

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF AT&T INC.

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COMMENTS OF AT&T INC.

Pursuant to the Commission’s *Notice*,¹ AT&T submits these comments in opposition to the Rural Cellular Association (“RCA”) Petition challenging exclusive distribution arrangements between wireless carriers and handset manufacturers.²

INTRODUCTION AND SUMMARY

The U.S. wireless services business is universally recognized as one of the most intensely competitive industries of any kind anywhere. Price, subscribership, usage, investment, entry, service quality and every other competitive metric exhibit consistently positive trends, and U.S. wireless consumers pay far less for far more than anyone else in the world.

Americans enjoy these benefits because the Commission has consistently refrained from imposing heavy-handed regulation on wireless carriers, opting instead to rely upon competition and market forces to maximize consumer welfare. In this environment, wireless carriers battle fiercely to attract and retain customers. Each carrier strives to differentiate its offerings from

¹ Wireless Telecommunications Bureau Seeks Comment On Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers And Handset Manufacturers, RM No. 11497, Public Notice, DA 08-2278 (WTB rel. Oct. 10, 2008) (“*Notice*”).

² In re Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497 (May 20, 2008) (“*Petition*”).

those of its rivals by offering more attractive service plans, improved coverage and service quality, innovative features and content, and a mix of handsets that it believes will best meet consumers' widely varying needs. And, as is common in highly competitive industries, wireless competitors sometimes seek to set themselves apart through exclusive offerings – *i.e.*, a wireless carrier may ink a deal with a like-minded manufacturer to be the exclusive distributor of a new handset in the hope that it will prove popular.

These types of arrangements, which have been a feature of the U.S. wireless marketplace since its inception, and which promote both carrier and manufacturer risk-taking and investment, are overwhelmingly *pro*-competitive. When an exclusive handset gamble pays off for one carrier, that provokes competitive responses and further innovation from other carriers and manufacturers, benefiting all consumers.

In a Petition that is remarkably devoid of evidentiary support or even a recognizable theory of harm, RCA nonetheless proclaims this competitive activity “anticompetitive” and asks the Commission to prohibit it. RCA has not tried to show that handset deals are either the cause or effect of any sort of market failure, and it never acknowledges a prior Commission finding that there is no evidence that they diminish competition in any way. RCA's unsupported petition flies in the face of the facts, the law, and bedrock wireless policies and economic principles, and it should be summarily denied.

This Opposition is organized into three parts.

First, we show that it would be a policy failure of immense proportions to interfere with market-based product differentiation, a hallmark of competition. As Professor Michael Katz explains in his attached declaration, the handset deals RCA condemns are unabashedly good for consumers and competition. They encourage collaboration to optimize handset performance and

to develop innovative features that will be available through the combination of handset and network. They increase a carrier's incentives to make purchase commitments and to invest in promotions, network improvements and special training of sales staff. They lower manufacturer entry barriers and serve as a key tool to maintain brand value. And, as an important form of competition, they encourage other carriers and manufacturers to do better, by improving their own handset portfolios or the prices, features and other characteristics of their existing offerings.

At the same time, while in certain circumstances exclusive arrangements may harm competition, none of these circumstances is remotely present in the wireless industry. There is no dominant manufacturer or carrier and no ability to use exclusivity to foreclose competition. Indeed, as Professor Katz explains, there is no tenable theoretical or empirical basis for concluding that handset exclusivity harms competition or consumer welfare in any way. Exclusive handset deals have been a feature of the wireless marketplace for the better part of two decades, and, by all measures, that marketplace has become *more* competitive each year. Handset manufacturers are free to choose among myriad buyers; carriers and other handset retailers are free to choose among myriad handset suppliers; and virtually all consumers are free to choose among three or more wireless suppliers, each of which offers dozens of different handset options. Those options continue to multiply as existing carriers increase their coverage, new providers continue to enter, more and more spectrum becomes available, and a constant stream of innovative new handsets floods the marketplace.

The Petition's obsession with the iPhone only highlights the divergence between RCA's wishes and the public interest. There is no more dramatic example of an exclusive arrangement creating enormous benefits for *all* consumers. The popularity of the iPhone and its innovative features and applications has provoked an unprecedented competitive frenzy, palpably

accelerating not only handset innovation but the pace of wireless broadband investment and applications development. Before the iPhone, mobile handheld “computers” tended to be clunky, expensive devices with traditional applications; now, the marketplace is awash with innovative devices that allow consumers to do things that no one even *imagined* only a year earlier and that cost *less* than their more limited predecessors. The exclusive arrangement between AT&T and Apple is in no small part responsible for these spectacular public interest benefits – both for the close collaboration and investment that deal made possible and for the competitive envy and activity it engendered when it proved successful. There is no conceivable basis to conclude that it could be in the “public interest” to forgo future opportunities to unleash market forces in this fashion: heavy-handed intervention in manufacturer and carrier choices would dramatically decrease the chances that consumers would reap the pro-competitive benefits of the *next* iPhone or whatever other as-yet-unimagined handset innovation is on the horizon.

Second, as the courts and the Commission have long recognized, the “unfair” large carrier advantages RCA claims would not be a matter of public interest even if they existed. The Commission’s mandate is to protect competition and consumers, not to protect individual competitors *from* competition. Thus, even when the wireline long distance business had a *single* dominant provider, the Commission recognized that “[t]he issue is not whether [the market leader] has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market.”³ RCA has no hope of making that showing here.

Moreover, even if the Commission could lawfully intervene to neutralize advantages one competitor earned just to make it easier for a rival to succeed, RCA’s claim that its members

³ *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd. 5880, 5891-92 (1991).

cannot obtain desirable handsets on terms that allow them to remain competitive is false. RCA implies that small carriers must deal directly with handset manufacturers that invariably give them the cold shoulder. The truth is that an entire industry has developed for the wholesale distribution of wireless handsets to smaller carriers. These wholesale distributors buy in bulk (some, in greater quantities than any single U.S. wireless carrier), operate worldwide, and plainly have the clout to obtain favorable terms for popular handsets from the scores of manufacturers that compete in the vigorously competitive global handset market. Thus, even the smallest carriers offer dozens of handsets, from basic voice phones to the highest of the high end, including “smartphones” from multiple manufacturers that include the latest touchscreen, WiFi, Bluetooth, music, QWERTY keyboards, and numerous other features. Smaller carriers also can (and do) band together to obtain their own handset exclusives. Thus, it is simply not true that rural carriers lack the ability to provide a full array of attractive handset options. Of course, even if some rural carriers did fail to assemble “optimal” handset portfolios, those same carriers may have distinct advantages in other respects, including close community ties, lower labor costs, and other advantages that come from their smaller size.

Third, RCA’s claims that exclusive handset deals violate the Communications Act are frivolous. Its principal assertion that such deals are “discriminatory” seems to be that if one carrier develops an advantage that some customers find attractive, it “discriminates” against the customers of other carriers that have not developed that same exact advantage. But that would turn all beneficial competition into a violation of the Act – a theory of “discrimination” that the Commission has never accepted (and never lawfully could accept). RCA also claims that the Commission’s precedents establish that exclusive handset deals are necessarily unreasonable practices that violate § 201(b), but exclusive handset arrangements that do not prevent any

wireless carrier from offering service to any customer obviously have nothing in common with the exclusive *access* contracts that dominant incumbent cable providers used to foreclose rivals from even offering their services to tens of millions of Americans in multi-tenant dwellings. Indeed, both the Commission and the courts have repeatedly held that the vigorous competition that characterizes the wireless industry makes it virtually impossible for any wireless carrier to sustain unreasonable practices.

RCA's suggestions that the Commission could ground the radical relief RCA seeks on universal service or Title I authority are equally misguided. Section 254 is not (and never has been) aimed at achieving universal availability of every possible brand of Customer Premise Equipment ("CPE") (much less every brand of wireless handset). Moreover, the urban/rural "handset divide" that RCA posits is pure fiction: the major national carriers also happen to be the largest rural carriers in the nation (and their exclusive phone offerings are available throughout their broad service areas), and many popular phones of every type including those with the latest whiz-bang features are not only available to, but actually distributed by, even the smallest rural carriers. Nor could the Commission lawfully assert jurisdiction over handset competition itself under Title I. RCA cannot identify any statutorily-mandated Commission responsibility to which such radical relief could be deemed "reasonably ancillary," and, in fact, interfering with market-based handset distribution contracts deals would affirmatively undermine the Commission's statutory mandate by depriving consumers of an important source of increased competition and innovation.

In short, RCA's petition is not about the public interest; it is not about competition; and it most certainly is not about what is good for consumers. It is instead a misguided attempt to put

the brakes on competition so that RCA's members are freed from its pressures. The Petition should be rejected out of hand.

ARGUMENT

I. EXCLUSIVE HANDSET ARRANGEMENTS INCREASE COMPETITION AND BENEFIT CONSUMERS; REGULATING THEM WOULD HARM THE PUBLIC INTEREST.

Exclusive arrangements are commonplace in competitive markets, and it is widely accepted in both economics and the law that they generally provide important benefits to consumers.⁴ In every competitive marketplace, each competitor strives to gain advantages over its rivals both to attract new customers and to retain existing ones. In wireless, carriers seek to lower their costs by obtaining volume discounts and other advantageous terms from suppliers when they can get them; they invest in their networks to achieve superior coverage and service quality and to enable new features and services that their competitors do not yet offer; and they roll out innovative service plans and product bundles. In each case, the goal is to gain an edge on rivals through superior offerings. Carriers that make the right choices begin to win customers from other carriers. Carriers that do an especially good job of creating advantages for

⁴ Michael L. Katz, *An Economic Analysis of the Rural Cellular Association's Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Feb. 2, 2009 ("Katz Decl.") ¶¶ 5-27; *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) ("[t]here is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant . . . an exclusive franchise"); Benjamin Klein & Andres V. Lerner, *Procompetitive Justifications For Exclusive Dealing: Preventing Free-Riding And Creating Undivided Dealer Loyalty* (Nov. 12, 2006) available at http://www.usdoj.gov/atr/public/hearings/single_firm/docs/219980.htm (discussing numerous benefits of exclusive arrangements including increased dealer promotion and reduction in free riding); Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 Antitrust L.J. 433 (2008) (explaining that competition by manufacturers to obtain exclusive arrangements with distributors benefits consumers); Barbara Esbin & Berin Szoka, *Exclusive Handset Prohibitions: Should the FCC Kill the Goose that Laid the Golden iPhone*, The Progress & Freedom Foundation, June 8, 2008, available at <http://www.pff.org/issues-pubs/pops/pop15.8exclusivehandsetdeals.pdf> (discussing the pro-competitive nature of exclusive handset arrangements and opposing the relief sought by RCA).

themselves may win new customers at a fast clip, and that forces rivals to work harder to improve their own offerings. This rivalrous behavior is the essence of competition, and it is a *good thing*.

Exclusive marketing and distribution arrangements are simply one more form of beneficial product differentiation. Department stores have exclusive clothing designers, discount chains offer exclusive releases of the latest CDs by both new and established artists, salons have exclusive hair care products – the list goes on and on. Exclusivity is not new to wireless markets either: exclusive handset arrangements have been a feature of the U.S. wireless marketplace since its inception. As detailed below, RCA’s position that handset exclusivity is anticompetitive lacks both theoretical and evidentiary support. In contrast, actual experience and marketplace evidence overwhelmingly confirm what economic theory and Commission precedent predict: that market-based handset deals provide enormous benefits to wireless competition and consumer welfare.

A. Handset Exclusivity Does Not Harm Competition or Consumers. Remarkably, RCA does not mention that the Commission has *already rejected*, in 1992, small carrier requests that it apply heavy-handed regulation to their larger rivals’ exclusive handset offerings – and this was at a time when cellular service was generally a facilities-based *duopoly* (with much smaller resellers) in every area and when the demand for wireless services was a small fraction of what it is today.⁵ Even then, the Commission found “no evidence” that “where cellular carriers have entered into exclusive distribution agreements with CPE manufacturers, CPE prices have increased or that CPE competition has diminished.”⁶ The Commission concluded that there was

⁵ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd. 4028, ¶ 15 & n.28 (1992).

⁶ *Id.*

no “reason to be concerned about future exclusive dealing arrangements,” because “carriers are primarily motivated to sell more service,” and they will therefore “carry the widest variety of CPE possible” in order to meet the varying “demand” of “their customers.”⁷ The Commission also found that even if “one carrier” agreed to sell only “one CPE manufacturer’s CPE, a customer could always go elsewhere or to another carrier to get CPE” produced by other manufacturers.⁸ Similarly, the Commission concluded that because handsets are manufactured in national and international markets, there was no prospect that exclusive dealing agreements could “eliminate international and national CPE providers.”⁹ In the intervening years, the courts have likewise held that exclusive handset deals (and exclusive arrangements more generally) are not anti-competitive.¹⁰

As Professor Katz explains, exclusive arrangements have been thought to raise an issue only under very specific conditions – generally where the parties are dominant and have substantial market power, such that their exclusive arrangement allows them to foreclose competition itself.¹¹ This is why the Commission and the courts have found exclusive deals to be a problem only in instances where such arrangements truly threatened to create or strengthen a monopoly – as in the Commission’s recent orders concerning agreements to provide exclusive

⁷ *Id.* ¶ 18.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See, e.g., Cancall PCS, LLC v. Omnipoint Corp.*, 2000 U.S. Dist. LEXIS 2830, at *15 (S.D.N.Y. Mar. 6, 2000) (rejecting claims that exclusive handset arrangement violates antitrust laws because there was no evidence of even “some harm to competition in the relevant markets in general”); *Elecs. Comm’ns Corp. v. Toshiba Am. Consumer Prods. Inc.*, 129 F.3d 240, 246 (1997) (upholding District Court decision to deny Plaintiff leave to replead allegations challenging exclusive handset arrangement: “[b]ecause the complaint does not reveal how the alleged agreement could conceivably harm competition market-wide, granting leave to amend would have been futile”).

¹¹ Katz Decl. ¶¶ 31-33.

access to apartment and office buildings, which threatened to foreclose rivals from even *offering* their services to tens of millions of multi-tenant building occupants. Those conditions plainly do not exist in the wireless marketplace. Quite the contrary: there is no dominant player in the manufacture or distribution of wireless handsets. Indeed, the freedom that handset manufacturers and wireless carriers have to adopt the distribution terms that they deem best is a major reason why the wireless marketplace today is so dynamic, with many innovative devices introduced each month and competing carriers and manufacturers constantly leap-frogging one another to offer what they hope will be the most popular services and products.

By any measure, wireless has become the quintessential fully functioning competitive marketplace. The Commission detariffed and largely deregulated wireless services many years ago.¹² In its most recent report on wireless competition, the Commission concluded that “U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition” in the wireless marketplace.¹³ The Commission found that “[n]o single [wireless] competitor has a dominant share of the market,”¹⁴ and that “[m]ore than 95 percent of the U.S. population lives in census blocks with *at least* three mobile telephone operators competing to offer service, and more than

¹² *Implementation of Sections 3(n) and 332 of the Communications Act.; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, ¶¶ 16, 174 (1994) (forbearing from enforcement of Section 203 for wireless carriers and stating that “competition, along with the impending advent of additional competitors, leads to reasonable rates” and “[t]herefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory”).

¹³ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Federal Communications Commission, Thirteenth Report, WT Docket No. 08-27, ¶ 1 (Jan. 16, 2009) (“*Thirteenth Report*”).

¹⁴ *Id.* ¶ 2.

60 percent of the population lives in census blocks with at least five competing operators.”¹⁵ Indeed, the U.S. wireless marketplace has all of the hallmarks of effective competition: (1) *output* is increasing substantially in every way (*e.g.*, subscribers, minutes of use, monthly text volumes, broadband usage, multimedia messaging, number of services and features),¹⁶ (2) *prices* have been falling for years and are among the lowest in the world,¹⁷ (3) *quality* is increasing,¹⁸ and (4) the industry is *investing* billions in upgrades, expansions and innovations.¹⁹ It would be

¹⁵ *Id.* (emphasis added).

¹⁶ *Id.*; *id.* ¶ 197 (“the total mobile telephone subscriber base has increased 23 percent in the last two years”); *id.* ¶ 201 (“[t]he percentage of U.S. mobile telephone subscribers that uses their mobile phones for data services continued to rise in the past year”); *id.* ¶ 206 (“the number of U.S. mobile subscribers with 3G enabled devices grew to 64.2 million in mid-2008, up by 80 percent from 35.65 million in mid-2007”); *id.* ¶ 208 (“[w]ireless subscribers continue to increase the amount of time they communicate using their wireless phones”); *id.* ¶ 210 (“For 2007 as a whole, total reported text/SMS traffic volume rose to more than 362 billion messages, more than double the total of more than 158 billion messages reported in 2006”); *id.* (“the volume of photo messaging and other multimedia messaging services also has continued to grow”); *id.* ¶ 164 (“Providers exhibit competitive rivalry with respect to mobile data services by introducing new mobile data offerings, responding to such innovations with rival offerings and differentiating their mobile data offerings from those of rivals”).

¹⁷ *Id.* ¶ 189 (“Of the three indicators of mobile telephone pricing examined here, all of the indicators show that the cost of mobile telephone service fell in 2007”); *id.* ¶ 192 (revenue per minute “has fallen from \$0.47 in December of 1994 to \$0.06 in December of 2007, which represents a decline of 87 percent”); *id.* ¶ 194 (“the price per text message dropped again in 2007 to \$0.025, about one cent [or nearly one third] lower than the price per text message in 2006”); *id.* ¶ 111 (“In the mobile telephone sector, we observe independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various handsets and policies on handset pricing”); *id.* ¶ 112 (“The major development since the release of the *Twelfth Report* is the introduction of unlimited national flat-rate calling plans across the four nationwide operators”); *id.* ¶ 218 (“mobile calls continue to be significantly less expensive on a per minute basis in the United States than in Western Europe and Japan”); *id.* ¶ 219 (average revenue per minute in U.S. is “less than one-third of the European average” and one fourth of revenue per minute in Japan).

¹⁸ *Id.* ¶ 214 (“wireless call quality problems declined for three consecutive reporting periods, reaching the lowest levels in the five-year history of the study”); *id.* ¶ 159 (discussing upgrades by carriers to “improve the coverage, capacity, and capabilities of their networks”).

¹⁹ *Id.* ¶ 2 (wireless providers “have continued to deploy mobile broadband networks”); *id.* (listing multiple “[n]ew and innovative mobile services and devices launched during the past year”); *id.* ¶ 155 (describing capital expenditures by wireless carriers to “expand and improve the

absurd to contend – and RCA has made no serious attempt to demonstrate – that the wireless marketplace today is experiencing any sort of market failure.

Moreover, new carriers continue to enter and grow, undaunted by the fact that some existing carriers offer exclusive phones. In just the past few months, Cox Communications and Clearwire announced and initiated broad scale entry into wireless services.²⁰ Similarly, over the last few years, Virgin Mobile has gone from a new entrant with no customers to a major carrier with five million customers, and MetroPCS and Leap Wireless are the fastest growing carriers in the nation.²¹ Such broad-scale entry and expansion is the exact opposite of what one would

geographic coverage of networks, increase the capacity of existing networks so they can serve more customers, and improve the capabilities of networks (by allowing higher data transmission speeds, for example)” totaling approximately \$20 billion annually).

²⁰ News Release, *Cox to Launch Next Generation Bundle With Wireless In 2009*, Cox Communications, Oct. 27, 2008, available at http://media.corporate-ir.net/media_files/irol/76/76341/release102708.pdf (“As wireless communications enters the new generation, we are uniquely positioned to deliver the entertainment and communications services our customers want, whenever, however and wherever they want them”); News Release, *Clearwire Reports Third Quarter 2008 Results*, Clearwire, Nov. 10, 2008, available at <http://newsroom.clearwire.com> (“We were very gratified when last week the FCC announced unanimous approval of our pending transaction to combine Clearwire with Sprint’s WiMAX business. . . . [W]e believe Clearwire will be set to unleash a new way to Internet by offering a true mobile broadband experience for our customers”).

²¹ See, e.g., News Release, *Virgin Mobile USA Reports Strong Q3 2008 Results*, Virgin Mobile, Nov. 10, 2008, available at <http://virginmobileusa.mediaroom.com> (“As of September 30, 2008, the Company had approximately 5.2 million customers, an increase of 6% over September 30, 2007”); Investor Overview, *MetroPCS Communications, Inc. to Present at Bank of America Credit Conference*, Nov. 18, 2008, available at <http://investor.metropcs.com> (“we have been among the fastest growing wireless broadband PCS providers in the United States as measured by growth in subscribers and revenues during that period”); Dan Frommer, *Cheap Wireless Service Weathering Downturn: Leap Subscriber Growth Spikes Up (LEAP)*, Silicon Alley Insider, Aug. 5, 2008, available at <http://www.alleyinsider.com/2008/8/cheap-wireless-service-weathering-downturn-leap-subscriber-growth-spikes-up-leap-> (“The U.S. economy is getting rocked, and the U.S. mobile business is slowing. So what’s pushing the growth at Leap Wireless, which sells cheap, all-you-can-eat wireless service? Easy: Cheap, all-you-can-eat wireless service.”).

expect if certain carriers' handset advantages were so great as to preclude effective competition against them. Moreover, this entry and competition is expected to increase, not decrease.²²

This robust competition is by no means limited to urban areas. The Commission's *Twelfth Report* found that U.S. "counties with population densities of 100 persons per square mile or less . . . have an average of 3.6 mobile competitors," compared to 4.3 everywhere else.²³ The *Thirteenth Report* adds that 94.2 percent of the U.S. population living in rural counties have two or more operators offering service in the census blocks in which they live and 82.1 percent live in census blocks with three or more competing operators.²⁴ Carriers are responding to competition by aggressively investing in wireless spectrum and technology to expand their rural service areas.²⁵ Both regional and local carriers operate very successfully today on business models that do not include exclusive handset offers. As the Commission found, providers "in rural areas seem to be providing many of the services that nationwide providers do,"²⁶ and they offer many of the same handsets, including many of the top selling handsets in the U.S. Accordingly, RCA does not contend that its own members are struggling to survive, and in fact they are thriving and growing.²⁷

²² See, e.g., Neil Mawston, StrategyAnalytics, *Wireless Strategies: Ten Predictions for 2009*, at 6 (Aug. 2008).

²³ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twelfth Report, WT Docket No. 07-71, ¶ 105 (Feb. 4, 2008) ("*Twelfth Report*").

²⁴ *Thirteenth Report*, ¶ 104.

²⁵ See, e.g., *Twelfth Report*, ¶ 2 ("Several smaller, incumbent regional operators acquired AWS licenses that will enable them to expand their coverage and gain entry into new regional markets").

²⁶ *Thirteenth Report*, ¶ 105.

²⁷ RCA's own website, for example, provides news releases touting its members' successes. See, e.g., Press Release, *Nex-Tech Wireless Celebrates Three Years of Providing Wireless Service to Central and Western Kansas*, Oct. 22, 2008, available at <http://www.rca-usa.org/associations/6491/files/Nex-TechThreeYrs102208.pdf> (touting the success of Nex-Tech

The manufacture and provision of wireless handsets has always been an intensely competitive business as well, and it has been settled for decades that it is not a common carrier activity at all.²⁸ According to a recent CTIA filing, there are more than 35 competing handset manufacturers producing more than 620 different handsets that are offered to U.S. consumers. A visit to virtually any carrier website confirms that many of today's handsets are used, not only for voice calls, but for text messaging, instant messaging, taking and sending photos, surfing the Internet, downloading and listening to music, watching TV and movies, following sports scores, following the stock market, and much else. Some also include touchscreens, Bluetooth, WiFi, GPS and high-mega-pixel cameras. Because of the consequent rapid innovation and a constant stream of new offers, the top national sellers change frequently, with Motorola, RIM and Apple all fighting for and each achieving the top monthly popularity spot during the past year in various surveys. No single handset has been chosen by even 5 percent of consumers.²⁹ And

Wireless and stating that “[t]he past three years has been an incredible testimony of what can happen when a group works together to achieve the goals laid before them”); Press Release, *Pocket Smart Wireless Selects Esecuritel For Cell Phone Protection Program*, June 10, 2008, available at http://www.rca-usa.org/associations/6491/files/FINAL_Pocket_&_eSecuritel_Release_071508.pdf (“Pocket Smart Wireless is Texas’ fastest-growing flat-rate wireless company, with more than a quarter of a million subscribers in and around San Antonio, Laredo, and the Rio Grande Valley”); CTIA Wireless Association, *CellCom Goes Green*, Apr. 21, 2008, available at http://www.ctia.org/media/wireless_newslines/press_release.cfm/press_id/6841 (announcing CellCom’s activation of “the first alternative energy cell site in the upper Midwest,” explaining that “[t]he new cell site is added to the already 385 digital cell sites in the northeast and Wisconsin,” and touting “Cellcom’s renowned network”).

²⁸ See, e.g., *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz*, Report and Order, 86 F.C.C.2d 469, ¶¶ 58-61 (1981).

²⁹ Comments of CTIA-The Wireless Association, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, Exhibit B, at 2, 7-8 & Exhibit C at 1-8 (filed March 26, 2008) (“CTIA 2007 Comments”); see also *Twelfth Report*, ¶ 2 (“More than 150 companies identified themselves as terrestrial mobile wireless carriers in the FCC’s local competition and broadband data gathering program”).

manufacturers are continually investing in new innovative technologies, in a market characterized by frequent leapfrogging of cutting edge technologies as manufacturers seek to eek out an advantage in this highly competitive industry.³⁰ There is no market failure or foreclosure of competition, and piling on intrusive, costly, investment-chilling new regulation during a global recession is the only real threat to the continued growth and competitiveness of the wireless and handset businesses.

In short, given the intense competitive conditions for wireless services and handsets today, no wireless carrier or handset maker could possibly use exclusive arrangements to foreclose competition. This is so clear that RCA is forced to advance economically nonsensical arguments. Contrary to RCA's Petition, it makes no sense to speak of a carrier's "monopoly power" over the price or terms of a single wireless handset.³¹ There are scores of competing handsets offered by many competing wireless carriers in virtually every area. Any consumer that does not like the terms or conditions of AT&T's iPhone offerings, for example, is free to choose any of these other phones, including a host of well-reviewed and received handsets that are expressly marketed as iPhone substitutes – *e.g.*, the HTC Touch, Blackberry Storm, Google G1, and multiple Samsung and LG models.³² Indeed, analyst reports say that "[t]he success of the

³⁰ Multiple handset makers recently have introduced numerous 3G handsets with touch screen displays and myriad other new features, including RIM (Storm), Samsung (Behold, Instinct, Glyde, Eternity, Delve), LG (Incite, Rhythm, Spyder, Voyager, Dare, VX830, Vu, Glimmer, Venus), Palm (Pre) and HTC (Max 4g, Touch HD, Touch 3G, Touch Viva, Touch Diamond Touch Dual, Touch Cruise, Touch, Fuze).

³¹ Katz Decl. ¶¶ 10, 28-34, 39-42. *See also In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 420 (S.D.N.Y. 2005) (rejecting argument that each brand formed in its own market in the wireless services industry in the context of antitrust challenges to the bundled sale of handsets and wireless service and noting that "[t]he enormous amount of churn in this industry eviscerates the suggestion that consumers do not view these brands and the services underlying them as essentially interchangeable").

³² *See, e.g.,* StrategyAnalytics, *Enabling Technologies: 425 Million Touchscreen Phones Sold Worldwide in 2013*, Oct. 27, 2008 ("Leading global touchscreen handset vendors today include

iPhone is driving competitors to launch their own lineups of look-alike devices” and “all the world’s top 10 vendors will have touchscreen handset portfolios in 2009.”³³ RCA neither does, nor could, explain how in this environment any carrier could sustain anticompetitive prices or terms for customers that have so many options, can easily vote with their feet, and, as churn statistics demonstrate, often do.³⁴

RCA’s unsupported claim that exclusive deals lead to higher prices is also directly refuted by the marketplace evidence. A recent study showed, for example, that “[t]he average price of a smartphone sold between June and August 2008 was \$174, down 26 percent from \$236 during the same period last year.”³⁵ And RCA’s suggestion that the iPhone is

Apple, HTC, Samsung, LG, Motorola, Nokia, Sony Ericsson, RIM, Palm and HP. The Apple iPhone, launched in H12007, was the catalyst that sparked popular interest among vendors and consumers in touch displays worldwide”); PhoneArena.com, *HTC Touch Dual Review*, Feb. 12, 2008, available at http://www.phonearena.com/htmls/HTC-Touch-Dual-Review-review-r_1905.html (“HTC Touch clears the path for the WM6 Professional line of fashion smartphones. Dual is another way to say ‘slimmer-faster-newer.’ The manufacturer should be given credit, not only for adding a slider, but for developing most elements of the interface too. TouchFlo marks serious progress making the phone more similar to the cult iPhone. We should not forget the HSPA support either, which provides extremely fast internet, wherever there is coverage.”); CNET.com Reviews, *RIM Blackberry Storm (Verizon Wireless)*, Nov. 21, 2008 (“The RIM BlackBerry Storm may blow in a frenzy for Verizon Wireless subscribers wanting a touch screen similar to the Apple iPhone”); CNET.com Reviews, *LG Glimmer*, Mar. 12, 2008 (“The LG Glimmer combines the glamour of a touch screen, the convenience of a slider keypad, plus high-end features to produce a top-notch phone for Alltel customers.”); CNET.com Reviews, *Samsung Instinct (SPH-M800)*, June 20, 2008 (“The Samsung Instinct stands out as one of Sprint’s finest devices to date.”).

³³ Neil Mawston, StrategyAnalytics, *Wireless Strategies: Ten Predictions for 2009*, at 6 (Aug. 2008); IDC Opinion, Forecast Update, *Economic Crisis Response: Worldwide Converged Mobile Device 2008-2012 Forecast Update September 2008*, Jan. 2009 (“with the popularity of the iPhone, and the imminent launch of the Android-based, HTC-manufactured Google phone, not to mention the attempt by other device vendors to beef up their [converged mobile devices] in their product portfolios, the [converged mobile device] is . . . slated for certain growth”).

³⁴ Appendix A to these comments compiles information on some (but by no means all) recent handset introductions, many of which were direct responses to the iPhone.

³⁵ The NPD Group, *One in Three iPhone 3G Buyers Switched From Other Carriers to Join AT&T*, Oct. 6, 2008, available at http://www.npd.com/press/releases/press_081006.html.

supracompetitively priced is particularly ironic, given that the iPhone has been recognized as one of the *most* heavily subsidized phones on the market; as AT&T recently explained to investors, it has invested enormous sums in handset subsidies to *reduce* the price that customers pay for iPhones.³⁶ Indeed, AT&T has reported that these subsidies have cut significantly into its earnings.³⁷

B. Handset Exclusivity Promotes Competition And Consumer Welfare. It is well-established in economics and law that, in the context of the sort of robust competition that exists for wireless services and handsets, competitor freedom to enter exclusive deals is *good* for consumers. One main reason is that exclusive arrangements can raise the competitive bar for everyone. When a carrier and a manufacturer launch a new phone that proves successful, competition intensifies and consumers benefit. Not only do consumers reap the benefits of the exclusive arrangements directly – in the form of new innovations, features, and often lower prices – the new competitive offering encourages other handset makers and carriers to respond with equal or better products and services, either by launching new handsets or by improving the prices, features and other key characteristics of their existing offerings. Either way, consumers win.³⁸ As discussed above, this is exactly what has been happening in the wireless marketplace,

³⁶ See *AT&T Fourth Quarter 2008 Investor Briefing*, at 3, Jan. 28, 2009, available at http://www.att.com/Investor/Financial/Earning_Info/docs/4Q_08_IB_FINAL.pdf (“AT&T 4Q Briefing”); *AT&T Third Quarter 2008 Investor Briefing*, at 3, Oct. 22, 2008, available at http://www.att.com/Investor/Financial/Earning_Info/docs/3Q_08_IB_FINAL.pdf (“AT&T 3Q Briefing”); see also Oppenheimer, Equity Research, Company Update, AT&T, Inc., Nov. 4, 2008 (“*Oppenheimer AT&T Update*”) (“Since AT&T announced its exclusive arrangement to distribute the 3G iPhone (on June 9, 2008), T’s share price has declined by 23%, we think partially due to (justifiable) concerns about the high iPhone subsidies”).

³⁷ See AT&T 4Q Briefing, at 3; AT&T 3Q Briefing, at 3; see also *Oppenheimer AT&T Update* (“In the short term, T’s high-iPhone subsidy has led to increased EPS dilution, though in the long-term we believe increased iPhone sales will benefit the company”).

³⁸ Katz Decl. ¶¶ 1-10, ¶ 43.

as handset makers constantly scramble to offer new and improved handsets with the latest innovations, resulting in lower prices, better products, and more choices.³⁹

Exclusivity arrangements also align the incentives of carriers and manufacturers in ways that allow new phones to be deployed more quickly and effectively. For example, exclusive deals allow handset makers to bring new and better products to market more quickly, by permitting the manufacturer to focus its resources on working with only one carrier to optimize, introduce and promote a new handset.⁴⁰

Similarly, exclusive deals greatly increase the carrier's incentives to make network investments in support of new handsets and to promote such handsets in the first place. No carrier wants to make substantial investments in developing a phone and heavily advertising it, only to have consumers respond to those investments by walking across the street to buy the phone from a competitor. An exclusive deal ensures that the carrier and handset maker will reap the full benefits of their investments in new products and services, and thereby allows risk sharing and eliminates the possibility that competitors will "free-ride" on their investments. Indeed, as Professor Katz explains, without exclusivity a wireless carrier could be reluctant to make these substantial pro-competitive investments.⁴¹ Thus, a ban on exclusivity would likely mean that some phones would not be developed at all, some phones would be introduced but with fewer features or less optimal performance, and carriers would have reduced incentives to promote new, innovative phones and to subsidize as heavily the prices consumers pay for those phones.⁴² The losers would be consumers and the public interest.

³⁹ Katz Decl. ¶¶ 1-27, 35-38, 43.

⁴⁰ Katz Decl. ¶¶ 16-27.

⁴¹ Katz Decl. ¶¶ 3, 11-27.

⁴² Katz Decl. ¶¶ 3, 12-27, 39-43.

These benefits of exclusivity are not lost on handset makers, who enjoy the ability to choose among many competing U.S. distribution channels for their products, but recognize that, in some cases, an exclusive arrangement will be the most efficient way to attract customers who have hundreds of wireless phone choices. A handset maker wants a carrier to support the phone to the fullest extent and to advertise and promote the phone as aggressively as possible. Granting exclusivity can ensure that the chosen carrier will make those investments, and indeed, in the context of today's highly competitive marketplace, the prospect of carrier investments creates significant incentives for handset manufacturers to develop innovative new handsets.⁴³ Once again, customers end up with better phones, better service, and better prices.⁴⁴

There is no better or more dramatic example of the consumer benefits that can flow from exclusive arrangements than the iPhone. Other carriers and handset manufacturers have responded like never before with numerous new devices – all aggressively pushing the envelope on innovations, features, quality, and price.

AT&T's exclusive arrangement to offer the iPhone, however, was a critical component to realizing the public interest benefits to competition and to consumers. AT&T took a big risk by investing many millions of dollars in the development, deployment, and promotion of the iPhone. Although it may not seem so now, the success of the iPhone was hardly certain. Apple had never before made a mass market handset; it faced stiff competition from entrenched and experienced handset makers such as Motorola, Nokia, Research in Motion, Palm, LG, Samsung, and many others; and the only other handset involving Apple – the Motorola ROKR, which

⁴³ Katz Decl. ¶¶ 3, 12-27, 39-43.

⁴⁴ For similar reasons, exclusive handset arrangements can also safeguard brand image. Manufacturers may design handsets that includes features, tolerances and capabilities that will not work properly (or not work at all) on all carriers' networks. Exclusive arrangements are thus an important tool for brand protection (both the carrier's brand and the handset manufacturer's brand) by ensuring that the handsets work as advertised.

provided a degree of iTunes integration – had not lived up to expectations. The exclusive arrangement helped to justify AT&T’s enormous investments in the iPhone by ensuring that rivals could not free-ride on those risky investments and undermine AT&T’s ability to recover them through new subscriptions in the event that the iPhone turned out to be a success.

AT&T made many substantial investments in an effort to help make the iPhone an innovative product. For example, AT&T invested thousands of man-hours working with Apple on myriad critical issues such as fine tuning the RF signals used by the handset to maximize performance and battery life. AT&T made substantial investments to enable the innovative features of the iPhone, such as its “visual voicemail” feature (in which recorded calls are stored directly on the individual customer’s handset). This feature had not been offered before, and AT&T therefore had to develop and deploy the hardware and software necessary to implement visual voicemail (and other carriers have since made similar investments). AT&T also made investments in new purchase and activation systems for the iPhone that would interact in real time with iTunes and would allow Apple’s unique handheld point of sale devices to interface with AT&T’s wireless service activation systems. AT&T significantly increased the capacity of its network to support the additional data traffic expected from iPhone users. AT&T also invested enormous resources in the promotion of the iPhone, and in special training for thousands of sales employees. And, as Apple has continued to add functionality to the iPhone, AT&T has continued to make these types of investments. In recent months, for example, AT&T accelerated its planned deployment of 3G services throughout the U.S. and expanded the capacity of its 3G network. All of AT&T’s 3G wireless customers benefited from these

additional network investments, and performance improvements by AT&T spur other carriers to accelerate their own capacity investments, providing additional benefits to their customers.⁴⁵

These investments facilitated by the exclusive arrangement have spawned spectacular benefits for consumers and for competition generally. There has been a revolution across the entire industry, with carriers and handset makers rushing to develop a wide array of new and innovative phones. *All* wireless consumers, even those that do not have an iPhone and have not subscribed to AT&T's mobile wireless service, have reaped enormous benefits from the intensified competition and innovation unleashed by the success of the iPhone.

When one considers these quite obvious and spectacular public interest benefits of market-based exclusive distribution arrangements, RCA's plea for regulation to halt such arrangements becomes, in a word, nuts. Indeed, RCA's Petition does not deal with these well-recognized *benefits* of exclusive arrangements at all.

In short, there is no conceivable rationale – or lawful basis – for new regulations on wireless handset offers. Indeed, wireless services and handsets are so intensely competitive today, and the case for new intrusive regulation of these services is so weak, that the Commission should summarily deny the Petition and make clear that it will not initiate any new rulemaking proceeding on these issues.

⁴⁵ One of the leading wholesale suppliers of handsets summed up its predictions regarding the impact of the iPhone and other exclusive handsets as follows: “While we do not participate in the direct distribution of the iPhone [and other exclusive handsets]” those “products may heighten competition with other existing manufacturers and provide consumers with more feature-rich products, broader selection and new market channels, which may result in increased wireless device shipments.” Brightpoint, Inc., Form 10-K For the Fiscal Year Ended December 31, 2007, at 5, Feb. 28, 2008, *available at* <http://cell.client.shareholder.com/secfiling.cfm?filingID=950137-08-3080>.

II. IN TRUTH, RCA'S PETITION IS AN IMPROPER PLEA FOR PROTECTION FROM BENEFICIAL COMPETITION.

RCA's Petition is not about trying to help consumers. As shown above, competition in wireless services and handsets is flourishing and will continue to do so. And it is doing so in no small part *because* of exclusive handset arrangements. Rather, RCA's real claim is that other carriers' handset deals put unwelcome competitive pressure on *RCA's members* to improve their own offerings. But that more limited claim is foreclosed for two fundamental reasons: first, the Communications Act authorizes the Commission only to promote competition, not individual competitors, and second, RCA's factual premise is manifestly untrue.

A. The Commission's Public Interest Mandate Does Not Extend To Protecting Competitors From Competition. Both the Commission and the courts have held repeatedly that the "Commission's statutory responsibility is to protect competition, not competitors."⁴⁶ Indeed, the Commission has squarely held that the mere fact that some competitors may have developed certain marketplace advantages is not a basis for regulation, as long as competition itself is still functioning. As the Commission explained in its *Interexchange Competition Order*, when speaking of the superior size, financial strength, and technological advantages of legacy AT&T when it was the sole dominant long-distance carrier, "[t]he issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are *so great as to preclude the effective functioning of a competitive market.*"⁴⁷ "Indeed, the competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for

⁴⁶ *In re Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation; and Application of Alascom, Inc. For Review of Authorization to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon for the Provision of Interstate Switched and Private Line Services*, Order and Authorization, 11 FCC Rcd. 732, ¶ 56 (1995).

⁴⁷ *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 60 (emphasis added).

this process to work.”⁴⁸ These principles have special force in the wireless arena, because Congress has adopted policies for wireless services to “encourage competition” and to “*reduce* the regulatory burden upon spectrum users,” 47 U.S.C. § 332(a) (emphasis added), and the Commission has implemented this mandate by formulating a “uniform, national and deregulatory framework.”⁴⁹

Accordingly, RCA’s Petition fails at the threshold. “[T]he Communications Act requires [the Commission] to focus on competition that benefits the public interest, not on equalizing competition among competitors.”⁵⁰ RCA has not shown, and cannot show, that the rivalry among wireless carriers to differentiate their offerings through exclusive arrangements to distribute a small minority of the hundreds of available handsets harms wireless *competition*. Rather, RCA asks the Commission to protect individual *competitors* – its members – from the beneficial competitive pressure that this product differentiation creates.

⁴⁸ *Id.*; *see also id.* (incumbent firms may have many advantages, including “perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc.,” but the mere fact that a firm has these advantages does not mean that it is “appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete”).

⁴⁹ *Truth-In-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6448, ¶ 35 (2005); *see also Twelfth Report*, ¶ 3 (Congress has “established the promotion of competition as a fundamental goal for [wireless] policy formation and regulation”).

⁵⁰ *In re Applications of Craig O. McCaw, Transferor, and American Tel. & Telegraph Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1995); *accord SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (“[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors”) (internal quotations omitted); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *Applications of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications, Inc.*, 10 FCC Rcd. 7783, ¶ 20 n.58 (public interest requires promoting competition, not “equalizing competition among competitors”); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (to the extent that parties contend that communications laws “should be interpreted to aid the minnows against the trout, such as AT&T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong”).

B. Small Carriers Can and Do Obtain Highly Desirable Handsets. In all events, RCA's assertion that exclusive handset arrangements disable its members from competing is incorrect. Its entire argument is based on the false assumption that rural carriers must deal on an individual basis with specific handset manufacturers, and that these rural carriers do not have the same bargaining power as larger carriers. The market has already addressed that issue. There is an entire world-wide wholesale industry devoted to the distribution of wireless handsets to smaller rural (and non-rural) carriers and to other handset retail outlets, including Wal-Mart, Best Buy, Radio Shack, and many others.⁵¹ These wholesalers negotiate bulk purchases of millions of handsets from virtually all of the major handset makers at substantial discounts and other favorable terms. RCA members have for years obtained handsets through these mega-wholesalers. For example, Brightpoint was chosen to be the "preferred supplier" for the Associated Carrier Group ("ACG"), which is a consortium of rural carriers, including Bluegrass Cellular, Carolina West Wireless, Cellcom, Cellular South, First Cellular of Southern Illinois and Midwest Wireless,⁵² most of which are also RCA members. And, AeroVoice, another large handset wholesaler, "has developed a strong customer base" that includes "RCA (Rural Cellular Association) carriers."⁵³ AeroVoice "works closely" with its carrier customers' "OEM partners" and its "flexibility and strong relationships makes it the number one choice for carrier

⁵¹ See, e.g., Investor Presentation, Brightpoint, *The Global Leader In The Wireless Value Chain*, at 16, Nov. 5, 2008, available at <http://cell.client.shareholder.com/events.cfm> ("Brightpoint Investor Presentation").

⁵² See Press Release, *Brightpoint Named Preferred Supplier by the Associated Carrier Group*, Apr. 5, 2006, available at <http://www.associatedcarriergroup.com/News/Brightpoint040506.html>.

⁵³ See AeroVoice Complete Wireless Company Profile, available at <http://www.aerovoice.com/profile.aspx>.

fulfillment.”⁵⁴ Indeed, the RCA website contains a listing of dozens of suppliers for its members, including many wholesale handset suppliers.⁵⁵

These wholesalers clearly have the clout to obtain very favorable handset distribution terms and conditions for their rural carrier customers. Indeed, their handset purchases approach or even exceed those of the largest U.S. carriers. As just one example, Brightpoint handled nearly 80 million handsets in 2007 (many more than any U.S. wireless carrier), and expects to handle up to 90 million handsets in 2008.⁵⁶ Not surprisingly, the supply of handsets available from these mega-wholesalers include “the most comprehensive selection of brands and products in the wireless industry” ranging from the simplest voice handsets to “[i]ntegrated devices” and “PDAs” from virtually all of the major manufacturers, including HTC, Kyocera, LG, Motorola, Nokia, Research In Motion, Palm, Samsung, Siemens, Pantech and Sony Ericsson – the same manufacturers that supply the largest U.S. carriers directly.⁵⁷

Therefore, it should come as no surprise that RCA members currently sell many of the most popular and most advanced handsets offered by manufacturers. RCA member websites confirm that RCA members sell nearly 200 different handsets. Moreover, according to their websites, these carriers are selling more than 40 handsets categorized by analysts as “smart phones,” including numerous innovative, highly desirable, and highly rated handsets, such as the HTC Touch and HTC Touch Dual, LG Spyder, Motorola Q, Nokia N series, Palm Treo series, Blackberry series, and numerous high-end richly-featured Samsung and Sony Ericsson handsets.

⁵⁴ *Id.*

⁵⁵ See RCA Buyers Guide Online, available at <http://www.rca.officialbuyersguide.net>.

⁵⁶ Brightpoint Investor Presentation, at 3, 18.

⁵⁷ See BrightPoint Products Description, available at <http://www.brightpoint.com/Brightpoint/Global/26/English/73/Products/15.html>; see also BrightPoint 2007 10K, at 8.

These handsets have the most popular features, which according to a recent study, include cameras, text messaging, QWERTY keyboards, Bluetooth, and music capabilities.⁵⁸

Nor is it true that rural or other smaller carriers have no ability to obtain exclusive handsets if they see value in such arrangements. In fact, rural carriers *have* in the past banded together to obtain exclusive rights to distribute handsets for some period of time. For example, one group of rural carriers, including many RCA members, through their ACG consortium, “[a] group of independent tier two and three CDMA carriers,”⁵⁹ procured at least one exclusive handset.⁶⁰ This “consortium enables its members to work with manufacturers, suppliers and other vendors to develop and procure, for its customers, scarce or unobtainable products in a timely fashion through economies of scale and standardization of coding and other features.”⁶¹

“Small operators may not have the buying power of the Tier 1 carriers, but by working together and developing innovative purchasing strategies, they are getting access to state-of-the-art devices in the same timeframe as their Tier 1 counterparts.”⁶² Another group of rural carriers recently formed NextGen Mobile LLC, which seeks to “aggregate[]” its orders “to entice device manufacturers to develop and deliver the next ‘it’ handset or data card to those customers.”⁶³

⁵⁸ See News Release, The NPD Group, *available at* http://www.npd.com/press/releases/press_081110.html (listing top selling handsets to consumers).

⁵⁹ See ACG, About ACG, *available at* http://www.associatedcarriergroup.com/about_acg.html.

⁶⁰ See *id.*

⁶¹ See Associated Carrier Group, LLC, General Information, *available at* <http://www.associatedcarriergroup.com>.

⁶² Sue Marek, Wireless Week, *Operators Collaborate on Exclusive Devices*, Nov. 1, 2005, *available at* <http://www.wirelessweek.com/article.aspx?id=82278>.

⁶³ Reuters, Domestic Wireless Operators Form New Alliance to Advance Small Carrier Causes and Promote Rural Competition, Sept. 30, 2008, *available at* <http://www.reuters.com/article/pressRelease/idUS173398+30-Sep-2008+BW20080930>.

In all events, even if it were true that RCA members faced certain disadvantages compared to larger carriers with respect to obtaining particular handsets, rural carriers indisputably have other advantages over national carriers. Rural wireless carriers often have substantial ties to the community, and in some cases are also the incumbent providers of wireline telecommunications, Internet and cable TV services as well, and thus often have established relationships and goodwill with local residents. Smaller carriers may also have more favorable cost structures than national carriers, due to lower labor costs, lower customer service costs, and other factors, which provide them with potential pricing advantages.⁶⁴

In other words, the market is working. Market-based exclusive handset deals do not prevent any competitor from building a competitive handset portfolio from the hundreds of handsets available from scores of manufacturers and wholesalers – as RCA’s members’ own experience vividly confirms.

III. THERE IS NO LEGAL BASIS FOR REGULATION OF HANDSET DISTRIBUTION.

Finally, RCA’s remaining legal arguments are baseless. RCA makes generic, unsupported allegations that the Commission simply must step in to regulate exclusive handset agreements because they are “discriminatory,” “unreasonable,” and “contrary to the public interest” under Sections 201, 202, 254, or Title I. These arguments are extremely superficial and ignore the plain terms of these statutory provisions.

Section 202(a). RCA’s principal legal argument is that exclusive handset arrangements are “discriminatory” in violation of section 202(a) of the Act. RCA appears to claim that this is

⁶⁴ Moreover, exclusive handset deals that induce increased carrier investment and promotion entail significant risk as well as potential rewards to a carrier. In this regard, many exclusive handsets agreements listed in RCA’s Petition (at Exhibit A) never really took off, and already have become obsolete in this fast-moving marketplace.

so because (1) such arrangements result in higher prices for the handsets that are subject to the exclusive distribution agreements, an assertion for which RCA provides no support, and (2) persons located outside of the exclusive carrier's network cannot purchase such phones. The short answer to both claims is that the wholesale distribution of wireless handsets is not a common carrier service and is not subject to § 202.⁶⁵ But even if § 202(a) applied, each of RCA's claims would be baseless.

First, even if exclusive arrangements did result in higher prices for the handsets that are subject to them (and they do not), that would not establish a Section 202(a) violation. Section 202 requires a showing that a particular wireless carrier is offering "like" services to similarly situated customers at unreasonably *different* rates or terms.⁶⁶ AT&T provides iPhones at the same prices to all customers in its service areas, and RCA has not even alleged that any wireless carrier is selling its services or handsets at differing rates or terms to similarly situated customers, much less that any rate differences that existed are unreasonable. Indeed, RCA appears to be claiming that a wireless carrier is unlawfully discriminating against the customers of *other* carriers by offering its own customers a feature or advantage not available from other carriers. That is a nonsensical proposition that ignores the plain terms of § 202(a). Indeed, if RCA's claim were valid, the service differentiation that is the very essence of beneficial competition would be a *per se* violation of the Act.

Second, RCA claims that exclusive handset arrangements are discriminatory because they prevent people located outside a carrier's service territory from purchasing the handsets. The "logic" of this claim is that it is a violation of § 202 when a carrier does not provide wireless

⁶⁵ See, e.g., *Inquiry into the Use of the Bands*, 86 F.C.C.2d 469, ¶¶ 55-61; see also *Cancel PCS, LLC v. Omnipoint Corp.*, 2000 U.S. Dist. LEXIS 2830, at *33.

⁶⁶ *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

service to the entire nation. Indeed, under RCA's theory, every wireless carrier (including RCA's members) is unlawfully discriminating against people located outside of its service territory by offering terms and conditions to its customers that are not available outside its territories. That is obviously incorrect. Section 202(a) prohibits unreasonable discrimination only against "similarly situated" customers. Persons who reside outside a carrier's service territory are not similarly situated to customers located within the service territory, for the obvious reasons, among others, that the calls that they place will typically originate on another carrier's network that can have different technical and economic characteristics.

Section 201(b). RCA's § 201(b) allegations also are foreclosed by the settled rule that the wholesale distribution of wireless handsets is not subject to Title II, and the claim would be baseless even if § 201(b) were applicable. The Commission and the courts have repeatedly held that claims that a carrier's practices are "unreasonable" face nearly insurmountable burdens in the highly competitive wireless industry, where carriers typically have no ability to implement or sustain unreasonable practices.⁶⁷ As the Commission explained in *Orloff*, "we are confident that consumers, given the opportunity to purchase service from five facilities-based CMRS carriers and numerous CMRS resellers, and given no evidence of other market failure, will shop around, if they believe a particular carrier does not meet their needs."⁶⁸ It continues to be the case today that wireless competition is thriving and that consumers have many options. Because there is no evidence of any market failure, there is no basis for any finding under § 201(b) that carriers act unreasonably in differentiating their service offerings through exclusive handset arrangements and other practices common in highly competitive markets.

⁶⁷ *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

⁶⁸ *Orloff v. Vodaphone Airtouch Licenses LLC*, 17 FCC Rcd. 8987, ¶ 23 (2002).

Contrary to RCA's claims, its proposed rule is not supported by the Commission's decisions that held that exclusive access arrangements in multi-dwelling units and multi-tenant environments were unreasonable practices. Those arrangements were held to be unreasonable practices because they gave a single service provider exclusive *access* to all of the tenants in these buildings and thus entirely *foreclosed* competition for multi-tenant residents and businesses – such that tenants in those buildings could have chosen only *one* provider.⁶⁹ Exclusive handset arrangements, in contrast, merely enhance one competing carrier's offer, much like better service, better call quality, fewer dropped calls, or a lower price. Such arrangements do not foreclose any other carrier from offering any wireless service to anyone (or from working with manufacturers to sell or develop competitive phone offerings), and they certainly do not give any wireless carrier an out-and-out monopoly, as the MDU-access agreements did within the affected buildings.

Section 254(b)(3). RCA's reliance on § 254(b)(3) is equally misguided. Section 254(b) merely instructs the Commission to consider several specific (and sometimes conflicting) “principles” in adopting “policies for the preservation and advancement of universal service.”⁷⁰ Section 254(b)(3) directs the Commission to consider whether customers in rural and high-cost areas have “access” to various types of “*services*” that are “reasonably comparable” to the services available in urban areas.⁷¹ As explained above, there is no question that this principle is

⁶⁹ *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, 22 FCC Rcd. 20235, ¶ 21 (2007) (“*MDU Order*”) (“In a MDU where an incumbent has the exclusive right to provide MVPD service, no other provider can offer residents [service] on its own facilities”); *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd. 5385, ¶ 12 (2008) (“*MTE Order*”) (“The exclusive provision of the telecommunications services in residential MTEs bars competitive and new entry”).

⁷⁰ 47 U.S.C. § 254(b).

⁷¹ 47 U.S.C. § 254(b)(3) (emphasis added).

being fully realized. Rural customers today have “access” to multiple competing carriers, and those carriers can and do offer handsets and plans with advanced touchscreens and many other innovative features and capabilities in rural areas.

Indeed, the notion that exclusive handset arrangements contribute to an imagined “digital divide” would be factually wrong even if it were the case – as it is not – that AT&T and the other national carriers are the only carriers who can and do offer handsets with advanced features. The national carriers are in fact the largest rural carriers in the nation and have spent more than all of RCA’s members *combined* in expanding and upgrading rural networks.

For these and other reasons, exclusive arrangements have demonstrably benefited customers in rural areas. As explained above, AT&T’s offer of the iPhone to its urban and rural customers has spurred numerous other carriers to offer handsets with similar (and additional) capabilities (some exclusive and some not) that are broadly available in both urban and rural areas. As a result, exclusive arrangements have benefited rural customers both directly (by enabling the development of advanced handsets and related capabilities that those carriers offer to all of their customers) and indirectly (by spurring competitors to offer other advanced handsets and capabilities).

Accordingly, RCA has not contended that rural customers are today being denied access to “*services*” that are “reasonably comparable” to those available in other areas of the country, which is the showing that would be required even to implicate this goal of § 254(b)(3). Rather, here, too, RCA’s complaint is merely that its members cannot offer particular individual handsets of particular manufacturers and that these particular handsets are not otherwise available ubiquitously. But that fact is quite irrelevant to the goal of § 254(b)(3). Section 254(b)(3) does not provide that *every specific type and brand of wireless handset* must be

available on a completely nationwide basis. It is quite absurd for RCA to suggest that the mere fact that there may be pockets of the country where wireless customers cannot purchase a certain kind of Blackberry or an iPhone means that the Commission has failed in its duties under § 254 to ensure universal service, notwithstanding the fact that similar advanced handsets are now available and that market forces will assure the availability of new forms of handsets that are developed hereafter.

Nor is there any authority to support RCA's claim. RCA relies only on the Commission's earlier DBS and BSS orders. But those orders held that DBS and BSS providers should provide service to Alaska, Hawaii, and other areas from their existing satellites *only* to the extent that it was technically and economically feasible to do so and would not harm the DBS providers or their customers.⁷² Here, there is no warrant to consider any such relief because comparable wireless services are already available throughout the country. Moreover, RCA surely is not suggesting that the Commission can or should require wireless carriers to provide service on a nationwide basis. In this regard, the Commission *rejected* proposals to "require [satellite] service to Alaska and Hawaii to be equal or comparable to that in the contiguous U.S. in terms of equipment, program offerings, and price equality,"⁷³ and it refused to order DBS providers to offer service to Puerto Rico on the ground that to do so would harm DBS providers and their customers.⁷⁴

⁷² *Revision of Rules and Policies for the Direct Broadcast Service*, Report and Order, 11 FCC Rcd. 9712, ¶ 14 (1995); *Establishment of Policies and Service Rules*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 8842, ¶ 49 (2007).

⁷³ *DIRECTV Enterprises, Inc.; For Authority to Launch and Operate A Direct Broadcast Satellite Service Space Station*, Order and Authorization, 15 FCC Rcd. 23630, ¶ 11 (2000); *Policies and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd. 11331, 65-79 (2002).

⁷⁴ *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, ¶ 80.

In addition, any ban on exclusive handset deals would not necessarily result in greater availability of such handsets from RCA members. First, many exclusive handsets either would not be compatible with or would not be fully functional on many rural carriers' networks. For example, many RCA member networks are CDMA, but Apple designed the iPhone as a GSM-compatible phone; accordingly, many RCA members' networks would not support the iPhone even if it was available to them. In addition, many exclusive handsets (including the iPhone 3G) are fully functional only on 3G networks, and many features of these phones also require other specific network capabilities. For example, the iPhone includes visual voicemail capabilities and integration with iTunes, and other exclusive handsets (to be fully functional) require the wireless network to be capable of delivering television services, other video services, turn-by-turn directions, and myriad other functionalities. Most RCA members, however, have not yet upgraded their networks to 3G, and most small carrier networks lack these additional capabilities.⁷⁵

Second, the proposed rule would not assure that any RCA member could offer any particular handset. Handset manufacturers determine the carriers through which their products will be distributed, and the Commission cannot require manufacturers to deal with RCA members.

⁷⁵ To the extent RCA's complaint is merely that other carrier's exclusive distribution rights should be limited to the territories they serve, the complaint is still misguided. Many rural carrier networks overlap, at least partially, with the national networks, and there is no feasible way to ensure that such carriers, if they obtained the rights to distribute handsets currently subject to exclusive arrangements, would in fact sell them only to customers that used the phones primarily outside of the areas where there is such overlap. Moreover, AT&T and other carriers are constantly adding new cell sites and thus expanding the reach of their rural networks, and any attempt to police these ever-changing boundaries would be even more costly and unworkable. See, e.g., CNET News, *iPhone to Land in Vermont*, Jan. 2, 2009, available at http://news.cnet.com/8301-17938_105-10130423-1.html.

In short, section 254 is not (and never has been) aimed at achieving universal availability of every possible brand of CPE (much less every brand of wireless CPE), and even if it had authority to do so, the Commission could not achieve that sort of universal availability without an enormous and extraordinarily costly disruption of these fully functioning markets that likely would not even achieve RCA's stated aims.⁷⁶

Section 1 of the Act and Title I. Because RCA has no coherent theory under the substantive provisions of the Communications Act, its Petition ultimately boils down to a plea for an assertion of ancillary Title I regulation. However, the Supreme Court has made clear that ancillary jurisdiction is “restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Act, which here would be the regulation of wireless telecommunications services.⁷⁷ Because ancillary jurisdiction is “incidental to, and contingent on, specifically delegated powers under the Act,” “each and every assertion of jurisdiction over [the ancillary activity] must be independently justified as reasonably ancillary to” a specific Commission power.⁷⁸ Thus, for example, the D.C. Circuit has held that the Commission’s authority over cable television does not give the Commission broad ancillary authority over the consumer electronics used in connection with those services.⁷⁹ Similarly, the Commission has no basis to assert Title I authority here over handset distribution (a non-common-carrier activity) unless it could be shown that the practices in question threaten the vitality of competition in the wireless telecommunications market itself – *i.e.*, unless such an assertion of authority is demonstrably necessary to the “effective performance” of the

⁷⁶ See Katz Decl. ¶¶ 39-42.

⁷⁷ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

⁷⁸ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

⁷⁹ *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

Commission's regulation of wireless services. But, as explained above, the wireless marketplace is extremely competitive, and RCA cannot remotely make a case for Commission intervention.⁸⁰

Indeed, RCA's focus on Title I simply highlights another problem with RCA's Petition: the Commission ultimately has no authority to address what really concerns RCA. The handset manufacturers today have no duty to deal with any particular carrier; even in the absence of contractually exclusive arrangements, handset makers could still refuse to sell to RCA members.⁸¹ The Commission could address *that* problem only if it asserted direct regulatory authority over the distribution practices of Research in Motion, Apple, Motorola, and numerous other manufacturers that are not common carriers today in any context, and began treating wholesale distribution of handsets to wireless service providers as a common carrier service. That would be a radical step that would require the Commission to overrule thirty years of precedent establishing that the wholesale distribution of handsets (*i.e.*, wireless CPE) is not a common carrier service. The Commission could not possibly provide a sustainable legal justification for such a radical and unprecedented step.

Abrogation of Contracts. Finally, and in all events, it would be entirely unlawful for the Commission to abrogate *existing* exclusive agreements. Wireless carriers and handset makers have engaged in exclusive distribution arrangements for many years, and the Commission itself held in 1992 that such arrangements were not anti-competitive. Accordingly, it clearly would be improper for the Commission to undermine the investment-backed expectations associated with existing exclusive arrangements between carriers and handset providers, given that the parties have not, in any way, been on notice that the Commission would consider abrogating such

⁸⁰ These same restrictions apply to the application of 47 U.S.C. § 303(r).

⁸¹ Indeed, because handset makers have no duty to deal with any particular carrier, those manufacturers could likely establish *de facto* exclusivity even in the absence of exclusive contracts.

contracts. The situation here, therefore, is diametrically opposed to the situation in the Commission's orders abrogating exclusive contracts to serve multi-dwelling units. Indeed, in the MTE/MDU proceedings, the Commission initially found such agreements to be unlawful but declined to modify existing agreements, explaining that "the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts."⁸² Eight years later, when the Commission did abrogate such agreements, it did so explicitly because the "validity" of such agreements "has been subject to question for some time," thus eliminating any expectations that such agreements would not be abrogated.⁸³ Similarly, when it abrogated exclusive video provider agreements in MDUs, it did so only because "[t]he lawfulness of exclusivity clauses has been under our active scrutiny for a decade, making the parties to them aware that such clauses may be prohibited."⁸⁴

⁸² *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report And Order and Further Notice Of Proposed Rulemaking, Fifth Report And Order And Memorandum Opinion And Order, And Fourth Report And Order And Memorandum Opinion And Order, 15 FCC Rcd. 22983, ¶ 36 (2000).

⁸³ *MTE Order*, ¶ 13.

⁸⁴ *MDU Order*, ¶ 36.

CONCLUSION

For the foregoing reasons, the Commission should reject RCA's proposal to ban exclusive handset arrangements.

Respectfully submitted,

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