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July 14, 2009

Marlene H. Dortch
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

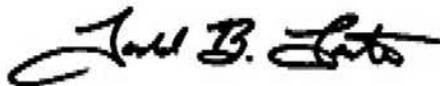
**Re: Rural Cellular Association Reply Comment Filing on Handset Exclusivity
and Data Roaming
RM-11497; WT Docket No. 05-265**

Dear Ms. Dortch,

Because of the relevance of the information included in the attached reply comments filed yesterday by the Rural Cellular Association (“RCA”) in the Commission’s 14th CMRS Competition Report proceeding (WT Docket No. 09-66), RCA hereby requests that the Commission also associate the reply comments with the above-captioned proceedings.

Please do not hesitate to contact me with any questions.

Respectfully submitted,



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Counsel to Rural Cellular Association

Attachment

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

In re:)
)
Wireless Telecommunications Bureau) WT Docket No. 09-66
Seeks Comment on Commercial Mobile)
Radio Services Market Competition)

REPLY COMMENTS OF RURAL CELLULAR ASSOCIATION

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July 13, 2009

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SUMMARY

The record strongly supports the conclusion that the *Fourteenth Report* should examine the competitive effect that exclusive handset agreements are having on the CMRS marketplace, as well as the effect that the Commission's current roaming rules and the roaming practices of the Tier 1 carriers are having on competition in the CMRS marketplace.

It is unquestionable that a consumer's choice of service provider is influenced by the devices available for use on a provider's network. Recent data indicates that a carrier's handset offering is now the primary factor behind a customer's decision to subscribe to a particular carrier. Because of the importance of the carrier's handset offering to the customer in making the decision to subscribe to a particular service provider, it is also evident that handsets play a key role in the competitiveness of the CMRS marketplace. Put simply, if a carrier is not able to offer any of the handsets proven to be most-desired by the American public (as is the case with most RCA member carriers), these smaller carriers will struggle to remain competitive with the largest.

While the "Big 4" carriers – and CTIA – have attempted to paint a rosy picture of the competitive state of the United States handset market, as described *infra*, further investigation might lead to a different conclusion by Commission staff. Data acquired by RCA documenting the most popular handsets in the United States demonstrates that 45 of the Top 50 handsets sold in May 2009 were subject to exclusive arrangements and each of the 45 exclusive agreements were with one of the "Big 4". Notably, the most popular handset sold in May 2009 in the United States, Research in Motion's ("RIM") Curve, was not subject to an exclusive arrangement which calls into question suggestions by the nation's largest carriers and RIM that exclusive arrangements are a necessary component of the nation's wireless handset market.

When the nation's four largest carriers who now control over 90% of the nation's wireless consumers also control – through exclusive arrangements – such a large percentage of the handsets sold in the United States, it becomes quite clear that the market power of the “Big 4” allows them to demand exclusivity from handset manufacturers, forcing smaller CMRS providers to the competitive sideline.

RCA believes that information provided to the Bureau supports the conclusion that exclusive handset arrangements result in a very direct and negative effect on the competitive positions of smaller carriers relative to the largest national providers. The longer that the nation's “Big 4” are permitted to use their market power to demand exclusive arrangements, the longer they will be operating with an unfair, competitive advantage over smaller carriers. As a result, the Commission should promptly investigate the harms caused to competition and consumers by exclusive handset agreements and, as necessary, take appropriate corrective action.

On the issue of data roaming, the increasing concentration of the wireless marketplace, spurred in recent years by numerous mergers and acquisitions, has left the Tier 1 carriers in a position to exert substantial influence over roaming arrangements with rural and smaller regional carriers. In many cases, the “Big 4” carriers have used this influence to refuse to enter into automatic data roaming agreements with their smaller competitors, or to offer agreements with rates, terms, and conditions that are highly favorable to the “Big 4” carriers. The coast has been made clear for these anti-competitive practices as a result of the Commission's decision not to require the Tier 1 carriers to enter into automatic data roaming agreements based upon reasonable rates, terms, and conditions.

Both consumers and competitors in rural and regional CMRS markets are harmed by these roaming practices of the “Big 4” carriers. Consumers are deprived of the benefits of hav-

ing full access to their mobile data services when they travel away from home, and rural and smaller regional carriers suffer the competitive consequences of being unable to provide a full range of roaming services to their customers.

For these reasons, RCA supports the roaming solutions proposed by several commenters. First, the Commission should extend the roaming obligations adopted two years ago for voice services so that these obligations also apply to automatic data roaming. Second, the Commission should repeal the “home roaming” exception to the roaming obligations it adopted two years ago, so that CMRS host carriers will be required to provide automatic roaming to requesting CMRS carriers in areas in which the requesting carriers hold wireless licenses or spectrum usage rights, but have not yet built out their networks. These actions will bring immediate benefits to consumers, and will also serve to protect and enhance competition, especially in rural and smaller regional CMRS markets.

Finally, because network interoperability between host carriers and other carriers provides important benefits to roaming customers, RCA supports the proposal that the *Fourteenth Report* should examine whether the lack of interoperability arrangements is harming competition in wireless markets.

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

In re:)
)
Wireless Telecommunications Bureau) WT Docket No. 09-66
Seeks Comment on Commercial Mobile)
Radio Services Market Competition)

To: Chief, Wireless Telecommunications Bureau

REPLY COMMENTS OF RURAL CELLULAR ASSOCIATION

Rural Cellular Association (“RCA”), by its attorneys, hereby submits these reply comments in the above-captioned proceeding, for consideration by the Wireless Telecommunications Bureau (“Bureau”) in connection with its evaluation of the state of competition among providers of Commercial Mobile Radio Service (“CMRS”) and its preparation of the Fourteenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (“*Fourteenth Report*”).¹

RCA is an association representing the interests of approximately 90 small, mid-sized and regional wireless licensees providing commercial services to subscribers throughout the country and geographically licensed to serve over 80% of the United States. Most of RCA’s members serve fewer than 500,000 customers.

I. INTRODUCTION.

Continuing consolidation in the CMRS marketplace combined with the questionable tactics employed by the nation’s largest four nationwide carriers makes the Bureau’s *Fourteenth*

¹ See *Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition*, WT Docket No. 09-66, Public Notice, 2009 WL 1362703 (WTB rel. May 14, 2009) (“*Public Notice*”); *Wireless Telecommunications Bureau Grants Extension of Time To File Reply Comments on Commercial Mobile Radio Services Market Competition*, WT Docket No. 09-66, Public Notice, 2009 WL 1811048 (WTB rel. June 24, 2009) (establishing July 13, 2009, as the revised filing date for reply comments).

Report critically important. RCA has chosen to focus its reply comments in this proceeding on the following two issues that – absent corrective action by the Commission – will continue to hinder the historically competitive nature of the CMRS industry: (1) exclusive handset arrangements involving the nation’s “Big 4” wireless carriers; and (2) data roaming, the “in-market exception,” and interoperability.

II. EXCLUSIVE HANDSET ARRANGEMENTS INHERENTLY INHIBIT COMPETITION HARMING CONSUMERS AND SMALLER COMPETITORS.

In the *Public Notice*, the Bureau seeks comment on, among other things, whether “a consumer’s choice of service provider [is] influenced by the devices or handsets available for use on that provider’s network,” “the role that handsets play in the extent of competition in the CMRS marketplace”, and whether “the variety of available handsets differ significantly depending on where a subscriber lives.”² RCA welcomes the opportunity to respond to these important questions – all of which are being asked for the first time by the Bureau in the context of a CMRS Competition Report – and to highlight the support in the record for the initiation of a Commission rulemaking proceeding to investigate the negative effects of such arrangements and, as necessary, the adoption of rules that prohibit such arrangements.³

A. A Carrier’s Handset Portfolio Plays a Primary Role in a Consumer’s Decision to Subscribe to a Particular CMRS Provider.

It is unquestionable that a consumer’s choice of service provider is influenced by the devices available for use on a provider’s network. Recent data indicates that a carrier’s handset selection is now the primary factor behind a customer’s decision to subscribe to a particular car-

² See *Public Notice*, at 9-10.

³ See, e.g., MetroPCS Communications, Inc. (“MetroPCS”) Comments, at 9-11; Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge (“Consumer Groups”) Comments, at ii, 31; Cellular South, Inc. (“Cellular South”) Comments, at 8-17; Rural Telecommunications Group (“RTG”) Comments, at 9-10.

rier. In response to a survey conducted by Cincinnati Bell Wireless in which the company asked its customers what was the “most appealing thing about the customer’s new service,” 42% chose “phone selection” over “price,” “features of service,” and “friends/family being on the same network.”⁴ Of those who cited “phone selection” as the basis for their switch, 35% of these customers identified the Apple iPhone and 10% identified the Blackberry Storm as their new handset.⁵ Focus groups of customers who have left Cellular South for the largest carriers repeatedly say that they are buying the device, not the network or the company.⁶ Verizon Wireless also submitted evidence to the Bureau stating that the number of consumers choosing a carrier based on handsets has grown by 51% since 2004.⁷ In addition, a recent study commissioned by Google Inc. found that more than one in two wireless shoppers said handsets played a major role in their purchase decisions. Specifically, “24% said their decision-making was solely a function of the handset; 28% said both handset and carrier influenced their decisions.”⁸ Clearly, a consumer’s choice of service provider is significantly influenced by the devices available for use on a provider’s network.

B. Handsets Play a Key Role in the Competitiveness of the CMRS Marketplace.

Because of the importance of the carrier’s handset offering to the customer in making the decision to subscribe to a particular service provider, it is also evident that handsets play a key role in the competitiveness of the CMRS marketplace. Put simply, if a carrier is only able to of-

⁴ Cincinnati Bell Wireless, LLC Comments, RM-11497, at 3-4.

⁵ *Id.*

⁶ See Written Statement of Victor “Hu” Meena, President and CEO, Cellular South, Inc. on “The Consumer Wireless Experience” to the U.S. Senate Committee on Commerce, Science and Transportation, at 3 (June 17, 2009) (“Meena Testimony”).

⁷ See Verizon Wireless Comments, at 15; see also Verizon Wireless Comments, RM-11497, at 23 (citing Lowenstein, “Evolving Role of Handsets,” at 4).

⁸ See *Proof that Handset Brands Help Sell Wireless Plans*, RCRnews.com (Oct. 28, 2008).

fer, if any, of the handsets proven to be most-desired by the American public (as is the case with most RCA member carriers), these smaller carriers will struggle to remain competitive with the nation's largest which can get access to the handsets – often times subject to exclusive arrangements – most preferred by consumers.

CTIA states in its comments that there are more than 630 wireless devices available to American consumers which, according to CTIA, is indicative of the vibrant competition in the wireless handset marketplace.⁹ While RCA has no reason to doubt the CTIA figure, to RCA's knowledge, CTIA has not provided any back-up documentation for the 630 figure in its filings with the Commission.¹⁰ RCA believes that the majority of these 630 wireless devices are or have been subject to exclusive arrangements. In addition, based upon handset sales data made available to RCA, it appears that more than 550 of these phones, by any objective measure, would be of marginal or no value in the CMRS marketplace today, since each would account for less than 0.1% of handset sales in the United States handset marketplace (as of May 2009). Even according to the figures provided by CTIA, as few as 8.6% of the 630 handsets are actually "unlocked," making only a minimal portion of the 630 handsets available to most RCA member carriers.¹¹

⁹ See CTIA Comments, at 31-32.

¹⁰ Further analysis of CTIA's figures would be helpful as part of any future Commission investigation into the growing use of exclusive handset arrangements. For example, it would be helpful to know whether the 630 wireless devices include multiple variations of the same handset model. Also, CTIA notes that there are 31 manufacturers whose devices are currently sold in the U.S. See CTIA Comments, at 31-32, n.87. Again, it would be helpful to know in any future Commission investigation how many devices are sold by each of the manufacturers, as well as each manufacturer's views regarding the harms and benefits of exclusive handset agreements.

¹¹ See CTIA Comments, at 34 ("Of the more than 630 wireless devices CTIA has identified at least 54 unlocked handsets currently available through third-party and manufacturer websites.").

Either the Bureau, in preparing the *Fourteenth Report*, or the Commission, in the course of its investigation into exclusive handset arrangements, should also determine:

- How long these “unlocked” handsets have been available in the market?
- Whether most of these “unlocked” handsets of relatively little market value because of their age and/or technical capabilities)?
- Whether any of these 54 “unlocked” handsets were initially subject to an exclusive handset arrangement? If yes, which carrier initially held the exclusive agreement?
- The percentage of these 54 “unlocked” phones that would be included in a list of the Top 10, Top 25 or Top 50 handsets being sold in the United States today.

In short, while the 630 wireless devices cited by CTIA may appear to paint a rosy picture of the competitive state of the United States handset market, further investigation might lead to a different conclusion by Commission staff.

Verizon Wireless cites in its comments a study conducted by its hired economist indicating that 51 members of RCA “offer one or more phones with Internet access” and that 38 “offer one or more phones with touch screens.”¹² What Verizon Wireless fails to mention, however, is the length of time it took RCA members to initially get access to a touch screen phone compared to Verizon Wireless or any other “Big 4” carrier,¹³ the discrepancy in the number of touch screen phones offered by an RCA member versus that of Verizon Wireless or any other “Big 4” carrier, and how many touch screen phones offered by Verizon Wireless are subject to exclusive arrangements. It is almost unimaginable that Verizon Wireless would attempt to argue that a car-

¹² See Verizon Wireless Comments, at 16-17.

¹³ Most RCA members were not able to offer their first touch screen handset until more than 12 months after Verizon Wireless’ introduction of a touch screen handset.

rier offering one touch screen phone puts that carrier on a legitimate competitive footing to Verizon Wireless that currently offers thirteen touch screen phones.¹⁴

Data acquired by RCA documenting the most popular handsets in the United States demonstrates that 45 of the Top 50 handsets sold in May 2009 were subject to exclusive arrangements and each of the 45 exclusive agreements were with one of the “Big 4” carriers.¹⁵ Notably, the most popular handset sold in May 2009 in the United States, Research in Motion’s (“RIM”) Curve, was not subject to an exclusive arrangement which calls into question suggestions by the nation’s largest carriers and RIM that exclusive arrangements are a necessary component of the nation’s wireless handset market.

When the nation’s four largest carriers, who now control over 90% of the nation’s wireless consumers, also control – through exclusive arrangements – such a large percentage of the handsets sold in the United States, it becomes quite clear that the market power of the “Big 4” allows them to demand exclusivity from handset manufacturers, forcing smaller CMRS providers to the competitive sideline.¹⁶ As Hu Meena, President and CEO of Cellular South, Inc., noted in his June 17, 2009, testimony to the United States Senate Committee on Commerce, Science and Transportation:

¹⁴ See www.verizonwireless.com (last visited July 13, 2009).

¹⁵ See Avian Securities, LLC’s *Wireless Handsets: Monthly U.S. Retail Store Survey* (May 28, 2009). According to Avian Securities, the firm’s proprietary survey is based on responses from 100 service representatives at retail stores of the four major U.S. wireless carriers – AT&T, Verizon, Sprint, and T-Mobile. The five handsets in the Top 50 not subject to exclusive arrangements included Research In Motion’s Blackberry Curve (18.52% handset market share in May 2009), Nokia’s E71 (2.38% market share in May 2009), HTC’s Touch Pro (1.51% market share in May 2009), HTC’s Diamond (0.56% market share in May 2009), RIM’s Pearl Flip ((0.53% market share in May 2009) and Nokia’s 5310 (0.20% market share in May 2009).

¹⁶ See Comments of MetroPCS Communications, Inc., RM-11497, at 6 (“As the largest carriers acquire more and more customers, this increased disparity will accelerate the ability of the larger carriers to demand more and more exclusivity agreements while ensuring that particular phones are unavailable for longer periods of time to smaller wireless carriers,” thereby severely restricting the ability of smaller carriers to compete.”).

Cellular South and other regional and rural carriers have competed with the largest carriers for years based on network quality, network coverage and price. These are all factors that are within our control. If we lose a customer because we don't offer the right plan or because we drop too many calls, that blame falls squarely on our shoulders – and I can and will fix that problem. However, our ability to compete is compromised because the largest carriers lock up devices in exclusivity agreements. Put simply, regional and rural carriers cannot gain access to the latest, cutting-edge devices which gives large carriers a key competitive advantage.¹⁷

C. The Variety of Handsets in Rural Areas Pales in Comparison to the Handset Availability in Urban Locations.

Because the “Big 4” carriers do not provide service throughout the United States, the variety of handsets available to Americans differs significantly depending on where a subscriber lives.¹⁸ Rural consumers cannot purchase many of today's most popular handsets because they reside in areas of the country not served by the one carrier offering the desired handset. In fact, according to the Commission's own information, significant portions of at least half of the states in the country have significant areas that are void of service from any of the “Big 4” carriers.¹⁹ As a result, the dozens of exclusive handsets controlled by the “Big 4” either literally or effectively remain unavailable to residents of these rural communities. For example, most rural residents of Alaska, Arizona, Colorado, Idaho, Kansas, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, West Virginia and Wyoming, still cannot use an iPhone without violating the terms of AT&T's standard service contract. Why? AT&T has no facilities in many of these areas – only roaming service on rural wireless carrier networks – and AT&T prohibits its subscribers from using more than 40% of their airtime roam-

¹⁷ Meena Testimony, at 2-3.

¹⁸ See *Public Notice*, at 9-10.

¹⁹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Conditions with Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27 (rel, Jan. 16, 2009) (Map B-1: Coverage of Top 4 Mobile Telephone Operators), at 140.

ing on an alternate network. According to AT&T, service is automatically canceled after four months when this happens.²⁰

D. The Commission Should Move Forward Expeditiously with an Investigation of the Harms Caused by the Growing Use of Exclusive Arrangements.

Commission leadership recently indicated its intention to investigate the growing use of exclusive handset agreements,²¹ as requested by RCA in its May 2008 Petition for Rulemaking.²² The decision is also responsive to concerns expressed by hundreds of small, mid-sized and regional service providers, individually or through their trade associations,²³ as well as calls from consumer groups²⁴ and from five U.S. Senators raising anticompetitive concerns about the proliferation of these agreements by the nation's four largest wireless carriers.²⁵

²⁰ *Id.* AT&T has reportedly canceled the contracts of some of its subscribers for violating these contract terms.

²¹ *See FCC chair-designate to look at mobile handset deals*, Reuters, by John Poirier (“Yes, if confirmed, I will ensure that the full record on the RCA petition is reviewed, and act accordingly to promote competition and consumer choice.” (<http://www.reuters.com/article/internetNews/idUSTRE55I3YP20090619>) (June 19, 2009); *see also* Remarks of FCC Acting Chairman Copps at the Pike & Fischer Broadband Policy Summit V (June 18, 2009) (“I agree that we should open a proceeding to closely examine wireless handset exclusivity arrangements that have reportedly become more prevalent in recent years, and I have instructed the Bureau to begin crafting such an item. The Commission as the expert agency should determine whether some of these arrangements adversely restrict consumer choice or harm the development of innovative devices, and it should take appropriate action if it finds harm.”).

²² *See RCA Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497 (May 20, 2008) (“RCA Petition for Rulemaking”).

²³ *See, e.g.*, RM-11497, Comments of Cincinnati Bell Wireless, LLC, (Feb. 2, 2009); Comments of MetroPCS Communications, Inc. (Feb. 2, 2009); Comments of the South Dakota Telecommunications Association (Feb. 2, 2009); Comments of RTG, OPASTCO, and NTCA (Feb. 2, 2009); Reply Comments of the Associated Carrier Group (Feb. 20, 2009); Reply Comments of United States Cellular Corporation (Feb. 20, 2009).

²⁴ *See, e.g.*, Comments of the Public Interest Spectrum Coalition (Feb. 2, 2009); Reply Comments of the Public Interest Spectrum Coalition (Feb. 20, 2009).

²⁵ *See* Letter from U.S. Senators John F. Kerry, Roger F. Wicker, Byron L. Dorgan and Amy Klobuchar, to Hon. Michael J. Copps, Acting Chairman, Federal Communications Commission (June 15, 2009); *see also* Letter from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, to Hon. Christine Varney, Assistant Attorney General – Antitrust Division, Department of Justice, and Hon. Julius Genachowski, Chairman, Federal Communications Commission (July 6, 2009) (“Chairman Kohl Letter”).

RCA believes that the information provided to the Bureau in this proceeding, as well as information provided to the Commission in RM-11497 (the proceeding number associated with the RCA Petition for Rulemaking), supports the conclusion that exclusive handset arrangements result in a very direct and negative effect on the competitive positions of smaller carriers relative to the largest national providers.²⁶ The longer that the nation's "Big 4" wireless carriers are permitted to use their market power to demand exclusive arrangements, the longer the "Big 4" carriers will be operating with an unfair competitive advantage over smaller carriers.

It has been almost fourteen months since RCA asked the Commission to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest. The Commission cannot afford to wait any longer. The time to investigate the harms caused to competition and consumers by exclusive handset agreements is now.

III. THE FOURTEENTH CMRS COMPETITION REPORT SHOULD EXAMINE HOW TIER 1 CARRIERS' ROAMING PRACTICES ARE STIFLING COMPETITION FROM RURAL AND SMALLER REGIONAL CARRIERS.

There can be little disagreement that carriers seeking to compete in today's CMRS marketplace are faced with an important imperative. Carriers must be able to offer their customers a nationwide footprint. Customers increasingly have come to expect that the services they pur-

²⁶ Cincinnati Bell Wireless noted in comments filed with the Commission that "internal data indicates that it experienced a 35% higher churn rate in the second six months of 2008 than in the first six months, a period during which a number of exclusive handsets and smartphones like the 3G iPhone and Blackberry Storm . . . were launched." *See* Cincinnati Bell Wireless, LLC, Comments, RM-11497, at 3-4. In addition, as noted by MetroPCS, the elimination of Alltel Wireless from the wireless marketplace has been extremely damaging to the ability of smaller carriers to get access to handsets. According to MetroPCS, "Alltel acted as a large purchaser of CDMA handsets without exclusivity which allowed many other carriers to gain access to the same handsets. With the merger of Alltel into Verizon, small, rural and regional carriers will find it increasingly difficult to secure the newest and most popular handsets." *See* MetroPCS Comments, RM-11497, at 7.

chase from their carrier, including data services that enable Internet access, will be available wherever they travel throughout the country.²⁷

The problem faced by rural and smaller regional carriers, however, is that Tier 1 carriers have little incentive to enter into roaming agreements with reasonable rates, terms, and conditions, that will enable their competitors to meet their customers' expectations regarding the availability of data services when they travel away from home. The record in this proceeding strongly supports the need for the Bureau to examine the extent to which competition in the wireless marketplace is being undermined by Tier 1 carriers' obstructionist practices regarding data roaming agreements.

A. Industry Concentration, Heightened by Recent Mergers and Acquisitions, Is Undercutting Competition in Wireless Markets.

There is compelling evidence in the record that the wireless marketplace has become increasingly concentrated in recent years,²⁸ that the pace of this concentration has been fueled by numerous mergers and acquisitions,²⁹ and that this concentration has tightened the grip of the "Big 4" carriers on wireless markets in general,³⁰ and rural and regional markets in particular.³¹

²⁷ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15819 (para. 3) (2007) ("*Roaming Order*"), *petitions for recon. filed, cited in* MetroPCS Comments, at 12.

²⁸ See, e.g., Cellular South Comments, at 4-5; Consumer Groups Comments, at 4-5; Cricket Communications Inc. ("Cricket") Comments, at 5; MetroPCS Comments, at 2.

²⁹ See, e.g., Bright House Networks ("BHN") Comments, at 6 (stating that "industry consolidation has made it more likely that national carriers can use unfavorable roaming rates as an anti-competitive tool against non-national carriers"); Cellular South Comments, at 3-4; Cricket Comments, at 2; MetroPCS Comments, at 2-5; RTG Comments, at 4. RTG also argues that the ineffective regulatory oversight of these mergers has added to the problem, explaining that transactions involving AT&T and Verizon Wireless are disturbing because of "the fact that when the acquiring company was forced to divest assets in order to gain regulatory approval, the lion's share of those divested assets were purchased by the non-participating member of that duopoly." *Id.*, at 5 (footnote omitted); see Cellular South Comments, at 4.

³⁰ See, e.g., Cellular South Comments, at 5 (noting that "the Big Four carriers account for more than 92.2 percent of all wireless subscribers") (footnote omitted); MetroPCS Comments, at 6 (observing that, when viewing CDMA and GSM services as separate markets, it is evident that AT&T and Verizon Wireless

These concerns expressed in the record of this proceeding parallel those articulated by the Chairman of a United States Senate subcommittee, who noted last week that members of the subcommittee “have become concerned with emerging barriers to competition in an already highly concentrated market. Four carriers control over 90% of the cell phone market, and two of them collectively have a market share of 60%.”³²

B. The Tier 1 Carriers Have the Ability and the Incentive To Withhold Reasonable Roaming Agreements from Rural and Smaller Regional Carriers.

Tier 1 carriers have the ability to block rural and smaller regional carriers from obtaining data roaming agreements with reasonable rates, terms, and conditions because they are under no regulatory mandate to do so, and because market consolidation has eliminated viable alternatives that once were available to rural and smaller regional carriers. Before the most recent wave of consummated and proposed acquisitions, companies like Alltel Communications, LLC, Dobson Communications Corp., and Centennial Communications Corporation were available as roaming partners. But now the Tier 1 companies are the only game in town. In addition, because the “Big 4” carriers do not use the same air interface technology, rural and smaller regional carriers are limited to one or two carriers as potential roaming partners in many markets.

The fact is, however, that these potential roaming partners have little incentive to enter into roaming agreements with rural and smaller regional carriers.³³ It would not serve their in-

“each have dominant positions in their respective air interfaces”); RTG Comments, at 4 (noting that “many commentators in the wireless industry . . . commonly refer to Verizon and AT&T now as a textbook example of an industry duopoly”) (footnote omitted).

³¹ See RTG Comments, at 3 (explaining that “[t]he simple fact of the matter is that while the CMRS marketplace might be competitive in larger cities and towns, it is anything but competitive in rural markets; and without doubt this lack of meaningful choice in CMRS service hits rural consumers the hardest”).

³² Chairman Kohl Letter, at 1.

³³ See Consumer Groups Comments, at 29; Cricket Comments, at 7; MetroPCS Comments, at 7 (arguing that “[b]ecause the Big-4 carriers individually possess nationwide, or near-nationwide, spectrum foot-

terests to facilitate these carriers' construction of nationwide footprints to serve their customers. Since the "Big 4" carriers face no regulatory compulsion to enter into reasonable automatic data roaming agreements with their rural and small regional competitors, they simply do not come to the table to negotiate agreements.³⁴

The record in this proceeding shows that, given the opportunity and license to behave badly, the "Big 4" carriers have acted accordingly. Thus, for example, Bright House Networks complains that it is unable to secure roaming agreements at reasonable and non-discriminatory rates.³⁵ Cricket reports that it and other carriers "have increasingly encountered abusive and anticompetitive business practices, such as the largest carriers' refusal to provide wholesale automatic roaming on just, reasonable, and non-discriminatory terms."³⁶

Cricket also observes that "the average *wholesale* roaming rates that the largest carriers charge to unaffiliated carriers exceeds – in some cases by four times – the *retail* rates that these carriers charge retail customers."³⁷ MetroPCS points out that Verizon's behavior since its acquisition of Alltel has "frustrated new entrants and small, rural and regional carriers" because Veri-

prints, they have little or no incentive to enter into reciprocal roaming agreements with smaller regional or rural carriers").

³⁴ The *Roaming Order* held that the Tier 1 carriers have a common carrier obligation to enter into voice, short text messaging, and push-to-talk roaming agreements with other carriers that comply with the requirements of the Communications Act of 1934, but stopped short of imposing any rate regulation with respect to such agreements. *Roaming Order*, 22 FCC Rcd at 15832 (para. 37).

³⁵ BHN Comments, at 2. BHN explains that the Tier 1 carriers' refusal to enter into reasonably priced automatic roaming agreements amounts to an entry barrier because:

carriers simply will not invest in the construction and operation of competitive systems because they would be forced either to absorb the high roaming rates and be deprived of a realistic return rate on their investment or pass along the higher roaming rates to customers in the form of higher monthly fees and be unable to compete with carriers.

Id., at 3. See Cellular South Comments, at 20.

³⁶ Cricket Comments, at 7.

³⁷ *Id.*, at 8 (emphasis in original) (footnote omitted).

zon has been “doing everything in its power to keep from abiding by the spirit of the Commission’s directives [regarding roaming agreements].”³⁸

Consumers – particularly those in rural areas – are victimized by these actions by the large nationwide carriers. Because the “Big 4” carriers continue to stonewall their competitors’ attempts to obtain reasonable automatic data roaming agreements, consumers are deprived of competitive choices (since the Tier 1 carriers’ roaming policies act as entry barriers), and consumers have limited opportunities to obtain mobile data services with a nationwide footprint. RTG has captured the absurdity of this problem, noting that “some rural CMRS customers are resigned to purchasing CMRS service from two separate operators just to have the same [roaming] experience as more fortunate suburban and urban CMRS customers.”³⁹

The record supports the proposition that the Bureau, in its preparation of the *Fourteenth Report*, should evaluate the practices being followed by the “Big 4” carriers to stymie the efforts of competing rural and smaller regional carriers to obtain automatic data roaming agreements, and should also assess the impact of these practices on competition in the CMRS marketplace, and especially in rural and regional markets. Several commenters have also proposed solutions to these roaming problems, which RCA discusses in the following sections.

C. The Commission Should Mandate Automatic Data Roaming, and Should Repeal the “Home Roaming” Exception.

RCA agrees with numerous commenters who argue that the Commission should act expeditiously to require Tier 1 carriers to enter into automatic data roaming agreements,⁴⁰ with reasonable rates, terms, and conditions, with their rural and regional competitors.⁴¹

³⁸ MetroPCS Comments, at 8.

³⁹ RTG Comments, at 3.

⁴⁰ As BHN has observed, the issues of automatic data roaming and the home roaming exception discussed in this section are under consideration by the Commission in the docket in which the *Roaming Order* was

Consumers in rural communities should have access to mobile broadband services that are comparable to services available in urban and suburban areas throughout the country. As Commissioner Copps has observed, however, “[r]ural communities have long been unserved or underserved by broadband technology, but the full implication of this divide has only emerged as the Internet has become less and less a novelty, and more and more a necessity.”⁴² The adoption of automatic data roaming requirements will bring relief to these rural consumers. Moreover, as Chairman Kohl has observed, “[a]n automatic data roaming obligation is critical to the continued growth of competitive wireless service offerings that will discipline the pricing and services of the large incumbent wireless operators.”⁴³

RCA agrees with BHN’s argument that the Commission’s failure to apply mandatory automatic roaming requirements to data services is out of step with the realities of the wireless marketplace and consumer expectations,⁴⁴ and RCA also endorses the Consumer Groups’ argument that this loophole in the Commission’s roaming requirements should be closed because it “limits the ability of smaller competitors and new entrants to provide their customers high-

issued. *See* BHN Comments, at 8, n.19. RCA supports those commenters, such as BHN, who have raised these issues in this proceeding because of RCA’s view that the *Fourteenth Report* should consider the effects of current roaming rules and practices on CMRS competition.

⁴¹ *See, e.g.*, MetroPCS Comments, at 17-19; RTG Comments, at 10-11.

⁴² Michael J. Copps, Acting Chairman, FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY (May 22, 2009), at para. 15, *quoted in* Cellular South Comments, at 16.

⁴³ Chairman Kohl Letter, at 2.

⁴⁴ BHN Comments, at 8-9 (stating that “for today’s wireless consumers, the use of data transmissions is equally, if not more important than voice roaming. The inapplicability of the automatic roaming requirement to information services is unfounded and outdated, especially when viewed in light of the convergence of voice, video, and data services and advances in wireless technology, applications, and devices.”) (footnotes omitted).

quality, high-range mobile broadband and mobile Internet access services, the very services most needed for growth in modern CMRS markets”⁴⁵

In addition, given the fact that “CMRS consumers consider data service an increasingly indispensable part of their wireless consumption[,]”⁴⁶ RCA agrees with MetroPCS’s contention that the Commission should apply a mandatory automatic data roaming rule to both current and future wireless technologies “in order to fulfill its mandate of ensuring that all Americans have access to cutting edge wireless technologies on a nationwide scale.”⁴⁷

As the Commission pursues its plan to ensure that all Americans – including those who live in rural areas – have access to affordable and ubiquitous broadband services,⁴⁸ it would appear anachronistic for the Commission to continue to tolerate practices by the “Big 4” carriers that not only undercut competition in rural wireless markets, but also disserve consumers throughout rural America.⁴⁹ RCA encourages the Commission to promote the interests of consumers and to advance wireless competition by requiring the “Big 4” carriers to enter into reasonable automatic data roaming agreements with their rural and regional competitors.

⁴⁵ Consumer Groups Comments, at 30.

⁴⁶ MetroPCS Comments, at 17.

⁴⁷ *Id.*, at 18.

⁴⁸ See *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009).

⁴⁹ Verizon argues that extending the Commission’s automatic roaming requirements to data services would be problematic because it would tend to reduce innovation by the Tier 1 carriers and discourage them from deploying advanced data services. Verizon Comments, Attachment, at 37. The absence of any basis for these concerns is illustrated by Verizon’s own claim that “[r]obust competition will continue in the deployment of next generation broadband wireless services . . . , because carriers will compete to win and retain customers who want the high speeds and applications that next-generation wireless broadband technologies promise.” Verizon Comments, at 8. The robust competition that Verizon believes will continue to inhere in the wireless marketplace should provide sufficient incentive for the “Big 4” carriers to develop innovative advanced data services.

A second step the Commission should take to cure the consumer harms and competitive problems associated with the current roaming practices of the “Big 4” carriers is to repeal the “home roaming” exception to the automatic roaming requirements adopted by the Commission in the *Roaming Order*.⁵⁰

The consumer and competitive benefits of automatic roaming delineated by the Commission – its convenience to subscribers and its responsiveness to customers’ expectations; its promotion of seamless CMRS service across the country (and particularly in rural areas); its reduction of inconsistent coverage and service qualities⁵¹ – apply with equal force in “home market” areas as well as other service areas. Because of this, as numerous commenters point out, the Commission should revisit and reverse its decision to forego these benefits in the case of in-market roaming.

The Commission’s concern was that, in the absence of the home roaming exception, carriers holding spectrum licenses or spectrum usage rights would be disinclined to build out their own facilities because they could roam on the host carrier’s network. This concern is misplaced. RCA agrees with BHN’s argument that licensees have strong incentives to build out their networks, even if they have entered into automatic roaming agreements, because they generally have “paid significant sums to obtain spectrum at a spectrum auction” and “spectrum in almost all services is subject to mandatory build-out requirements.”⁵² In light of these incentives, noth-

⁵⁰ *Roaming Order*, 22 FCC Rcd at 15835 (para. 48) (deciding that a CMRS carrier is not required “to provide automatic roaming to a requesting CMRS carrier in a market where the CMRS carrier directly competes with the requesting CMRS carrier. Specifically, a CMRS carrier is not required to provide automatic roaming to a requesting CMRS carrier where the requesting CMRS carrier holds a wireless license or spectrum usage rights (*e.g.*, spectrum leases) in the same geographic location as the would-be host CMRS carrier.”).

⁵¹ *Id.*, at 15828 (paras. 27-28).

⁵² BHN Comments, at 9. *See* Consumer Groups Comments, at 29-30; MetroPCS Comments, at 13-17; RTG Comment, at 11. Verizon seeks to ignore the logic reflected in BHN’s analysis, claiming that “[t]he

ing should stand in the way of the Commission's eliminating the exception to its automatic roaming requirements that is having anti-competitive effects and is harming consumers.

D. The Fourteenth Report Should Examine Whether the Absence of Network Interoperability Is Harming Competition in Rural Wireless Markets.

Interoperability is an important adjunct to automatic data roaming because interoperability helps to ensure uninterrupted connectivity between host carriers and other carriers, and also facilitates data transfers between the carriers that enhance services and applications used by the carriers' customers.⁵³

The issue of interoperability is an important one for rural and smaller regional carriers because their interoperability arrangements with Tier 1 carriers serve to provide their customers with all the data functionalities of their handsets when they roam in the Tier 1 carriers' service areas.⁵⁴ For these reasons, RCA supports Cellular South's suggestion that the *Fourteenth Report* should evaluate whether the unavailability of interoperability arrangements is having adverse competitive effects in wireless markets.⁵⁵

IV. CONCLUSION.

The record supports the view that recent consolidations among CMRS carriers have led to even greater concentration in the wireless marketplace, and have further empowered the "Big 4" carriers to engage in practices that are undermining competition and harming consumers.

rationale for the in-market exception is self-evident – a carrier that can piggyback off its competitor, and tout the competitor's network as its own, has less incentive to invest in its own network there." Verizon Comments, Attachment, at 35. The problem with Verizon's view, of course, is that the supposedly piggybacking carrier has every incentive to build out its own network because, as BHN explains, it has *already made* significant spectrum investments. Moreover, as MetroPCS points out, there generally is significant lag time (measured in years, not weeks or months) between spectrum acquisition and build-out, and there is no sound reason to deprive carriers and their customers of the benefits of automatic roaming during these extended build-out periods. MetroPCS Comments, at 16.

⁵³ Cellular South Comments, at 21.

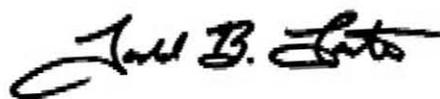
⁵⁴ *Id.*, at 21-22.

⁵⁵ *Id.*, at 22.

A principal example is the “Big 4” carriers’ practice of demanding exclusive arrangements from handset manufacturers that effectively freeze out smaller competing carriers from having access to the most popular and desired handsets. The *Fourteenth Report* should examine the negative competitive effects of these exclusive arrangements, particularly in rural and regional markets, and the Commission should act expeditiously to investigate the widespread use of handset exclusivity arrangements and take remedial action as necessary.

The *Fourteenth Report* also should evaluate the competitive impact of the Tier 1 carriers’ roaming practices. Several commenters have already demonstrated the adverse competitive effects of these carriers’ persistent refusal to enter into reasonable automatic data roaming agreements with their smaller competitors. The *Fourteenth Report* also should examine whether the lack of sufficient interoperability arrangements between host carriers and other carriers is having harmful competitive effects. Finally, RCA urges the Commission to adopt automatic data roaming obligations, and to eliminate the “home roaming” exception.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd B. Lantor". The signature is fluid and cursive, with the first name "Todd" being the most prominent.

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