

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

REPLY COMMENTS OF UNITED STATES CELLULAR CORPORATION

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SUMMARY

The rulemaking petition filed by the Rural Cellular Association (“RCA”) makes a strong case that handset exclusivity agreements between the Big Four national wireless carriers and handset manufacturers should be closely examined by the Commission because of the likelihood that these agreements are impairing competition and harming consumer welfare. This case has now been fortified even further by the record, with numerous commenters identifying the difficulties faced by regional and small rural carriers as a result of these exclusive deals, which in turn impose disadvantages upon consumers, especially in rural and less populated markets. Based upon the RCA petition and the record in this proceeding, the Commission should commence a rulemaking for purposes of examining the following issues.

In rural markets that are not served by any of the Big Four national carriers, exclusive handset deals virtually eliminate any possibility that consumers in these markets can obtain handsets with the latest and most desired features, functions, and innovations. Exclusive arrangements almost always preclude consumers using other networks from accessing a desirable handset until it is nearly obsolete. This barrier to consumers’ access to desirable handsets is becoming even more problematic as exclusive arrangements lock up the availability of smartphones with advanced Internet browsing capabilities and this deters investments in broadband infrastructure and services.

When national carriers compete head-to-head with regional and small rural carriers, the national carriers are armed with exclusive handset deals that tilt the playing field to their advantage. Competition based upon price, coverage, service quality, and customer care is dulled by the substantial competitive advantage seized by the national carriers through their use of exclusive deals. As detailed below, U.S. Cellular has experienced significant and sustained customer losses to AT&T since introduction of the iPhone.

In cataloging the harms caused by exclusive deals, it is important to observe that these harms are not limited to consumers in rural areas, or to regional and rural carriers, but also extend to affect all wireless consumers. The Commission should examine claims in the record, which U.S. Cellular finds to be persuasive, that exclusive handset deals harm consumers by leading to higher prices (for both wireless service and handsets), fewer choices for consumers, less favorable service terms, less innovation in the design and development of handsets, a greater likelihood that handsets will be configured with a view toward making customers more dependent upon the service provider's network, and less opportunity for consumers to take advantage of open network architectures and handset interoperability.

Given the commanding market share held by the Big Four carriers, there are strong reasons to be concerned that these exclusive handset arrangements lessen competition, broadband deployment, and the availability of advanced telecommunications capabilities. The Commission's rulemaking also should focus on the extent to which the national carriers' exclusive handset agreements either violate the antitrust laws, or have anticompetitive effects that are similar to established antitrust violations. Exclusive handset agreements are analogous to tying arrangements, for example, in that they force consumers who wish to purchase a particular handset to purchase wireless service from the carrier that has exclusive access to that handset. In addition, exclusive handset agreements may constitute illegal exclusive dealing arrangements under established antitrust precedents, or have similar anticompetitive effects on the market, especially given how over-broad the typical exclusive handset arrangements are in terms of both their duration and geographic scope.

Thus, the Commission should examine the scope and duration of the national carriers' exclusive deals because, in U.S. Cellular's view, there is evidence in the record suggesting the

substantial degree of competition that is foreclosed by exclusive deals, and the unreasonable geographic scope and time periods during which this foreclosure occurs under the terms of the exclusive arrangements. As described in the attached statement by Professor (and former FCC Chief Economist) William Rogerson, the Commission should consider restricting exclusive arrangements negotiated by any of the Big Four wireless carriers to apply only to other members of the Big Four, not to smaller carriers. This restriction would preserve any theoretical pro-competitive benefits of exclusive contracting that might exist, while spurring more advanced telecommunications services in all areas.

Finally, opponents of RCA's petition place considerable emphasis on their view that the Commission lacks jurisdiction to initiate a rulemaking to examine whether the national carriers' exclusive handset deals drive out competition, harm consumers, and fail to serve the public interest. These views must fail. The Commission has explicit regulatory authority over exclusive deals such as those between wireless carriers and handset manufacturers.

Opponents are wrong in contending that no provision of the Communications Act of 1934 ("Act"), as amended, authorizes the Commission to regulate exclusive handset agreements, they are wrong in claiming that Sections 201 and 202 of the Act do not apply to contracts between carriers and handset manufacturers, and they are wrong in characterizing RCA's request for a rulemaking as merely a plea for the agency to assert its ancillary jurisdiction under Title I of the Act. In fact, the Commission has already asserted its jurisdiction over wireless carriers' exclusive dealing arrangements with handset manufacturers.

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REPLY COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation (“U.S. Cellular”) hereby provides these Reply Comments concerning the petition for rulemaking (“RCA Petition” or “Petition”) submitted by the Rural Cellular Association (“RCA”) on May 20, 2008, regarding the effects of exclusive arrangements between commercial wireless carriers and wireless handset manufacturers.¹

I. INTRODUCTION.

U.S. Cellular believes there is strong support in the record for the arguments and facts presented in the RCA Petition concerning the anti-competitive effects and consumer harms that

¹ See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497, *Public Notice*, DA 08-2278 (WTB rel. Oct. 10, 2008) (“*Public Notice*”). On October 23, 2008, the *Public Notice* was published in the Federal Register. See 73 Fed. Reg. 63127 (Oct. 23, 2008). On November 26, 2008, the Wireless Telecommunications Bureau granted a request for extension of time and provided that reply comments would be due on February 20, 2009. *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, Order, DA 08-2576 (WTB rel. Nov. 26, 2008).

result from handset exclusivity arrangements,² and therefore urges the Commission to commence a rulemaking proceeding for the purpose of examining these issues, fashioning proposals to resolve the problems associated with these arrangements between commercial wireless carriers and handset manufacturers, and adopting such rules and remedies as the Commission determines to be necessary or appropriate based upon the record of its rulemaking. The Commission has recently acknowledged that a general rulemaking proceeding is an appropriate vehicle for examining the concerns of interested parties regarding harms that may be caused by exclusive handset arrangements.³

There is convincing evidence in the record demonstrating the need for the Commission to examine the extent to which the large national carriers—AT&T Inc. (“AT&T”), Sprint Nextel Corporation (“Sprint”), T-Mobile USA, Inc. (“T-Mobile”), and Verizon Wireless⁴—are using these exclusivity arrangements to control the market availability of particular handsets, and the extent to which such exertion of control has the effect of impeding competition from regional carriers and small rural carriers. A Commission rulemaking should also examine the extent to which such restraint on competition, in turn, is resulting in harm to both the customers of regional and rural carriers in particular and the customers of all wireless carriers in general.

² RCA explains that the large wireless carriers apparently enter into exclusive arrangements with handset manufacturers for a variety of reasons, including control over the following, for particular handsets: (1) features, content, and design; (2) marketing; (3) sale price; and (4) market availability. RCA Petition at 2.

³ *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, *For Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.*, *Petition for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, File No. ISP-PDR-20080613-00012, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258, 2008 WL 4876046 (rel. Nov. 10, 2008), at para. 185 (citing the RCA Petition).

⁴ RCA identifies the “Big Five” national wireless carriers in the Petition, *see* RCA Petition at 2, but Alltel Communications, LLC, has since merged with Verizon Wireless.

II. DISCUSSION.

The record presents strong evidence that exclusivity agreements between wireless carriers and handset manufacturers are likely to be harmful to consumers in rural areas, that such arrangements are also likely to have anti-competitive effects, to the detriment of consumers in both rural and urban areas, and that the Commission has jurisdiction under the Communications Act of 1934 (“Act”) to regulate and protect against any harmful effects caused by handset exclusivity arrangements. Each of these issues is discussed in the following sections.

A. A Rulemaking Is Necessary To Examine Whether Handset Exclusivity Arrangements Should Be Eliminated Because They Are Harmful to Consumers in Rural Areas.

One of the principal problems likely to be caused by exclusive handset contracts, from a competitive and consumer welfare perspective, is that they divide wireless customers into “have’s” and “have not’s.” Many customers residing in rural areas fall into the latter category. In many cases, consumers in rural areas do not have the option of subscribing to services provided by the major national wireless carriers because these carriers have made the business decision to refrain from deploying wireless infrastructure and providing service in rural areas.⁵ The absence of this option means that, in many cases, these consumers do not have access to the most desirable and advanced wireless handsets, because these handsets often are only available through exclusive arrangements with one of the national carriers.

A case in point, of course, is the Apple iPhone, which is available only through an exclusive arrangement with AT&T.⁶ As RCA points out, when AT&T began offering the iPhone, the

⁵ See *id.* at 3; William P. Rogerson, “An Economic Analysis of Exclusivity Arrangements Between the Big Four Wireless Carriers and Handset Manufacturers and a Proposal for a Modest Restriction on These Exclusivity Arrangements,” Feb. 20, 2009 (prepared for U.S. Cellular and attached to these Reply Comments) (“Rogerson”), at 5.

⁶ This particular exclusive dealing arrangement is the subject of an antitrust class action currently pending against Apple and AT&T Mobility (“AT&TM”) in the Northern District of California. See *In re Apple &*

popular handset was not available in Alaska, Vermont, and most areas in Arizona, Colorado, Idaho, Kansas, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, West Virginia, and Wyoming, because AT&T did not provide service in these areas.⁷ As Professor (and former FCC Chief Economist) William Rogerson observes, while some opponents of the RCA Petition claim that this restriction on distribution of the iPhone is not harmful to consumers because similar handsets are available from other carriers, these claims are unpersuasive because these similar handsets are also locked up by exclusive deals and are unavailable in many rural areas.⁸

Moreover, U.S. Cellular agrees with Professor Jim Chen's observation that handset exclusivity arrangements are becoming increasingly harmful to rural consumers because, even though mobile broadband is rapidly emerging as a viable alternative for browsing the Internet, "[h]andset exclusivity arrangements, especially in markets not served by the nominally 'nation-wide' carriers that wield these arrangements[,] . . . cripple or eliminate the broadband access mechanism that many rural consumers would choose" by shutting off these consumers' access to smartphones that provide Internet browsing features.⁹

AT&TM Antitrust Litigation, Case No. 07-05152 (N.D. Cal. filed Oct. 5, 2007). In their complaint, a putative class of iPhone consumers alleges that by entering into the iPhone exclusive dealing arrangement, Apple and AT&TM monopolized, attempted to monopolize, and conspired to monopolize the market for wireless voice and data services for the iPhone, in violation of Section 2 of the Sherman Act. Significantly, while Apple moved to dismiss these antitrust claims, the court recently denied that motion.

⁷ See RCA Petition at 6-7; Blooston Rural Carriers Comments at 3; Rural Telecommunications Group, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and National Telecommunications Cooperative Association ("Joint Parties") Comments at 3; South Dakota Telecommunications Association ("SDTA") Comments at 3. The Blooston comments were filed by the law firm of Blooston Mordkofsky Dickens Duffy & Prendergast, LLP, on behalf of 21 of the firm's rural telephone carrier clients. Blooston Rural Carriers Comments at 1.

⁸ Rogerson at 9.

⁹ Jim Chen ("Chen") Comments at 16. Professor Chen was retained by Cellular South, Inc., to prepare comments regarding the RCA Petition. *Id.* at 2. See Cincinnati Bell Wireless LLC ("CBW") Comments at 5-6 (stating that exclusivity arrangements have made it difficult for CBW to acquire handsets for use on Advanced Wireless Services ("AWS") spectrum purchased by CBW in 2006, severely hampering the car-

U.S. Cellular also supports the views of commenters who embrace RCA's argument that turning rural consumers into second class customers by blocking their access to smartphones and other desirable and innovative handsets is contrary to the policies and purposes of the Act. Section 1 of the Act requires the Commission to regulate communications "so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges" ¹⁰ Moreover, Section 706(a) of the Telecommunications Act of 1996 ("1996 Act") ¹¹ directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" including through "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." ¹²

Professor Rogerson observes that restricting exclusive handset agreements would promote rural broadband deployment. ¹³ As the Ad Hoc Public Interest Spectrum Coalition ("PISC") points out, "[b]reaking open handset exclusivity arrangements would allow consumers to purchase new and popular wireless devices *with any carrier*" ¹⁴ Affording this option to wireless customers would serve the universal service, broadband deployment, pro-consumer, and pro-competition policies of the Act and the 1996 Act.

Permitting the major national carriers, who are gaining increasing dominion over wireless markets as a result of spectrum purchases, mergers, and acquisitions, to shut out rural consumers

rier's ability to deliver advanced broadband wireless services, and that this has caused CBW to suffer considerable economic harm because of lost revenues from customers and the incurrence of additional capital costs associated with supporting customers on CBW's Global System for Mobile network).

¹⁰ 47 U.S.C. § 151. *See, e.g.*, Blooston Rural Carriers Comments at 4; SDTA Comments at 4. *See also* RCA Petition at 5-6.

¹¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹² 47 U.S.C. § 157 note.

¹³ Rogerson at 10-11.

¹⁴ PISC Comments at 4 (emphasis added).

from the most desirable, innovative, and feature-rich handsets clearly short circuits the statutory policy of ensuring that communications service is available to all consumers throughout the country. To take one example, a lack of access to smartphones with advanced Internet browsing capabilities deprives customers of regional and rural carriers of the opportunity to use mobile Internet access services. The Commission should reaffirm and enforce the statutory mandate in Section 1 of the Act by instituting a proceeding for the purpose of determining whether it is necessary or appropriate to prohibit or constrain the national wireless carriers' use of handset exclusivity contracts.

Finally, the record also makes it evident that the deprivation of access to desirable, advanced wireless devices is not the only way in which rural consumers are harmed by handset exclusivity arrangements. Further consumer harms that result from these contracts, and that affect both rural and urban consumers throughout the country, are discussed in the following section.

B. The Commission Should Address Assertions That Handset Exclusivity Arrangements Are Discriminatory and Anti-Competitive, Resulting in Harm to All Wireless Consumers as Well as to Regional and Rural Wireless Carriers.

Commenters have provided persuasive arguments demonstrating that exclusive handset deals have pernicious effects in addition to the harm they cause to rural consumers in areas not served by a national carrier. Exclusivity arrangements give the national carriers an unfair competitive advantage in markets in which they compete against regional and rural carriers. Immediately following the introduction of both the 2G and 3G iPhone, U.S. Cellular experienced a significant and sustained increase in port-outs to AT&T that can only be attributed to the fact that customers could only obtain the iPhone by switching from U.S. Cellular to AT&T. Moreover, consumers are harmed in markets in which national carriers with exclusive handset deals compete (even though these consumers may gain access to devices subject to exclusive arrangements, by signing up with the carrier that entered into the exclusive deal) because the exclusive

arrangements skew the choices available to consumers and deprive them of the full benefits of competition. These effects of exclusive handset arrangements provide a powerful further basis for the Commission to prohibit or constrain the exclusive arrangements.

1. A Rulemaking Is Necessary To Address Allegations That Exclusive Handset Contracts Hand an Unfair Competitive Advantage to the Large National Carriers, Resulting in Direct and Unwarranted Harm to Regional and Rural Wireless Carriers.

The record makes it clear that exclusivity arrangements currently dominate the wireless handset market,¹⁵ that “[m]any rural carriers face competition in their markets from larger carriers who are able to offer customers popular handsets with advanced features that rural carriers are unable to offer their own customers[.]”¹⁶ and that “[a] direct result of such discriminatory access to handsets is the migration of customers from rural carriers to their larger in-market competitors.”¹⁷ TCA, Inc. (“TCA”), in observing that handsets are becoming “the competitive intersection in the wireless industry[.]”¹⁸ argues that, particularly with regard to advanced wire-

¹⁵ See, e.g., Chen Comments at 9 (stating that exclusivity arrangements currently dominate the market for advanced handsets, that eight of the 10 most popular handsets in November 2008 “were handcuffed by an exclusivity arrangement to a single carrier[.]” and that these arrangements are the most recent example of how the large wireless carriers have leveraged their customer bases “into a clutch of oligopsonistic and highly undesirable practices”).

¹⁶ Joint Parties Comments at 2. See California RSA No. 3 Limited Partnership d/b/a Golden State Cellular (“Golden State”) Comments at 2-3 (arguing that these exclusive arrangements prevent small, rural carriers from being able to offer their customers the most advanced and desired handsets produced by handset manufacturers, thus unfairly impeding competition, and that, although consumers have a choice from about 15 handset models offered by Golden State, none of these models is among the top 10 most popular handsets in the country because most of these handsets are subject to exclusivity arrangements); CBW Comments at 4.

¹⁷ Joint Parties Comments at 2. See Cellular 29 Plus and Lyrix Wireless Comments at 1 (noting that exclusivity deals are harming them because they cannot offer handsets, such as the iPhone, Voyager, and Storm, that are available from competitors in adjacent markets, and pointing out that even U.S. Cellular is “not large enough to enter into exclusive deals with manufacturers”).

¹⁸ TCA Comments at 2 (quoting David W. Braden, *et al.*, Wireless Services & Handset Pricing Analysis, Bank of America, Equity Research (Dec. 19, 2006) at 8-9).

less services, this competitive intersection appears to be the exclusive domain of the large carriers.¹⁹

Regional and rural carriers, as well as other commenters in this proceeding, have pointed to the fact that, while regional and rural wireless carriers are fully capable of competing against the large national carriers based upon service quality, service packages, and price, they often find themselves stymied by the fact that many existing customers and potential customers place a premium on selecting handsets that have been locked up by the competing national carriers through exclusive deals with the handset manufacturers.²⁰ Professor Rogerson emphasizes that “[c]ompetition over attributes such as service quality and coverage will be dulled when carriers instead are able to compete by denying their competitors access to handsets and prohibiting their customers from migrating their handsets to a competing carrier.”²¹ PISC points to the fact that

¹⁹ *Id.* TCA illustrates its point by indicating that the only way that consumers can utilize Google’s open source Android operating system is by subscribing to T-Mobile, because T-Mobile currently is the only carrier offering an Android handset. *Id.*

²⁰ *See, e.g.*, Cellular 29 Plus and Lyrix Wireless Comments at 1 (stating that the inability to purchase quality, competitive handsets in a timely manner “is by far the most difficult competitive hurdle” they face, largely because customers are increasingly choosing their wireless carriers based on the handsets offered by the competing carriers); CBW Comments at 3-4 (explaining that exclusivity arrangements have increased churn rates among carriers trying to compete with the large national carriers, and have allowed the largest carriers to corner the market on the newest cutting-edge handsets); Corr Wireless Communications, LLC (“Corr Wireless”) Comments (filed Dec. 2, 2008) at 1-2 (arguing that, even though Corr Wireless can compete against larger carriers based upon price, coverage, flexibility of service, and customer service, it is placed at a competitive disadvantage because it cannot match the handset offerings of the larger carriers); MetroPCS Communications, Inc. (“MetroPCS”) Comments at 6 (citing a recent study conducted by Google Inc. which found that “more than one in two wireless shoppers said handsets played a major role in their purchase decisions”); NTELOS Inc. (“NTELOS”) Comments at 4-5 (arguing that, even with competitive rate plans and services, NTELOS loses a significant number of sales opportunities because it is unable to offer exclusive handsets, and that national carriers use software programming on their exclusive handsets that prevent consumers from “unlocking” the handsets for use on other networks). *See also* RCA Petition at 4.

²¹ Rogerson at 9. Professor Rogerson rejects assertions by opponents of the RCA Petition that competition is not impaired so long as other carriers have access to relatively close substitute handsets; he points out that these substitutes are not likely to be available in rural and less densely populated areas, and that smaller carriers are important entrants and fringe competitors in urban markets dominated by a four-firm oligopoly. *Id.* at 10-11.

“exclusivity arrangements . . . prevent would-be subscribers to rural and competitive wireless services from acquiring the newest and most popular wireless devices[,]”²² thereby impeding the market from “promot[ing] competition over quality and cost of wireless service”²³

U.S. Cellular agrees with MetroPCS’s argument that the lack of availability of particular handsets (as a result of exclusivity deals) “has the practical effect of stifling competition”²⁴ because regional and rural carriers are forced to offer handsets with less functionality and desirable features than those offered by competing national carriers. U.S. Cellular also agrees with arguments in the record that handset exclusivity arrangements, in addition to suppressing current competitive efforts by regional and rural carriers, also have a chilling effect on competitive entry.

As Professor Rogerson explains:

[T]he fact that the big four are able to use their size and market clout to deny small and medium sized carriers access to the most highly desired, newest, and most technologically advanced handsets would also tend to make entry of new firms and growth of smaller firms in any region of the country more difficult.²⁵

It would be difficult to construct a strong business case in favor of entry into wireless markets currently occupied by the large national carriers (if they are armed with exclusive handset deals). This is particularly true as the wireless industry transitions to Long Term Evolution standards, protocols, and air interfaces.

²² PISC Comments at 1.

²³ *Id.*

²⁴ MetroPCS Comments at 3.

²⁵ Rogerson at 11. MetroPCS points out that, unless a new entrant has the scale and scope necessary to overcome the built-in advantage that exclusive handset deals provide to the large national carriers, the prospective new entrant must attempt to compete without being able to offer the newest and most desirable handsets to potential subscribers. MetroPCS Comments at 8.

In markets where small carriers compete against the large national carriers, customers are subject to the anti-competitive effects that flow from the exclusive deals.²⁶ As Professor Chen points out:

[H]andset exclusivity arrangements threaten to distort and destroy this competitive environment [in which rural carriers are competing against national carriers on a level playing field] by enabling nationwide carriers to raise prices, throttle competition, and suffocate innovation throughout the industry through the erection of artificial barriers that rural carriers simply cannot overcome through ordinary competitive channels.²⁷

There is, in short, no “market solution” to the threat posed by exclusive handset contracts. These exclusive deals are an ominous indicator that vibrant competition in all markets faces difficult challenges.

U.S. Cellular believes that the lessening of competition and harms to consumer welfare, which have been caused by the large carriers’ handset exclusivity arrangements, present a compelling reason for the Commission to initiate a rulemaking proceeding.

Finally, U.S. Cellular believes there is ample precedent for Commission action. In addition to the agency’s specific promise to monitor the bundling of wireless service and customer premises equipment (“CPE”) for purposes of guarding against anti-competitive abuses caused by exclusive handset arrangements,²⁸ the Commission’s decision two years ago to impose automatic

²⁶ See Chen Comments at 13 (arguing that competing carriers have no effective recourse to combat exclusive handset arrangements, and that, because of the sheer gravity of the large carriers’ customer bases, “even the combined purchasing power of industry consortiums such as the Associated Carrier Group, LLC, does not approach that of the nationwide carriers”).

²⁷ *Id.* at 30.

²⁸ See *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028, 4032 (para. 31) (1992) (“*Cellular CPE Bundling Order*”). This decision is discussed in Section II.D.4., *infra*.

roaming requirements on national wireless carriers is instructive.²⁹ In the automatic roaming proceeding, regional and rural carriers had complained to the Commission that it was becoming increasingly difficult for them to gain access to the networks of national carriers, that costs imposed on their customers for roaming on the national carriers' networks were increasing, and that the national carriers were showing an increasing unwillingness to enter into roaming agreements with the regional and rural carriers.³⁰

The Commission agreed with these concerns, and held that "it is in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers, particularly in rural areas."³¹ The Commission found that most wireless customers expect to roam automatically on other carriers' networks, that automatic roaming is beneficial to subscribers because it promotes seamless service and reduces inconsistent coverage and service qualities,³² and that automatic roaming is subject to the protections of Sections 201 and 202 of the Act, so as to ensure that subscribers receive automatic roaming on just, reasonable, and non-discriminatory terms.³³

The same rationale that led the Commission to require automatic roaming, upon reasonable request, in the *Automatic Roaming Order* should now prompt the agency to initiate a rulemaking for the purpose of examining the reasonableness of exclusive handset deals. In the *Automatic Roaming Order* the Commission invoked Sections 201 and 202 to prevent national carriers from gaining a competitive advantage by refusing to enter into automatic roaming agree-

²⁹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) ("*Automatic Roaming Order*"). See Chen Comments at 23-24.

³⁰ *Automatic Roaming Order*, 22 FCC Rcd at 15828 (para. 28).

³¹ *Id.*

³² *Id.* at 15828 (para. 27).

³³ *Id.* at 15829 (para. 28).

ments with regional and rural carriers. Now, these national carriers are again seizing an unfair competitive advantage by using exclusive deals to freeze regional and rural carriers out of access to the latest and most desirable handsets sought by customers. The initiation of a rulemaking is the first step toward a determination by the Commission of whether it should again invoke Sections 201 and 202 to prevent these anti-competitive abuses.

Similarly, the Commission should take customer expectations into account in the same manner it did in the *Automatic Roaming Order*. Customers understandably expect that they have reasonable access to handsets with the most advanced features and functions, and that they can choose the carrier offering the most attractive quality and price for wireless service. The Commission should not permit the national carriers' exclusive handset deals to stand in the way of this reasonable consumer expectation.

2. The Commission Should Examine in a Rulemaking Whether Exclusive Handset Contracts Deprive Consumers of the Full Benefits of Competition.

From a consumer's perspective, wireless carriers should have the ability to compete for the consumer's business based upon the price of their services, the coverage and quality of their networks, the mix of their service plans, the efficiency and responsiveness of their customer service, and, not least, the quality and variety of their wireless handsets.

Exclusive handset agreements, of course, destroy this competitive paradigm. Consumers suffer as a result. For example, U.S. Cellular agrees with the Joint Parties' argument that "[f]or consumers, exclusivity arrangements mean higher prices for those who are able to purchase premium handsets because the carriers who benefit from such exclusivity face no competition [from other sellers of the handsets] that would drive the price of such handsets down."³⁴ Sprint essen-

³⁴ Joint Parties Comments at 3. See Cellular 29 Plus and Lyrix Wireless Comments at 2 (arguing that exclusivity arrangements have the effect of raising the cost of handsets to consumers); Chen Comments at

tially acknowledges this link between exclusive deals and higher consumer prices by noting that the Motorola RAZR phone was initially sold exclusively by Cingular Wireless (now AT&T) for \$499 but was later sold by both large and smaller carriers at much lower prices.³⁵ Exclusive contracts also narrow the choices available to consumers³⁶ and force them to make trade-offs that would be avoided in a competitive market. As PISC explains:

The unique market dynamic associated with exclusivity provisions exaggerates the harms of consolidation by providing consumers with an undesirable choice between service offered by a less expensive or higher quality rural or small wireless carrier, and service offered by a larger provider who may not offer the best service or the best rate but who offers the latest in popular wireless devices.³⁷

Innovation in the design and development of handsets is another victim of exclusive handset deals. Taking away the opportunity of consumers to make independent decisions and selections in the market for handsets undermines the incentives of handset manufacturers to compete for customers by emphasizing research and innovation as a means of differentiating their products. Consumers are thus further disadvantaged by a handset market that is constricted by exclusive deals imposed by large carriers with the market power to do so.³⁸ Professor Chen paints this problem in stark terms, arguing that:

10 (concluding that exclusivity arrangements prevent rival carriers from disciplining rates); *id.* at 29 (arguing that “nationwide carriers’ exclusivity arrangements raise the overall price paid by many consumers for wireless services and for the handsets that they use in connection with those services”). While it may be correct that, “[i]n a competitive market a pig-headed refusal to satisfy customers’ preferences, or an attempt to charge for unwanted items, does not lead to monopoly prices; instead it leads to ruin as rivals step in to take the business[.]” *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 762 (7th Cir. 1996), exclusive handset deals interfere with rival carriers’ ability to discipline pricing.

³⁵ Sprint Comments at 8 (citing Wikipedia, accessed at http://en.wikipedia.org/wiki/Motorola_RAZR_V3, in which it is stated that the price of the phone was lowered when it was no longer being sold exclusively).

³⁶ See MetroPCS Comments at 8 (arguing that, if the development of new handsets is directed by a small number of carriers, this will result in less choice for consumers).

³⁷ PISC Comments at 3.

³⁸ See *id.* at 4-5.

[A]rrangements that commit equipment manufacturers to design smartphones for a single purchaser reduce each manufacturer's incentive to develop innovative features that would optimize consumer value across wireless networks. Instead, manufacturers affirmatively disable features that consumers would value . . . in favor of design elements that increase subscribers' dependence on their wireless providers' networks and demand for these providers' premium services.³⁹

U.S. Cellular agrees with CBW's argument that wireless consumers are disadvantaged in several ways by exclusivity arrangements. If a customer's carrier is not offering the most advanced wireless handsets desired by the customer, then the customer must switch to another carrier in order to obtain a handset that is locked up by that carrier in an exclusive deal. In addition, the customer who switches to a new carrier must pay a premium for the desired handset and must enter into a multi-year service agreement with the new carrier.⁴⁰ Customers would not face these impediments in a competitive market free from exclusive handset deals.

A further harm imposed on consumers results from the fact that exclusive handset deals undercut the benefits of "open access" networks that have been promoted by the Commission. As Corr Wireless argues, the agency's efforts to make 700 MHz C Block spectrum subject to open access requirements could be jeopardized if carriers purchasing C Block spectrum impose handset exclusivity agreements that result in these carriers "hogging the best, newest and most popular handset devices for themselves."⁴¹

Moreover, even AT&T Mobility is promoting open wireless architectures because its customers "want a simplified market for devices, applications and services."⁴² The company's chief executive officer recently commented that "[w]e have islands of applications' that don't inter-

³⁹ Chen Comments at 10.

⁴⁰ See CBW Comments at 4-5.

⁴¹ Corr Wireless Comments at 2.

⁴² Mike Dano, @MWC: AT&T chief calls on Apple, others to develop open ecosystem, RCR WIRELESS, Feb. 17, 2009, accessed at <http://www.rcrwireless.com/article/20090217/WIRELESS/902179989/1081>.

perate ‘There’s a huge risk to our industry if we don’t get this straightened out. . . . Obviously the iPhone has been successful, but I think it would be even more so if there was commonality among applications.’”⁴³ Exclusive handset deals clearly undercut this goal and detract from the benefits that customers could receive from interoperable applications and from integrated devices, applications, and services. Interoperable handsets are of little use to consumers who cannot get their hands on them.

The Commission is charged with protecting consumer welfare.⁴⁴ It is evident from the record in this proceeding that a Commission rulemaking is necessary to focus on the issue of the extent to which exclusive handset deals are harming consumer welfare. The record compiled in response to the RCA Petition demonstrates that consumers of wireless services are harmed by exclusivity arrangements, because these arrangements reduce customer choice, impose higher prices for both services and handsets, lead to less innovation and more restrictions on the use of handsets, force customers to switch carriers in order to obtain desired handsets, reduce the incentive for carriers with exclusive arrangements to build high-quality networks in rural areas, and require customers to choose between better service and prices from one carrier or their desired handsets from another carrier. The record thus presents a compelling case for a rulemaking to determine whether the Commission should prohibit or constrain the ability of large national carriers from entering into exclusive handset contracts.

⁴³ *Id.* (quoting Ralph de la Vega, Chief Executive Officer, AT&T Mobility).

⁴⁴ Section 1 of the Act, for example, requires the Commission to ensure that a nationwide telecommunications service is made available to “all the people of the United States” 47 U.S.C. § 151. Section 10 of the Act, which gives the agency authority to forbear from certain regulations and provisions of the Act, restricts the Commission’s exercise of this authority to cases in which “enforcement of such regulation or provision is not necessary for the protection of consumers” 47 U.S.C. § 160(a)(2); *see* 47 U.S.C. § 332(c)(1)(A)(ii).

3. **The Commission Should Assess Whether Exclusive Handset Deals Amount to Tying Agreements That Harm Both Consumers and Regional and Rural Carriers, and Whether Such Deals Should Be Prohibited as Restrictive Covenants with Unreasonable Scope and Duration.**
 - a. **A Rulemaking Should Examine Whether Tying Wireless Service to Exclusively Available Handsets Enables the Large National Carriers To Exercise Their Market Power in a Manner That Harms Competition and Consumer Welfare.**

The Blooston Rural Carriers argue that exclusive handset contracts between the large national carriers and handset manufacturers have the impact of tying arrangements that harm both competing carriers and consumers:

When consumers are required to purchase wireless service from [a] carrier just so that they can obtain [a wireless] device [offered exclusively by that carrier], it has the impact of a tying arrangement. Antitrust law has long recognized that tying arrangements can be harmful to consumers, and must be carefully evaluated for anticompetitive impact. . . . In the case of exclusive handset arrangements, it is respectfully submitted that competition is blocked and consumers (especially those living in rural areas) are harmed.⁴⁵

“Locking in” customers in this fashion illustrates the manner in which the large national carriers are able to leverage their exclusive handset deals to further erode competition from regional and rural carriers.

U.S. Cellular believes that the Commission, in connection with initiating a rulemaking proceeding as requested by RCA, should examine the issue of whether exclusive handset deals should be treated as tying arrangements that should be prohibited or regulated to control their harmful effects upon competition and consumers.⁴⁶

⁴⁵ Blooston Rural Carriers Comments at 6.

⁴⁶ Although it previously has been argued to the Commission that illegal tying arrangements do not exist in the cellular industry because consumers are not being forced to purchase wireless devices, the Commission refused to adopt such a narrow standard that would focus exclusively on anti-competitive effects, “because . . . the public interest standard encompasses matters that go beyond the promotion of competition.” *Cellular CPE Bundling Order*, 7 FCC Rcd at 4028 (para. 6 n.13).

“A tying arrangement occurs when a seller conditions the availability of one product on the buyer’s purchase of a second product.”⁴⁷ The Commission, which has noted that “[a]ntitrust laws particularly prohibit unlawful tying arrangements in which the seller has enough market power to force a customer to purchase a component of the package that he or she would not otherwise purchase in a competitive market[,]”⁴⁸ has often expressed concerns about tying arrangements⁴⁹ and also has taken action to prevent them or control their harmful effects. The Commission, for example, has prohibited the bundling⁵⁰ of CPE and transmission service,⁵¹ and has also

⁴⁷ *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6853 (2005) (Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Dissenting in Part, Approving in Part).

⁴⁸ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 98-183, *1998 Biennial Regulatory Review—Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, Report and Order, 16 FCC Rcd 7418, 7428 (para. 18) (2001) (“*Bundling Order*”) (footnote omitted) (citing Section 3 of the Clayton Act, 15 U.S.C. § 14; *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 12 (1984) (“*Jefferson Parish*”); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 837 (1990)) (internal citations omitted).

⁴⁹ *See, e.g.*, Opening Statement of FCC Chairman Kevin J. Martin, Public En Banc Hearing on Broadband and the Digital Future, Carnegie Mellon University, Pittsburgh, Pennsylvania, 2008 WL 2827409 (July 21, 2008) (as prepared for delivery) (“We are examining tying arrangements to ensure that large media companies are not constraining small cable providers and their ability to deploy broadband by forcing them to dedicate capacity to unwanted channels by the way they bundle programs.”); *Bundling Order*, 16 FCC Rcd at 7428 (para. 18) (footnote omitted) (“We emphasize that the benefits associated with allowing carriers to bundle products and services at one price do not exist where the provider maintains sufficient market power to require that a customer purchase multiple goods or services in order to obtain one of the components in the package.”).

⁵⁰ “Bundling means selling different goods and/or services together in a single package. . . . The economic analysis of ‘bundling’ is a subset of the modern industrial organization literature on tying arrangements.” *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 98-183, *1998 Biennial Regulatory Review—Review of Customer Premises Equipment And Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21531, 21531 (para. 1 & n.4) (1998).

⁵¹ The Commission has explained that one of the primary reasons it adopted CPE bundling restrictions in the agency’s *Computer II* rulemaking proceeding “was to prevent carriers from forcing consumers to buy unwanted carrier-supplied CPE in order to obtain transmission service.” *Bundling Order*, 16 FCC Rcd at 7428 (para. 18) (footnote omitted).

acted to protect wireless customers against bundling arrangements involving digital subscriber lines.⁵² In his concurrence in the *SBC-AT&T Merger Order* and the *Verizon-MCI Merger Order*, then Commissioner Copps indicated that:

We require the Applicants to make available stand-alone, or “naked” DSL. This means consumers can buy DSL without being forced to also purchase voice service. This is good news. If savvy consumers have cut the cord and use only a wireless phone, why should they have to pay for wireline voice service they don’t even want?⁵³

In examining the application of the antitrust laws to tying arrangements, the Commission has explained that:

For tying to be found illegal under the antitrust laws, courts look for the following factors at a minimum: (1) the tying and tied products or services are separate; (2) the firm effecting the tie has market power in the tying market; (3) the firm can use its market power in the tying market to “force” customers to purchase the tied product; and (4) the tying arrangement forecloses a substantial amount of interstate commerce.⁵⁴

The Commission has also noted that “[i]n most circumstances a court will then analyze the reasonableness of the effects of the tie, *i.e.*, whether the economic, technological or competitive effects of tying the good or services outweighs the competitive harms.”⁵⁵

⁵² See *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) (*SBC-AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) (*Verizon-MCI Merger Order*).

⁵³ Statement of Commissioner Michael J. Copps, Concurring, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, WC Docket No. 05-75, 2005 WL 4114086.

⁵⁴ *Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska Digitel, L.L.C. and the Transfer of Control of Interests in Alaska Digitel, L.L.C. to General Communication, Inc.*, WT Docket No. 06-114, Memorandum Opinion and Order, 21 FCC Rcd 14863, 14906 (para. 104 n.313 (2006) (*Denali Order*)) (citing *Jefferson Parish*, 466 U.S. at 12-18).

⁵⁵ *Denali Order*, 212 FCC Rcd at 14906 (para. 104 n.313) (citing *Jefferson Parish*, 466 U.S. at 29-32; *United States v. Microsoft Corp.*, 253 F.3d 34, 89-96 (D.C. Cir. 2001).

U.S. Cellular believes that the record in this proceeding strongly supports the initiation of a rulemaking to examine whether exclusive handset deals are, at a minimum, analogous to tying arrangements because of the manner in which they impede competition and harm consumers. With reference to the tests described by the Commission in the *Denali Order*, the tying product (*i.e.*, exclusively available handsets) and the tied service (*i.e.*, the wireless service provided by the carrier holding the exclusive deal for the handsets) are separate. Each of AT&T and Verizon Wireless serves about 30 percent of domestic wireless subscribers. The “Big Four” carriers have all adopted exclusive arrangements for advanced handsets within a short period and operate in a highly concentrated market, with a combined share of about 86 percent of domestic wireless subscribers.⁵⁶

In many rural areas served by only one or a few of the Big Four carriers, alternative sources of advanced handsets are unavailable or very limited. A carrier’s control over advanced handsets in such an area enables the carrier to “force” consumers to purchase its wireless service, and usually the purchase arrangements are favorable to the carrier. The more desirable the handset, the more susceptible are consumers to entering into wireless service contracts that are not subject to the discipline of a competitive market.

Finally, handset exclusivity arrangements foreclose a substantial amount of interstate commerce. In rural areas, as RCA and commenters have shown, commerce is shut off completely, in the sense that rural consumers have no opportunity to obtain desired handsets. Commerce is also foreclosed in markets in which the large national carriers compete against regional or rural carriers because, in these markets, exclusive handset agreements deprive the regional and ru-

⁵⁶ See Rogerson at 18 (Table 1) (showing a 27.1 percent share for AT&T and a 30.4 percent share for Verizon Wireless).

ral carriers of the ability to compete against the national carriers on the basis of the range of handsets they can make available to current and prospective customers.

b. The Commission Should Determine Whether Handset Exclusivity Agreements Amount to Restrictive Covenants with Unreasonable Scope and Duration.

The Commission should grant the RCA Petition and institute a rulemaking regarding the national carriers' handset exclusivity deals because these deals operate as restrictive covenants, raising serious anticompetitive concerns. The Commission has long recognized that antitrust issues are relevant to its consideration of the public interest,⁵⁷ and that it has a substantial interest in “*preventing* anti-competitive behavior and removing impediments to consumer choice.”⁵⁸ The Commission is not required to wait until a monopoly exists—instead it is fully empowered to act in the public interest as a market failure develops. The Commission has noted that eliminating any such restraints on competition is “a substantial government interest.”⁵⁹

The record supports the conclusion that exclusive handset deals are too broad in scope, and therefore should not be permitted, because these deals completely block other carriers from selling handsets which are subject to the exclusive deals in markets in which the national wireless carrier involved is not even competing. Any legitimate and beneficial purposes that may be served by the exclusive arrangements cannot have any bearing in rural markets that are not served by the national carrier that is imposing the prohibitions. The competitive interests of the

⁵⁷ See *Time Warner Cable, Petition for Public Interest Determination under 47 C.F.R. § 76.1002(C)(4) Relating to Exclusive Distribution of Courtroom Television*, CSR-4231-P, Memorandum Opinion and Order, 9 FCC Rcd 3221, 3227 (para. 35 n.89) (1994) (citing *Paragon Cable Television v. FCC*, 822 F.2d 152, 154 (D.C.Cir.1987)).

⁵⁸ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rule-making, 18 FCC Rcd 5099, 5105 (para. 17) (2003) (emphasis added) (“*Carrier Selection Order*”).

⁵⁹ *Carrier Selection Order*, 18 FCC Rcd at 5106 (citing *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994)).

national carrier clearly are not at stake in such markets. On the other hand, the public interest is harmed in these rural markets because the customers of regional and rural carriers providing service in those markets are being deprived of access to advanced and innovative handsets.⁶⁰ The public interest concerns here echo the concerns expressed by Congress in enacting the Universal Service Fund—a need to protect rural consumers from becoming economically isolated from the benefits of telecommunications technology.

The overbroad geographic scope of exclusive handset deals also encompasses geographic markets in which regional or rural carriers (or both) are attempting to compete against a national carrier, because the inability of the regional or rural carriers to offer the handsets that are subject to the exclusive deals, or to fashion their own exclusive deals with handset manufacturers, places them at a substantial competitive disadvantage.

In examining the effects of exclusive handset agreements in wireless markets, while there may be theoretical pro-competitive arguments for a large national carrier to enter into a “quasi-exclusive” handset deal under which the handset manufacturer would be barred from entering into sale arrangements with any of the other *national* carriers,⁶¹ there is no public policy justification for the national carriers’ using these exclusive deals to bar handset arrangements with regional and rural carriers. In fact, the record demonstrates that such a bar is contrary to the public interest.

⁶⁰ We note that most, if not all, of the Big Four carriers contractually prohibit a consumer from obtaining a desirable handset in a metropolitan area and then using it in the consumer’s home market by requiring the majority of all usage to be in the market where the phone was obtained. AT&T, for example, provides the following notice to consumers: “Our systems have detected that you are transmitting a substantial amount of data while roaming in areas not directly served by AT&T. The Terms and Conditions of our data plans (including unlimited plans) provide an ‘off-net usage’ allowance that is equal to the lesser of 6 megabytes or 20% of the kilobytes included in your plan.”

⁶¹ See Rogerson at 2, 14-16.

A rulemaking initiated by the Commission also should examine closely whether the period during which regional and rural carriers are denied the opportunity to sell the handsets to their customers should be limited. Today, exclusivity agreements remain in place for periods of time that significantly exceed the product's desirability in the marketplace.⁶² That is, by the time exclusivity agreements expire, the handset at issue is obsolete, replaced by more modern and desirable handsets which are also subject to exclusivity.

Finally, an action recently taken by the Conseil de la Concurrence ("Competition Council") in France is instructive. The Competition Council temporarily suspended an exclusive handset agreement between France Telecom and Apple which gave French operator Orange the exclusive right to sell the Apple iPhone for a five-year period.⁶³ According to press reports, the Council determined that "France Telecom's five-year deal with Apple . . . adds another obstacle for consumers in a market already suffering from a lack of competition. Any future exclusivity deals would also be limited to three months at a time."⁶⁴

C. The Commission, as Part of a Rulemaking Proceeding, Should Evaluate Claims That Benefits Flow from Handset Exclusivity Arrangements.

Opponents of the RCA Petition contend that exclusive handset deals render a valuable service to consumers by increasing the incentive of the large national carriers to make "substantial pro-competitive" investments to assist the development of new and innovative handsets and

⁶² For example, the first iPhone exclusivity arrangement between Apple and AT&T was for five years. The 3G iPhone replaced the initial model well before the exclusivity arrangement expired.

⁶³ Conseil de la Concurrence, Decision No. 08-MC-01, Dec. 17, 2008, *aff'd*, Paris Court of Appeals, Feb. 4, 2009.

⁶⁴ Dianne See Morrison, *France Telecom exclusive deal to sell iPhone in France banned*, MOCONEWS.NET, Dec. 17, 2008, accessed at <http://www.moconews.net/entry/419-france-telecom-exclusive-deal-to-sell-iphone-banned/>.

to bring them to market.⁶⁵ These commenters claim that the exclusive handset agreements, by preventing competing carriers from supplying the same handsets, enhance the development and deployment of new technologies.⁶⁶

The problem with these claims is that the record provides no basis for them. It arguably could be the case that exclusive handset deals would enhance consumer welfare, to a degree that might offset the anti-competitive effects of such deals, if the handset agreements resulted in extensive investment by the Big Four carriers in handset research, development, and innovation. But the evidence of such investment is lacking.

Using the iPhone case as an example, Professor Rogerson explains that AT&T “essentially played almost no role at all in developing this handset.”⁶⁷ Professor Rogerson suggests that this is not unusual because, typically, handset manufacturers gear their development and sale of handsets to a global market in which U.S. carriers have only a small share. Given the position held by the U.S. carriers in the global market, it is unlikely that they would play a significant role in funding the research and development costs associated with handsets deployed throughout the global market. Professor Rogerson buttresses this point by noting that the Competition Council determined that the French operator Orange had made only a small “relationship-specific investment associated with the iPhone” and that this finding was a factor in the Competition Council’s preliminary decision to block the exclusive deal.⁶⁸

A Commission rulemaking could ascertain whether investment incentives (or any other factors) could counteract the harmful effects of exclusive handset arrangements on competition

⁶⁵ AT&T Comments at 18. *See* Sprint Comments at 11-12; Telecommunications Industry Association Comments at 10; Verizon Wireless Comments at 20-21.

⁶⁶ *See* AT&T Comments at 19-20; Sprint Comments at 12; Verizon Wireless Comments at 20-21.

⁶⁷ Rogerson at 13.

⁶⁸ *Id.* at 13-14.

and consumer welfare. In U.S. Cellular's view, the record in this proceeding provides no basis for concluding that any such factors exist.

D. The Commission Has Title II Jurisdiction To Regulate the Exclusive Dealing Contracts of Wireless Providers.

In the preceding sections of these Reply Comments, U.S. Cellular has demonstrated that the record in this proceeding presents a compelling case that the Commission should begin a rulemaking proceeding to examine whether exclusive handset arrangements flout the goals and purposes of the Act and the policies of the Commission.

U.S. Cellular believes that the RCA Petition and the record in this proceeding provide a reasonable basis for concluding that the exclusive deals are contrary to the public interest by placing regional and rural wireless carriers at a substantial competitive disadvantage, by impairing competitive entry in wireless markets, by depriving many consumers in rural areas of any opportunity to obtain and use the most recently marketed and most desirable wireless handsets, and by harming all wireless consumers in a variety of ways, including higher prices, restrictive contractual commitments, less choice in their selection of handsets, and less broadband deployment.

The only issue that remains is whether the Act provides the Commission with jurisdiction to utilize its rulemaking powers to address the harms to competition and consumer welfare that are being caused by exclusive handset contracts. As U.S. Cellular will show, this is not a close question.

Predictably, three of the Big Four carriers attempt to throw up jurisdictional obstacles to the exercise of the Commission's authority to initiate a rulemaking to address the discriminatory and anti-competitive effects of exclusive dealing contracts between the nation's largest wireless carriers and handset manufacturers.

Verizon Wireless erroneously contends that no provision of the Act authorizes the Commission to regulate “agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers.”⁶⁹ Sprint incorrectly claims that Sections 201 and 202 of the Act do not apply to contracts between carriers and handset manufacturers.⁷⁰ AT&T agrees with Verizon Wireless and Sprint, and mistakenly thinks that RCA’s request for a rulemaking “boils down to a plea for an assertion of ancillary Title I jurisdiction.”⁷¹

As U.S. Cellular demonstrates in the following sections, the fact of the matter is that the Commission has been explicitly given regulatory authority over the exclusive dealing contracts of wireless carriers.

1. The Commission Has Rulemaking Authority Under Sections 4(i), 201(b), 211(b), 215(c), and 303(r) of the Act.

RCA has not asked the Commission to assume jurisdiction to regulate equipment vendors generally or handset manufacturers specifically. Rather, it is asking the Commission to exercise its existing Title II jurisdiction over Commercial Mobile Radio Service (“CMRS”) providers,⁷² and the contracts of CMRS carriers,⁷³ particularly their “[e]xclusive dealing contracts.”⁷⁴ As set forth below, those provisions give the Commission jurisdiction over the “procurement practices” of carriers subject to the Act.⁷⁵

⁶⁹ Verizon Wireless Comments at 4.

⁷⁰ See Sprint Comments at 14.

⁷¹ AT&T Comments at 34.

⁷² See 47 U.S.C. § 332(c)(1)(A).

⁷³ See *id.*, § 211(b).

⁷⁴ *Id.*, § 215(c).

⁷⁵ *Regulatory Policies and International Telecommunications*, CC Docket No. 86-494, Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7408 (para. 40) (1988).

Cellular, Personal Communications Service, and AWS carriers obviously are CMRS providers.⁷⁶ CMRS providers are common carriers subject to Title II⁷⁷, and must comply with thirteen Title II sections, specifically including Sections 201 and 202.⁷⁸ Accordingly, all practices of cellular carriers “for and in connection with” their communications services are subject to the Commission’s Title II jurisdiction.⁷⁹

Section 201(b) gives the Commission authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act].”⁸⁰ The Supreme Court has held that “the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”⁸¹ Rejecting arguments that the Commission’s rulemaking authority is limited to purely interstate or foreign communications matters, the Court emphasized that “even though ‘Commission jurisdiction’ always follows where the Act ‘applies,’ Commission jurisdiction (so-called ‘ancillary’ jurisdiction) *could* exist even where the Act does *not* ‘apply.’”⁸² Because, as U.S. Cellular demonstrates in the following paragraphs, Title II of the Act clearly applies to carrier contracts, the Commission’s rulemaking authority extends to carrier practices in connection with their CMRS services, including their contract practices.

Section 211(a) of the Act requires that every subject carrier file with the Commission its contracts with other carriers, whether subject to the Act or not, concerning any traffic affected by

⁷⁶ See 47 C.F.R. § 20.9(a)(7); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1218 (D.C. Cir. 1999).

⁷⁷ See 47 U.S.C. § 332(c)(1)(A); *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003).

⁷⁸ See 47 C.F.R. § 20.15(a).

⁷⁹ See 47 U.S.C. §§ 201(b), 202(a).

⁸⁰ *Id.*, § 201(b). See also *id.*, §§ 154(i), 303(r).

⁸¹ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999).

⁸² *Id.* (emphasis in original).

the provisions of the Act.⁸³ Section 211(b), however, gives the Commission the “authority to require the filing of *any other contracts* of any carrier.”⁸⁴ The Commission has determined that it will forbear from applying the inter-carrier contract filing requirement of Section 211(a) to CMRS providers.⁸⁵ But the Commission made no such determination with respect to its authority under Section 211(b) to require CMRS providers to file contracts other than those with carriers, including exclusive dealing contracts with handset manufacturers.

The Commission’s authority to require the filing of a carrier contract under Section 211 gives it authority to modify the terms of the contract under the *Sierra-Mobile* doctrine.⁸⁶ For all contracts filed with the Commission, “it is well-established that ‘the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public.’”⁸⁷ Thus, the Commission’s

⁸³ See 47 U.S.C. § 211(a).

⁸⁴ *Id.*, § 211(b) (emphasis added).

⁸⁵ See *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480 (para. 181) (1994) (“*CMRS Forbearance Order*”); 47 C.F.R. § 20.15(b)(1). Under Title III of the Act, the Commission is authorized to “specify by regulation” the Title II provisions (except Sections 201, 202, and 208) that are inapplicable to CMRS providers. See 47 C.F.R. § 332(c)(1)(A). But under Title I, the agency may forbear from applying any regulation or provision of the Act to CMRS providers. See 47 U.S.C. § 160(a). The Commission must make the same three determinations prior to exercising its forbearance authority under Title I or Title III. Compare 47 U.S.C. § 160(a)(1)-(3) with 47 U.S.C. § 332(c)(1)(A)(i)-(iii). However, a Commission determination that it may forbear from enforcing a Title II provision assumes that it has jurisdiction. Thus, for example, the Commission’s decision that it will not apply Section 211(a) to CMRS providers does not mean that it is without authority to enforce Section 211(a) against them should circumstances warrant. If its authority under Section 211(a) is needed, the Commission would have to conduct a rulemaking in order to regulate under that provision. See *CMRS Forbearance Order*, 9 FCC Rcd at 1484.

⁸⁶ See *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956). The *Sierra-Mobile* doctrine refutes AT&T’s claim that “it would be entirely unlawful for the Commission to abrogate *existing* exclusive agreements.” AT&T Comments at 35 (emphasis in original).

⁸⁷ *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (quoting *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)).

authority to require wireless carriers to file exclusive dealing contracts with handset manufacturers provides it with ample authority to regulate the terms of such contracts.⁸⁸

Under Section 215 of the Act, the Commission has the obligation to examine “transactions entered into by any common carrier which relate to the furnishing of equipment . . . to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier.”⁸⁹ The Commission decided not to forbear from applying its authority under Section 215 to CMRS providers.⁹⁰ It decided that the exercise of its authority to examine the activities and transactions of CMRS carriers “may be necessary for the protection of consumers if some market failure occurs” and there was no public interest reason to limit its ability “to act if the need arises.”⁹¹

One of the powers retained by the Commission was its authority under Section 215(c) to regulate “[e]xclusive dealing contracts.”⁹² Under Section 215(c), the Commission is empowered to “examine all contracts of common carriers subject to [the Act] which prevent the other party thereto from dealing with another common carrier subject to [the Act].”⁹³ Although Section 215(c) provides that the Commission must report its findings as to exclusive dealing contracts to Congress with its recommendation for legislation,⁹⁴ the provision does not preclude the Commission from exercising its rulemaking authority under Sections 4(i), 201(b), and 303(r) of the Act.⁹⁵

⁸⁸ See *Cable & Wireless*, 166 F.3d at 1231-32.

⁸⁹ 47 U.S.C. § 215(a).

⁹⁰ See *CMRS Forbearance Order*, 9 FCC Rcd at 1484.

⁹¹ *Id.*

⁹² 47 U.S.C. § 215(c).

⁹³ *Id.*

⁹⁴ See *id.*

⁹⁵ See *GTE Service Corp. v. FCC*, 474 F.2d 724, 731 n.9 (2d Cir. 1972).

In *GTE*, the court upheld that Commission’s initial foray into regulating the provision of computer data processing by communications common carriers.⁹⁶ After finding that the Commission had jurisdiction under Section 1 of the Act to ensure that carriers provide efficient and economic service,⁹⁷ the court rejected the notion that the Commission had to wait for evidence that the carriers’ activities were actually abusive and then proceed on an adjudicatory basis rather than by rulemaking.⁹⁸ In that context, the court addressed the authority granted the Commission under Section 215 of the Act:

Several of the petitioners have urged that rule-making here is implicitly foreclosed by 47 U.S.C. § 215 (1970) which directs the Commission to examine into carrier activities and transactions likely to adversely affect the ability of a carrier to render adequate service to the public and to report any findings to Congress along with recommended corrective legislation. We do not agree. In view of the Commission’s broad responsibilities, we cannot believe that Congress intended by this section to preclude rule-making in the area of the Commission’s prime concern—adequate public communications service. Had Congress wished to impose such a limitation on its expansive grant of power to the Commission, we think it would have done so explicitly. We refuse to impose the limitation.⁹⁹

Agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers are clearly “exclusive dealing contracts” within the meaning of Section 215(c), since they prevent vendors from supplying handsets to other

⁹⁶ See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267 (1971).

⁹⁷ See *GTE*, 474 F.2d at 730 (citing 47 U.S.C. § 151). With respect to jurisdiction, the court specifically held that:

even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service.

Id. at 731.

⁹⁸ See *id.* at 731-32.

⁹⁹ *Id.* at 731 n.9.

carriers that are subject to the Act.¹⁰⁰ Thus, Sections 211(b) and 215(c) of the Act constitute a congressional delegation of authority to the Commission to examine exclusive dealing contracts between wireless equipment vendors and handset manufacturers to determine whether they have a substantial adverse effect on the provision of wireless telecommunications services or result in an impairment of competition.¹⁰¹ As U.S. Cellular has shown in the previous sections of these Reply Comments, the record in this proceeding provides ample justification for the Commission to exercise its jurisdiction for purposes of determining the extent to which exclusive handset deals are harming wireless customers, are having an adverse effect on the provision of wireless services, and are impairing competition.

2. The Commission Has Regulatory Authority Under Section 201(b) of the Act.

Ignoring the plain language of Section 201(b) of the Act, Sprint first argues that the provision applies “only to communications services by common carriers.”¹⁰² Sprint then implicitly concedes that Section 201(b) also applies to common carrier practices “in connection with” the provision of communications services.¹⁰³ Contrary to Sprint’s contention, an “equipment supply contract” between a wireless carrier and a handset manufacturer can be evidence of a practice in connection with the carrier’s service that is cognizable under Section 201(b).¹⁰⁴

¹⁰⁰ See 47 U.S.C. § 215(c).

¹⁰¹ See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Tentative Decision of the Commission, 28 F.C.C. 2d 291, 300-01 (para. 29) (1970). Because the Commission has specific statutory authority to regulate exclusive dealing contracts, we need not address whether the Commission has Title I ancillary jurisdiction to regulate such contracts.

¹⁰² Sprint Comments at 14.

¹⁰³ *Id.* See 47 U.S.C. § 201(b).

¹⁰⁴ *But see* Sprint Comments at 14.

In the first place, *Iowa Utilities Board* dispensed with the idea that Congress limited the practices that can be deemed “unjust or unreasonable” to those prescribed under the original provisions of Title II of the Act. The Supreme Court held that Section 201(b) gives the Commission the power to enact such rules and regulations as may be necessary to carry out the provisions of the Act, including the provisions that were added by the 1996 Act.¹⁰⁵ The Court subsequently found that the fact the 1996 Act rewrote the Act to enhance the role of competition but left Section 201(b) in place “indicates that the statute permits, indeed it suggests that Congress likely expected, the FCC to pour new substantive wine into its old regulatory bottles.”¹⁰⁶ Thus, it upheld the Commission’s determination that a carrier’s refusal to divide the revenues it receives from the caller with the payphone operator, despite the Commission’s requirement that it do so, was a “practice” “in connection with” the provision of the carrier’s long distance service that was “unreasonable” in violation of Section 201(b).¹⁰⁷

Entering into an exclusive dealing contract obviously can be an unreasonable carrier “practice” that violates Section 201(b). The Commission has twice held that an exclusive contract for telecommunications service in a multiple tenant environment (“MTE”) “impedes the pro-competitive purposes of the 1996 Act,” and thus “a carrier’s agreement to such a contract is an unreasonable practice” under Section 201(b).¹⁰⁸ Citing *Cable & Wireless*, the Commission concluded that it had authority under Section 201(b) “to regulate the contractual or other ar-

¹⁰⁵ See *Iowa Utilities Bd.*, 525 U.S. at 377-78.

¹⁰⁶ *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, —, 127 S.Ct. 1513, 1521 (2007).

¹⁰⁷ See *Global Crossing*, 127 S.Ct. at 1520.

¹⁰⁸ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, 5391 (para. 14) (2008) (“*MTE Nonexclusivity II*”); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23000 (para. 35) (2000) (commercial MTEs).

rangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.”¹⁰⁹ Obviously, the Commission can assert its Section 201(b) jurisdiction to regulate the exclusive dealing contracts between wireless carriers and handset manufacturers even though the manufacturers are not subject to regulation under the Act.

Contrary to Verizon Wireless’s claims,¹¹⁰ the fact that a carrier’s exclusive dealing contract is a “wholesale supply” contract for CPE does not deprive the Commission of its regulatory authority under Section 201(b). The provision of cellular CPE and cellular service on a “packaged basis” by facilities-based carriers has long been subject to regulation under the just and reasonable provisions of Section 201(b), as well as the non-discriminatory provisions of Section 202(a).¹¹¹ A carrier’s exclusive dealing contract with an equipment vendor that impedes the pro-competitive purposes of the 1996 Act does not escape the Commission’s Section 201(b) jurisdiction simply because the procurement contract is for cellular CPE.

3. The Commission Has Jurisdiction Under Sections 1, 4(i), 201(b), 202(a), 253(b)(3), and 303(r) of the Act.

The Commission’s rulemaking authority under Sections 4(i), 303(r), and particularly 201(b) of the Act gives it the power to promulgate rules to carry out any of the provisions of the Act. Therefore, it has the authority to adopt rules to regulate carrier contract practices if it finds that such regulation would carry out its Section 1 mandate “to make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, nation-wide . . . radio communication service with adequate facilities at reasonable charges.”¹¹² Similarly, Sec-

¹⁰⁹ *MTE Nonexclusivity II*, 23 FCC Rcd at 5391.

¹¹⁰ See Verizon Wireless Comments at 7.

¹¹¹ *Bundling of Cellular CPE and Cellular Service*, CC Docket No. 91-34, Notice of Proposed Rulemaking, 6 FCC Rcd 1732, 1735 (para. 21) (1991).

¹¹² 47 U.S.C. § 151.

tion 706(a) of the 1996 Act directs the Commission to adopt “measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment” in pursuit of greater deployment of “advanced telecommunications capability to all Americans.” As U.S. Cellular has demonstrated, the record in this proceeding provides sufficient basis for the Commission to initiate a rulemaking to determine the extent to which exclusive handset arrangements are interfering with the opportunity of wireless customers to utilize communications service and advanced telecommunications capability, and whether this interference warrants action by the Commission pursuant to its Section 1 and Section 706 mandates.

Because a contract is considered a “device” under Section 202(a),¹¹³ the Commission has the authority under Section 201(b) to regulate carrier contract practices if to do so would prevent cellular carriers from giving “any undue or unreasonable preference or advantage to any particular person, class of persons, or locality,” or from subjecting “any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”¹¹⁴ Clearly, the Commission has jurisdiction under Section 201(b) to adopt rules to prevent carriers from entering into contracts that are discriminatory within the meaning of Section 1 or Section 202(a), or both. The record in this proceeding, as U.S. Cellular has shown in these Reply Comments, provides convincing support for the exercise of this jurisdiction by the Commission to launch a rulemaking to decide whether wireless customers, as well as regional and rural wireless carriers, are being subjected to “undue [and] unreasonable prejudice [and] disadvantage” by exclusive handset deals.

¹¹³ See *Midwestern Relay Co.*, Docket No. 20801, Memorandum Opinion and Order, 69 F.C.C. 2d 409 (1978); *Bell System Tariff Offerings*, Docket No. 19896, Decision, 46 F.C.C. 2d 413, 432 (para. 38) (1974).

¹¹⁴ 47 U.S.C. § 202(a).

Sprint is plainly wrong to claim that an unreasonable discrimination in violation of Section 202(a) requires “discrimination by a carrier between or among its customers in connection with the provision of like communications service.”¹¹⁵ A carrier can engage in a practice that unreasonably discriminates without discriminating among its customers. For example, a wireless carrier can violate Section 202(a) by refusing “to deal with any segment of the public whose business is the type normally accepted” or declining “to serve any particular demographic group.”¹¹⁶ Moreover, the plain language of § 202(a) prohibits unreasonable discriminations and preferences with respect to any particular “locality.”

After the Commission detariffed CMRS and Congress enacted the 1996 Act, the Commission was left with substantial discretion to determine what constitutes unreasonable discriminations or preferences under Section 202(a).¹¹⁷ The generality of the terms Congress employed in Section 202(a) “opens a rather large area for the free play of agency discretion.”¹¹⁸ Indeed, the language of Section 202(a) “bristles with ‘any’” and states the anti-discrimination prohibition in “flat and unqualified” terms.¹¹⁹ By making it unlawful for “any” carrier to give “any” undue or unreasonable preference or advantage to “any” person by “any” means or device, Section 202(a) gives the Commission the authority to examine whether wireless carriers can give themselves an undue or unreasonable competitive advantage by entering into exclusive dealing contracts with handset manufacturers.

¹¹⁵ Sprint Comments at 14-15.

¹¹⁶ *Orloff*, 352 F.3d at 420 (quoting *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8997 (2002)).

¹¹⁷ *See id.* at 420-21.

¹¹⁸ *Bell Atlantic Telephone Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

¹¹⁹ *American Trucking Ass’n, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966).

The breadth of the Commission’s rulemaking authority under Section 201(b) permits it to adopt rules to carry out the anti-discrimination provisions of Section 202(a) *and* implement anti-discrimination principles codified elsewhere in the Act. For example, the Commission possesses the discretion under Section 202(a) to adopt a rule that would prohibit any practice by wireless carriers that would subject any community (a locality) to an unreasonable disadvantage by denying it “a fair, efficient, and equitable distribution of radio service.”¹²⁰ Surely, Sections 201(b), 202(a), and 303(r) authorize the Commission to undertake a rulemaking to examine whether exclusive dealing contracts between wireless carriers and handset manufacturers could produce unreasonable discriminations by preventing the fair, efficient, and equitable allocation of CMRS among the “several States and communities.”¹²¹

It is now settled that the Commission’s rulemaking authority under Section 201(b) extends to carrying out the provisions of the 1996 Act, including the statute’s universal service principles.¹²² Consequently, the Commission has the discretion to prohibit practices of wireless carriers under Section 202(a) that place consumers at an unreasonable disadvantage in terms of such principles. A carrier practice could be deemed to violate Section 202(a) by subjecting a region (a locality) to an unreasonable disadvantage by denying it access to advanced telecommunications services,¹²³ or by denying “low-income consumers” (a class of persons) or those in a “rural, insular, and high cost” area (a locality) access to advanced telecommunications “that are reasonably comparable to those services provided in urban areas and that are available at rates that

¹²⁰ 47 U.S.C. § 307(b).

¹²¹ *Id.*

¹²² *See id.*, § 254(b).

¹²³ *See id.*, § 254(b)(2).

are reasonably comparable to rates charges for similar services in urban areas.”¹²⁴ Clearly, the Commission has jurisdiction to determine whether the practice of wireless carriers of entering into exclusive dealing contracts with handset manufacturers subjects consumers to an unreasonable disadvantage under Section 202(a) by denying them access to advanced telecommunications services consistent with the universal service principles of Section 254(b).

Sprint’s jurisdictional quibbles “confound[] the very purpose of agency delegation—institutionalization of authority to fashion policies and programs that implement broad legislative mandates in presently unforeseeable circumstances.”¹²⁵ Congress did not envision the rapid development of the innovative features of today’s handsets or the competitive implications of exclusive dealing contracts with handset manufacturers. However, Congress delegated a breadth of authority to the Commission sufficient to allow it to engage in a rulemaking simply to determine whether regulatory actions need be taken to ensure that the practice of entering into such exclusive dealing contracts do not violate the non-discriminatory policies of Sections 1, 254(b), and 307(b), as well as the non-discriminatory provisions of § 202(a).

4. The Commission Has Already Assumed Jurisdiction over Exclusive Dealing Contracts for Cellular CPE.

In federal administrative law terms, subject matter jurisdiction simply refers to an agency’s statutory power to regulate.¹²⁶ The Commission has already decided that it has the statutory power to regulate exclusive dealing contracts between cellular carriers and handset manufacturers.

¹²⁴ *Id.*, § 254(b)(3).

¹²⁵ *North Carolina Utilities Comm’n v. FCC*, 552 F.2d 1036, 1051 (4th Cir. 1977).

¹²⁶ *See Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986). *Cf.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1989).

AT&T chastises RCA for failing to “mention that the Commission has *already rejected*, in 1992, small carrier requests that it apply heavy-handed regulation to their larger rivals’ exclusive handset offerings.”¹²⁷ In point of fact, two resellers alleged that facilities-based cellular carriers had entered into exclusive dealing agreements with CPE providers,¹²⁸ but it was the Independent Data Communications Manufacturers Association (“IDCMA”) that urged the Commission in 1991 to adopt regulatory safeguards to prevent the potential anti-competitive effects of such agreements.¹²⁹

The Commission declined to adopt the proposed safeguards for reasons unrelated to its jurisdiction or to the anti-competitive effects of exclusive dealing agreements on competing carriers and rural consumers. The Commission found that the adoption of IDCMA’s safeguards was not warranted because there was “no evidence that cellular carriers refused to provide service to customers that purchase another brand of CPE.”¹³⁰ The Commission reasoned that “if one carrier managed to eliminate all agents and offered a bundle of service and one CPE manufacturer’s CPE, a customer could always go elsewhere or to another carrier to get CPE.”¹³¹ Moreover, the Commission found that it would be “highly unlikely” that “a future exclusive dealing arrangement could be successful in eliminating a CPE manufacturer.”¹³² However, the Commission promised “if in the future, it comes to our attention that carriers’ exclusive distribu-

¹²⁷ AT&T Comments at 8 (emphasis in original) (citing *Cellular CPE Bundling Order*, 7 FCC Rcd at 4030 (para. 15 & n.28)).

¹²⁸ See *Cellular CPE Bundling Order*, 7 FCC Rcd at 4030 & n.27.

¹²⁹ See *id.* at 4030.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

tion agreements with CPE manufacturers are resulting in anticompetitive abuse, we will not hesitate to revisit this area.”¹³³ *Id.*

The Commission obviously did not decide in 1992 that it was without jurisdiction to regulate wireless carriers’ exclusive dealing arrangements with cellular CPE manufacturers. It simply decided that the record was insufficient for it to act at that time. But now the circumstances have changed. As U.S. Cellular has demonstrated in these Reply Comments, the RCA Petition and the record in this proceeding provide a sufficient basis for the Commission to examine whether anti-competitive abuses, as well as direct harm to rural consumers and other wireless customers, have resulted from exclusive handset deals. Therefore, the Commission should exercise its jurisdiction to revisit these issues in such a rulemaking proceeding.

III. CONCLUSION.

The record has supported and supplemented the arguments and facts presented in the RCA Petition, and thus has convincingly demonstrated a basis for the Commission to begin the rulemaking requested by RCA. Such a rulemaking would closely examine the extent to which handset exclusivity arrangements between national wireless carriers and handset manufacturers are harming consumers and broadband deployment in rural areas not served by a national carrier, undermining competition in other rural and urban markets, threatening the availability of advanced telecommunications services, subverting the choices that consumers should be able to make in a competitive marketplace for wireless services and wireless devices, and forcing customers to pay higher rates and agree to more restrictive service agreements.

The Commission has jurisdiction under the Act to exercise its rulemaking authority, if necessary or appropriate, to rectify any harm to competition and any damage to consumer wel-

¹³³ *Id.*

fare that are being wrought by these exclusive handset deals. U.S. Cellular therefore respectfully urges the Commission to invoke its jurisdiction and initiate a rulemaking proceeding to address concerns raised regarding these exclusive arrangements.

Respectfully submitted,

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