

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the Matter of)
)
RURAL CELLULAR ASSOCIATION)
)
Petition for Rulemaking Regarding)
Exclusivity Arrangements Between)
Commercial Wireless Carriers and)
Handset Manufacturers)

RM - _____

FILED/ACCEPTED

MAY 20 2008

To: The Commission

Federal Communications Commission
Office of the Secretary

**PETITION FOR RULEMAKING REGARDING EXCLUSIVITY
ARRANGEMENTS BETWEEN COMMERCIAL WIRELESS CARRIERS AND
HANDSET MANUFACTURERS**

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SUMMARY

Rural Cellular Association (“RCA”) requests that the Commission initiate a rulemaking to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest, consistent with its obligations under the Communications Act.

The Commission has already acknowledged the widespread existence of handset exclusivity arrangements. The nation’s largest carriers enter into these exclusive arrangements with handset manufacturers for what appears to be a variety of reasons, including monopolistic control over the sale price of a particular handset and absolute control over the market availability of a particular handset.

For many consumers, the end result of these exclusive arrangements is being channeled to purchase wireless service from a carrier that has monopolistic control over the desired handset and having to pay a premium price for the handset because the market is void of any competition for the particular handset. For other consumers – particularly rural ones – these exclusivity arrangements prevent them from purchasing many of today’s most popular handsets because they reside in areas not served by the one carrier offering the desired handset.

For example, almost one year after launch, residents of Vermont still cannot use an iPhone without violating the terms of AT&T’s standard service contract. Why? AT&T provides only roaming service in Vermont and does not allow its subscribers to spend more than 40% of their airtime roaming. The iPhone is also unavailable to most rural residents of Alaska, Arizona, Colorado, Idaho, Kansas, Maine, Montana, Nebraska,

Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah and Wyoming.

Verizon Wireless, Sprint Nextel, T-Mobile and Alltel Wireless are also without service offerings in many rural areas. As a result, unique phones like LG's Voyager™ (offered exclusively by Verizon Wireless) and Samsung's Ace™ (offered exclusively by Sprint Nextel) are not available to millions of rural consumers, creating yet another "digital divide" between urban and rural America.

Making matters worse is the fact that, absent the exclusivity arrangements, these innovative handsets could, in most instances, be made available to rural America by dozens of other service providers, including small and regional wireless carriers, and to urban America by the consumer's carrier of choice.

For the nation's five largest wireless carriers demanding these exclusive arrangements, the end result is a significant and unfair advantage over competitors. The ability of smaller carriers to effectively compete with the products and services offered by the five largest wireless carriers is significantly and unfairly diminished due to their limited handset selection, thereby further enhancing the market power of the "Big 5."

The exclusivity arrangements between the Big 5 and certain manufacturers such as Apple, LG, Research in Motion and Samsung do not serve the public interest. Absent these exclusivity arrangements, these popular handsets would likely be sold by multiple carriers, with fewer conditions, and at lower prices to consumers. The time to protect consumers and smaller competitors from these ongoing harms and re-establish a truly competitive U.S. wireless marketplace is now.

TABLE OF CONTENTS

SUMMARY.....	i
TABLE OF CONTENTS.....	iii
I. SCOPE OF THE PROBLEM.....	2
II. EXCLUSIVE ARRANGEMENTS ARE DISPROPORTIONATELY HARMFUL TO RURAL CONSUMERS AND UNDERMINE PURPOSES OF THE COMMUNICATIONS ACT	5
III. UNDER THE COMMUNICATIONS ACT, IT IS UNLAWFUL TO DISCRIMINATE AGAINST PARTICULAR PERSONS OR LOCALITIES....	10
IV. THE COMMUNICATIONS ACT EMPOWERS THE COMMISSION TO STOP ANTICOMPETITIVE PRACTICES THAT ARE CONTRARY TO THE PUBLIC INTEREST	11
V. THE COMMISSION HAS A HISTORY OF PROHIBITING EXCLUSIVITY ARRANGEMENTS THAT ARE CONTRARY TO THE PUBLIC INTEREST	13
VI. SUCCESS IN THE COMPETITIVE MARKET DOES NOT REQUIRE EXCLUSIVITY ARRANGEMENTS	14
VII. CONCLUSION.....	15

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Pursuant to Sections 1, 4(i), 201(b), 202(a), 303(r) and 307(b) of the Communications Act (the "Act"), 47 U.S.C. §§ 151, 154(i), 201(b), 202(a), 303(r), and 307(b), and Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401, Rural Cellular Association ("RCA"),¹ by counsel, hereby petitions the Commission to initiate a rulemaking to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.

¹ RCA is an association representing the interests of more than 80 small and rural wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers operate in rural markets and in a few small metropolitan areas. No member has as many as one million customers, and all but two of RCA's members serve fewer than 500,000 customers.

I. SCOPE OF THE PROBLEM

The Commission has already acknowledged the widespread existence of handset exclusivity arrangements.² The “Big 5” carriers – *i.e.*, AT&T, Verizon Wireless, Sprint Nextel, T-Mobile and Alltel Wireless³ – enter into exclusive arrangements with handset manufacturers for what appears to be a variety of reasons, including unilateral control over the features, content and design of a particular handset, sole control over the marketing of a particular handset, monopolistic control over the sale price of a particular handset, and absolute control over the market availability of a particular handset.

For many consumers, the end result of such exclusive arrangements is being channeled to purchase wireless service from a carrier that has monopolistic control over the desired handset, paying higher prices for the services and accessories available with the desired handset, having to agree to unusual (and undesirable) terms and conditions of service, and having to pay a premium price for the handset because the market is void of any competition for the particular handset.⁴

² See *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, WT Dkt. No. 07-71, FCC 08-28, 2008 WL 312884, Twelfth Report (rel. Feb. 4, 2008), ¶ 188 (“*CMRS Competition 12th Report*”) (“Providers have been attempting to differentiate themselves through exclusive arrangements to reduce churn...wireless carriers are hoping that exclusive access to content and desirable handsets will help them retain and attract customers.”)

³ Collectively, as of Dec. 31, 2006, the Big 5 carriers accounted for approximately 92% of all wireless telephone subscribers in the U.S. *CMRS Competition 12th Report*, ¶ 18, Chart 1: YE2006 Mobile Telephone Subscribers by Company. Verizon Wireless and AT&T collectively accounted for approximately 53% of all wireless telephone subscribers in the U.S. The top three carriers – AT&T, Verizon Wireless and Sprint Nextel – accounted for over 75% of all wireless telephone subscribers in the U.S. *Id.*

⁴ For example, at launch, the 4GB Apple iPhone, offered exclusively in the U.S. by AT&T, retailed for \$499.00 and the 8GB Apple iPhone cost \$599.00 AT&T and Apple also require that consumers enter a 2-year service contract (or a renewed 2-year service agreement for existing AT&T customers) for the iPhone. In the typical agreement between a carrier and a handset manufacturer, the carrier subsidizes (*i.e.*, sells the handset to the consumer at a substantial discount off the list price) the purchase price of the handset in return for the consumer entering into a one or multi-year agreement. The standard early termination fee (“ETF”) charged by the carrier in this arrangement is justified by the subsidy of the cell phone price.

However, consumers who are forced to sign up for service with the one carrier with rights to the desired handset and pay a premium price for the handset and its capabilities are not the only ones harmed by these exclusive arrangements. Americans living in rural areas who cannot get any coverage from the carriers benefiting from these exclusive arrangements are also harmed, since they are denied the technological benefits of many of the most popular handsets available today.

For carriers able to command these exclusive arrangements, the end result is a significant and unfair advantage over competitors.⁵ By way of example, RCA members continue to encounter significant obstacles in attempting to provide prospective and current customers with the most popular handsets made by Samsung and LG. Despite repeated attempts to secure additional handset offerings, the two manufacturers still only offer a paltry number of handsets to RCA members. Moreover, the handsets that have been made available to RCA members are basic, low-end handsets without many of the cutting-edge features customers covet. As a result, the ability of RCA member carriers to compete effectively with the products and services offered by the largest carriers is

Although AT&T currently provides no subsidy for the iPhone, it still charges a \$175.00 ETF to its iPhone customers. In addition, neither AT&T nor Apple will “unlock” the iPhone Subscriber Identity Module (“SIM”) card – a standard industry practice – for customers traveling internationally.

⁵ Of course, Tier II and Tier III carriers are further challenged in their ability to compete with the Big 5 not only because they are unable to get access to wireless handsets that are comparable in function and style to the high-end exclusive handsets, but also because they are unable to command the same volume discounts from vendors as the Big 5 – creating a wireless marketplace bordering on oligopsony. The stranglehold held by the country’s two largest carriers – Verizon Wireless and AT&T -- on the U.S. CMRS marketplace was never more apparent than in the recently concluded 700 MHz auction in which the two companies spent a combined \$16.3 billion on 700 MHz licenses out of the total \$19.592 billion collected by the U.S. Treasury.

significantly and unfairly diminished due to their limited handset selection, thereby further enhancing the Big 5's dominant market power.⁶

In contrast, based upon information available on the web sites of the Big 5 carriers, all are currently offering numerous handsets from Samsung and/or LG, with a significant variety of features.⁷ As a result, customers who want to purchase the most popular handsets, like LG's Voyager™⁸ and Apple's iPhone,⁹ have no choice but to sign up for service with Verizon Wireless to get the Voyager™ or with AT&T to have the iPhone.¹⁰ In addition, as a result of these exclusive arrangements, consumers are forced

⁶ As the FCC also acknowledges in the *CMRS Competition 12th Report*, "market structure is only a starting point for a broader analysis of the status of competition based on the totality of circumstances, including the pattern of provider conduct, consumer behavior, and market performance..." See *CMRS Competition 12th Report*, ¶ 110. As highlighted in this petition, a deeper analysis demonstrates that while there are multiple competitors in most rural areas and most small, rural providers might offer wireless packages that "they feel are competitive with those offered by nationwide providers," few, if any, small, rural providers can provide the variety of handsets and handset features offered by the Big 5. *Id.*

⁷ See Appendix A. The information provided reflects information provided on the websites of Verizon Wireless, AT&T, Sprint Nextel, T-Mobile and Alltel Wireless as of May 6, 2008.

⁸ Since its introduction in November 2007, LG (through its exclusivity arrangement with Verizon Wireless) has reportedly sold over 1.1 million Voyager™ handsets.

⁹ In the first quarter of its existence, the iPhone attained a 19% share of the U.S. smartphone market. Although the iPhone was only available for approximately six months in 2007, the iPhone still claimed nearly a 10% share of the 2007 U.S. smartphone market. See *PHOTOGUIDE: 2007's ten best-selling smartphones*. The iPhone was also the third most-popular phone sold domestically in the 4th quarter of 2007, as well as the best-selling smartphone. See NPD Mobile Phone Track, as cited by Ross Rubin, NPD Group, in *Analyst Angle: with SDK, iPhone is Jobs' 'next great thing*, RCR Wireless News (Mar. 17, 2008). In January 2008, Apple sold its 4,000,000th iPhone, meaning that Apple has sold roughly 20,000 iPhones per day. See *Apple's sold 4 million iPhones since launch* (available at <http://www.engadget.com/2008/01/15/apples-sold-4-million-iphones-since-launch/>). Apple has said that it intends to sell 10 million iPhones by 2008. See Amol Sharma, Nick Wingfield, and Li Yuan, *Apple Coup: How Steve Jobs Played Hardball in iPhone Birth – In Deal with Cingular He Called the Shots; Flirting with Verizon*, The Wall Street Journal (Feb. 17, 2007). In the first quarter of 2008, Apple sold 1,703,000 iPhones domestically. See *Apple Reports Record Second Quarter Results* (available at www.apple.com).

¹⁰ In summing up the AT&T/Apple iPhone exclusivity arrangement, one industry analyst stated, "[AT&T's]... exclusive deal with Apple is an absolute killer to the [wireless carrier] competition." See *"FCC Ruling Changed Phone Industry in 1968; It Could Happen Again Today,"* USA Today (Jan. 30, 2007) citing Danny Briere, CEO, TeleChoice. ("It's like having pots that work on only one brand of stove. Or cereal that must be used with milk from one kind of cow... these [exclusive] arrangements are an unnatural levee set up to hold back market forces.").

to pay premium prices for their desired handsets since competition for the desired handset is non-existent.

It is now time for the Commission to take additional steps -- consistent with its responsibilities under the Communications Act -- to initiate a rulemaking to investigate the widespread use and anticompetitive effects of these exclusivity arrangements spearheaded by the Big 5 who dominate the U.S. mobile telephone marketplace and tacitly endorsed by certain manufacturers and, if necessary, adopt rules that prohibit such arrangements when contrary to the public interest.¹¹

II. EXCLUSIVE ARRANGEMENTS ARE DISPROPORTIONATELY HARMFUL TO RURAL CONSUMERS AND UNDERMINE PURPOSES OF THE COMMUNICATIONS ACT

In enacting Sections 1 and 307 of the Communications Act, Congress made clear its intention that service equity across the United States is a priority. Section 1 of the Act tasks the Commission with regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.¹² Section 307(b) of the Act directs the Commission to develop rules with the goal of

¹¹ On March 20, 2008, CTIA filed a letter with the FCC touting the number of handsets available today in the U.S. market. RCA has no reason to doubt the figures provided regarding the number of companies designing and manufacturing handsets for the U.S. market, nor the number of unique wireless devices for sale in the U.S. However, the information provided by CTIA fails to acknowledge the issue that is the subject of this petition -- the dearth of recently-brought-to-market handsets that are available to smaller carriers due to exclusivity arrangements between members of the Big 5 and certain manufacturers, and the harms caused to consumers by these arrangements. *See* Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-27; RM-11361 (filed Mar. 20, 2008).

¹² 47 U.S.C. § 151 (emphasis added).

providing “a fair, efficient, and equitable distribution of radio service” to all states. To that end, the Commission has repeatedly stated that it is committed to establishing policies and rules that will promote telecommunications service to all regions in the United States, particularly to traditionally underserved areas and, as discussed *infra*, has repeatedly taken action to fulfill this commitment.¹³

The exclusivity arrangements between the Big 5 and manufacturers are inconsistent with these core Commission responsibilities and objectives. For example, at the time the iPhone was introduced (and for many months thereafter), no Alaskan resident could “legally” activate and use an iPhone.¹⁴ Why? AT&T provided only roaming service in Alaska and did not have a store in the state. In an *Anchorage Daily News* article, an AT&T spokesman stated that Alaskans who tried to purchase the iPhone would have their contract terminated by the company on the basis that, pursuant to the terms of AT&T’s standard subscriber contract, the company does not allow its subscribers to spend more than 40% of their time on non-AT&T networks.¹⁵ When that

¹³ See e.g., *The Establishment of Policies and Service rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Bands*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 8842, ¶ 47 (2005) (“*BSS Report and Order*”).

¹⁴ In December 2007, Alaskans were finally able to activate and use the iPhone, without fear of AT&T cancelling one’s service, as a result of AT&T’s acquisition of Dobson Communications Corporation. See Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 22 FCC Rcd. 20295 (2007). Barring AT&T’s acquisition of Dobson, Alaskans would most likely still not be able to activate and use the iPhone. However, even with AT&T’s recent re-entry into Alaska, the majority of the state remains unserved by AT&T and areas of the state that only have wireless coverage from providers other than AT&T are unable to enjoy the benefits of the iPhone due to AT&T’s lock on the handset.

¹⁵ *Shut out of service, tech-head Alaskans will need guts to get hands on an iPhone*, Leslie Anne Jones, *Anchorage Daily News* (June 23, 2007). See Appendix B.

happens, according to AT&T, service is automatically canceled after four months.¹⁶ AT&T's standard contract also requires that iPhone users live in a community that receives direct service.¹⁷

The negative effects of AT&T's monopolistic control of the iPhone are not limited, however, to outlying areas such as Alaska.¹⁸ Residents of the entire state of Vermont still cannot activate and "legally" use the iPhone.¹⁹ The iPhone is also unavailable to residents of rural areas in other states, including most parts of Arizona, Colorado, Idaho, Kansas, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, West Virginia, and Wyoming.

AT&T's exclusive right to carry the iPhone in the U.S. is, perhaps, the most high-profile example of the now common trend for the Big 5 and certain manufacturers to enter into exclusive handset arrangements. In the context of another much-anticipated recent handset launch, it was announced that Research in Motion's new Blackberry® model with significant design and technological changes – the Bold™ – will also be

¹⁶ *Id.* AT&T has reportedly canceled the contracts of some of its subscribers for violating these contract terms.

¹⁷ *Id.*

¹⁸ Residents of many U.S. Territories, including all residents of American Samoa, Guam, and the Northern Mariana Islands are also unable to activate and use an iPhone.

¹⁹ *Lure of iPhone proves too strong for some in Vermont*, USA Today, Adam Silverman (Aug. 27, 2007). See Appendix C. AT&T and Verizon Wireless recently agreed to swap wireless assets as a result of two acquisitions: Verizon Wireless' pending acquisition of Rural Cellular Corporation and AT&T's recently-approved purchase of Dobson Communications Corporation. Upon acquisition of these wireless assets, AT&T will start providing service in limited areas of Burlington and two other rural service areas in Vermont. See *AT&T Mobility, Verizon Wireless swap markets*, RCR Wireless News, Kelly Hill (Dec. 4, 2007).

exclusive to AT&T when it becomes available later this year and, therefore, will similarly be unavailable to residents in many rural areas of the U.S. unserved by AT&T.²⁰

Of course, AT&T is not the only “nationwide carrier” that fails to offer service in thousands of rural communities. Verizon Wireless, Sprint Nextel, T-Mobile and Alltel Wireless – carriers that demand exclusive rights from manufacturers for many of the handsets they carry – are without service offerings in many rural areas. As a result, handsets like LG’s Voyager™ (offered exclusively by Verizon Wireless), Samsung’s Ace™ (offered exclusively by Sprint Nextel), Samsung’s Katalyst™ (offered exclusively by T-Mobile), LG’s AX565 (offered exclusively by Alltel Wireless) and the soon-to-be-launched RIM Thunder,™ a touch screen version of RIM’s Blackberry® device (available in 3Q 2008 and will be offered exclusively by Verizon Wireless),²¹ and Samsung Instinct,™ another touch screen handset (available in June 2008 and will be offered exclusively by Sprint Nextel)²² – all unique products for which there are no readily available substitutes – cannot be used by millions of rural Americans, essentially creating another “digital divide” between urban and rural America.

Making matters worse is the fact that, absent these exclusivity arrangements, these innovative handsets could be made available to consumers by dozens of other service providers, including Tier II and Tier III carriers, which do serve these rural areas. In other words, only commercial exclusivity arrangements are preventing millions of

²⁰ See *RIM Updates the BlackBerry*, The Wall Street Journal Online, Sara Silver (May 12, 2008).

²¹ See *BlackBerry With Touch Screen Planned*, The Wall Street Journal Online, Sara Silver and Cassell Bryan-Low (May 16, 2008).

²² See *Sprint Nextel’s Last-Ditch Weapon*, Businessweek, Cliff Edwards (Apr. 1, 2008).

rural residents from reaping the same technological benefits from today's most innovative and popular handsets.²³

The Commission has, on multiple occasions, taken action to ensure that citizens of particular states and territories are afforded the same benefits from telecommunications services as residents of other states or territories so as not to leave residents of these unserved areas technologically behind. For example, in the Direct Broadcast Satellite ("DBS") service context, the Commission adopted Section 25.148(c) of its rules which, in part, states:²⁴

[E]ntities acquiring DBS authorizations after January 19, 1996, or who after January 19, 1996 modify a previous DBS authorization to launch a replacement satellite, must provide DBS service to Alaska and Hawaii where such service is technically feasible from the authorized orbital location... DBS applicants seeking to operate... who do not provide service to Alaska and Hawaii, must provide technical analyses to the Commission demonstrating that such service is not feasible as a technical matter, or that while technically feasible such services would require so many compromises in satellite design and operation as to make it economically unreasonable.

Similarly, in adopting processing and service rules for the 17/24 GHz Broadcasting-Satellite Service ("BSS"), the Commission stated that 17/24 GHz BSS licensees, to the extent that they provide DBS-like services, are required to certify that they will provide service to Alaska and Hawaii comparable to that provided to locations

²³ The discriminatory effects are reminiscent of the FCC's acknowledgement in its *Automatic Roaming Report and Order* of the difficulties small and rural carriers face in obtaining access to nationwide carriers' networks through automatic roaming agreements. In that proceeding, the FCC was compelled to adopt new rules to respond to public interest concerns regarding the discriminatory roaming practices of the country's largest wireless carriers to ensure that, "ultimately, subscribers receive automatic roaming on just, reasonable and non-discriminatory terms." See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 28 (2007) ("*Automatic Roaming Report and Order*").

²⁴ 47 C.F.R. § 25.148(c) (formerly 47 C.F.R. § 100.53).

in the 48 contiguous United States, unless such service is not technically feasible or not economically reasonable from the authorized orbit location.²⁵

The Commission must take additional steps – consistent with its responsibilities under the Act – to reverse the increasingly common practice of exclusive handset arrangements that deprive rural area residents of the benefits of evolving technology.

III. UNDER THE COMMUNICATIONS ACT, IT IS UNLAWFUL TO DISCRIMINATE AGAINST PARTICULAR PERSONS OR LOCALITIES

The Commission has made clear that wireless carriers are subject to Sections 201 and 202 of the Communications Act.²⁶ Section 201(b) prohibits unjust or unreasonable practices for or in connection with communication service and declares that any practice that is unjust or unreasonable is unlawful. Similarly, Section 202(a) of the Act states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in the charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Yet, the exclusivity arrangements being employed by the Big 5 in collaboration with certain manufacturers are unjustly discriminatory and anticompetitive. Absent these

²⁵ See *BSS Report and Order*, 22 FCC Rcd. 8842, 8862-63.

²⁶ Section 332(c)(1)(A) provides that a “person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person.” See 47 U.S.C. § 332(c)(1)(A). See also *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, 16865-66, ¶¶ 15-18 (rel., July 2, 1998) (noting that Section 201 and 202 codify “the bedrock consumer protection obligations” and that their existence “gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance.” The Commission has also made clear that the “bedrock consumer protection obligations” of Section 201 and 202 apply “even when competition exists in a market.” *Id.* at 16865, ¶¶ 15, 17.

exclusivity arrangements, these popular handsets would likely be sold by multiple carriers, with fewer conditions, and at lower prices to consumers. The discrimination extends not only to those who have to pay higher prices for these exclusive handsets and the services and accessories that complement these handsets.²⁷ Consumers in rural areas who are not permitted access to the benefits of these unique and revolutionary products in clear violation of Sections 201(b) and 202(a) are also harmed.

The discriminatory conduct which has become increasingly common in the marketplace is also in conflict with universal service principles set forth in Section 254(b)(3) of the Act, requiring the Commission to base policies for the preservation and advancement of universal service, in part, on ensuring that consumers in all regions of the U.S. have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas.²⁸ Clearly, the Communications Act demands that the FCC rectify the ongoing public harms caused by these exclusivity arrangements.

IV. THE COMMUNICATIONS ACT EMPOWERS THE COMMISSION TO STOP ANTICOMPETITIVE PRACTICES THAT ARE CONTRARY TO THE PUBLIC INTEREST

The Commission has consistently observed that it has broad authority under the Communications Act to protect U.S. citizens from harms resulting from anti-competitive

²⁷ Consumers may also be required to change carriers because their current service provider does not offer their desired phone.

²⁸ Section 254(b)(3) states that “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” 47 U.S.C. § 254(b)(3).

behavior.²⁹ The powers provided to the Commission under Sections 4(i) and 303(r) of the Communications Act,³⁰ as well as its broad ancillary jurisdiction³¹ to serve the public interest pursuant to Title I of the Communications Act provide the Commission with authority to review and prohibit anticompetitive practices.³² In addition, as discussed *supra*, Sections 201(b) and 202(a) of the Communications Act³³ also empower the Commission to take all reasonable and necessary measures to end the anticompetitive practices that are inherent in exclusivity arrangements that discriminate against millions of Americans who are not offered service by the nation's five largest wireless carriers or are required to sign up for service from the one carrier with exclusive rights to their desired handset, and harm smaller competitors.

The exclusivity arrangements between Big 5 members and manufacturers such as Apple, LG and Samsung do not serve the public interest. The time to protect consumers

²⁹ See *In the Matter of Saskatchewan Telecommunications*, Order, Authorization and Certificate, 22 FCC Rcd. 91 (2007), n.42; see also *In the Matter of News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, Memorandum Opinion and Order, FCC 08-66 (rel. Feb. 26, 2008), ¶ 26 (“In addition to considering whether a transaction will reduce existing competition, therefore, we also must focus on whether the transaction will decrease the market power of dominant firms in the relevant communications markets and the transaction's effect on future competition. Our analysis also recognizes that a proposed transaction may lead to both beneficial and harmful consequences. For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways.”).

³⁰ See 47 U.S.C. §§ 154(i) and 303(r).

³¹ “Ancillary jurisdiction may be employed, in the Commission’s discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is ‘reasonably ancillary to the effective performance of [its] various responsibilities.’” *IP-Enabled Services*, WC Docket No. 04-36, *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, 10261 (2005).

³² 47 U.S.C. § 151 *et seq.*

³³ See 47 U.S.C. §§ 201(b) and 202(a).

and smaller competitors from these ongoing harms and re-establish a truly competitive U.S. wireless marketplace is now.

V. THE COMMISSION HAS A HISTORY OF PROHIBITING EXCLUSIVITY ARRANGEMENTS THAT ARE CONTRARY TO THE PUBLIC INTEREST

The Commission has a track record of prohibiting exclusivity arrangements that become obstacles to competitive access in the telecommunications market. In 2001, the Commission prohibited common carriers from entering into contracts with commercial multiple tenant environment (“MTE”) owners that granted to the carriers exclusive access for the provision of telecommunications services to tenants in the MTE.³⁴ In 2007, the Commission found that contractual agreements granting one multichannel video programming distributor exclusive access for the provision of video services to multiple dwelling units (“MDUs”) and other real estate developments harm competition and broadband deployment and that any benefits are outweighed by the harms of such agreements.³⁵ In March 2008, the Commission prohibited carriers from entering into contracts with residential MTE owners that grant carriers exclusive access for the provision of telecommunications services to residents in those MTEs.³⁶ In each case, the Commission found that the exclusivity arrangements at issue limited consumer choice

³⁴ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd. 22983, ¶¶ 160-164 (2000).

³⁵ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 07-51, 22 FCC Rcd. 20235 (2007).

³⁶ *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, WT Docket No. 99-217 (rel. Mar. 21, 2008) (“*Telecom Nonexclusivity Order*”).

and competition, contrary to the goals of the 1996 Act, and that such arrangements “not only could adversely affect consumers’ rates, but also quality [and] innovation...”³⁷

The same anticompetitive harms are being felt by consumers as a result of the exclusivity arrangements that dominate the U.S. handset market. Therefore, consistent with its actions in similar proceedings, the Commission should initiate a rulemaking to investigate the harms caused by these exclusivity arrangements and take all necessary corrective actions.

VI. SUCCESS IN THE COMPETITIVE MARKET DOES NOT REQUIRE EXCLUSIVITY ARRANGEMENTS

In the context of the Skype petition,³⁸ CTIA argued that “[a] rule that would prevent carriers from offering unique handsets and services to distinguish themselves in the marketplace would remove an important competitive spur to the development of new handsets that offer customers innovative features and functions.”³⁹ RCA believes that carriers can distinguish themselves in the marketplace in a variety of ways – *e.g.*, lowest priced plans, best coverage, superior customer service, unique services and features – and still be successful in the marketplace without resorting to exclusivity arrangements.

³⁷ *Telecom Nonexclusivity Order*, ¶ 8.

³⁸ Skype Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007).

³⁹ *CTIA Talking Points: Given the Competitiveness of the Wireless Marketplace, There is No Need to Regulate the Use or Functionality of Wireless Handsets* (July 23, 2007) (available at www.ctia.org).

VII. CONCLUSION

For all of the foregoing reasons, RCA hereby petitions the Commission to initiate a rulemaking to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.

Respectfully submitted,

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May 20, 2008

APPENDIX A

Exclusive Carrier	Manufacturer	Handset Model
AT&T	LG	CE110
AT&T	LG	CU515
AT&T	LG	VU™
AT&T	LG	Shine™
AT&T	LG	CG180-GoPhone®
AT&T	Samsung	a437
AT&T	Samsung	a727
AT&T	Samsung	a737
AT&T	Samsung	Access™
AT&T	Samsung	BlackJack™ II
AT&T	Samsung	SLM
AT&T	Samsung	a117 - GoPhone®
AT&T	Samsung	A127 - GoPhone®
Alltel Wireless	LG	AX145
Alltel Wireless	LG	AX275
Alltel Wireless	LG	AX390
Alltel Wireless	LG	AX565
Alltel Wireless	Samsung	Alltel Snap™
Alltel Wireless	Samsung	Muse™
Sprint Nextel	LG	LX160
Sprint Nextel	LG	Muziq™
Sprint Nextel	Samsung	a580
Sprint Nextel	Samsung	m300
Sprint Nextel	Samsung	m520
Sprint Nextel	Samsung	Ace™
Sprint Nextel	Samsung	Upstage™

T-Mobile	Samsung	t219
T-Mobile	Samsung	t409
T-Mobile	Samsung	t429
T-Mobile	Samsung	t439
T-Mobile	Samsung	t639
T-Mobile	Samsung	t819
T-Mobile	Samsung	Beat™
T-Mobile	Samsung	Blast™
T-Mobile	Samsung	Katalyst™
T-Mobile	Samsung	Stripe™
Verizon Wireless	LG	VX5400
Verizon Wireless	LG	VX8350
Verizon Wireless	LG	VX9400
Verizon Wireless	LG	Chocolate™
Verizon Wireless	LG	Venus™
Verizon Wireless	LG	enV™
Verizon Wireless	LG	enV²
Verizon Wireless	LG	Voyager™
Verizon Wireless	Samsung	Alias™
Verizon Wireless	Samsung	FlipShot™
Verizon Wireless	Samsung	Gleam™
Verizon Wireless	Samsung	Glyde™
Verizon Wireless	Samsung	Juke
Verizon Wireless	Samsung	SCH-u340
Verizon Wireless	Samsung	SCH-u410
Verizon Wireless	Samsung	SCH-u540
Verizon Wireless	Samsung	SCH-u550
Verizon Wireless	Samsung	SCH-u620

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Shut out of service, tech-head Alaskans will need guts to get hands on an iPhone

By LESLIE ANNE JONES

ljones@adn.com

(Published: June 23, 2007)

On Friday, most of the contiguous states will delight in the debut of the cell phone/music player/multimedia device promised to revolutionize how we dial. And, as per usual, Alaskans will be stuck in the telecommunication dark age sans iPhone.

AT&T has a five-year exclusive contract with Apple for iPhone. And they don't offer cell service here. Yep, it could be half a decade.

Maybe we can make string-and-cup phones and take turns holding a boom box up to them in emulation of the iPhone enlightenment.

But what about the itchy fingers among us? The ones who can't wait to caress its scratch-resistant glass and watch "The Starter Wife" on its sparkling 3.5-inch screen?

There's one other option. An option that AT&T spokesman Mark Siegel disdained to hear we would write about.

"There's nothing frivolous about this," he said. "This is not the way wireless service is to be bought and used."

Scruples aside, here's how an Alaskan can get their mitts on that \$499 phone:

Buy a plane ticket to the nearest AT&T or Apple Store (at least \$350 to Seattle) and misrepresent oneself as a Washington resident. Get ready to pay sales tax for the phone plus a yet-unknown amount for the service plan.

Or find a friend in the Lower 48 to do the misrepresenting, in which case shipping runs \$1.48 to \$16.25.

Now the really sneaky part:

Siegel said AT&T would be on to Alaskans' tricks quickly. AT&T knows when calls bounce off another provider's towers because it costs them even if it doesn't show up on your bill. Service would be terminated, and said dishonest Alaskan is out \$499 (or more; that's the cheapest model).

For "security reasons," Siegel declined to say how long it would take AT&T to figure out a user was chatting/texting/downloading exclusively outside AT&T service area.

A call to AT&T's help line cleared up that mystery.

An obliging customer service agent explained that if AT&T's computer sees four months of chitchatting in Alaska (or elsewhere out of AT&T coverage area), service will be automatically canceled.

But if you call AT&T ahead of time and explain to them that you'll be on an extended trip, you can avoid service termination -- at least for a little while.

In a second phone call, Siegel testily confirmed the four-month figure.

But he emphasized that if the iPhone is in Alaska more than it is in AT&T service area -- service will be terminated.

Cost of getting the phone up here aside, and not considering dollars dropped outfitting the thing with songs and movies -- after buying the phone, paying for call minutes, texting and Web services, and assuming you'll only get to use it for about four months before AT&T cuts the cord -- it's a spendy, short-lived glory.

But beating Alaska's technological lag time?

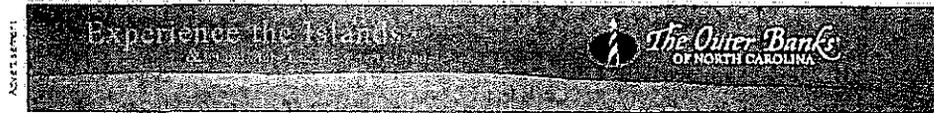
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Lure of iPhone proves too strong for some in Vermont

By Adam Silverman, USA TODAY

BURLINGTON, Vt. — There's a digital ax hanging over John Canning's head, but he doesn't much care.

The South Burlington resident is too busy surfing the Internet, perusing his e-mail, compiling driving directions and keeping track of the stock market — all on what amounts to a portable computer he cradles in the palm of his hand.

Canning bought an iPhone, the trendy gadget from Apple that combines a wireless phone, iPod, digital music player and Internet and e-mail applications.

That made Canning something of a risk-taker. The device is tethered exclusively to AT&T, which offers no wireless service in Vermont and threatens in legal documents and media interviews to terminate the contracts of anyone who buys an iPhone while living here.

Canning is among a sprinkling of people in Vermont and other states nationwide where AT&T has a limited or non-existent presence who have purchased the gadget regardless of the risk.

Those pioneering users have weighed the gizmo's utility and hip factor against the potential of AT&T expulsion, and they've decided the gamble is worthwhile.

"It certainly is much easier to use and more well-thought-out than any other cellphone I've ever used," says Canning, president of Physician's Computer, a Winooski-based software developer for pediatricians. "I used to sit down on the computer, but now I just grab my iPhone."

Apple released the iPhone to considerable fanfare and critical and consumer acclaim on June 29. The device is available to any of the 284 million people in 13,000 communities across the country to which AT&T says its network extends.

Vermont and Alaska remain the only states where the company has no presence whatsoever; the iPhone also is unavailable to people who live in large but mostly rural regions that lack AT&T coverage in 17 other states.

AT&T devices work in locales without direct coverage through agreements with other companies that do offer service. In Vermont, AT&T's partner is Unicom.

Earlier this summer, AT&T announced plans to buy Alaska's primary wireless provider, a move that would leave Vermont alone in its cocoon of iPhone isolation. AT&T says it hopes to complete the deal by year's end.

Allure vs. risk

Castling their worries aside, some of Vermont's most devout Apple enthusiasts have paid \$499 to \$599 for one of the iPhone's two models.

Canning purchased his during a recent stay in Boston. His hotel was next to an AT&T store, and his resistance crumbled each time he walked past the prominent display.

"It said, 'Buy me, buy me!'" Canning said. "I withheld for the first two days, but I finally broke down on the third."

Demonstrating the device one afternoon at his busy office, Canning clicked through Web pages, e-mail messages, photographs and a camera interface with a flick of his finger on the touch-sensitive screen. The display read "AT&T" in listing the service provider on whose network Canning's phone was operating.

"I've been using it non-stop," he said.

Canning said he's confident he's adhering to his contract terms. A provision says users can't spend more than 40% of their monthly minutes on non-AT&T networks, and Canning said he's closely monitoring his talking and surfing to keep within that boundary.

AT&T spokesman Mark Siegel points to another contract clause, though, which says users must live in a community that receives direct service.

The company has canceled the contracts of "a very small percentage" of its 63.7 million subscribers, Siegel said, declining to provide figures. People who live in places where AT&T offers no service shouldn't buy an iPhone, he said.

"Just by doing that, you're violating the terms of the agreement," Siegel said.

Conflicted resellers

The risk of termination is too much for some longtime Apple aficionados. Bert Samsa, who owns Apple reseller MacMan in Fairbanks, Alaska, said he won't buy an iPhone until he can do so properly.

"The only way we can get one is to go to Washington and file," said Samsa, in the Apple business since 1990. "As soon as it's available, of course, we'll all jump right on it."

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T-Mobile

For employees of Waitsfield, VT-based Apple reseller Small Dog Electronics, the iPhone's allure has proved persuasive enough to overcome the worries

Chief Executive Don Mayer formulated a back-up plan: If AT&T boots him, he'll sell his iPhone through online auction site eBay. The gadget's technological advances overshadow potential hassles, he said.

"It is an incredibly innovative and handy device in a nice, small package," said Mayer, who estimated about half a dozen other Small Dog employees also own iPhones. "I have virtually everything I need in a handheld device."

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