democracy are protected from the concentration and misuse of private power.¹⁰ Over the years this includes newspapers, book publishing, and online communications platforms (including, in 2011, Twitter).¹¹

Indeed, the FTC's statement on November 10, 2022 that it intends to use the original text of the Federal Trade Act of 1914 to guide enforcement of the "federal ban on unfair methods of competition" provides an excellent model for all three agencies to adopt in assessing the nature of the threats posed by Mr. Musk's takeover of Twitter, and for cataloging the many authorities available to address those threats.¹²

Ultimately, your responsibility derives from the Constitution itself. As Supreme Court Justice Anthony M. Kennedy wrote in 1994, "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of the critical pathway of communication, the free flow of information and ideas."¹³

You are not alone in having a duty to review this combination and to act to protect our democracy and security. At least six other departments, agencies, and offices have a responsibility to work with you on a thorough investigation of Mr. Musk's takeover and management of Twitter, and his management of Starlink: the Committee on Investment in the United States (CFIUS), the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB), the Department of Defense, the Department of Treasury, and the Federal Reserve.

That said, only your agencies have the ability to lead and coordinate this investigation. Your offices and staffs are uniquely equipped to: 1) identify threats to freedom of expression and freedom of the press posed by dangerous forms of vertical integration and arbitrary and discriminatory provision of services; 2) wield a wide and sophisticated range of regulatory tools to address such threats; 3) help other departments and agencies understand such threats and how to use their own authorities to protect democracy and the public interest; and 4) establish rules that empower citizens to safely benefit from the full promise of new technologies.

We believe the following goals should guide your work and that of the other offices in the U.S. government with whom you partner:

- Ensuring the complete independence of Twitter and Starlink from foreign interests.
- Ensuring the complete Independence of Twitter and Starlink from other business interests.
- Protecting all communications and political debates on Twitter and Starlink from any interference by Twitter and Starlink executives, board members, and employees.
- Ensuring both Twitter and Starlink establish clear terms of service for all users, and enforce those terms without prejudice or discrimination, in a completely transparent fashion.
- Ensuring that present management of Twitter and Starlink does not pose any avoidable threat to the stability and viability of Twitter Starlink.
- Protecting the interests and properties of Twitter users, who are the people who built that platform into an essential communications network.
- Protecting the privacy of every Twitter and Starlink user.
- Protecting small and medium-scale investors in Twitter, SpaceX/Starlink, and Tesla.
- Preventing any use of the Twitter and Starlink platforms to sidestep financial and monetary regulatory regimes, or to promote dangerous speculation.
- Preventing any leveraging of the monopoly nature of the Twitter and Starlink platforms to concentrate power over other businesses and markets.

There is no reasonable excuse for delay. On its own, an investigation by CFIUS into ownership of Twitter is not sufficient.¹⁴ The same is true for FTC enforcement of its consent decree with Twitter on privacy.¹⁵ The same is true The public has a right to know that the U.S. government is investigating *every* potentially troublesome aspect of this deal, and using *every* existing authority to ensure that the managers of Twitter and Starlink neither misuse nor destroy either platform.

It is important to state that our aim in writing you is not to target Mr. Musk personally. No matter who controlled Starlink and Twitter, we would call for the same close review of any deal involving these two entities.

In ending, it's worth remembering Justice Hugo Black's assurance in 1945 that enforcement of antimonopoly law against powerful communications platforms does not, in any respect, constitute regulation of speech or of the press. On the contrary, as Justice Black said, "it would be strange indeed... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom."¹⁶

Thank you.

The Open Markets Institute.

¹ As Lydia Polgreen of the *New York Times* put it, "Musk is right that the world needs a digital public square; unfortunately, he seems to have little idea that creating one involves balancing free speech against abuse, misinformation and government overreach. Twitter had just barely managed to get the hang of that difficult, important work in the past couple of years. Musk has left little doubt that rather than continue that work, he'd rather burn it all down." *If You Want to Understand How Dangerous Musk Is, Look Outside America*, NEW YORK TIMES (Nov. 14, 2022).

² *When Natural Disasters Happen, Twitter Can Be Used to Help. Here's How*, TWITTER (Oct. 13, 2022), https://blog.twitter.com/en_us/topics/company/2022/when-natural-disasters-happen-twitter-can-help-heres-how.

³ *Id.*

⁴ Barbara Ortutay, *Musk's Partisan Tweets Call Twitter Neutrality into Question*, AP NEWS (Nov. 7, 2022), <https://apnews.com/article/elon-musk-twitter-inc-technology-cbd873f1>.

⁵ See Alex Marquardt, *Musk's SpaceX Says It Can No Longer Pay For Critical Satellite Services in Ukraine, Asks Pentagon to Pick Up the Tab*, CNN (Oct. 14, 2022), <https://www.cnn.com/2022/10/13/politics/elon-musk-spacex-starlink-ukraine>; see also Karina Tsui, *Taiwan, Looking to Ukraine, Pursues Internet Backup*, WASH. POST (Oct. 6, 2022), <https://www.washingtonpost.com/world/2022/10/06/taiwan-ukraine-satellite-interent-china-russia/>.

⁶ Mehul Srivastava et al., *Ukrainian Forces Report Starlink Outages During Push Against Russia*, FIN. TIMES (Oct. 7, 2022), <https://www.ft.com/content/9a7b922b-2435-4ac7-acdb-0ec9a6dc8397>.

⁷ See Daniel A. Hanley et al., *Financing Free Speech: A Typology of Government Competition Policies in Information, Communication, and Media Markets*, CTR. FOR JOURNALISM & LIBERTY 5-6, 10-11 (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089870.

⁸ Daniel A. Hanley, *Administrative Antimonopoly*, OPEN MARKETS INST. 7 (Feb. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044077.

⁹ *Why Are We Letting Monopolists Corner Space?* Luke Goldstein, Washington Monthly, Nov./Dec. 2021.

¹⁰ See generally Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830702.

¹¹ American citizens have used their state and federal governments to guarantee the neutrality and financial stability of electronic communications systems since passing the first laws regulating telegraph services in the mid-19th century. See RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS (2010); see, e.g., Act of July 1, 1862, § 15, 12 Stat. 489 (1862).

¹² *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition*, FTC, Nov. 10, 2022.

¹³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994).

¹⁴ *Musk's Foreign Investors in Twitter Are "Worthy" of Review*, Biden Says, Rebecca Kern, Politico, Nov. 9, 2022.

¹⁵ *In the Matter of Twitter, Inc.*, 151 F.T.C. 162 (2011).

¹⁶ *Associated Press v. United States*, 326 U.S. 1 (1945).