

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

In the Matter of)
)
)

RURAL CELLULAR ASSOCIATION)
)

Petition for Rulemaking Regarding)
Exclusivity Arrangements Between)
Commercial Wireless Carriers and)
Handset Manufacturers)
_____)

RM-11497

REPLY COMMENTS OF T-MOBILE USA, INC.

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As the comments show, RCA's request could indeed backfire – ultimately diserving not only consumers but the carriers themselves, including RCA's own members.

The intrusive regulation RCA seeks here is unnecessary, because there is no problem that requires government intervention: The wireless market is robustly competitive, as is the market for wireless handsets. Consumers throughout the nation can choose from among a variety of wireless providers in an increasingly open environment that offers different plans with different features, terms, pricing, and equipment. Indeed, a recent snapshot of today's market shows there are now over *40 handset manufacturers* offering over *600 handset models* in the United States and new players and new models are introduced frequently.

Time-limited exclusive handset agreements are a reasonable means by which carriers seek to compete and distinguish their service offerings in a highly competitive market. For T-Mobile, such agreements permit the company to undertake the significant research and development investments necessary to cultivate new features and functionalities designed to improve the experience of its wireless customers. A limited exclusive arrangement can mitigate the risk of such investment to at least some degree – and can provide the initial reassurance and return carriers need to provide the substantial subsidies that typically support wireless handset offerings.

T-Mobile's limited exclusive agreements also protect its investment in highly customized, "branded" handsets that are developed to reflect the "look and feel" of its service. As T-Mobile shows here and other commenters have demonstrated, exclusivity agreements do not distort competition or unfairly harm small and rural carriers as RCA suggests. To the contrary, exclusivity agreements in most cases remain in place for only a short period of time. Longer exclusive arrangements like those involving the iPhone are few and far between. In

addition, T-Mobile and other wireless carriers and manufacturers actively work with smaller carriers to ensure that their customers will have access to the new generation of 3G phones. Indeed, T-Mobile's exclusive arrangements generally impact only Tier 1 and 2 competitors, purposefully *excluding* from their scope the Tier 3 carriers that are the focus of RCA's requested relief.

Not surprisingly, then, the overwhelming evidence shows that rural carriers currently offer a wide array of handsets, including the most advanced features, without any need for regulatory intervention. These carriers benefit from the innovation that larger carriers fund since, in the vast majority of cases, they obtain access to new handsets either immediately, or, at worst, after a relatively short period of just a few months. Beyond this, the record shows that many small and rural carriers provide exclusive handset offerings of their own. In short, the explosion of innovation that exclusive handset contracts foster benefits consumers – and carriers – everywhere.

Finally, the comments raise serious questions about the Commission's jurisdiction to take the steps RCA advocates. The Communications Act grants the Commission no authority to regulate the handset market.

Under these circumstances, RCA has shown no basis for regulatory intervention, and its petition should be rejected.

DISCUSSION

I. PROTECTING HANDSET INNOVATION ENHANCES CONSUMER WELFARE AND ENRICHES THE MARKETPLACE.

As discussed below and as commenters and the FCC have made clear,^{1/} the wireless market is highly competitive. Beyond the myriad wireless service providers at both the national,

^{1/} See Comments of AT&T at 1-2; Comments of Verizon Wireless at 11.

regional, and local levels, there are currently over 40 handset manufacturers offering over 600 handset models in the United States and new players and new models are introduced frequently. Consumers have a broad choice of service offerings including many different handset and device options both within and among carriers, while carriers have flexibility in their choice of manufacturers, and vice versa. As a result, carriers and manufacturers are constantly driven to develop offerings at all levels to attract and retain customers. Exclusive handset arrangements are an intrinsic component of this competitive marketplace. These agreements create opportunities and incentives for product and service differentiation and innovation. Not only do consumers benefit directly – but competitors that might not be able to command a major innovative effort on their own quickly benefit from the fruits of larger carriers’ research and development. These agreements should be encouraged, not prohibited or subjected to inflexible regulatory limitations.

A. Handset Exclusivity Agreements Promote Healthy Innovation and Fuel Competition.

The key purpose of exclusive agreements is to provide carriers and manufacturers with the necessary economic incentives to make the substantial investments required in developing a new handset – especially on a fast track. The type of innovation that typically underlies an exclusive agreement involves an effort to devise unique features, consumer-friendly processes, and notable differentiators over pre-existing phones. That process may take years, involving many hours, much carrier-manufacturer collaboration, and a significant expenditure of resources. In some cases, a carrier may even need to make changes in its own network to support the new handset capabilities: T-Mobile had to do precisely this to optimally support some features of the

new T-Mobile G1™ with Google™, and AT&T reports that it likewise had to make changes to support some of the capabilities of the iPhone.^{2/}

In today's highly competitive marketplace, carriers undertake these investments at considerable risk. As soon as a phone hits the market, competitors will begin seeking to meet or beat it with a device of their own – indeed, a competitor may already be poised to unveil the fruits of its own long-pending innovative efforts. Entering into at least a limited exclusive arrangement allows a carrier to enjoy a unique, if short-lived, “bump” in connection with the introduction of the new device. The market attention this garners helps the carrier recoup its costs – and also helps the carrier justify and afford the significant device subsidization that consumers have come to expect.

But the key point is not simply that exclusive arrangements are a perfectly legitimate means to recoup the cost of investment. It is that, *without* this assurance, neither carriers nor manufacturers would make those investments – and the result would be a significant drop-off in innovation, and a slow-down in the introduction of new handsets and new features and applications. Manufacturers – most of whom are struggling significantly in the marketplace and have been for several years^{3/} – cannot make these investments, without an understanding that carriers stand ready to purchase the resulting devices. Exclusive agreements employed by T-Mobile allow innovation to flourish by providing at least some assurance to both parties that

^{2/} AT&T Comments at 20.

^{3/} See, e.g., Latour, Almar & Guth, Robert A., *World's Mobile-Phone Makers Struggle—Sales Are Hot, But Profits Aren't, Competition Rises*, WALL STREET JOURNAL, at A16 (Aug. 16, 2000); Sarah Reedy, *Motorola spins off struggling handset business*, Telephony Online (Mar. 26, 2008), available at: <http://telephonyonline.com/wireless/news/motorola-handset-business-0326/>.

experimentation will be worth their while. The result is the explosion in specialized handsets that has been witnessed in recent years.

Moreover, the innovation that exclusivity arrangements foster rapidly spreads throughout the wireless market, expeditiously benefiting all consumers. Exclusive agreements tend to extend only a number of *months*, not years. Indeed, the lengthy exclusivity term of the iPhone in the United States is an anomaly. Most of T-Mobile's exclusive agreements last less than a year and some are as short as 90 days. As a result, a single carrier's investment in technology very quickly benefits its competitors and consumers generally. For example, T-Mobile was the exclusive U.S. distributor of the BlackBerry® Pearl™ for less than three months; the Pearl™ is now available from multiple outlets for use on multiple networks.^{4/} Likewise, the exclusivity period that will govern the new BlackBerry® Pearl™ flip phone – the first flip phone BlackBerry to be made available in the wireless market – will last only three months. And just recently, T-Mobile introduced an entirely new phone called the MOTO™ W233 Renew – a new handset made of recycled water bottles.^{5/} The environmentally sensitive Renew is a brand new concept that has received significant market attention, yet it is subject to only a modest six-month exclusivity arrangement, and will then be available to other carriers.^{6/}

^{4/} See http://na.blackberry.com/eng/devices/device-detail.jsp?navId=H0,C101,P203#tab_tab_purchase.

^{5/} See <http://www.t-mobile.com/shop/phones/Cell-Phone-Detail.aspx?cell-phone=Motorola-Renew>.

^{6/} See, e.g., *Motorola Renew recyclable phone coming to T-Mobile*, InfoSync (Jan. 6, 2009), available at: <http://www.infosyncworld.com/news/n/10002.html>; Olga Kharriff, *Motorola's Eco-Friendly W233 Renew*, BusinessWeek (Feb. 12, 2009), available at: http://www.businessweek.com/technology/content/feb2009/tc20090211_210334.htm?technology+product+review.

To be sure, exclusive arrangements tend to be longer where a carrier has spent substantial time and resources to develop and design a customized handset to fit specifically with the look and feel of its brand and service. For example, T-Mobile has invested heavily in developing proprietary handsets like the Sidekick™ and Shadow™ to provide users with a completely customized experience that is specific to and reflective of T-Mobile's brand. These flagship phones are designed to leverage T-Mobile's network and provide users with an optimal experience with services like MyFaves®, text, instant messaging, MySpace Mobile™, and unique features like customizable skins and limited edition designer shells created in collaboration with celebrities such as skateboarder Tony Hawk.⁷¹ In these cases, exclusivity periods protect not only the investment but the unique branding and customized features of the phone, which is important in a highly competitive marketplace in which carriers must differentiate themselves. Notably, however, T-Mobile does *not* subject the basic, underlying phone model to any exclusivity restrictions; it simply seeks to protect the customized, carrier-specific model, which has become an intrinsic component of the T-Mobile "brand."

And even when the phone itself is not available immediately to competitors, the technology nevertheless enters and positively affects the marketplace. For example, T-Mobile invested heavily in its partnership with Google to develop the G1™, the first handset to employ Google's open source mobile software platform, Android. Development of the groundbreaking G1™ took more than a year of work and millions of dollars for research and development. The G1™ has already begun to inspire innovation in the wireless marketplace by leveraging open

⁷¹ See <http://www.sidekick.com/gallery/default.aspx>.

source software to facilitate the widespread development of new downloadable applications.^{8/} All consumers will benefit from the success of the G1™, which has paved the way for future Android-based handsets that will be available on the networks of other carriers as well as T-Mobile.

Rather than lock technology up, limited exclusive agreements engender technological development, protect innovation and encourage competition. When a carrier and manufacturer introduce a new “hit” phone, competitors rush to respond. If an exclusive agreement is in place, a competitor cannot simply introduce the identical phone, at least not immediately, even where this might otherwise be advantageous. Instead, a competitor seeking to counter the effect of that hit phone will be forced to invest in its own development efforts. The result is that the market is never stagnant; there is a constant progression forward with an ever-expanding array of options and more and more user-friendly interfaces. As Sprint explained in its comments, the introduction of the iPhone incentivized Sprint to develop the touchscreen Samsung Instinct and Verizon Wireless worked with Blackberry to introduce the Storm.^{9/} Carriers will no doubt respond to the G1™ and to the Renew with their own advanced and environmentally sensitive phones. And the process of differentiation and innovation will continue apace.

B. Exclusive Agreements Do Not Harm Smaller Carriers or the Consumers They Serve.

RCA’s request suffers from another fundamental misconception: exclusive agreements often do not even apply to the Tier 3 carriers that are at the heart of its petition. Most of

^{8/} In fact, Time Magazine named the G1™ one of the “Best Inventions of 2008.” See http://www.time.com/time/specials/packages/article/0,28804,1852747_1852746_1852742,00.html.

^{9/} Sprint Comments at 6.

T-Mobile's exclusive agreements in the U.S. extend only to Tier 1 and Tier 2 carriers, which are T-Mobile's primary competitors. Thus, T-Mobile's agreements typically leave manufacturers free to sell the subject handsets to smaller carriers even right after launch. And T-Mobile typically does not object where the agreement is unclear and where manufacturers have sought T-Mobile's consent for such sales.^{10/} Contrary to the implication underlying RCA's requested relief, its members stand to benefit substantially from the significant investment T-Mobile makes in new handsets that usually are immediately made available to smaller carriers.

For example, T-Mobile partnered with Nokia, Samsung, and Sony Ericsson to develop the first handsets to operate on Advanced Wireless Services ("AWS") spectrum. But many of these handsets, including the Nokia 6263 and the Sony Ericsson TM506 already have been released for purchase by smaller carriers and the general public. Thus, contrary to claims by Cincinnati Bell Wireless that T-Mobile and others are tying up the 3G marketplace and restricting access to phones,^{11/} the fact is that T-Mobile's development efforts are *seeding* the market with phones that other carriers then stand to enjoy. These carriers (including Cincinnati Bell Wireless) may not command a customer base large enough to single-handedly motivate a manufacturer to develop an entirely new type of phone for a new spectrum band, which makes T-Mobile's commitment to and arrangement with the manufacturers especially important to their business interests. Rather than harm RCA's members, T-Mobile's limited exclusive agreements with handset vendors often serve their interests by ensuring that they enjoy the benefits of investment that they might not be able to support on their own.

^{10/} Branded handsets like the Sidekick™ and Shadow™ are exclusive as to all carriers – but as noted, the underlying phone models are available without restriction.

^{11/} See Comments of Cincinnati Bell Wireless at 5-6.

Furthermore, despite RCA's claims, exclusive arrangements are not merely the province of the carriers that RCA chooses to identify as "the Big 5." Many smaller carriers employ exclusive arrangements in order to support innovative service offerings or appeal to a specialized niche market. As observers have noted, "most [exclusive] deals concerned mobile virtual network operators (MVNOs), whose business model as resellers required that [they] distinguish themselves . . . by offering unique devices and service features."^{12/} For example, Firefly Mobile markets an exclusive handset designed specifically for children, which is paired with services that allow parents to control incoming and outgoing calls.^{13/} And, Jitterbug Wireless caters to older wireless users, featuring handsets with oversized keypads and displays and a dial tone whenever the handset is opened.^{14/} These MVNOs have distinguished themselves largely by offering exclusive handsets that are highly customized to meet the needs of their customers and to reflect their distinctive brands.

Also, rural carriers have demonstrated the capacity to compete using exclusivity agreements of their own. For example, a group of small and rural Tier II and Tier III carriers – known as the Associated Carrier Group ("ACG") – pooled their resources to attract a handset manufacturer partner to bring one of the first music phones to the wireless market in 2005.^{15/} As a result, these small carriers were able to offer an innovative handset, which they described as "the first phone to be centered around music," that was developed to their specifications and

^{12/} B. Esbin & B. Szoka, The Progress & Freedom Foundation, *Exclusive Handset Prohibitions: Should the FCC Kill the Goose that Laid the Golden iPhone?*, at 2 (June 2008).

^{13/} See <http://www.fireflymobile.com/phone/>.

^{14/} See <http://www.jitterbug.com/Easy-Cell-Phones/easy-to-use-mobile.html>.

^{15/} See Sue Marek, *Operators Collaborate on Exclusive Devices*, *Wireless Week* (Nov. 1, 2005).

offered exclusively to their customers.^{16/} In short, “[s]mall operators may not have the buying power of [larger] carriers, but by working together and developing innovative purchasing strategies, they are getting access to state-of-the-art devices in the same timeframe as their Tier I counterparts.”^{17/}

And, perhaps most critically, no evidence has been presented that *consumers* are harmed in any way by protecting handset innovation through exclusive agreements. While RCA’s members may want every device that their competitors offer as soon as those devices come to market, the FCC regulates to protect competition and consumers – not competitors.^{18/} And, both consumers and competition benefit from exclusive agreements. Even in those areas where the larger carriers’ devices are not available immediately upon market launch, there is substantial choice in advanced handsets for most consumers: the record shows that rural carriers tend to carry a variety of handsets including smartphones and other advanced devices with QWERTY keyboards and touchscreens;^{19/} and, as noted above, some rural carriers even have exclusive devices.^{20/} Rural and smaller carriers can and do respond with service offerings that keep many customers loyal and the Commission need not intervene.

^{16/} *Id.*

^{17/} *Id.*

^{18/} See Memorandum Opinion and Order on Reconsideration, *In re Applications of Craig O. McCaw, Transferor, and American Tel. & Telegraph Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1995); see also AT&T Comments at 22-23.

^{19/} See AT&T Comments at 24-25.

^{20/} And simply making all the larger carriers’ devices available would be of dubious value, since in many cases the rural carriers have not made the unique network upgrades to support the newest devices.

II. THE RELIEF RCA SEEKS IS NOT AUTHORIZED BY THE COMMUNICATIONS ACT AND IS INCONSISTENT WITH COMMISSION PRECEDENT.

A. Commission Precedent Precludes the Relief RCA Seeks.

The relief RCA seeks runs counter to Commission precedent. In its 1992 *Cellular Bundling Order*, the Commission found no cause for concern about the purported anticompetitive effects of exclusivity arrangements because the market for wireless handsets – even in 1992 – was “extremely competitive,”^{21/} and the market for wireless services was growing ever more competitive.^{22/} Moreover, the Commission found that this competition created opportunities for CPE manufacturers to reach deals with a variety of carriers, and precluded carriers from imposing terms on the manufacturers that were unattractive or unfair.^{23/}

While the Commission is free to reconsider its prior orders, it may do so only where the record clearly supports that about-face.^{24/} The record here does not provide such support. In its 1992 *Cellular Bundling Order*, the Commission called the market for wireless handsets “extremely competitive, both locally and nationally,”^{25/} and noted the presence of between 17 and 25 manufacturers that were unaffiliated with service providers. Competition has only increased in the seventeen years since that Order was issued. Today, as the Commission has recognized, “[t]he wireless industry is the most competitive of all the sectors that [it]

^{21/} Report and Order, *Bundling of Cellular Premises Equipment and Cellular Service*, 7 FCC Rcd. 4028, 4029-30 ¶ 9 (1992) (“*Cellular Bundling Order*”).

^{22/} *Id.* ¶ 11.

^{23/} *Id.* ¶ 15.

^{24/} *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

^{25/} *Cellular Bundling Order* ¶ 9.

regulate[s].”^{26/} For example, in its most recent Annual Report on the state of competition in the mobile wireless industry, the Commission found that the majority of Americans live in census blocks served by *five or more* wireless carriers.^{27/} And, over 40 manufacturers now compete in the market for wireless handsets.^{28/} Wireless handset manufacturers offer more than 620 unique wireless devices for sale to consumers in the U.S.^{29/} Moreover, consumers can purchase handsets from a growing number of non-carrier sources.^{30/}

As a result, individual wireless carriers do not have the market power to adversely affect or exert anti-competitive influence over the numerous wireless handset manufacturers operating on a national and international basis. Manufacturers foreclosed from the market by one carrier’s activities would have myriad other options to choose from to get their products to market. Similarly, a carrier foreclosed from accessing one manufacturer’s products would have an array of others to choose from – and could also seek to compete on other grounds, given the enormous

^{26/} Stephen Lawson, *FCC Chief: Wireless Key to Universal Service Access*, InfoWorld, Mar. 27, 2007, available at http://www.infoworld.com/article/07/03/27/HNfccchief_1.html.

^{27/} Thirteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 08-27, DA 09-54, at 6 (rel. Jan. 16, 2009). Nearly sixty-five percent of Americans live in census blocks served by five or more carriers, over 90 percent live in census blocks served by four or more carriers, and 96 percent live in census blocks served by three or more carriers. *Id.*

^{28/} See Comments of T-Mobile USA, Inc., *Skype Communications S.A.R.L. Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM-11361, at 14-15 n.57.

^{29/} See CTIA – The Wireless Association, *Ex Parte*, WT Docket No. 08-27 (Mar. 20, 2008).

^{30/} Consumers can buy handsets directly from manufacturers, online or through retail stores, see, e.g., <https://www.nokiausa.com/buy-online>; from general electronics stores; from online retailers (such as Amazon.com and Wirefly.com); and from online auction sites, such as eBay. In addition, there is a healthy online market for refurbished phones, see, e.g., <http://www.recellular.com>.

flexibility in price and service options available to wireless carriers today. To be sure, carriers occasionally hit a home run with a device that attracts extensive consumer attention. But despite some commenters' insistence that devices rule the day and govern consumer subscription choices, there is no evidence that any device has held overwhelming sway in the marketplace. As AT&T notes, no individual handset has captured more than 5 percent of the consumer market at any given time.^{31/} And new popular devices are immediately countered with development efforts by competitors seeking to develop the "next great thing." This type of differentiation among carriers is not a skewing of competition – it is evidence of healthy competition, which leads to innovation and promotes consumer welfare.

RCA's requested relief is unwarranted given the Commission's own finding that the Communications Act should be interpreted as enacting "a clear national policy that competition leading to deregulation . . . shall be the preferred means for protecting consumers."^{32/} This preference for the market over regulatory intervention has been especially clear with respect to the wireless marketplace: The wireless sector is to be "governed by the competitive forces of the

^{31/} AT&T Comments at 14 n.29; *see also* Comments of CTIA – The Wireless Association, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, Exhibit B at 2, 7-8 & Exhibit C at 108 (filed March 26, 2008).

^{32/} Memorandum Opinion and Order, *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online*, 16 FCC Rcd. 6547, 6611 ¶ 150 n.408 (2001) (citing Joint Statement of Managers, S. Conf. Rep. No. 104-230 at 1 (1996)). *See also*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 972 (2005) (Congress sought to foster "a minimal regulatory environment that promotes investment and innovation in [the] competitive market" for communications services.).

marketplace, rather than by governmental regulation”^{33/} Further, the FCC has recognized that unnecessary regulation in a competitive market harms consumers and reduces competition by imposing significant additional costs on carriers and their customers,^{34/} impeding carriers from quickly introducing new services in response to customer demands and opportunities created by technological developments, reducing the ability of carriers to respond quickly to competitors’ advanced services offerings and tailor their own offerings to meet customers’ needs, and diminishing their ability to reduce prices and improve service in response to competitive pressures.^{35/}

B. No Provision of the Act Supports Regulation of Handset Exclusivity Agreements Between Manufacturers and Carriers.

Finally, no provision of the Communications Act authorizes the Commission to regulate the terms of handset exclusivity agreements designed to protect innovation and the development

^{33/} Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd. 19898, 19902 ¶ 9 (1999) (citing the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)); *see also* Report and Order, *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd. 7025, 7030, 7031-32 ¶¶ 8, 10 (1995) (“Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.”)

^{34/} First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 85 F.C.C.2d 1, 6 ¶ 14 (1980), *rev’d on other grounds*, *MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, 3288 ¶ 27 (1995) (“*AT&T Non-Dominance Order*”).

^{35/} Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd. 27000, 27014-15 ¶ 26 (2002); *see also AT&T Non-Dominance Order* at 3288 ¶ 27 (regulation can “inhibit[] [a carrier] from quickly introducing new services and from quickly responding to new offerings by its rivals” and “imposes compliance costs on [regulated carriers] and administrative costs on the Commission”).

of new technology. As commenters AT&T, Sprint Nextel, and Verizon Wireless explain in detail,^{36/} RCA's search for a basis for regulatory authority within provisions such as Sections 201, 202, and 254 of the Communications Act or Title I stretches these provisions beyond their breaking point – and still fails.

First, although RCA cites Title II provisions to argue that handset exclusivity agreements amount to unreasonable discrimination in the provision of wireless service, these sections of the Act govern the provision of *service* to consumers and do not address the contractual provisions between handset manufacturers and wireless carriers. This likewise makes Section 254, which ensures comparable access to and rates for telecommunications *services*, inapplicable. And these provisions are likewise inapplicable on the merits: Section 202 prohibits wireless carriers from offering service to similarly situated customers at unreasonably different rates or terms;^{37/} it does not prohibit a carrier from seeking to distinguish its own service from that of other competing carriers. And Section 254 requires “reasonable comparability” – a standard which, even if applicable here, could not reasonably be interpreted to require that every customer everywhere be permitted to obtain the precise same handsets from every single available carrier.

Likewise, the Commission's Title I ancillary jurisdiction provides no basis for regulation here. The Commission's ancillary jurisdiction is “contingent on . . . specifically delegated powers under the Act,” and as a result, “each and every assertion of jurisdiction over [an ancillary activity] must be independently justified as reasonably ancillary to” a specifically

^{36/} See Comments of AT&T at 27-36; Comments of Sprint Nextel at 13-19; Comments of Verizon Wireless at 4-11.

^{37/} See *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); see also AT&T Comments at 28; Sprint Comments at 14.

delegated Commission power.^{38/} No provision of the Act provides a basis for the Commission to assert jurisdiction over the distribution of wireless handsets.^{39/} Accordingly, there is no support for any assertion of ancillary jurisdiction in this case.

In short, even if the FCC had the legal jurisdiction to regulate exclusive handset arrangements – which it does not – prior Commission findings and both the FCC’s and the Act’s clear policies preclude a sudden dive into regulatory intervention absent a showing of significant market failure and consumer harm. Neither is present here.^{40/}

CONCLUSION

The Commission should not open a new regulatory front in order to police or even terminate a practice that has produced a surfeit of exciting devices at breakneck speed over the past few years and promises to continue to do so in the future. The wireless handset market is innovative and evolving in exciting ways for the benefit of consumers. Now is not the time to

^{38/} *National Association of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 613 (D.C. Cir. 1976).

^{39/} While Section 1 of the Act provides the Commission jurisdiction to regulate wireless service and wireless handsets *while transmitting*, it does not provide a grant of authority to regulate contracts governing the distribution of handsets long before any transmission takes place – especially when such contracts have no effect on any entity’s ability to transmit any service using any available equipment of their choice. *See* 47 U.S.C. §§ 151, 153(33); *see also* Sprint Nextel Comments at 18-19; Verizon Wireless Comments at 5.

^{40/} While RCA points to the FCC’s decision in the *MDU* and *MTE Orders* in an attempt to justify regulation, *see* RCA Petition at 13-14, those cases are inapposite. In the *MDU* and *MTE Orders*, the FCC found that regulation was necessary to prevent one competitor from foreclosing the ability of all others to provide *service* to a group of customers. *See* Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235 (2007) (“*MDU Order*”); Report and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd. 5385 (2008) (“*MTE Order*”). In contrast, exclusivity arrangements do not prevent carriers from competing to offer *service* to *any* customers in the wireless market.

undercut these developments with inflexible regulation. T-Mobile urges the Commission to reject RCA's petition.

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