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July 16, 2009

VIA ECFS

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

**Re: Rural Telecommunications Group, Inc.
Reply Comment Filing on Handset Exclusivity, Spectrum Cap
and Data Roaming
RM-11497; RM-11498; and WT Docket No. 05-265**

Dear Ms. Dortch:

Because of the relevance of the information included in the attached Reply Comments filed on July 13, 2009 by the Rural Telecommunications Group, Inc. (“RTG”) in the Commission’s 14th CMRS Competition Report proceeding (WT Docket No. 09-66), RTG 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,

By: */s/ Caressa D. Bennet*

Caressa D. Bennet
Counsel to Rural Telecommunications Group, Inc.

Attachment

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

In the Matter of)	
)	
Fourteenth Annual Report and Analysis of)	WT Docket No. 09-66
Competitive Market Conditions With Respect to)	
Commercial Mobile Service)	

REPLY COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP, INC.

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July 13, 2009

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SUMMARY

For over a decade and a half, the Federal Communications Commission has published annual reports on the health of competition in the CMRS marketplace. Few can argue against the growth of the wireless industry in general or the appreciable technological evolution of the equipment used to make mobile communications a reality during that same time frame. However, those advancements are global in scope, and certainly not the domain of the U.S. market alone. The fundamental issue of whether there exists today *effective competition* in the U.S. is an entirely different matter. While the Commission should still consider such factors as market structure, provider conduct, consumer choice and market performance in its analysis of the industry, it must pay particular attention to more nuanced factors that act as leading indicators for how competition is doing.

For example, the Commission should re-evaluate the quality of the source data used to reach conclusions regarding market areas actually served by CMRS operators, because using faulty data will distort the competitive analysis. Additionally, the Commission should conduct a careful review of all acquisitions and transfers of control in the CMRS marketplace, including those transactions which occurred prior to the period of review for this *Fourteenth Report*. It should pay particular attention, however, to mergers and acquisitions occurring since the compilation of the *Thirteenth Report*, which have winnowed the number of active CMRS operators, and in the process, reduced choice for mobile consumers. Similarly, the Commission should recognize just how stifling the effects have been of a lack of a spectrum cap due to both hyper-consolidation and misguided auction rules, both of which have caused harm to aspiring and nascent small and rural mobile operators and all of the mobile consumers in those markets.

Proactive steps the Commission can take to instill pro-consumer, pro-competition policies include the imposition of a spectrum cap of 110 megahertz in spectrum below 2.3 GHz, the prohibition of handset exclusivity agreements between CMRS operators and mobile device manufacturers, the treatment of automatic data roaming as a common carrier service, and the complete removal of the in-market or “home” roaming exclusion in order to promote nascent CMRS operators and recent license auction winners.

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

In the Matter of)
)
Fourteenth Annual Report and Analysis of) WT Docket No. 09-66
Competitive Market Conditions With)
Respect to Commercial Mobile Service)

To: Wireless Telecommunications Bureau

REPLY COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP, INC.

The Rural Telecommunications Group, Inc. (“RTG”), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby submits its reply comments to the comments submitted in response to the Wireless Telecommunications Bureau’s *Public Notice*¹ concerning its annual report on Commercial Mobile Radio Service (“CMRS”) market competition (“*Fourteenth Report*”).

I. INTRODUCTION

The annual CMRS marketplace competition reports released by the FCC have been a useful tool to help track the success and failures of the industry for much of the last two decades. The domestic CMRS industry has seen phenomenal growth and technological advancement since the days of the “brick-phones” and “bag-phones” used by a few privileged consumers. Nonetheless, year-over-year increases in subscriber counts were not restricted to the United States; neither was the sophistication of the devices and underlying networks. Instead, the growth and maturity of the CMRS industry has been experienced by all advanced nations, many

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

of whom sport penetration rates much greater than the United States.² The goal of the Commission should be to determine whether *effective competition* exists in the U.S. today, and to reach that determination, the Commission must analyze multiple factors. In addition to analyzing factors such as market structure, provider conduct, consumer choice and market performance which it has examined in previous years, the Commission should also examine more subtle but equally important criteria that influence the level of effective competition in the CMRS marketplace, such as the fundamental changes in the competitive CMRS landscape resulting from hyper-consolidation, the harmful impact on consumer choice brought about by handset exclusivity agreements between large carriers and device manufacturers, and the anticompetitive effects of the in-market (home) roaming exclusion and the unequal treatment of automatic voice and data roaming.

Any critical examination of the CMRS marketplace must consider what it truly means to be *mobile*. To the average consumer, mobile means the ability to enjoy voice and data services using the most advanced devices commercially available, using those devices throughout the provider-of-choice's home market, and then retaining those same services and the same equipment functionality when outside the provider-of-choice's home coverage area when roaming on another domestic CMRS operator. Yet today, there exist numerous barriers preventing many Americans from enjoying true "mobility." Effective competition and consumer choice is a myth in today's CMRS marketplace, especially for rural Americans, and the Commission cannot accurately determine that effective competition exists until additional action is taken. Specifically, the achievement of true market competition will remain elusive unless the Commission: (1) improves its collection of data when drafting reports such as the *Fourteenth*

² http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&RP_intYear=2008&RP_intLanguageID=1 (last checked July 13, 2009).

Report; (2) limits the amount of spectrum below 2.3 GHz that can be held by a single entity; (3) prohibits handset exclusivity agreements; and (4) requires that automatic data roaming be treated like automatic voice roaming.

II. THE COMMISSION SHOULD REEXAMINE SOURCES OF DATA USED TO DETERMINE WHETHER EFFECTIVE COMPETITION EXISTS IN THE CMRS MARKETPLACE.

Before the Commission determines whether there is effective competition in the mobile marketplace, it should rely upon statistically sound data, whether it is from the public domain or contracted third parties. The Commission has previously stated that 99.6% of Americans (or 284 million) have at least one CMRS operator in their home market³, and some of the large national CMRS operators were quick to reiterate that statistic in recent comments.⁴ However, the data relied upon by the Commission is completely inconsistent with other public data sources, and therefore, is patently misleading. The Census Bureau shows that the population of the United States was at least 300 million by 2007.⁵ The official census data flatly contradicts the data proffered by American Roamer[®] that the total population of the U.S. in 2007 or 2008, when the study was completed, was only 285 million people.⁶ That difference of approximately 15 million Americans, completely unaccounted for by American Roamer[®], one of the FCC's primary data sources, is not just statistically significant, but calls into question the quality of the data

³ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Service*, WT Docket No. 08-27, DA 09-54 (released January 16, 2009) (“*Thirteenth Report*”) at 23-25.

⁴ Comments of AT&T, Inc. (“AT&T Comments”) at 2; Comments of Verizon Wireless (“Verizon Comments”) at 13.

⁵ See <http://www.census.gov/Press-Release/www/releases/archives/population/011108.html>; <http://www.census.gov/compendia/statab/tables/09s0012.pdf>. When Puerto Rico and the U.S. Virgin Islands are added to this figure, as American Roamer[®] has apparently done, then that number increases by several million more people.

⁶ *Thirteenth Report* at 25-26.

altogether. While RTG understands that demographics and census information is a moving target in non-Census years, that does not excuse inconsistencies in the methodology used by the FCC in coming to conclusions about effective competition based on the number of providers in a market.

While using Census Blocks may provide more detail than a breakdown by county or Zip Code, AT&T and Verizon overstate their accuracy.⁷ The FCC acknowledges that the American Roamer[®] data that it does use is an “estimate” at best.⁸ Just because a rural Census Block has some level of CMRS coverage does not necessarily mean that a significant portion of the population in that Census Block has coverage, or better yet, that a significant portion of the general population has a choice of CMRS operators. Relying on Census Block data is misleading in part because the maps used to “estimate” coverage availability across the country are based on large numbers of *carrier*-created maps, each of which are often overly-optimistic because they are based directly on carrier marketing materials.

III. PRIOR DETERMINATIONS OF EFFECTIVE COMPETITION NO LONGER HOLD TRUE.

In their comments, AT&T and Verizon asserted that competition in the CMRS marketplace is “clearly ‘effective’ under any rational definition”⁹ and “robustly competitive by any measure.”¹⁰ While effective competition in the CMRS marketplace may have existed at some time in the past, it does not exist today. Both AT&T and Verizon give great attention to

⁷ AT&T Comments at 19, Verizon Comments at 13.

⁸ *Thirteenth Report* at 24.

⁹ AT&T Comments at 5.

¹⁰ Verizon Comments at 2.

indicators such as retail price offerings to justify the competitiveness of the CMRS marketplace.¹¹ Individual indicators such as retail price offerings, along with customer care and home network quality of service (QoS), are often the most vocalized indicators of “competitiveness” brought forth by large operators because those are precisely the few indicators small and rural CMRS operators have any direct control over when competing for customers.

In today’s marketplace, the average American consumer fully expects the ability to purchase a broadband-capable device of his or her own choosing. That consumer also expects that device to work outside his home market just as it does in his home, place of work, and locales in between. Small and rural operators cannot incentivize customers to stay, no matter how many minutes or text messages or megabytes of data are included in a rate plan, and no matter how fast the home network performs, when the larger operators engage in exclusive agreements with device manufacturers and refuse to price roaming fairly for rural consumers. A small or rural operator is resigned to “meet-or-beat” a larger operator on price, customer care, and network QoS, because they often are unable to provide their customers a nationwide, mobile broadband network on which to roam. As will be discussed in greater detail in later sections, restricted access to “exclusive” mobile devices and a nationwide data roaming network put RTG’s small and rural members at an immediate disadvantage.

AT&T has asserted in its comments that “snapshots” of market-share concentration at any given point in time are poor indicators of any diminution of competition.¹² Additionally, AT&T has asked the Commission to believe that only “limited” consolidation has occurred of late and that not only has it “benefited consumers, particularly those in rural areas; there is no

¹¹ AT&T Comments at 15-17 and 30-32; Verizon Comments at 11-12.

¹² AT&T Comments at 7-8.

evidence it has resulted in *any* consumer harm.”¹³ What AT&T fails to point out is that since the release of the *Thirteenth Report*, the country’s second largest mobile operator purchased the nation’s fifth largest mobile operator¹⁴, thereby becoming the *largest* mobile operator, and the bulk of assets divested by the now largest mobile operator (upon order of the Commission and the Department of Justice) are now slated to be purchased *by the country’s second largest mobile operator: AT&T*. The transactions in effect create a nationwide duopoly between AT&T and Verizon that no other mobile operator can come close to matching in terms of market power. This is nothing if not a dramatic change that exemplifies the type of industry event and/or development that arose after early 2008 which the Commission seeks to increase its understanding of in order to compile the *Fourteenth Report*.¹⁵

AT&T claims that it and other large operators are just as susceptible to customer churn as smaller operators. However, the sources cited by AT&T for this claim also highlight that it is AT&T and other large operators who are likely to benefit most from this churn!¹⁶ The article cited by AT&T states that “33 percent of all customers surveyed who say they would switch their carrier within the next six months said they would move to AT&T,” and that 24 percent of those customers likely to churn would move on to Verizon.¹⁷ Accordingly, more than half of all American mobile customers ready to churn are turning to AT&T and Verizon, and they are doing

¹³ *Id.* at 23-24.

¹⁴ ALLTEL, formerly the country’s fifth largest CMRS mobile operator in terms of subscribers, was also the largest of the country’s “regional” operators.

¹⁵ *Public Notice* at 2.

¹⁶ AT&T Comments at 48 citing “*Report: AT&T Most Likely to Pick Up Switching Subscribers*,” <http://www.fiercewireless.com/story/report-t-most-likely-pick-switching-subscribers/2009-05-28>. The *Fierce Wireless* online article itself cites a *ChangeWave* online survey and accompanying article titled “*AT&T Rides iPhone’s Coattails*” (May 26, 2009).

¹⁷ *Id.*

so for devices like the iPhone which are restricted by handset exclusivity agreements.¹⁸ Once the tide turns, small and rural operators will be forced to abandon or sell their businesses, resulting in even less options for consumers.

IV. EASE OF MARKET ENTRY BY NEW COMPETITORS IS HINDERED BY THE LACK OF A SPECTRUM CAP.

Most parties who have submitted comments agree that there is an issue of spectrum scarcity in today's CMRS marketplace and that more spectrum will be needed in order to offer Americans next generation mobile data services.¹⁹ However, RTG strongly believes that the simple act of auctioning-off more spectrum will not necessarily alleviate the concerns. Today, the largest of the country's CMRS operators, all of whom are urban-centric, have spectrum holdings in rural markets that greatly exceed their actual need. Without a spectrum cap, large amounts of unused or fallow bandwidth are kept out of the hands of small and rural operators, many of whom were shut-out of recent AWS and 700 MHz auctions.²⁰ RTG urges the FCC to adopt a spectrum cap to curtail the recent anti-competitive consolidation in the wireless market discussed above. Excessive concentration of licenses contradicts the Commission's stated goal of avoiding such concentration, and undermines its goal of diversity among licensees.²¹ A limit

¹⁸ *Id.*

¹⁹ AT&T Comments at 29; Comments of Cricket Communications, Inc. at 9-12; Comments of MetroPCS Communications, Inc. at 19-22; Comments of RTG at 5-6; Comments of the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge at 26-27; Comments of the National Telecommunications Cooperative Association at 11; Comments of the Wireless Communications Association International at 7-11; Verizon Comments, Appendix A at 16-18.

²⁰ The "Big Four" operators accounted for 78% of all the winning bids in Auction 66. *See generally* Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, RM Docket No. 11498 (filed July 16, 2008).

²¹ *See Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-553, Third

on the amount of spectrum that any one carrier can hold will promote competition and diversity in furtherance of the public interest.²² In addition to the promotion of competition and diversity, the FCC has recognized other public interest benefits resulting from a spectrum cap, such as providing parties with guidance regarding what transactions the Commission would likely consider to be in the public interest, allowing parties to structure their transactions to fall within the rule, and providing guidance for the FCC itself.²³

A spectrum cap would eliminate the hoarding of spectrum by an ever-dwindling number of large entities who increasingly offer the same products and services in lockstep fashion. Smaller regional CMRS carriers such as Cricket and Metro PCS offer flexible buckets of minutes, pre-paid plans, and other innovative plans and options. Cricket, for example, offers local calling areas similar to local, landline service. This option allows customers to seriously consider “cutting the cord” and going 100 percent wireless. Metro PCS offers flat rates and no contracts. This is in direct contrast to the large, nationwide carriers’ reliance upon multi-year contracts to lock in their customers.

Both Cricket and Metro PCS also offer business plans that appeal to budget-conscious small businesses, rather than large corporations. A spectrum cap is needed in order to allow new

Report and Order (rel. Sept. 23, 1994) (“*CMRS Third Report and Order*.” In awarding licenses, one of the Commission’s statutory objectives is “promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3)(B).

²² *CMRS Third Report and Order* at p. 8100 (rules limiting spectrum aggregation “seek to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.”).

²³ *2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, WT Docket No. 01-14, par. 56 (rel. Dec. 18, 2001).

entrants and smaller carriers such as Cricket and Metro PCS to flourish and continue to offer compelling alternatives to the large, nationwide carriers.²⁴

Small, rural carriers also benefit from access to spectrum and a spectrum cap would free up unused spectrum in many rural areas. For such spectrum to continue to lie fallow benefits no one, least of all rural consumers. In many cases, rural carriers are the only carriers willing to serve sparsely populated rural regions outside of the towns and highways. Small, rural carriers are especially adept at providing the services and coverage that rural consumers desire and need. Rural carriers generally reside in their service areas and can meet their customers' needs on a personal level. For example, many rural carriers keep their analog networks up and running in order to serve customers at the edges of their networks where analog handsets provide superior coverage. Rural carriers will also take into account the needs of their local public safety officials when determining where to upgrade their networks.²⁵ To most large, nationwide carriers, the provision of service in rural areas is an afterthought. A spectrum cap will encourage large spectrum hoarders to divest some of their spectrum in rural areas to small, rural carriers who will actually use it.

²⁴ In comments filed June 20, 2008 in the 700 MHz D Block proceeding, WT Docket No. 06-150 and PS Docket No. 06-229, numerous other parties in addition to RTG, including Cricket-parent Leap Wireless International, Inc., support spectrum aggregation limits or eligibility restrictions in order to prevent further excessive aggregation of 700 MHz spectrum. *See* Comments of Leap Wireless International, Inc. at pp 2-8 (Commission should restrict the participation of large entities that already have significant access to 700 MHz spectrum); Comments of the Public Interest Spectrum Coalition at pp. 6-7 (Commission should prohibit bidders from exceeding the existing 95 MHz screen used for merger analysis); Comments of Rural Cellular Association at pp. 3-5 (FCC should limit bidding eligibility to entities that do not already have nationwide or near-nationwide 700 MHz spectrum holdings); Comments of NTCH, Inc. at pp. 13-14 (no single company should be permitted to hold more than 20 MHz of 700 MHz spectrum in any market); Comments of Cellular South, Inc. at pp. 2-3 (Commission should restrict participation in the D Block re-auction using the "spectrum screen" for mergers); Comments of Council Tree Communications, Inc. (Commission should prohibit the national carriers from participating in the D Block re-auction); *see also* Comments of Coleman Bazelon (outcome of the 700 MHz auction was that AT&T and Verizon won most of the licensed spectrum, and are poised to dominate the market for high capacity, ubiquitous wireless broadband services).

²⁵ By contrast, the FCC's Phase II E911 location accuracy rules serve as a disincentive for large carriers to build out their networks in rural areas.

As discussed above, recent mergers and consolidation in the wireless industry have had an anticompetitive effect on the CMRS marketplace and have resulted in conditions that continue to threaten competition in the CMRS market. These developments were exactly the concerns feared by the Commission when it adopted its initial limits on spectrum aggregation. A spectrum cap will serve the public interest by limiting the ability of carriers with large concentrations of spectrum to use their market power to impede competition or to simply allow their spectrum in rural areas of the country to lie fallow when there are carriers willing to develop such spectrum. Accordingly, in order to nurture genuine competition for mobile consumers, the Commission should impose, at the county level, a spectrum cap of 110 megahertz for all CMRS licensees in the bands below 2.3 GHz.

V. HANDSET EXCLUSIVITY AGREEMENTS BETWEEN MOBILE DEVICE MANUFACTURERS AND CMRS OPERATORS ARE ANTICOMPETITIVE AND DISPROPORTIONALLY HARM RURAL CONSUMERS.

By entering into handset exclusivity agreements, major CMRS operators are effectively preventing mobile consumers in America from entering into commercial agreements to buy a particular product that fits their needs. While AT&T argues that the exclusive arrangement for the iPhone creates “enormous benefits for all consumers,” it is impossible to claim a benefit “for all consumers” when only a limited number of consumers are eligible to even purchase the device in the first place.²⁶ In its comments, Verizon claims that “[n]o regulation is needed to enable consumers [sic] obtain the innovative devices that fit their needs.”²⁷ This is completely untrue if the device that “fits their needs” is the iPhone 3G S or the Blackberry Tour 9630 which

²⁶ AT&T Comments at 36.

²⁷ Verizon Comments, Appendix A at 22.

are only available from AT&T and Verizon respectively. If a consumer wants one of those devices and lives in a market unserved by AT&T or Verizon, then the consumer must settle for something he or she did not originally want.

Verizon's assertion that "[r]egulating 'exclusivity' would be unworkable" is completely false.²⁸ Verizon incorrectly suggests that prohibiting device exclusivity agreements would force mobile device manufacturers into producing devices on any air interface a CMRS operator desires and then compel mobile device manufacturers into entering into device procurement agreements with those CMRS operators. First, the successful operation of both hacked and grey/black-market advanced devices demonstrates that those devices can perform just fine on competing mobile networks using the same air interface. Second, the premise that device manufacturers will be forced to produce handsets for more than one next generation air interface will evaporate completely when LTE becomes the de facto 4G network of choice for many domestic CMRS operators. Third, prohibiting exclusivity agreements will in no way "force" device manufacturers into procurement agreements with smaller CMRS operators. Customers of RTG members want the ability to purchase smartphones such as the iPhone or Blackberry Tour. Today, in areas where AT&T and Verizon have no coverage, they are simply unable to do so. If given the mere *opportunity* to procure these types of devices for their consumers, it is extremely unlikely that small and rural operators would seek to demand that a device manufacturer develop an air interface that it does not already make for a particular handset.

Verizon wishes to draw the Commission's attention to what it identifies as carriers offering "competing smartphones from multiple manufacturers," but only the "Big Four" nationwide operators of AT&T, Sprint, T-Mobile and Verizon are referenced, along with another

²⁸ *Id.*

company (Helio) that is now out of business.²⁹ Verizon's inability to identify by name *even one* small or rural operator offering a competing smartphone shines a bright spotlight on the unlevel playing field on which small and rural operators are forced to compete.³⁰

Verizon even suggests that exclusive handset arrangements between operators and manufacturers are not preventing manufacturers from selling *other* equipment to multiple service providers.³¹ But as is often the case with popular devices, consumers don't want the less popular or obsolete models also sold by the device manufacturer - - they want the popular mobile device tied-up in an exclusivity agreement with one privileged CMRS operator! In the particular case of Apple, RTG is completely unaware of any other mobile devices offered by them other than the iPhone.

Finally, both AT&T and Verizon suggest in their comments that small and rural operators should rally together to aggregate demand to make the procurement of smartphones economically feasible. This suggestion is wildly unrealistic because the "Big Four" CMRS operators control approximately 85% of the mobile marketplace, and even if all the remaining "other" CMRS operators in the country did aggregate demand, they would still not have a critical mass to command the development of their own exclusive devices. Essentially, all these small and rural operators would end up with the exact same devices they are purchasing today - - either low end models, or popular models made available months or years after they first debuted with

²⁹ Verizon Comments at 16.

³⁰ *Id* at 17 (Citing AT&T Comments (RM 11497), Declaration of Economist Michael L. Katz, "An Economic Analysis of the Rural Cellular Association's Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers," at 18-19 (Feb 2, 2009). Mr. Katz's declaration identifies only mobile devices with Internet access and touch-screens available to RCA members as competing smartphones from multiple manufacturers. RTG members offer devices with touch screens or Internet access, but that doesn't change the fact that even Verizon doesn't view them as "competing smartphones."

³¹ Verizon Comments at 23.

a national CMRS operator and which have since been superseded by newer models restricted under a handset exclusivity agreement.

VI. THE COMMISSION SHOULD REQUIRE AUTOMATIC DATA ROAMING AND REMOVE THE IN-MARKET ROAMING EXCEPTION IN ORDER TO FOSTER EFFECTIVE COMPETITION.

It is impossible for a domestic CMRS operator to remain competitive in today's marketplace without access to automatic data roaming. The Commission has already clarified that automatic voice roaming is a common carrier service that must be provided on a just, reasonable and nondiscriminatory basis. This policy not only makes sense, but it embodies what mobile consumers expect: seamless coverage across the country. Most CMRS operators in this country lack a national presence; they do not own licenses in every part of the country, and thus are incapable of building out their own nationwide network. Since network size is a prominent component of non-price rivalry, automatic roaming for voice and data services is essential to allow mobile customers to enjoy the benefits of their CMRS operator's services when outside their home coverage area. The need for the Commission to extend automatic roaming to data services follows the same rationale as that for voice services. Furthermore, there is the added justification that mobile networks are becoming increasingly data-centric and consumers are seeing little to no distinction between voice and data services. Verizon has often said that the CMRS marketplace is "increasingly national in nature"³² and that "wireless services are increasingly nationwide, and allow customers to benefit from national rate plans that offer the same prices and services across state boundaries."³³ Without automatic data roaming, those data

³² *In re Applications of Atlantis Holdings LLC, Transferor, and Celco Partnership D/B/A Verizon Wireless, Transferee*, Description of Transaction, Public Interest Showing and Related Requests and Demonstrations, WT 08-95 (filed June 13, 2008) at *iii*.

³³ Verizon Comments, Appendix A at 10.

services will not be available to customers of some small and rural CMRS operators who do not have access to a nationwide network but depend upon a nationwide presence to remain competitive and relevant in the marketplace.

AT&T and Verizon have both heralded the dawn of a wireless broadband era. AT&T has stated that “customers increasingly demand services based on wireless broadband technologies”³⁴ while Verizon has predicted that one-third of all mobile subscribers will in fact be “mobile broadband subscribers” by 2013.³⁵ The country’s two largest CMRS operators have attempted to sidestep the entire debate by insisting that they already offer data roaming to willing partners. This is simply not true. In its comments, Verizon proclaimed that “[c]arriers with advanced services are willing to give favorable roaming terms to other carrier that have implemented similar advanced technology in their networks so that when customers roam they can use these same advanced services.”³⁶ The truth is that when AT&T and Verizon have offered data roaming to small and rural CMRS operators, it is usually at broadband speeds that are one evolution below what they themselves offer to their own customers, even if the requesting roaming partner has comparable data speeds for its customers in the home market. This is not the case of a small CMRS operator furnishing only 1xRTT or GPRS/EDGE to its local subscribers, but then demanding EVDO/LTE or UMTS/HSPA/LTE when its customers roam in major markets on a national provider, yet that is what the national operators seem to imply.³⁷

³⁴ AT&T Comments at 25-27. AT&T sees wireless broadband growth on its own network grow at a clip of 50% year-over-year, on average.

³⁵ Verizon Comments at 15-16.

³⁶ Verizon Comments, Appendix A at 32.

³⁷ AT&T Comments at 34 (AT&T will have commercially available HSPA access to all its customers in 2009); Verizon Comments at 10 (Verizon will begin deploying LTE in 2009).

First, CMRS customers are not expecting something above and beyond what is offered in their home market, they simply want a continuation of the same speeds and services that they are accustomed to on a day-to-day basis in their home coverage area. Second, by forcing small and rural operators to offer sub-standard services to their customers when roaming, it increases the likelihood that: (1) in addition to the services purchased by the rural consumer from his or her local rural carrier, the rural consumer will be forced to purchase the services and devices of a major CMRS operator (meaning two handsets and two service plans); or (2) rural consumers will choose the national CMRS operator and pay more due to roaming charges.

The issue of the in-market or “home” roaming exclusion has been mischaracterized by the country’s two largest CMRS operators, AT&T and Verizon. Even Sprint and T-Mobile, not to mention dozens of smaller Tier II and Tier III CMRS operators, support the abandonment of the home roaming exclusion. Prior to the build-out of their own “nationwide” mobile networks, both AT&T and Verizon were all too willing to use the roaming networks of small and rural CMRS operators, even in areas where they owned overlapping licenses. It is only because those two operators have now reached a coverage level commensurate and in accordance with their longevity in the marketplace that they seek to limit the opportunities of smaller operators, many of whom are struggling start-ups with newly acquired licenses from recent FCC auctions. For each and every new market entrant to become fully deployed across their license area overnight, or at least prior to a commercial launch, is completely impractical and a policy maintaining the expectation that they do so only discourages new competition. Small and rural operators are not seeking a permanent crutch by requesting in-market roaming from more established operators, as Verizon has recently asserted, because there is a built-in disincentive to relying on roaming

coverage.³⁸ Generally speaking, the more an operator relies on roaming, the more expensive the costs to support that extended service (whether voice or data). The more customers a CMRS provider sells service to that are eligible to roam, and the more geographic areas those customers can roam in, the more those operating costs increase. Additionally, the notion of in-market roaming to assist nascent competitors is not a novel concept and has been successfully instituted with regulatory oversight in other OECD countries.³⁹ Moreover, the FCC has used this very concept during the early 850 MHz cellular build-out regime by allowing in-market roaming among the A and B cellular licensees. Allowing new market entrants a ramp-up period creates more sustainable choice for wireless consumers.

VII. CONCLUSION.

The purpose of the Commission's *Fourteenth Report* is to determine where effective competition exists *today* in the CMRS marketplace, and whether any anticompetitive factors are preventing such a desired state of healthy competition. First, the Commission must make an earnest effort to get detailed coverage and service data and not rely on "estimates" that skew the picture of competition. Second, the Commission must acknowledge that prior determinations of competitiveness in the CMRS marketplace no longer hold true, and that recent mergers and acquisitions which have occurred since the preparation of the *Thirteenth Report*, many of which have proven to be paradigm-shifting events, have stunted competition and removed choice for the American consumer.⁴⁰ Third, the Commission should limit the amount of spectrum all

³⁸ Verizon Comments, Appendix A at 35.

³⁹ The European Commission found that by allowing O2, a late-market entrant, to have access to T-Mobile's network, geographical coverage expanded and helped the country to achieve a faster deployment of the 3G network and related services. Additionally, the Australian Competition and Consumer Commission approved a network sharing deal whereby Hutchison 3, another late-market entrant, was granted access to the 3G network of Telstra.

⁴⁰ *Public Notice* at 7.

incumbent licensees hold below 2.3 GHz while at the same time opening up new spectrum for start-up CMRS operators and CMRS operators previously shut-out of spectrum auctions in order to foster more competition and consumer choice. Finally, the Commission should recognize the concerns of legislators⁴¹, consumers and numerous mobile operators and conclude that handset exclusivity agreements and the in-market roaming exception decrease CMRS competition and are harmful to consumers, and that automatic data roaming provisions are necessary for *all* Americans to benefit from mobile broadband, the next phase of CMRS evolution.

For the forgoing reasons, RTG respectfully requests that the Commission act in accordance with the views expressed herein and in RTG's comments in this proceeding.

Respectfully submitted,

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July 13, 2009

⁴¹ Letter from Senator Herb Kohl to FCC Chairman Julius Genachowski, July 6, 2009.

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Bennet & Bennet, PLLC, 4350 East West Highway, Suite 201, Bethesda, MD 20814, hereby certify that a copy of the foregoing Reply Comments of the Rural Telecommunications Group, Inc. was served on this 13th day of July, 2009, by email on those listed below:

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**Federal Communications Commission**

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...and Thank You for Your Comments

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