BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF SOUTHERNLINC WIRELESS

Southern Communications Services, Inc. d/b/a SouthernLINC Wireless ("SouthernLINC Wireless") hereby submits its reply comments in response to the Federal Communications Commission's October 10, 2008, *Public Notice* requesting comment on the Petition for Rulemaking filed by the Rural Cellular Association ("RCA") regarding exclusivity arrangements between commercial wireless carriers and handset manufacturers ("Petition").[1]

I. INTRODUCTION

The initial comments filed in response to the Petition demonstrate that rural carriers are experiencing significant problems in obtaining new handset models, particularly those incorporating new technologies and services that consumers want and increasingly demand.[2]

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[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 (rel. Oct. 10, 2008) ("*Public Notice*").

[2] / *See, e.g.*, Comments of Cincinnati Bell Wireless; Comments of MetroPCS; Comments of NTELOS; Comments of California RSA No. 3 Limited Partnership d/b/a Golden State Cellular ("Golden State Cellular").

Supporters of the Petition further point out that the dearth of available handsets severely restricts the ability of rural carriers to provide their customers – many of whom have few (if any) competitive alternatives – with advanced services and technologies such as those enjoyed by customers of the nationwide carriers.[3] Finally, supporters of the Petition describe how handset exclusivity arrangements can interfere with or even prevent compliance by non-nationwide regional and rural carriers with important Commission mandates designed to protect the public interest, such as hearing aid compatibility and E911 location accuracy.[4] Although the nationwide carriers may disagree, the record shows that the non-nationwide carriers' concerns over handset exclusivity arrangements are very real and immediate and that they warrant the Commission's attention.

As discussed below, SouthernLINC Wireless submits that the public interest concerns that have been raised in this proceeding appear to give the Commission the legal authority necessary to take action regarding exclusivity arrangements between wireless carriers and handset manufacturers.

II. THE LEGAL BASIS FOR COMMISSION ACTION ON HANDSET EXCLUSIVITY

In order to determine what action the Commission should take in this matter, it is necessary to first determine the extent of the Commission's legal authority to regulate the contractual relationships between wireless carriers and handset manufacturers. Commenters on

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[3] / *See, e.g.*, Comments of Cellular 29 Plus & Lyrix Wireless at 1 ("[C]ustomers in south west and south central Iowa do not have the opportunity to realize the benefits of the newest features and conveniences that the latest and greatest technology has to offer, all to the benefit of carriers that don't even offer service in [our] markets."].

[4] / *See* Comments of Corr Wireless at 2 – 4; Comments of Cincinnati Bell Wireless at 6; Comments of MetroPCS at 10 – 11; Comments of Golden State Cellular at 3 – 4; Joint Comments of RTG, OPASTCO and NTCA at 3; Comments of the Blooston Rural Carriers at 5, 7.

both sides of the issue have already presented extensive arguments regarding the scope and nature of the Commission's authority under a variety of statutory provisions, including Sections 1, 4(i), 201, 202, 254(b)(3), 303(r), and 307(a) of the Communications Act, as well as the Commission's ancillary jurisdiction and Commission precedent in unrelated proceedings.[5] SouthernLINC Wireless suggests that, aside from the arguments already presented during the initial round of comments, there may be additional grounds for Commission action regarding handset exclusivity arrangements.

A. Section 710 and the Hearing Aid Compatibility Rules

In their comments, the nationwide carriers argue that, while the Commission has the authority to regulate the technical specifications of handsets and the use of handsets while they are transmitting, it does not have the authority to regulate handsets or handset manufacturers with respect to distribution.[6] However, the Commission recently did exactly that when it adopted new rules on hearing aid compatibility ("HAC") that not only established the technical specifications that handsets must meet to be deemed HAC-compliant, but also imposed requirements directly on handset manufacturers regarding the composition of the overall handset portfolios that they offer to wireless carriers.[7]

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[5] / *See* Petition at 5 – 6, 9 – 14; Comments of Jim Chen (consultant to Cellular South) at 18 – 29, 31 – 41; Comments of AT&T at 27 – 36; Comments of Verizon Wireless at 4 – 11; Comments of Sprint Nextel at 13 – 19.

[6] / *See* Comments of Verizon Wireless at 4 – 6, 9 – 11; Comments of Sprint Nextel at 18 – 19; Comments of AT&T at 34 – 36.

[7] / *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC 63*, WT Docket No. 07-250, First Report and Order, 23 FCC Rcd 3406 (2008) ("*2008 HAC Report and Order*"). These rules were adopted pursuant to the Commission's authority under Section 710 of the Communications Act, as amended, 47 U.S.C. § 610. *Id.* at ¶¶ 14 and 127.

Specifically, handset manufacturers are now required to ensure that at least one-third of the models in their handset portfolios for each air interface meet a rating of M3 or higher and that at least twenty percent (increasing to one-third in 2011) of the models in their handset portfolios for each air interface meet a rating of T3 or higher.[8] Moreover, handset manufacturers are now subject to a "product refresh" rule requiring manufacturers to introduce new handset models rated M3 or higher every other calendar year or every calendar year, depending on the total number of handset models in their portfolio for a particular air interface.[9] According to the Commission, the "product refresh" rule "is necessary to ensure that service providers will be able to offer consumers a selection of hearing aid-compatible models *including those with the latest features*."[10]

These requirements, adopted pursuant to the Commission's authority under Sections 4(i), 303(r), and 710 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and 610,[11] effectively regulate manufacturers' business decisions with respect to the types of handsets that they offer to service providers and, thus, effectively regulate the provision of equipment to wireless carriers. Because the purpose of these rules is to "further 'ensure reasonable access to telephone service by persons with impaired hearing' as required by the Communications Act" and to "ensure that consumers with hearing loss have a variety of handsets available to them, *including handsets with innovative features*,"[12] the Commission should consider the extent to

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[8] / *Id.*, 23 FCC Rcd at 3418-19 ¶¶ 35 – 36; 47 C.F.R. §§ 20.19(c)(1)(i) and (d)(1).

[9] / *2008 HAC Report and Order*, 23 FCC Rcd at 3425 ¶¶ 48 – 49; 47 C.F.R. § 20.19(c)(1)(ii).

[10] / *2008 HAC Report and Order*, 23 FCC Rcd at 3425 ¶ 49 (emphasis added).

[11] / *2008 HAC Report and Order*, 23 FCC Rcd at 3453 ¶ 127.

[12] / *Id.*, 23 FCC Rcd at 3408 ¶ 5 (emphasis added).

which these important public interest goals – and the Commission's statutory responsibilities – are affected by handset exclusivity arrangements.

Accordingly, SouthernLINC Wireless submits that Section 710 of the Communications Act, as amended, 47 U.S.C. § 610, and the rules and orders adopted thereunder appear to provide a legal basis for Commission action regarding handset exclusivity arrangements. Moreover, the clear statutory and policy goals established by these provisions further support the Commission's exercise of its broad Title I ancillary jurisdiction in this matter.

B. Public Safety Interests

The Commission could also take action regarding handset exclusivity arrangements pursuant to its mandate to "promot[e] safety of life and property through the use of wire and radio communication," such as through wireless E911 and the Commercial Mobile Alert System ("CMAS").

Greater location accuracy for wireless E911 services has long been one of the Commission's top policy priorities. However, there is substantial evidence already before the Commission that any further improvements in wireless location accuracy will require the development and deployment of new technologies and services.[13] For example, while AT&T recently proposed new location accuracy standards for GSM-based carriers, its proposal was dependent on the future deployment of A-GPS-capable handsets by these carriers. Similarly, any further improvements in location accuracy for carriers currently using handset-based solutions would likely require the implementation of new technologies, such as improved GPS chipsets,

[13] / Numerous filings on this point may be found in the record for PS Docket No. 07-114.

that would require new handsets.[14] However, non-nationwide regional and rural carriers have previously alerted the Commission of their concern that they may not be able to obtain such handsets in a timely manner – if at all – as a result of exclusivity deals.[15] As a result, millions of US consumers could be denied access to an important public safety feature.

In addition, the Commission has been charged with promoting the development and deployment of a Commercial Mobile Alert System pursuant to the Warning, Alert, and Response Network Act ("WARN Act").[16] Although carrier participation in the CMAS program is currently voluntary, the eventual widespread deployment of CMAS capabilities is an important public interest and one of the Commission's highest policy priorities.[17] However, the actual deployment of CMAS requires further developments in technologies and equipment – including CMAS-capable handsets – as evidenced by the high number of wireless carriers that have notified the Commission of their election to not participate in the CMAS program at this time. To the extent that new handsets capable of receiving CMAS alerts become available, non-nationwide regional and rural carriers could find their ability to obtain such handsets significantly restricted by handset exclusivity arrangements, thus delaying the potential availability of CMAS alerts to large segments of the population.

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[14] / *See, e.g.*, Comments of Sprint Nextel in PS Docket 07-114 at 1 (filed Oct. 6, 2008) (describing Sprint Nextel's steps to improve E911 location accuracy, including the release of new handsets with more sensitive GPS receivers).

[15] / In addition to the initial comments filed in the instant proceeding, the impact a lack of available handsets would have on E911 location accuracy has been raised in PS Docket 07-114. *See, e.g.*, Comments of Corr Wireless in PS Docket 07-114 at 4 (filed Oct. 6, 2008); Reply Comments of SouthernLINC Wireless in PS Docket 07-114 at 7 – 8 (filed Oct. 14, 2008); Reply Comments of the Rural Cellular Association in PS Docket 07-114 at 3 – 4 (filed Oct. 14, 2008).

[16] / Security and Accountability For Every Port Act of 2006 (SAFE Port Act), Pub. L. 109-347, Title VI – Commercial Mobile Service Alerts (WARN Act).

[17] / *See, e.g., The Commercial Mobile Alert System*, PS Docket No. 07-287, Notice of Proposed Rulemaking, 22 FCC Rcd 21975, 21976 ¶ 3 (2007).

Accordingly, as it considers what measures should be taken with respect to exclusivity agreements between wireless carriers and handset manufacturers, the Commission should consider the extent to which such agreements affect the public interest in improved E911 location accuracy and CMAS deployment, as well as the Commission's statutory and policy duties to advance these important public interests.

WHEREFORE, THE PREMISES CONSIDERED, SouthernLINC Wireless respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

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