

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of )

Wireless Telecommunications Bureau Seeks )  
Comment On Commercial Mobile Radio )  
Services Market Competition )

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WT Docket No. 09-66

**REPLY COMMENTS OF AT&T INC.**

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Pursuant to the Public Notice (“*Notice*”) released by the Wireless Telecommunications Bureau (“Bureau”) on May 14, 2009,<sup>1</sup> AT&T Inc. (“AT&T”) submits these reply comments.

**INTRODUCTION AND SUMMARY**

Searching for signs of effective wireless competition is like looking for hay in a haystack. Whether the focus is market structure, carrier conduct, consumer behavior, or market performance, confirmation of intense rivalry that benefits consumers by expanding and improving service offerings, promoting innovation and lowering prices is everywhere you look. Virtually all Americans can choose among competing carriers that have sunk enormous investments in infrastructure that must be constantly upgraded – a market structure that guarantees rivalrous behavior to attract and retain customers. Even in a weakened economy, wireless entry, expansion and broadband investment are at record levels. Every day brings new and improved services, prices, devices and applications as carriers scramble to optimize and differentiate their offerings. Customer satisfaction levels are the highest ever, and wireless consumers continue to demonstrate that they are well aware of, and willing to take full advantage

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<sup>1</sup> Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Commercial Mobile Radio Services Market Competition*, DA 09-1070, WT Docket No. 09-66 (rel. May 14, 2009) (“*Notice*”).

of, their many choices in the marketplace. Prices are falling, output is soaring, coverage and service quality are improving, and the pace of innovation is off the charts. The U.S. wireless industry is the envy of the rest of the developed world: least concentrated, lowest priced, most heavily utilized, and most innovative. Whether one sees the forest or proceeds tree by tree, there is simply no way to characterize this industry as anything but effectively competitive.

Those that claim otherwise and urge wholesale retreat from the regulatory environment that fuels wireless investment and competition do not seriously dispute the competitive facts, which speak for themselves. None urges an alternative definition of “effective competition” or any coherent explanation how the Commission could ignore that *all* of the economic indicators commonly employed to assess the effectiveness of competition point in the same direction: competition that is not just effective, but as intense and dynamic as in any capital-intensive industry anywhere. Instead, they complain that the four largest wireless carriers are fighting *too hard* to satisfy consumers, that this competition puts too much competitive pressure on smaller competitors, and that the Commission simply must put the brakes on this “unfair competition,” sacrificing the enormous consumer benefits it creates. But the few arguments marshaled in support of government neutralization of the competitive process lack any factual, economic or legal basis, and are foreclosed by the Commission’s core public interest mandate, which is to promote competition, not to protect individual competitors *from* competition.

The proponents of increased regulation rest their claims of ineffective wireless competition principally on misguided views of market concentration, claiming that “any HHI level above 1800 in any individual economic area (“EA”) indicates severely limited competition.”<sup>2</sup> This argument flies in the face of the most basic principles of industrial

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<sup>2</sup> CFA Comments at 5.

economics and decades of court and Commission precedent. The average HHI of the wireless industry has always exceeded 1800 – a level that requires *six* equal-sized competitors. But, as the Commission cautioned when it first reported CMRS HHIs, that is to be expected in an industry with the technological and economic characteristics of wireless.<sup>3</sup> Few capital-intensive industries sustain an HHI below 1800, yet many such industries, including wireless, are intensely competitive. Beyond that, the pro-regulation contingent completely misapprehends the relevance of market concentration in a competition analysis. As Dr. Katz explains in his attached declaration, and as the Commission itself has repeatedly recognized, a “high” market concentration alone does not demonstrate a lack of competition but is merely a trigger for further inquiry.<sup>4</sup> And, in the United States – the world’s least concentrated wireless marketplace, with three or more facilities-based competitors engaging in multi-dimensional competition for the business of virtually all Americans – any such further inquiry unquestionably confirms that customers are enjoying the benefits of intense competition.

Rhetoric about industry “hyper-consolidation” is equally misguided.<sup>5</sup> The average HHI estimated in the Thirteenth CMRS Report earlier this year was actually lower than reported two

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<sup>3</sup> See, e.g., *Ninth Report* ¶ 55 (“In industries where the scale of output at which a firm can fully exploit scale economies (the minimum efficient scale) is large relative to potential demand, there will be room in the market for only a small number of firms operating at the lowest possible cost. In theory, therefore, market concentration in such industries will tend to be high relative to industries characterized by greater potential demand or smaller minimum efficient scale”).

<sup>4</sup> Declaration of Michael Katz, ¶¶ 16-30, attached hereto as Exhibit A (“Katz Declaration”) (“Although widely used in the analysis of competition, measures of concentration suffer from several drawbacks that limit their usefulness or invalidate them as stand-alone indicators of competition”; rather “[a] complete competitive analysis must look beyond market share data and measures of concentration”). See also *Ninth Report* ¶ 55 (“it is worth noting that the economic literature does not provide a theoretical or empirical basis for the existence of any critical threshold level of concentration above which adverse competitive effects are likely”).

<sup>5</sup> See RTG Comments at 12.

years earlier (and unchanged from the previous year),<sup>6</sup> because merger activity has been accompanied by a whirlwind of entry and expansion. Moreover, the merger activity that has taken place raised competitive issues only in particular geographic areas, and those issues were fully addressed through divestiture commitments. Tellingly, no commenter even attempts to show any link between the consolidation that has occurred and any real world reduction in the effectiveness of wireless competition.<sup>7</sup>

The competition naysayers do correctly observe that recent consolidation has “disproportionately impacted rural consumers,”<sup>8</sup> but they are wrong about the direction of the impact. Recent efforts by larger carriers to expand their coverage in rural areas have dramatically *benefited* rural consumers, as the Commission ruled in its orders approving the acquisitions that enabled such expansion.<sup>9</sup> For example, AT&T’s wireless expansion into rural areas it previously did not serve has greatly increased the choices available to, and competition for the business of, millions of rural consumers. That, in turn, has spurred existing competitors to improve their own offerings, further benefiting rural consumers.

Beyond concentration and consolidation, those advocating a Commission finding of ineffective competition have little to say about actual marketplace conditions. They cannot deny that U.S. wireless prices are declining and are already the lowest in the industrial world by a

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<sup>6</sup> See *Thirteenth Report*, ¶ 46, Table 3.

<sup>7</sup> See Katz Decl. ¶ 20 (“[T]here is no catch-all theory that relates the strength and nature of competition to market shares and concentration, or to changes in concentration. Levels and trends in concentration have to be interpreted carefully based on the underlying drivers of those levels and trends.”).

<sup>8</sup> RTG Comments at i.

<sup>9</sup> See, e.g., *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, et al.*, 23 FCC Rcd. 17444, ¶¶ 119-120 (2008) (“*Verizon/Alltel Order*”) (merger “will benefit rural customers” in multiple ways, “including faster and more extensive deployment of wireless broadband service, seamless national coverage, improved customer care, and a greater variety of services, devices, and service plans”).

wide margin. So they complain that the average U.S. consumer spends a little more on wireless services annually than the average European. But that reflects nothing more than the economic fact that consumption increases when products and services are cheaper. Because wireless service is so much less expensive here, the average American talks nearly five times as much, sends twice as many text messages and is more likely to use a 3G device than the average European,<sup>10</sup> which only confirms that U.S. consumers are reaping enormous benefits from the effective wireless competition that the Commission's longstanding policies have created.

Complaints that many U.S. wireless carriers give their customers the *option* of obtaining a heavily-subsidized handset with pro-rated early termination fees are equally misguided.<sup>11</sup> Most customers choose to purchase a subsidized handset and those that do not can buy an unsubsidized handset, bring their own, or choose a prepaid or pay-as-you-go plan. That most consumers prefer a one, or more typically a two, year commitment no more impedes competition than do similar (or longer) commitments in numerous other industries – the automobile industry, to name one example, where leases are generally longer than one or two years. Indeed, industry churn statistics confirm that service contracts neither prevent consumers from switching nor relieve carriers from competitive pressure.

Advocates of re-regulation are thus reduced to hypothesizing criminal conduct: “parallel pricing” conspiracies.<sup>12</sup> These irresponsible (and entirely unsupported) allegations are refuted by the directly observable facts (*e.g.*, wide variation among the many wireless plans) and

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<sup>10</sup> See CTIA Comments at 51; Darren Murph, Study Says Americans Send Twice As Many Text Messages As Europeans, Twice As Prone To Thumb Failure, Engadget immobile (Dec. 5, 2008), available at <http://www.engadgetmobile.com/2008/12/05/study-sez-americans-send-twice-as-many-text-messages-as-european>; *Thirteenth Report* ¶ 227.

<sup>11</sup> See, *e.g.*, CFA Comments at 14-15.

<sup>12</sup> See *id.* at 8-9.

common sense (conspiracies to reduce prices are decidedly uncommon). There is simply no denying the mountain of evidence of intense price and non-price rivalry among U.S. wireless carriers or the complete absence of contrary evidence.

The naysayers' complaints are no less wide of the mark when it comes to innovation. The Consumer Federation of America, in particular, proclaims that the wireless marketplace is characterized by "explicit barriers to innovation."<sup>13</sup> Really? Most consumers would identify rapid, dramatic innovation as the *defining* characteristic of the U.S. wireless marketplace. As one commentator recently noted, U.S. wireless consumers are the beneficiaries of a "brutal technology competition that is making the chariot race in Ben Hur look like a stroll in the park,"<sup>14</sup> as all industry participants work frenetically to one-up each other. Competition hit a new level of intensity this past year, as wireless "apps" have taken off in popularity, and online stores proliferate to offer consumers tens of thousands of new ways to make their wireless devices even more useful. Some grumble that not every wireless device has every feature or runs every application and that carriers typically impose some limits on a customer's usage of the bandwidth that all users must share. But product differentiation and quality control are hallmarks of effective competition in the provision of technically complex products and services, not evidence of its absence.

In short, there are no serious arguments that wireless is not effectively competitive. Rather, these arguments are just a pretext for commenters' efforts to advance their own parochial business interests. It should thus come as no surprise that claims of a lack of competition are coupled with proposals to ban exclusive handset offers, extend automatic roaming requirements,

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<sup>13</sup> *See id.* at 2.

<sup>14</sup> Steven Levy, *Speed, Smarts Keep iPhone 3GS at the Front of the Mobile Race*, *Wired* (June 17, 2009), available at [http://www.wired.com/reviews/product/iphone\\_3gs](http://www.wired.com/reviews/product/iphone_3gs).

re-impose spectrum caps, and even mandate wireline special access rate reductions. Each of these efforts to avoid the pressures of competition is as meritless as it is out of place here.

First, claims that exclusive handset offerings are hindering wireless competition have it backwards. In competitive markets, firms work hard to differentiate themselves from their rivals. Exclusive offers are a key means of doing so. These arrangements are the fuel that sparks the virtuous cycle of innovation and response. The popularity of the iPhone and its innovative features and applications, for instance, has provoked an unprecedented competitive reaction. The marketplace is now awash with innovative devices that allow consumers to do things that no one even imagined just a year or two ago and that cost consumers less than previous, less capable devices. In the absence of the exclusive distribution arrangement between AT&T and Apple, though, this competitive frenzy would not have occurred, as competitors would have seen no need to develop a differentiating response in the marketplace. Indeed, it is now so clear that the success of the iPhone has energized competition, giving all consumers more and better choices, that even the opponents of exclusivity no longer seriously dispute it. Rather, they unabashedly plea for special protection *from* competition, arguing that, unless they are permitted to free-ride on the benefits of others' handset gambles (only the successful ones, of course), they simply cannot win and retain customers. Even if that were true, of course, it would in no way justify sacrificing consumers' interests, but, in all events, the facts tell a different story. The facts show that even the smallest wireless carriers offer a broad array of cutting-edge phones with all of the latest features and capabilities. And more than two years into the iPhone era which they claimed would put them under, rural and regional carriers are, as detailed below, actually reporting higher subscriber growth rates and margins than their larger competitors, aggressive expansion and 3G upgrades, and even their own exclusive offerings.

Second, there is no possible justification for the Commission to amend its roaming rules to provide automatic roaming rights to carriers that *already hold spectrum licenses* in the same service area. It would be hard to think of a more anti-investment policy. Requiring “in-market” roaming would relieve carriers of the need to build out their own networks and use their own spectrum. Meanwhile, carriers that do build out would be forced to facilitate what would amount to resale competition, which would burden their networks and create yet a further disincentive for a carrier to be the first to build. A new automatic data roaming requirement is equally unwarranted. Even if (contrary to fact) the Commission had authority to order information service roaming, any such requirement would create disincentives for carriers to make much-needed broadband investments.

Third, spectrum caps are yet another solution looking for a problem. The Commission eliminated spectrum caps in 2003, and the result has been unambiguously pro-competitive, allowing carriers to expand their in-network coverage and improve the quantity and quality of their services. No proponent of renewed spectrum caps has ever provided any evidence that the elimination of spectrum caps has harmed competition. Rather, those that support spectrum caps transparently seek a reduction in the competition for (and hence a lowering of the value of) spectrum.

Finally, Sprint tries to make this proceeding about *wireline* competition by repeating its baseless claims that the Commission should mandate wireline special access rate reductions. The record in the Commission’s special access docket overwhelmingly demonstrates that special access is robustly competitive, and that Sprint and other customers have lots of options (at falling prices) even for the lowest capacity circuits. It is for this reason that Sprint and its allies are fighting so hard in that proceeding to avoid having to submit data about their own networks and

special access options. Moreover, mandating massive rate reductions for special access would severely diminish the incentive of any carrier (incumbent or entrant) to build or upgrade the wireline broadband infrastructure that is so important to our nation's future, since huge rate reductions would eliminate any expected return from such investments. And Sprint's claims that special access rates are harming wireless competition are particularly disingenuous, given that Sprint concedes that the wireless marketplace is competitive, does not contend that AT&T or Verizon discriminate in favor of their wireless affiliates, and has hitched its broadband wagon to Clearwire, whose stated goal is to build and self-provide its own wireless backhaul.

**I. THERE IS OVERWHELMING EVIDENCE THAT THE UNITED STATES WIRELESS MARKETPLACE IS ROBUSTLY COMPETITIVE.**

The comments confirm that “the Commission should continue to consider a range of indicators” in determining whether there is effective wireless competition.<sup>15</sup> Although the Commission sought comment on whether it should attempt to “define effective competition in a more specific manner,”<sup>16</sup> no commenter, including those who question the competitiveness of the marketplace, has proposed any “more specific” definition of effective competition. Nor does any commenter seriously dispute the relevance of the established economic indicators that the Commission has always applied; to the contrary, the record establishes that the Commission's time-tested framework for consideration of those indicators is both rigorous and responsive to new data.<sup>17</sup> The Commission should therefore “continue to use the same approach for its 2009

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<sup>15</sup> *Notice* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *See* AT&T Comments at 8-15; Verizon Comments at 11-13 (noting that “[t]he Commission has performed an increasingly more rigorous analysis of the structure and performance of the wireless market” and describing the increasing detail and depth of analysis in the successive annual reports); CTIA Comments at 8-9 (urging the Commission to adhere to the approach “of the last thirteen consecutive dockets” and referencing “sources of information that will help both the Commission and Congress” understand the industry). *See also* Katz Decl. ¶¶ 29-30, 52-59.

review.”<sup>18</sup> The Commission’s four categories of established metrics – market structure, provider conduct, consumer behavior, and market performance – overwhelmingly demonstrate that the wireless industry “is robustly competitive in both rural and urban markets.”<sup>19</sup> As detailed below, commenters’ contrary claims reflect bad facts, bad logic or both.

**A. Market Structure Considerations Confirm That The Wireless Industry Is Highly Competitive.**

The structure of the U.S. wireless marketplace effectively *guarantees* intense competition: (i) the Commission has set aside enough spectrum to support multiple carriers throughout the nation; (ii) numerous carriers have made enormous investments to build out wireless networks; and (iii) to recover those investments carriers have no choice but to compete fiercely for customers. Because of far-sighted Commission policies, U.S. wireless customers “can choose from among multiple carriers who vie head-to-head to win their business,” and no single carrier holds even a remotely dominant share of the market.<sup>20</sup> More than 95 percent of the U.S. population can choose among three or more competing wireless carriers and nearly two-thirds can choose among five or more competing carriers.<sup>21</sup> No industrialized country can boast a wireless industry that is as well structured to promote competition.<sup>22</sup>

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<sup>18</sup> Verizon Comments at 11; *see also id.* at 13 (“The Commission’s current approach fully discharges its obligation under Section 332(c)(1)(C) of the Act”); CTIA Comments at 8 (“CTIA urges the Commission to retain its results-tested method for determining CMRS competition”).

<sup>19</sup> CTIA Comments at 8; Katz Decl. ¶¶ 52-59.

<sup>20</sup> CTIA Comments at 2, 5-6 (270 million U.S. wireless subscribers obtain service from more than 150 separate wireless licensees, and the largest market share of any carrier is 28.5%).

<sup>21</sup> *See* AT&T Comments at 19.

<sup>22</sup> CTIA Comments at 50 (citing Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11361, GN Docket No. 09-51, and WC Docket No. 07-52 (filed May 12, 2009)). There is also a “dynamic resale market” with over 43 MVNOs offering differentiated products and services to target specific market segments. *Id.* at 6-7.

The U.S. wireless marketplace also is open to new entry. The most dramatic example is Clearwire, a joint venture backed by Google, Intel, Sprint, and large cable companies that has acquired from scratch what it touts as “a nationwide spectrum portfolio” and is rapidly building a nationwide WiMAX network.<sup>23</sup> Even since the opening comments were filed, Comcast (following on the heels of other cable companies like Cablevision) has announced that it will begin offering wireless data services using Clearwire’s network.<sup>24</sup> As observers have noted, “through the Clearwire venture, cable companies like Comcast and Time Warner Cable Inc. . . . are trying to beat rivals [such as AT&T and Verizon] to market [with 4G services].”<sup>25</sup> Other cable giants, such as Cox Cable, are deploying their own 3G and LTE wireless networks to bring wireless broadband services to their customers.<sup>26</sup> And, as CTIA reiterates, many others are also either entering or positioned to enter, including EchoStar, Chevron, and Vulcan Ventures.<sup>27</sup>

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<sup>23</sup> See Verizon Comments at 8-10.

<sup>24</sup> *Comcast To Offer 4G Wireless Broadband Service*, CNET News (June 30, 2009) (“Comcast is getting into the wireless broadband business by bundling Clearwire’s 4G wireless service with its existing broadband products. [Comcast] will launch the new service in Portland, Ore. And it will expand the service to other Comcast cities later in the year, including Atlanta, Chicago, and Philadelphia. Clearwire’s plan has been to roll out its service nationwide.”); see also Vishesh Kumar, “Comcast to Offer Wireless Cards,” Wall St. J., p. B5 (June 30, 2009), available at <http://online.wsj.com/article/SB124630057671269255.html?ru=MKTW#mod=MKTW> (“Comcast Corp. said it will begin offering wireless-broadband cards for laptop users in Portland, Ore., in what the cable operator is billing as a prelude to a wider wireless rollout”).

<sup>25</sup> Vishesh Kumar, “Comcast to Offer Wireless Cards,” Wall St. J., p. B5 (June 30, 2009), available at <http://online.wsj.com/article/SB124630057671269255.html?ru=MKTW#mod=MKTW>.

<sup>26</sup> *Huawei Seals Deal With Cox*, CNET News (Mar. 30, 2009) (Cox Communications . . . is building its own 3g cell phone network,” “which the Company says will be upgradeable to the 4G wireless technology LTE”), available at [http://news.cnet.com/8301-1035\\_3-10207290-94.html](http://news.cnet.com/8301-1035_3-10207290-94.html).

<sup>27</sup> CTIA Comments at 6; see also *id.* (describing recent significant spectrum acquisitions by T-Mobile, Leap Wireless, and Metro Communications).

Existing competitors are also expanding. AT&T and Verizon have documented their own aggressive efforts to increase coverage and bandwidth,<sup>28</sup> and expansion is by no means limited to larger carriers. Cricket just announced that its services are now available in the D.C. and Baltimore areas and that these launches “together with our other recent launches in Philadelphia and Chicago, are part of our overall plan to expand our coverage along the Eastern Seaboard and in other key markets across the U.S.”<sup>29</sup> MetroPCS has announced “major metropolitan area launches” “and continued growth of existing markets into adjacent communities,” and it has told investors it “is fully funded for this planned significant expansion with a substantial liquidity cushion.”<sup>30</sup> Cellular South’s web site contains press release after press release touting its expansion into new areas and its 3G upgrades, as part of its “more than \$350 million investment since 2006 in equipment, services and software to advance Cellular South’s wireless network.”<sup>31</sup>

Those who seek regulation of services for ideological or self-interested reasons search in vain for the dark cloud in the silver lining. For example, CFA and its allies argue that because the average CMRS HHI is above 1800, the wireless marketplace is, *ipso facto*, non-competitive. But this argument is based on a fundamental misunderstanding of the purpose of such market

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<sup>28</sup> AT&T Comments at 4-5, 29-34; Verizon Comments at 10-11.

<sup>29</sup> Leap Wireless, Press Release, Leap Brings Cricket Unlimited Wireless Services to Washington, D.C. and Baltimore (June 23, 2009), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-news>.

<sup>30</sup> MetroPCS, Raymond James Investor Conference, at 9 (March 9, 2009), available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-presentations>.

<sup>31</sup> Press Release, Cellular South, Cellular South Expands 3G High-Speed Mobile Broadband Services to Meridian, Lauderdale County (May 28, 2009), available at [https://www.cellularsouth.com/news/2009/20090528\\_Meridian.html](https://www.cellularsouth.com/news/2009/20090528_Meridian.html). There are numerous other Cellular South press releases reporting numerous other expansions and upgrades to its network, available at <https://www.cellularsouth.com/news/index.html>.

concentration metrics.<sup>32</sup> Concentration metrics like the HHI are merely a starting point for determining whether a market is competitive;<sup>33</sup> they are most useful where direct market-based evidence of competition is unavailable, such as in the context of horizontal mergers, where there typically is limited or no evidence as to how the marketplace will actually perform post-merger. But even in those circumstances, a relatively high concentration simply means that the regulator or court may decide to take a closer look at actual marketplace conditions, such as pricing, output, quality, investment, innovation, advertising, churn rates, and so on.<sup>34</sup>

It has thus been “many years since anyone knowledgeable about” competitive analysis “thought that concentration by itself imported a diminution in competition.”<sup>35</sup> Indeed, the current FTC and DOJ economists have strongly criticized any attempt to “link[] increases in concentration to declines in market performance,” explaining that “[i]n recent decades . . . industrial organization scholars and the courts have been more apt to stress that high concentration can be compatible with vigorous competition and efficient market performance.”<sup>36</sup>

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<sup>32</sup> See Katz Decl. ¶¶ 16, 23 (“measures of concentration suffer from several drawbacks that limit their usefulness or invalidate them as stand-alone indicators,” and “it would be a mistake to simply assume that the market in question is not effectively competitive” merely because HHIs exceed 1800).

<sup>33</sup> See *id.* ¶¶ 16-30.

<sup>34</sup> *Id.* For example, under the Horizontal Merger Guidelines, even where a merger is proposed in an industry with HHI measures above 1800, further examination of the marketplace is required, including entry, innovation, pricing, output, technology, potential for coordinated interaction, and other factors. Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, §§ 1.151-1522 (1992). See also Katz Decl. ¶ 25 (“A study of mergers reviewed but not challenged by the FTC between 1996 and 2003 showed that the mean HHI was in excess of 3000.”).

<sup>35</sup> *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7<sup>th</sup> Cir. 1994); *United States v. Syufy Enters*, 903 F.2d 659, 665-66 (9<sup>th</sup> Cir. 1990) (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share”) (emphasis in original).

<sup>36</sup> Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, at 4 (Working Paper, Nov. 25, 2008).

Study after study shows that “a number of U.S. industries – including several that nearly all would regard as competitive – are relatively concentrated” as measured by HHIs.<sup>37</sup>

High HHIs are particularly commonplace in markets that, like wireless, are characterized by high sunk costs and large economies of scale and scope.<sup>38</sup> “As consistently demonstrated by academic research, given the huge fixed and sunk costs inherent in the construction and commercial operation of communications networks, the equilibrium level of concentration of terrestrial firms in the local communications markets (voice, video, and data) will be relatively high.”<sup>39</sup> This is neither controversial nor novel. Indeed, every time the Commission has reported CMRS HHIs, it has cautioned that, where “the scale or output at which a firm can fully exploit scale economies (the minimum efficient scale) is large relative to potential demand, there will be room in the market for only a small number of firms operating at the lowest possible cost” and, as a result, “market concentration in such industries will tend to be high relative to industries characterized by greater potential demand or smaller efficient scale.”<sup>40</sup> And, when reviewing wireless mergers, the Commission employs a “screen” under which it has determined

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<sup>37</sup> George Ford, Thomas M. Koutsky, Lawrence J. Spiwak, *Competition after unbundling: entry industry structure, and convergence*, Federal Communications Law Journal, at 4 (March 2007) (For example, the household refrigerator and freezer business has an HHI of over 2000, silverware manufacturing has an HHI of nearly 2800, and glass container manufacturing has an HHI of 3000).

<sup>38</sup> See Katz Decl. ¶¶ 21-23, 30.

<sup>39</sup> George Ford, Thomas M. Koutsky, Lawrence J. Spiwak, *Competition after unbundling: entry industry structure, and convergence*, Federal Communications Law Journal, at 4 (March 2007).

<sup>40</sup> *Ninth Report* ¶ 55; see also *Tenth Report* ¶ 47; *Eleventh Report* ¶ 46; *Twelfth Report* ¶ 53; *Thirteenth Report* ¶ 48.

that where the merger will result in an HHI below 2800 and will not increase the HHI by more than 250, “there is clearly no competitive harm in today’s generally competitive marketplace.”<sup>41</sup>

In short, it is well recognized that the wireless marketplace is *expected* to have higher HHIs, and that is fully consistent with the fact that wireless is intensely competitive.<sup>42</sup> Ironically, it is clear that CFA does not believe its own rhetoric that market concentration is the be-all and end-all, for it touts European and Asian marketplaces, even though HHIs in those countries are far higher than those in the U.S.<sup>43</sup>

Certain commenters hyperventilate about supposed “hyper-consolidation” from recent mergers.<sup>44</sup> This rhetoric lacks any factual support. Indeed, HHIs for the wireless marketplace in the Commission’s reports have barely changed since 2005.<sup>45</sup> Further, each of the transactions that has taken place in recent years has been subjected to careful review by the Commission and the Department of Justice, and divestiture commitments have been made when competitive concerns about the impact of consolidations have been pressed. For example, in the Verizon-Alltel merger, the DOJ and FCC required, as a condition of their approval, that Verizon and

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<sup>41</sup> Memorandum Opinion & Order, *Applications of Wireless Telecommunications, Inc., Debtor-In-Possession, Assignor and The Vermont Telephone Company, Inc., Assignee*, 24 FCC Rcd 3177, ¶¶ 15-16 (2009).

<sup>42</sup> Katz Decl. ¶¶ 21-23, 30 (“although a wireless market with three or even five facilities-based providers may yield HHI concentration figures that reside in the ‘highly concentrated’ category of the *Merger Guidelines*, it would be a mistake to simply assume that the market in question is not effectively competitive. Rather sound economics mandates an analytical approach that is consistent with the Commission’s current methodology”).

<sup>43</sup> CTIA Comments at 53.

<sup>44</sup> RTG Comments at 12.

<sup>45</sup> *Thirteenth Report* ¶ 46, Table 3.

Alltel divest spectrum and other assets in every area where the merger would have reduced the number of wireless providers to three or fewer.<sup>46</sup>

More fundamentally, the mergers that have occurred have manifestly benefited consumers and intensified competition. Much of the recent consolidation in the wireless industry has occurred when a national or large regional carrier purchased a smaller carrier serving a rural or underserved area, bringing customers in those areas access to the same wireless services and products that are available to customers in the most densely populated areas, including access to next-generation networks, innovative voice and data plans, and many other services and features.<sup>47</sup> While certain rural providers and Washington-based groups complain about the heightened competition they are experiencing as a result of these mergers, *consumers* in those areas are not complaining.<sup>48</sup>

CFA argues (at 10) that, in competitive markets with economies of scale, one would expect concentration measures to be highest in the least densely populated EAs. It then claims, using raw population as a proxy for population *density*,<sup>49</sup> that the *Thirteenth Report* shows that both the highest and lowest concentration levels are in the least populated EAs “demonstrating

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<sup>46</sup> *Applications of Cellco P’ship d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Commc’ns Act*, 23 FCC Rcd. 17444, ¶ 101 (2008) (“*Verizon-Alltel Order*”) (requiring divestiture in “in any market in which the transaction would reduce the number of genuine competitors to three or fewer”).

<sup>47</sup> AT&T Comments at 24; *see also Verizon-Alltel Order*, ¶¶ 119-156 (2008) (these transactions “result in expanded and improved services and features for wireless customers, especially in rural areas,” “increased broadband deployment and next generation services,” “higher quality service,” and “increase[d] efficiency and . . . economies of scale and scope.”).

<sup>48</sup> Katz Decl. ¶¶ 14-15.

<sup>49</sup> CFA Comments at 5, n.10.

distortions compared to what would be expected from a competitive environment.”<sup>50</sup> But the Commission has already rejected this approach. Rather than relying on population figures as a proxy for population density, the Commission directly examined the relationship between concentration and population density (as well as per capita income, urbanization, the age distribution of the population, and the size and composition of the business sector).<sup>51</sup> The Commission found that relative concentration levels are consistent with economic theory.<sup>52</sup>

In short, the wireless marketplace structure is conducive to intense competition, and arguments to the contrary are meritless. Moreover, as discussed more fully below, every other measure that the Commission and economists use to gauge competition confirms that competition in the wireless marketplace is intense.

Nonetheless, there are a few measures the FCC can and should take that would remove regulatory barriers to even more intense competition. One such measure would be to issue an order in the pending Section 332(c)(B)(A) proceeding to ensure that “local ordinances and state laws” do not effectively block competitive entry.<sup>53</sup> As the record makes clear, “all CMRS providers, not just those in rural markets, are beginning to have problems with tower sitings” and “[n]o amount of broadband stimulus funding or good intentions of mobile broadband service providers can overcome local and state zoning restrictions specifically promulgated to limit the

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<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Thirteenth Report* ¶ 48.

<sup>52</sup> *Id.* (“[a] regression analysis of data at the EA level indicates that, consistent with economic theory, concentration in the mobile telephone market (measured by HHI) declines with increases in market size, population density, per capita income and percentage of the population living in urban areas”); *see also* Katz Decl. ¶ 48. CFA also wrings its hands over individual EAs with HHIs in the 4000-6000 range. But these are some of the most rural EAs in the country, such as Scottsbluff, Wyoming, Minot, ND, and North Platt, Colorado, where one would expect much higher concentration due to scale economies. *See id.* ¶ 21.

<sup>53</sup> RTG Comments at 8; AT&T Comments at 28-29.

speedy deployment of cell towers.”<sup>54</sup> The Commission should promptly address this growing problem. The Commission should also ensure greater regulatory certainty for wireless auction bidders, in the form of clear and secure spectrum rights,<sup>55</sup> and commenters agree that the Commission will eventually have to make more spectrum available for CMRS carriers.<sup>56</sup>

**B. Provider Conduct Unambiguously Confirms That The Wireless Marketplace Is Effectively Competitive.**

**Pricing Rivalry.** Those claiming ineffective competition have a difficult time with the pricing facts. As CTIA notes, “[p]rices continue to drop” and “the price per minute in the United States is the lowest of the 26 OECD countries measured.”<sup>57</sup> Competition has pushed carriers to offer innovative pricing plans for voice and data services “to satisfy all levels of subscriber usage, including friends and family plans, free long distance plans, national and local plans and unlimited calling and data services options.”<sup>58</sup> In addition, AT&T has introduced family plans, a plan tailored specifically for seniors, and other consumer-friendly features such as free roll-over minutes, free nights and weekends, and free intra-network calling. AT&T and other carriers also have introduced a variety of unlimited, flat-rated calling plans; indeed, “Cricket’s entire business model is based on flat-rate, unlimited calling within its coverage network.”<sup>59</sup> Carriers likewise have been introducing innovative rate plans for text messaging, including flat-rated plans, with

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<sup>54</sup> RTG Comments at 8.

<sup>55</sup> AT&T Comments at 30.

<sup>56</sup> *Id.* at 29-30; CFA Comments at 26; Cricket Comments at 10; MetroPCS Comments at 20-21.

<sup>57</sup> CTIA Comments at 2.

<sup>58</sup> *Id.* at 24; *see also id.* (“The bottom line is that, through tiered pricing, the wireless industry accommodates consumers’ needs across all income and usage levels”).

<sup>59</sup> *Id.* at 25; *see also id.* at 24-29 (detailing numerous plan offerings, including “pay as you go” plans, “less expensive or targeted unlimited plan offerings,” and bundled services plans); Verizon Comments at 18 (detailing the emergence of non-contract broadband service alternatives).

the result that the amount consumers pay for text messaging has been plummeting, while usage increases dramatically. In just the last year, the number of text messages on AT&T's network has doubled.<sup>60</sup> Carriers are also increasingly offering prepaid or pay-as-you-go plans, which are placing even more competitive pressure on rates and provoking yet more competitive responses from all carriers.<sup>61</sup> For example, Tracfone recently introduced a pre-paid plan offering 1000 voice minutes, 1000 text messages, and 30 Mbps of data for \$30 per month, and for an additional \$15 per month, Tracfone offers unlimited voice and text messaging with this plan.<sup>62</sup>

Incredibly, amidst this diverse array of pricing plans, CFA purports to find not rivalry but “parallel pricing.” This claim is absurd. Not only do rates and terms vary widely from carrier to carrier, but those offers are constantly changing in response to competition. As shown in Attachment B, of dozens of plans offered by the four largest carriers, there are very few, if any, that provide the same service offering for the same price.<sup>63</sup> This should come as no surprise. As AT&T explained in its opening comments, coordinated “parallel” pricing is simply implausible in dynamic industries like wireless, in which providers offer a large range of products and bundles (*e.g.*, voice, texting, Internet, email, music, video, GPS) with multiple pricing variables (*e.g.*, rollover minutes, free night and weekend calling, free in-network calling, and handset subsidies).<sup>64</sup>

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<sup>60</sup> See CTIA Comments at 24-29; AT&T at 31-32 & n.58.

<sup>61</sup> CTIA Comments at 28-29; Verizon Comments at 18.

<sup>62</sup> Ken German, *TracFone Offers \$45 Unlimited Plan*, CNET News (July 2, 2009), available at [http://news.cnet.com/8301-17938\\_105-10276677-1.html](http://news.cnet.com/8301-17938_105-10276677-1.html).

<sup>63</sup> As CFA itself concedes, the national carriers' minute plans bottom out at minutes ranging from 200 to 450, depending on the carrier, and the prices for those plans range from about \$30 to \$40. CFA Comments at 8. See also Katz Decl. ¶ 47.

<sup>64</sup> See AT&T Comments at 20-21 & nn.35-36; see also Katz Decl. ¶ 47.

CFA claims that national wireless providers in the U.S. “offer little flexibility and consumer choice” because their “monthly plans offer a minimum of 200-450 minutes for \$29.99 to \$39.99” which, according to CFA, forces customers to purchase more services than they want. But, amidst exploding demand for wireless services, CFA’s claim that customers want monthly plans with fewer minutes is a makeweight. The average wireless customer in the U.S. uses more than 800 minutes per month. Equally important, CFA ignores that the national carriers not only offer dozens of prepaid and postpaid plans with varying minutes, but various “pay-as-you-go” plans. Indeed, any review of the carriers’ websites vividly illustrates that the national carriers offer much more choice and flexibility in rate plans than the smaller carriers, which typically offer only a handful of options.

CFA is also incorrect when it claims (at 9) that U.S. prices do not reflect the economies of scale associated with the growth in wireless customers since 2000. Between 2000 and 2007 (the most recent data year), the number of voice minutes increased by 3.01 times and the number of voice subscribers increased by 2.4 times<sup>65</sup> – but prices for voice services were 3.6 times lower in 2007 than they were in 2000.<sup>66</sup> Thus, contrary to CFA’s assertion, prices actually fell by more than call volumes or subscribership increased.

CFA’s claims of data service “parallel pricing” are equally specious. First, it claims that the mere fact that carriers have “overage” charges for heavy data use in flat-rate data plans proves a lack of competition. As with voice plans, however, the actual facts reflect intense rivalry; carriers offer many different types of data plans with different usage thresholds, flat rates, and overage charges. Moreover, there can be no serious argument that the mere existence

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<sup>65</sup> *Thirteenth Report*, Table 12 (showing minutes of use for 2000 and 2007); *compare Seventh Report*, at 21 with *Thirteenth Report* ¶ 197 (showing increase in subscribers).

<sup>66</sup> *Thirteenth Report*, Table 12.

of caps on usage in data plans somehow reflects a lack of competition. Network management is a central issue in wireless networks. All portions of the wireless network are shared among users, and as a result, any user's individual actions can affect the quality of service for all other users of the bandwidth (and can even result in blocked calls). This creates a heightened need for active network management on wireless networks, and wireless providers must take far greater care than wired broadband providers to limit use of bandwidth-intensive applications or devices that occupy channels even when they are not actively in use. Accordingly, the fact that AT&T and other carriers price their data services in ways that encourage users to internalize the cost of their usage is unremarkable.<sup>67</sup>

CFA's claim that, "at 20 cents per message," "[p]rices for text messages services reflect a failure of competition,"<sup>68</sup> is even more disingenuous. Here too variations in rate plan offerings refute any suggestion that carriers coordinate prices.<sup>69</sup> More fundamentally, the vast majority of text messages transmitted by large carriers are sent under one of their plans offering a fixed number of (or unlimited) messages. Indeed, more than 99% of the messages that AT&T customers send and receive are under fixed-rate pricing plans. The price per message in these pricing plans is just over a penny, not 20 cents. And those per-message prices have been plummeting: AT&T's prices were about three times higher in 2007 (about 4.3 cents per

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<sup>67</sup> CFA's specific attack on AT&T's "overage charges" for certain data services is also meritless. CFA focuses on AT&T's \$60 Data Connect plan that allows customers to use their laptop computers to access the Internet over AT&T's wireless broadband network. This plan allows customers to download 5 Gigabytes of data each month, a level that very few AT&T customers even come close to reaching.

<sup>68</sup> CFA Comments at 11.

<sup>69</sup> See, e.g., Testimony of Randall S. Milch, Executive Vice President and General Counsel of Verizon Communications Inc., before the Senate Judiciary Committee, Subcommittee of Antitrust, Competition Policy, and Consumer Rights, June 16, 2009, Appendix at 5-7, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3917>.

message) than they are today (1.4 cents per message).<sup>70</sup> That is a triumph of competition, not a failure.<sup>71</sup>

**Non-Pricing Rivalry.** The comments also document unprecedented non-price rivalry.<sup>72</sup> Carriers across the industry are working harder than ever to improve service quality, and customer satisfaction is at an “all-time high.”<sup>73</sup> Carriers also advertise heavily in all types of media outlets.<sup>74</sup> In addition, they continue to make substantial investments in existing and next-generation networks “[a]t a time when the U.S. economy is struggling through a recession;” as CTIA notes, in 2008, U.S. carriers reported incremental capital expenditures in their operational systems of \$20.17 billion.<sup>75</sup> Much of this investment has been targeted at developing the infrastructure for wireless broadband services, which are experiencing explosive growth.<sup>76</sup> Here, again, the U.S. leads the world. U.S. LTE deployment is scheduled to begin next year,<sup>77</sup> while large European carriers do not expect to begin rolling out LTE before 2012.<sup>78</sup>

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<sup>70</sup> *See id.*; *see also* Written Statement Of Wayne Watts (AT&T), before the Senate Judiciary Committee, Subcommittee of Antitrust, Competition Policy, and Consumer Rights, June 16, 2009, Appendix at 5-7, *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?id=3917>.

<sup>71</sup> *See* Katz Declaration ¶ 49.

<sup>72</sup> CTIA Comments at 29 (“[c]ompetitive forces continue to drive carriers to modify other features and policies”).

<sup>73</sup> Verizon Comments at 3 (citing Press Release, *ACSI: Customer Satisfaction Rises Again, Now Joined by Other Economic Indicators* (May 19, 2009), *available at* [http://www.theacsi.org/images/stories/images/news/0901q\\_Press\\_Release.pdf](http://www.theacsi.org/images/stories/images/news/0901q_Press_Release.pdf)).

<sup>74</sup> CTIA Comments at 7-8.

<sup>75</sup> *Id.* at 12.

<sup>76</sup> *See id.* at 17-23 (detailing current high-speed offerings of various carriers and planned, next-generation upgrades); Verizon Comments at 8-10 (describing plans of Clearwire and other providers). CTIA also documents the extraordinary growth in the number of cell sites in the United States (reaching 242,000 at the end of 2008, one for every 1,116 estimated wireless subscribers). CTIA Comments at 21-22.

<sup>77</sup> *See, e.g.*, Christine Gallen, *A Dozen Operators Launching LTE Services in 2010*, ABI Research (June 16, 2009), *available at* “<http://www.abiresearch.com/press/1442->

But reciting these facts only scratches the surface, because non-price rivalry among carriers today is driving innovation and choice at rates never before seen in the wireless industry. Carriers, device manufacturers, and applications developers are scrambling to offer new features and capabilities on an almost daily basis. AT&T is a perfect example. AT&T's customers have an incredible range of choice for devices; they can either bring their own phone or choose one of the scores of handsets AT&T offers, which provide an enormous variety of cutting-edge features, functions, and operating systems (Blackberry, Mac OS X Leopard, Microsoft Windows Mobile, Palm OS, and Symbian). Over the past year, competition for applications has also intensified greatly (driven prominently by Apple's iTunes Store), and developers are making thousands of applications available for all platforms.<sup>79</sup> There are now more than 50,000 applications available at the iTunes Store alone, and there were over one billion downloads in its first nine months of operation.<sup>80</sup> AT&T and other carriers are further feeding this innovation and competition by providing software development kits to help independent programmers develop third-party applications.<sup>81</sup>

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A+Dozen+Operators+Launching+LTE+Services+in+2010; Verizon Press Release, Verizon Wireless Fosters Global LTE Ecosystem as Verizon CTO Dick Lynch Announces Deployment Plans (Feb. 18, 2009), *available at* <http://news.vzw.com/news/2009/02/pr2009-02-18.html>; AT&T Press Release, AT&T to Deliver 3G Mobile Broadband Speed Boost (May 28, 2009), *available at* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26835>.

<sup>78</sup> Lynnette Luna, *Vodafone: No LTE in Europe before 2012*, Fierce Wireless (July 9, 2009), *available at* <http://www.fiercebroadbandwireless.com/story/vodafone-no-lte-europe-2010/2009-07-09>.

<sup>79</sup> AT&T Comments at 36-37; *see* CTIA Comments at 38-40 (listing and describing existing and planned applications stores).

<sup>80</sup> Press Release, *Apple, Apple Sells Over One Million iPhone 3GS Models* (June 22, 2009), *available at* <http://www.apple.com/pr/library/2009/06/22iphone.html> (there are “over 50,000 applications available from Apple’s revolutionary App Store”).

<sup>81</sup> AT&T Comments at 38-40.

No commenter can dispute these facts; indeed, this extraordinary degree of non-price rivalry is readily apparent to any American. Undeterred, CFA complains that “the popular Skype VoIP program is not permitted to operate over AT&T’s 3G network.”<sup>82</sup> That is false. AT&T wireless customers are free to choose any of a wide array of handsets with various operating systems, features, functionalities and prices that support VoIP over AT&T’s 3G network.<sup>83</sup> The same is true of other carriers. Indeed, Skype’s own website lists nearly a hundred different wireless handsets that are compatible with its services, including devices that work with all of the major wireless carriers’ networks.<sup>84</sup> Consumers do not lack options to run Skype over 3G wireless networks, including AT&T’s network.<sup>85</sup>

CFA’s assertion that AT&T has chosen not to support “several” of the features of the new iPhone is also just plain wrong. There are only two features of the brand new iPhone that AT&T’s network does not *yet* support, MMS (text messaging with pictures, videos or other

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<sup>82</sup> CFA Comments at 12.

<sup>83</sup> For example, AT&T supports and markets numerous Windows Mobile handsets produced by Samsung, LG, HTC, Pantech, and Motorola, and any consumer who chooses one of these handsets can download Skype’s software to the handset and use it to make Skype calls over AT&T’s 3G network, which treats the Skype packets like other data packets, neither restricting nor prioritizing their delivery. See <http://www.wireless.att.com/cell-phone-service/cell-phones/index.jsp>; <http://www.skype.com/download/skype/windowsmobile>. See also Katz Decl. ¶ 45.

<sup>84</sup> See <http://www.skype.com/download/skype/mobile>; Katz Decl. ¶ 45. In addition to offering handsets that allow customers to run Skype on AT&T’s 3G network, AT&T offers, and many AT&T customers have chosen, handsets that include Wi-Fi compatibility. Customers with Wi-Fi access (including iPhone customers) can use VoIP on their handsets at locations with a Wi-Fi signal, including any one of AT&T’s more than 20,000 Wi-Fi hot spots.

<sup>85</sup> CFA focuses solely on the iPhone, which supports Skype calls using Wi-Fi connections, but not using AT&T’s 3G network. In so doing, CFA ignores that, for some handsets, especially iconic handsets like the iPhone, it is critical to ensure a uniform high level of performance and call quality. But call quality using Skype can vary greatly when using a 3G network, as Skype’s own website makes clear. <https://support.skype.com/faq/FA1011/Can-I-use-Skype-over-3G?frompage=search&q=3g> (although “[m]ost 3G networks . . . support Skype . . . call quality will vary depending on your network bandwidth and 3G usage by other users in your area.”).

media) and tethering (which allows customers to use the iPhone to connect laptop computers to the Internet over AT&T's 3G network). AT&T has announced that it will support both features in the near future, and that the MMS service will be provided at no additional cost.<sup>86</sup> But the fact that the best CFA can do is offer a couple of complaints about a couple of features on one of the more than 600 wireless devices available today – indeed, it often seems as if commenters equate the iPhone with the entire wireless marketplace – is powerful confirmation of an intensely competitive U.S. wireless marketplace.<sup>87</sup>

**C. Customer Behavior Also Unambiguously Shows That The Wireless Marketplace Is Effectively Competitive.**

Customer conduct provides additional real world evidence that wireless markets are highly competitive. The record demonstrates that consumers have access to a wealth of information that enables them to make informed choices among the many service providers and service plans available to them, and that consumers are ready, willing, and able to change providers in order to obtain the best possible value proposition.<sup>88</sup> Not only are the rates, terms and conditions of the various service plans readily accessible on carriers' web sites, but, so too, are resources, such as on-line coverage mapping programs which can be used to determine the

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<sup>86</sup> AT&T, *iPhone 3GS Frequently Asked Questions*, available at <http://www.wireless.att.com/learn/internet/iphone-faq.jsp> (“Later this summer, as part of the 3.0 software, AT&T will make multimedia messaging (MMS) available at no extra cost to customers with a text messaging bundle. And, in the future, AT&T will offer tethering capability for iPhone 3G S and iPhone 3G.”).

<sup>87</sup> CFA's assertion that AT&T's policy of not permitting customers to stream television stations over its 3G network reflects a lack of competition in the industry is likewise baseless. This is simply a bandwidth issue; it says nothing about the level of competition. Streaming television is a much more bandwidth-intensive activity than simply purchasing and downloading a television program or movie or watching Internet video clips. And it is entirely appropriate to impose limits in the terms of service to protect the quality of service for all customers.

<sup>88</sup> CTIA Comments at 35 (“[a] multitude of resources are available to help consumers measure their wireless options and determine which may best meet their needs including a wealth of publicly available information on carrier operations from the providers themselves”).

level of service coverage in specific areas, some of which even “includ[e] ‘drill-down’ capabilities to the neighborhood and street level.”<sup>89</sup> Consumer resources also include third-party sources that “offer reviews and provide guidance on how to shop for a service provider and choose a mobile phone.”<sup>90</sup>

That consumers avail themselves of this information and are willing and able to change providers to get a better deal is evidenced by the significant customer churn rates in the wireless industry.<sup>91</sup> Recent developments, such as pro-rated early termination fees and “money back guarantee” policies will undoubtedly make it even easier for consumers to switch carriers.<sup>92</sup> The actions of wireless consumers speak for themselves and demonstrate that carriers must compete hard to win and keep customers.

CFA tries to turn these facts upside down as well, arguing that there are “practical impediments to consumer[s] switching” wireless carriers, including early termination fees (“ETFs”) and contract extension requirements. To begin with, the notion that such measures permit carriers “to divide customers among themselves without the threat of suddenly losing them to a competing CMRS provider” does not pass the most basic reality check, in light of the significant churn rates that prevail in the industry. But even beyond that obvious flaw, CFA’s arguments fail.

For example, CFA claims that ETFs “lock in” customers by “penaliz[ing]” them for switching carriers. But ETFs are triggered only when a customer obtains a subsidized handset

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<sup>89</sup> *Id.* at 35-36.

<sup>90</sup> *Id.* at 36 (citing [www.myrateplan.com](http://www.myrateplan.com), [Phonescop.com](http://Phonescop.com), [MountainWireless.com](http://MountainWireless.com), J.D. Power and Associates, and *Consumer Reports*).

<sup>91</sup> *See* AT&T Comments at 48.

<sup>92</sup> CTIA at 30-31 (detailing carriers that offer 30-day cancellation periods and refunds of activation fees for customers who are not satisfied).

(sometimes for free) and/or subscribes to a subsidized or promotional service offering.<sup>93</sup> In such circumstances, the provider effectively gives the customer a substantial up-front discount, and, in return, the customer agrees to stay with the service for a fixed period so that the carrier can recover that up-front cost through the monthly subscription. The customer also agrees that if the customer cancels service early, the customer will pay an ETF to offset a portion of the up-front subsidy not yet recovered by the provider. Thus, the ETF is not a “penalty” designed to “lock in” a customer – it *expands* consumers’ options by making high-end expensive handsets or other services available with less money down.<sup>94</sup> In that respect, handset subsidies and the ETFs that facilitate them have played an important role in making wireless services accessible to all Americans. It is hard to understand why giving customers the *option* of obtaining a subsidized handset in return for a service commitment and ETF is in any way contrary to the public interest. In all events, contrary to the rhetoric of some comments, ETFs are set at eminently reasonable levels, and AT&T and other carriers pro-rate ETFs. For example, AT&T’s maximum ETF is \$175, which is less than the subsidy AT&T provides for some devices, and AT&T reduces the ETF by \$5 for each month that the customer continues to subscribe to AT&T’s service.

CFA’s allegation that providers secretly extend customer contracts or force customers to extend contracts when they change plans or upgrade phones is also false. First, AT&T never extends a contract without permission from the customer. Second, as explained on AT&T’s web

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<sup>93</sup> Many customers are not even subject to ETFs, including customers with pay-as-you-go plans, customers who bring their own phone to the network, customers who pay full price (rather than a subsidized price) for a phone and service, and customers whose existing contracts have expired. In addition, for AT&T, ETFs are inapplicable for the first 30 days of most service, under AT&T’s 30-day worry-free return policy.

<sup>94</sup> See Katz Decl. ¶ 51.

site, customers may change their plans (up or down) without extending their contracts.<sup>95</sup> Third, consumers do not have to extend their contracts when they switch phones, unless the customer receives an up-front subsidy on the new phone, in which case, to receive that subsidy, the customer will be subject to a new term contract.

**D. Market Performance Measures Show That The Wireless Marketplace Is Effectively Competitive.**

Finally, marketplace outcomes, “the ultimate test of effective competition,”<sup>96</sup> overwhelmingly point to effective wireless competition. As the comments make clear, all of the market performance metrics the Commission has previously examined – “pricing levels and trends, subscriber growth and penetration, MOUs, innovation and diffusion of services, and quality of service”<sup>97</sup> – show effective and ever-increasing competition.

U.S. wireless prices continue to fall and are among the lowest in the world.<sup>98</sup> Indeed, in the days since comments were initially filed in this proceeding, the Wall Street Journal reported on yet another new low price offering that has investors “concern[ed] over a stepped-up price war” among wireless carriers.<sup>99</sup> At the same time, output continues to soar. The 270 million

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<sup>95</sup> See <http://www.wireless.att.com/answer-center/main.jsp?t=solutionTab&solutionId=KB61945> (“Customers who change rate plans to any one of the company's standard wireless plans, during the course of their contract, will not be asked to extend their existing contract or enter into a new one.”).

<sup>96</sup> *Thirteenth Report* ¶ 187.

<sup>97</sup> *Id.*

<sup>98</sup> See CTIA Comments at 2.

<sup>99</sup> Roger Cheng, *New Low Wireless Rate Reignites Fear Over Price War*, Wall Street Journal (July 2, 2009), available at [http://online.wsj.com/article/BT-CO-20090702-714020.html?mod=dist\\_smartbrief](http://online.wsj.com/article/BT-CO-20090702-714020.html?mod=dist_smartbrief); see also R.W. Baird, *Wireless Carriers Circling the Ring*, Barrons (July 2, 2009), available at [http://online.barrons.com/article/SB124648889886482875.html?mod=googlenews\\_barrons](http://online.barrons.com/article/SB124648889886482875.html?mod=googlenews_barrons).

wireless subscribers at the end of 2008 is a 15 million increase from just one year earlier.<sup>100</sup> The wireless penetration rate has rocketed upwards since 1985, and has now reached 87.8 percent.<sup>101</sup> U.S. wireless consumers generated 2.2 trillion minutes of use, 1.005 trillion text messages, and 14.9 billion MMS messages in 2008 – all significantly up from the year before.<sup>102</sup> Nearly 20 percent of U.S. consumers now live in households with only wireless service, as compared to less than 6 percent of U.S. households in 2005.<sup>103</sup> Customer satisfaction in the quality of wireless service is at all-time highs.<sup>104</sup>

Wireless broadband growth is particularly striking, and is a direct result of the significant investments by carriers in their existing and next-generation broadband infrastructure. Notably, “mobile wireless broadband Internet access is the fastest growing segment of the U.S. broadband market.”<sup>105</sup> Indeed, from December 2006 to December 2007, wireless broadband additions far exceeded the additions from other modes of broadband (ADSL, cable, and other) combined.<sup>106</sup> Wireless consumers “have a number of options for mobile Internet access,” including metered services and all-you-can-eat plans (either on a month-to-month basis or longer terms contracts), which enable them “to tailor their wireless service plans to their broadband needs.”<sup>107</sup> The

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<sup>100</sup> CTIA Comments at 42.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 43.

<sup>103</sup> *See* AT&T Comments at 2.

<sup>104</sup> Verizon Comments at 3

<sup>105</sup> CTIA Comments at 46.

<sup>106</sup> *Id.* at 47 (Citing FCC Report, *High-Speed Services for Internet Access: Status as of Dec. 31, 2007*, January 2009).

<sup>107</sup> *Id.* at 48.

proliferation of wireless broadband is of particular benefit to consumers in rural and high-cost areas that may have limited access to wireline broadband services.<sup>108</sup>

CFA recognizes that the prices American consumers actually pay for wireless services have been going down, but contends that U.S. prices must be too high because U.S. consumers pay more than in “most other developed nations” – a claim that is based on an assertion that in 2005, U.S. customers paid fifteen percent more per year than the average paid by customers in OECD countries (\$506 in the U.S. compared to \$439 in other countries).<sup>109</sup> This argument is absurd. According to the Commission’s *Eleventh Report*, the average number of minutes of calls in the U.S. was *four times higher* than the average in OECD countries in 2005.<sup>110</sup> If U.S. customers (in 2005) spent about 15 percent more per year to obtain at least four times more service, that’s a *good* thing.

CFA also was the only commenter to support using “profits” as a measure of marketplace performance. CFA’s entire argument is that, although prices admittedly are declining and usage is increasing, the market could still be noncompetitive if costs are declining more quickly than prices (and if carriers are earning persistent “supracompetitive profits”). CFA cites no evidence

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<sup>108</sup> *Id.* at 49.

<sup>109</sup> CFA Comments at 8.

<sup>110</sup> See *Eleventh Report* ¶ 192 & Table 12 (“The United States widened its lead in mobile voice usage in 2005, with average MOUs estimated to be approximately 798 per month in the fourth quarter of 2005. This compares with an average across Western Europe of 142.6 MOUs, and estimates in individual countries that range from a high of 279 in Finland to a low of 81 in Germany. MOUs in comparable Asian-Pacific countries were generally higher than the Western European average, but still well below the U.S. figure, including Japan (147), Australia (178), South Korea (321.6), Hong Kong (395), and Singapore (313).”). The Commission’s *Eleventh Report* contains the number of minutes for only a subset of the OECD countries on which CFA’s comparison of annual spending is based. According to the 2005 OECD report relied on by CFA, the number of minutes in the U.S. was closer to *thirty* times higher than the average of the other OECD countries. See Organization for Economic Co-Operation and Development, *OECD Communications Outlook 2006*, Table 4.10 (2007).

to suggest that this is the case, and as Dr. Michael Katz explains in his accompanying declaration, there are several fatal deficiencies in CFA’s quest to rely upon carriers’ “profits.”<sup>111</sup> As Dr. Katz notes, “the economic literature has long recognized” that there are insoluble problems “inherent in trying to infer economic profits from accounting measures of profits.”<sup>112</sup> Moreover, even if profits are high, “persistently high economic profits can be consistent with competitive markets” – especially if companies are achieving those profits through “innovation and other forms of successful, but risky investments.” As Dr. Katz notes, “for these reasons,” regulators and competition authorities “generally do not focus on accounting measures of profitability.”<sup>113</sup> And the Lerner Index measure of marginal cost margins is particularly poorly suited to capital intensive industries like wireless.<sup>114</sup>

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<sup>111</sup> See Katz Decl. ¶¶ 31-39.

<sup>112</sup> *Id.* ¶ 32. For example, “asset valuation from an accounting perspective does not necessarily correspond to the true economic valuation of assets and investments,” and thus “accounting treatment of capital investment often yields results that have little economic meaning” – a particular problem in a capital-intensive industry like wireless. *Id.* ¶ 33. Similarly, “it is essential to adjust the cost of capital to account for the degree of risk associated with the investment when calculating economic profits” but “proper adjustment for risk can be very difficult, and the failure to account properly for investment risk will yield inaccurate estimates of economic profits.” *Id.* ¶ 34. In addition, “[e]conomies of scope make it socially efficient and commercially profitable for suppliers [such as CMRS carriers] to become multi-product firms,” and “this fact raises complex issues about the sharing of common costs across different services, which makes the calculation of profits for an individual service particularly difficult.” *Id.* ¶ 35.

<sup>113</sup> Katz Decl. ¶ 36.

<sup>114</sup> See *id.* ¶ 37 (“It is well-accepted among economists . . . that the Lerner Index can be subject to serious misinterpretation in a marketplace such as CMRS that is characterized by significant fixed costs and scale economies. In such a setting, market participants must set prices above marginal cost—perhaps substantially so—in order to cover fixed costs. Requiring firms to price at or near marginal cost in order to be considered competitive would set the wrong standard. In an industry with economies of scale, firms pricing at marginal cost would suffer economic losses and would not be commercially viable. Indeed, in the presence of economies of scale, a firm could have a Lerner Index of 70, 80 percent, or more and still be suffering economic losses. In addition, as discussed earlier in this section. . . . For these reasons, the Lerner Index can be a very poor indicator of economic profits.”)

## **II. EXCLUSIVE HANDSETS, AUTOMATIC ROAMING, SPECTRUM CAPS AND SPECIAL ACCESS RATES RAISE NO ISSUES RELATING TO COMPETITION.**

Some commenters view this proceeding as a proper forum to discuss anything *but* wireless competition. They have chosen to advocate their entire regulatory agendas – wireless and wireline – most of which constitute self-interested pleas for protection from competition. Thus, various commenters ask for restrictions on exclusive handsets, expanded automatic roaming, the reimposition of spectrum caps, and increased regulation of (wireline) special access services.

The Commission is already examining each of these issues in other pending proceedings. The commenters here repeat the same old arguments by rote, with no acknowledgement that those arguments have been repeatedly discredited and, in many cases, specifically rejected by the Commission. AT&T will not repeat the extensive showings it has made in the other proceedings, but instead will briefly address each of these claims.

### **A. Exclusive Handset Offers Are Pro-Competitive.**

A number of commenters – led by Cellular South and MetroPCS – argue that exclusive handset arrangements are hindering wireless competition.<sup>115</sup> They claim that, because of exclusive offers, rural consumers have no access to cutting edge phones and small and rural carriers are deprived of the ability to upgrade their networks.<sup>116</sup> These claims are both factually false and theoretically incoherent. Where there is no single dominant provider – and no wireless

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<sup>115</sup> See Cellular South Comments at 8-16; MetroPCS Comments at 10-11; CFA Comments at 15-18; RTG Comments at 9-10.

<sup>116</sup> Cellular South Comments at ii, 16-17.

carrier or device manufacturer is even remotely dominant – exclusive offers are commonplace and only *pro-competitive*.<sup>117</sup>

Exclusive handset offers are pro-competitive for a simple reason: they promote innovation, investment, and competition.<sup>118</sup> In competitive markets, firms seek to differentiate and improve their products to attract new customers and to retain existing ones. One common form of differentiation is an exclusive offer. Exclusive handsets merely enhance one competing carrier’s offer, much like better service, better call quality, fewer dropped calls, or a lower price. As economists and regulators have long recognized, such exclusive offers have several strongly pro-competitive benefits. When an exclusive offer is successful, it raises the competitive bar for everyone else, igniting the virtuous cycle of innovation and response and resulting in better prices, better features, and/or better service.<sup>119</sup> Exclusivity agreements also align incentives in ways that lead to more innovation more quickly: they permit the manufacturer to focus its resources on working with only one carrier to optimize, introduce and promote a new handset, while increasing the carrier’s incentives to make supporting network investments and to promote the handset (because no carrier wants to invest in and heavily advertise a handset only to have consumers buy the phone from a competitor).<sup>120</sup>

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<sup>117</sup> See Katz Decl. ¶¶ 41-44; *see also* AT&T Comments, RM 11497, Declaration of Michael Katz ¶ 3 (“Katz Handset Decl.”) (exclusive contracts promote consumer welfare, and are problematic only where “a dominant distributor locks up such a substantial portion of the suppliers that rival distributors are left without competitively viable supply options” – circumstances that do not remotely exist here).

<sup>118</sup> See Katz Decl. ¶¶ 41-44; *see also* Katz Handset Decl. ¶ 3.

<sup>119</sup> See Katz Decl. ¶¶ 41-44; Katz Handset Decl. ¶ 9.

<sup>120</sup> See Katz Decl. ¶¶ 41-44; Katz Handset Decl. ¶¶ 12-27.

The record in the pending proceeding on exclusive handset arrangements overwhelmingly establishes these benefits.<sup>121</sup> Indeed, the stimulative effects on innovation and competition from exclusive handset arrangements should be obvious to anyone that has followed the wireless industry since the introduction of the iPhone. The popularity of the iPhone and its innovative features and applications, has provoked an unprecedented competitive reaction. The result has been dramatically increased choice and value for all consumers, as carriers have raced to develop an “iPhone killer.” The marketplace is literally awash with innovative devices that allow consumers to do things that no one even imagined just a year or two ago, and that cost consumers less than previous, less capable devices. In the absence of the exclusive distribution arrangement between AT&T and Apple, this competitive frenzy would not have occurred, as competitors would have seen no need to develop a differentiating response in the marketplace. And with the exploding market for device applications, wireless handsets provide more direct benefits to consumers than ever before.<sup>122</sup>

None of the proponents of restrictions on exclusive handset arrangements can explain away these facts, nor do they offer a credible showing that exclusive arrangements have diminished competition. Instead, they argue, in effect, that such arrangements make it more difficult for them to win and retain customers. That is an argument that should be given no weight in this or any other proceeding. As the Commission has long recognized, and as the D.C.

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<sup>121</sup> Katz Handset Decl. ¶¶ 12-27; AT&T Handset Comments, RM-11497, at 17-22; Verizon Handset Comments, RM-11497, at 20-28; Sprint Handset Comments, RM-11497, at 11-13; T-Mobile Handset Comments, RM-11497, at 3-8.

<sup>122</sup> *See, e.g.*, Statement of Barbara S. Esbin, Senate Commerce Committee, June 17, 2009 (“if every carrier had been able to sell the iPhone when it was initially released, it is unlikely that there would have been as much carrier support for developing competing products such as Google’s G1, Research in Motion’s touch screen Blackberry Storm, Samsung’s Instinct, or Palm’s Pre”).

Circuit has held: “[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors.”<sup>123</sup>

To be sure, Cellular South and its allies’ attempt to wrap their arguments in a public interest cloak, but their claims in that regard are demonstrably false. For example, they assert that customers in rural areas have no access to exclusive phones. But AT&T offers service to more rural customers than any of the commenters seeking to ban exclusive arrangements. Moreover, AT&T has spent billions in recent years to obtain spectrum rights that would permit it to fill in the remaining gaps even further. Of course, AT&T is not the only carrier with exclusive handset arrangements, and other larger carriers have been taking similar steps to increase their coverage in rural areas. More importantly, even where AT&T or another larger carrier does not offer service, the innovation propelled by exclusive phone offers has generated a plethora of non-exclusive handsets with attractive features and capabilities – which are available to and offered by rural carriers today. Thus even if a particular handset that is subject to an exclusive arrangement is not available to a small segment of the population, the virtuous cycle of innovation spawned by that exclusive will benefit all consumers.

Similarly, although the success of certain exclusive phones in recent years has garnered a lot of attention, opponents of exclusivity greatly overstate the actual prevalence of exclusive phones in today’s marketplace. As CTIA has documented, there are more than 600 wireless phones available today, and the vast majority are non-exclusive. The current top selling device in the wireless industry is the Blackberry Curve – which is nonexclusive. AT&T’s own top

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<sup>123</sup> *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 60 (1991) (“the issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market”; “[i]ndeed, the competitive process itself is largely about trying to develop one’s own advantages, and all firms need not be equal in all respects for this process to work”).

selling wireless device is the GoPhone – which also is nonexclusive. The reality is that all carriers have access to a vast variety of phones,<sup>124</sup> and there is no single phone that has been chosen by more than a small percentage of wireless customers.<sup>125</sup> As a result, all carriers today – including smaller carriers and rural carriers – offer a full portfolio of cutting-edge phones that have all of the latest features.<sup>126</sup>

Exclusivity opponents further peddle the myth that national carriers somehow use ostensible market power to demand and obtain exclusive arrangements that hapless manufacturers would otherwise not give them. Wholly apart from the fact that no carrier in the hotly competitive wireless marketplace has market power to exert, nothing could be further from the truth. In the real world, what typically happens is that a carrier will approach a manufacturer and say that it would like to be able to offer a phone that is *not* in the manufacturer’s current portfolio – *i.e.*, that the carrier believes that its customers would be interested in a new device with a certain look and feel, with a particular combination of features, at a particular price. The manufacturer’s response is invariably that developing such a device would entail substantial risks, and it will ask the carrier to share in that risk by agreeing to substantial volume and other

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<sup>124</sup> Multiple handset makers have introduced 3G handsets with touch screen displays and myriad other new features, including RIM (Storm), Samsung (Behold, Instinct, Glyde, Eternity, Delve), LG (Incite, Rhythm, Spyder, Voyager, Dare, VX830, Vu, Glimmer, Venus), Palm (Pre) and HTC (Max 4g, Touch HD, Touch 3G, Touch Viva, Touch Diamond Touch Dual, Touch Cruise, Touch Fuze).

<sup>125</sup> According to NPD Group, the top five selling wireless handsets in the U.S. for the first quarter of 2009, in order of sales, are the BlackBerry Curve, Apple iPhone 3G, BlackBerry Storm, BlackBerry Pearl, and the T-Mobile G-1. *See* Press Release, NPD Group (May 4, 2009), *available at* [http://www.npd.com/press/releases/press\\_090504.html](http://www.npd.com/press/releases/press_090504.html).

<sup>126</sup> AT&T Handset Comments, RM-11497, at 24-27 (rural carriers offer many high-end smartphones and are succeeding in the marketplace); Sprint Handset Comments, RM-11497, at 10-11 (“Small operators may not have the buying power of Tier I 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.”).

upfront commitments. The freedom to enter into an exclusive arrangement is what allows a carrier to make such commitments. But without that freedom, the economic basis for bringing innovative devices to market quickly would be severely diminished, because a carrier often could not then justify the development costs, advertising costs, close collaborative efforts with a manufacturer, and volume commitments required to launch the new handset.

When such gambles are successful, they raise the competitive bar and thus benefit all consumers. An obvious example is the iPhone, but another is the Samsung Propel. AT&T concluded that a low-cost device focused on text messaging would appeal to consumers, at a time when only Blackberries really catered to such users and when other manufacturers did not offer such devices. Accordingly, AT&T worked with Samsung to develop a texting device to AT&T's specifications, and AT&T made substantial volume commitments and heavily promoted the device. The Propel was a success, and it led directly to a flurry of innovation and competition from other manufacturers and carriers to create new texting-oriented phones.<sup>127</sup>

But make no mistake: developing innovative phones entails great risk for both the carrier and the manufacturer. For every successful exclusive offer, like the iPhone, there are other gambles that do not pay off. For example, very few people remember the Motorola ROKR E680. The ROKR was the product of an exclusive agreement between AT&T, Motorola, and Apple. The idea was to develop a robust wireless device that would have direct access to iTunes and could store music. AT&T made a substantial volume commitment, and the companies made

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<sup>127</sup> In that regard, when this risk-taking is successful, such devices often end up on the list of top ten selling devices. Commenters like CFA fall prey to a common chicken-and-egg misconception that carriers seek exclusive deals *because* a certain phone is popular; in reality, the carrier has taken a great risk at the outset by making substantial volume commitments and investing in multi-million-dollar promotional campaigns, and when those gambles pay off, the *result* is a popular phone. But the important point is that exclusivity greatly increases the carriers' and device manufacturers' incentives to take those initial risks.

significant investments and heavily marketed the device. Although the companies were hoping that the device would be a “game-changer,” it never connected with consumers and failed in the marketplace – even driving customer defections from AT&T. But opponents of exclusivity never look at this half of the picture. Exclusivity arrangements involve risk *and* reward. Opponents want to free-ride on the rewards when a phone is successful, but they want no part of the risks and the costs that are part and parcel of such arrangements. Eliminating or restricting the freedom to enter into such arrangements, however, would eliminate the ability of carriers to take those risks – and the losers would be consumers.<sup>128</sup>

Nor is it true that manufacturers are opposed to exclusive arrangements and would expect to sell more units if they had no exclusive deals.<sup>129</sup> Granting exclusive distribution rights, which eliminates the possibility that other carriers will free ride on the exclusive carrier’s investments, creates powerful incentives on the part of the carrier to make volume commitments, to subsidize the purchase price of the device, and to engage in heavy promotion of the device – all of which can contribute greatly to the success of the device. An exclusive arrangement also facilitates close collaboration between the manufacturer and the carrier to integrate the device with the network, thus increasing the value the manufacturer can offer (which, in turn, enhances the manufacturer’s brand). Research in Motion, the largest distributor of smartphones (Blackberry), made these same points itself, in support of maintaining the freedom to enter into exclusive deals.<sup>130</sup>

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<sup>128</sup> See Katz Decl. ¶ 42.

<sup>129</sup> Curiously, Cellular South claims (at 9) that exclusive deals are “the direct result of the market power of those carriers with manufacturers” – but the Commission has held consistently for years that no wireless carrier has market power.

<sup>130</sup> See Reply Comments of Research in Motion, RM-11497, at 5-9.

In short, it is only becoming more clear that restricting exclusive arrangements would be unlawful and would disserve the public interest, and that rural and smaller carriers can compete without access to every available phone. As AT&T and others have shown, these carriers' own public statements and actions demonstrate that they are not only surviving but prospering in the iPhone era.<sup>131</sup> As Cellular South concedes, these carriers have access to a broad range of cutting-edge handsets, including smartphones with all of the latest features, capabilities, and device applications,<sup>132</sup> and are constantly providing their customers with new options that have ever-

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<sup>131</sup> See, e.g., MetroPCS Press Release, *MetroPCS Reports First Quarter 2009 Results: Industry Leading High-Growth, Low Cost Structure, Results in Record First Quarter Adjusted EBITDA* (May 7, 2009), available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight=> (reporting quarterly consolidated total revenues of \$795 million, an increase of 20% over first quarter of 2008, quarterly consolidated adjusted EBITDA of approximately \$199 million, an increase of approximately 12% over first quarter of 2008, and quarterly consolidated income from operations of \$131 million, an increase of 17% from first quarter of 2008); Leap Wireless Press Release, *Leap Reports Record Net Customer Additions of Nearly 500,000 for First Quarter 2009* (May 7, 2009), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1286095&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1286095&highlight=) (reporting service revenues of \$514 million for the first quarter of 2009, an increase of 29 percent over the prior year period, and adjusted operating income before depreciation and amortization for the company's existing business of \$164.4 million, an increase of 22 percent over the prior year period). Leap Wireless also touts its "strong balance sheet," noting that at year end 2008 it had \$596 million in unrestricted cash. Leap Wireless 2008 Annual Review: Strong Balance Sheet, available at <http://www.leapwireless.com/ar2008/financial3.php>. Notably, MetroPCS has recently been selected to be added to the Standard & Poor's 500 stock index. See Reuters, *S&P 500 to add MetroPCS, drop Tyco Electronics* (June 22, 2009), available at <http://www.reuters.com/article/rbssTechMediaTelecomNews/idUSWEN086620090622>.

<sup>132</sup> Cellular South Comments at 14; see also AT&T Handset Comments, RM-11497, at 24-26 (detailing phones smaller and rural carriers offer); Leap Wireless 2008 Annual Review: Latest Devices, available at <http://www.leapwireless.com/ar2008/devices.php> (noting that Leap offers "a quality handset portfolio from the major handset suppliers in the industry, such as Samsung, Motorola and Nokia as well as Kyocera and PCD"); Leap Wireless Press Release, *Leap Brings Cricket Unlimited Wireless Services to Washington, D.C. and Baltimore* (June 23, 2009), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1301347&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1301347&highlight=) ("Cricket has more than a dozen devices available ranging from higher-end handsets, such as the touch screen Motorola Evoke, to more affordable mobile phones"); MetroPCS Annual Report 2008, at 7 ("We sell a variety of handsets manufactured by nationally recognized handset manufacturers for use on our network, including

expanding capabilities.<sup>133</sup> Smaller carriers plainly can obtain exclusive deals if that is the way they want to differentiate their offers – indeed, Leap Wireless recently took its “first step into device development” by delivering the Cricket EZ, a device that is “[d]esigned and manufactured specifically for Cricket.”<sup>134</sup> And, although, Cellular South, in particular, claims that exclusive offers preclude it from upgrading its network, Cellular South recently announced “aggressive” upgrades to 3G throughout its Mississippi service area.<sup>135</sup> Notably, Cellular South also recently began offering a subsidized Dell netbook, although at a congressional hearing last month it maintained that the “the largest carriers are now demanding exclusivity agreements” and have effectively locked up the netbook market, thus “effectively denying Netbooks to any American who could meet an entry-level price point but who does not live in the proper service area, or

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models that have cameras, can browse the Internet, play music and have other features facilitating digital data”).

<sup>133</sup> See, e.g., Leap Wireless Press Release, *Cricket Introduces Samsung MyShot II with Customized Cricket MyHome Screen* (June 16, 2009), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1299415&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1299415&highlight=); MetroPCS Press Release, *MetroPCS Reports First Quarter 2009 Results: Industry Leading High-Growth, Low Cost Structure, Results in Record First Quarter Adjusted EBITDA* (May 7, 2009), available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight=> (reporting MetroPCS’ introduction of additional new smart phones); U.S. Cellular Press Release, *Samsung and U.S. Cellular Introduce Samsung Gloss* (May 26, 2009), available at [http://www.uscc.com/uscellular/SilverStream/Pages/x\\_page.html?p=a\\_press090526](http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press090526); BusinessWeek, *Key Developments for Cellular South, Inc.*, available at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4657234> (reporting Cellular South’s recent announcements of the availability of the Samsung Finesse touch screen phone and the Motorola Hint QA30 Slider Phone).

<sup>134</sup> Leap Wireless 2008 Annual Review: Latest Devices, available at <http://www.leapwireless.com/ar2008/devices.php>.

<sup>135</sup> See Cellular South Press Release, *Cellular South to Expand Availability of Advanced 3G Mobile Broadband Services Throughout Much of Mississippi* (March 10, 2009) (“Cellular South unveiled an ambitious plan today to dramatically expand availability of its third-generation (3G) high-speed wireless mobile broadband services to consumer and business customers in 28 counties and 78 cities in Mississippi this year”; “The company intends to aggressively invest in its wireless network across the footprint to increase coverage and capacity”).

who wishes to connect the device to their carrier of choice.”<sup>136</sup> Regional and smaller wireless providers tout the growth of their networks in both urban and rural areas,<sup>137</sup> expanded service offerings,<sup>138</sup> accelerating subscriber additions,<sup>139</sup> and high service quality and customer

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<sup>136</sup> Written Statement Of Mr. Victor H. “Hu” Meena, President And CEO, Cellular South, Inc. On “The Consumer Wireless Experience,” Before The Committee On Commerce, Science And Transportation United States Senate, at 8-9 (June 17, 2009), *available at* [http://www.commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=03b81ffd-ba9f-42e6-8331-7c28f6d112b0&Witness\\_ID=a33a883f-d173-47ec-a9e6-1c2643e97bfb](http://www.commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=03b81ffd-ba9f-42e6-8331-7c28f6d112b0&Witness_ID=a33a883f-d173-47ec-a9e6-1c2643e97bfb).

<sup>137</sup> *See, e.g.*, MetroPCS Press Release, *MetroPCS Reports First Quarter 2009 Results: Industry Leading High-Growth, Low Cost Structure, Results in Record First Quarter Adjusted EBITDA* (May 7, 2009), *available at* <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight=> (reporting launch of unlimited service in the New York City and Boston metropolitan areas); MetroPCS Press Release, *Unlimited Wireless Carrier MetroPCS Expands Greater Philadelphia Coverage to Include Southern New Jersey Shore* (May 20, 2009), *available at* <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1290416&highlight=>; Leap Wireless Press Release, *Leap Brings Cricket Unlimited Wireless Services to Washington, D.C. and Baltimore* (June 23, 2009), *available at* [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1301347&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1301347&highlight=); Cricket Press Release, *Cricket Extends Philadelphia Calling Area by Expanding into Trenton* (May 27, 2009), *available at* <http://www.mycricket.com/aboutcricket/pressroom/details?id=416>; U.S. Cellular Press Release, *U.S. Cellular Expands Network in Clarksville [Missouri]* (June 8, 2009), *available at* [http://www.uscc.com/uscellular/SilverStream/Pages/x\\_page.html?p=a\\_press090608](http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press090608) (noting that U.S. Cellular “has led the effort to preserve federal support for rural wireless development”); Cellular South Press Release, *Cellular South to Expand Availability of Advanced 3G Mobile Broadband Services Throughout Much of Mississippi* (March 10, 2009), *available at* <https://www.cellularsouth.com/news/2009/20090310.html>; Bluegrass Cellular Press Release, *Bluegrass Cellular Announces Enhanced Voice and 3G Coverage in Grayson County [Kentucky]* (June 2, 2009), *available at* [http://bluegrasscellular.com/about/news/bluegrass\\_cellular\\_announces\\_enhanced\\_voice\\_and\\_3g\\_coverage\\_in\\_grayson\\_coun](http://bluegrasscellular.com/about/news/bluegrass_cellular_announces_enhanced_voice_and_3g_coverage_in_grayson_coun).

<sup>138</sup> *See, e.g.*, MetroPCS Press Release, *MetroPCS Is First North American Carrier to Offer Unlimited International Calling for \$5 per Month: Unlimited Plan Includes over 100 Countries and More Than 1,000 Destinations* (June 24, 2009), *available at* <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight=>; Leap Wireless Press Release, *Cricket Footprint Grows with Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier: Roaming Agreements with 14 Wireless Companies Expands Coverage from Coast to Coast* (Nov. 13, 2008), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=95536&p=irol-newsArticle&ID=1226045&highlight=>.

satisfaction,<sup>140</sup> and they emphasize how well-positioned they are to grow and prosper in the future.<sup>141</sup> This evidence permits only one conclusion: exclusive handset offers are promoting rather than harming competition.

## **B. The Commission Should Not Expand Automatic Roaming Requirements.**

The Commission's automatic roaming rules require a wireless carrier to entertain a reasonable request to accommodate roaming on its voice network in areas where the requesting

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<sup>139</sup> See, e.g., Leap Wireless Press Release, *Leap Reports Record Net Customer Additions of Nearly 500,000 for First Quarter 2009* (May 7, 2009), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1286095&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1286095&highlight=) (noting that this was “more than double the number of net customer additions for the first quarter of 2008”); MetroPCS Press Release, *MetroPCS Reports First Quarter 2009 Results: Industry Leading High-Growth, Low Cost Structure, Results in Record First Quarter Adjusted EBITDA* (May 7, 2009), available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight=> (reporting first quarter 2009 net subscriber additions of approximately 684,000, the “highest quarterly net additions in company history,” which enabled the company to achieve “the 6 million subscriber milestone”).

<sup>140</sup> See, e.g., MetroPCS Press Release, *MetroPCS Reports Fourth Quarter and Year End 2008 Results* (Feb. 26, 2009), available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1260271&highlight=> (reporting that MetroPCS earned the highest ranking in the J.D. Power and Associates third annual Prepaid Customer Satisfaction Study); U.S. Cellular Press Release, *U.S. Cellular Tops J.D. Power And Associates Call Quality Ranking For The Seventh Consecutive Time* (March 20, 2009), available at [http://www.uscc.com/uscellular/SilverStream/Pages/x\\_page.html?p=a\\_press090320\\_1](http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press090320_1); Cellular South Press Release, *Cellular South Rolls Out TV Ad Campaign Based On Nationwide Network Theme* (Feb. 2, 2009), available at <https://www.cellularsouth.com/news/2009/20090202.html> (company representative reporting that Cellular South has “one of the nation’s best networks in terms of quality, reliability and coverage and it’s obvious that [the company’s] customers wholeheartedly agree”).

<sup>141</sup> See, e.g., Leap Wireless Press Release, *Leap Reports Record Net Customer Additions of Nearly 500,000 for First Quarter 2009* (May 7, 2009), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle\\_Print&ID=1286095&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle_Print&ID=1286095&highlight=) (Leap’s president and CEO stating that “[g]iven the continuing strength of our operating business and success of our recent market launches, we believe that we are well positioned for future growth”); MetroPCS Annual Report 2008, *A Message From Chairman, President and Chief Executive Officer Roger D. Linqvist*, at 5 (“we believe our strength in increasing penetration clearly demonstrates we are changing the marketplace . . . [w]e are proud of our strong subscriber growth, our low cost model, continued market innovation, and our improving Adjusted EBITDA margins”).

carrier lacks its own spectrum rights.<sup>142</sup> That tracks closely with the market-based roaming solutions that had developed long before the Commission codified roaming rights. Some commenters nonetheless assert the Commission should vastly expand roaming entitlements, so that (1) automatic roaming would be available even within the areas in which the requesting carrier holds its own spectrum, and (2) automatic roaming would be available for wireless services that are not interconnected with the PSTN.<sup>143</sup> Although these specific issues are already the subject of a pending petition for reconsideration and further notice of proposed rulemaking, respectively, AT&T will briefly reiterate why the Commission should not adopt either of these proposals.

To begin with, history shows that appropriate market-based solutions always have and always will address legitimate roaming needs. Even before the Commission crafted automatic roaming regulations in 2007, AT&T already had reciprocal roaming agreements with the vast majority of GSM carriers in the United States, and the same is true today. AT&T also has reciprocal data roaming arrangements today for 2G services with many smaller GSM carriers that have deployed their own 2G data networks. The two types of roaming entitlements that these commenters want, however, are very different. In both cases, wireless providers that have chosen *not* to invest in their own networks are trying to free-ride on other competitors' investments while offering little or nothing in return. Thus, a Commission order requiring one-sided roaming agreements in these two instances would effectively force the facilities-based carrier to offer a resale service that would relieve the requesting provider of any need to invest

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<sup>142</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, ¶¶ 23, 28 (2007) (“*Automatic Roaming Order*”).

<sup>143</sup> CFA Comments 28-30; Metro PCS Comments at 13-19; RTG Comments at 10-11; Cricket Comments at 6-8; BHN Comments at 9; Cellular South Comments 18-20; NTCA Comments at 3-4.

further in its own network. The Commission has already concluded that automatic roaming requirements in such instances would create severe disincentives for investment, and that judgment remains correct.

For example, with respect to home roaming, if a carrier already holds (or leases) wireless spectrum to serve a particular area, that carrier should be encouraged to *use* that spectrum to serve its customers. If a carrier could obtain automatic roaming throughout the area in which it already has spectrum, it is indisputable that the carrier would lose much of its incentive to make full use of its spectrum and build out its own network.<sup>144</sup> Moreover, a major source of competition between wireless carriers today is network coverage,<sup>145</sup> but if a carrier immediately lost its coverage advantage every time it invested in building out its network, then the original carrier would also have reduced incentives to build out or enter new areas.<sup>146</sup> That is why the Commission has already concluded that “if a carrier is allowed to ‘piggy back’ on the network coverage of a competing carrier in the same market, then *both* carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage.”<sup>147</sup> Consumers would then be severely “disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage.”<sup>148</sup>

Home roaming proponents’ contrary claim – that the lack of an automatic home roaming requirement somehow discourages build-out – is not credible. Indeed, these carriers should have no standing to claim that building out networks where they *already* hold spectrum is not viable.

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<sup>144</sup> See Katz Decl. ¶ 61.

<sup>145</sup> *Eleventh Report* ¶ 133.

<sup>146</sup> See Katz Decl. ¶ 62.

<sup>147</sup> *Automatic Roaming Order* ¶ 49 (emphasis added).

<sup>148</sup> *Id.*

All of these carriers bid on and won those spectrum licenses on both the Commission's expectation and the carriers' representations that they would build out their networks. Moreover, prior to 2007, there was no automatic roaming requirement at all, anywhere, and yet these same carriers bid at spectrum auctions, acquired licenses, and entered numerous service areas. If these carriers had been willing to enter markets and build out prior to the imposition of any automatic roaming requirement at all, they cannot claim that entry or build-out where they have already bid on and hold spectrum would be deterred merely because there is a home market exception. Moreover, recent statements by these carriers further confirm that they do not require home roaming arrangements to effectively compete. The Chief Executive of MetroPCS, for example, recently explained that "[o]ur success and growth has never been hindered by our coverage."<sup>149</sup> Leap wireless has likewise downplayed the need for national coverage, stating that its customers "want quality coverage in their own city where they live, work and play."<sup>150</sup>

Nor should the Commission extend automatic roaming to wireless services that are not interconnected with the PSTN. In fact, data roaming requirements would be unlawful. As the Commission has made clear, automatic roaming "is a common carrier service, subject to the protections of Sections 201 and 202." *Automatic Roaming Order* ¶ 23. Accordingly, when a common carrier, like a CMRS carrier, "offers automatic roaming, [that offer] triggers its common carrier obligations with respect to the provisioning of that service under the Communications Act," including the obligation to serve all potential customers "upon reasonable

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<sup>149</sup> Roger Cheng, *MetroPCS, Leap Feel Pressure To Offer Nationwide Access*, Dow Jones Newswire (July 10, 2009), available at <http://www.nasdaq.com/asp/stock-market-news-story.aspx?storyid=200907091520dowjonesdjonline000822&title=metropcsleap-feel-pressure-to-offer-nationwide-access>.

<sup>150</sup> *Id.*

request” on “reasonable and non-discriminatory terms and conditions” under Sections 201 and 202. *Id.* ¶ 26.

Wireless broadband data services, however, are information services, not common carrier services.<sup>151</sup> As AT&T has previously explained, when a wireless broadband provider provisions data roaming, it necessarily provides information service functions above and beyond mere transmission, and therefore data roaming plainly meets the statutory definition of an information service.<sup>152</sup> Moreover, the Commission has held that wireless broadband providers have no obligation to provide either the Internet service *or the underlying transmission standing alone* as a common carrier service.<sup>153</sup> Indeed, the Commission has uniformly held for all Internet service platforms – cable modem service, wireline broadband, wireless broadband, and electric power lines – that it would not perform “radical surgery” on such broadband services and force providers to carve out a common carrier transmission service. The Supreme Court has expressly affirmed these rulings. *See National Cable Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

For these reasons, although a wireless broadband provider may choose to offer data roaming on a private carriage basis – and as explained above, AT&T does have numerous data roaming agreements – such an offer does not (and could not) trigger any common carrier obligations, such as the obligation to serve all potential customers upon reasonable request,

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<sup>151</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901, ¶ 1 (2007) (“In this Declaratory Ruling, we find that wireless broadband Internet access service is an information service under the Communications Act of 1934”).

<sup>152</sup> Reply Comments of AT&T Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, at 5-10 (November 28, 2007).

<sup>153</sup> *Id.* ¶ 32; *see also Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 94 (2005).

because wireless broadband data services are not common carrier services. That is why the Commission has already held that automatic roaming, “as a common carrier service,” does not apply either to information services or to other wireless services that are not CMRS services.<sup>154</sup>

Nor could the Commission impose such an obligation under Title I. To be sure, courts have acknowledged that the Commission retains some authority under Title I to impose certain types of obligations on information service providers. What is proposed here, however, is an obligation to “hold out” an offering of automatic data roaming “indifferently” to all comers – which is the very definition of common carriage.<sup>155</sup> The Supreme Court has squarely held that if the Act *expressly* carves out a set of services from common carrier regulation, the Commission cannot lawfully impose a common carriage obligation. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699-709 (1979). In *Midwest Video*, Section 3(h) of the Act provided that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier,” and therefore the Court struck down a Commission order imposing common-carrier-type access obligations on cable providers. *Id.*, 440 U.S. at 700-01 (access obligations violated statute because “[e]ffectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status”). The same would be true here: it is well-settled that services that fall within the statutory definition of an “information service” are not to be treated as common carrier services,<sup>156</sup> but an obligation to provide automatic data roaming “indifferently” to all would “effectively . . . relegat[e]” wireless

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<sup>154</sup> *Automatic Roaming Order* ¶ 60.

<sup>155</sup> *NARUC v. FCC*, 525 F.2d 630, 641-642 (D.C. Cir. 1976) (Communications Act presumptively permits any communications provider to offer services on a private carriage basis unless it affirmatively undertakes to “hold out” its service to the public “indifferently” or is under a “legal compulsion” to do so).

<sup>156</sup> *Brand X*, 545 U.S. at 975 (“[t]he Act regulates telecommunications carriers, but not information-service providers, as common carriers”).

broadband providers – which are information service providers – to “common-carrier status” in violation of the Act.<sup>157</sup>

The same result holds under Title III. As the Commission explained in the *Wireless Broadband Order*, Title III establishes a system for the allocation and licensing of spectrum, but that system is independent of the classification of the service using the spectrum. *Automatic Roaming Order* ¶ 36. Moreover, Title III expressly provides that the Commission may only “make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act.”<sup>158</sup> The “provisions” of Title III make an express distinction between CMRS services, which are to be regulated as common carrier services, and other wireless services, which are not.<sup>159</sup> In the *Wireless Broadband Order*, the Commission held that wireless broadband services are not CMRS services. *Wireless Broadband Order* ¶¶ 37-56. Accordingly, Title III only *reinforces* the conclusion that the statute prohibits the imposition of common-carrier-type obligations on wireless service providers to the extent that they are not common carriers.<sup>160</sup>

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<sup>157</sup> Nor is there any basis in the record for finding that a lack of automatic data roaming is impacting competition for wireless voice services. No commenter has submitted any evidence that any carrier has acted unreasonably or that the fact that data roaming is subject to commercial negotiations (rather than mandatory) has in any way impeded competition. Indeed, as explained in Section II.A, *supra*, the smaller carriers that have raised this issue are doing extremely well and are confident of their future prospects.

<sup>158</sup> 47 U.S.C. § 303(r).

<sup>159</sup> 47 U.S.C. § 332(c).

<sup>160</sup> Because the statute expressly precludes imposing common carrier obligations on information services, the Commission could not justify such requirements either through conditions on licenses – because Title III conditions must “carry out,” not violate, the “provisions of the Act” – or through an assertion of “ancillary” jurisdiction – because, again, such measures cannot violate the statutory provisions to which they are “ancillary.” Indeed, at the time *Midwest Video* was decided, the Commission’s regulation of cable systems was purely a matter of “ancillary jurisdiction.”

In addition to being patently unlawful, there is no factual or policy case for new rules either. History has shown that voluntary negotiations will produce appropriate roaming agreements without the need for government mandates. Other than AT&T, few GSM carriers have deployed 3G networks. Accordingly, there has been no basis for AT&T to enter into reciprocal roaming arrangements for 3G data services (although, as noted, AT&T does have reciprocal roaming agreements for 2G data services). This situation will of course evolve over time – as other GSM carriers upgrade their networks to 3G (and ultimately 4G). Proponents of mandatory data roaming, however, seek something far more radical – they want carriers that have *not* made any investments in upgrading their networks to 3G (or made only token 3G upgrades) to have mandatory rights to roam on the networks of those that have. This sort of one-sided roaming essentially commits larger carriers to offer nationwide data resale services, and as the Commission itself has acknowledged, such easy access to data resale would strongly discourage investment in broadband infrastructure and network upgrades.<sup>161</sup>

In addition, mandatory data roaming – essentially forcing the largest carriers to serve all of their competitors’ customers – is, by any measure, quite premature. Data networks today are already under stress. Carriers like AT&T are already committing billions of dollars on capital expenditures to increase bandwidth, upgrade infrastructure, and acquire additional spectrum, all to meet rapidly increasing demands on data networks created by the exploding growth in wireless data services. AT&T and other carriers are making these multi-billion-dollar

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<sup>161</sup> Nor would a requirement that carrier be offering “some” 3G services to qualify for 3G roaming solve the reciprocity issue. A carrier could then build out in a very limited portion of its license area and demand immediate nationwide roaming on the AT&T network. Not only would such a rule strongly discourage investment in broadband infrastructure, it would provide a disincentive to be the first carrier to expand to an area as well. AT&T did not have the advantage of mandatory national data roaming when it risked its own capital to upgrade its network, and AT&T should have the right to compete on the product differentiation made possible by its own enormous investments in cutting-edge infrastructure.

expenditures to serve their *own* customers; creating additional, significant bandwidth demands on these carriers through an automatic data roaming requirement would place unreasonable burdens on such carriers and would threaten service quality for their own customers. Accordingly, the Commission at a minimum should postpone any action on automatic data roaming until it sees how these nascent data services continue to develop.

**C. The Commission Should Not Reimpose Spectrum Limits.**

RTG and CFA make perfunctory suggestions that the Commission should reverse years of pro-competitive spectrum policies and reimpose an arbitrary spectrum cap.<sup>162</sup> These are transparent pleas to prevent an entire set of potential auction bidders and spectrum holders from participating in the spectrum market, in the hope that another set of bidders can obtain spectrum more cheaply against fewer bidders (and, in the process, ensuring that spectrum does not go to its highest and best uses and that the Treasury is deprived of the maximum potential revenue). The commenters in the pending proceeding concerning RTG’s Petition for Rulemaking (RM No. 11498) have thoroughly refuted these claims, and they deserve no further consideration here.<sup>163</sup>

The spectrum caps were imposed in a long-ago era when spectrum was far more scarce than it is today. Since 2003, when the Commission repealed the spectrum caps, the Commission has made large amounts of additional spectrum available (including 80 MHz of 700 MHz spectrum, 90 MHz of AWS spectrum, and 55.5 MHz of BRS spectrum, with another 30 MHz anticipated from the AWS-2 and AWS-3 spectrum). Consumers today demand more ubiquitous and reliable coverage, more speed and bandwidth for data, more advanced features and functionality, and more value, and elimination of the spectrum caps has allowed carriers to

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<sup>162</sup> RTG Comments at 6-7; CFA Comments at 23-24.

<sup>163</sup> See also Katz Decl. ¶¶ 68-69 (“a binding spectrum cap would distort and attenuate competition”).

expand their coverage, reduce their costs, and maximize their efficiency. As it relates to this competition report, these developments have *increased* competition (especially in rural areas), and the winners have been consumers, who have enjoyed better services at lower prices.

CFA's statement (at 24) that the elimination of the spectrum caps has allowed AT&T and Verizon to use their "purchasing power at spectrum auctions and ward off new entrants in CMRS markets" is baseless. The way clearly remains open for new competitors to gain spectrum and compete, as companies like Leap, Metro PCS, and Clearwire dramatically prove. Neither CFA nor RTG has ever provided any evidence that any carrier has been unable to obtain spectrum. The DOJ and the Commission deal with concerns about consolidation by examining acquisitions on a case-by-case basis and conditioning approval on divestitures where appropriate. But CFA's and RTG's bald assertions about "hyper-consolidation" and "ever fewer" competitors are belied by the facts that (1) there is enough spectrum today that caps are unnecessary, (2) there are scores of wireless competitors, and smaller carriers are among the fastest growing in the nation, (3) rural wireless customers remain served by three or more competitors in almost all cases, and (4) no carrier even remotely has a dominant position in the marketplace.

**D. The Commission Should Not Reimpose Rate Regulation on Special Access.**

Finally, in a proceeding devoted to *wireless* competition, Sprint devotes its comments entirely to its shopworn claims that AT&T and Verizon *wireline* services are not subject to effective competition.<sup>164</sup> Sprint's struggle to manufacture some connection between its special access complaints and some issue of relevance to this proceeding borders on incoherence. And the idea that the Commission could have any non-arbitrary basis for addressing longstanding industry disputes over the appropriate regulation of wireline special access services in a wireless

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<sup>164</sup> Sprint Comments at 3-9; *see also* CFA Comments at 21-23.

proceeding that is entirely devoid of the enormous special access record that has been developed in the Commission docket devoted to special access issues is, frankly, absurd.

But this unfortunately has become par for the course for Sprint, because it recognizes that any serious inquiry into the special access marketplace facts will expose the falsity of its assertion that Verizon and AT&T face no competition for the business of supplying Sprint with wireless backhaul circuits. In reality, the existing record – and, notably, Sprint’s own public statements and actions – have already done so. As it relates to wireless services, Sprint’s myopic focus on DS1s is misplaced; with consumers already holding wireless devices capable of 3-10 Mbps, service providers will routinely require much greater backhaul speeds, which will require high capacity fiber or microwave transmission facilities – *not* the legacy, copper TDM-based DS1s and DS3s that consume Sprint’s attention. Seemingly everyone other than Sprint smells opportunity and is rushing in to build these facilities or expand their existing ones, including not only Sprint’s partner Clearwire but FiberTower, Level 3, the cable companies, and dozens of others.<sup>165</sup> In fact, as a Sprint officer recently admitted, the only reason microwave backhaul is not already more prevalent here is that market-based rates for DS1s from the ILECs are so cheap.<sup>166</sup> Sprint has never been forced in the past to buy backhaul circuits from AT&T or Verizon; when it has done so, it is because Sprint got a good deal, because as Sprint is quick to remind AT&T sales people (if not the Commission), it has lots of other choices.<sup>167</sup>

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<sup>165</sup> See Letter from James W. Cicconi, AT&T to Marlene H. Dortch, FCC, WC Docket No. 05-25, filed June 22, 2009, at 2-4.

<sup>166</sup> Stephen Lawson, *Sprint Picks Wireless backhaul for WiMAX*, The Industry Standard, July 9, 2008, available at <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (Sprint CTO quoted as saying the reason microwave backhaul not as prevalent here as it is in the rest of the world is that “relatively abundant and *inexpensive* T-1s have stifled the technology here” (emphasis added)).

<sup>167</sup> AT&T 2007 Reply, Casto Supp. Reply Decl. ¶ 4; see also Verizon 2007 Reply at 16.

With each passing day, Sprint's assertions that special access competition is ineffective become increasingly indefensible, which explains Sprint's strategy of trying to keep the Commission from looking any further. Sprint vociferously objects to data requests that would force Sprint to disclose in detail its supplier options (and competitive carriers to disclose the proximity of their facilities and their willingness to serve Sprint). Incredibly, Sprint has also argued that the Commission must keep secret any data it does collect, denying such information even to outside attorneys under the sorts of protective orders the Commission has used countless times in similar circumstances.

Rather than confront the actual marketplace facts, Sprint simply parrots the same baseless arguments that have been discredited over and over again in the actual special access proceeding. For example, Sprint and CFA continue to tout the ILECs' supposed special access "rates of return" calculated from ARMIS data<sup>168</sup> – but the Commission has repeatedly rejected the use of service-specific rates of return using ARMIS data, even in this very context.<sup>169</sup> Even the NRRI's recent study for NARUC noted that "the RBOCs contend that the ARMIS figures are virtually meaningless," and concluded: "We agree with the RBOCs."<sup>170</sup> Sprint repeats the canard that

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<sup>168</sup> Sprint Comments at 6 (claiming that AT&T and Verizon have earned "obscene profits" of over \$8 billion); CFA Comments at 22 (claiming that Verizon earned a 700% rate of return).

<sup>169</sup> Order And Notice Of Proposed Rulemaking, Special Access Rates for Price Cap Local Exchange Carriers, FCC 05-18, WC Docket No. 05-25, ¶ 129 (Jan. 31, 2005) ("Even if the Commission had enough data, moreover, we question [the] central reliance on accounting rate of return data to draw conclusions about market power. High or increasing rates of return calculated using regulatory cost assignments for special access services do not in themselves indicate the exercise of monopoly power"); Second Report & Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, ¶ 380 (1990) ("the collection of rate of return data on an access category or rate element level is improper and unnecessary for price cap LECs"); Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd. 2637, ¶ 199 (1991) (category-specific returns reported in ARMIS "do not serve a ratemaking purpose"). See also Katz Decl. ¶ 71.

<sup>170</sup> See Peter Bluhm & Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, at 70 (rev. ed. 2009).

special access prices are too high based on price comparisons with DSL services like Verizon's FiOS – never acknowledging that there are numerous differences between the two services and that Sprint is comparing the price of a one-mile-or-so DSL line with the price of a DS1 circuit encompassing two channel terminations and ten miles of transport.<sup>171</sup> Sprint also repeats the falsehood that GAO and NRRI both found that the ILECs' have a "virtual monopoly," when in fact GAO found that it did not have enough data to make any such judgment (and hence the need for Sprint to stop stonewalling),<sup>172</sup> and the NRRI study relying on data from non-ILEC sources confirmed that special access prices for lower-capacity DS1 and DS3 circuits declined substantially over the period studied (2006-07).<sup>173</sup>

In short, the record in the special access proceeding overwhelmingly demonstrates that the Commission's special access and pricing flexibility policies, adopted during the Clinton administration, have been a resounding success. Those policies have brought customers lower prices and more choices just as the Commission predicted, and by allowing the market to set rates (rather than relying on government diktat, as Sprint advocates), the Commission's policies have promoted booming broadband investment. Sprint's endless rhetoric about the incumbents' supposed market power in special access is really just a company-specific plea for a government bailout financed by AT&T and Verizon. AT&T remains confident that any thoughtful

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<sup>171</sup> See Sprint at 5 & n.21; see also AT&T Response to Sprint, WC Docket No. 05-25, at 4 (filed Feb. 21, 2008). See also Katz Decl. ¶ 71.

<sup>172</sup> Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-08, at 40 (Nov. 2006); see also *id.* at 50-52.

<sup>173</sup> See NRRI Report at 59 (“[d]ata in this table are the best estimate of actual prices paid by large wholesale purchasers because these customers purchase a high percentage of their circuits at discounted rates,” and “[e]ach of the discounted rates we measured declined from 2006 to 2007”).

consideration of competition in the special access marketplace – in the special access proceeding, of course – that focuses on competitive *facts* rather than just more rhetoric, will lead to a conclusion that special access is robustly competitive and that government-mandated rate reductions would do nothing but eliminate providers’ incentive to continue investing in vital upgrades in broadband infrastructure.

Of course, none of this has anything to do with the question in this proceeding, which is whether there is effective wireless competition. Sprint nowhere suggests that wireless competition is anything but intensely competitive. In fact, it concedes (at 7) that there is “intense competition among wireless carriers,” and Sprint has reiterated again and again in Commission proceedings and elsewhere that the wireless marketplace is extremely competitive.<sup>174</sup> Although Sprint claims that special access pricing somehow disadvantages Sprint vis-à-vis Verizon and AT&T, it provides no support whatever for that claim – indeed, Sprint pointedly does not contend that AT&T and Verizon are unreasonably discriminating in favor of their wireless affiliates in violation of Section 202 of the Communications Act.<sup>175</sup> Equally important, the suggestion that special access rates could impact the rate of 3G and 4G broadband deployment is particularly disingenuous given that Sprint has partnered with Clearwire to deploy a nationwide WiMAX network in which Clearwire has already said will rely almost entirely upon self-supply and other wireless solutions, not ILEC special access, for its backhaul needs.

Sprint’s own comments confirm that its special access campaign is really just a request for an unwarranted, government-provided windfall that Sprint would simply pocket. Sprint claims (at 7) that if AT&T and Verizon were to reduce their “profit levels” to the “FCC

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<sup>174</sup> See, e.g., Sprint Handset Comments, RM-11497, at 5 (wireless marketplace is “competitive and producing innovation that benefits the public”).

<sup>175</sup> See Katz Decl. ¶ 71.

authorized return of 11.25%” for special access, “Sprint would realize an *annual* cost savings of \$790 million.” Sprint then asserts (*id.*) that “intense” competition in the wireless marketplace would “ensure” that special access price reductions would be passed on to consumers, *not* in the form of lower prices for wireless services, but “*e.g.*” through “accelerated network expansion to areas currently underserved or more rapid deployment of new technologies or services.” With that concession, however, the jig is up. The entire wireless industry – with the apparent exception of Sprint – is already investing heavily in upgrades to their wireless networks, and clearly they are able to make these investments without the government-mandated special access rate reductions Sprint advocates. In fact, Sprint is a notable anomaly in the industry in that its capital expenditures have been decreasing over the last two years as it struggles to overcome its own operational missteps.<sup>176</sup>

It should be obvious, however, that artificially cutting ILEC special access rates would reduce the incentive for any company (Sprint included) to expand its networks; in fact, it would eliminate the returns that either incumbents or new entrants could expect from continuing the deployment of next generation infrastructure that our nation needs. The result would be a significant slow-down in wireline broadband infrastructure deployment, which is one the few sources of investment and jobs that has remained steady through the current economic crisis. The wireless marketplace is functioning extraordinarily well, and neither Sprint nor anyone else has identified any deficiency in *wireless* competition that would justify a Commission order simply handing Sprint a billion dollars a year in special access rate reductions.

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<sup>176</sup> See Letter from James W. Cicconi, AT&T to Marlene H. Dortch, FCC, WC Docket No. 05-25, filed June 22, 2009, at 4-5 (it is “inarguable that Sprint is slashing infrastructure investment to meet short-term financial objectives even as it demands massive, government-mandated cuts in ILEC rates for legacy TDM-based DS1 and DS3 services”).

**CONCLUSION**

For the foregoing reasons, and for those stated in AT&T's initial comments, the Commission should reaffirm that wireless markets are intensely competitive and take the limited action to further reduce barriers to competition discussed herein.

Respectfully Submitted,

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