

**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)	
_____)	

REPLY COMMENTS OF AT&T INC.

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

INTRODUCTION AND SUMMARY

RCA’s Petition asked for the most radical forms of government intervention – abrogating existing private contracts and regulating the terms of future ones – to prevent supposed competitive harm from handset distribution arrangements that have been a common, beneficial feature of the intensely competitive U.S. wireless marketplace since its inception. The Petition contained no actual *evidence* of any such harm, no coherent economic argument how such product differentiation could even theoretically harm consumers in the dynamic wireless marketplace, and no legal justification for any regulatory “solution” to this nonexistent problem. Now, at the conclusion of a months long comment period, it is abundantly clear that none of

¹ Public Notice, *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 (October 10, 2008) (“*Notice*”).

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

these gaps can be bridged, and that the protection *from* competition that RCA improperly seeks for its members would cause extraordinary harm to wireless consumers.

AT&T and others have submitted extensive evidence that confirms that interfering with market-based decisions how distribution arrangements should be tailored to support the introduction, promotion and optimal operation of particular handsets would *reduce* competition, innovation and investment by carriers and handset makers alike. As the handset makers' trade association aptly put it: "prohibition of exclusive contracts between wireless carriers and handset manufacturers will lead to unintended consequences that will hamper provision of new wireless devices and services."³ The comments likewise confirm that none of the market conditions under which exclusive arrangements have been thought to harm competition is present in the wireless industry, that actual market performance refutes any suggestion that exclusive handset deals must be banned to allow a functioning competitive market, and that exclusive handset deals do not, in fact, prevent rural carriers from distributing a full range of handsets, including high end "smartphones" with the latest features.

RCA's supporters, in contrast, have chosen to follow RCA's approach, urging the Commission to curb competitive activity through investment and innovation-chilling regulation on the basis of entirely unsupported assertions of competitive harm that are at odds with the most basic marketplace facts. Like RCA, they do not even acknowledge the tremendous benefits that come with the increased competition and investment made possible by exclusive distribution arrangements; nor do they grapple with the obvious reality that today's exclusive phones have spawned a golden age of innovation that is unambiguously benefiting all wireless consumers. And like RCA, they simply recite a laundry list of sections of the Communications Act with no

³ Telecommunications Industry Association ("TIA") Comments, at 4.

attempt to show how any of those provisions or any prior Commission decisions could remotely justify Commission restrictions on manufacturer-carrier handset distribution contracts.

But the comments that support regulation are most telling in what they concede about the wireless marketplace and the true motivations for the regulation sought here. The carriers that support the Petition concede that the wireless marketplace is vigorously competitive, and that carriers compete on a variety of fronts, including price, service quality, service plan, applications, devices, and product bundles. They readily admit that their handset offerings reflect their own choices among hundreds of available handsets, including many that are comparable to handsets that are exclusively distributed by others. They acknowledge that a successful exclusive offering by one carrier encourages other carriers to improve their own offerings. And they even admit that their real concern is not that any exclusive handsets are inherently superior to other handsets, but that consumers' responsiveness to the advertising and other investments that such arrangements make possible brings unwelcome competitive pressure and customer "churn." In other words, they ask the Commission to retard competition and eliminate the broad, nationwide competitive benefits that exclusive arrangements provide, so that a subset of carriers will not have to work so hard to attract and retain customers. As Dr. Katz notes in his Reply Declaration, "[m]odern public policy makes an important distinction between harm to competition and harm to competitors that these commenters fail to recognize,"⁴ and that is reason enough to deny the Petition.

In fact, the Commission already has a glimpse of what RCA's alternative world would look like: Europe. RCA's supporters point out that manufacturer/carrier collaboration to introduce new handsets is much less prevalent in Europe, yet it is indisputable that America's

⁴ Katz Reply Decl., ¶ 3 (attached hereto); *see also id.* ¶ 8.

wireless marketplace is vastly more competitive and innovative than Europe's. Wireless innovations are almost invariably enjoyed by U.S. consumers long before they are available in Europe. iPhones, Blackberries, Google phones, "app stores," and Amazon Kindles, to name a few, all came here first. And, the United States has *more* competing wireless carriers, and as the Commission recently confirmed, by far the lowest prices and highest usage.⁵ There is no possible justification for regulation designed to make the American wireless marketplace more like Europe.

Moreover, it is important to recognize that the regulation sought in the Petition inherently threatens competition, investment and innovation well beyond the sphere of traditional wireless handsets and services. As the iPhone example vividly illustrates, exclusive distribution arrangements are particularly important to the introduction of *innovative* wireless devices that break new ground, and when such offerings prove successful they spur the most important competitive responses and further innovation. Today, device manufacturers and wireless carriers are engaged in creative efforts to develop entirely new uses for wireless broadband networks: recent examples include Amazon's Kindle electronic reader that operates on Sprint's 3G network and Dell's mini-laptop with both 3G and Wi-Fi connectivity that is available from AT&T for only \$99 with a service contract. Such ventures can be enormously costly and risky and require extensive consumer education and product promotion, and the fact that device manufacturers today have the freedom to enter into exclusive distribution arrangements enables the risks and

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, ¶ 218 (Jan. 16, 2009) ("*Thirteenth Report*") ("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).

rewards of ground breaking innovations to be efficiently shared so that important new products can be developed and introduced. By contrast, if the Commission were to create a regulatory environment that encouraged free-riding, it would profoundly discourage, and likely altogether prevent, the introduction of many new revolutionary devices.

Because the competitive balance here is so plainly all benefit and no harm, some of RCA's supporting commenters now raise other objections to exclusive distribution arrangements. They contend that exclusive handset arrangements threaten smaller carriers' ability to obtain hearing aid compatible ("HAC") handsets, handsets with A-GPS functionality for E911 compliance, and handsets that support various current and future spectrum bands and technologies. As demonstrated below, all of these claims are makeweights. With respect to HAC, for example, the same rural carriers that argue that they may be unable to obtain the HAC-compatible handsets necessary to comply with the Commission's mandates reported to the Commission just last month that they already have complied with those mandates. And they will have no difficulty doing so on a going forward basis: AT&T, for example, currently offers twenty non-exclusive HAC-compatible handsets.

In short, all parties have now had ample opportunity to gather whatever evidence may be available, and given the complete failure of RCA and its supporters to muster *any* evidence of actual harms or even to confront the enormous consumer benefits that would be lost if the Commission promulgated the heavy-handed regulation they seek, the Commission should now promptly dismiss the Petition and close down this proceeding. One of the last things the country needs right now is for the Commission to hobble innovation and investment with rules that serve no purpose except to insulate certain carriers from competition.

I. EXCLUSIVE HANDSET ARRANGEMENTS INCREASE COMPETITION AND BENEFIT CONSUMERS, AND RESTRICTING SUCH ARRANGEMENTS WOULD HARM THE PUBLIC INTEREST.

There is broad agreement that allowing manufacturers and carriers the flexibility to structure their distribution arrangements promotes competition and encourages innovation. And, after having had months to prepare a case, RCA's supporters have not identified any way in which such exclusive arrangements do, or even theoretically could, harm competition. Rather, as their comments confirm, their requests for restrictions on exclusivity are nothing more than improper pleas for protection *from* competition – extraordinarily short-sighted requests that would operate solely to deprive consumers of the substantial benefits of such arrangements and to discourage and delay introduction of the *next* generation of innovative wireless devices.

A. The Comments Confirm That Exclusive Arrangements Promote Wireless Competition, Investment and Innovation.

As a number of commenters emphasize, and as the Commission, courts, and economists have long recognized, exclusive distribution arrangements can provide several important competitive benefits. First, exclusive arrangements can raise the competitive bar for everyone. As Dr. Katz has explained, “innovation by one manufacturer-carrier pair creates powerful competitive pressures for other manufacturers and carriers to meet or beat that innovation.”⁶ Exclusive deals increase carriers' incentives to make network investments in support of new handsets and to promote such handsets; “a carrier does not have to worry that other carriers will

⁶ See Katz Decl., ¶ 9 (the Declaration of Professor Katz is attached to AT&T's initial comments); see also Katz Reply Decl., ¶¶ 3, 7; Sprint at 11 (“exclusivity has led to intensive development of innovative handsets”); Verizon, at 20 (exclusivity encourages closer cooperation between the carrier and the manufacturer to develop devices with innovative features, to the benefit of consumers); AT&T, at 17-21.

free ride on its investments” if it has the exclusive right to sell the handset.⁷ Exclusivity arrangements also increase manufacturers’ incentives to devote resources to the development of innovative new devices and features, which in turn results in new devices being deployed more quickly and effectively. As TIA explains, exclusive arrangements decrease the risks inherent in developing innovative offerings, thus *increasing* investment and speeding up the deployment of such offerings.⁸

Commenters’ descriptions of competitive reactions to AT&T’s successful exclusive arrangement with Apple to distribute the iPhone starkly confirm these points. That exclusive distribution arrangement sparked unprecedented competitive responses from AT&T’s (and Apple’s) largest competitors, which in turn further increased competition and provided consumers with more and better handset choices than ever before. Sprint, for example, explains that in response to the iPhone it collaborated with Samsung and poured extraordinary resources – including “over 200 Sprint employees and contractors” – into developing a “competitive alternative” to the iPhone and placing it on the market in only ten months.⁹ Moreover, Sprint confirms that “[w]ithout handset exclusivity, Sprint would not have spent so much to promote

⁷ Katz Decl., ¶ 14; Katz Reply Decl., ¶¶ 12, 14. *See also* Sprint at 12 (“[h]andset exclusivity thus serves to protect Sprint’s investment in the development of [its exclusive phones] as well as the millions of dollars that Sprint spent to advertise and promote” it); Verizon, at 20 (“wireless providers have lesser incentive to develop and promote a handset that every other provider will have immediate access to without having to make a comparable investment in research and design”).

⁸ TIA at 10, (exclusivity “reduces the enormous financial risks” and “allows manufacturers to fund expensive investment in the development of new products,” “speed[s] the development time for new devices and features,” and “results in innovative devices designed to work properly on the provider’s network”); *see also* Katz Decl., ¶¶ 16-20; Katz Reply Decl., ¶¶ 3, 6-7, 10-11, 12-14; Sprint, at 11-13; Verizon, at 22; AT&T, at 17-22.

⁹ Sprint, at 11-12.

the Instinct if months later the Instinct could be sold by a competitor.”¹⁰ And the flood of innovative “iPhone killers” is only accelerating in 2009: Toshiba, a new entrant in the handset market, is introducing the TG1 (with a 4.1 inch touchscreen),¹¹ and Palm is releasing the Palm Pre, which combines a touchscreen with a vertically sliding QWERTY keyboard.¹²

Even opponents of exclusivity recognize these benefits. For example, Professor Chen, writing for Cellular South, acknowledges that the “emergence of powerful, cutting edge mobile devices such as Apple’s iPhone” caused Sprint to “roll[] out the Samsung Instinct, under an exclusive agreement to meet the new demand for multimedia features and touchscreen interface” and that T-Mobile “has introduced the G1, a phone built by HTC . . . and heavily preloaded with Google applications.”¹³ He admits that handset manufacturers often choose to enter into an exclusive arrangement with carriers to obtain financing and to ensure promotion of new innovative handsets, and that such arrangements could permit entry by companies like Dell and other computer manufacturers that might not otherwise enter the handset market.¹⁴ But Professor

¹⁰ Sprint, at 12; *see also* Sprint at 6 (“Apple’s touch screen iPhone offered by AT&T has led to the development of competitive models from multiple vendors, such as the Samsung Instinct offered by Sprint and the Blackberry Storm offered by Verizon”).

¹¹ *See* Toshiba TG1, Technoget.com, Feb. 4, 2009, available at <http://www.technoget.com/en/toshiba-tg1/> (“The phone . . . has a 1GHz processor from Qualcomm, which makes it mobile with the fastest processor”; “it has AGPS, GPS, [a] microSD card reader, [a] 3G connection[, it can] read DivX videos and has a memory of 512MB. Yes, they call it the iPhone Killer”); *see also* <http://massiveideas.wordpress.com/2009/02/06/toshiba-tg1>.

¹² *See* Sprint Wireless Website, http://now.sprint.com/pre/?id9=SEM_Google_C_Sprint_Pre; *see also* *Palm strikes back with new OS, pre handset at CES*, Arstechnica, Jan. 8, 2009, available at <http://arstechnica.com/gadgets/news/2009/01/palm-launches-new-handset-pre-operating-system-at-ces.ars>.

¹³ Chen, at 8.

¹⁴ Chen, at 8-9.

Chen never draws the obvious conclusion: restricting exclusive handset deals would deprive consumers of these substantial competitive benefits.

To the extent these commenters make any argument at all, they suggest that there might be even *more* innovation and investment if the Commission were to ban exclusive arrangements.¹⁵ As Dr. Katz has explained, these claims are contrary to both economic theory and consistent experience.¹⁶ In fact, the Commission has at its disposal a real-world experiment. According to these commenters, there is far less collaboration between carriers and handset makers in Europe.¹⁷ But America’s wireless marketplace is vastly more competitive and innovative than Europe’s. U.S. companies invented the iPhone, the RAZR, and many other innovative phones and these phones (as well as the Google G1 and many others) were distributed first in this country. The U.S. market introduced and popularized the “app stores” for handsets that are further revolutionizing how consumers use wireless services. The Amazon Kindle is available in the U.S., but not Europe. Indeed, virtually every significant wireless innovation reaches U.S. consumers first. The U.S. also has more competing wireless carriers; more competing wireless technologies; and, as the Commission itself recently confirmed, the lowest prices and highest usage – by a wide margin.¹⁸ The *last* thing the Commission should be contemplating now is to attempt to make our wireless marketplace more like the comparatively ossified markets of Europe, particularly now when the nation’s economic recovery critically

¹⁵ *See, e.g.*, Chen, at 9-16.

¹⁶ *See* Katz Decl., ¶¶ 28-34.

¹⁷ *See, e.g.*, Chen, at 4-5 (“[r]oughly 70 percent of mobile phones in Europe are sold independently of a wireless carrier”).

¹⁸ *Thirteenth Report*, ¶ 218 (“mobile calls continue to be significantly less expensive on a per minute basis in the United States than in Western Europe”); *id.* ¶ 219 (average revenue per minute in U.S. is “less than one-third of the European average”).

depends on increased investment from wireless and those other sectors of the economy that remain relatively healthy.¹⁹

Moreover, restricting exclusivity arrangements would deprive consumers of benefits that go far beyond traditional wireless phones. Device manufacturers are increasingly relying on wireless transmission for a whole host of services, many quite far afield from mere wireless voice services. For example, Amazon's Kindle device operates wirelessly under a contract with Sprint. There are also an increasing number of computer makers that are using exclusive arrangements to provide wireless connectivity through network cards in laptops. The range of possibilities is endless and certainly far beyond the ability of either the Commission or anyone else to predict. Banning exclusive arrangements therefore could have far-reaching negative consequences for a broad range of possible innovations, not just smartphones, and the Commission should not even consider adopting unnecessary regulations that would stifle innovation, hamper investment, prevent beneficial products from reaching the market and halt the substantial benefits that consumers have enjoyed *because* carriers and handset makers have the freedom to enter into exclusive arrangements.

B. The Comments Confirm That Exclusive Arrangements Do Not Harm Wireless Competition Or Consumers.

The comments likewise confirm that exclusive arrangements do not cause any competitive or other cognizable harms that would weigh against the clear and enormous benefits those arrangements provide. As AT&T demonstrated in its opening comments, RCA's insistence that there must be some harm somewhere cannot be reconciled with either the

¹⁹ As TIA points out, the other country with a wireless model similar to that of the U.S. is Japan, which "is lauded for its broadband deployment and highly ranked in global surveys of broadband penetration." TIA, at 9.

marketplace evidence or economic theory.²⁰ As the Commission recently concluded, “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, “[n]o single [wireless] competitor has a dominant share of the market,” and almost all Americans have several wireless carriers to choose from.²¹ Given that there are many competing wireless carriers and handset manufacturers, the notion that any single wireless carrier could use exclusive contracts with one of these handset manufacturers to foreclose competition is absurd. Dr. Katz’s testimony is conclusive on this score. He has examined the marketplace evidence and economic literature on exclusive distribution arrangements, and demonstrated that the case against the Petition and the heavy-handed regulation it seeks is so overwhelming that the Commission should not waste any more time with the matter and should close this proceeding promptly.²²

None of the commenters supporting RCA confronts these marketplace realities or the harmful implications of the regulation RCA seeks, and they have no coherent theory of harm. They assert that wireless carriers have “monopsony power” over the handset makers, but this claim is absurd on its face.²³ The market for handsets is a *global* market, with hundreds of wireless carrier purchasers; none of these companies has the remotest ability to dictate price or terms to any handset manufacturer.²⁴ Indeed, the Commission held in 1992 – at a time when

²⁰ See, e.g., AT&T, at 7-21; Katz Decl., ¶¶ 5-27; Katz Reply Decl., ¶¶ 12-13; 15-21.

²¹ *Thirteenth Report*, ¶¶ 1-2.

²² See Katz Decl., ¶¶ 7-34; Katz Reply Decl., ¶¶ 12-13; 15-21; see also Verizon, at 12 (“no single manufacturer or service provider has sufficient market power in their respective markets to control the distribution market”); Sprint, at 11 (“RCA offers . . . no *evidence* of anticompetitive harm suffered by its members due to exclusivity contracts”); TIA, at 9-12.

²³ Chen, at 9-11; MetroPCS, at 9; Golden State, at 3.

²⁴ Katz Decl., ¶¶ 7-12; Katz Reply Decl., ¶ 20; Sprint, at 5-6; Verizon, at 12.

U.S. cellular service was generally a facilities-based *duopoly* – that U.S. wireless carriers have no ability to foreclose handset competition.²⁵

Today, rural carriers alone offer more than *two hundred* unique handsets, including many with the newest features, including touch screens, Bluetooth, Wi-Fi, and Internet browsers, which RCA’s own supporters’ comments now confirm this as well.²⁶ And the strong opposition to the Petition by TIA – the trade association that includes all of the major handset manufacturers – belies Professor Chen’s portrait of handset makers “handcuffed” by wireless carriers.²⁷

The Petition’s supporters also have no response to the marketplace facts. Inconveniently for them, the Commission just concluded in the *Thirteenth Report* that the wireless marketplace is robustly competitive, and none of these commenters takes issue with those findings. Indeed, many of them actually concede (1) that the wireless and handset marketplaces are competitive;²⁸ (2) that small and rural carriers do in fact obtain handsets with comparable functionality to the

²⁵ Report and Order, *Bundling of Cellular Customer Premises Equip. and Cellular Serv.*, 7 FCC Rcd 4028, ¶ 15 & n.28 (1992) (finding “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,” and 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”).

²⁶ See, e.g., CBW, at 2 (CBW “attributes its success to” among other things “an attractive selection of wireless handset models”); NTELOS, at 3 (acknowledging that they offer “handsets with similar features” to the exclusive phones); MetroPCS, at 8 (explaining that, contrary to RCAs assertions, it has had success negotiating handset supply contracts with Samsung). See also Sprint, at 8, 10 (“an examination of the websites from some smaller, regional wireless operators confirms that the largest operators’ exclusivity deals do not prevent smaller operators from offering a wide array of handsets at all price points, including smartphones with the latest features, such as touchscreens and keyboards”).

²⁷ Cf. Chen, at 9. Exclusivity opponents’ reliance on a single month’s snapshot estimate (November 2008) showing that eight of the ten most popular phones are exclusive is also misleading. See, e.g., Chen, at 9. They ignore that the top selling handset in those lists is the Blackberry curve, which is not exclusive. And, they ignore that, for the first eight months of 2008, the top selling handsets were the Blackberry Curve and the Motorola RAZR, neither of which is exclusive.

²⁸ See, e.g., Chen, at 41 (“the wireless industry today is competitive”).

“exclusive” handsets they urge the Commission to regulate;²⁹ (3) that handsets are merely one aspect on which carriers compete and that small carriers have their own countervailing advantages;³⁰ and (4) that, in fact, small carriers are doing just fine.³¹

Thus, like RCA, these commenters are reduced to unsupported assertions of harm, in particular the claim that exclusive distribution arrangements cause customers to pay more for handsets or wireless service or both.³² In fact, U.S. wireless prices have been falling steadily for

²⁹ See NTELOS, at 3 (NTELOS “offers handsets with similar features [to the exclusives]”); CBW, at 2 (Cincinnati Bell offers “an attractive selection of wireless handsets”); Golden State Cellular, at 2-3 (Golden State offers fifteen handset models); MetroPCS, at 8 (contrary to RCA’s claim, MetroPCS has been able to secure good arrangements with Samsung). Indeed, RCA supporters are even developing and deploying their own innovative exclusive handsets. See, e.g., German, Kent, MetroPCS adds Samsung Messenger, CNET News, Aug. 12, 2008, available at http://news.cnet.com/8301-17938_105-10015347-1.html (exclusive to MetroPCS, “[t]he Samsung Messenger . . . offers a candy bar design with a 262,000-color display and a slide out keyboard to warm your text-loving heart. . . . Inside you’ll find a 1.3-megapixel camera, an MP3 player, e-mail and instant messaging, stereo Bluetooth, USB mass storage, organizer features, a speakerphone, voice recognition, 20MB of internal storage, and an microSD card slot.”).

³⁰ See Golden State Cellular, at 2 (“rural carriers have more familiarity with the communities in their service area, provide superior coverage in the local communities than national carriers, and can better tailor their service offerings to the needs of the customers they serve”).

³¹ See, e.g., CBW, at 2 (noting that it has achieved a 25% market share in its service areas, has made “continuous capital investments in the network and quality of service,” offers “competitive rate plans and ability to provide national and international roaming,” and offers “an attractive selection of wireless handsets”); CBW News Release, Cincinnati Bell Delivers Revenue and Earnings Growth in 2008; Investments in Wireless and Technology Solutions drive solid full-year performance, Feb. 5, 2009, available at <http://www.cincinnati-bell.com/aboutus/news/articles/news.asp?page=20090205.asp> (reporting that Cincinnati Bell’s revenue, income and subscriber base all increased significantly in the most recent quarter); NTELOS, at 1-2 (discussing its substantial growth, upgrades to 3G technologies, high penetration rates, “wide array of voice and data plans,” and “handsets with similar features” to those of the exclusives); NTELOS 3Q2008 Results, available at <http://ir.ntelos.com/releasedetail.cfm?ReleaseID=345339> (“Wireless operating revenues for the third quarter of 2008 were \$104.8 million compared to \$96.2 million for the same period in 2007, an increase of 9%,” and announcing a declaring an increase in dividends).

³² See, e.g., CBW, at 4; MetroPCS, at 3; Chen, at 10; Ad Hoc PISC, at 3; RTG, at 3.

years.³³ Most exclusive handsets are available under the same voice and data plans as a carrier's other handset offerings.³⁴ For example, AT&T's voice and data plans are the same for all of its Blackberry devices, whether exclusive or non-exclusive. But even where prices may differ, none of these commenters provides any *evidence* that exclusivity leads to higher prices.³⁵ There is a good reason for that: intense competition and customer choice in the wireless marketplace prevent any carrier from charging supracompetitive prices.³⁶ For example, the iPhone has one of the highest subsidies in the industry – and iPhone users place far greater demands on data networks than users of any other handset – but AT&T's unlimited voice and data plans for the iPhone is priced the unlimited voice and *same* as the data plans offered by RCA's supporters.³⁷

³³ *Thirteenth Report*, ¶ 188; Katz Reply Decl., ¶ 23 & n.29 (“industry analysts have estimated that prices for mobile phones are declining for many manufacturers”) (citing Wachovia Capital Markets, LLC, *Wireless Handset Market Q3 2008 - Semiconductors/Computer/Cell Phones*, October 30, 2008, at 4); *id.* (A market research firm recently reported that smart phone prices have declined” (citing Dylan McGrath, *iPhone Leads U.S. Smartphone Sales*, EE Times, October 6, 2008, available at <http://www.eetimes.com/showArticle.jhtml?articleID=210700311>).

³⁴ Sprint, at 7 (“the terms of service offered by wireless carriers are not typically dependent on the particular model of handset that will be used”).

³⁵ TIA, at 6 (“RCA does not provide a specific example of this [higher prices] scenario or define ‘premium prices’ and ‘desired handsets,’ two subjective terms which vary based on consumer expectation”); Katz Reply Decl., ¶¶ 24-26 (explaining the many economic flaws in the arguments that exclusive handset arrangements cause higher prices).

³⁶ CBW, relies on an unscientific survey showing that a *minority* of its customers that switched carriers were paying more for service than before they switched. *See* CBW, at 5 (“of the 290 respondents to CBW’s December 2008 survey [out of 1200 solicited], approximately 40% indicated that they were paying more for service with their new provider”). CBW provides no detail about this survey, but most of these increases are probably due to the fact that such customers are purchasing more services than they purchased from their previous carrier – *e.g.*, adding a data plan or more minutes of voice calling. *See* Katz Reply Decl. ¶ 23, n.31.

³⁷ The data plan offered with the iPhone is \$30 per month, and according to their web sites, CBW’s and NTELOS’s data plans (for their Blackberry and “smartphone” devices) are \$29.99. Moreover, the unlimited voice plan offered with the iPhone is \$99 per month, which is the same as the unlimited voice plan offered by CBW, and it is also the same as the 2200 minute voice plan offered by NTELOS.

RCA's supporters also assert without the slightest support that exclusive arrangements slow innovation and new product introduction, but again the actual evidence is to the contrary.³⁸ Here again, the contrast with Europe, where exclusive distribution arrangements are less prevalent and innovation and product introduction almost invariably *follow* the U.S. lead is instructive.³⁹

Unable to identify any *present* harms, a number of commenters insist that harms must surely be right around the corner. Indeed, this is Professor Chen's entire argument: although he concedes that wireless is competitive now, he claims that exclusive handsets "*may trigger*" undefined problems down the road.⁴⁰ But there is no *evidence* (and Chen cites none) that the market is trending in that direction. To the contrary, there are more handset manufacturers (including some very substantial new entrants) and consumers enjoy more handset and wireless service options today than ever. And the industry participants are working feverishly to design and introduce new and ever more innovative phones and services. The marketplace is

³⁸ See AT&T, at 9-21; Katz Decl., ¶¶ 11-34; Katz Reply Decl., ¶¶ 3, 6-7; 10-28.

³⁹ Some commenters repeat the discredited claim that AT&T forces handset manufacturers to cripple handset functionality. See, e.g., Chen, at 10-11. The only example they offer is that more than two years ago AT&T chose to sell the Nokia E62, which lacks Wi-Fi capabilities, rather than the Nokia E61, which has such capabilities. As AT&T has previously explained, however, its decision to sell the Nokia E62 was based on a desire to provide a handset that could be sold as part of AT&T's "email for everyone" strategy, *i.e.*, a low-cost handset with email capability that could compete generally with the Blackberry but also could appeal to mass market customers. The E61 did not satisfy those requirements. It was designed for professionals in Europe and included costly functionalities, such as high-speed UMTS capability (but only on the 2100 MHz frequency band used in Europe). It did not have mass-market appeal in the U.S., for it would have sold for \$400-500 per unit in the U.S. Accordingly, AT&T worked with Nokia to develop the E62, which had the functionalities to fit the market AT&T was trying to reach – *e.g.*, basic email capabilities and a QWERTY keyboard – and could also be sold in the U.S. for less than \$100. There was thus no sinister plot to "cripple" the E61; AT&T merely worked with Nokia to convert an expensive handset designed for high end professionals into an affordable handset for the mass market. And, of course, other carriers (including RCA's members) offer many other Wi-fi enabled handsets.

⁴⁰ Chen, at 42 (emphasis added).

extraordinarily dynamic, with individual handsets constantly leapfrogging one another in popularity, and no single phone attracting even a double digit percentage of wireless customers.⁴¹ Given these facts, Professor Chen's suggestion that exclusive arrangements are suddenly going to stop these competitive forces tomorrow is complete fantasy.

Other commenters claim that exclusive handset deals may prevent them from obtaining certain types of phones in the future, but none of these claims is remotely credible. For example, a number of rural carriers claim that exclusive handset arrangements should be banned because they somehow "threaten[] the ability of Tier II and Tier III wireless carriers to secure an adequate supply, and variety, of the latest phones and devices that meet the Commission's safety-related mandates such as hearing aid compatibility and E911."⁴² In fact, these same rural carriers just reported to the Commission in January that they *already have complied* with the Commission's HAC mandates.⁴³ Nor is any future shortage plausible; indeed, AT&T alone offers 20 different non-exclusive HAC handsets, and on January 15, 2009, the Alliance for Telecommunications Industry Solutions reported that, "[a]s of December 31, 2008, . . . service providers offer 206 models with FCC-granted M3 or T3 or higher ratings."⁴⁴ The notion that

⁴¹ AT&T, at 14-15.

⁴² SDTA, at 5-6; *See also* Blooston, at 5-6; Golden State, at 3; CBW, at 4-6; Corr, at 3-4; MetroPCS, at 10-12; RTG, at 3-4.

⁴³ For example, the Blooston law firm has submitted compliance reports with the Commission on behalf of the carriers it represents (and for which it filed comments in this proceeding) listing as many as *twenty nine* different HAC handsets offered by its carriers. MetroPCS reported to the FCC that it offers more than a dozen HAC handsets, and NTELOS reports that it offers more than twenty. *See, e.g., Voluntary Form for Hearing Aid Compatibility Status Report*, Reporting Period July 31, 2008 to December 31, 2008, filed by Wapsi Wireless (a Blooston Carrier), NTELOS, and MetroPCS, WT Docket No. 07-250 (filed between Jan. 14, 2009 and Jan. 21, 2009).

⁴⁴ Hearing Aid Compatibility Efforts, Status Report #8, *Amendment of the Commission's Rules Governing Hearing Aide Compatible Mobile Handsets*, WT Docket No. 07-250, filed by the Alliance for Telecommunications Industry Solutions (filed Jan. 15, 2009).

exclusivity may foreclose access to E911-compliant handsets is also a makeweight. Most rural carriers use CDMA technology, and AGPS has been incorporated in CDMA handsets for years. Non-exclusive GSM AGPS handsets are also available, and, in any event, most GSM providers comply through network-based, not handset-based, approaches.⁴⁵ Even more baseless is the claim that larger carriers in the future might use exclusive contracts to undermine other carriers' ability to deploy next generation LTE wireless services. To the extent that the industry converges in the future around a single technology, that can only increase the (already large) number of handsets available to carriers that choose that technology.⁴⁶

The balance here is not even close. Exclusive arrangements manifestly provide enormous benefits to consumers, but not a single party to this proceeding has identified any harms of any kind. That should be the end of the matter.

C. The Comments Further Confirm That RCA's Supporters Seeks Protection *From* Competition.

Remarkably, the carriers supporting RCA's Petition have confirmed, often quite explicitly, that they seek restrictions on exclusive arrangements because they want the Commission to protect them *from* competition. For example, NTELOS openly concedes that it "offers handsets with similar features [to the exclusives]," but complains that it is an "uphill

⁴⁵ Further, as Professor Katz explains, none of RCA's supporters provide any evidence that *exclusive arrangements* in any way affect their access to HAC and E911-compatible handsets. Katz Reply Decl. ¶¶ 32-35.

⁴⁶ CBW's assertion that it is unable to use its AWS 3G spectrum as a result of exclusivity arrangements does not withstand scrutiny. According to CBW's website, it already offers AWS 3G capable handsets. Moreover, as CBW concedes, the only large carrier using predominantly AWS 3G technology is T-Mobile, and T-Mobile has exclusives on only a small subset of the AWS 3G capable handsets it offers. Accordingly, whatever difficulties CBW is experiencing have nothing to do with exclusive arrangements (and such company-specific complaints would not, in any event, justify banning such arrangements altogether).

battle to convince consumers to try a handset other than those that are heavily advertised.”⁴⁷ In other words, these carriers’ real complaint is not that they lack access to cutting-edge phones, but that they want access to certain *specific* phones so that they can free-ride on others’ national advertising. This is a naked plea for protection from competition. The Commission could not reasonably restrict exclusive offers merely to relieve some carriers’ of the need to advertise their services. Moreover, the promotional investments about which these commenters complain are one of the key pro-competitive benefits of exclusive handsets, because the carrier’s ability to benefit from investments in promotion establishes an incentive for the manufacturer to make the investments necessary to bring a new phone to market in the first place.⁴⁸

Some carriers go even further and complain about increased churn. For example, Cincinnati Bell claims that it has noticed “significant spikes in its churn rate when new, highly touted handsets are launched.”⁴⁹ It says that its customer churn was 35% higher in the second half of 2008 than in the first half, which it blames on the iPhone 3G and Blackberry Storm launches.⁵⁰ Churn rates, however, are evidence of intensified competition, and Cincinnati Bell never explains how the Commission could rationally adopt intrusive new regulations that harm consumers in order to reduce particular carriers’ churn rates. The appropriate response to

⁴⁷ NTELOS, at 3; *see also* Chen, at 13-14.

⁴⁸ Katz Decl., ¶¶ 10-15; Katz Reply Decl., ¶¶ 3, 11-20; TIA, at 10 (“Exclusive contracts help guarantee a return on investment, and, in turn, speed the development of time for new devices and features”); Sprint, at 12 (“Developing and manufacturing new devices is a long and costly process and one that requires good branding and marketing to develop market share and sales. Vendors are attracted to exclusivity contracts because they commit the carrier for a certain period of time to promoting the device. In other words, unlike multi-carrier equipment sales, the vendor and carrier in an exclusive contract are both equally vested in promoting the handset. . . . The resulting leverage enables manufacturers to fund costly efforts to develop novel devices.”).

⁴⁹ CBW, at 3.

⁵⁰ *Id.* at 3-4.

increased churn is for the affected carrier to step up its own efforts to win and retain customers, not for the government to turn down the competitive heat.

A number of other carriers seek to imbue their claim for protection from competition with high-mindedness. They argue that if they could just obtain and sell some of the exclusive phones, they could do better competitively in areas where they compete against larger carriers, which in turn would give them more profits to use to build out wireless infrastructure in underserved areas (where they would not compete against larger carriers). In other words, their claim, literally, is that the Commission should retard competition for everyone *nationwide*, and eliminate the substantial competitive benefits that exclusive arrangements provide to consumers across the country, based on speculation that these carriers might have a little more money and might choose to use it to build out their wireless networks in areas with few potential customers.

This plea is fundamentally misguided for several reasons. First, the Commission has consistently opposed policies consciously designed to make markets *less* competitive solely to aid certain market participants.⁵¹ Equally important, as AT&T has explained, banning exclusive agreements would be a particularly ineffective way to insulate rural carriers from competition from handsets they do not offer – even if it could be assumed that they would use the windfalls from reduced competition to invest in areas where they face no competition. Handset manufacturers have no duty to deal with any particular wireless carrier, and even if the Commission banned carriers from entering into exclusive agreements, the Commission has no direct regulatory authority over handset manufacturers and could not compel them to sell phones

⁵¹ *SBC v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (“[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors”); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *Application of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Commc’ns, Inc.*, 10 FCC Rcd. 7783, ¶ 20 n.58 (public interest requires promoting competition, not “equalizing competition among competitors”).

to these rural carriers. There are numerous reasons why these handset manufacturers would in fact decline to deal with rural carriers, the most obvious being that many of those carriers have not upgraded their networks to 3G (and have not made other upgrades that would support individual features of the newer phones).⁵²

To be sure, the carriers and the Commission face challenges – and opportunities – in finding ways to support further deployment of wireless infrastructure, but if rural wireless deployment is the goal, there are much more direct ways of accomplishing it. For example, the stimulus bill recently passed by Congress would make direct funding available for such deployments, and a large coalition of industry participants have proposed a variety of specific measures the Commission could adopt to promote further broadband deployment.⁵³ Any of these direct forms of aid would be far more efficient than heavy-handed regulation intended to provide indirect aid by slowing down competition and trying to equalize outcomes among competitors.

In short, RCA's Petition has nothing to do with promoting competition, and everything to do with protecting some competitors from competition. But as the Commission and the courts have repeatedly held, "the Communications Act requires [the Commission] to focus on competition that benefits the public interest, not on equalizing competition among competitors."⁵⁴ The Petition and its supporting comments are unabashed pleas for a narrow protectionism that would interfere with functioning markets merely to provide highly dubious short-term benefits to a few carriers. Such restrictions would be profoundly counterproductive and short-sighted, and the Commission should now make clear that it will not impose them.

⁵² See, e.g., Verizon, at 14, 18; AT&T, at 33.

⁵³ See "Call to Action," US Broadband Coalition, at <http://www.bb4us.net/id10.html>.

⁵⁴ *Applications of Craig O. McCaw, Transferor, and Am. Tel. & Tel. Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1994).

II. THE COMMENTS CONFIRM THAT THE COMMISSION HAS NO LEGAL AUTHORITY TO RESTRICT EXCLUSIVITY ARRANGEMENTS.

The comments overwhelmingly confirm that RCA has failed to identify any legal basis for regulation of exclusive handset arrangements.⁵⁵ For the most part, RCA's supporters do not even attempt to defend RCA's legal arguments (or offer any of their own). The one exception is the comments of Cellular South submitted by Professor Chen, which devotes more pages, but no more substance, to the same arguments raised in the Petition.

Professor Chen quotes at length from cases discussing the Commission's general legal authority to regulate communications services, but he makes no serious attempt to demonstrate that the Commission has the authority to regulate the private arrangements between non-carrier handset manufacturers and wireless carriers that are at issue here. He ignores that the Commission's decisions have expressly authorized exclusive arrangements that do not prevent competition among carriers. He is thus ultimately reduced to making the same facially frivolous "discrimination" and universal service claims that RCA advanced in its Petition and to invoking a laundry list of equally irrelevant Communications Act provisions.

The Commission's MDU/MTE Decisions and Section 201(b). Professor Chen's claims are based principally on the Commission's prior decisions that banned exclusive arrangements that conferred monopolies in the provision of telecommunications and video services to commercial and residential multi-tenant environments ("MTEs") and multi-tenant dwelling units ("MDUs"). He devotes more than eight pages to discussing the Commission's "experience" with these exclusive arrangements, but he merely quotes the Commission's reasons for banning such arrangements that completely prevented individual tenants in these MTEs and MDUs from obtaining services from alternative suppliers. Exclusive handset distribution

⁵⁵ AT&T, at 27-36; Sprint, at 4-20; Verizon, at 13-20; TIA, at 3-8.

arrangements, by contrast, do not prevent any consumer from obtaining any service from any alternative suppliers. And Professor Chen simply ignores the Commission’s recognition that where, as here, exclusive arrangements do not block customers from seeking out alternatives and can provide significant benefits to consumers, the arrangements should be encouraged, not banned.

In particular, in the MTE and MDU orders, the Commission expressly recognized that exclusive arrangements may be “harmful *or beneficial* . . . to the public interest, depending on the precise environment in which they occur.”⁵⁶ The Commission found that the MTE and MDU exclusive arrangements before it fell within the “harmful” category because they “erect[ed] a barrier preventing other . . . firms from offering service to tenants in the building(s) covered by contract.”⁵⁷ Consequently, “once the [MTE or] MDU owner is ‘locked’ into an exclusivity clause, residents [we]re prevented from choosing alternative services they might prefer – on the basis of price, quality, and innovative and technologically advanced offerings.”⁵⁸ Moreover, the Commission found that since rivals were completely blocked from serving entire classes of customers, the MTE and MDU arrangements reduced incentives to develop and deploy innovative new services.⁵⁹ And, the Commission found no offsetting benefits of such arrangements.⁶⁰

⁵⁶ *Promotion of Competitive Networks In Local Telecomm. Mkts.*, 15 FCC Rcd. 22983, ¶ 28 (2000) (emphasis added) (“2000 MTE Order”); see also *Exclusive Service Contracts for Provision of Video Serv. in Multiple Dwelling Units and Other Real Estate Dev.*, 22 FCC Rcd. 20235, ¶ 5 (2007) (“MDU Order”); *Promotion of Competitive Networks In Local Telecomm. Mkts.*, 23 FCC Rcd. 5385, ¶¶ 16-29 (2008) (“2008 MTE Order”).

⁵⁷ 2000 MTE Order, ¶ 29; see also MDU Order, ¶¶ 9-10, 12, 16; 2008 MTE Order ¶¶ 6-13.

⁵⁸ MDU Order, ¶ 47; see also 2000 MTE Order ¶ 34; 2008 MTE Order ¶ 12.

⁵⁹ 2000 MTE Order, ¶¶ 29; MDU Order, ¶¶ 16-29; 2008 MTE Order ¶¶ 5, 12.

⁶⁰ 2000 MTE Order ¶ 27; MDU Order ¶ 25; 2008 MTE Order ¶ 12.

Here, by contrast, the exclusive handset arrangements clearly fall within the “beneficial” category. Unlike the MTE and MDU exclusives, exclusive handset arrangements do not “block” anyone from choosing to purchase service from a different provider.⁶¹ A customer that is unhappy with the wireless service its receives from a carrier with an exclusive handset deal can choose to purchase service from any one of multiple other providers (or can obtain other handsets from the current provider). Moreover, as noted, unlike the exclusive MTE and MDU arrangements, exclusive wireless handset arrangements indisputably produce significant benefits by, among other things, enhancing competition, increasing investment, and accelerating the development and deployment of new innovative services.

This explains why the Commission rejected a request to ban exclusive wireless handset arrangements in 1992 – at a time when wireless service was a duopoly.⁶² There is no conceivable basis for banning these arrangements now, when there are scores of handset manufacturers, four national wireless carriers, several large regional wireless carriers, and dozens of smaller local wireless carriers providing myriad different services, and when exclusivity arrangements have demonstrably led to innovations and increased competition.

In this regard, it is ironic in the extreme that Professor Chen (and Corr Wireless) contend that Commission authority to “ban exclusivity arrangements” between handset manufacturers and wireless carriers “find[s] support from the Competition Council of France.”⁶³ The short answer here is that French law does not govern Commission authority,⁶⁴ and it is fortunate for

⁶¹ Katz Reply Decl. ¶¶ 29-30.

⁶² *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd. 4028, ¶ 15 & n.28.

⁶³ Chen, at 41; Corr Wireless Further Comments, at 1-2.

⁶⁴ Moreover, regulatory policy in France has different goals than those in the U.S. Katz Reply Decl. ¶ 21.

U.S. consumers that it does not. The last thing the Commission should do is emulate the French wireless market. There are only three wireless carriers in France, and once carrier still controls about half the market. Further, French customers have access to far fewer services, and they pay much higher prices for the services they can purchase.⁶⁵ And what has the French decision done for French consumers (at least for now why appeals continue): the iPhone is available from other distributors for more than a thousand dollars.⁶⁶ But even if U.S. policy did look to Europe for guidance, the Commission would be far better served looking to Germany, which upheld an exclusive iPhone distribution contract against challenge.⁶⁷

For all these reasons, Professor Chen's arguments based on the terms of Section 201(b) of the Act are simply beside the point.⁶⁸ Whatever the scope of these provisions, the Commission's precedents foreclose a ruling that it is an "unreasonable practice" for carriers to seek to improve their services by entering into exclusive handset arrangements with a manufacturer, just as the Commission's precedents would foreclose a ruling that prohibited wireless carriers from differentiating their services by enhancing the capabilities of their own networks. As the Commission has held many times, the fundamental objective of the Communications Act is to foster maximum competition whenever possible, for consumers will

⁶⁵ *Thirteenth Report*, ¶ 218 ("mobile calls continue to be significantly less expensive on a per minute basis in the United States than in Western Europe"); *id.* ¶ 219 (average revenue per minute in U.S. is "less than one-third of the European average").

⁶⁶ *See, e.g., FNAC sells contract-free iPhone 3G in France*, Wireless Federation, December 30, 2008 ("After the recent ruling by the French telecoms regulator, the people in France will now be able to buy an iPhone 3G without the contract which is Apple-sanctioned for Orange. The French retailer FNAC is now selling a contract-free version of the black 8GB iPhone for \$1,123, while black or white 16GB models are fetching \$1,263. The cost will be five times more than the \$210.01 in-contract cost for the 8GB model sold by Orange.").

⁶⁷ *See* W. David Gardner, InformationWeek, *T-Mobile Can Keep iPhone Exclusive, German Court Rules*, December 4, 2007, available at <http://www.informationweek.com/news/hardware/mac/showArticle.jhtml?articleID=204700392>.

⁶⁸ Chen, at 19-20.

benefit most when carriers are engaged in constant efforts to lower their prices, to improve their services, or otherwise to gain (temporary) advantages over rivals.⁶⁹ The Commission could not hope to sustain a decision that declared it “unreasonable” for each of the multiplicity of existing wireless carriers to take ordinary steps to improve the quality of the services that they offer their own customers.

The fallacy of Professor Chen’s claim is vividly illustrated by his startling assertion that the Commission can declare wireless handset exclusive arrangements “unreasonable” without finding “market power.”⁷⁰ The Commission’s decisions make clear that practices cannot be condemned under § 201(b) unless there is market power or some structural impediment to the operation of the competitive process that would allow a carrier to engage in sustained activities that harm or mislead consumers.⁷¹ As the Commission has long recognized, competition will best assure that consumers receive the best possible services at the lowest possible prices, and the Commission has never exercised its Section 201(b) authority to outlaw carrier practices in

⁶⁹ See, e.g., *Implementation of Sections 3(n) and 332 of the Commc’ns Act*, 9 FCC Rcd. 7988, ¶ 29 (1994) (declaring that the “overarching congressional goal” in the Congressional enactment of the Omnibus Budget Reconciliation Act of 1993 (which amended the Act), was to “promot[e] opportunities for economic forces – not regulation – to shape the development of the CMRS market”); *Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, 84 F.C.C.2d 445, ¶ 33a (1981) (“The guiding principle implicit in our discussion of the economic consequences of Title II regulation is that competition will serve the public interest and achieve the Act’s underlying purpose ‘to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges’”).

⁷⁰ Chen, at 21.

⁷¹ First Report and Order, *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C. 2d 1, 31, ¶ 88 (1980) (firms lacking market power cannot rationally price their services in contravention of Sections 201(b) and 202(a) of the Act because they would lose market share); *Implementation of Sections 3(n) and 332 of the Commc’ns Act Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd 1411, ¶ 175 (1994) (“continued applicability of Sections 201, 202, and 208 [in the wireless industry] will provide an important protection in the event there is a market failure”).

conditions where, as here, there is no structural impediment to the operation of marketplace forces and where, as here, the challenged arrangements have a history of demonstrably spurring innovation and raising the level of service available to all consumers in the nation.

In these regards, Professor Chen's Section 201(b) arguments all reduce to a palpably absurd claim. He contends that exclusive wireless handset arrangements cause a carrier's "charges" to be "unreasonable" for all their subscribers.⁷² He notes, correctly, that it is common practice for carriers to "bundl[e] discounted handset prices with subscriptions for service" and then baldly asserts – without any support or basis – that the amount of the discount is recouped "through higher rates charged to the subscriber base *as a whole*."⁷³ But that is nonsense. The intense competition in the wireless industry assures that carriers lack any ability to charge supra-competitive rates,⁷⁴ and the Commission has held that prices that result from the operation of competitive forces in wireless markets are "just and reasonable" and not unreasonably discriminatory as a matter of law.⁷⁵ The fact that Professor Chen has resorted to such untenable arguments is vivid confirmation that the Commission's Section 201(b) precedents provide no authority for RCA's extraordinary proposal.

Finally, an order that declared it unreasonable for carriers to enter into exclusive arrangements would also be incapable of even addressing the putative concerns about the

⁷² Chen, at 19-20

⁷³ *Id.* at 20. Nor is it otherwise relevant that wireless carriers bundle discounted handsets with subscriptions for service. The Commission has always been careful to segregate regulatory treatment of common-carrier and non-common-carrier services when bundled together – *e.g.*, treatment of service-CPE bundles and telecom-service/information-service bundles for universal service purposes. *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd. 7418 (2001). The Commission has never assumed that bundling transforms non-common-carrier goods or services into common carrier activities.

⁷⁴ See Katz Reply Decl., ¶ 28.

⁷⁵ *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd. 8987 (2002), *aff'd Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

unavailability of certain handsets to customers of particular carriers. As Professor Chen does not deny, such an order would apply only to carriers, and the Commission has no conceivable legal authority to compel handset manufacturers to distribute their products through all the carriers licensed to serve the nation. Handset manufacturers have powerful business reasons to distribute their products through carriers whose networks are compatible with the handsets, who have installed the capabilities that allow the features of the handsets to be fully utilized, and who have incentives to train sales personnel in the capabilities of the handsets and to provide consumers with valuable information and service.⁷⁶ The market forces that often lead manufacturers to prefer exclusive distribution arrangements for innovative new handsets would be entirely outside the Commission's ability to control, even if there were a legal basis for the Commission to attempt to do so.

Sections 202 and 254. Because Section 201(b) could not authorize the proposed rule, Professor Chen also repeats arguments that RCA made under Sections 202 and 254 of the Act. He contends that these provisions allow the Commission to prohibit exclusive handset arrangements because they purportedly result in differences in the services that are available to rural and urban customers. These claims are baseless as a matter of law.

⁷⁶ See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977) (“new manufacturers and manufacturers entering new markets can use [vertical] restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for manufacturers products. . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-call ‘free rider’ effect, these services might not be provided by retailers in purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if non did.”); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988) (explaining that exclusive distribution arrangements have “real potential to stimulate interbrand competition, the primary concern of antitrust law”).

Professor Chen claims that Section 202 covers “all forms” of discrimination.⁷⁷ But that is simply wrong. Section 202 only prohibits a carrier from unreasonably discriminating in the provision of service among its own customers.⁷⁸ And, as Professor Chen does not dispute, AT&T and other carriers provide the same range of handsets to all their customers, free of any unreasonable discrimination, and the fact that people located outside of a carrier’s service area may not have access to the carrier’s exclusive handsets is not unreasonable discrimination.⁷⁹

Professor Chen claims that the Commission’s *PCS Forbearance Order*⁸⁰ adopted a different Section 202(a) standard for wireless services. That, too, is wrong. There, the Commission merely explained why it would not forbear from applying Sections 201 and 202 to PCS wireless services. The Commission emphasized that the usual Section 202 standard applies – *i.e.*, “that section 202 does not prohibit all different treatment of consumers, only unreasonable discrimination among consumers” – and that application of this standard would not prevent wireless carriers from developing new or innovative ways to improve their services. *Id.* ¶ 29. The Commission stated that Section 202 allows “wireless carriers have ample discretion to adopt flexible pricing to meet customer needs and marketplace demands” and it “disagree[d] that enforcement of sections 201 and 202 puts carriers in the position of speculating about the legal ramifications of offering innovative service packages and prices” because there “is a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory.” *Id.* Professor Chen relies on the portion of the *PCS*

⁷⁷ Chen, at 21.

⁷⁸ See AT&T, at 27-29; Sprint, at 14-15; Verizon, at 7-8.

⁷⁹ See AT&T, 27-29, Sprint, 14-15, Verizon, 7-8.

⁸⁰ Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services*, 13 FCC Rcd. 16857 (1998) (“*PCS Forbearance Order*”).

Forbearance Order (§ 30) that stated that to forbear from enforcing Section 202 could cause customers of PCS carriers to receive different levels of protection from the type of discrimination Section 202 is designed to prevent depending on where they live. But that observation merely reflected the fact that consumers would then receive only those protections afforded by various courts under state law and that these protections would, by definition, vary from state to state.

Professor Chen's claims under § 254(b)(3) are similarly misguided. He relies on its specific (and sometimes conflicting) statement of "principles" to govern the Commission in adopting "policies for the preservation and advancement of universal service."⁸¹ But these provisions merely direct 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.⁸² Professor Chen (like RCA) does not contend that *these* principles are not being met. Rather, he (like RCA) merely complains that every single customer in the U.S. does not have access to each and every handset made by each and every manufacturer that might be available somewhere else in the country, which is quite irrelevant to these Section 254(b) principles.⁸³ The commenters that actually addressed the relevant Section 254(b) principles showed that they are being fully realized in the wireless industry, because rural and urban customers both have access to "reasonably comparable" "services" (and, as RCA's supporters concede, reasonably comparable handsets).⁸⁴ AT&T and other national carriers are the largest rural carriers in the U.S, and their rural customers have access to all of their

⁸¹ Chen, at 22-23 (quoting 47 U.S.C. § 254(b)(1)-(3)).

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

⁸³ Sprint, at 15-16; AT&T, at 31-32.

⁸⁴ Sprint, at 15-16; AT&T, at 31-32. *See also* Verizon, at 7, n.7.

handsets.⁸⁵ And, where the national carriers do not operate, the carriers that serve those areas can and do offer handsets and plans with advanced touchscreens and other innovative features and capabilities similar to the handsets offered by the national carriers.⁸⁶

Sections 1, 4, 214, 257, 303(r), and 307 and “Ancillary Jurisdiction.” Professor Chen cites a laundry list of other irrelevant provisions and theories. He first cites (at 22-23) Sections 1 and 307 of the Act, which provide that the Commission should promote broadly available communications services. But as the Commission has found and as no one could seriously dispute, wireless services today are broadly available nationwide and the wireless marketplace is fiercely competitive.⁸⁷ None of these statutory provisions could even remotely be interpreted to require the universal availability of every single brand of wireless CPE; indeed, these sections do not even mention CPE.⁸⁸

Nor does the Commission have broad “public interest” authority under Sections 4(i) and 303(r) to regulate handsets. Rather, at the D.C. Circuit has made clear, to act under Sections 4(i)

⁸⁵ AT&T, at 31-32. Notably, although RCA initially complained that customers in Alaska and Vermont lacked access to AT&T exclusive handsets, the iPhone is now available in both states. *See*, Chen, at 13 (AT&T now provides service in Alaska); TCA, at 3 (same); Gamet, Jeff, *Apple’s Newest iPhone Market: Vermont*, The iPod Observer, Jan. 16, 2009, available at http://www.ipodobserver.com/ipo/article/apples_newest_iphone_market_vermont. RCA’s supporters are thus reduced to complaining that AT&T has not yet expanded to the “interior portion[s]” of Alaska, where very few people live and where, they concede, “zero” other “terrestrial wireless providers” have deployed service. TCA at 3-4.

⁸⁶ Sprint, at 7-11; Verizon, at 19; AT&T, at 31-32. TCA’s related assertion that “exclusive handset arrangements” should “be prohibited as a business practice of any Competitive Eligible Telecommunications Carrier (“CETC”) is likewise baseless. The CETC rules are not a back door license to regulate carrier or manufacturer practices. Moreover, as noted, exclusive handset arrangements are *beneficial* to *all* customers, because all customers either have directly access to the exclusive handset or they benefit from access to the new innovative handsets available where they live that were developed in response to exclusive offerings. Finally, such threats to withhold CETC subsidies from carriers that developed a competitive edge through innovation would chill investment in such innovation, harming all customers, especially rural customers.

⁸⁷ *See* TIA, at 10-12, AT&T, at 7-22; Verizon, at 11-15; Sprint, at 4-11.

⁸⁸ *See* AT&T, at 27-36; Sprint, at 16-17.

the Commission first must have authority over a specific subject matter, and, as noted, the Act provides no independent authority to regulate exclusive handset arrangements.⁸⁹ Section 257 also does not support Professor Chen’s arguments. That provision requires the Commission, to reduce barriers to entry for “entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services” by “promoting the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promoting of the public interest convenience and necessity.”⁹⁰ No one is suggesting that exclusive handset arrangements affect the “diversity of media voices,” and, as shown above, exclusive handset arrangements are clearly useful in promoting vigorous competition, technological advancement and the public interest.

Professor Chen next cites various merger orders, claiming that the Commission has extremely broad authority to promote the “public interest,” which is not limited to antitrust violations but extends to “the full contours of the ‘broader public interest.’”⁹¹ He again misreads the Act. The Commission does not have an untethered mandate to go forth and promulgate rules

⁸⁹ *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002). See also Memorandum Opinion and Order, *Central California Communications Corp. Complaint of Anti-Competitive Practices*, 30 F.C.C.2d 630, ¶ 4 (1971) (“Complainant avers that the Commission is empowered to act in this matter under section 4(i) of the Communications Act. That provision, however, confers upon the Commission authority to act where action is necessary in the execution of its functions. That intervention in a competitive matter where the public interest is not adversely affected is not necessary to the execution of our functions under the Communications Act is, we think, well summarized by the Supreme Court in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 [(1940)], where it said: ‘Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.’”); Verizon at 8-9; AT&T at 27-36.

⁹⁰ 47 U.S.C. § 257(a)-(b).

⁹¹ Chen, at 24-25.

it thinks will advance the “public interest,” broadly defined.⁹² To the contrary, the cases he cites are all applying Section 214, which expressly requires the Commission to determine whether a particular transfer of licenses is in the public interest. The merger standards have no application in this setting, in which the Commission is considering industry-wide rules.

For the same reasons, there is no merit to the argument that the Commission could use its ancillary jurisdiction to promulgate rules restricting exclusive arrangements.⁹³ Professor Chen relies heavily on the fact that the Commission used ancillary jurisdiction to adopt broad regimes such as the initial cable television regulations, the initial universal service fund, E911 requirements for VoIP, and regulations on information services.⁹⁴ But all of these assertions of authority involved the direct regulation of *communications*; the courts have held that the Commission does not have ancillary authority to regulate electronics separate and apart from communications flowing through such devices. *E.g., Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (“general jurisdiction grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communications when those devices are not engaged in the process of radio or wire transmission”).⁹⁵ Professor Chen has made no predicate showing that handset exclusivity is somehow directly harming competition for wireless communications services, nor could he for the reasons set forth above and in the Comments of AT&T, Verizon, Sprint and TIA.

⁹² *Motion Picture Ass’n*, 309 F.3d at 806 (“The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to ‘carry out the provisions of the Act,’ nor is it necessarily authorized by the Act.”).

⁹³ Chen, at 27-29.

⁹⁴ *Id.*, at 27-28.

⁹⁵ *See also* Verizon, at 10; Sprint, at 18-19.

Finally, Ad Hoc PISC claims that (at 5-6) two other Commission precedents support the proposed rules. First, it cites the Commission’s Internet Policy Statement and its provision that “consumers are entitled to connect [to the Internet] their choice of legal devices that do not harm the network.” But that policy is inapplicable here. As PISC elsewhere concedes, “handset exclusivity arrangements do not legally prohibit consumers from connecting wireless broadband devices of their choice to the network once they have been purchased.”⁹⁶ Further, for the reasons stated above, the reality is that exclusive handset arrangements have *increased* the number and quality of devices that can be connected to the Internet through wireless carriers.

PISC also relies on The *Comcast Order*, WC Docket No. 07-52, FCC 08-183 (rel. Aug. 20, 2008). But it is inapplicable because it did not address wireless handsets, or even wireless services. Rather, it addressed restrictions on consumers’ use of certain Internet applications. Here, by contrast, exclusive handset arrangements have resulted in handsets with more robust Internet browsers that can access more web sites, and they have resulted in increased capacity of wireless broadband networks, which further improves customers’ ability to access and use Internet content and applications.

Abrogation of Existing Contracts. In all events, even if there were a legal and factual basis for the Commission to regulate handset arrangements, it is clear that the Commission cannot lawfully abrogate existing contracts.⁹⁷ Professor Chen claims that the fact that exclusivity arrangements are “created by contracts between private parties poses no legal obstacle,” because the Commission can abrogate contracts under the *Mobile-Sierra* doctrine.⁹⁸ But the *Mobile-*

⁹⁶ Ad Hoc PISC, at 6.

⁹⁷ Sprint, at 18-19; Verizon, at 10-11; AT&T, at 35-36.

⁹⁸ Chen, at 31-32 (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) and *United Pipeline Gas Co. v Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956)).

Sierra doctrine applies only to regulatory regimes in which privately negotiated contracts are required to be filed with a federal agency and are subject to its plenary authority. The Commission has no direct regulatory authority over handset manufacturers or the contracts they enter into with carriers, and therefore the *Mobile-Sierra* doctrine does not even arguably apply here. Even if the doctrine did apply, it is well-settled that the standard is higher than the normal public interest standard and that “generic *Mobile-Sierra* findings are appropriate only in rare cases.”⁹⁹

For example, in the MTE and MDU context, although the Commission found the contracts at issue to be unlawful, it declined to interfere with the enforcement of existing agreements, explaining that doing so would improperly affect “the investment interests of those building owners and carriers that have entered into such contracts.”¹⁰⁰ Only after the parties had been on notice for more than seven years did the Commission finally find it appropriate to prohibit regulates from enforcing any such exclusive arrangements that still existed, because its prior orders had eliminated any expectation that such agreements would not be abrogated.¹⁰¹

Here, by contrast, the Commission’s previous orders relating to exclusive handset arrangements *upheld* such arrangements,¹⁰² so that carriers and handset manufacturers had (and still have) every expectation that the Commission will support – not abrogate – such arrangements.

⁹⁹ *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 711 (D.C. Cir. 2000).

¹⁰⁰ *2000 MTE Order*, ¶ 36.

¹⁰¹ *MDU Order* ¶ 36; *2008 MTE Order* ¶ 16; *see also* Katz Reply Decl. ¶ 31.

¹⁰² *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd. 4028, ¶ 15 & n.28.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in AT&T's Comments, the Commission should reject RCA's proposal to ban exclusive handset arrangements.

Respectfully submitted,

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