

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
)	
Fostering Innovation and Investment in the Wireless Communications Market)	GN Docket No. 09-157
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
_____)	



**COMMENTS OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)**

The wireless marketplace is characterized by rapid innovation and robust competition. In order to ensure that consumers will continue to benefit from an increasing variety of choices among advanced wireless services and pricing options, the Commission should recognize that wireless investment and innovation has taken place in an atmosphere of minimal regulation. The wireless innovation and competition we see today is a vindication of the free marketplace. Whereas other telecommunications industries have been stifled by overly burdensome regulations, wireless has thrived in a light regulatory environment. While additional steps can be taken to create improved incentives for even more wireless innovation and competition, any such action taken by the Commission should further a free market approach.

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STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote the Jeffersonian principles of individual liberty, limited government, federalism, and free markets. Through its Telecommunications and Information Technology Task Force, ALEC develops public policies that preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the telecommunications and technology industries free from new burdensome regulations. Guided by the same principles, ALEC's Tax & Fiscal Policy Task Force has also participated in the development of public policies concerning appropriate taxation of advanced communications technologies.

ALEC has consistently supported minimal regulations and strong marketplace competition in wireless voice and data through its officially-adopted policies. ALEC's *Resolution Supporting Pro Consumer Public Policy for Voice, Video, and Data Services* recognizes that "a competitive marketplace, not multiple layers of regulation, will most efficiently provide consumers with voice, video and data choice in the marketplace today" and declared that "Government policies should encourage the private sector to provide competitive choices for voice, video and data." In adopting its *Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments*, ALEC resolves "its support of minimal, competitively neutral state and federal regulation of all telecommunications providers, including incumbent and competitive wireline carriers, wireless carriers and cable telephony providers." Also, through its *Statement of Principles for Telecommunications Tax Reform*, ALEC declares its support for "pro-growth" tax policies that "encourage the deployment of traditional and advanced communication infrastructure on a technology neutral basis." ALEC has adopted additional

policies and model legislation concerning specific wireless issues that will be discussed below.

Beyond its adoption of official public policies concerning wireless, ALEC's Telecommunications and Information Technology Task Force has kept apprised of important developments in the wireless marketplace. At recent meetings, the Task Force called its attention to wireless industry investment and deployment, as well as new trends for growth in wireless broadband capacity and capability. The Task Force will continue its examination of wireless marketplace developments at its December, 2009 States & Nation Policy Summit meeting in Washington, D.C., and in meetings to be held in 2010.

ALEC submits these comments in response to certain questions posed by the Commission's Notice of Inquiry. In particular, ALEC addresses some of the significant public policy roadblocks and deterrents to wireless innovation and investment that need to be cleared in order to better promote wireless innovation and competition. ALEC offers itself as a resource to the Commission concerning important public policy measures that can encourage continued deployment and adoption of wireless technologies.

ANALYSIS

I. The Wireless Marketplace is Competitive and Dynamic

There is robust competition in the wireless marketplace, offering consumers a variety of choices. As the Commission's *Thirteenth Report on Competitive Market Conditions With Respect to Commercial Mobile Radio Service (CRMS)* acknowledges, "there is effective competition in the CMRS market."¹ In particular, "[m]ore than 95 percent of the U.S. population lives in census blocks with at least three mobile telephone operators competing to offer service,

¹ *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27 (2009) at 5, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

and more than 60 percent of the population lives in census blocks with at least five competing operators."² This competitiveness has driven down costs to consumers. As the Commission is undoubtedly aware, early 2009 estimates of average monthly minutes of use per subscriber total 769, with an average cost per minute of \$0.06.³ Average cost per minute has proceeded on a downward trajectory, with a 2003 average cost per minute of \$0.10.⁴

The wireless marketplace is also characterized by rapid innovation in technology and services. Recent years have witnessed a proliferation of mobile handset devices designed with a variety of functions and features. In addition to voice services, wireless consumers now partake of a number of advanced communications services, including text and multimedia messaging, web browsing, and other specialized applications. As the Commission has pointed out, "wireless technology is increasingly being used to provide a range of mobile broadband services."⁵

Importantly, ALEC believes that the competitive, dynamic marketplace for wireless vindicates the federal policy of minimal regulation for voice wireless.⁶ As one economist has observed concerning wireless sector growth, "this competition developed in an environment of little regulation. As a result, prices reflect network costs, not the regulators' desire to cross-subsidize various services."⁷ To some extent, this light regulatory approach has been extended to advanced wireless data services.⁸ ALEC supports the continued extension of this policy approach to encourage and unleash further innovation in advanced wireless services.⁹

² *Id.*

³ *Id.* at 8.

⁴ *Id.*

⁵ *Id.* at 5.

⁶ *Id.* at 8.

⁷ Robert W. Crandall, COMPETITION AND CHAOS: U.S. TELECOMMUNICATIONS SINCE THE 1996 TELECOM ACT (2005), at 108.

⁸ See, e.g., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, WT Docket No. 07-53, 22 FCC Rcd 5901 (2007) (finding "wireless broadband Internet access is an information service").

⁹ See Section III, *infra*.

II. More Spectrum Should be Made Available through Market-based Mechanisms, Free of Regulatory Encumbrances

ALEC urges the Commission make additional spectrum available in order to meet existing and future demand for advanced wireless services. ALEC believes there is important need for new spectrum. In ALEC's view, auctioning spectrum free of regulatory encumbrances best ensures that auction bidders put such spectrum to its highest and best use.

As provided in its *Resolution Concerning Management of the Public Spectrum*, ALEC believes that consumer choice is best assured by "encouraging the most efficient use and fullest deployment of spectrum-based, or wireless, telecommunications services to the greatest number of people at the least possible costs." Efficient deployment should be achieved through "market-based mechanisms, such as competitive bidding or auctions for spectrum assignment." Moreover, ALEC's *Resolution* maintains that the Commission should "[r]educe regulation and rules to encourage flexible use of all assigned frequencies," and ensure "regulatory and tax parity among all new and existing radio-based competitors who offer like, or similar, telecommunications services."

In particular, ALEC believes the Commission should *not* repeat its recent experiment of imposing an "open access" mandate on a portion of the 700 MHz spectrum set for auction. That episode constitutes an unfortunate incursion into the free-market based approach to spectrum management that the Commission embarked on in the early 1990s. The fact that the 700 MHz C block auction raised approximately \$7 billion less than it would have raised without that mandate strongly suggests that the more encumbered spectrum will not be put to its highest and best economical use.

Also, the fact that unencumbered spectrum solicited higher bids in the 700 MHz auction underscores the inequities of imposing any kind of retroactive regulation on such unencumbered spectrum. Investment in advanced wireless services would be hampered by the imposition of any new substantive regulations on such spectrum.

ALEC believes that spectrum efficiency and flexibility is best achieved by leaving spectrum use open to the widest possible range of competing business models. The less restrictive approach allows competing spectrum auction winners the flexibility needed to best meet consumer demands. Different kinds of business models may have the potential to enhance consumer welfare and choice. But the efficacy and viability of such models should ultimately be decided by consumer preferences, not regulator preferences.

III. The Commission Should Classify Short Messaging Services as “Information Services” Rather than Impose Common Carrier Regulations

More rapid innovation and deployment of advanced wireless services will lead to greater adoption and choices by wireless consumers. In ALEC’s view, one commonsense action that the Commission can take to reduce regulatory uncertainty and to encourage further innovation is to declare short messaging services (SMS) such as text messages, and common short codes (CSC) often used as part of text messaging campaigns as information services. As the Commission makes plain in its *Thirteenth Report*,¹⁰ these advanced wireless services are increasingly popular with consumers and this growing demand should not be stifled by new regulation.

ALEC is aware that the Commission has taken comments on a petition for rulemaking concerning the status of SMS and CSC.¹¹ ALEC offered its own views in that proceeding,¹² and

¹⁰ *Thirteenth Report*, at 7-8.

¹¹ See *In the Matter of Petition of Public Knowledge et al. for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, Public

it reiterates here that Commission should *not* impose Title II common carrier obligations on SMS or CSC. Neither of those services are commercial mobile radio services, since they are primarily not interconnected to the public-switch telephone network (PSTN). Typically, SMS text messages are routed through Internet protocol (IP) systems to data transfer centers where they are rerouted to designated recipients. Moreover, ALEC believes the Commission does *not* have delegated authority to impose Title II regulations on SMS or CSC.

To the fullest extent possible, the Commission should take a hands-off approach to advanced wireless services that rely on IP-based systems. Such an approach will best encourage advanced wireless marketplace investment and innovation in new services for consumers.

IV. Current Federal Income Tax Policy for Employee Cell Phones Discourages Wireless Adoption

Federal individual income taxation lies beyond the Commission's jurisdiction. Nonetheless, ALEC believes it important to point to the unfortunate disincentive for wireless adoption posed by federal tax policy's treatment of employee use of cell phones.

Pursuant to an 1989 Tax Code provision,¹³ an employer has to report an employee's personal cell phone usage as income on an employee's W-2, unless the employee meets detailed documentation rules substantiating each element of the expenditure or use by designating whether the call was business or personal, and demonstrates that the cell phone is used for business more than fifty percent of the time. When an employee uses a cell phone for business purposes, it qualifies as a working condition fringe benefit that is excluded from an employee's

Notice, WT Docket No. 08-7 (2008), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-78A1.pdf.

¹² See Reply Comments [on behalf of ALEC], In the Matter of Petition of Public Knowledge, et al., WT Docket No. 08-7, available at: <http://www.alec.org/AM/pdf/telecom/2008%204%2014.pdf>.

¹³ See 26 U.S.C. § 280F(d)(4); see also 26 U.S.C. § 274(d).

gross income, and the employer can deduct the cell phone as a business expense, provided the substantiation requirements of § 274(d) are met.

ALEC's Resolution Urging Congress to Update Tax Treatment of Cell Phones recognizes the expense and difficulty for employees to maintain logs documenting use of cell phones provided by their employers. The *Resolution* urges repeal of the Tax Code's treatment of cell phones as listed property and the burdensome reporting requirements that accompany such listing. ALEC believes that repeal of this outdated provision will remove a roadblock to increased wireless adoption.

V. Removal of State & Local Policy Roadblocks to Wireless Investment and Innovation Must Continue

The Telecommunications Act of 1996 contemplates only limited, narrow role for state regulation of wireless. Wireless networks are a channel and instrument of interstate commerce that would be unduly burdened by a regime of 50 conflicting, overlapping state standards. Also, a lighter regulatory touch was necessary to encourage innovation and deployment of wireless technologies. Accordingly, states cannot prohibit new entrants into the wireless marketplace or set rates. But the wireless landscape has nonetheless been significantly impacted by public policies adopted by state and their local governments pursuant to their limited scope of regulatory powers. ALEC believes that the states' general trend away from more onerous regulation has been important in encouraging wireless deployment, but that this trend needs to continue.

To be sure, the Commission cannot directly alter the allocation or scope of state regulatory authority over wireless that is recognized by Congress in the Telecommunications Act. But it is entirely appropriate for the Commission to spotlight the impact of state regulatory policies on

wireless investment and innovation in the any report resulting from this inquiry or in the National Broadband Plan.

A. Preemption of State Public Utility Commission Regulation of Wireless

The overall trend among states has been to remove unnecessary layers of wireless regulation. ALEC supports this movement in the states and believes it should continue.

In particular, the trend among states has been to limit or entirely remove their respective public utility commissions' respective jurisdiction over wireless. ALEC's careful consideration of this issue is reflected in its *Wireless Competition Act*. This important model state legislation removes state PUC jurisdiction over wireless. Some thirty states have adopted legislation based on or otherwise similar to ALEC's model.

In ALEC's view, marketplace forces are much more likely to enhance consumer choice and discipline competitors' conduct than multiple regulatory entities. It is crucial that these deregulatory efforts *not* be reversed, but that they continue into the future.

B. Reform of Cell Tower Siting Process

One important area in which states have room for improvement is cell tower siting and collocation. Long delays by local governments in approving cell tower siting or collocation permit applications and protracted litigation have prevented more rapid deployment of needed wireless infrastructure. Wireless service availability and quality is reduced by a lack of such infrastructure.

ALEC has adopted model state legislation for cell tower siting and collocation, including its *Wireless Communications Tower Siting Act*. Among other features, this model legislation requires local authorities to take final action on a cell tower siting permit application within 75 days of its filing. It also requires local authorities to take final action on a collocation permit

application within 45 days of its filing. Absent a showing of necessity by the permitting authority, a failure to take action within the allotted time results in the permit being automatically approved by operation of law. ALEC believes that lengthy delays in the permitting process need to be curtailed, and the disciplining force of a shot clock is a necessary answer to the problem of delays.

Cell tower siting and collocation permit applicants benefit from the certainty of deadlines. Such certainty allow wireless service providers to better assess the costs of regulation—*i.e.*, the risk of lengthy delays, lengthier processing, and rejection of collocation or new siting applications. Clear timeframes for action on applications reduces costly unknown variables for applicants. Through the form of lower prices, consumers also benefit from reduced uncertainty costs to wireless service providers. To the extent date-specific deadlines hasten authority approval, consumers benefit from a more rapid deployment of advanced wireless services.

As an organization of elected state officials, ALEC appreciates the state sovereignty concerns relating to state and local government control over their rights-of-ways. To this end, ALEC believes that important discretion over permit application approval must remain with states and their local governmental subdivisions. However, ALEC also recognizes the inherently interstate nature of wireless networks and the significant “network effects” they exhibit. Accordingly, ALEC believes that CTIA’s proposal (in a separate proceeding) that the Commission adopt a federal “shot clock” and “deemed granted” provision is a reasonable one that the Commission should carefully consider.¹⁴

¹⁴ See *In the Matter of: Petition for Declaratory Ruling by CTIA – The Wireless Association to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Public Notice, WT Docket No. 08-165 (2008), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1913A1.pdf.

C. Reduction of State Taxation Burden on Wireless

Unfortunately, state taxes imposed on wireless have risen significantly in recent years. ALEC is concerned that many states have limited the growth and availability of wireless services to consumers by excessive taxation. As discussed earlier, ALEC's *Statement of Principles for Telecommunications Tax Reform*, encourages "pro-growth" tax policies that "encourage the deployment of traditional and advanced communication infrastructure on a technology neutral basis." However, a snapshot look at taxation of wireless services by states suggests that state tax rates are *not* pro-growth.¹⁵ High rates of state taxation on wireless reduces overall economic welfare.¹⁶ In the time ahead, ALEC will continue its support for lowering the tax burden on wireless services.

¹⁵ See, e.g., Written Testimony of Scott R. Mackey, Hearing on HR 5793, the "Cell Tax Fairness Act of 2008" House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (September 18, 2008) at 4 (listing state taxes and fees on wireless as of July, 2008, and comparing to general sales tax rates), available at: <http://judiciary.house.gov/hearings/pdf/Mackey080918.pdf>.

¹⁶ See, e.g., Allan T. Ingraham & J. Gregory Sidak, "Do States Tax Wireless Services Inefficiently? Evidence on the Price Elasticity of Demand," 24 *Virginia Tax Review* 249 (2004), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525523#.

CONCLUSION

As indicated above, ALEC believes that the wireless marketplace is innovative and competitive. Wireless consumers are benefiting from the light regulatory touch that has been applied to wireless in recent years. ALEC believes that a free-market approach to wireless has been an extraordinary success to this point, and that it should continue indefinitely so that consumers can enjoy continued innovation and increased competition as the next generation of advanced wireless technologies becomes available.

Respectfully submitted,

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September 30, 2009