Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Carriers and Handset Manufacturers	)	RM No. 11497

<u>REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.</u>

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SUMMARY

MetroPCS only favors government regulation when free market forces are not operating properly to promote the public interest. Unfortunately, competitive market forces are breaking down in the market for wireless handsets. The wireless handset market is operating in a dysfunctional manner because large national carriers are able to use their dominant positions in the market for wireless services to dictate exclusive handset agreements. These arrangements effectively deny smaller and rural carriers, as well as new entrants, the opportunity to offer their customers the latest wireless technology, which harms the ability of such carriers to compete. While AT&T, Verizon Wireless, and Sprint Nextel (three of the "Big-4" national carriers) maintain that the wireless industry is intensely competitive, they ignore the overwhelming number of indicators that the wireless industry has become a highly concentrated, Big-4 dominated marketplace. In addition, AT&T and Verizon Wireless attempt to equate competition among wireless handset manufacturers with competition in the wireless services market, which ignores entirely the near-stranglehold that wireless carriers possess over the distribution channels for wireless handsets. Handset manufacturers need wireless carriers considerably more than wireless carriers need any particular handset vendor – thus wireless carriers have considerable leverage to extract exclusive arrangements from handset manufacturers. In order to fulfill its congressional directive to promote competition, diversity of ownership and growth of wireless technology for the benefit of all citizens, urban and rural alike, the Commission must initiate a rulemaking to examine the trend toward exclusive handset arrangements. Only by taking this step can the Commission prevent the Big-4 from monopolizing the newest and most advanced handsets, to the detriment of smaller and rural carriers, new entrants and the American consumer.

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MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its reply comments in support of the Petition for Rulemaking (the "Petition") filed by Rural Cellular Association ("RCA") regarding exclusivity arrangements between commercial wireless carriers and handset manufacturers.[2] MetroPCS supports RCA's Petition and opposes certain comments filed in opposition. In reply, the following is respectfully shown:

[1] For purposes of these Reply Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] Rural Cellular Association Petition for Rulemaking of Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497, filed May 20, 2008; "Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers," RM No. 11497, DA 08-2278 (rel. Oct. 10, 2008).

I. AT&T AND VERIZON WIRELESS' DOMINANT POSITIONS IN THE MARKET FOR WIRELESS SERVICES ALLOW THEM TO EXERT ANTICOMPETITIVE INFLUENCE OVER THE WIRELESS HANDSET MARKETPLACE

Exclusive arrangements may raise competitive concerns when a market is dominated by a few major players, such as the market for wireless services. AT&T admits that exclusive arrangements give rise to competitive concerns under certain circumstances, "generally where the parties are dominant and have substantial market power, such that their exclusive arrangement allows them to foreclose competition itself."[3] This type of carrier dominance is precisely what exists in today's wireless services marketplace. AT&T's assertions that "none of these circumstances is remotely present in the wireless industry," and that "[t]here is no dominant manufacturer or carrier and no ability to use exclusivity to foreclose competition," completely ignore industry realities, as illustrated below.[4]

A. <u>Despite Their Protestations to the Contrary, AT&T and Verizon Wireless Hold Dominant Positions Over Their Respective Air Interfaces in the Highly-Concentrated Market for Wireless Services</u>

AT&T's assertion that no carrier holds a dominant position in the market for wireless services flies in the face of the evidence of the true conditions in the wireless industry. Properly viewed, the industry is split into two sets of providers that offer service over either a CDMA or GSM air interface exclusively. A proper analysis of the separate market for CDMA service on the one hand and the separate market for GSM service on the other reveals that AT&T and Verizon Wireless each have a dominant position with respect to their air interfaces. With Verizon Wireless' consummation of its acquisition of Alltel, it has nearly 80 million CDMA

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[3] AT&T Comments at 9.

[4] *Id.* at 3.

customers.[5] By comparison, Sprint Nextel, US Cellular, MetroPCS, Leap and other smaller rural and regional CDMA carriers serve only approximately 65 million customers in the aggregate.[6] This means that Verizon Wireless alone serves more than 55 percent of the CDMA market, unquestionably giving it a dominant position in that market. The GSM market is even more concentrated, as AT&T serves over 70 million customers, while its next largest rival, T-Mobile, serves a mere 29 million.[7] This gives AT&T an estimated market share of over *70 percent* in the GSM market, allowing it to exercise market power and thereby reap the unjust rewards of a monopolist.

The wireless industry also must be considered highly concentrated when viewed as a whole, even without the GSM and CDMA segments being separated. According to the recently released *Thirteenth Report* pertaining to CMRS competition, the "[a]verage concentration of the U.S. mobile telephone market, as measured by the Herfindahl-Hirschman Index ('HHI'), was unchanged at 2674 at the end of 2007."[8] With an HHI rating of 2674, the U.S. Department of Justice and the Federal Trade Commission consider the wireless industry to be "highly concentrated" according to their Horizontal Merger Guidelines, far exceeding the 1800 HHI benchmark number necessary for the "highly concentrated" designation.[9] The Horizontal Merger Guidelines further state that "[w]here the post-merger HHI exceeds 1800, it will be

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[5] *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, Table A-4 (Jan. 16, 2009) ("*Thirteenth Report*").

[6] *Id.* at Table A-4.

[7] *Id.* at Table A-4.

[8] *Id.* at 6.

[9] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 1.51 (rev. Apr. 8, 1997).

presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."[10]

The highly concentrated nature of the wireless industry is further demonstrated by the tremendous market share that the Big-4 carriers together control. According to the *Thirteenth Report*, the Big-4 carriers account for 92.4 percent of all wireless subscribers.[11] Such a stunning concentration of customers in a mere four carriers shows that they clearly dominate the competitive landscape. Although AT&T correctly concludes that 95 percent of the U.S. population has the choice of three or more carriers,[12] the choice is nearly always limited to members of the Big-4 carriers, most typically AT&T, Verizon Wireless and Sprint Nextel. With the same small group of large carriers dominating nearly every area of the U.S. population, the market for wireless services can hardly be called highly competitive.

Although no single competitor may have a dominant share of the market as a whole, it is simply disingenuous and factually incorrect for the Big-4 carriers to claim that the market is anything but highly concentrated, with large participants being in a position to exercise improper market power. With the data so clearly indicating a highly concentrated, four-carrier-dominated marketplace, the Commission should regulate exclusive handset arrangements even by the Big-4 carriers' own advocacy.[13] For example, AT&T acknowledges that exclusive agreements may be anticompetitive in markets "where the parties are dominant and have substantial market power."[14] That is the precise situation in the market for wireless services today.

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[10] *Id.* at § 1.51.

[11] *Thirteenth Report* at Table A-4.

[12] *Id.* at Table 2.

[13] AT&T Comments at 3.

[14] *Id.* at 3.

B. The Commission's 1992 Ruling on Handset Bundling is Based on Starkly Different Market Realities

AT&T asserts that "the Commission has *already rejected*, in 1992, small carrier requests that it apply heavy-handed regulation to their larger rivals' exclusive handset offerings" (emphasis in original).[15] However, while the Commission did indeed visit a similar issue over 15 years ago, the reasoning used in that analysis is stale and no longer applies to the modern market for wireless services. Based on the observation at the time that the wireless industry was largely composed of smaller carriers that operated in local markets, the Commission held that no single or group of carriers could likely "possess market power that could impact the numerous CPE manufacturers operating on a national...basis."[16] The Commission reasoned that "because cellular service is offered in local markets, exclusive dealing arrangements would not eliminate international and national CPE providers in the absence of a nationwide conspiracy by cellular carriers."[17] It is simply no longer the case that wireless service is offered on a local market basis.[18] The "nationwide conspiracy" that the Commission feared in 1992 has come to pass in the form of industry consolidation, creating large, nationwide carriers with the ability to exercise market power over wireless handset manufacturers.

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[15] *Id.* at 8.

[16] *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, 4029-30 (1992) ("*Bundling Order*").

[17] *Id.* at 4030.

[18] Indeed, in seeking Commission approval of merger transactions, the large carriers routinely argue that the Commission should analyze the market for wireless services on a national basis. *See e.g., Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Applications for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Leasing Arrangements,* Memorandum Opinion and Order, FCC 08-258 at para. 50 (rel. Nov. 10, 2008) (applicants Verizon Wireless and Alltel Wireless argue that "the market for mobile telephony/broadband services is increasingly national in scope").

The marketplace for wireless services is no longer made up of small, regional carriers, incapable of exercising market power. Consolidation in the industry has created a market with four dominant players on a national scale, a situation that simply did not exist when the Commission made its original findings in 1992. Indeed, the market for wireless services 15 years ago was an entirely different place than today. For instance, when the Commission issued its *Bundling Order* in 1992, there were only 8.8 million wireless subscribers. As late as 1997, the top six carriers served 55 percent of customers nationally.[19] Today, there are nearly *thirty times* as many wireless customers, with more than 92 percent of those customers being served by the Big-4.[20] In addition, in 1992 all wireless handsets operated on the same analog cellular interface, as market for wireless services had not yet begun its conversion to digital. Since no CDMA-GSM market division existed in 1992, customers were free to independently purchase cellular handsets, which would in turn operate on any cellular network. Today, the exclusive tying of the most advanced wireless handsets to a single air interface robs consumers of the important ability to travel freely among wireless carriers, further underscoring the tremendous changes that the market for wireless services has undergone since the Commission's 1992 decision.

The Commission in 1992 supported the conclusion that "if individual cellular service companies do not possess market power in the sale of cellular service on a national level, it is unlikely that foreclosure of the CPE market can be successful."[21] The Commission's reasoning

[19] *Remonopolizing Local Telephone Markets: Is Wireless Next?*, Cooper, Mark, *Consumer Federation of America*, July 2004 at 8.

[20] *Background on CTIA's Semi-Annual Wireless Industry Survey*, CTIA, *available at* http://files.ctia.org/pdf/CTIA_Survey_Mid_Year_2008_Graphics.pdf (last visited Feb. 17, 2009).

[21] *Bundling Order*, 7 FCC Rcd at 4030 (quoting FTC Staff Comments at 23).

cannot possibly still apply in 2009 when the wireless services market is unquestionably made up of wireless service companies that "possess market power in the sale of [wireless] service on a national level."[22] Today, the Big-4 carriers exercise market power to an enormous degree, one that enables them to adversely impact competition in the handset market. The Commission simply cannot rely on dated analyses and 15-year-old market snapshots that no longer ring true. It is time for the Commission to revisit this issue and make its decision based on current market realities.

II. AT&T AND VERIZON WIRELESS IMPROPERLY CONFLATE THE MARKET FOR HANDSET MANUFACTURE WITH THE MARKET FOR HANDSET DISTRIBUTION

In an attempt to "cherry-pick" the most helpful pieces of each market for their analysis, AT&T and Verizon Wireless improperly conflate the two very distinct markets relevant to this proceeding; namely the market for handset manufacture and the market for handset distribution. In doing so, the carriers gloss over the major differences between these two markets. As demonstrated below, the Big-4 have used their dominance in the market for wireless services to exert control over the market for wireless handset distribution.

AT&T attempts to show the competitive nature of the handset market by reciting statistics provided by CTIA, namely that "there are more than 35 competing handset manufacturers producing more than 620 different handsets" for the U.S. wireless market.[23] However, recent mergers in the handset manufacture market and a changing global wireless landscape have made this once-competitive market far less competitive.[24] Indeed, the global

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[22] *Id.* at 4030.

[23] AT&T Comments at 14.

[24] *See* "ST, Ericsson Move Ahead on Wireless Joint Venture," Deffree, Suzanne, *Electronic Daily News*, Feb. 3, 2009, *available at*

(continued...)

economy has placed increased pressure upon wireless handset manufacturers. Nevertheless, even operating under the faulty assumption that the handset manufacturer market will remain competitive, the simple fact is that competition among handset manufacturers does not reach consumers. Wireless carriers control the distribution channels for most handsets, meaning that the vast majority of customers are not realistically able to purchase handsets except through arrangements with carriers. Indeed, carriers have successfully exerted their market dominance in today's wireless marketplace into the market for handsets to consumers.

In its comments, Verizon Wireless cites statements by handset manufacturer LG that wireless carriers are not the only sources for purchasing a wireless phone, noting that LG offers phones to consumers "via its website."[25] Yet even this supposedly alternative channel is clogged by the Big-4 carriers. Customers visiting LG's website wishing to purchase the popular new LG Vu are not able to do so directly from the manufacturer, as the Verizon Comments suggest. Instead, upon selecting the phone, customers are simply redirected to AT&T's website, the exclusive provider of the Vu.[26] A similar redirection occurs to Verizon Wireless' website should

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http://www.edn.com/index.asp?layout=articlePrint&articleID=CA6634281 (last visited Feb. 13, 2009); "Japan's Phone Makers Under Pressure to Exit," Negishi, Mayumi, *Reuters*, Aug. 4, 2008, *available at* http://www.reuters.com/articlePrint?articleId=UST21459420080804 (last visited Feb. 13, 2009); "Motorola's Decline Seen as Cautionary Tale," Carew, Sinead, *Reuters*, Feb. 14, 2008, *available at* http://www.reuters.com/articlePrint?articleId=USN1444261220080214 (last visited Feb. 13, 2009).

[25] Comments of Verizon Wireless at 13; *see also* Comments of Sprint Nextel at 6 (suggesting that "handsets are available from many sources, ranging form large nationwide electronics stores to independent retailers and carrier web sites").

[26] Visiting LG's website for the LG Vu (http://mobilephones.us.lge.com/phone.aspx?id=10806) does not give customers the option to purchase the Vu, but rather directs them to AT&T's website (http://www.wireless.att.com/cell-phone-service/cell-phone-details/?device=LG+VU(TM)&q_sku=sku2490219&source=ECN5q400000v8916) to make the purchase.

a customer visit LG's website to purchase the also-popular LG Voyager.[27] In yet a further example of how dominant carriers are able to obtain favorable treatment from handset manufacturers, the LG web pages for handsets provided to the dominant carriers (AT&T, Verizon Wireless/Alltel and Sprint Nextel) all contain direct links to purchase from the carrier while pages for phones provided to regional carriers MetroPCS and U.S. Cellular contain no such links.

Wireless carriers are using their dominance in the market for wireless services and wireless handset distribution market to limit competition in the consumer handset market. Although the Big-4 carriers may argue that some consumers are able to purchase their wireless phones from a variety of sources, the number of such sales pale in comparison to the number of consumers who purchase their phones from the brick-and-mortar locations of wireless service providers. According to a study by NDP Intellect, 54 percent of new wireless customers use wireless providers' brand name retail stores as their point of purchase, in comparison to the 16 percent who purchase phones at retail electronics stores and the scant 0.6 percent who purchase their wireless phone over the Internet.[28] By dominating the distribution channels, the Big-4 can and do dictate terms to manufacturers. Without a well-established, alternative distribution channel, wireless handset manufacturers are dependant on service providers to sell their products to consumers.

[27] Visiting LG's website for the LG Voyager (http://mobilephones.us.lge.com/phone.aspx?id=9416) does not give customers the option to purchase the Voyager, but rather directs them to Verizon Wireless' website (http://www.verizonwireless.com/b2c/index.html) to make the purchase.

[28] *In-store Education Drives Wireless Consumer Sales*, TESSCO, *available at* http://www.tessco.com/yts/industry/retailer/casestudy/study1.html (last visited Feb. 15, 2009).

The efforts of the Big-4 to use their position in the market for wireless services to forestall competition in the handset market is similar to an issue which arose in the local/long distance market prior to the breakup of AT&T. Because AT&T controlled the local loop, all long distance competitors were forced to enter into agreements with AT&T in order to complete calls for customers. Using its bottleneck over local services, AT&T engaged in "strategic use of its market dominance to…deny and condition access to its monopoly local distribution plant."[29] The Big-4 are engaged in a similar use of market dominance to condition access to the distribution system for mobile phones. Handset manufacturers are coerced to enter into exclusive handset arrangements in order to have access to the massive consumer markets that the Big-4 provide.[30]

Verizon Wireless also attempts to equate the exclusive arrangements in the wireless industry with exclusive arrangements that exist in the video console gaming and computer industries.[31] Though this may sound good when spoken fast, it completely ignores the basic differences among the markets, most notably the unique distribution channels by which most customers obtain their wireless handsets. As discussed above, the majority of wireless customers obtain their branded handsets from the carrier that provides them with service; customers visit one store, owned by the carrier, to obtain two distinct products – a handset and wireless service. On the contrary, when a customer purchases a console gaming system it is typically at an

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[29] Telecommunications in Transition: The Status of Competition in the Telecommunications Industry, Report of the Majority Staff of the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, U.S. House of Representatives, p. 2 (Nov. 3, 1981).

[30] It is noteworthy that no handset manufacturer (including Apple) filed comments in this proceeding, perhaps in an effort to avoid offending the Big-4 carriers who control their distribution stream.

[31] Verizon Wireless Comments at 31.

electronics store or online retailer unconnected with the manufacturer of the console.[32] Simply put, video game console companies do not control the distribution points for video games to a degree even approaching the manner in which service providers control the point of sale for wireless handsets. Verizon Wireless also argues that "[c]onsumers are used to products being associated with retailers (Macs with Apple)."[33] This comparison fails to even approximate the situation created by exclusive handset arrangements. Macs are not only associated with Apple, they *are* Apple. Apple designs, manufactures and markets Mac computers, and would obtain no anticompetitive benefits by restricting distribution solely to its own retail outlets. More simply, Macs are not an independent brand artificially tied to Apple by exclusive agreements; they are instead a computer line developed and sold by Apple itself.

The damage that these exclusive arrangements cause is further exacerbated by the prevalence of handset locking and long-term contracts in the wireless industry. The majority of the Big-4's wireless customers operate under single- or multi-year contracts that provide for hefty termination fees should a customer choose to end the contract before its expiration.[34] As a result, customers are not only forced to select a certain carrier in order to obtain the newest and

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[32] Sony, maker of the Playstation referenced in the Verizon Wireless Comments, operates only 59 Sony-branded retail outlets in less than half of U.S. states, while the only branded point of purchase offered by Microsoft, maker of the Xbox also referenced in the Verizon Wireless Comments, is the online "Microsoft Store." *See* http://www.sonystyle.com/webapp/wcs/stores/servlet/CategoryDisplay?catalogId=10551&storeId=10151&langId=-1&identifier=S_BrandShowcase_Retail_Locations (last visited Feb. 15, 2009); *see also* http://store.microsoft.com/microsoft/Entertainment-Xbox-360-Consoles/category/30202?WT.mc_id=xboxcom_wheretobuy (last visited Feb. 15, 2009).

[33] Verizon Wireless Comments at 30-31.

[34] AT&T and Verizon Wireless currently charge initial early termination fees ("ETFs") of $175.00, whereas T-Mobile charges an initial early termination fee of $200.00 (AT&T and Verizon Wireless reduce ETFs by a minimal amount each month that a customer remains with the carrier, while T-Mobile reduces its ETFs at 180, 90 and 30 days remaining on the contract term).

most desirable phones, but also they are forced to stay with that carrier for several years or pay a large termination fee. If the customer generally does anything to their service (such as changing the amount of minutes in their plan or obtaining a new handset), their contract is generally renewed for a similar term. This is very similar to the tenant farmer who buys all its products from the landlord and never ceases to get out of debt, or the employee of a company living in a company town. To suggest these customers have a choice or an ability to leave, or that the large national carriers do not dominate their customers, is to simply misunderstand their relationship.

In addition, should that customer choose to pay that termination fee or fulfill the contract, handset locking by the Big-4 carriers prevents customers from using that handset on a competing carrier's network. Essentially, a customer who pays for the handset through fulfillment of their contract cannot even get the benefit of their investment. This binds a consumer to the handset that they have purchased and therefore imposes further artificial limits on the market for handsets. However, many customers seek to have this lock broken, a direct result of customers wanting to have choice of their carrier independent from the purchase of their phone. If customers were truly happy to have their handsets artificially bound to a single provider, there would not be such controversy over the handset unlocking issue.

III. THE COMMISSION HAS A STATED POLICY OF DIVERSIFYING OWNERSHIP AND AN OBLIGATION UNDER § 332 TO PROMOTE SMALL BUSINESSES IN WIRELESS

In the Omnibus Budget Reconciliation Act of 1993, Congress specifically provided the Commission with a mandate to do its utmost to promote a diversity of ownership in the telecommunications marketplace. Congress instructed the Commission to take steps to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."[35] Congress recognized even in 1993 that concentration of wireless services was occurring and wanted to break that logjam. Further, the Commission is directed to adopt policies "favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[36] The Commission has also been directed by Congress to "encourage competition and provide services to the largest feasible number of users" in the wireless industry specifically.[37] By continuing to allow handset exclusivity arrangements, the Commission is failing to promote these mandates.

A. Allowing Handset Exclusivity Arrangements is Contributing to the Digital Divide

The Commission's consumer-oriented goals do not stop simply at providing the bare minimum of wireless service to U.S. citizens – the Commission must be actively engaged in pursuing the widest distribution of new technology to all citizens. Sprint Nextel argues that consumers have an "array of wireless devices to choose among."[38] However, by allowing the Big-4 to enter into exclusive agreements wherein they hoard the most advanced handsets for themselves, the Commission is condoning a system that prevents rural Americans from accessing cutting-edge technology, exacerbating the urban-rural digital divide.

While AT&T, Sprint Nextel and Verizon Wireless claim that regional and rural carriers have access to many different handsets, the crux of the matter is that they do not have timely access to the most popular or most advanced handsets. This creates two distinct and equally

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[35] 47 U.S.C. § 257(a).

[36] 47 U.S.C. § 257(b).

[37] 47 U.S.C. § 332(a)(3).

[38] Sprint Nextel Comments at 5.

unfair disadvantages. First, this harms competitive carriers – and by extension, consumers – by not allowing them to compete on an even playing field. While a regional carrier may offer better service at a lower cost, they are automatically precluded from competing for every customer who has decided to purchase an iPhone, a BlackBerry Storm, an Instinct or a G1.[39] Second, rural Americans who may live in areas unserved by one of the Big-4 find themselves utterly unable to obtain cutting-edge wireless technology. This is particularly disturbing in the context of next-generation wireless broadband. Should a carrier like Verizon Wireless, who has selected Long-Term Evolution ("LTE") technology as its 4G standard,[40] choose to enter into a series of excusive agreements for LTE-enabled phones, many rural Americans would be quite literally shut out from this important wireless broadband revolution. The Commission must act on its congressional mandate to ensure that *all* Americans – not just those in major cities who happen to be in range of a Big-4 carrier – have equal access to the best wireless technologies.

B. Recent Activation Numbers Confirm That New Customers Are Driven to Carriers That Offer the Most Advanced Handsets

Verizon Wireless discusses the fact that the wireless marketplace is 80 percent or more penetrated.[41] In such an environment, the ability to obtain the newest handsets is even more critical in order to ensure that smaller and rural carriers are able to compete. These new handsets are tremendous drivers of growth, as indicated by the subscriber numbers posted by the Big-4 carriers. In the fourth quarter of 2008, AT&T posted a net gain of 2.1 million wireless

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[39] The iPhone is distributed exclusively by AT&T, the Storm is distributed exclusively by Verizon Wireless, the Instinct by Sprint, and the G1 is distributed exclusively by T-Mobile.

[40] *Verizon Selects LTE as 4G Wireless Broadband Direction*, Press Release, Nov. 29, 2007, *available at* http://investor.verizon.com/news/view.aspx?NewsID=872 (last visited Feb. 15, 2009).

[41] Verizon Wireless Comments at 23.

subscribers, a number no doubt buoyed by the 1.9 million fourth quarter activations of the new iPhone 3G.[42] Further, approximately 40 percent of iPhone activations were from *new* customers, indicating that customers were leaving other service providers based largely, if not solely, on the fact that AT&T was the exclusive provider of the iPhone. Verizon Wireless also posted strong gains, with 1.9 million net customer additions in the fourth quarter, [43] aided by the sale of more than 1 million units of the popular BlackBerry Storm through January, 2009.[44] In an even stronger indicator of handsets driving sales, early indicators suggest that 75 percent of Storm sales were to customers new to Verizon Wireless.[45] Not to be outdone by its competitors, T-Mobile signed an exclusive agreement with Google, the developer of the highly anticipated G1 handset. The 500,000 G1 units that T-Mobile was projected to sell in the fourth quarter no doubt helped the provider post net customer additions of 621,000.[46]

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[42] *AT&T Reports Fourth-Quarter and Full-Year Results Highlighted by Robust Wireless Data Growth, Accelerated U-verse TV Ramp, Continued Double-Digit Growth in IP Data Services*, Press Release, Jan. 28, 2009, *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26502 (last visited Feb. 15, 2009).

[43] *Verizon Caps Successful Year With Strong 4Q Results*, News Release, Jan. 28, 2009, *available at* http://newscenter.verizon.com/press-releases/verizon/2008/verizon-caps-successful-year.html (last visited Feb 15. 2009).

[44] *Verizon posts improved Q4 earnings; 1M BlackBerry Storms sold*, Hamblen, Matt, *Computerworld*, Jan. 27, 2009, *available at* http://www.computerworld.com/action/article.do?command=viewArticleBasic&taxonomyId=15&articleId=9126850&intsrc=hm_topic (last visited Feb. 17, 2009).

[45] *Verizon, RIM pleased with BlackBerry Storm Sales*, Goldstein, Phil, *FierceWireless*, Dec. 19, 2008, *available at* http://www.fiercewireless.com/story/rim-verizon-pleased-blackberry-storm-sales/2008-12-19?utm_medium=rss&utm_source=rss&cmp-id=OTC-RSS-FW0 (last visited Feb. 15, 2009).

[46] *T-Mobile USA Reports 32.8 Million Customers at the End of 2008*, Business Wire, Jan. 29, 2008, *available at* http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20090128006363&newsLang=en (last visited Feb. 15, 2009).

AT&T cites Professor Michael L. Katz in support of its proposition that, absent exclusive agreements, carriers would be hesitant to invest in new handset technology.[47] The numbers above, however, suggest just the opposite. Looking at the new subscriber additions above, it is clear that new devices are a significant driver of customer activation. It is highly unlikely that carriers, even absent exclusivity, would not invest in devices in order to spur new buying by consumers. Since customers are drawn to new devices, it stands to reason that wireless companies would continue to encourage the development of new devices as a way to attract new customers – whether they were the exclusive provider of the device or not. New devices, exclusive or not, mean more customers, new services and increased revenue streams, all of which are critical to the growth of any wireless service provider. Further, these statistics clearly show that carriers who cannot have access to these handsets are disadvantaged.

IV. EXCLUSIVITY DOES NOT DRIVE COMPETITION IN THE HANDSET MARKET

AT&T claims that "[w]hen a carrier and a manufacturer launch a new phone that proves successful, competition intensifies and consumers benefit."[48] Competition for handset innovation may indeed increase with the release of a new handset, but this has little to do with whether or not a carrier is exclusively tied to it or not. Handset manufacturers must compete with one another based on the features and quality of their product. Sprint Nextel contends that "Apple's touch screen iPhone offered by AT&T has led to the development of competitive models…such as the Samsung Instinct offered by Sprint and the Blackberry [sic] Storm offered by Verizon."[49] It strains credulity to assume that RIM, for example, developed the BlackBerry

[47] AT&T Comments at 18.

[48] *Id.* at 17.

[49] Sprint Nextel Comments at 5.

Storm due to its exclusive agreement with Verizon Wireless, rather than of its own desire to remain relevant in the wireless handset marketplace and to compete with the iPhone. RIM responded to the iPhone with the Storm because, as a rational market participant, the company recognized the most fundamental of business truths – innovate or perish.

In reality, it is the handset manufacturers who are providing the design innovation with respect to wireless handsets. While the wireless service providers may have a say in the "look and feel" of the handset, it is the manufacturers who develop the intellectual property and technology that drive wireless innovation. As a result, exclusive agreements do nothing to promote innovation in wireless devices – manufacturers are already doing this on their own. Handset manufacturers will continue to invest and innovate, because without doing so they will have fewer sales. Since manufacturers have nearly no distribution channels, they are almost entirely reliant on the Big-4 to get their products to market. In reality, if a manufacturer has no distribution network, it would likely be frozen out of the current distribution model if it tried to create its own, as the owners of the distribution channels (such as AT&T and Verizon Wireless) have a monopsony. It is clear that the handset manufacturers have no choice but to enter into these exclusive arrangements.

AT&T also suggests that these exclusive arrangements serve to preserve and promote brand image. "Manufacturers may design handsets that include 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."[50] The argument that manufacturers need to protect their brand by ensuring that their handsets are not sold on networks on which they will not function is really no argument at all. What possible benefit

[50] AT&T Comments at 19.

accrues to a CDMA provider who sells GSM iPhones to its customers, only to have them fail to function on the network? Further, the choice of whether a carrier wants to sell a handset and to invest in the infrastructure necessary to support it should be made by the carrier – not by the Big-4 dictating that they will not have that choice.

Casting aside exclusive agreements certainly does not lead to the conclusion that manufacturers must support all bands, all air interfaces and all configurations. If a manufacturer offers a handset to all carriers that requires specific network technology, and a specific carrier's network will not support it, that carrier has no claim of unfair treatment. Should the carrier desire the new handset badly enough to upgrade the network, it may do so and freely offer the phone. Carriers and manufacturers might even enter into "exclusives" for colors or shapes that match the "look and feel" of a carrier's brand. The problem arises when carriers are completely unable to get the basic model of a newly developed handset that would function properly on its network.

V. EXCLUSIVE ARRANGEMENTS FRUSTRATE THE FCC'S OBJECTIVE OF ENCOURAGING NEW ENTRANTS AND RURAL PROVIDERS

As discussed above, the Commission has a congressionally-mandated policy objective of spurring competition in the form of new entrants, and of increasing the availability of wireless service across rural America.[51] New entrants and rural carriers do not have access to exclusive arrangements and as such are hindered when they are competing with the larger carriers who do. The Big-4 carriers already have greater resources, greater spectrum, and larger roaming footprints when they compete against regional or rural carriers. These unfair exclusive agreements are merely an additional rock in the small carrier's backpack that weighs them down

[51] 47 U.S.C. §§ 257, 332.

in their competitive fight with the Big-4. Moreover, such exclusivity arrangements can hinder broadband deployment if the large carriers dictate exclusive arrangements on a new generation of handsets, like LTE. As MetroPCS notes in its earlier comments,

> [t]he availability of handsets that are able to operate on LTE technology in the future will be critical to the competitiveness of the wireless industry. The ability of small, rural and regional competitors to obtain such handsets is of paramount importance, as such handsets will be necessary to all competitors to attempt to compete with the national wireless carriers and offer 4G services.[52]

The Commission must act now to ensure that the new 4G broadband technologies are not merely limited to subscribers of the Big-4 wireless carriers.

VI. CONCLUSION

For the foregoing reasons, the Commission should initiate a rulemaking to investigate the anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest, consistent with its obligations under the Communications Act. By issuing a notice of proposed rulemaking, the Commission will create a forum for these important competitive issues to be explored based upon a full and complete record.

[52] MetroPCS Comments at 11-12.

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CERTIFICATE OF SERVICE

I, Andrew Morentz, hereby certify that a true and correct copy of the foregoing Reply Comments of MetroPCS Communications, Inc. was sent via first class mail this 20th day of February, 2009 to the individuals on the following list:

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