

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
RURAL CELLULAR ASSOCIATION) RM-11497
)
Petition for Rulemaking Regarding)
Exclusivity Arrangements Between)
Commercial Wireless Carriers and)
Handset Manufacturers)
_____)

**COMMENTS OF VERIZON WIRELESS
REQUESTING DISMISSAL OR DENIAL OF PETITION**

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Verizon Wireless requests that the Commission dismiss or deny the above-referenced Petition for Rulemaking of the Rural Cellular Association (RCA) for lack of jurisdiction and for RCA's failure to demonstrate evidence of any harm that can be resolved through the requested regulation.¹

SUMMARY

RCA asks the Commission to investigate the practices associated with exclusive handset arrangements in supply contracts between commercial wireless service providers and equipment manufacturers and to "adopt rules that prohibit such arrangements when contrary to the public interest." The crux of RCA's complaint is its allegation that equipment vendors do not offer smaller wireless providers an adequate array of handsets, and, therefore, consumers

¹ See Wireless Telecommunications Bureau, Public Notice DA 08-2278 (Oct. 10, 2008). The Wireless Telecommunications Bureau published a Federal Register notice indicating that the petition is being treated as a "proposed rule." 73 Fed. Reg. 63127 (Oct. 23, 2008). The Bureau granted a request for extension of time for filing comments to February 2, 2009. Wireless Telecommunications Bureau, Public Notice DA 08-2576 (Nov. 26, 2008).

would rather obtain equipment and service from a large provider with more handset selections, many of which are the product of exclusivity arrangements with the equipment vendors. RCA's solution is for the Commission to ban exclusivity arrangements, which it apparently thinks will force equipment vendors to offer smaller carriers broader access to handsets, including those with the latest technology and features.

There are many, many obstacles to the Commission's consideration of RCA's alleged problem and adoption of its proposed solution:

The FCC Lacks Jurisdiction. The jurisdictional premise of RCA's Petition is fundamentally flawed. The Commission does not have jurisdiction over equipment vendors generally and their contracts for sale of equipment to wireless providers; therefore, the Commission cannot regulate the terms and conditions in supply agreements between wireless providers and equipment manufacturers that are the subject of RCA's Petition. The Commission does have jurisdiction over (a) providers of communication services and (b) equipment when transmitting, but these grounds provide no jurisdictional authority to act on RCA's request. The Commission cannot lawfully adopt the requested rule, and so, the Petition must be dismissed.

The Wireless Device Market Is Competitive Without Regulation. Regulation of the wireless device market is not needed nor is it in the public interest. The mobile handset market in the United States is highly competitive, and equipment manufacturers offer their products to multiple providers and to consumers through many channels. Wireless service providers do not have sufficient market power to block access to handset models by other providers. In this market, a provider or group of providers can work with equipment manufacturers to develop

competitive products without relying on governmental regulation of equipment distribution to obtain desirable handsets.

Exclusivity Arrangements Benefit Consumers. RCA is wrong about exclusivity arrangements harming consumers. Exclusive arrangements, including time-to-market based arrangements, promote innovation and consumer choice, and are not implemented for anti-competitive purposes. In a competitive market, like the U.S. wireless industry, service providers must compete on many levels, and “exclusive” devices are one means for differentiation. Competition in handsets has repeatedly produced innovations in technology and features that benefit consumers and ultimately all wireless service providers. Banning such arrangements would harm consumers and providers, whether large or small, national or rural.

The Requested Rule Is Not a Feasible Remedy. Even if the Commission had jurisdiction, the Petition fails to identify what about “exclusivity” arrangements or equipment vendor practices could be regulated. There are many forms of exclusivity agreements, ranging from the exclusive marketing arrangement between AT&T and Apple for the iPhone, to exclusive deals for specific handset colors. The Petition does not identify what agreements the rule would cover, what circumstances the rule would remedy, or what standards the Commission would apply to recognize the public interest need for a proposed ban.

Moreover, a rule prohibiting exclusive arrangements would have no effect on what handsets equipment vendors can or will make available to rural carriers. There are other intervening barriers based on provider technology choices and equipment vendor business choices. RCA’s requested solution is contrary to the reality of the wholesale handset ecosystem, and would be easily evaded. The requested rule cannot be tailored to solve the alleged problem that RCA raises.

Regulation Is Contrary to Congressional Intent. Even if the Commission had subject matter jurisdiction, the regulation proposed by RCA would be contrary to Congress' and the Commission's framework for limited regulation of the competitive wireless industry.

The Petition Must Be Dismissed. For all these reasons, the Commission should dismiss or deny RCA's Petition.²

I. THE COMMISSION MUST DISMISS RCA'S PETITION FOR LACK OF JURISDICTION.

No provision of the Communications Act authorizes the Commission to regulate equipment vendors *per se* or agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers. RCA asserts that the Commission has jurisdiction to regulate exclusivity terms pursuant to Sections 1, 4(i), 201, 202, 303(r), and 307(b) of the Communications Act plus through the Commission's ancillary jurisdiction under Title I of the Act. However, none of these statutes governs equipment vendors or such contractual terms with wireless service providers. Accordingly, the Commission must dismiss RCA's Petition for lack of jurisdiction.

Scope of Sections 1 and 307(b). RCA claims that, through exclusivity arrangements for specific handsets, equipment vendors discriminate against carriers and consumers in rural areas. It claims (Petition, at 5-10) that Sections 1 (47 U.S.C. § 151) and 307(b) (47 U.S.C. § 307(b))

² Even if the Commission were to grant any part of RCA's Petition, the Commission cannot adopt a rule without issuing a valid Notice of Proposed Rulemaking identifying the language or substance of the rule under consideration. The Administrative Procedure Act requires the Commission to publish notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Petition itself identifies no specific language for a rule, and the Bureau's Public Notice and Federal Register notice simply recite the language of the Petition. The breadth and diversity of supply agreements between equipment manufacturers and wireless service providers that could be captured by RCA's proposal make it impossible to determine the substance of a proposed rule or how any such rule would apply. *Cf. WJG Tel. Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (interested parties must have sufficient notice to participate and not be deprived of the opportunity to present relevant information by lack of notice of the relevant issues). For the reasons set forth in the text, grant of RCA's Petition would be improper, but any action beyond initiating a rulemaking with an appropriately specific "proposed rule" would also be improper.

of the Act authorize the Commission to take action to prevent discrimination among persons and localities, and so, the Commission may adopt a rule under which equipment vendors must offer equitable distribution of specific handsets.

RCA is wrong with respect to both cited statutes. “Nondiscrimination” in wholesale supply contracts for specific consumer equipment is not the gravamen of the Commission’s authority under Section 1. Section 1 authorizes the Commission “to make available . . . to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio *communication service* with adequate facilities . . .” Section 1 thus only gives the Commission general authority over communication services. And, the D.C. Circuit has rejected attempts to squeeze into Section 1 any and all substantive authority for Commission action because “[b]oth the terms of § 1 and the case law amplifying it focus on the FCC’s power to promote the accessibility and universality of *transmission*.”³ Exclusivity agreements for marketing specific handsets do not promote or impede *transmission* of communication services, nor affect whether *transmission* services are available to all people of the United States without discrimination.

While the Commission may certainly specify regulations as to the technical characteristics of radio communication equipment used to provide communication services based on the potential for such devices to cause interference *while transmitting* (47 U.S.C. §§ 303(e-f)), vendor supply agreements for time-to-market arrangements or exclusive supply contracts for non-interference-related features of a certain model of consumer equipment fall far outside the scope of such authority.⁴

³ *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (emphasis added).

⁴ The Commission may also regulate marketing of wireless equipment pursuant to Section 303(r) of the Communications Act based on and to the extent of the transmission properties and potential to cause interference. *See, e.g.*, 47 C.F.R. § 2.1201 (regulation of marketing and importing equipment “capable of causing harmful

RCA also misconstrues the “equitable distribution” clause of Section 307(b) and ignores its plain language. Section 307(b) authorizes the Commission to provide for “fair, efficient, and equitable distribution” of *radio station licenses* when it is “considering applications for licenses, and modifications and renewals thereof.” This statute authorizes the Commission to take into account the distribution of radio stations across the United States in awarding licenses to ensure nationwide radio communication services.⁵ Section 307(b) does not authorize regulation of equipment vendors or vendor supply agreements to implement or operate those radio stations, which is what RCA’s Petition seeks.

RCA argues that exclusivity arrangements for desirable handsets prevent fair distribution of equipment to rural America. (Petition, at 6-7.) But, whatever actions Congress authorized the Commission to take pursuant to Section 307(b) have no connection to, for example, the lack of iPhones in Alaska. The Commission’s rules requiring broadcast satellite licensees to serve Alaska and Hawaii, cited by RCA as precedent, are inapposite. (Petition, at 9-10.) These rules impose conditions on radio station licensees for the provision of a communication service, over which the Commission clearly has jurisdiction under Title I and Title III of the Act.⁶ Moreover, there is a significant difference between regulating the marketing practices of equipment vendors with respect to one model of handset as opposed to the geographic coverage of services provided under radio licenses. Regulating the latter is a principal duty of the Commission, while regulating the former is not authorized by the Communications Act at all.

interference”); 47 C.F.R. § 15.19 (labeling requirements attesting to compliance with unlicensed equipment operational requirements).

⁵ See, e.g., *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955) (discussing application of Section 307(b) in award of broadcast licenses).

⁶ See 47 C.F.R. § 25.148(c); *Broadcasting-Satellite Service*, 22 FCC Rcd 8842, 8860-62 (2007).

Scope of Sections 201 and 202. Similarly, RCA claims that Sections 201 and 202 (47 U.S.C. §§ 201-202) authorize the Commission to prohibit discrimination in the distribution of specific wireless devices. (Petition, at 10-11.) But, these two provisions specify conditions under which a common carrier offers “communication service” to its customers.⁷ They contain no language that would permit the Commission to regulate equipment vendors, the sales practices of equipment vendors toward certain types of carriers, or the wholesale supply agreements that equipment vendors reach with wireless service providers for a specific handset model.

A wireless operator’s decision to enter into a contract with an equipment vendor does not involve the provision of *any* transmission service using communications to *any* end user, for a common carrier service or otherwise. An exclusive arrangement for a specific device does not itself create or block transmission of information over a service provider’s network, unlike, for example, an exclusive agreement for *service* to a particular group of consumers. RCA cites (Petition, at 13) proceedings in which the Commission has used Sections 201-202 to bar exclusive arrangements that restrict the communication services that can be provided to tenants of multiple dwelling units.⁸ But, these rules are inapposite because they govern the provision of a communication service.⁹

⁷ Similarly, Section 254(b)(3), also cited by RCA as a source of Commission authority (Petition, at 11), only refers to providing “access to telecommunications and information services.” 47 U.S.C. § 254(b)(3). It says nothing about providing access to handsets featuring certain technologies.

⁸ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007); *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd 5385 (2008).

⁹ For the same reasons, the Commission’s decisions on bundling of cellular service and CPE are not relevant to the jurisdictional issue here. For bundling, the issue was whether consumers were being “forced to buy unwanted carrier-supplied CPE in order to obtain necessary transmission service.” *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4028 (1992). Here, the issue is not whether service and CPE are bundled, but whether wireless providers can obtain certain devices wholesale from equipment vendors. Consistent with the bundling order, no consumer is obligated to buy specific CPE, or CPE from the service provider, in order to obtain wireless transmission services.

Exclusive marketing arrangements for specific handsets do not preclude the provision of communication services by those authorized to offer them, as do agreements that restrict tenants in apartment buildings to one service provider. Rather, exclusivity terms appear in a contractual arrangement with an equipment vendor – not a customer. The wireless operator does not provide any communication service to the equipment manufacturer as a result of the contract that could be the subject to Sections 201-202, and thus could be a basis for action on RCA’s Petition. Sections 201-202 offer no relief to RCA.

Scope of FCC’s Antitrust and Ancillary Jurisdiction. Finally, RCA argues (Petition, at 12) that the Commission’s powers to protect consumers against harm from anticompetitive behavior and its “broad ancillary jurisdiction” under Title I of the Act, in conjunction with Sections 4(i) and 303(r), authorize the regulation it seeks. Again, RCA is incorrect.

Sections 4(i) and 303(r). These two statutes cited by RCA have already been rejected by the D.C. Circuit as a source of substantive Commission authority. With respect to the general grants of authority to act in the public interest in Sections 4(i) and 303(r), the D.C. Circuit has made clear that the Commission must have authority over a specific subject matter in order to pursue regulations under these provisions. Section 4(i) (47 U.S.C. § 154(i)) authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” The D.C. Circuit has confirmed that this ““is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a ‘necessary and proper’ clause. Section 4(i)’s authority must be ‘reasonably ancillary’ to other express provisions.””¹⁰

¹⁰ *Motion Picture Ass’n*, 309 F.3d at 806 (quoting with approval *Implementation of Video Description of Video Programming, Report and Order*, 15 FCC Rcd 15230, 15276 (2000) (Chairman Powell, dissenting)).

Similarly, Section 303(r) (47 U.S.C. § 303(r)) authorizes the Commission to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.” But, again, the D.C. Circuit has pointed out specifically with respect to this section that “[t]he FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.”¹¹

Antitrust Remedies. With regard to anticompetitive conduct, the Commission’s authority to address competitive issues must be grounded in the provisions in the Communications Act governing activities over which it does have authority.¹² For example, in the case of transactions involving mergers and transfers of control of radio facilities, the Commission does consider whether the transaction serves the public interest, including review of issues related to the effect on competition of the transaction.¹³ But, RCA has cited to no Communications Act authority over equipment vendors and vendor supply contracts for specific handsets that would allow the Commission to consider any alleged anticompetitive conduct with respect to such agreements in the context of a Communications Act requirement.¹⁴

Ancillary Title I Jurisdiction. Moreover, the Commission’s ancillary authority cannot provide such jurisdiction. The Commission’s ancillary authority is limited in scope. The service to be regulated must fall within Title I’s general subject matter jurisdiction and the regulation in question must be “reasonably ancillary to the effective performance of the

¹¹ *Id.*

¹² See *United States v. RCA*, 358 U.S. 334 (1959); *Character Qualifications*, 102 FCC 2d 1179, 1202-03 (1986).

¹³ See, e.g., *SBC Communications, Inc. and AT&T Corp.*, 20 FCC Rcd 18290, 18300-02 (2005).

¹⁴ In any event, given the competitive markets for communications service and handsets, there is no antitrust theory under which RCA could demonstrate anticompetitive conduct. See B. Nigro & M. Trahar, “An Antitrust Perspective in Response to Skype’s Petition” (Apr. 26, 2007), Att. D to *Opposition of CTIA – The Wireless Association®*, RM-11361 (filed Apr. 30, 2007).

Commission's various responsibilities."¹⁵ Title I limits the Commission's jurisdiction to "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds" and "instrumentalities, facilities, apparatus, and services. . . incidental to such transmission."¹⁶

As noted above, a supply contract for a specific device is not for a transmission service and therefore is not a "transmission by radio." While the devices that are the subject of the supply contract may be used for communications, that does not bring the equipment vendor or the contract itself within the scope of the Commission's jurisdiction over transmission services. Indeed, the D.C. Circuit has noted that the Commission's "general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission."¹⁷

Nor are such contracts incidental to transmission. The D.C. Circuit has explained that "at most, the Commission only has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication *while those apparatus are engaged in communication.*"¹⁸ Citing this decision, the Commission has explained that a particular object is "incidental to [a] transmission" if it is "an integral and necessary part of" the communication.¹⁹ A marketing arrangement or supply contract between a specific equipment vendor and service provider for a specific handset is neither integral to nor necessary for communication by radio between a subscriber and a service provider. Regulating the

¹⁵ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 (1979).

¹⁶ 47 U.S.C. § 153(33).

¹⁷ *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005). The Commission has similarly recognized that "[t]he Commission does not license or regulate handset manufacturers." *Section 68.4(a) of the Commission's Rules Governing Hearing-Aid Compatible Telephones, Notice of Proposed Rule Making*, 16 FCC Rcd 20558, 20580 (2001).

¹⁸ *American Library Ass'n*, 406 F.3d at 704 (emphasis added).

¹⁹ *IP-Enabled Services*, 22 FCC Rcd 11275, 11288, ¶ 23 & n.98 (2007); see also *Continental Airlines*, 21 FCC Rcd 13201, 13219 (2006) (same).

provisions of equipment supply contracts is an even further stretch for the Communications Act than regulating receiver apparatus post-transmission and video descriptions provided during broadcast transmissions, both of which the D.C. Circuit has held fall outside the scope of the Commission's jurisdiction.²⁰

As the Seventh Circuit Court of Appeals explained in rejecting a similar request to extend the FCC's jurisdiction to any subject matter "affecting communications":

While we appreciate the need for a flexible approach to FCC jurisdiction, we believe the scope advanced by petitioners is far too broad. The "affecting communications" concept would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals, much less being remotely electronic in nature. Nothing before us supports this extension.²¹

Handset supply agreements are totally apart from any transmission of information or communication by end users, and so, lie beyond the Commission's general *and* ancillary jurisdiction. Because the Commission lacks jurisdiction over the practices of equipment vendors and vendor supply contracts, the Commission must dismiss the Petition without taking the requested action.

II. THE WIRELESS DEVICE MARKET IS INTENSELY COMPETITIVE AND THERE IS NO MARKET FAILURE JUSTIFYING REGULATION.

RCA argues that exclusivity arrangements prevent certain carriers from obtaining newer handsets to distribute to consumers and, therefore, consumers in areas served by those carriers are deprived of access to the latest handsets. (Petition, at 2-3.) RCA offers no specific evidence to support these claims. As discussed below, the market for wireless handsets does not support the claims or the action RCA requests to remedy the alleged harm.

²⁰ *American Library Ass'n*, 406 F.3d at 702-05; *Motion Picture Ass'n*, 309 F.3d at 803-07.

²¹ *Ill. Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972).

A. Handset Manufacturers Face Significant Competition and Generally Distribute Handsets Broadly Among U.S. Wireless Carriers.

The U.S. market for wireless handsets is characterized by significant competition among many well-established and newer manufacturers, including Motorola, Nokia, LG, Samsung, Research in Motion, Palm, Sony Ericsson, Kyocera, Sanyo, and HTC.²² Across the United States, there are currently hundreds of wireless phones and devices available to consumers, from nearly three dozen manufacturers.²³

As an initial matter, it should be noted that no wireless service provider in the United States manufactures wireless devices, or owns equity in any of the major handset manufacturers.²⁴ Thus, there is no ownership restraint on manufacturers offering or not offering devices to one or another of the wireless carriers. Also, no single manufacturer or service provider has sufficient market power in their respective markets to control the distribution market.²⁵ Any vertical relationships between manufacturers and operators are therefore likely to be beneficial rather than harmful to competition:

[V]ertical relationships do not run afoul of antitrust laws where the integrating firms lack market power in their respective markets. Rather, it may be ‘affirmatively desirable because it promotes efficiency.’ This is especially true ‘as products become more technical and specialized and as an ongoing relationship between bargaining opposites requires increasing amounts of coordination.’²⁶

²² See, e.g., M. Lowenstein, “The Evolving Role of Handsets in the U.S. Wireless Industry,” at 7-8 (Jan. 2009) (Attachment A); *Comments of LG Electronics MobileComm USA*, at 2, RM-11361 (filed Apr. 30, 2007).

²³ See Phone Scoop, <http://www.phonescoop.com/Phones/>.

²⁴ See R. Hahn, R. Litan, & H. Singer, “The Economics of ‘Wireless Net Neutrality,’” at 31 (Apr. 2007), Att. E to *Opposition of CTIA-The Wireless Association*, RM-11361 (filed Apr. 30, 2007).

²⁵ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Thirteenth Report*, DA 09-54, ¶¶ 274-75 (rel. Jan. 16, 2009) (“Thirteenth Competition Report”) (concluding that effective competition exists in U.S. CMRS market); W.D. Gardner, “Samsung Overtakes U.S. Market Share Lead from Motorola,” *InformationWeek* (Nov. 7, 2008) (reporting 3Q08 U.S. handset market share of 22.4% for Samsung, 21.1% for Motorola, 20.5% for LG, 10.2% for Research in Motion, 8.4% for Nokia, 5.7% for Apple).

²⁶ Nigro-Trahar, “Antitrust Perspective,” at 5 (internal citation omitted).

In this environment, manufacturers and service providers enter into supply agreements based on their independent business judgments about how best to compete in the wireless market, and such competition in the wireless market benefits consumers, as the Commission repeatedly has found.²⁷

Moreover, the facts demonstrate that handset manufacturers typically distribute their equipment broadly. For example, a review of the handset availability of various manufacturers, on a given date, shows that Research in Motion distributes its products through two dozen U.S. providers,²⁸ Nokia 16 or more,²⁹ Kyocera 15,³⁰ and Samsung 13 plus generic phones.³¹ Obviously, any exclusive handset arrangements that these manufacturers might have with service providers are not preventing them from selling equipment to *multiple* service providers, and such arrangements are not preventing service providers from offering communication services with *multiple* manufacturers' handsets.

Exclusivity arrangements may also be irrelevant to consumer handset sales because consumers do not have to obtain wireless equipment directly from service providers. Many of the handset manufacturers sell devices through several outlets, including directly to consumers and through "Big Box" stores. LG noted recently that it "sells handsets through its wireless carrier customers, direct to the consumer (e.g., via its website), and through various retail channels."³² However, even with this broad-based distribution of devices, equipment manufacturers do enter into exclusive arrangements because they offer economic benefits.

²⁷ See *Thirteenth Competition Report*, ¶ 2.

²⁸ See <http://na.blackberry.com/eng/purchase/?regionId=2>. (Visited Jan. 29, 2009.)

²⁹ See <http://www.nokiausa.com/find-products>. Nokia lists many more providers but specific phones are associated only with 16 on the date visited (Jan. 29, 2009).

³⁰ See <http://tools.kyocera-wireless.com/helpmechoose.do>. (Visited Jan.28, 2009.)

³¹ See <http://www.samsung.com/us/consumer/type/type.do?group=mobilephones&type=mobilephones>. (Visited Jan. 29, 2009.)

³² *Comments of LG Electronics MobileComm USA*, at 3, RM-11361.

As RCA points out (Petition, at 3 n.5), a volume purchase order that incentivizes sales promotions is certainly one reason for an exclusive arrangement to be economically efficient for a manufacturer.

The goal of vertical restraints generally is to align the incentives of the retailer with those of its suppliers. One way to think about such restraints is to imagine how a vertically integrated firm would behave in the same circumstances. In the case of wireless service, vertical restraints are used to encourage wireless operators to promote the handset aggressively and discount the price of handsets.³³

Exclusive handset arrangements can significantly benefit manufacturers because sales of their products ride on the marketing and promotional efforts of the provider.

Handset makers like Nokia and Samsung enter into exclusive contracts with wireless operators to ensure that the operators are properly motivated to market the handset. In the absence of exclusivity, a wireless operator might lack the incentive to invest sufficiently in brand development because other operators would free-ride on the efforts of the investing operator. That is, the benefits from the investment would have to be shared with other, non-investing operators.³⁴

And, consumers benefit because they obtain lower prices for equipment, usually through a subsidy against the retail price, as a result of provider's promotional and branding efforts and need to meet volume commitments.³⁵

Of course, equipment vendors are under no obligation to manufacture handsets that meet all providers' requirements. Historically, some handsets have always been "exclusive" in that the vendor for business reasons excludes certain carriers, for example, by technology choice

³³ Hahn-Litan-Singer, at 22 (footnotes omitted).

³⁴ *Id.*

³⁵ Wireless providers generally provide some form of subsidy for wireless devices. As the Commission has recognized, up-front subsidies are pro-competitive and benefit consumers. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, ¶ 6 (2001) (bundling is both "an 'efficient distribution mechanism' and an 'efficient promotional device' that allows consumers to obtain service and equipment 'more economically than if it were prohibited'").

(Motorola's iDEN devices) or by business planning (Nokia's focus on GSM technology).³⁶

These business judgments reflect that manufacturers also compete to differentiate themselves and can exercise discretion over how to run their businesses and with which parties to deal.

These facts undercut RCA's thesis. The market for wireless devices is fiercely competitive on multiple levels, and, and in such a competitive market, both equipment manufacturers and service providers have the flexibility to seek or not seek exclusivity agreements.³⁷ Moreover, equipment manufacturers who make desired technological advances that are attractive to carriers and their customers can determine the terms under which service providers offer the latest handsets to consumers. This is, however, not anticompetitive but is in fact pro-competitive because it incents manufacturers to make advances in technology. It also undercuts RCA's thesis that banning service providers from entering into exclusivity arrangements will allow rural carriers to buy any handset. The reality is that many other factors affect handset availability having nothing to do with contractual exclusivity terms.

B. Exclusivity Agreements Do Not Foreclose Supply Contracts for Rural Carriers.

Since U.S. wireless service providers do not manufacture handsets, and compete with each other through offering handsets, it is against each provider's self-interest to discourage competition among handset manufacturers in the production of desirable handsets.³⁸ Service providers "profit by the availability of desirable complementary products, which raise demand

³⁶ Lowenstein, "Evolving Role of Handsets," at 3-4.

³⁷ See *Comments of LG Electronics MobileComm USA*, at 3, RM-11361 ("The current handset market is marked by fierce competition, and manufacturers should continue to have the freedom and flexibility to determine how they distribute their products, including through exclusive contracts.").

³⁸ *Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 429 (S.D.N.Y. 2005).

for their goods and services.”³⁹ If wireless carriers were blocking the introduction of desirable devices or features by other carriers, there would be evidence of it, and there is not.⁴⁰

At bottom, RCA is claiming that some wireless carriers are blocking other wireless carriers from obtaining access to desirable devices or technological features by restricting their access to certain manufacturers through exclusivity arrangements, to the detriment of consumers. That, however, is economically impossible. No U.S. wireless carrier has sufficient market power to foreclose a handset manufacturer from entering the U.S. market and working with various providers.

[C]omplete foreclosure by a single wireless operator would not likely prevent a handset maker from achieving the requisite economies of scale (that is, the cost of making the handset would be no higher). Because the targeted handset maker could supply at a minimum the other U.S. wireless operators’, there would be no foreclosure. And, without foreclosure, there is no prospect of higher prices for consumers, as higher prices require higher costs of rival handset makers. Thus, without foreclosure, there can be no anticompetitive harm.⁴¹

Because market foreclosure is not possible, lesser restrictions, such as exclusivity agreements, have essentially no potential to cause anticompetitive harm.⁴² Wireless carriers, large and small, have dozens of manufacturers with which to deal and, limiting access to one, even for a specific device, does not prevent developing a similar device through another.⁴³

Therefore, before adopting any regulation suggested by RCA, the Commission has to determine whether some public interest goal would be achieved by regulating exclusivity

³⁹ T. Hazlett, “Wireless *Carterfone*: An Economic Analysis,” at 10 (Apr. 30, 2007), Att. A to *Comments of Verizon Wireless*, RM-11361 (filed Apr. 30, 2007).

⁴⁰ See *Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d at 425 n.30 (“At no point have the plaintiffs explicitly argued, much less proven, that any defendant’s control over which handsets will be approved for use with its respective network has actually foreclosed manufacturers from the market for handset sales in the U.S.”).

⁴¹ Hahn-Litan-Singer, at 21.

⁴² Nigro-Trahar, “Antitrust Perspective,” at 3-4 (“any consumer harm in a vertical case requires market power in at least one market,” and noting no monopoly exists in wireless service or handset market).

⁴³ See, e.g., B. Smith, “The Changing U.S. Handset Market,” *Wireless Week* (Mar. 1, 2008) (describing MetroPCS’ deal with Chinese manufacturer ZTE).

contracts in allowing distribution of desirable handsets by multiple providers. In fact, that goal would not be achieved because many factors come into play in distribution of popular handsets. For example, Verizon Wireless starts developing a line of handsets twelve to fifteen months ahead of the time those handsets would be offered to consumers. Verizon Wireless works closely with manufacturers on developing the technical and “look-and-feel” requirements for each handset. Beyond the basic operating system and service chips – which are available to all manufacturers and providers – these requirements may include programs to access certain features that Verizon Wireless offers, such as location-based services and/or music services. They may also include features that Verizon Wireless’ marketing and product development departments have decided are important to offer consumers, for example, the width of the handset, the quality of the backlight on the keypad, the sensation from a touch screen, the configuration of a QWERTY keyboard, additional memory chips, and colors. Layered on top of all is the “Verizon Wireless” look-and-feel of the handset and its features. Once all these requirements have been determined, they are provided as a package of specifications to the manufacturers who produce the finished products. The resulting devices can reflect various combinations of generic, exclusive and proprietary elements, depending upon the handset and manufacturer.

Some carriers do offer what are advertised as the same handset model.⁴⁴ But, since handsets are generally designed to work on a specific network, a regulatory regime which forces wireless service providers to offer “the same” devices, or even the same platforms, would not be consistent with the needs of every carrier or manufacturer. The LG Voyager is a Verizon Wireless handset model, just as the Prius is a Toyota model car. If a manufacturer

⁴⁴ For example, Alltel and U.S. Cellular were both featuring Samsung’s touchscreen Delve™. See <http://www.samsungmobileusa.com/Delve.aspx>.

stripped out the specific proprietary elements, so that it could be sold by other providers – even after a short time period of exclusive marketing – the handset may be an LG Voyager, but it would not be the same LG Voyager offered by Verizon Wireless.

The public interest question here should not be whether another carrier can distribute the LG Voyager, but whether another carrier can work with an equipment manufacturer to develop a device competitor to the LG Voyager, without regard to what its name is. That answer is clearly “yes,” and RCA does not claim otherwise. Any rule that has the goal of distribution of the same handsets by multiple providers would appear to be just a deterrent to innovation and competition rather than a benefit in a market where differentiation by provider – and manufacturer – is a major factor in the development and production of so-called desirable handsets.⁴⁵

The cost of the handset is another consideration that makes RCA’s proposal regarding supply contracts difficult or impractical to implement. Even if a service provider had the opportunity to install its own network operating system on an “exclusive” handset, that device as advertised may include features that the second network may not support, or features that its marketing department may not find useful – yet those features would still be embedded in the cost of the handset, and passed on to consumers whether used or not.⁴⁶ Service providers would have to be in a position, and willing, to agree to pay the manufacturer for those features in order to gain access to the specific handset model, or to pay for the manufacturer’s creation of a new platform. And, if the Verizon Wireless-inspired design elements are stripped out for cost

⁴⁵ Lowenstein, “Evolving Role of Handsets,” at 5-6.

⁴⁶ The same issue is faced by consumers who decide to take their handset from one carrier to another. Usually, there is no guarantee, beyond basic voice and data services, that the features on the handset will have any corresponding network element, and so, may be non-functional. An unlocked iPhone does not necessarily provide access to all its features when used on another network. *See* B. Stone, “With Software and Soldering, a Non-AT&T iPhone,” *New York Times* (Aug. 25, 2007).

reasons, again the question arises whether the handset is an LG Voyager, and meets RCA's desirable device standard.

RCA points to the economic power of larger carriers as a barrier to distribution of desirable handsets by smaller carriers. But, the facts show that lack of market power is *not* a barrier. Smaller carriers who offer smaller volume sales are not without recourse to obtain desirable handsets. Metro PCS, Leap Wireless, Virgin Mobile, Helio and Boost all offer handsets that are exclusive to their customers.⁴⁷

Also, while manufacturers want to sell as many units as possible and to get a firm commitment from providers to buy as many units as possible, there is nothing to stop the members of RCA from banding together, and so representing potentially millions of subscribers, to get the same kinds of attention and exclusive arrangements as larger carriers. That is exactly what Bell Atlantic NYNEX Mobile, AirTouch Cellular and US West New Vector Group, Inc. did when they were regional carriers to secure new and innovative handsets.⁴⁸ Some providers could decide to sell the same new handset.⁴⁹ And, some rural carriers have taken steps to jointly obtain certain handsets.⁵⁰ For example, 28 companies have formed NextGen Mobile L.L.C. to coordinate launch of GSM-based, next generation networks covering small and rural markets.⁵¹ NextGen Mobile is specifically targeting procurement of new devices and "hopes to entice manufacturers to develop and deliver the next 'it' handset or

⁴⁷ Lowenstein, "Evolving Role of Handsets," at 4.

⁴⁸ "Audiovox Furnishes 500,000 Phones to TomCom," Mobile Phone News (Nov. 13, 1995), available at http://findarticles.com/p/articles/mi_m3457/is_n46_v13/ai_179664?tag+artBody:col.1.

⁴⁹ *Cf.*, e.g., Motorola Press Release, "Motorola Introduces Value-Packed MOTO™ VE240 with Mobile Music and Hands-Free Compatibility" (Nov. 14, 2008) (to be distributed by both Leap and MetroPCS).

⁵⁰ See R. Wickham, "Rural Operators Get Better Device Deals," Wireless Week (Sept. 17, 2008). Smaller carriers may also seek out new players in the handset market to develop competitive devices to obtain better deals on handsets. See B. Smith, "The Changing U.S. Handset Market," Wireless Week (Mar. 1, 2008) (describing MetroPCS' deal with Chinese manufacturer ZTE).

⁵¹ D. Meyer, "Rural Operators, license holders unite to launch UMTS, LTE," RCR Wireless News (Sept. 30, 2008).

data card to those customers shut out in the past.”⁵² Given such effective *market-based* remedies for the concerns of RCA, government regulation of exclusivity agreements is simply unnecessary and contrary to the public interest.

III. EXCLUSIVE HANDSET MARKETING AGREEMENTS ARE BENEFICIAL TO CONSUMERS AND SHOULD NOT BE PROHIBITED.

In the competitive market for wireless services, exclusive supply agreements between equipment vendors and service providers benefit both wireless service providers and consumers. “[T]here is little or no likelihood of consumer harm that *could* follow vertical arrangements between non-dominant carriers and non-dominant handset manufacturers.”⁵³ In fact, there are many benefits.

First, innovation in wireless devices is furthered by such arrangements. Verizon Wireless, like other providers, invests substantial dollars in the design, testing and marketing of products offered by manufacturers that result in handsets with innovative features, both in form factor and technology, and it works closely with handset manufacturers to develop new products. The Commission has repeatedly found that consumers are the beneficiaries of these innovative advances in wireless devices,⁵⁴ and economists agree that innovation is one of the principal benefits of such vertical arrangements in a competitive market.⁵⁵ Smaller carriers with smaller development budgets also benefit because the technical features and form factors are used by the manufacturers over and over. But, wireless providers have lesser incentive to develop and promote a handset that every other provider will have immediate access to without having to make a comparable investment in research and design. Requiring every handset to be

⁵² *Id.*

⁵³ Nigro-Trahar, “Antitrust Perspective,” at 11.

⁵⁴ See *Thirteenth Competition Report*, ¶¶ 126-27.

⁵⁵ M. Schwartz & F. Mini, “Hanging up on *Carterfone*: The Economic Case Against Access Regulation in Mobile Wireless,” at 26 (May 2, 2007), Ex. A to *Reply Comments of AT&T, Inc.*, RM-11361 (filed May 15, 2007).

available to competing carriers, who can pick and choose among the handsets that have been successful, will in fact deter innovation. “If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”⁵⁶

Moreover, the cost of innovation must be borne by the carrier, who seeks a return on its investment, or the consumer. As noted above, exclusive arrangements encourage branding and promotion by the carrier, which generally include offering the “exclusive” handset at a subsidized price to help the carrier ensure a revenue stream from the handset and shift the costs of the new device away from the consumer.

In exchange for purchasing a handset at a discounted price, wireless customers are expected to use that handset with the operator’s service for a fixed duration. This fixed duration guarantees the wireless operator a stream of revenues, which can be used to discount the price of the handset.⁵⁷

One dramatic example is the iPhone: AT&T reportedly subsidizes the cost of the 3G iPhone at \$300.00 per device.⁵⁸ As the sole source for the iPhone, AT&T can anticipate its sales will bring in the revenues necessary to make this investment worthwhile. And, it is not just high-end smart phones with two-year service contracts that are subsidized. Virgin Mobile offers handsets for its pre-paid service that are subsidized so they can be sold below the wholesale price, and it also wants to make sure that the handset will be used on its network.⁵⁹

The nature of wireless networks makes close collaboration between network providers and device manufacturers essential, and may lead to exclusive agreements, or *de facto* exclusive

⁵⁶ *United States Telecomm. Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

⁵⁷ Hahn-Litan-Singer, at 23.

⁵⁸ See L. Cauley, “AT&T: ‘We’re all about wireless,’” *USA Today* (July 31, 2008).

⁵⁹ See *Reply Comments of Virgin Mobile USA, LLC*, at 6, RM-11361 (filed May 15, 2007) (stating that the company “incorporates proprietary software into its handsets that ensures use of the handset on the Virgin Mobile network”).

devices.⁶⁰ Wireless devices are *part* of the end-to-end network: their operation substantially affects not only the quality of an individual subscriber's service but the overall efficiency and quality of the service of other customers as well. Yet, when subscribers are negatively affected, the operator, not the manufacturer, bears the burden of responding.

Wireless operators impose certain performance requirements on equipment and applications suppliers to ensure that the attachments perform properly. If a customer is dissatisfied by the performance of a new feature, the complaint will be directed to the operator, not to the upstream supplier. Because the operator manages this relationship with the customer, the operator should be able to impose requirements on upstream suppliers that ensure high quality of service.⁶¹

And any number of desirable wireless products – including multimedia features, various messaging services, and location-based applications to name just three examples – depend on implementation both within network switches and on the devices. Devices like the Blackberry and iPhone similarly depend upon tight integration between the hardware, software, and network to enable a high-quality and successful user experience, and an exclusive handset developed by collaboration between the service provider and equipment vendor ensures that successful handset.⁶²

A unique user experience is another integral part of the development of a handset line, which may implicate exclusivity. Almost every Verizon Wireless handset, no matter who the manufacturer or what the model, provides the user with the same user experience, such as how calls are made, or what features are available. As a result, Verizon Wireless subscribers can move from a Motorola, to Samsung, to LG handset without noticing who made the handset and

⁶⁰ See Brian Higgins, Technical Statement in Response to Skype Petition, 1-7, Att. C to *Comments of Verizon Wireless*, RM-11361 (filed Apr. 30, 2007).

⁶¹ Hahn-Litan-Singer, at 24.

⁶² See *Comments of Verizon Wireless*, RM-11361, at 30-31; Lowenstein, "Evolving Role of Handsets," at 8-9.

experience the same look and feel and features. Exclusive arrangements help ensure that the manufacturer will build a handset with a consistent user experience, resulting in easier procedures for a customer switching phones, and facilitating the provision of customer service and phone repair, all of which lowers costs which allows lower prices for handsets and service generally.

Exclusive arrangements also play an important role in marketing, competition and differentiating one provider from other providers.⁶³ In the current wireless market, penetration is over 80%, and the differences in prices for service among operators have decreased.⁶⁴ The handset has become an important factor in the selling of a specific brand and in a customer's purchasing decision. "With nearly everyone having a cellular phone, a device is more of a personal statement – for some it is tied to functionality, for others it is more of a fashion accessory."⁶⁵

Exclusive arrangements can also be built around a provider's brand and/or user experience or having the "next best" phone. In the competitive market for wireless services, providers use many features to differentiate themselves from each other, and "exclusive" handset arrangements, whether for models or colors or screen design, offer that opportunity for competitive marketing for new designs or technology to attract consumers, who, in this market, can and do switch carriers.⁶⁶

RCA claims (Petition, at 14) that exclusive arrangements are unnecessary because wireless service providers can differentiate themselves in other ways, through pricing, coverage, customer service, and features. Wireless service providers certainly compete on all

⁶³ See M. Lowenstein, "Evolving Role of Handsets," at 5-6.

⁶⁴ *Id.* at 4-6.

⁶⁵ *Id.* at 4.

⁶⁶ See Nigro-Trahar, "Antitrust Perspective, at 6.

these dimensions of service. But, competing for innovative technologies and offering exclusive access to those technologies has become an integral part of the wireless service market, as differences in price and coverage have decreased.⁶⁷ According to one study, the number of consumers choosing a carrier based on handsets has grown by 51% since 2004.⁶⁸ Attempting to eliminate this differentiating factor to benefit small carriers would also have the impact of making it more difficult for any carrier, large or small, to use innovative handset technology as a competitive sales point, thereby discouraging technological innovation. Indeed, the Commission itself has long recognized that competition in technology fosters continued innovation to the benefit of consumers in many respects, including product variety, differentiation of services, and greater price competition.⁶⁹

Attempting to regulate equality in technological choices and business decisions is contrary to the public interest because it would skew the market away from the consumer benefits that the Commission has already recognized are important in the wireless industry, which is characterized by rapid technological change and innovation.

The prospects of improving welfare through regulation of industries characterized by rapidly changing technologies are even more difficult. Wireless services are evolving rapidly, from analog voice to digital voice (2G) to data (3G) to video (4G). This remarkable progress occurred in the span one decade. ... it would be dangerous to interfere with this kind of dynamic industry.⁷⁰

⁶⁷ Lowenstein, "Evolving Role of Handsets," at 4.

⁶⁸ *Id.* at 6.

⁶⁹ See *Thirteenth Competition Report*, ¶ 126 ("Competition among multiple incompatible standards has emerged as an important dimension of non-price rivalry in the U.S. mobile telecommunications market"); see also *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, ¶ 137 (1993); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033, ¶¶ 51-52 (1988).

⁷⁰ Hahn-Litan-Singer, at 13.

If the Commission were to ban exclusivity agreements, wireless providers would likely offer an inventory of “generic” mobile handsets, available to any and all providers. But, such a regime is not feasible in the United States without a radical shift in the wireless market.

Based on the Commission’s policies to allow technological diversity, U.S. wireless providers have built their networks to the standards they decide will best serve consumers, and, as noted above, have made countless independent technology decisions about such factors as air interface (CDMA vs. GSM), application platforms (BREW vs. JAVA), E911 compliance (handset vs. network solutions), and user interfaces. Selling handsets built on generic platforms to accommodate any and all networks would result in more expenses to manufacturers, who may have to build several versions of the same phone, perhaps incorporating features some subscribers could never use, because they are available only on certain networks.⁷¹ Those costs would likely be shifted to consumers in the form of higher prices.

To the extent regulation requires carriers to adapt their businesses in ways that increase their costs or compromise their service ... consumers will either pay more or get less. That is because, fundamentally, [petitioner] wants the Commission to intervene to correct what it believes are bad business decisions by the wireless carriers; it wants the Commission to give priority to what [petitioner] thinks the market desires and how [petitioner] thinks the wireless carriers should manage their businesses, rather than let the competitive process determine the direction the market will take.⁷²

As the Commission has found, consumers benefit from competitive efforts among providers in the free market toward differentiation, not the opposite.

⁷¹ The problems with and harms to consumers in genericizing (or, “Carterfoning”) the U.S. mobile device market and wireless networks have been fully vetted in the context of Skype’s Petition for Declaratory Ruling (RM-11361). See, e.g., *Comments of Verizon Wireless* (filed April 30, 2007).

⁷² Nigro-Trahar, “Antitrust Perspective,” at 2.

In Europe, where use of GSM technology is standardized, consumers may have more device choices, simply because more GSM phones are manufactured globally.⁷³ However, U.S. consumers have access to more diverse handsets and more multi-band and multi-mode phones in addition to their fair share of innovative devices, including the iPhone and many Blackberry and Treo models that are introduced here first.⁷⁴ Also, “[s]ome of the most feature-rich 3G handsets are either only available in the U.S. or have been specially developed for the market here.”⁷⁵ The technical diversity has allowed U.S. carriers to differentiate themselves, whether through exclusive handsets or exclusive features on more generic handsets, all to the benefit of U.S. consumers who have available more innovative devices.

Time-to-market exclusivity arrangements also help to promote, rather than restrict, distribution of the latest technology to consumers of multiple carriers. The RAZR V3 phone exemplifies how the wireless market works to develop innovative products, fulfill user demand, and reduce prices to consumers, even for increased technology, and promote distribution to multiple providers at a rapid pace.⁷⁶ Introduced into the U.S. market in November 2004 as a GSM phone exclusively through Cingular, the RAZR quickly became popular as a high-end phone, selling for around \$500 with a two-year service agreement. Based on its popularity among consumers, Motorola released a CDMA version of the device, the RAZR V3c, distributed by Verizon Wireless, ALLTEL and other CDMA carriers at the end of 2005. The CDMA version was slightly thicker than the GSM version, but had more memory (30 MB) and a 1.3 megapixel camera. Also, the initial Cingular RAZR was black, but, Motorola continued

⁷³ See M. Lowenstein, “Comparisons Between U.S. and European Markets for Wireless Services and Devices: Myth vs. Reality,” at 3 (July 2007), Attachment to Verizon Wireless Ex Parte Letter, RM-11361 (filed Aug. 28, 2007).

⁷⁴ *Id.* at 4.

⁷⁵ *Id.*

⁷⁶ See *Comments of Verizon Wireless*, RM-11361, at 13-15.

to introduce the RAZR in different colors, at first, with a pink RAZR in various shades available from Cingular, Verizon, and T-Mobile.

As new models appeared, the RAZR featured more memory, a better resolution camera, a microSD card slot for additional memory, Bluetooth functions, music players (e.g., iTunes, Motorola's Digital Audio Player), and supported carrier-specific applications, such as T-Mobile's MyFaves, and Verizon Wireless' V-CAST multimedia services. By July 2006, Motorola announced that it had shipped 50 million RAZRs, making it one of the most popular phones ever distributed. Today, various RAZR models are still available from multiple service providers.⁷⁷

The RAZR is an example of just one product that has been introduced successfully into the wireless market, at first with limited distribution, which then became available through more carriers, and gradually developed better technology and more functions, at lower prices, as carriers responded to consumer demand and offered differentiated versions of the same basic handset. Apple's iPhone is already taking a similar path. Because the iPhone apparently will not be made available to other distributors, equipment vendors are designing their own iPhone-like devices, such as the T-Mobile/Google G1 Phone, Alltel's Samsung Delve, and Verizon Wireless' Blackberry Storm.⁷⁸ As a result, service providers can compete with the iPhone in the areas of pricing, brand loyalty and network differences. And consumers get more choices. The RAZR and many other devices have shown that in a competitive market such as wireless

⁷⁷ See www.phonescoop.com/phones.

⁷⁸ RCA claims that handsets such as these are "unique products for which there are no readily available substitutes." (Petition, at 8.) However, while there may be only one iPhone or one LG Voyager, just as with other consumer electronics products, the features and functions of these devices (voice, data, web browsing, camera, synchronized email, etc.) can be found on dozens of other devices that are readily available wholesale to carriers or retail to consumers. Exclusivity agreements for desirable products drive manufacturers and service providers to develop devices that are competitors of, if not better than, the desired product, thereby fostering innovation and competition.

there is no need to impose regulations to achieve consumer choices when consumer demand achieves that goal faster.

As outlined above, banning exclusivity agreements for wireless handsets would have an impact on many aspects of the competitive wireless industry, not all of which would benefit consumers or rural carriers. RCA has presented no evidence of market failure, or adverse economic impact on consumers or rural carriers directly tied to exclusivity arrangements for specific phones that would justify its proposed remedy or that demonstrates its proposal is in the public interest under any circumstances. The Commission itself has rejected RCA's argument that it should regulate in an intensely competitive market to protect certain participants from the impact of other carriers' competitive choices. "We agree with the FTC Staff and the DOJ that the most efficient government policy is to allow firms the ability to choose how to distribute their own products. ... the possibility that one type of retailer may be harmed does not provide a basis for a rule that limits the use of a potentially efficient contract or retail distribution system."⁷⁹ The Commission should, therefore, deny the Petition, and let the competitive market continue to work for the benefit of consumers.

IV. THE COMMISSION SHOULD DISMISS RCA'S PETITION FOR FAILURE TO PROVIDE A CONCRETE PROPOSAL TO IMPLEMENT THE RELIEF REQUESTED.

The Commission should also dismiss RCA's Petition because it fails to provide a concrete proposal that can be developed into Commission rules. Like similarly deficient petitions, "the Petition does not set forth the text or substance of any proposed Commission rule change or amendment, as required by the Commission's rules governing petitions for

⁷⁹ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd at 4032 (internal quotes and footnotes omitted).

rulemaking. Without concrete proposals regarding the definition and implementation of [the rule] . . . it would be imprudent to pursue this matter further at this time.”⁸⁰

In this regard, RCA’s Petition is deficient in several respects. First, RCA fails to define what it means by “exclusivity arrangements,” and therefore what terms in vendor contracts the Commission would regulate. Agreements between a wireless provider and handset manufacturer may cover many terms that could be deemed “exclusive,” ranging from an iPhone-like time-based exclusive agreement for the entire handset itself to an agreement that reserves a specific color of a handset to a specific provider.⁸¹ If RCA’s goal is to force vendors to give its members access to the latest technology, it is not necessary to restrict wireless providers from entering into agreements, exclusive or otherwise, related to technology that is repackaged in a different form factor, or for colors or other designer-like features. RCA’s proposal is vague and overbroad, and is not narrowly tailored to achieve its stated goal of broadening handset availability.

Another obstacle to action on the Petition is RCA’s failure to consider the consequences of individual providers’ technology choices and the business decisions of equipment vendors. The U.S. wireless world is broadly divided between CDMA and GSM, which technologies are not interoperable. Some equipment manufacturers only or primarily produce handsets for specific technologies, e.g., Nokia for GSM.⁸² AT&T operates a GSM network, and the iPhone is only marketed in the United States as a GSM device. Sprint Nextel offers push-to-talk devices using iDEN technology, which is generally not available through other providers.

⁸⁰ *Letter to Federal Law Enforcement Wireless Users Group*, 19 FCC Rcd 11500, 11501 (WTB 2004) (footnote omitted) (dismissing petition).

⁸¹ Lowenstein, “Evolving Role of Handsets,” at 8-9.

⁸² *Id.* at 3.

RCA has not suggested that the Commission should force an equipment manufacturer to produce handsets for any and all technologies that a wireless provider might decide to use. Moreover, a wireless provider could evade any ban on exclusive arrangements by simply adopting a network-specific technology and finding an equipment manufacturer interested in supplying handsets using that technology. Or, a wireless provider could simply produce its own exclusive handsets to sell along side other manufacturers' devices. RCA's proposal would have no impact on such a provider with a manufacturing business. Adopting RCA's proposal is not feasible in its present form because it simply is not narrowly tailored to "cure" the alleged evil, nor does the Commission have the authority to deal with all ways in which "exclusive" handsets can be marketed to consumers.

Yet another obstacle to action on the Petition is RCA's failure to deal with underlying proprietary technology that is incorporated into a handset. Wireless providers offer differing features and services in their networks, and have developed handset technology to present those features with a specific user experience, all of which is likely to be proprietary. Beyond the basic operating system and basic service chips, it would be virtually impossible for two providers to offer "the same" handset for every device model because the internal software and feature specifications would be different regardless of external form factor or operating systems. Moreover, there is no obligation on any provider to sell a specific handset model. If only one provider offers a model, it becomes a *de facto* exclusive phone.⁸³

Finally, it is not at all clear that there is a definable "harm" that can be remedied by a Commission rule. Exclusivity arrangements are common among many industries, including the consumer electronics industry.⁸⁴ Consumers are used to products being associated with certain

⁸³ *Id.* at 7 (citing the Sidekick sold only by T-Mobile).

⁸⁴ *Id.* at 9-11.

retailers (Macs with Apple), or some products only working in conjunction with certain other products (certain games with Xbox or Sony's Playstation). Handsets present even more complicated scenarios. If the Commission were to regulate handsets, would it regulate just the communications capability? Other non-communications features may be the "desired" feature, e.g., the camera, the music store, or the search engine. If the Commission does not regulate the entire package, how can the Commission isolate by rule the features that are regulated from those that are not?⁸⁵ RCA offers no guidelines as to what its members would consider to be the correct and equitable solution.

As noted above, a petition for rulemaking must "set forth the substance of the proposed rule." 47 C.F.R. § 1.401(c). RCA's proposal is vague, not narrowly tailored to solve the alleged problem, and lacking in necessary details of what would be regulated. The proposals "either do not describe rule changes or amendments to the Commission's rules, are not sufficiently justified under the circumstances presented, or otherwise do not demonstrate that they would be in the public interest."⁸⁶ Therefore, the Petition should be dismissed.

V. RCA'S PROPOSAL IS CONTRARY TO THE DEREGULATORY PARADIGM FOR WIRELESS.

RCA is seeking unprecedented economic regulation of the wireless industry. Under longstanding Congressional and Commission policy for economic regulation of the mobile wireless industry, RCA has a high burden to demonstrate that such regulation is clearly warranted to address a specific market failure or other problem, and it has not met that burden.

⁸⁵ *Id.* at 9.

⁸⁶ *Federal Law Enforcement Wireless Users Group*, 19 FCC Rcd at 11504 (denying petition for rulemaking).

A. Congress and the Commission Have Set a High Hurdle for Wireless Regulation.

In considering RCA's petition for rulemaking, the Commission must start with the overarching deregulatory approach to the wireless industry that both it and Congress have followed for more than a decade – an approach that the Commission has found has proven hugely successful for the American economy and for consumers. That approach starts from Congress' enactment of the Omnibus Budget Reconciliation Act of 1993 (OBRA), which amended the Communications Act. The Commission has declared that the “overarching congressional goal” in OBRA was “promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market.”⁸⁷ Congress amended the Act to implement its “general preference in favor of reliance on market forces rather than regulation,”⁸⁸ and to permit the mobile wireless market to develop subject only to the degree of regulation “for which the Commission and the states could demonstrate a clear-cut need.”⁸⁹ This means that any new mandate for mobile wireless services must have a clear factual record justifying it, such as evidence of market failure. RCA presents no such evidence. And, as discussed above, regulation of handset supply contracts would profoundly change the way wireless service providers do business, and potentially impede the significant benefits to consumers of the existing competitive market – without any showing of need for regulation.

The Commission has also recognized the critical importance of investment in wireless networks in driving benefits to consumers and the harm that regulation can have on investment:

The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote

⁸⁷ *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8004 (1994).

⁸⁸ *Petition of New York State Public Service Commission*, 10 FCC Rcd 8187, 8190 (1995).

⁸⁹ *Id.* at 8191.

robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services – rather than as a burden standing in the way of entrepreneurial opportunities – and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.⁹⁰

RCA's proposed regulatory regime would have a profoundly adverse impact on investment in wireless handsets. By not allowing service providers to develop exclusive handsets for their network, their incentives to design those handsets would be completely undermined. Less investment means less value for consumers. Again, adoption of RCA's proposals would be inconsistent with the Commission's desire to promote continued investment and innovation in the wireless industry.

B. Competitive Wireless Services Need No New Regulation.

While RCA claims that wireless service providers are engaged in marketing practices that harm consumers, it presents no evidence of such harm in the form of empirical data or economic analysis. To the contrary, as the Commission has found, vigorous competition in the wireless industry has brought consumers extraordinary benefits. With carriers engaged in massive pro-consumer investments in broadband technologies and adding new devices and applications at a dizzying rate, there is no sign that this trend is abating.

RCA bases its complaints in part on the fact that the five largest wireless carriers have over 90 percent of the total U.S. subscribers. (RCA Petition, at 2 n.3.) But the Commission has

⁹⁰ *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd 1411, 1421 (1993).

found that “[n]o single competitor has a dominant share of the market.”⁹¹ Therefore, regulation based on concentration is unwarranted and unnecessary.

In any event, the issue is not what wireless service providers *collectively* can do, because wireless service providers do not act collectively.⁹² If a carrier does not offer what consumers want, consumers can and do choose another carrier.⁹³ In the competitive and constantly evolving wireless marketplace, *consumers* make choices, based on what matters to *them*. RCA wants the Commission to influence those choices, and artificially constrain the competitive market for wireless handsets. But that is profoundly contrary to Congress’ and the Commission’s deregulatory paradigm for wireless. Moreover, as the Commission has found, over 80 percent of persons living in rural areas of the country are served by at least three mobile carriers.⁹⁴ As investments in build-out continue, wireless providers in rural areas are offering many of the same services available from providers with national footprints.⁹⁵ Indeed, the Commission has just concluded that “CMRS providers are competing effectively in rural areas.”⁹⁶ In this competitive environment, there simply is no need for the Commission to attempt to “fix” what is not broken.

⁹¹ *Thirteenth Competition Report*, ¶ 2.

⁹² As a federal court recently found in rejecting a claim that carriers’ marketing practices were suppressing competition in the sale of handsets, “the issue is not whether a [particular wireless service provider] has impaired the distribution of a particular kind of product with its own service but whether it has impaired competition among handset manufacturers and within the handset market.” *Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d at 429.

⁹³ *See Applications of Nextel Communications, Inc. and Sprint Corporation for Consent To Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13967, ¶¶ 101, 116 (2005) (noting that consumers consider wireless providers to be substitutes for one another).

⁹⁴ *Thirteenth Competition Report*, ¶ 104.

⁹⁵ *See id.*, ¶ 105.

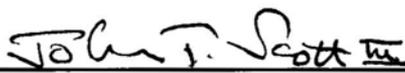
⁹⁶ *Id.*, ¶ 109.

VI. CONCLUSION

RCA has failed to demonstrate that there is any market failure or other justification for banning any exclusive agreements between wireless service providers and handset manufacturers. Even if the Commission had jurisdiction to take that action, which it does not, such a radical intrusion into the wireless market would in fact harm innovation and thereby harm consumers. Accordingly, RCA's Petition should be denied.

Respectfully submitted,

VERIZON WIRELESS

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Date: February 2, 2009

CERTIFICATE OF SERVICE

I, Sarah Trosch, hereby certify that, on February 2, 2009, a true and correct copy of the foregoing "Comments of Verizon Wireless Requesting Dismissal or Denial of Petition" was served by first-class U.S. mail, postage prepaid, on the party listed below:

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A handwritten signature in cursive script that reads "Sarah Trosch". The signature is written in black ink and is positioned to the right of the text block above it.