FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of Section 6002(b) Of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services	)	WT Docket No. 07-71

Reply Comments of BT Americas Inc. on Behalf of Itself and other BT Entities

Pursuant to the Commission's Public Notice of 6 April, 2007, BT Americas Inc. ("BTA") submits these Reply Comments on behalf of itself and other BT entities in the US to assist the Federal Communications Commission's evaluation of the state of competition among providers of Commercial Mobile Radio Services ("CMRS") for its Twelfth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services("*Twelfth Annual CMRS Report*").

INTRODUCTION AND SUMMARY

BTA is a U.S. company and subsidiary of BT plc. It is a section 214 licensee and serves the global information and communications technology needs of large business ("enterprise") customers. BTA employs over 4000 people in the United States.

The U.S wireless services market has, as a result of recent consolidations, become much more concentrated, with the remaining dominant carriers engaging in coordinated anticompetitive conduct. This includes a common refusal by the wireless affiliates of the incumbent BOCs, AT&T/Cingular and Verizon Wireless, to supply wholesale wireless service to downstream competitors, requiring would-be wholesale customers to instead act as the BOCs'

agents, selling AT&T/Cingular or Verizon Wireless branded wireless services at prices and under terms and conditions dictated by them. Incumbent mobile operators have been imposing similar conditions in Europe, leading to regulatory intervention. The dominant U.S. wireless carriers have also, as demonstrated in the pending Skype proceeding,[1] imposed common contractual limitations on consumers' use of their wireless networks, and/or required device manufacturers to technically disable their interconnecting devices, to exclude new, innovative, but competing technologies such as Voice over Internet Protocol ("VoIP").

The U.S. mobile service market thus is an increasingly concentrated market in which the providers pursue in varying degrees a "walled garden" approach, *i.e.* a closed set or exclusive set of information services provided for users. Absent regulatory intervention, innovative services will not be introduced, harming U.S. innovation, productivity and competitiveness.

ARGUMENT

I. The US Wireless Market Has Become Increasingly Concentrated As A Result of Recent Mergers

The U.S. wireless market has seen a series of horizontal consolidations, including Cingular's acquisition of AT&T Wireless, SBC's (which co-owned Cingular with BellSouth) subsequent acquisition of AT&T which would have otherwise entered as an Mobile Virtual Network Operator ("MVNO"),[2] and finally new AT&T's acquisition of BellSouth which had been a previously semi-independent voice within Cingular. These consolidations have also resulted in the re-integration of the two largest wireless carriers (Cingular and Verizon Wireless)

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[1] *In the Matter of Skype Communications, S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM No. 11361.

[2] "Sprint Under AT&T's Hood," 07/01/2004, http://www.phoneplusmag.com/articles/471resell02.html ("AT&T Corp. announced in mid-May that it will private label services from the Sprint PCS network allowing AT&T to offer wireless service to its more than 30 million business and consumer customers").

with the two largest interexchange carriers (AT&T and MCI), increasing their incentives to discriminate against downstream competitors.

The affiliation of these two largest wireless carriers with the dominant providers of in-region special access affords AT&T/Cingular and Verizon Wireless with a unique advantage. As explained by Sprint/Nextel in its Comments in this proceeding:

> RBOCs are able to impose costs on Sprint Nextel by using their monopoly power over bottleneck facilities that are essential inputs to the provision of CMRS. Specifically, the RBOCs impose significant costs on their competitors by overcharging for dedicated transport facilities, otherwise knows as "special access." That AT&T and Verizon possess monopoly power for the vast majority of cell site "back haul" facilities is confirmed by the high prices and obscene profits they are making on special access ... [AT&T and Verizon] are effectively able to set a price floor for the provision of wireless services – thereby protecting their own landline broadband services from more intense competition from wireless alternatives."[3]

As a result of these consolidations and affiliations, AT&T/Cingular and Verizon Wireless have emerged as the dominant wireless service providers. As of the fourth quarter of 2006, AT&T/Cingular and Verizon Wireless controlled over half of the overall wireless market, with the top four carriers controlling over 85% of the market.[4] And the third largest wireless carrier, Sprint Nextel Corp, is losing share to AT&T/Cingular and Verizon Wireless. Most recently, Sprint Nextel Corp. posted a first-quarter 2007 net loss of $211 million[5] with a net loss of 220,000 post-pay customers, who have long-term contracts and generate the most revenue for

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[3] Sprint/Nextel Comments filed on May 7, 2007 at i.

[4] The total U.S. market was 230.8 million subscribers, and the four largest carriers were: Cingular Wireless with almost 61 million subscribers (26.5%); Verizon Wireless with over 59 million (25.6%); Sprint Nextel with 48 million (21%); and T-Mobile with 25 million (11%). Market Share: Mobile Connections, North America, 4Q06, Gartner Dataquest.

[5] "Sprint Posts a Loss as More-Profitable Users Leave," by Amol Sharma, Wall Street Journal, Thursday, May 3, 2007 at B3.

carriers. Sprint's growth trailed competitors AT&T/Cingular and Verizon Wireless, which added 1.2 million and 1.7 million customers, respectively.[6]

Indeed, Sprint/Nextel in its Comments in this proceeding, noted that following AT&T's merger with BellSouth, AT&T/Cingular used its increased market power to engage in anti-competitive conduct against its customers who are also its downstream competitors. Specifically, AT&T/Cingular has, post-merger, adopted a new "'corporate policy' to increase other wireless carriers' cost of termination ... whereby Sprint Nextel will no longer be permitted to interconnect directly with it under specified circumstances, but rather must instead begin sending traffic destined to Cingular *via* AT&T tandem switched – in effect introducing a new bottleneck .... The policy is designed to generate new revenue for itself while increasing the service costs of its rivals."[7]

Barriers to entry remain high. They include limited spectrum, the high sunk costs of infrastructure, restrictions on the locations of cellular towers, the need for special access as described above, and long term contracts with end users.

Mobile Virtual Network Operators ("MVNOs") are not significant competitors, at least in the enterprise business segment. That is because both Verizon Wireless and AT&T/Cingular have consistently refused to resell their wireless services on a wholesale basis to those competing with them in the business retail market. Instead, they require would-be wholesale customers to provide services to their customers solely as an agent of the incumbent. Had the market been competitive, one would have expected at least one of those carriers to have provided such service for resale.

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[6] Sprint's average monthly turnover was 2.3% of its subscriber base, well above rivals. Monthly churn at Verizon Wireless, a joint venture of Verizon Communications Inc. and Vodafone Group PLC, was just 1%. *Id.*

[7] Sprint/Nextel Comments, WT Docket 07-71 at i.

Regional wireless providers are similarly not an alternative when providing wireless service to enterprise customers. Enterprise customers' demanding quality requirements and the transaction costs of interconnecting regional wireless networks, make a single national wireless carrier the preferable solution.

Nor do other technologies present meaningful competitive alternatives.[8] Thus, the General Accountability Office ("GAO"), in a 2006 study, found that alternative technologies (such as WiMax) are still being developed and have only been used in limited circumstances.[9]

As demonstrated below, the market is sufficiently concentrated that market leaders jointly engage in common conduct to disadvantage competitors even though it is economically irrational for any single provider to adopt such practices unless the other wireless carriers are engaged in similar conduct.

II. Increasing Concentration Has Led to Coordinated Anticompetitive Effects

A. Co-ordinated Refusals to Resell Wireless Service

Wholesale wireless service is a critical component for new entry and innovation. Wholesale wireless service is an essential input for new entrants, where being a reseller/MVNO is the "first rung" in the "ladder" of investment. And wholesale wireless service is critical for ensuring competition with already integrated fixed/mobile companies and incumbent mobile networks in the provision of Fixed-Mobile Converged IP enabled solutions ("FMC").

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[8] It has been urged that WiFi is a viable competitive alternative based on a 2006 experiment by Google for residential users in the town where it is headquartered. Sarah Jane Tribble, *Going Wireless in Mountain View, Google Launches Free WiFi Today*, San Jose Mercury News, Aug. 16, 2006, at 4 ("The network covers about 90 percent of the city's 12 square miles and offers maximum data-transfer speeds of up to 1 [Mbps] -- slightly slower than DSL. . . . The Mountain View-based company spent in the 'ballpark' of $1 million on the project . . . . And the company agreed to pay Mountain View $36 per light pole, or about $13,680, annually, although that number may grow slightly as the company plans to install a few more transceivers as residents request more access."). This effort has not been replicated in other venues where Google would not have comparable "home town" advantages.

[9] Government Accountability Office, Report to Congressional Committees, GAO-06-426, May 2006.

Most large enterprise customer users are making the transition from traditional telephony to full IP corporate networks. Many also have considered, or are considering, installing Wireless Large Area Networks ("WLANs"). Business users are increasingly demanding integrated wireline/wireless offers and in particular large corporate users and multi-site businesses are requiring fully integrated propositions that require wireless services.

FMC allows all of the terminal devices (including mobile handsets) of a company to access a single IT system. For example, BT Fusion Wi-Fi, launched in December 2006, brings together the benefits of fixed and mobile convergence on one mobile device, with seamless two-way handover between Wi-Fi and GSM. This service is provided by BT business which supports more than 1.1 million small companies across the UK. The importance of FMC is highlighted in a recent report by Ovum titled "MNCs & mobility: ten important messages for service providers" where it was noted that "mobile service providers are not even coming close to meeting multinationals' enterprise mobility needs" including key areas such as (1) the enterprise's need to integrate mobile voice into the corporate network and (2) help companies with access services for staff working off-site, both among some of the critical drivers of convergence. Other benefits accruing to end users include improved productivity through features such as one number services and one voice mail and access to corporate directory, so that no matter where the person is, their device will ring and the person is contactable. More companies are becoming aware that improved mobility for an ever increasingly flexible workforce has a great value.

The provision of such services requires either (i) ownership of, or (ii) access to, mobile network facilities to allow the service to function fully. As noted above, the barriers to facilities-based entry in the U.S. are very high. And Verizon Wireless and AT&T/Cingular have

consistently refused to resell their wireless services on a wholesale basis to those competing with Verizon and AT&T in the business retail market. Instead, they require would-be wholesale customers to provide services to their customers solely as an agent of the incumbent. As a result, resellers/MVNOs create little if any competitive pressures in the mobile telecommunications sector.

BT's experience in Europe shows that in absence of regulatory intervention it is impossible to secure agreements with Mobile Network Operators ("MNOs") allowing alternative operators to compete and innovate. As shown in the table appended as Appendix A hereto:

- Only in 6 out of 27 countries in Europe have wholesale wireless agreements been signed in the absence of any regulatory intervention.
- In 8 countries out of 27, agreements with either independent Service Providers (SPs) or MVNOs have been signed only because of regulatory intervention.
- Of the above 14 countries where agreements are in place, MVNOs are present in 9 countries only (that is a third of the countries analysed).
- The remaining 13 countries have no SPs nor MVNOs whatsoever.

In Europe, absent any regulatory pressure, the vast majority of existing cases of independent provisions by either mobile resellers or MVNOs would have never existed. The most recent examples are in Spain an Italy. MVNOs in both countries were confronted with a continued denial to supply by all MNOs. In both countries regulatory pressure has proven critical to finally unlocking the market, in Spain as a result of a decision of the national regulatory authority, Comisión del Mercado de las Telecommunicaciones (CMT), and its finding

of joint dominance of all MNOs. In Italy there is an on-going antitrust case against the three largest MNOs on joint dominance and abuse of market power.[10]

B. Coordinated Refusals to Allow Access to Innovative but Competing Technologies

While fixed networks are moving toward fully IP Next Generation Networks, delivering and developing innovative services, the mobile sector seeks to protect its legacy services (*i.e.,* voice and wireless data – Short Message Service or "SMS") preventing innovative players from challenging existing business models by either denying access to their own access networks and/or barring access to third parties' IP applications and clients through commercial and/or technical artificial barriers. Thus incumbent wireless operators have instead taken commercial and technical steps to obstruct the emergence of VoIP on their networks in a bid to protect returns on legacy mobile voice services.

Some restrictions can be understood from the perspective of needing to manage traffic over fairly constrained bandwidth, *e.g.,* restrictions on peer-to-peer traffic. 3G mobile services providers have limited access bandwidth. Bandwidth is expensive and clearly they have an interest in preventing a scarce, costly resource from being clogged up with large content files. Other restrictions however are designed to promote the broadband provider's own product. As Skype demonstrated in the proceeding based upon its Petition,[11] anti-competitive practices are evidenced, among other things, by carrier's removal of consumer-friendly features of mobile devices in order to favour their own affiliated services and exclude competitors.

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[10] And while competition law is a viable constraint in Europe, its applicability here has been put in doubt as a result of the Supreme Court's decision in *Verizon Communications v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398 (2004)

[11] *In the Matter of Skype Communications, S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks,* RM No. 11361 (Petition filed February 20, 2007).

One example identified in the Skype petition is the Nokia E62/E61 smartphone. While the Nokia E61 was released in Europe with full-functionality, including a high-end email device and phone, the E62 version used in the US lacks, among other things, Wi-Fi connectivity. The reason that this feature, which has been so popular among European customers, was removed from E62 phones, is that Wi-Fi connectivity would have allowed customers to make VoIP calls when they were near a Wi-Fi network.

The FCC should also place particular attention to:

a. Product Design and Feature Crippling – By controlling entry, carriers are in a position to exercise strong control over the design of mobile equipment. They have used that power to force equipment developers to omit or cripple many consumer-friendly features. Carriers have also forced manufacturers to include technologies, like "walled garden" Internet access, that neither equipment developers nor users want.

b. Discriminatory Broadband Services – In recent years, under the banner of "3G" services, carriers have begun to offer wireless broadband services that compete with Wi-Fi services and may compete with fixed DSL broadband. However, the services are offered pursuant to bandwidth limits and usage restrictions that violate basic network neutrality rules. Often contractual limits are established to bar routine uses of the Internet including the use of alternative VoIP platforms.

c. Application Stall – Mobile application development is by nature technically challenging. However, the carriers have not helped in fostering a robust applications market hence hampering innovation in their quest for market control.

Mobile operators in Europe have been taking the very same "wall-gardened" approach which in turn is making it even more difficult for third party providers to run their own applications over mobile networks. Just recently Truphone, a new VoIP entrant, alleged that Vodafone and Orange released a version of the Nokia N95 mobile phone handset with its VoIP capability disabled.[12] Companies such as Truphone allow customers to download free software on to their mobile phones that will enable them to make cheaper, or in some cases free, phone

[12] "Mobile phone giants accused of 'crippling ' free voice start-up," The Independent, Thursday April 26th, 2007.

calls by using a Wi-Fi network. This allows customers to make calls without having to pay their usual network provider, who most likely also provided an expensive phone as part of the contract. As reported in the press:

> "A spokesman for Orange said VoIP had been disabled to avoid confusion for customers as it was a new function that had not been properly tested. Vodafone said it does not currently offer VoIP as such a service would require "an end-to-end customer experience, billing integration and customer service support which is currently not available". "Vodafone believes that VOIP over mobile is not yet a mature service proposition and an experience that our customers would want to be exposed to," a spokesman said. "Vodafone feels responsible to protect the customer from unexpected charges and potential "bill shock" associated with unintended data service usage."

Whilst access requirements are critical in today's narrowband mobile environment they become even more important in a 3G environment with the shift from traditional switched narrowband voice and data to fully fledged IP high-speed access and core platforms. In such an environment it will be critical that independent application providers have the right to gain access on non-discriminatory terms to mobile networks in order to ensure that users can access their services and service platforms also from mobile networks rather than face an artificially restricted wall-gardened approach which may be developed by relevant MNOs. As noted by the European Commission "*For the multi-platform environment to proliferate and for the platforms themselves to complement each other, the regulatory environment must favour technologically neutral conditions for competition, without giving preference to one platform over others*".[13]

III. The Critical Issue Open Markets Which in the U.S. Requires Proportionate Regulation Because of Market Failures

Market imperfections may require proportionate regulation to enable innovative service provision that can only occur in the context of competitive markets. In light of the withdrawal of at least partial antitrust protection for the telecommunications marketplace after the Supreme

[13] In its paper COM(2003) 410 (Communication on Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications).

Court decision in *Trinko*,[14] regulation may be necessary remove the anti-competitive incentives that exist as a result of the type of consolidation that has occurred in the wireless market.

The issue is thus not regulation or de-regulation, but rather open markets. The coordinated effects resulting from the mergers, leading to common policies among the market leaders: (i) to refuse to resell to competitors in the retail enterprise market and (ii) contractual and technical limitations on competing technologies such as VoIP, in the face of market demand that would, in a competitive market, induce at least one of the providers to meet that demand with its unused capacity, demonstrate that the wireless market is not open. It is thus clear that "market forces" cannot be expected to safeguard consumers from unreasonable carrier practices.

The claim that *all* regulation reduces investment is simply not true. In a market dominated by a few players with substantial coordinated effects, investment by the incumbents is focused on blocking competitive entry and on ensuring that investment in new technologies is timed so as not to replace old technologies until the investment in those old technologies has been fully recovered. The more innovative, market-driven investment of innovative entrants is displaced by this less innovative investment of the incumbents. Under these circumstances, proportionate regulation is more likely to produce the type of investment that will increase U.S. productivity and competitiveness and help the U.S. maintain its innovative advantage.

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[14] *Verizon Communications, Inc., v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004) (the U.S. Supreme Court held that Verizon's refusal to provide competitors with access to bottleneck facilities at non-monopoly prices as required by statute does not, despite the antitrust savings clause in the statute, violate the U.S. antitrust laws).

Conclusion

BTA hopes that the Commission critically evaluate the current state of the U.S. wireless market, and that it consider the impact of its failure to act on competition and innovation in the United States.

Respectfully submitted.

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Appendix A

Countries where no MVNOs exist

Countries where MVNOs exist because of regulatory or antitrust intervention

Countries where MVNOs and SPS exist purely under free commercial negotiations

Country	Threat of regulatory intervention or other risk of obligation being imposed - status	Presence of MVNOs and SPS
Austria		Yes both MVNOs and SPs since 2003
Belgium		SPs only since 2002
Bulgaria		NO
Cyprus		NO
Czech Republic		NO
Denmark		Yes both MVNO and SPs since 2000
Estonia		Yes both – MVNO since 2004 and SPs since 2005
Finland		Yes both – MVNOs since 2004 and SPs since 1998
France	Substantial pressure and threat of intervention also by the Government led to first agreements being signed in 2004	Yes SPs since 2004
Germany		Yes SPs since nearly opening of mobile market
Greece		NO
Hungary		NO
Iceland		NO
Ireland		NO
Italy	Substantial pressure through antitrust litigation has recently led Vodafone to offer voluntary undertakings to Antitrust Authority to open up access to MVNOs - first SP agreement just signed with BT	Not yet (first SP agreement just signed by Vodafone)
Lithuania		Yes SPs since 2004
Malta		NO
The Netherlands		Yes both MVNOs and SPs since 2001
Norway		Yes both – MVNO since 2003 and SPs since 1999
Poland		NO
Portugal		NO
Slovak Republic		NO
Spain		Yes both MVNOs and SPs since late 2006
Sweden		Yes both – MVNO since 2003 and SPs since 1999
Switzerland		NO
Turkey		NO
UK		Yes both MVNOs and SPs since 2000