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

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| In the Matter of<br><br>Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993<br><br>Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Including Commercial Mobile Services | ) | WT Docket No. 09-66 |

# REPLY COMMENTS OF AT&T INC.


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## INTRODUCTION AND SUMMARY

Is the United States wireless industry "competitive *enough*"? That is the question posed by the one set of comments, filed by the Consumer Federation of America and other like-minded groups (collectively, "CFA"), that purports to dispute that the industry is characterized by "effective competition." Tellingly, however, CFA never tries to answer the question, and for good reason. The industry certainly is "competitive enough" to deliver unprecedented levels of investment – upwards of $20 billion this year alone, at a time when other industries are dramatically scaling back. It is "competitive enough" to spur carriers aggressively to deploy next generation technologies to satisfy consumers' exploding appetite for wireless broadband. It is "competitive enough" for device manufacturers to team with providers to develop strikingly innovative smartphones that in turn drive broadband penetration and necessitate still more network investment. It is "competitive enough" to generate record numbers of subscribers (more than 270 million and counting) and usage (in 2008, approximately seven billion minutes of use and 3.5 billion text messages, *every single day*). It is "competitive enough" to generate near weekly price wars that cause investors heartburn even as they save consumers millions. It is "competitive enough" that, for close to two decades, the Commission has consistently and correctly found that each of the established metrics for measuring competition – market structure, provider conduct, consumer conduct, and market performance – demonstrates that the industry is effectively competitive.

Perhaps most significantly, as AT&T demonstrated in detail in its opening comments, the industry is "competitive enough" to deliver choice to consumers in every aspect of the wireless ecosystem. Most obviously, consumers have a broad choice among wireless providers – in most cases, they can choose from at least five facilities-based providers, and in close to all cases they

can choose among at least three. Consumers can also choose from a multitude of devices – over 100 from AT&T alone – that range from simple voice-only devices to the most advanced smartphones with highly innovative broadband capabilities. Under AT&T's "bring your own device" plan, consumers can even choose to use on AT&T's network GSM-capable devices that AT&T does *not* sell. Consumers can further choose from among the more than half-dozen operating systems that run on wireless devices, and from among the many tens of thousands of applications available for download over the Internet or through the numerous app stores that have sprung up in the last two years. They can also choose specialized devices, such as Amazon's wildly popular Kindle or other competing e-book readers, that feature low-cost (or even "free") download-only wireless service built-in to the device. And they can choose how to pay for their device and service – with options ranging from heavily subsidized devices coupled with post-paid term plans, to deeply discounted prepaid plans whose prices plummet with each passing week.

Indeed, in just the few short weeks since opening comments were filed, the industry has provided even more evidence that it is "competitive enough" to deliver innovation and consumer choice at unprecedented levels. Two weeks ago, Amazon announced a new iteration of the Kindle with built-in wireless service that will permit content downloads in more than 100 countries worldwide. That same week, both Verizon and T-Mobile (with Samsung) announced plans to develop and support wireless devices running Google's "Android" operating system, and thereby to capitalize on the demand by some (though not all) consumers for an environment that features limited or no pre-screening of applications for wireless devices. For its part, AT&T announced that it would permit VoIP applications to run on the iPhone using its 3G network, notwithstanding the deeply subsidized rate at which AT&T sells the iPhone.

At the same time as these developments underscored the stunning pace of innovation and change in the marketplace, the last few weeks also brought a cautionary tale: A "technical snafu" involving the Sidekick – a leading device that runs on the network of one of the nation's largest carriers – threatened the availability and integrity of a substantial amount of consumer data, including contact information, photos, and other data. This episode is just the latest example of the critical importance of – and technical challenges inherent in – safeguarding wireless networks from harm, as more and more consumers use smartphones coupled with broadband wireless service to manage more and more aspects of their daily lives.

Particularly in view of these developments – which, again, highlight the astonishing pace of innovation, the speed at which the marketplace is evolving, and the importance of safeguarding wireless networks – there is another question that CFA and other proponents of regulation should be asking. In addition to asking whether the industry is "competitive enough" to deliver benefits to consumers without regulatory intervention (as the last two weeks show just as clearly as the last two decades, it plainly is), they should also ask whether they are "wise enough" to guarantee that regulatory intervention will not bring unintended consequences that impede those benefits or otherwise harm consumers. Are CFA and other proponents of regulation wise enough, for example, to know – better than industry participants and consumers themselves know – the optimal level of pre-screening of applications to provide the best customer experience? Are they wise enough to calibrate the precise trade-off between, on the one hand, refusing to certify applications that interfere with a device's look-and-feel and, on the other hand, providing consumers access to a wide range of capabilities that promise a wide range of consumer benefits? Are they wise enough to know, better than industry participants, how best to ensure that applications developers have the support and resources they need to create and

deliver to consumers the best, most innovative applications that will drive broadband adoption and usage? Are they wise enough to assess – again, better than industry participants motivated by consumer demand and the fear of failure – whether the security risks of "open access" will diminish the ability of carriers to protect their networks? Are they wise enough to know, in advance, whether a mandate that would require carriers to permit subscribers to use any device on any network to access any lawful content would in fact diminish customer choice – either by inhibiting device manufacturers from maintaining control over the customer experience in order to preserve a device's unique look-and-feel, or by preventing the next specialized device to supplant the Kindle as the newest novel thing? And are they wise enough to gauge whether and the extent to which foreclosing exclusive handset distribution arrangements would slow the pace of innovation in devices, thereby diminishing their popularity, derailing wireless broadband adoption, and diminishing carriers' need to invest in new broadband technologies?

The stakes here could not be higher. For close to two decades, the wireless industry has been characterized by growth, investment, and innovation. The enormous amount of data compiled in this proceeding demonstrates in no uncertain terms that the industry is at present accelerating along all three of these trend lines – it is growing faster, investing more, and innovating more rapidly than ever before – at a time when few industries can make a claim to any of those three, much less all of them. The success of the wireless industry – over time and particularly today – has been made possible by the bipartisan commitment at the Commission and in Congress to permit the forces of competition and consumer demand to dictate the choices made available to consumers and to drive investment decisions. The facts show that this approach is *working* – prices are declining, output is increasing, investment is surging, and consumers are choosing. A false step could change that. The industry is indeed "competitive

enough" – competitive enough to deliver consumers enormous benefits while serving as a crucial engine of growth for the U.S. economy. The Commission should be wary of any steps that would compromise the industry's ability to continue that role.

* * *

As it did in its opening comments, AT&T organizes the remainder of these reply comments into two parts. In Part I, AT&T surveys the record evidence addressing the competitive indicia the Commission has traditionally used to gauge competition in wireless services themselves, explaining that in each respect the record shows that the industry bears all the hallmarks of effective competition in a capital-intensive industry. Part I also addresses "edge" market segments (including devices, operating systems, and applications), and explains that, here too, the record demonstrates that consumers are benefitting from tremendous innovation and a dizzying array of choices, and that proponents of regulation would in fact impede customer choice by replacing the robust variation in business relationships that now characterizes the wireless ecosystem with a one-size-fits-all regulatory mandate tailored to the interests of the few.

In Part II, AT&T addresses the mobile "value chain." It reiterates that, as to spectrum, the Commission should take aggressive steps to alleviate what Chairman Genachowski has rightly called the "looming spectrum crisis," while resisting calls from smaller providers that would disable larger carriers from fully competing in future spectrum auctions and that would, as a result, artificially limit the price of spectrum, preventing it from being put to its highest and best use and punishing U.S. taxpayers in the meantime. Part II also addresses commenters' calls for special access rate regulation, explaining that these requests, yet again, are utterly lacking in empirical support and simply ignore the fact that Commission intervention would severely limit

the deployment of the fiber and wireless backhaul necessary to satisfy the burgeoning demand for wireless broadband. Finally, Part II addresses and rebuts commenters' requests for more regulation of roaming arrangements, as well as the misguided claims that AT&T has somehow curtailed smaller carriers' ability to obtain network equipment optimized for use in the 700 MHz lower A Block.

## DISCUSSION

### I. THE RECORD CONFIRMS THAT EVERY SEGMENT OF THE WIRELESS ECOSYSTEM IS CHARACTERIZED BY COMPETITION, CONSUMER CHOICE, AND ROBUST INVESTMENT

The comments filed in this proceeding reveal broad consensus on three key points.

*First*, as AT&T's opening comments demonstrated, the robust competition that characterizes the U.S. wireless industry is creating unprecedented consumer choice, driving breakneck innovation, and spurring vast amounts of infrastructure investment at a time when other industries are sharply cutting back.[1] That competition extends not just to wireless services themselves, but to "edge" segments such as wireless devices, operating systems, and applications.[2] No one seriously disputes any of this, and many commenters confirm it. Sprint states that "[t]he wireless retail market remains competitive and has brought unimagined innovation and value to American consumers over the past decade."[3] T-Mobile observes that "today's wireless market is robustly competitive and well-functioning. . . . Innovation, both at the core and at the edge of the wireless platform, has accelerated in recent years."[4] MetroPCS "considers the retail mobile wireless services marketplace to be competitive – at the present

[1] *See* AT&T Comments at 1-4.

[2] *Id*. at 3.

[3] Sprint Comments at ii, 2-3.

[4] T-Mobile Comments at 2.

time."[5] And CTIA observes that, "[e]ven as the wireless market has evolved well beyond what the Commission has reviewed in its previous competition reports, it remains intensely competitive at every level."[6] The simple fact is that wireless in the United States is the most vibrantly competitive sector of the U.S. telecommunications industry and the envy of the world.

*Second*, as AT&T's comments also showed, the competition that characterizes the U.S. wireless industry – and the incredible successes that result from that competition – is due in large part to the consistent, bipartisan, de-regulatory framework put in place over the last two decades by this Commission and Congress. Commenters echo this point as well. Sprint emphasizes that the Commission's "hands-off, de-regulatory approach has been enormously successful to the benefit of consumers, investment and innovation."[7] T-Mobile explains that "the wireless market is as robust, open, and dynamic as it is today because the Commission took a deregulatory approach to the market early on, allowing competition to promote consumer welfare and drive innovation."[8] MetroPCS agrees that "much of the success of the mobile wireless services industry has resulted from the Commission's light regulatory touch."[9]

*Third*, there is likewise widespread agreement that, in analyzing competition for wireless services, including competition for devices and so-called edge markets, the Commission should continue to use the same four categories of established metrics – market structure, provider conduct, consumer behavior, and market performance – that it has consistently applied in the

[5] MetroPCS Comments at iii, 3.

[6] CTIA Comments at i.

[7] Sprint Comments at iii.

[8] T-Mobile Comments at 33.

[9] MetroPCS Comments at iii, 3.

past.[10] Although a few parties argue that the Commission should focus its analysis on static market-share metrics such as HHIs, as discussed further below the Commission has correctly rejected that approach in the past – as have the Department of Justice, courts, and noted economists – and no commenter provides a basis to retreat from this precedent here. As Dr. Willig has explained, "[a]ny reliance on such metrics in the wireless industry, given its dynamic nature and complexity, likely will lead to misguided, and perhaps counterproductive, regulatory decisions."[11]

In the face of all of this, one set of commenters – CFA and its allies – argues that the wireless market is not "effectively competitive." But CFA grossly misconstrues this term, equating it with a standard of "perfect competition" that has little relevance in the real world.[12] In addition to trying to set the bar impossibly high, CFA attempts to divert attention from the facts. Indeed, recognizing that it has no answer to the reams of industry data that demonstrate a highly competitive marketplace, CFA argues that the Commission should, in effect, create new data, by putting questions (much of them irrelevant) to the nation's largest wireless carriers. But CFA can't get past the facts that exist today by asking the Commission to create new ones. The demonstrable truth – discussed below and revealed in endless amounts of data that is already in the record in this proceeding – is that the wireless industry, including its "edge" segments, is robustly competitive.

[10] *See id*. at 19; CTIA Comments at 71; Verizon Comments at 8-12.

[11] Willig Decl. ¶ 18.

[12] Willig Decl. ¶ 14.

### A. The Comments Confirm That Wireless Retail Service Market Segments Are Highly Competitive

United States consumers have more choices among wireless providers than consumers anywhere else in the world. The Commission's own data – which no commenter challenges – show that most Americans can choose from among at least five facilities-based carriers and almost all can choose from at least three.[13] New nationwide wireless networks such as Clearwire are being deployed, many smaller facilities-based carriers (such as Leap, MetroPCS, and Cellular South) are growing rapidly, and consumers also can obtain service from numerous Mobile Virtual Network Operators ("MVNOs") that resell service.[14] The intense rivalry among this range of providers has impelled carriers to introduce service offerings for every type of wireless customer, from prepaid offerings for light cell phone users at one end of the spectrum, to unlimited everything (calling, text, data, etc.) plans at the other end of the spectrum, and countless variation in between.[15] The competition among providers also has led to rapidly falling prices, steadily increasing output, and ever-expanding levels of investment and innovation – all of the hallmarks of a robustly competitive marketplace.[16]

The comments confirm, moreover, that consumers have choices among wireless providers not only in urban and highly populous areas, but in rural areas as well. As AT&T has explained, its network provides extensive coverage in rural areas, and AT&T offers consumers in

[13] *See* AT&T Comments at 4; Thirteenth Report, *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 Services*, 24 FCC Rcd 6185, ¶ 2 (2009) ("*Thirteenth Report*") (more than 95 percent of the U.S. population lives in census blocks with at least three competing mobile operators, and more than 60 percent lives in census blocks with at least five competing providers).

[14] *See* AT&T Comments at 10-11.

[15] *See id*. at 11-12.

[16] *See id*. at 21-41.

these rural areas the same competitive service plans, devices, and applications that it offers consumers in urban and other areas.[17] AT&T also faces intense competition in these rural areas just as it does elsewhere. Other wireless carriers, including those that focus on rural areas, likewise acknowledge that they are competing aggressively, including by upgrading their networks to next generation broadband technologies. For instance, NTELOS states that it has "had numerous successes as a regional wireless carrier – growing its wireless business, transforming its network with broadband, introducing new services, and offering its customers innovative plans that make wireless affordable."[18] The company "continues to make significant investments in its wireless network," adding 1,183 cell sites in 2008 and 24 in the first six months of 2009, and recently completing an EVDO broadband upgrade in numerous markets throughout Virginia.[19] USCC likewise states that it has "deployed new towers to cover previously unserved areas" and that it "has also deployed CDMA 1xEV-DO technology in most of its markets."[20] As a result, "[t]he majority of USCC customers now have phones, wireless modems or PDAs that can download multiple applications, including games, news, sports information, ring tones and stock quotations."[21] Coupled with the data on investment and the deployment of next generation networks presented in AT&T's opening comments,[22] and in anticipation of the Commission's prompt approval of pending acquisitions, these comments paint an unmistakable picture: competition in wireless – including the smartest phones, the most

[17] *See id*. at 72-73.

[18] NTELOS Comments at 1.

[19] *Id*. at 3.

[20] USCC Comments at 10, 17.

[21] *Id*.

[22] *See* AT&T Comments at 17-18, 71-73, 84-86.

varied service plans, the newest apps, and all of the other benefits that stem from a robustly competitive marketplace – has already come to or will shortly arrive in virtually every corner of the United States.

### 1. The Wireless Market Structure Is Highly Competitive

There is no dispute that consumers throughout the U.S. can choose from multiple wireless providers, including both facilities-based carriers and MVNOs.[23] No single wireless carrier has anything approaching a dominant share, and smaller wireless carriers (such as MetroPCS, Leap Wireless, and CellSouth) are all experiencing rapid growth, as their own words confirm.[24]

While impressive in its own right, moreover, the structure of the U.S. wireless industry also compares favorably to market structures abroad. The U.S. is the least concentrated of the 26 OECD countries, and the structure of the industry is more competitive than anywhere in Europe, by the standards that regulators there have set to measure their own wireless industries.[25] And, as AT&T has previously explained, concentration levels alone understate the degree of wireless

[23] *See* AT&T Comments at 22; Verizon Comments at 18, 19-42; CTIA Comments at 4-7.

[24] *See* MetroPCS Comments at 3; *see also* AT&T Comments at 10, 25-28 (collecting sources).

[25] *See* AT&T Comments at 23; *see also The United States and World Wireless Markets: Competition and Innovation Are Driving Wireless Value in the U.S.*, at 6 (May 2009), *attached to* Ex Parte Letter from Christopher Guttman-McCabe, CTIA, to Marlene Dortch, FCC, RM-11361, GN Docket No. 09-51, WC Docket No. 07-52 (FCC filed May 12, 2009) (the United States wireless marketplace is the least concentrated of the 26 OECD countries tracked by Merrill Lynch, citing Merrill Lynch, *Global Wireless Matrix 4Q08*; the four OECD countries not tracked by Merrill Lynch are Iceland, Ireland, Luxembourg, and the Slovak Republic); *see* Ofcom News Release, *Ofcom Pledges Further Consumer Protection for Mobile Users and Publishes 3G Mobile Coverage Maps for the First Time* (July 8, 2009), http://www.ofcom.org.uk/media/news/2009/07/nr_20090708 ("The UK has the most competitive mobile industry in Europe with five mobile network operators."); *see also* U.K. Office of Communications (Ofcom), *Mostly Mobile: Ofcom's Mobile Sector Assessment, Second Consultation* (July 8, 2009), http://www.ofcom.org.uk/consult/condocs/msa/msa.pdf.

competition in the U.S., as the pace of innovation and the speed with which providers are introducing new service offerings, pricing strategies, devices, and applications effectively precludes any sort of coordinated behavior among U.S. wireless carriers.[26]

Although no one disputes that consumers have choices among wireless providers, CFA argues that, according to an HHI calculation, the wireless marketplace is "highly concentrated" and growing more so.[27] But CFA has no answer to the point that over-reliance on concentration analysis is misplaced in the wireless industry.[28] Metrics such as HHI were designed to be used in situations where direct-market based evidence of competition is unavailable, such as in the context of horizontal mergers,[29] where there typically is limited or no evidence as to how the marketplace will actually perform post-merger. Here, by contrast, there is ample evidence of how the marketplace actually *is* performing (all of which shows intensely rivalrous behavior). Beyond that, it is well established that HHI analysis is unhelpful in dynamic markets such as this one, which, as the Commission has explained, are "more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve."[30] Moreover, as Dr. Willig

[26] *See* AT&T Comments at 23-24.

[27] CFA Comments at 7-8.

[28] *See* AT&T Comments at 23-25; Willig Decl. ¶¶ 18, 22; Declaration of Michael L. Katz ¶¶ 24-26 (FCC filed July 13, 2009), attached as Exhibit A to Reply Comments of AT&T, WT Docket No. 09-66 (FCC filed July 13, 2009) ("Katz July 2009 Decl."); Verizon Comments at 12-14; Declaration of Michael D. Topper at 20-22 (FCC filed Sept. 30, 2009), attached as Exhibit A to Verizon Comments.

[29] *See, e.g.*, Katz July 2009 Decl. ¶¶ 24-26.

[30] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 50 (2005), *aff'd, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007). As Mercatus Center notes, "[e]mpirical and experimental research demonstrates that there is no automatic relationship between industry structure and market performance. . . . The possibility of

explained, given that wireless is characterized by high sunk costs and large economies of scale and scope,[31] relatively high HHIs are not only consistent with the fact that wireless is intensely competitive, but are to be expected.[32] For all of these reasons, this Commission,[33] courts,[34] other regulators, [35] and economists[36] routinely reject the knee-jerk reliance on HHIs that CFA advocates here.

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innovative or dynamic competition makes it especially important that the forthcoming [14th CMRS Competition] report avoid assuming that market structure mechanistically determines firm conduct and performance." Mercatus Center Comments at 4-5.

[31] Indeed, every time the Commission has reported CMRS HHIs, it has cautioned that, where "the scale of output at which a firm can fully exploit scale economies (the minimum efficient scale) is large relative to potential demand, there will be room in the market for only a small number of firms operating at the lowest possible cost" and, as a result, "market concentration in such industries will tend to be high relative to industries characterized by greater potential demand or smaller minimum efficient scale." Ninth Report, *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 Services*, 19 FCC Rcd 20597, ¶ 55 (2004) ("*Ninth Report*"); *see also* Tenth Report, *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 Services*, 20 FCC Rcd 15908, ¶ 47 (2005); Eleventh Report, *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 Services*, 21 FCC Rcd 10947, ¶ 46 (2006); Twelfth Report, *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 Services*, 23 FCC Rcd 2241, ¶ 53 (2008); *Thirteenth Report* ¶ 48.

[32] *See, e.g., Ninth Report* ¶ 55.

[33] *See, e.g., id.*

[34] *See Capital Cities/ABC, Inc.* v. *FCC*, 29 F.3d 309, 315 (7th Cir. 1994) (It has been "many years since anyone knowledgeable about" competitive analysis "thought that concentration by itself imported a diminution in competition"); *United States* v. *Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.") (emphasis in original).

[35] *See, e.g.*, David L. Meyer, Deputy Assistant Attorney General for Civil Enforcement, *Merger Enforcement Is Alive and Well at the Department of Justice*, Remarks at the ABA Fall Antitrust Section Forum (Nov. 15, 2007), http://www.usdoj.gov/atr/public/speeches/227713.htm ("the outcome of our merger review does not hinge on HHI calculations or any other objective or readily observable benchmark").

In any event, even apart from its overreliance on concentration measures, CFA is wrong to assert that the wireless industry is growing increasingly concentrated. The average HHI estimated in the *Thirteenth Report* earlier this year was actually lower than reported two years earlier (and unchanged from the previous year),[37] because merger activity has been accompanied by aggressive entry and expansion by smaller carriers. Moreover, the merger activity that has taken place raised competitive issues only in particular geographic areas, and those issues were fully addressed through divestiture commitments. Tellingly, neither CFA nor any other commenter even attempts to show any link between the consolidation that has occurred and any real world reduction in the effectiveness of wireless competition.

Although no one disputes that consumers have ample choices among wireless providers, a few commenters (mostly smaller wireless carriers) complain about how consumers are exercising that choice. AT&T and Verizon, they claim, together accounted for a substantial share of industry net subscriber additions in recent quarters, and they suggest that this must be evidence of a problem in the industry.[38] Yet these same carriers have elsewhere acknowledged that they are continuing to invest and grow rapidly, despite (or, more likely, because of) the

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[36] *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, at 4 (Working Paper, Nov. 25, 2008), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1033&context=berkeley_econ221 ("[i]n recent decades . . . industrial organization scholars and the courts have been more apt to stress that high concentration can be compatible with vigorous competition and efficient market performance."); George Ford et al., *Competition After Unbundling: Entry Industry Structure, and Convergence*, 59 Fed. Comm. L. J., 331, 339 (March 2007) (For example, "[t]he household refrigerator and freezer business has an HHI of over 2000, silverware manufacturing has an HHI of nearly 2800, and glass container manufacturing has an HHI of 3000.").

[37] *See Thirteenth Report* ¶ 46, Table 3.

[38] *See* CellSouth at 2; MetroPCS Comments at 7.

actions of their larger rivals.[39] Indeed, recent trends show that, if anything, wireless is growing even *more* competitive and *less* concentrated.[40] Thus, for example, the most recent available data show that, putting aside merger activity, whereas AT&T and Verizon grew their respective subscriber bases in the range of 3% during the first half of 2009, MetroPCS and Leap Wireless each expanded their respective subscriber counts by more than *16%* during the same time period.[41] And these gains by smaller carriers are poised to continue or accelerate given the very aggressive pricing plans that many of them have just recently introduced,[42] as well as the considerable investments they are making in next generation networks.[43] Moreover, the most recent available evidence also suggests that Sprint has regained its footing and that T-Mobile is signing up customers in droves,[44] further underscoring that the industry is competitive from top to bottom.

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[39] *See* AT&T Comments at 17-18, 25-27.

[40] *See, e.g.*, Scott Cleland, *DOJ Will Find Vibrant Competition in Reviewing Telecom Industry*, The Precursor Blog (July 6, 2009), http://www.precursorblog.com/content/doj-will-find-vibrant-competition-reviewing-telecom-industry ("[t]he competitive facts in the telecom industry [] speak for themselves; the industry is clearly and overtly competitive and trending more competitive").

[41] The percentages reflected in the text are based on net subscriber adds, excluding adds resulting directly from mergers, for first and second quarter 2009 data, as reported in Timothy Horan & Xavier Olave, Oppenheimer, *Correction: 3Q09 Wireless Preview*, at 11-12, Exh. 10 (Oct. 1, 2009). These data show that, in the first and second quarters of 2009, AT&T increased its subscriber base 1.59% and 1.75%, respectively; Verizon Wireless grew its base 1.77% and 1.32%, respectively; MetroPCS grew its base 12.74% and 3.4%, respectively; and Leap Wireless grew its base 12.82% and 4.68%, respectively.

[42] *See, e.g.*, AT&T Comments at 28; Jason Armstrong et al., Goldman Sachs, *Combining Telco/Cable*, at 21 (Sept. 8, 2009) (projecting that "prepaid subscriber additions will represent 33% of total industry net additions over the course of 2010.").

[43] *See* AT&T Comments at 27-28.

[44] *See, e.g.*, Christopher Larsen et al., PiperJaffray, *Checks Indicate Pickup at Sprint and T-Mobile; Possible Softness at Verizon*, at 1 (Oct. 2, 2009) ("Overall, our September channel checks indicated that sales were solid, but that some share may have shifted between carriers.

What is more, even if commenters' unsupported pronouncements about AT&T's and Verizon's supposed ever-increasing market shares were correct, that would not reflect a lack of competition in the industry. AT&T and Verizon, like others, have been forced to work enormously hard to win and retain customers precisely *because* the industry is so competitive. To the extent these efforts have paid off – by enabling these providers to offer service offerings that consumers find attractive – it is a *good* thing for consumers, especially insofar as it is triggering a competitive response from other providers.

Presumably recognizing that wireless services considered as a whole are intensely competitive, a few commenters assert the existence of separate markets for voice and data and claim that these supposedly separate markets are not competitive.[45] But these commenters do not establish that these products fall into separate product markets, and in fact all evidence points to the contrary. As the Commission has noted, "mobile wireless services and applications – including voice, messaging, games, video and music downloads, and Internet access – often jointly use the same spectrum, network facilities, and customer equipment; many mobile providers have integrated the marketing of these services and applications, offering them in bundles; and mobile telephone subscribers tend to purchase bundled services."[46] Furthermore, as AT&T previously explained, many consumers use their wireless services and devices for both voice and data – not just as part of the same plan but as part of the same communication (as

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Based on our checks, we believe Sprint and T-Mobile picked up some share during the month, primarily from Verizon Wireless. . . . Sales at MetroPCS and Leap appeared to be steady with some rate plan trade downs, but not a dramatic increase.").

[45] *See, e.g.*, CFA Comments at 9-10.

[46] Notice of Inquiry, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, 24 FCC Rcd 11357, ¶ 3 (2009) (footnote omitted).

when a customer elects not to leave a voicemail and sends a text instead, or sends a text or e-mail instead of making a call in the first place).[47] And that trend will only continue, as advances in network innovation permit consumers to email, text, browse the web, or even share live video from their location while simultaneously holding a voice conversation using the same device. It therefore makes little sense to define and investigate "voice" and "data" as separate markets, and both the Department of Justice and the Commission have refused to do so to date.[48] But, even if the Commission were to depart from this precedent here, it would find intense competition for both, as wireless providers offer a range of both voice and services, and are investing heavily to expand their offerings.[49]

There is likewise no merit to arguments that the Commission should separately analyze competition for GSM-and CDMA-based services.[50] The underlying factual predicate of this argument – that GSM and CDMA services do not compete – is false. For example, there is constant customer churn among GSM and CDMA carriers, indicating that consumers view these as substitutes that belong in the same market.[51] In fact, it is widely recognized that the existence

[47] *See* AT&T Comments at 21.

[48] *See, e.g.*, Complaint at 6, *United States and State of Louisiana v. AT&T Inc. and Centennial Communications Corp.*, No. 1:09-cv-01932-JDB (D.D.C. filed Oct. 13, 2009) ("[m]obile wireless telecommunications services include both voice and data services provided over a radio network"); Memorandum Opinion and Order and Declaratory Ruling, *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holding LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Management and* De Facto *Transfer Leasing Agreements*, 23 FCC Rcd 17444, ¶ 45 (2008) ("we evaluate this proposed transaction using a combined 'mobile telephony/broadband services' product market (as defined herein), which is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services)") (footnote omitted).

[49] *See* AT&T Comments at 6, 36; Verizon Comments at v; CTIA Comments at 3, 25-26.

[50] *See* MetroPCS Comments at 9; Cricket Comments at 4.

[51] *See, e.g.*, Timothy Horan & Xavier Olave, Oppenheimer, *Correction: 3Q09 Wireless Preview* at 11, Exh. 10 (Oct. 1, 2009).

of multiple wireless standards in the U.S. is responsible for greater levels of competition than in countries that chose to mandate only a single standard (generally GSM).[52] In any event, GSM- and CDMA-based wireless carriers both large and small are rapidly upgrading their networks to LTE, which will enable even greater interoperability and roaming between and among these different networks.[53]

Finally, as AT&T explained in its opening comments, wireless providers are constrained not only by each other, but also by wireline technologies.[54] Roughly 80% of households still have both a wireline and wireless phone, and therefore routinely decide whether to use wireless or wired technology when making a call from their home. Wireless providers clearly market their services to capture such business. As MetroPCS reveals, for example, it is "acting as a substantial catalyst for wireless competition with traditional wireline servicing. Based on company surveys, over 80 percent of MetroPCS customers use their MetroPCS service as their

[52] *See*, *e.g.*, Braden Cox & Steve Delbianco, ACT, *National Policies as Platforms for Innovation: Reconciling a Flat World with Creative Cities*, at 26 & n.114 (Feb. 2007), *available at* http://www.actonline.org/documents/070207-ACT-Innovation-Report.pdf. Moreover, while it may be the case that few CDMA-based wireless carriers have entered into roaming agreements with GSM-based carriers, and vice versa, this merely demonstrates that there is sufficient competition with respect to both types of wireless networks to make such agreements unnecessary. There is no technical barrier to such agreements (although it may add to cost), as dual-mode or tri-mode phones make it possible to roam between different types of networks. *See* FCC Consumer Facts, *Understanding Wireless Telephone Coverage Areas* at 3 (Sept. 17, 2008), http://fcc.gov/cgb/consumerfacts/cellcoverage.pdf ("'Single-mode' handsets can connect to either a digital or an analog network, but not both. 'Dual-mode' handsets can be used on both an analog network and one type of digital network. 'Tri-mode' handsets can be used on analog and two types of digital networks. Digital networks allow wireless service providers to offer advanced features such as Internet access.").

[53] *See* AT&T Comments at 94; CDMA Comments at 4; CTIA Comments at 14; MetroPCS Comments at 2-3; U.S. Cellular at 5; Verizon at vii.

[54] *See* AT&T Comments at 24-25.

primary telecommunications service."[55] CFA likewise notes that "[m]any consumers are cutting the cord and migrating to cell phones as their primary voice device. Similarly, wireless data use has sky-rocketed, and many Americans rely on their handset as their primary link to the Internet."[56] Wireless service providers, in short, compete not only amongst themselves but also with other, wireline-based technologies that the Commission must take into account.

### 2. Entry and Investment Are Occurring at a Rapid Clip

As AT&T noted in its comments, the rapid entry of new wireless providers – and the aggressive investment by existing ones – further highlight the competitive nature of the industry. Despite the recent economic downturn, for example, the four national carriers spent $20.17 billion in capital expenditures in 2008,[57] and are on track to invest the same amount in 2009, if not more.[58] Investment by new entrants, such as Clearwire, and smaller carriers, such as Leap

[55] MetroPCS Comments at 2.

[56] CFA Comments at 31.

[57] *See* Comments of CTIA – The Wireless Association, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 12-13 (FCC filed Aug. 31, 2009) (this investment yields "a total cumulative capital expenditure in operational systems of more than $90 billion over the last four years (not including the billions of dollars paid to the federal treasury for spectrum, or investment in pre-operational systems)"); *see also* Marguerite Reardon, *AT&T's CTO Defends Wireless Network*, CNET (Oct. 8, 2009), http://reviews.cnet.com/8301-12261_7-10371298-10356022.html?tag=mncol;title (AT&T alone estimates that it "will spend between $17 billion and $18 billion on its wireless and wireline networks" in 2009; AT&T's CTO, John Donovan, stated that AT&T will have its "HSPA 7.2 network up and running in 25 to 30 markets by mid-2010 with the goal of reaching 90 percent of its current 3G wireless footprint in 2011."); AT&T News Release, *AT&T Calls for Constructive, Fact-Based Dialog with FCC on New Government Push to Regulate Vibrant U.S. Wireless Industry* (Oct. 7, 2009), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27211; David Dixon & Dutch Fox, FBR Capital Markets, *Summary of 4G Network Upgrade Insights and Potential Capex Implications*, at 1 (Oct. 9, 2009).

[58] *See, e.g.*, Simon Flannery et al., Morgan Stanley, *2Q Trend Tracker: Attractive Valuations & Share Shifts Favor the Bells*, at 87, Exhibit 132 (Aug. 31, 2009) (comparing estimated 2009 capex for Verizon Wireless, AT&T, Sprint, and T-Mobile of $19.0 billion with 2008 capex of $18.7 billion); David Barden et al., Bank of America/Merrill Lynch, *2Q09*

Wireless and MetroPCS, also is expected to reach more than $20 billion this year.[59] Other commenters underscore the point. For example, Sprint highlights Clearwire's $7.4 billion investment in "new 4G mobile broadband services,"[60] while T-Mobile states that it is spending $5 billion this year to upgrade its 3G network, and that it will have HSPA+ up and running on a *nationwide* basis by 2010.[61] T-Mobile claims that this will make it the operator with the highest data speeds in the largest footprint. Verizon recently launched an advertising campaign – targeted directly at AT&T – that touts what it claims is the nation's most expansive wireless broadband coverage. MetroPCS states that it is investing heavily to deploy LTE,[62] and other carriers – such as U.S. Cellular, Cincinnati Bell, Cellular South, and Cricket Communications – likewise indicate that they are making considerable investments to expand their networks and service offerings.[63]

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*Telecom Results Heads Up and Model Handbook*, at 28 (July 17, 2009) ("We project an increase of 1.6% YoY in aggregate wireless capex for 2009. . . . In aggregate, after a 5.4% increase in 2008 to $20.6 billion, we forecast 2009 spending of $20.9 billion . . . driven by increases from Clearwire, Verizon, and AT&T."); Phil Cusick et al., Macquarie Research, *Follow the Money: 2Q Telco and Cable Capex Preview*, at 1 (July 23, 2009) ("We believe the major carriers will maintain or increase their capex budgets for 2009.").

[59] *See* David Barden et al., Bank of America/Merrill Lynch, *2Q09 Telecom Results Heads Up and Model Handbook*, at 28 (July 17, 2009).

[60] Sprint Comments at 8; *see also* Sprint News Release, *Sprint 4G Blazes into Milledgeville* (Oct. 5, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1338275&highlight= (the 10 new markets are Milledgeville, Ga.; Salem, Ore.; Abilene, Amarillo, Corpus Christi, Killeen-Temple, Lubbock, Midland-Odessa, Waco, and Wichita Falls, Texas, and Sprint announced plans to deploy service in Chicago; Dallas-Fort Worth; Philadelphia; Austin; Charlotte, Greensboro, and Raleigh, N.C.; Honolulu and Maui, Hawaii; San Antonio; and Seattle in 2009, and Boston, Houston, New York, San Francisco, and Washington, D.C. in 2010).

[61] *See* T-Mobile Comments at 9, 12.

[62] *See* MetroPCS Comments at 2-3.

[63] *See* U.S. Cellular News Release, *U.S. Cellular Seeks To Expand Mobile Broadband in Rural Missouri with Support from Federal Recovery Act Funds* (Sept. 10, 2009),

No commenter can or does dispute that massive investment and new entry is occurring. CFA argues instead that investment by two carriers, AT&T and Verizon, is declining as a percentage of revenue, which it claims "is a strong sign that providers are not competing on non-price factors such as investment."[64] But the notion that wireless carriers are not competing on investment does not even pass the straight-face test: again, the industry will invest tens of billions of dollars this year alone on network upgrades, and carriers large and small are planning to deploy 4G technology that will allow them to satisfy consumers' increasing demand for wireless broadband.[65] Indeed, multiple analyst reports issued in the few weeks since opening comments highlight that network investment is on the rise.[66]

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http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press090910_3 ("[T]he projected cost of delivering mobile broadband service on U.S. Cellular's existing and budgeted cell sites to proposed service areas in Missouri is $22.4 million. Slightly less than half of this total is to be underwritten by a BIP grant, with the balance funded by U.S. Cellular using other sources … 'No one will be able to provide broadband to more customers faster or cheaper than what we propose,' commented [U.S. Cellular President and CEO, John E.] Rooney. Even without BIP support, U.S. Cellular forecasts that 3G mobile broadband coverage will be enabled on 60 percent of its cell sites by the end of the summer, which will reach approximately 75 percent of its post-pay customers."); Cincinnati Bell Wireless News Release, *Cincinnati Bell Selects Yap for Next Generation Voice-to-Text* (Oct. 6, 2009), http://www.cincinnatibell.com/aboutus/news/articles/news.asp?page=20091006.asp; Cellular South News Release, *Cellular South Expands 3G High-Speed Mobile Broadband Data Services Throughout Much of Mississippi Delta Region* (Aug. 4, 2009), http://www.cellularsouth.com/news/2009/20090804.html; Cricket Communications Press Release, *Cricket UM185C Modem Provides Unlimited Wireless Internet Service Around Town or Across the U.S.* (Sept. 17, 2009), http://www.mycricket.com/aboutcricket/pressroom/details?id=441.

[64] CFA Comments at 14; *see id.* at 49 ("What these figures illustrate is a substantially profitable business in which the two largest players are adding subscribers, increasing revenue, and improving operating margins.").

[65] *See* AT&T Comments at 16-18, 77.

[66] *See* David Dixon & Dutch Fox, FBR Capital Markets, *Summary of 4G Network Upgrade Insights and Potential Capex Implications*, at 1 (Oct. 9, 2009) ("Higher-than-expected capital expenditure going forward for AT&T and Verizon Wireless – we see potential for AT&T to report capex above the 2009 guidance range of $17 billion to $18 billion, with similar capex

Nor, in all events, does a decline in investment as a percentage of revenues indicate that competition is decreasing, much less that current levels of investment are inconsistent with a vibrantly competitive market. For one thing, major network investment is made in cycles. As new generations of technology evolve, investment will necessarily be higher in some years than others. As the Yankee Group notes, "capital expenditures tend to be cyclical, and since just about all the carriers and service providers are in the midst of next-generation network builds, it would not be unusual or unexpected for capex to contract somewhat after the 'heavy lifting' is finished."[67] That is especially true in a dynamic industry subject to rapid change such as wireless, where disruptive technological advances can trigger aggressive capital spending initiatives that may even out over time as the industry matures.[68] At the same time, as investment levels off or declines, revenues may increase, as the deployment of new technology bears fruit.[69] That investment varies over time as a percentage of revenue thus establishes only that carriers are investing wisely – again, a *good* thing for consumers.

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spending levels in 2010."); Craig Moffett et al., Bernstein Research, *Weekend Media Blast: Tilt (Part II) . . . Bandwidth Arbitrage* (Oct. 9, 2009) ("The jump to LTE will facilitate a 5x improvement in bandwidth per megahertz of spectrum. But that's not close to the rate at which bandwidth consumption is rising. Future returns on capital are shaping up to be just a fraction of what we've seen in the past.").

[67] Gary Kim, *U.S. Carrier Capex Will Peak in 2009*, I.P. Business (citing Yankee Group Director, Brian Partridge), http://www.ipbusinessmag.com/departments/article/id/427/.

[68] *See generally* Mike Farrell, *As Growth Slows, Free Cash Flow Becomes Cable's Finance Metric*, Multichannel News (Sept. 7, 2009), http://www.multichannel.com/article/339628-Cover_Story_Cash_Business.php ("When Cablevision was spending a lot of money to build out its network and drive penetration of new services to industry-leading levels, its capex was about 20% to 25% of revenue. Today, now that its penetration gains have leveled off, capex represents about 10% of revenue.").

[69] *See* David J. Kostin et al., Goldman Sachs, *Investing for Growth: Capex and R&D* at 5 (Aug. 31, 2009) ("In general, we see capex respond to sales after a 1-2 quarter lag. We consider sales growth to be the best real-time indicator of end-market demand for most companies and believe management teams look at sales trends to make projections regarding future business

Beyond that, even the current level of investment as a percentage of revenues in wireless – which CFA decries as too low – is in fact fully consistent with a competitive market. For example, AT&T's and Verizon's ratios (15.9% and 17.7%, respectively, in 2008) are higher than the ratios of *any other* Fortune 50 company, including more than 50% higher than Google's (10.8%), nearly twice General Electric's (8.8%), more than three times IBM's (4.7%), and nearly five times Apple's (3.7%).[70] Even if CFA is right that wireless investment as a percentage of revenues today is less than it has been at some other point in time, the rate of investment remains at levels well above the norm for competitive industries.

### 3. Pricing and Output Reflect a Vibrantly Competitive Marketplace

Steadily declining prices and rapidly expanding output provide further evidence of the robust competition for wireless services. As AT&T highlighted in its opening comments, many wireless consumers are paying *60% less* for service than they were approximately six months ago, reports of yet another wireless "price war" are practically a weekly occurrence, and U.S.

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prospects. This lag between sales growth and capex growth suggests that firms wait to see validation of sales trends before committing to long-term investment projects.").

[70] *See* Google Finance, *AT&T, Inc. Financials*, http://www.google.com/finance?q=NYSE:T&fstype=ii; Google Finance, *Google, Inc. Financials*, http://www.google.com/finance?q=NASDAQ:GOOG&fstype=ii; Google Finance, *Microsoft, Inc. Financials*, http://www.google.com/finance?q=NASDAQ:MSFT&fstype=ii; Google Finance, *International Business Machines Corp. Financials*, http://www.google.com/finance?q=NYSE%3AIBM; Google Finance, *Pfizer, Inc. Financials*, http://www.google.com/finance?q=NYSE:PFE&fstype=ii; Google Finance, *Apple, Inc. Financials*, http://www.google.com/finance?q=NASDAQ:AAPL&fstype=ii. *See also* Letter from Larry Cohen, President, Communications Workers of America to Julius Genachowski, Chairman, FCC (Oct. 15, 2009), *available at* http://files.cwa-union.org/national/communicationspolicy/other/20091015_CWA_FCC_Open _Internet.pdf ("*CWA Internet Investment Letter*") (attaching charts and tables comparing capital investment of AT&T, Verizon, and other wireless providers to that of market leaders in other industries).

wireless consumers pay less (in most cases far less) for each minute of use than consumers in any other country tracked by the OECD.[71]

That evidence alone should dispel any conceivable concern about the state of competition among wireless service providers. But if more were necessary, the comments confirm that wireless carriers are competing aggressively to differentiate themselves through innovative voice and data pricing plans targeted at all types of consumers.[72] For example, Sprint notes that "American consumers can choose among a virtually unlimited array of plans,"[73] while MetroPCS states that it offers "plans that are differentiated from the more complex and long-term plans required by many of its competitors."[74] NTELOS claims that it "offers a wide array of voice and data plans to meet the specific needs of each of its customers," and that it recently "introduced the most affordable unlimited prepaid calling plan in its region," offering "unlimited, anytime calling starting at just $30 a month without a contract, credit check, or activation fee."[75] The comments further confirm that these plans have resulted in declining prices for U.S. consumers that are now the lowest in the world. As Sprint notes, wireless prices fell by 5.4% last year as compared to a 3.1% increase in the Consumer Price Index, and "[o]n a per minute basis, Americans pay the lowest prices in the world – paying 80 percent less than the Japanese and 67 percent less than the French."[76]

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[71] *See* AT&T Comments at 6, 12, 21-23.

[72] *See* AT&T Comments at 11-13; Verizon Comments at 5, 64-79.

[73] Sprint Comments at 5.

[74] MetroPCS Comments at 2.

[75] NTELOS Comments at 4.

[76] Sprint Comments at ii.

Prices have continued to decline even in the short time since opening comments were filed. Since then, providers have continued to announce deeply discounted pricing plans and innovative service bundles that promise more minutes (and texts) for less, prompting one head-scratching analyst to gripe that wireless pricing has gone "crazy."[77] As wireless prices have declined and service offerings have expanded, moreover, output has continued to increase. In the past year, wireless subscribership increased by 15 million (up 6%), wireless MOUs increased to 1.1 trillion (up 3%),[78] text messages increased to 740 billion within the first half of 2009 (up 50% from last year),[79] and wireless broadband has exploded. AT&T's wireless data traffic has increased *5,000%* in the last three years, and, "[b]y some accounts, *total* traffic on AT&T's wireless network has doubled in just the past five months."[80] Here, too, the U.S. is leading the world. As Sprint notes, "American consumers use wireless services far more than people elsewhere – by a factor of eight compared to Germans and by a factor of six compared to the Japanese."[81]

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[77] Phil Cusick et al., Macquarie Research, *Wireless Services: More Coming Down the Pricing Pipe*, at 1 (Oct. 9, 2009) ("this has been a crazy year for pricing"); *id.* ("AT&T announced on [October 9, 2009] that it is offering unlimited talk and text on GSM through the GoPhone brand name."); *id.* ("Checks indicate that T-Mobile is running unlimited voice/SMS prepaid trials in select markets. We also hear of another unlimited prepaid offer, called Cool-J, being discussed at Sprint, although this seems redundant once Virgin is brought in. Lastly, Page Plus, Verizon's other unlimited MVNO, is slowly adding distributors and could begin broader advertising into the holidays.").

[78] *See* CTIA – The Wireless Association, *Semi-Annual Wireless Industry Survey*, at 7 (Oct. 7, 2009), http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf.

[79] *See* CTIA – The Wireless Association Press Release, *CTIA – The Wireless Association Announces Semi-Annual Wireless Industry Survey Results* (Oct. 7, 2009), http://www.ctia.org/media/press/body.cfm/prid/1870.

[80] Craig Moffett et al., Bernstein Research, *Weekend Media Blast: Title (Part II) . . . Bandwidth Arbitrage* (Oct. 9, 2009) (emphasis in original).

[81] Sprint Comments at ii. In contrast to its earlier comments in this proceeding, CFA apparently no longer disputes that U.S. wireless subscribers pay lower prices than do their

In the face of the vast array of pricing plans available to U.S. consumers, CFA asserts, incredibly, that wireless carriers have adopted "parallel pricing structures for voice, data, and SMS services, as well as parallel limitations on usage of services."[82] But CFA provides no evidence to support this far-fetched allegation; in fact, it concedes as much in suggesting that it could prove its claim if only the Commission were to "collect . . . data."[83] There is no need for more data gathering here, however, as a vast body of evidence already demonstrates that rates and terms vary widely from carrier to carrier, and that those offers are constantly changing in response to competition.

Indeed, far from evidencing "parallel pricing," there is a significant disparity – on the order of 33% – between the prices of certain lead offers of the four national carriers alone;[84] and

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counterparts elsewhere, noting that "CTIA's criticism of the OECD study" on which CFA previously relied "correctly notes that an international comparison of a single bucket of usage volumes does not provide all of the information that the Commission would need to compare prices for service in the United States to prices in other countries." CFA Comments at 41. As AT&T has explained, the OECD study is indeed multiply flawed. *See* AT&T Comments at 30-31.

[82] CFA Comments at 10.

[83] *Id*. at 12. Further demonstrating that it lacks any data to support its claims, CFA argues that wireless carriers "may have both the incentive and the ability to charge higher rates through hidden charges." *Id*. at 9. CFA cites in support a paper on the behavioral economics of shrouded attributes, which is "any contingency that is not fully incorporated into the initial purchase decision," such as "surcharges, fees, penalties, accessories, options, or any other hard-to-anticipate feature of the ongoing relationship between a consumer and a firm." Xavier Gabaix & David Laibson, *Shrouded Attributes and Information Suppression in Competitive Markets*, at 8 (May 22, 2004), http://idei.fr/doc/conf/jjl/papers/71gabaix.pdf. There is no evidence that wireless consumers are failing to take into account any so-called shrouded aspects of wireless service, to the extent they even exist, but even if that were the case it would have no bearing on the Commission's analysis. The whole point of the paper is to explain that "informational shrouding flourishes even in highly competitive markets" due to "consumer biases," such as the failure to anticipate contingencies. *Id.* at 1-2.

[84] *See* David Barden et al., Bank of America/Merrill Lynch, *Wireless Service & Handset Pricing – Pressure Building*, at 1 (Oct. 5, 2009) ("Sprint offers the lowest entry point for all 'data+voice+text service offerings among the post paid operators across all device types, with

the differences increase further still when taking into account the prepaid and other competitive offerings of the many regional and local carriers and MVNOs.[85] Furthermore, in the most recent quarter (3Q 2009), wireless carriers continued to alter their pricing plans to differentiate themselves: AT&T introduced its "A-List" calling feature on September 9, 2009, which allows unlimited mobile calling to and from any five "VIP" domestic phone numbers (10 for family plans); on September 10th, Sprint introduced its "Any Mobile, Anytime" feature, which provides unlimited calling to a select group of numbers, as a no-charge addition to its "Everything Data" plan; MetroPCS and Leap Wireless both recently added features to their standard unlimited plans; and Verizon has cut its average smartphone price to what analysts claim is "the lowest level we have seen for any carrier since we began tracking the average price after discount starting in 3Q06."[86]

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discounts as much as 33% versus AT&T and VZ and 20% versus T-Mobile."); Sprint Connection, *Analyst Says T-Mobile Taking Aim at Sprint with Plan To Cut Prices*, Kansas City Star (Oct. 13, 2009) ("T-Mobile may lower unlimited plans to between $50 and $80 a month from $100, analyst John Hodulik said.… At $80, Verizon Wireless and AT&T 'will not feel the need to match this price point,' he said").

[85] *See* Sid Gorham, *Telecom Case Study: All You Can Eat Plan Take a Bite Out of Vegas*, Nielsen Wire (June 9, 2009) ("the Big 4 national carriers are increasingly challenged by regional carriers that exclusively sell unlimited plans. These 'All You Can Eat' (AYCE) carriers offer unlimited service in the $40-$50 per month range."); *see also* Phil Cusick et al., Macquarie Research, *More Me-Too Prepaid Unlimited*, at 1 (Aug. 4, 2009) ("Our checks indicate that the Page Plus offer is to include unlimited talk and SMS, as well as 20Mbs of data on Verizon's network over 30 days for US$40. While this plan is cheaper than Straight Talk's US$45 unlimited plan, it's not an industry low like the US$30 Straight Talk plan, which offers 1,000 MOUs, 1,000 SMS/MMS and 30Mbs of data, and is essentially in line with Leap and Metro's US$40 unlimited offer."); Simon Flannery et al., Morgan Stanley, *2Q 2009 Preview: Strong Cash Flow Likely as Top-Line Pressures Persist*, at 6 (July 20, 2009).

[86] David Barden et al., Bank of America Merrill Lynch, *Wireless Service & Handset Pricing – Pressure Building*, at 7 (Oct. 5, 2009). Even if CFA's parallel pricing allegation were right on the facts, moreover, it would be wrong on the economics. It has long been recognized that parallel pricing among rivals can be reflective of competition. *See, e.g., E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984); Donald Turner, *The Definition of*

There is likewise no merit to CFA's claim that wireless carriers are forcing customers to purchase plans with more services than they want, and that "[i]n a truly competitive market . . . consumers would be able to obtain or negotiate a plan at an economic purchase price that suits their usage level, even if that use is low in volume, and should not be forced into paying higher prices for usage beyond what they desire."[87] This claim, offered yet again with no empirical support, reflects a startling ignorance of industry facts. AT&T alone offers 13 individual plans, 20 family plans, 12 prepaid plans, and six data plans; the individual post-paid plans start with as few as 450 minutes per month, which is slightly more than half of the 800 minutes per month that the average US. wireless customer actually uses.[88] AT&T also offers a Senior Plan with 200 minutes per month, for customers 65 and older.[89] And all AT&T customers can choose from prepaid plans starting with 200 minutes per month, or a "pay as you go plan" that has no monthly minimum and imposes a daily fee plus usage surcharges only on days a customer uses her phone. And that is just AT&T. Other national, regional, and local wireless carriers offer a similar array of options, with the result that "the market has moved in such a way that there is very little comparability left between any 2 bucket [of] minute plans. One such plan may include free texts while the other may include unlimited wireless calling."[90] In the face of all of this, CFA's

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*Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 659 (1962).

[87] CFA Comments at 42.

[88] *See* AT&T, *AT&T Cell Phone Plans*, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/index.jsp.

[89] *See* AT&T News Release, *AT&T Introduces New Wireless Plan for Seniors* (Oct. 26, 2007), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24612; AT&T, *Individual Cell Phone Plans*, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/individual-cell-phone-plans.jsp.

[90] David Barden et al., Bank of America/Merrill Lynch, *Wireless Service & Handset Pricing – Pressure Building*, at 2 (Oct. 5, 2009).

suggestion that U.S. wireless customers are unable to find "a plan . . . that suits their usage level" is preposterous.

Equally misguided is CFA's complaint that, although wireless prices have declined, they have not declined as much as they should have given the larger base of wireless users over which to spread high fixed costs.[91] Here again CFA substitutes empty rhetoric for empirical evidence. Contrary to its assertion, prices have actually fallen by *more* than volumes have increased. For example, between 2000 and 2007 (the most recent year for which Commission-collected data are available), the number of voice minutes increased by 3.01 times and the number of voice subscribers increased by 2.4 times[92] – but nominal prices for voice services fell by 3.6 times.[93] Moreover, while it is true that the wireless industry is characterized by high fixed costs, these costs are by no means static, as CFA's argument assumes. To the contrary, as explained above, wireless carriers have invested tens of billions of dollars to expand and improve their networks in the last few years alone. This is therefore not a situation where *one-time* fixed costs are supporting an ever-growing base of users; rather, fixed costs in the industry are continually and rapidly expanding to meet the needs of new and existing users.

CFA's argument that text messaging pricing is too high fares no better. As AT&T has demonstrated, wireless carriers continue to offer better value text messaging plans that allow

[91] *See* CFA Comments at 41-42.

[92] *See Thirteenth Report*, Table 12 (showing minutes of use for 2000 and 2007); *compare* Seventh Report, *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 Services,* 17 FCC Rcd 12985, 13004-05 (2002) *with Thirteenth Report* ¶ 197 (showing increase in subscribers).

[93] *See Thirteenth Report*, Table 12.

customers to buy large blocks or even unlimited text messages for a single price.[94] CFA's claim that "rates for individual text messages doubled from 10 cents to 20 cents" between 2005 and 2008 simply ignores that the vast majority of text messages transmitted by large carriers are sent under flat-rate plans offering a fixed number of (or unlimited) messages, and not under the pay-as-you-text pricing that CFA cites.[95] In the case of AT&T, for example, more than 99% of the text messages that AT&T customers send and receive are under fixed-rate pricing plans. Customers under these plans pay an average of just over a penny per text, and that rate is falling. Between January 2007 and March 2009, the nominal price-per-text paid by AT&T customers fell nearly 70%.[96]

CFA next claims that prices for data service indicate "supracompetitive profits and an absence of price rivalry."[97] It argues that this is "demonstrate[d] . . . particularly clearly" by "new plans priced at $9.99 per month for 25 MB plus 50 cents per additional MB, or $19.99 for 75 MB plus 30 cents per additional MB."[98] It is ironic that CFA would complain about data plans that charge consumers for exceeding their specified usage levels, since the open access/net neutrality rules for which CFA so fervently advocates would limit the ability of wireless carriers

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[94] *See, e.g.*, David Barden et al., Bank of America/Merrill Lynch, *4Q08 Wireless Services & Handset Pricing Analysis*, at 6-7 (Jan. 20, 2009) (describing key pricing changes, including unlimited text messaging); Craig Moffett et al., Bernstein Research, *Quick Take – U.S. Telecommunications: Another LEAP into the Abyss (of Pre-Paid Pricing)*, at 2, Exhibit 1 (Aug. 4, 2009) (comparing historical prices for unlimited voice, text, and Web pricing plans).

[95] CFA Comments at 11.

[96] Written Statement of Wayne Watts, Senior EVP & General Counsel, AT&T Inc., at 4-5, *Hearing on Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market*, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (June 16, 2009), *available at* http://judiciary.senate.gov/pdf/06-16-09WattsTestimony.pdf.

[97] CFA Comments at 11.

[98] *Id.*

otherwise to ensure that individuals' excessive usage of data services does not impair service for all customers.[99] In all events, CFA's selective citation of two Verizon plans is hardly indicative of some kind of market failure, particularly given the many different types of data plans that are available to consumers, with different usage thresholds, flat rates, and overage charges.[100]

Without a valid argument that prices or output reflect a lack of competition, CFA falls back on the argument that the Commission should collect extensive data to analyze wireless *profits*.[101] This burdensome request is wholly unwarranted. Given the vast evidence demonstrating that wireless services are competitive, no further data inquiry – much less one into carrier profits – is required.

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[99] *See generally* Farhad Manjoo, *The iPhone Is Not an All-You-Can-Eat Buffet: Why AT&T Should Dump Unlimited Data Plans*, Slate (Oct. 6, 2009), http://www.slate.com/id/2231646/ ("Every iPhone/AT&T customer must deal with the consequences of a slowed-down wireless network. Not every customer, though, is equally responsible for the slowdown. At the moment, AT&T charges $30 a month for unlimited mobile Internet access on the iPhone. That means a customer who uses 1 MB a month pays the same amount as someone who uses 1,000 MB. I've got a better plan – one that superusers won't like but that will result in better service, and perhaps lower bills, for iPhone owners: AT&T should kill the all-you-can-eat model and start charging people for how much bandwidth they use.").

[100] *See* Marguerite Reardon, *Beware of Pricier Mobile Internet Data Plans*, CNET News (Sept. 14, 2009), http://news.cnet.com/8301-30686_3-10351105-266.html (Forrester Research analyst Charles Golvin believes that "'[t]he model of paying a flat $30-a-month rate for data service on a high usage device like the iPhone is likely going away. Carriers are trying to find ways to introduce more tiers and more premium services.'"); *see also* Jonathan Atkin et al., RBC Capital Markets, *U.S. Wireless Review*, at 20, Exh. 14 (Mar. 9, 2009); AT&T, *Smartphone Plans (for Smartphones and Blackberry devices)*, http://www.wireless.att.com/businesscenter/popup/dataconnect-comp-table.jsp?wtLinkName=AvailableDataRatePlans&wtLinkLoc=BDY; Verizon Wireless, *Mobile Broadband*, http://www.verizonwireless.com/b2c/mobilebroadband/?page=plans&lid=//global//plans//mobile+broadband+plan; T-Mobile, *Internet & Email Plans*, http://www.t-mobile.com/Shop/Plans/Cell-Phone-Plans.aspx?catgroup=Internet-Email-cell-phone-plan&WT.mc_n=InternetEmail_PlanFirstTile5&WT.mc_t=OnsiteAd.

[101] *See* CFA Comments at 21.

Indeed, an examination of wireless provider profits would not only be unnecessary, but also profoundly misguided. As the Mercatus Center explains, it is highly problematic even to measure economic profits, but

> even if accounting data could accurately measure economic profits, the presence of substantial innovation and dynamic competition in mobile wireless makes economic profits an ambiguous measure of market performance. In dynamic competition, the firm that first introduces a cost-reducing or quality-enhancing technology, feature, or service can temporarily earn higher profits, until its success is imitated. Successful competitors appear to earn abnormal profits. The prospect of earning these rents, however, is the prize that motivates firms to strive for superior performance. Profits that appear to be 'abnormal' after the competitive process has revealed which competitors are successful may actually be a risk premium or a return to the firm's investment in unique capabilities.[102]

Other noted economists have likewise recognized that, particularly in industries with significant fixed costs such as wireless, it is critical for companies to charge prices above marginal cost to recover investment.[103] And the courts also have acknowledged that the ability to charge prices above the competitive level is an appropriate reward for investment and innovation, particularly when investment is more than usually risky.[104] Moreover, in addition to the problem of measuring profits and their competitive significance, doing so would be an exercise in futility because "regulation of profits is unlikely to produce price reductions nearly as large as those the wireless market has actually produced."[105] As the Mercatus Center explains, the Commission's own data show that wireless prices have declined far more steeply – two and a half times as

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[102] Mercatus Center Comments at 13 (footnotes omitted).

[103] *See* David S. Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 Antitrust 36, 38 (Spring 1996); William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L.J. 661, 665 (2003).

[104] *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[105] Mercatus Center Comments at 13.

much – than a regulatory environment would have produced; "[i]t strains credulity to suggest that some type of regulation aimed at eliminating economic profits could deliver better results for consumers than the wireless marketplace has actually delivered without such regulation."[106]

### B. The Comments Confirm That Device Market Segments Are Highly Competitive

Just as the comments confirm that competition is thriving for wireless services as a whole, the same is true with respect to wireless devices: carriers continue to introduce new handsets at a breakneck pace with new and innovative features that appeal to unique customer segments and help establish competitive differentiation in the marketplace. The record is replete with examples. As T-Mobile notes, "in the last two years, some of the most advanced handsets in the world have been launched in the U.S., including the T-Mobile myTouch 3G, the T-Mobile G1 with Google, Apple's iPhone 3G, Samsung's Instinct, the Motorola Cliq, four new Research in Motion Blackberry devices, and the Palm Pre."[107]

Here again, in just the few weeks since opening comments were filed, evidence of extensive competition has continued to pour in. In an October 2009 survey of wireless handset pricing, Bank of America/Merrill Lynch found that the recent third quarter of 2009 was the "[m]ost aggressive quarter to date," with Verizon lowering its average smartphone price 39% to $74.35, with only a few priced above $100.[108] In addition, Verizon and RIM are teaming up to

[106] *Id*. at 15; *see also* Katz July 2009 Decl. ¶¶ 31-39 (discussing multiple deficiencies in CFA's proposal to rely on carrier "profits" as a metric for examining competition in the wireless industry).

[107] T-Mobile Comments at 10.

[108] David Barden et al., Bank of America/Merrill Lynch, *Wireless Service & Handset Pricing – Pressure Building*, at 2 (Oct. 5, 2009).

offer the Storm 2, one member of a "long parade of iPhone threats,"[109] which RIM hopes will solidify its status as "the top seller of smartphones in North America."[110] Verizon also recently announced a deal with Google to introduce new devices using Google's Android operating system later this year,[111] and it has already begun running television ads for its Android phone that take aim straight at the iPhone. T-Mobile likewise recently announced that it would be releasing new Android-powered devices, as did Sprint.[112] For its part, AT&T will be introducing two new devices running Microsoft's planned Windows Mobile 6.5 update – HTC's Tilt 2 and Pure, both of which will include support for AT&T's 3G network.[113] AT&T also announced a partnership with satellite operator TerreStar to offer Genus, the world's first satellite/cellular smartphone, which switches to satellite coverage when cellular service is unavailable.[114] And, as

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[109] Walter Mossberg, *The CLIQ, Storm2 Join Long Parade of iPhone Threats*, Wall St. J. (Oct. 15, 2009), *available at* http://online.wsj.com/article/SB10001424052748704107204574473423239117900.html?mod=WSJ_hps_MIDDLEForthNews ("It's raining smart phones. No, make that super-smart phones. . . . This holiday season, new super-smart phone models seem to be appearing weekly.").

[110] Saul Hansell & Ian Austen, *Blackberry, Upgraded, Aims To Suit Every User*, N.Y. Times (Oct. 13, 2009), *available at* http://www.nytimes.com/2009/10/14/technology/companies/14rimm.html.

[111] *See* Verizon Wireless News Release, *Groundbreaking Agreement Between Verizon Wireless and Google To Leverage High-Speed Network and Open Android Platform for Wireless Innovation* (Oct. 6, 2009), http://news.vzw.com/news/2009/10/pr2009-10-05g.html.

[112] *See* Dan Meyer, *AT&T Mobility, T-Mobile USA Throw (More) Hats Into Smartphone Fight*, RCR Wireless (Oct. 6, 2009), http://www.rcrwireless.com/article/20091006/FRONTPAGE/910069998/att-mobility-t-mobile-usa-throw-more-hats-into-smartphone-fight.

[113] *See* AT&T News Release, *AT&T and HTC Debut HTC Tilt 2 and HTC Pure Windows Phones* (Oct. 5, 2009), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27204.

[114] *See* AT&T News Release, *AT&T Announces Agreement with TerreStar To Offer Integrated Cellular/Satellite Solution* (Sept. 30, 2009), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27180.

noted at the outset, Amazon recently announced a new version of its Kindle that will enable readers to wirelessly download content in over 100 countries and territories through AT&T's global wireless coverage.[115]

Particularly in view of these recent events, there can be no serious question that device manufacturers and carriers are competing aggressively to provide consumers ever-more innovative features and devices, and that consumers are benefiting as a result.

*Exclusive Arrangements.* As AT&T's comments explained, exclusive handset distribution arrangements between device manufacturers and wireless providers have been a key driver behind the explosion in innovation that has characterized the device segment in recent years. These agreements have facilitated collaboration among network providers and manufacturers, they have increased the incentives of both to improve their products and services, and they have unleashed a firestorm of competitive responses, as competing manufacturers and providers team up to match and exceed the latest features and innovations.[116] There is and can be no serious dispute that the competitive dynamic triggered by these exclusive relationships has been enormously beneficial to consumers, who virtually every week see new smartphones, at lower prices, with new and increasingly innovative features.

Here again, the comments confirm the overwhelmingly pro-competitive trends in the industry. The Telecommunications Industry Association ("TIA"), which represents "600 member companies [engaged in the] manufacture or supply [of] the products and services used in

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[115] *See* Amazon News Release, *Amazon Lowers Price on #1 Bestseller Kindle to $259 and Introduces New Addition to the Kindle Family of Wireless Reading Devices – Kindle with U.S. & International Wireless* (Oct. 7, 2009), http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1339431&highlight=.

[116] *See* AT&T Comments at 54-56; CTIA Comments at 38-39; Verizon Comments at 122-125.

the provision of broadband and broadband-enabled applications,"[117] including on wireless networks, confirms that exclusive arrangements "allow service providers to differentiate themselves from competitors and provide incentives for handset manufacturers to innovate. As a result, the United States has a competitive wireless services market that offers consumers a variety of devices, applications, service plans, and content associated with their mobile handsets."[118] As TIA further notes, the United States wireless industry is not alone in using the exclusive handset business model – "wireless providers in China and Canada also use exclusive contracts to increase competition."[119] And, as AT&T has explained, these arrangements also are common in other competitive industries.[120]

Several regional or local wireless carriers – NTELOS, MetroPCS, USCC, and CellSouth – repeat arguments they made in the earlier stage of this proceeding that exclusive handset arrangements prevent them from competing.[121] They claim that, because of these exclusive offers, they are deprived of certain revenue streams and therefore "cannot afford to offer certain high-value applications and attract or retain certain heavy users."[122] But, as with their prior

[117] TIA Comments at 2.

[118] *Id*. at 6; *see also id*. at 7-8 ("The revenue-sharing derived from exclusivity allows manufacturers to fund expensive investment in the development of new products and in the marketing of that product. This investment reduces the enormous financial risks associated with development and results in innovative devices designed to work properly on the provider's network. Carriers also use exclusive contracts to minimize financial risks associated with providing a new device to customers and to differentiate themselves in the marketplace. Operators take a financial risk when introducing a new device to be offered over their systems, particularly if the device runs on a new operating system. Exclusive contracts help guarantee a return on investment, and, in turn, speed the development time for new devices and features.").

[119] *Id*. at 7.

[120] *See* AT&T Comments at 54-56 & n.177.

[121] *See* NTELOS Comments at 4; MetroPCS Comments at 40; USCC Comments at 9-10.

[122] USCC at 10-11.

comments, not one of these carriers provides any reason to think that exclusivity has in any way limited competition in the industry or been anything but a boon to consumers.[123] Indeed, these commenters' claims are particularly suspect in view of the fact that smaller carriers in the industry are experiencing impressive growth,[124] are investing heavily in next-generation networks,[125] are targeting market segments that are showing explosive growth,[126] and are offering a device lineup that includes smartphones.[127]

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[123] CellSouth – apparently recognizing that there is no such evidence – argues that the Commission instead should examine whether national carriers "are exercising their [purported] market power by entering into exclusive agreements with device manufacturers for the purpose of blocking competitive carriers' access to the latest and most popular devices." CellSouth at 16. CellSouth thus appears to concede there is no existing evidence of anticompetitive effect, and instead hopes to remedy this through a search for anticompetitive motive. There is no basis for such inquiry. While AT&T certainly makes every effort to differentiate itself from other wireless competitors, including by offering exclusive handsets, this is a pro-competitive – not anticompetitive – response to the aggressive competition in the industry.

[124] *See* AT&T Comments at 10 & n.16; *see also* Amy Thomson, *MetroPCS Chief Goes Own Way as Mobile Rivalry Mounts*, Bloomberg News (May 18, 2009) , http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aT6PJ7vnY55U (Metro PCS's Chief Financial Office stated that his company is in a "'sweet spot'"); Roger Cheng, *Leap, MetroPCS Shares Down on New Pre-Paid Plan from AT&T*, Dow Jones Newswire (Oct. 9, 2009), http://online.wsj.com/article/BT-CO-20091009-709957.html (observing that "Leap and MetroPCS continue to show impressive growth").

[125] *See* AT&T Comments at 15-16; *see also* NTELOS Comments at 3 ("In August 2007, NTELOS announced that it would upgrade virtually its entire network for mobile broadband services using EVDO Rev A. . . . In 2008, NTELOS completed the EVDO deployment in western Virginia and West Virginia. On July 9, 2009, NTELOS announced the completion of the EVDO broadband upgrade in its Virginia East market, including Richmond, Hampton Roads, Norfolk, and Virginia Beach."); USCC at 17 ("USCC has also deployed CDMA 1xEV-DO technology in most of its markets. The majority of USCC customers now have phones, wireless modems or PDAs that can download multiple applications, including games, news, sports information, ring tones and stock quotations.").

[126] *See* AT&T Comments at 26-27.

[127] *See id*. at 45; *see also* Metro PCS, *Cellular Phones, Plans, and Services from MetroPCS*, http://www.metropcs.com/shop/phonelist.aspx (offers customers 5 smartphones manufactured by RIM, Motorola, and Samsung); Cellular South, *Phones*, https://www.cellularsouth.com/cscommerce/products/phones/category_phones_list.jsp?id=cat30003&homeFilter=pda/smartphone (offers customers 6 smartphones manufactured by HTC and

More fundamentally, the relevant inquiry is not whether individual competitors are benefitting from exclusive arrangements, but whether these arrangements benefit competition and consumers *as a whole*. In this respect, the record assembled in response to RCA's petition for rulemaking regarding handset exclusivity reveals unmistakably that critics of exclusivity are motivated by a desire not to innovate and compete on the merits, but rather to be protected from competition.[128] But, as the Commission has long recognized, and as the D.C. Circuit has held, "[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors."[129] And the record in this proceeding – as well as in the separate proceeding on exclusive handset arrangements – overwhelmingly establishes that exclusive arrangements are strongly in the public interest.[130] As AT&T demonstrated at length

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RIM); U.S. Cellular, *Phones*, http://www.uscc.com/uscellular/SilverStream/Pages/b_showphone.html?zip=03221&mkt=607750&tm=0&prepaid=N&sort=0&filter=Y&smartphone=Y (offers customers 6 smartphones manufactured by RIM and HTC); Cincinnati Bell Wireless, *Wireless Phones & Devices*, http://www.cincinnatibell.com/consumer/wireless/phones_and_devices/?view=pda (offers customers 10 smartphones manufactured by Nokia, Pantech and Blackberry, including the Nokia 5800 which the company touts as its "exclusive touch phone"); Cincinnati Bell Wireless News Release, *Cincinnati Bell Is First U.S. Carrier To Launch Nokia 5800 XpressMusic Smartphone* (May 4, 2009), http://www.cincinnatibell.com/aboutus/news/articles/news.asp?page=20090504.asp.

[128] *See* Reply Comments of AT&T Inc., RM-11497, at 17-20 (FCC filed Feb. 20, 2009) (collecting comments).

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

[130] *See* Declaration of Michael L. Katz, RM-11497, ¶¶ 12-27 (FCC filed Feb. 2, 2009), attached to Comments of AT&T, RM-11497 (FCC filed Feb. 2, 2009); Comments of AT&T Inc., RM-11497, at 17-21 (FCC filed Feb. 2, 2009); Comments of Verizon Wireless Requesting Dismissal or Denial of Petition, RM-11497, at 20-28 (FCC filed Feb. 2, 2009); Comments of

in its comments, anyone who has followed the wireless industry since the introduction of the iPhone can see the positive effects on innovation and competition that AT&T's exclusive arrangement with Apple has fostered.

There is also no validity to the claim – offered without any evidence or data to support it – that exclusive arrangements harm customers in rural areas by denying them access to smartphones and related applications.[131] As AT&T has explained, its network alone provides coverage to close to 95% of the U.S. population, a percentage that will increase further upon approval of AT&T's acquisition of wireless assets from Verizon that are located primarily in rural areas across 18 states.[132] Given that approximately 20% of the U.S. population lives in areas that are characterized as rural according to U.S. census data, AT&T alone provides coverage to the vast majority – at least three quarters – of rural America. Other wireless carriers likewise provide a full range of offerings, including smartphones, over extensive and growing service areas, including in rural areas.[133] There is, in short, every reason to believe that consumers in rural areas have access to the same innovative devices that are available to their urban and suburban counterparts, and there is certainly no evidence to the contrary.

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Sprint Nextel Corp., RM-11497, at 11-13 (FCC filed Feb. 2, 2009); Reply Comments of T-Mobile USA, Inc., RM-11497, at 3-8 (FCC filed Feb. 20, 2009).

[131] *See, e.g.*, USCC at 9 ("Most of the popular smartphones and smartphone-based applications are unavailable in many rural areas because they are exclusive to a 'Big Four' national wireless carrier."); *see also* Written Statement of John E. Rooney, President and Chief Executive Office, United States Cellular Corp., at 1, 3-5, *The Consumer Wireless Experience*, before the Committee on Commerce, Science & Transportation, United States Senate (June 17, 2009), *available at* http://commerce.senate.gov/public/_files/RooneyTestimonyConsumerWireless.pdf.

[132] *See* AT&T News Release, *AT&T To Acquire Divestiture Properties from Verizon Wireless, Enhance Network Coverage and Customer Service* (May 8, 2009), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26803.

[133] *See* AT&T Comments at 72-73; CTIA Comments at 35-36; Verizon Comments at 112-113.

Antitrust authorities and economists have found time and again that "[t]he benefits of exclusive dealing are many," that "the potential of exclusive-dealing arrangements to produce beneficial results greatly exceeds their potential for harm," and that these arrangements "should be presumptively lawful in all but a few carefully defined circumstances."[134] Indeed, the Supreme Court has expressly recognized the "redeeming [procompetitive] virtues" of vertical restraints (such as exclusive arrangements) and has long refused to adopt prophylactic rules preventing them.[135] The arc of antitrust law is thus *away* from *per se* condemnation of vertical restraints: "[t]he rule of reason is the accepted standard for testing whether" a vertical restriction restrains competition in violation of the Sherman Act.[136] Here reason dictates that exclusivity between manufacturers and providers is to be applauded. Competition to provide wireless voice and data services to consumers is fierce, as it is in the supply of devices. Exclusivity has

[134] XI Herbert Hovenkamp, *Antitrust Law* ¶ 1810, at 136 (1998).

[135] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977); *see also id.* ("Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.").

[136] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *see also id.* at 890 (overturning *per se* prohibition on vertical price maintenance, noting that "[t]he justifications for vertical price restraints are similar to those for other vertical restraints"); Willig Decl. ¶¶ 26-29. To be sure, under the rule of reason, exclusive arrangements can raise anticompetitive concerns, but only where the upstream and downstream parties to an exclusive agreement have market power, such that their arrangement threatens to foreclose competition. *See* XI Herbert Hovenkamp, *Antitrust Law*, ¶ 1802d, at 73-74 ("When exclusive dealing is considered as a 'foreclosure offense,' it ordinarily becomes necessary to examine market power or share at *both* of the two market levels involved.") (emphasis added); ABA, *Antitrust Law and Economics of Product Distribution*, at 277-78 (explaining that proof of market power is "crucial" to antitrust analysis of exclusive dealing arrangements). *See also* XI Herbert Hovenkamp ¶ 1803a, at 100 ("principal concern" with output contracts – in which a seller agrees to sell products only to a particular buyer – "is monopoly or other injury to competition in the buyer's market" but "a manufacturer or supplier ordinarily does not profit from monopoly in its downstream market" and, "[f]or that reason, the majority of output contracts are at least presumptively procompetitive"); *Continental T.V.*, 433 U.S. at 56 ("Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.").

permitted manufacturers and carriers to create efficient and innovative devices that would have been unthinkable a few short years ago, and it has compelled competing manufacturers and carriers to respond in kind – with better handsets, better pricing, and better service, all of which, again, has been *good* for consumers. And because no manufacturer or wireless provider has anything remotely resembling a dominant share of the market, any claims of anticompetitive harm flowing from exclusive handset distribution agreements are illusory. It follows from all of this that there is no sound economic rationale on which to predicate proposals to ban or limit exclusivity.[137]

*Handset Subsidies and ETFs*. AT&T's opening comments explained that, just as exclusive handset distribution agreements are a defining, pro-competitive feature of the wireless industry, so too are subsidized handsets. Subsidized phones – and the term commitments and ETFs that go hand-in-hand with them – enhance consumer choice and are manifestly procompetitive.[138] As the comments confirm, such agreements also are commonplace in other markets with highly competitive and innovative wireless markets. For example, "wireless

[137] In this respect, the Supreme Court's decision in *Leegin Creative* is instructive. There, in overturning a *per se* rule against one type of a vertical restraint (resale price maintenance), the Court emphasized that "[n]ew products and new brands are essential to a dynamic economy," and it emphasized that vertical restraints can contribute to that result: "New manufactures and manufacturers entering new markets can use [vertical] restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." 551 U.S. at 891 (internal alteration and internal quotation marks omitted).

[138] *See* AT&T Comments at 59-61; *see also* Verizon Comments at 122-125; CTIA Comments at 43-44; Written Statement of Barbara S. Esbin, Senior Fellow and Director, Center for Communications and Competition Policy, The Progress & Freedom Foundation, at 7, *The Consumer Wireless Experience*, before the Committee on Commerce, Science & Transportation, United States Senate (June 17, 2009), *available at* http://www.pff.org/issues-pubs/testimony/2009/090617-Esbin-Exclusive-Handset-Testimony.pdf ("The net result [of subsidized devices] is a competitive wireless services market that offers consumers a variety of devices, applications, service plans, and content associated with their wireless handsets.").

services providers in Japan, a country lauded for its broadband deployment and highly ranked in global surveys of broadband penetration, relies heavily on the subsidization of handsets."[139]

No commenter disputes any of the key facts regarding subsidized handsets – that they have helped drive wireless penetration and deliver innovative handsets to consumers; that early termination fees ("ETFs") are a critical component of the economic bargain that takes place between carriers and consumers in making subsidized handsets widely available; and that consumers who do not wish to enter into long-term contracts subject to ETFs may avoid them by paying the retail price for their device. CFA nonetheless argues that ETFs "present substantial obstacles for consumer movement between carriers."[140] But that naked assertion is directly at odds with the real-world facts, which show that industry churn rates, including the churn rates of the major national providers, remain high.[141] Moreover, claims of consumer "lock in" ignore the fact that post-paid wireless customers are free to purchase an unsubsidized phone without a term plan, and that for most national carriers ETFs are no more than $200 and are typically reduced on a pro rata basis for each month the customer stays with the carrier.[142] In addition, many other types of wireless offerings – including pre-paid and pay-as-you-go plans – have no ETFs.

[139] TIA Comments at 7.

[140] CFA Comments at 14.

[141] *See Thirteenth Report* ¶ 181. A more recent survey states that "9 percent of AT&T customers said they would switch carriers in the next six months, compared with 11 percent of Verizon customers." Phil Goldstein, *Report: AT&T Most Likely To Pick Up Switching Subscribers*, Fierce Wireless (May 28, 2009), http://www.fiercewireless.com/story/report-t-most-likely-pick-switching-subscribers/2009-05-28.

[142] *Accord Thirteenth Report* ¶¶ 185-186 (noting the increasing prevalence of pro-rated early termination fees).

Faced with these indisputable facts, CFA is again left to argue that the Commission should "continue studying these problems through new data collection efforts."[143] But here too there is no need for further study: vast available evidence directly contradicts the underlying premise of CFA's supposed concern – *i.e.*, that ETFs diminish competition by preventing customers from switching carriers – and shows instead that subsidized handsets and ETFs drive handset adoption and are providing enormous benefits to consumers. Nor is CFA correct in asserting that "[r]ecent studies examining consumer behavior" provide support for its request, by "suggest[ing] that consumers are looking for more freedom and innovation in their service plans."[144] The first cited study – a July 2009 Pew Internet American Life Project study on Wireless Internet Use – has absolutely nothing to do with the issue; instead, it simply shows rapid increases in wireless use, particularly to access the Internet. Given that this rapid increase has occurred at the same time that subsidized handsets and ETFs have been the industry norm, if anything the study suggests that these policies spur adoption and are pro-consumer.[145] The second study, a September 2009 Brookings study on consumer preferences, serves merely to confirm that "the United States has the highest utilization rates of [the U.S., U.K., Spain, and

[143] CFA Comments at 15.

[144] *Id*. at 16.

[145] CFA describes the Pew Study as showing that "the number of people who have cell phones far exceeds the number actually using handheld devices to access the Internet," and it implies that, therefore, ETFs are preventing consumers from obtaining the handsets they want. *Id*. But cell phones have been available for far longer than smartphones that enable Internet access, and it is therefore unsurprising that the embedded base of such devices would be much higher. Moreover, the Pew Study is based on data from December 2006, which largely ignores the enormous increase in smartphones that has occurred over the past three years since that time. And, in all events, CFA provides no reason to think that the hypothesized group of consumers about which it professes concern – i.e., those with conventional handsets that CFA apparently believes want smartphones – would pay an ETF if they made such a switch, much less that the ETF would exceed the handset subsidy they would receive on the purchase of a new smartphone.

Japan] for smart phones and PDAs," and that U.S. consumers are taking advantage of the capabilities of these phones.[146] While the study also indicates that some consumers (in both the U.S. and abroad) express frustration about "length of service contracts," it never frames this issue in correct economic terms – as a tradeoff between a full-priced phone and a subsidized one – and is therefore of no value on this issue.

### C. The Comments Confirm That Additional "Edge" Market Segments Are Highly Competitive

The application and operating system segments of the wireless industry are likewise characterized by competition, consumer choice, innovation, and investment. As T-Mobile notes, "[t]hird party innovation at the edge has . . . exploded. . . . Today, consumers can choose among tens of thousands of wireless applications from a range of online application stores."[147] Sprint likewise recognizes that these edge market segments are "vibrant and growing rapidly."[148]

More specifically, the comments confirm that wireless operators are offering handsets that run a range of operating systems developed by third-party providers, and that these different systems offer consumers a range of choices with respect to the degree of openness to third-party applications. Sprint, T-Mobile, and other wireless carriers provide extensive lists of the devices they provide that run on different operating systems.[149] Sprint and T-Mobile also tout their

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[146] Darren M. West, Brookings Institution, *What Consumers Want from Mobile Communications in the United States, United Kingdom, Spain, and Japan*, at 2 (Sept. 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/09_mobile_west/09_mobile_west.pdf.

[147] T-Mobile Comments at 11.

[148] Sprint Comments at 9.

[149] *See* Sprint, *Develop: Devices*, https://developer.sprint.com/show_devices.do; T-Mobile, *Partner Network: All Devices*, http://developer.t-mobile.com/browseDevice.do?keyword=device+keyword+search; *see also* W. David Gardner, *Verizon: Too Many Mobile Operating Systems*, InformationWeek (Apr. 2, 2009),

membership in the Open Handset Alliance, pursuant to which they and dozens of other participating companies support the "free and open mobile applications platform named Android."[150] This alliance has certified over 300 third-party devices, and "there are now more than 10,000 applications available from the ever-growing Android Market."[151] T-Mobile further explains that "competition has produced an even 'edgier' development: with the T-Mobile G1, the T-Mobile myTouch 3G, and the Motorola Cliq, wireless end users can develop and download their *own* applications to run on the devices."[152]

In the time since comments were filed, moreover, evidence of intense competition in these edge market segments has continued to mount. As noted above, Verizon has announced an alliance with Google to create wireless devices that use Google's Android software. Verizon will reportedly be preloading some of its applications on the devices, as well as tailoring the OS to provide a distinctive user experience.[153] One leading analyst predicts that, "[w]hile the Google-backed Android mobile operating system currently runs on less than 2% of all smartphones, . . . it will surge to 14% of the global smartphone market in 2012 – ahead of the iPhone, as well as Windows Mobile and Blackberry smartphones."[154] For its part, on the same

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http://www.informationweek.com/news/software/operatingsystems/showArticle.jhtml?articleID=216402551 (Verizon CEO Lowell McAdam stated that Verizon's wireless device portfolio runs on "'eight or nine different operating systems'").

[150] Sprint Comments at 10.

[151] T-Mobile Comments at 13.

[152] *Id*. at 11.

[153] *See* Verizon Wireless News Release, *Groundbreaking Agreement Between Verizon Wireless and Google to Leave High-Speed Network and Open Android Platform of Wireless Innovation* (Oct. 6, 2009), http://news.vzw.com/news/2009/10/pr2009-10-05g.html.

[154] Matt Hamblen, *Android to Grab No. 2 Spot by 2012, says Gartner*, Computerworld (Oct. 6, 2009),

day as Verizon's and Google's announcement, Microsoft announced the latest version of its Windows software for cellphones, which it said would be used in more than 30 new handsets by the end of 2009.[155] And, as noted at the outset, AT&T recently announced that it will allow customers to use Skype and other VoIP applications on the iPhone over AT&T's 3G network, and that AT&T does not object to Apple making these applications available in the iPhone App store.[156]

At the same time, recent marketplace evidence also confirms the importance of both permitting consumers a choice in the degree to which their applications or network provider pre-screens applications, and enabling industry players to develop unique value propositions that meet consumers' needs. Amazon's new Kindle offering, for example, expands upon its prior successes by enabling consumers to download content worldwide. But it stops far short of permitting consumers to "run any application" or "access any lawful content" they like – it has to, in order to be able to build the price of the wireless service it offers into the price of the device and associated content. On the other side of the coin, just days ago, Microsoft reported that "a technical snafu" had "likely caused the loss of contacts, photos and other personal data for users of the T-Mobile Sidekick," highlighting both the vulnerability of wireless networks and

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http://www.computerworld.com/s/article/9139026/Android_to_grab_No._2_spot_by_2012_says_Gartner (discussing report from Gartner Inc.).

[155] *See* Emil Protalinski, *Windows Mobile 6.5 Arrives with New Marketplace, Cloud Sync*, Ars Technica (Oct. 6, 2009), http://arstechnica.com/microsoft/news/2009/10/windows-mobile-65-arrives-with-new-marketplace-cloud-sync.ars; *see also* Bonny Cha, *Microsoft to Launch More Than 30 Windows Mobile 6.5 Devices By End of Year*, CNET News (Sept. 23, 2009), http://news.cnet.com/8301-17938_105-10359740-1.html.

[156] *See* AT&T News Release, *AT&T Extends VoIP to 3G Network for iPhone* (Oct. 6, 2009), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27207; *see also* Letter from Robert W. Quinn, AT&T, to Ruth Milkman, FCC, DA 09-1737 (Oct. 6, 2009), *available at* http://www.att.com/Common/about_us/public_policy/Response_Wireless_Telecomm_Bureau.pdf.

the paramount importance – at least to some consumers – of robust security measures, including pre-screening of applications.[157] In both respects – the advent of innovative new service offerings and value propositions, on the one hand, and the vulnerability of wireless networks on the other – these episodes underscore the importance of providing consumers a choice not only in the devices they can purchase, but also in the degree to which consumers take responsibility for the safety and security of the applications that run on those devices.

As AT&T highlighted in its opening comments,[158] market forces have to date ensured that consumers have this choice. As Mercatus Center explains, moreover, the variety of options available to consumers is both consistent with and ensured by a competitive marketplace: "Competition might not guarantee that all platforms are open. A closed platform can survive if it offers some advantage – such as lower costs or higher quality – to a sufficiently large segment of consumers. But competition will ensure that an open platform is available as long as a sufficient number of consumers want and are willing to pay for it."[159] That is precisely correct, and, by the same token, there can be no question that artificially limiting this variety – by, for example, mandating that all networks be open to all devices, or that all devices be open to all applications – would diminish investment and innovation and *limit* consumer choice. In the case of the iPhone, for example "it is precisely this ability to jealously guard its platform and to present to consumers only applications that conform to Apple's vision of a quality user experience that motivates Apple to make the investment it has in developing the iPhone. And it probably also

[157] Nick Wingfield, *Microsoft, T-Mobile Stumble with Sidekick Glitch,* Wall St. J. at B4 (Oct. 12, 2009).

[158] *See* AT&T Comments at 4-6, 14-15.

[159] Mercatus Center Comments at 16.

accounts in large part for its success."[160] Given the unequivocal and undisputed evidence that consumers can choose today among different platforms, "there is no reason why *the regulator*" should insist upon an "open platform" and foreclose "a proprietary one. Each has its comparative advantages and satisfies different segments of the market,"[161] and, as the marketplace has already demonstrated, consumers are plainly capable of choosing the model that meets their needs.

Despite the wide variety of devices and operating systems available to meet consumers needs – and despite the explosive growth of an applications segment that has gone from zero to *billions* of downloads in perhaps two years – CFA identifies a "critical need for the Commission to adopt rules and policies that promote" open access and open platforms to consumers.[162] But there is no need – critical or otherwise – to do *anything* here. The market is exploding. Virtually every carrier – and many device manufacturers – tout their own "app stores," and the volume at which consumers are downloading applications is staggering. Moreover, despite this frenzy of activity, there has not been a single credible claim that any wireless application has been unable to find a distribution medium, highlighting that anyone with a good idea has ample routes to reach the market. In the face of this dynamic, exploding marketplace – a marketplace that is delivering consumers unprecedented innovation at an unprecedented clip – the claim that the Commission should choose this of all areas in which to intervene should be rejected out-of-hand.

The absence of any coherent rationale for CFA's proposed regulatory intervention is highlighted by the supposed "evidence" it cites in support: a Brookings study that purportedly

[160] *Id*. at 18.

[161] *Id*.

[162] CFA Comments at 17.

finds that "consumers in the United States have a strong preference for choosing their own applications."[163] But the question is not whether consumers will be permitted to "choos[e] their own applications" – consumers can choose their applications no matter the device they own, the operating system it runs, or the wireless network they choose. The question is whether consumers want to take on the added risk and burden associated with a platform that performs limited or no pre-screening of applications. On *that* question – which CFA conspicuously ignores – the evidence is decidedly mixed. Many customers apparently want the purportedly "open" environment offered by Android-enabled phones, as evidenced by the headlong rush in the industry towards supporting such devices.[164] But many other customers apparently prefer an environment in which the device manufacturer takes a more active role in screening applications, as demonstrated by the success of the iPhone. If, as CFA claims, "consumers are looking for more in the way of innovative products and service offerings beyond those provided by incumbent carriers"[165] – and if, as CFA claims, purportedly "open" platforms will deliver those innovative products and services [166] – then handset manufacturers, network providers, and app store owners will respond appropriately. But it is the height of arrogance for CFA to suggest that it knows, better than consumers, the right model for delivering innovation.

Indeed, it is pure fancy to believe that CFA – or the Commission – knows what "consumers" want. As AT&T has noted, there are more than 270 million wireless subscribers in the United States. These subscribers are not monolithic: different consumers want different functionalities and service attributes. Some consumers value the security or ease of use that

[163] *Id.*

[164] *See supra* p. 34.

[165] CFA Comments at 17.

[166] *Id.*

comes with a managed network environment; other consumers may prefer an environment in which applications are not pre-screened or certified; and still others may prefer a device that serves a niche wireless need. What is more, these preferences are evolving: consumers' preferences not only drive innovation but they are shaped by innovation. In such a competitive and dynamic marketplace, wireless carriers have every incentive to strike balances that appeal to various segments of consumers. Regulators – acting on imperfect information – are far less likely than market participants to strike the appropriate balance among openness, security, functionality, and price,[167] and, as a recent letter from the Communications Workers of America highlights, an errant step here could have potentially serious consequences for the investment that now characterizes the industry and that is so critical to the nation's economic recovery.[168]

Beyond that, the very premise that there is one appropriate balance to strike via regulation is fundamentally misplaced. With an evolving variety of models of network openness for consumers to choose from, there is no reason for this Commission to seek to homogenize the wireless marketplace by dictating that each carrier adopt one model to the exclusion of others. Today, wireless offerings run the gamut from the avowedly closed (*e.g.*, the Kindle) to the avowedly open (*e.g.*, Android-enabled devices). Forcing all wireless broadband offerings to accommodate one model of network "openness" would only reduce the experimentation, innovation, and consumer choice that characterize the industry today and that the Commission

[167] *See* Willig Decl. ¶ 12.

[168] *See generally CWA Internet Investment Letter* at 1 (advocating "reasoned discussion among all stakeholders about the technical requirements of network management and the economics of broadband build-out to ensure continued private sector investment in advanced high-speed Internet networks . . . We depend on private capital to invest in next-generation wireline and wireless networks, create and maintain jobs in the industry.").

expressly sought to facilitate through the imposition of "open access" requirements on the 700 MHz C Block.[169]

Nor, finally, is there any basis to CFA's request that the Commission "collect data to assess the likelihood that consumers would more readily adopt new mobile broadband services in a regulatory environment promoting open access, open platforms, and handset portability."[170] As we discuss further immediately below, the Commission's task in this proceeding is to collect data that demonstrates the competitive state of CMRS service. It has done that: there are reams of data in the record here that demonstrate the enormously competitive nature not only of wireless service itself, but also of the edge segments that rely on wireless service. Given the options available to consumers, it is not for the Commission to decide what consumers want and then force it on them; rather, the Commission's task is to ensure that consumers have choice, and to let them exercise it. In asking the Commission to deny consumers an option that is present in the market today and has proved popular, CFA is pursuing an elitist agenda, masquerading as pro-consumer populism: "open access" may well be the preferred model of those who are most technologically sophisticated, but it does not meet the needs of many consumers who are not as Internet-savvy and who prefer a more managed environment.[171]

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[169] *See* Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289, ¶ 205 (2007); *see also* Comments of AT&T Inc., at 115-117, *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, GN Docket Nos. 09-157, 09-51 (FCC filed Sept. 30, 2009) ("*AT&T Wireless Innovation NOI Comments*") (discussing C Block requirements); Willig Decl. ¶¶ 67-73.

[170] CFA at 17.

[171] For the reasons AT&T has explained elsewhere, moreover, the mandated "openness" that CFA supports would contradict prior Commission rulings and is for that and other reasons unlawful. *See, e.g., AT&T Wireless Innovation NOI Comments* at 117-121.

### D. In Light of the Extensive Evidence Demonstrating Competition Across the Entire Mobile Value Chain, There Is No Need To Collect Additional Data from Wireless Carriers

As demonstrated above, the record in this proceeding firmly establishes that the wireless industry is competitive by every meaningful metric – the market structure is highly competitive, prices continue to fall, output continues to surge, providers are investing massive amounts in their networks, innovation is thriving, and consumers enjoy unbounded choice among network providers, devices, operating systems, and applications.

Rather than attempt the futile task of debating the facts, CFA devotes much of its energy to identifying data the Commission supposedly does *not* have. It argues that, if only the Commission were to "take a deeper look at the mobile wireless marketplace and ecosystem," it could determine "*if* this surface picture is accurate" – that is, whether the mobile wireless marketplace is "competitive *enough*."[172] Rather than apply the economically sound "structure-conduct-performance" framework the Commission has used in the past – which evidently does not build the case for the regulation CFA seeks to justify – CFA urges the Commission to explore "other economic frameworks, models, standards, metrics, and sources of data that would provide better analytical tools for assessing the operation of that market."[173]

But conducting this fishing expedition, when there is already a pool of fish in plain sight, would be wholly unnecessary. The Commission already has more than enough data – from commenters as well as countless public and easily accessible sources – to fulfill its statutory duty to report on the competitive state of the wireless industry. And that data makes clear beyond any

[172] CFA Comments at 43 (emphases added).

[173] *Id.* at 3.

reasonable doubt that wireless services, devices, and applications are provided in an intensely competitive environment.

CFA nonetheless argues to the contrary, claiming, for example, that the data on which the Commission has relied for the past 13 years is unreliable because it reflects "third party data," rather than "data directly from industry participants."[174] That is simply wrong. The very document that CFA cites indicates that previous CMRS Competition Reports were derived from sources that include "company filings and news releases" as well as "SEC filings," all of which constitute primary, not third-party, sources. Moreover, CFA's attempt to write-off third-party sources as inadequate and unreliable is unpersuasive. The views of independent analysts, such as financial investment houses, for example, are generally highly probative of the state of competition. It is these analysts' job to advise investors how certain companies and industry sectors are performing, and they therefore have every incentive to provide a candid and accurate assessment of the facts.[175] Not all industry participants, by contrast, have the same incentives to be forthcoming with data, particularly where they are hoping to prompt the Commission to take regulatory action tailored to their business case. In the special access context, for example,

[174] *Id*. at 30.

[175] *See* United States Dept. of Labor Bureau of Labor Statistics, *Occupational Outlook Handbook, 2008-2009 Edition: Financial Analysts and Personal Financial Advisors* (Mar. 19, 2009), *available at* http://www.bls.gov/oco/pdf/ocos259.pdf; *see also* Testimony of James K. Glassman, Resident Fellow, American Enterprise Institute, *Analyzing the Analysts: Are Investors Getting Unbiased Research from Wall Street*, before Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives at 4 (June 14, 2001), *available at* http://financialservices.house.gov/media/pdf/061401gl.pdf ("An analyst who recommends bad stocks in an effort to sell investment banking services will be an analyst whose track record – closely watched by journalists and professional tracking services – will soon lose his job. . . . One such episode and, I believe, the analyst is finished.").

competitors seeking greater regulation have long refused to provide any meaningful data about their networks and operations.

Apart from being unnecessary, moreover, CFA's proposed data requests are conceptually flawed and enormously burdensome in scope.[176] For example, it seeks "data at the census block group level showing advertised pricing for each service plan," even though carriers typically price their offerings on a regional or nationwide basis, and even though consumers already can obtain pricing information on an even more granular basis (specific to their zip code or address) through carrier and countless third-party web sites. It seeks – again at the census block level – "pricing on a per minute, per megabyte, and per message basis, as applicable to voice, data, and messaging services."[177] But this too ignores the fact that consumers typically purchase these services in large blocks up to and including in "unlimited" quantities, and that actual prices per minute, megabyte, and per message will therefore vary customer to customer, depending on actual usage. CFA also seeks data on "usage limitations for any service offered," even though these can already be downloaded from any carrier's website, and "detailed spectrum holdings on a market-by-market basis," even though the Commission already maintains these data on its own.[178] Other requested categories of data are routinely reported to and compiled by Wall Street analysts – such as data regarding "churn statistics," "capital expenditures," and "operating margins."[179] And a number of the requests seek information that is purely hypothetical, and certainly outside the reach of wireless carriers, such as "consumer likelihood to adopt new services under open access regimes," and prices and costs imposed on "mobile value chain

[176] *See* CFA Comments at 4-5.

[177] *Id*. at 4.

[178] *Id*. at 5.

[179] *Id*.

participants in downstream or 'edge' markets for handsets, other mobile wireless devices, applications, and content."[180]

In sum, CFA's effort to cajole the Commission into requesting still more data from the industry should be rejected. The Commission has ample data before it, and it demonstrates beyond legitimate dispute that the wireless industry, including each of its "edge" market segments, is vibrantly competitive. The Commission should study and report on *that* data, and it should take it into account when considering whether regulatory intervention – in an industry that has shown explosive growth, provided consumers boundless choices, and continues to drive investment and jobs at a time when both are sorely needed – promises benefits that exceed the potential costs.

## II. RECORD EVIDENCE CONFIRMS THAT SPECTRUM AND NON-SPECTRUM INPUTS ARE COMPETITIVE TODAY, BUT THAT MORE SPECTRUM IS NEEDED TO MEET FUTURE DEMAND

That wireless competition is robust at every level is itself unmistakable evidence that carriers can access upstream inputs on reasonable terms.[181] As Dr. Willig observes, "the substantial degree of rivalry among wireless carriers strongly suggests that carriers have access to upstream inputs, including spectrum, on terms that do not stultify competition."[182] None of the comments challenge, much less disprove, that fundamental economic conclusion. The comments do establish, however, that the Commission's primary objective going forward should

[180] *Id.*

[181] AT&T Comments at 75-84; Willig Decl. ¶¶ 30, 61-62.

[182] Willig Decl. ¶ 62; *see also id.* ¶ 63 (in light of success of deregulatory policies, calls for regulation "should be viewed with great skepticism, and ultimately rejected, absent compelling evidence that there exists a significant and persistent market failure that likely will derail a continuing state of effective competition"); Verizon Comments at 95 ("vibrant competition in the mobile wireless *retail* market refutes any suggestion that carriers have either the ability or the inclination to distort the workings of input and edge markets").

be to identify, clear, and auction spectrum as quickly as possible in order to meet the exploding demand for wireless broadband services, and that it should also remain committed to its policy of flexible use while taking steps to protect licensed spectrum from interference.[183] Although the comments also include the usual rhetoric about a purported inability to gain access to other carrier's networks, either in the form of special access or via roaming agreements, that rhetoric is, again, accompanied by no credible evidence establishing any concrete harm to competition. Instead, these claims are aimed at advancing the parochial interests of some industry participants at the expense of competition and consumers generally,[184] and, as AT&T has explained more fully in the proceedings directly addressing these issues, they should be rejected.

### A. The Comments Confirm That the Commission Should Take Aggressive Steps To Make More Spectrum Available Under a Regime That Encourages Efficient Use

As Chairman Genachowski recently put it, there is a "looming spectrum crisis" that could drastically affect the wireless industry.[185] Although the 700 MHz auction was a step in the right direction and helped correct the past imbalance between spectrum availability in the United States and other industrialized countries, more spectrum is needed in order to satisfy the growing

[183] *See* AT&T Comments at 76-83; Cellular South Comments at 5-7; Clearwire Comments at 6-7; CTIA Comments at 82-83, 86-87. *See also* David Dixon & Dutch Fox, FBR Capital Markets, *Summary of 4G Network Upgrade Insights and Potential Capex Implications* (Oct. 9, 2009) ("Spectrum interference, a potentially significant issue: Verizon is experiencing a high degree of unauthorized device usage in the 700Mhz frequency range, e.g., wireless microphone usage, which is difficult to pin down.").

[184] *See* Willig Decl. ¶ 64 (noting that proposals for regulation are not based on evidence of "market failure" and instead are "properly are viewed as requests for special concessions designed to protect the interests of certain competitors, at the expense of competition and consumer welfare").

[185] W. David Gardner, *FCC Chair Cites 'Spectrum Crisis'*, Information Week (Oct. 7, 2009), http://www.informationweek.com/news/government/mobile/showArticle.jhtml?articleID=220301552.

array of bandwidth-intensive mobile broadband services and the rapid rise in customer usage of these services.[186] Indeed, the availability of spectrum, AT&T has explained, will be critical to facilitating the deployment of next generation 4G network technologies.[187]

The comments emphatically confirm the need for the Commission to address the need for additional spectrum. T-Mobile points to an "urgent need for additional commercial bandwidth in the United States."[188] It stresses that "[p]roviding the marketplace with additional licensed spectrum is the single most important step that the Commission could take to both preserve and stimulate mobile innovation and competition."[189] T-Mobile therefore advocates that the Commission make available for auction "at least 25 MHz of contiguous spectrum located in the 1755-1800 MHz government band," to be paired with the existing commercial allocation of the AWS-3 band.[190] For its part, CTIA explains that, "[a]s consumers increasingly adopt and rely on mobile broadband services and the advanced capabilities that these services permit, carriers will need additional spectrum to meet network capacity demands and facilitate further deployment of bandwidth-intensive next-generation voice, data, and video services."[191] Other commenters agree that spectrum issues should be the Commission's top priority with respect to wireless.[192]

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[186] *See* AT&T Comments at 79-80.

[187] *See* AT&T Comments at 80.

[188] T-Mobile Comments at 4.

[189] *Id*. at 17.

[190] *Id*. at 4; *see also id.* at 21-22.

[191] CTIA Comments at 82.

[192] *See* Comments of Sprint Nextel Corporation, at 2-3, *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, GN Docket Nos. 09-157, 09-51 (FCC filed Sept. 30, 2009) ("*Sprint Innovation Comments*"); Verizon Comments at 105-06; MetroPCS Comments at 14-16.

Despite near universal recognition of a spectrum crisis, some of the smaller wireless carriers seek to arrogate to themselves any spectrum the Commission succeeds in making available, by imposing limits on how much spectrum the larger wireless carriers can obtain.[193] This self-serving proposal is deeply flawed.

*First*, the factual predicate underlying this call for regulation – that larger wireless carriers already have enough (or even too much) spectrum – is misplaced. Larger carriers have greater demands on their spectrum, due to their larger customer bases and the rapid speed with which they are deploying spectrum-intensive wireless broadband services.[194] On the other side of the coin, the new entry by Clearwire, cable companies such as Cox, and others, together with the ongoing expansion of smaller wireless carriers such as MetroPCS and Leap Wireless, confirms that spectrum constraints are not deterring competitive entry and investment by smaller providers.[195]

*Second*, the vigorous competition in the wireless marketplace is itself a powerful argument counseling against spectrum caps.[196] The Commission eliminated the spectrum cap rule in 2001 based on a finding that it was "no longer necessary in the public interest" "[i]n light

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[193] *See, e.g.*, USCC at 25; *see also* CFA Comments at 26 (asserting the Commission "should not hesitate to consider re-adopting spectrum caps if and when necessary").

[194] Rysavy Research, *Mobile Spectrum Demand* (Dec. 2008), http://www.rysavy.com/Articles/2008_12_Rysavy_Spectrum_Demand_.pdf ; *see also* Ex Parte Letter – The Wireless Crisis Foretold: The Gathering Spectrum Storm … and Looming Spectrum Drought at 7-8, *attached to* Ex Parte Letter of CTIA – The Wireless Association, *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (FCC filed Sept. 29, 2009).

[195] *See* AT&T Comments at 25-26; *see also* USTelecom, *High-Capacity Services: Abundant, Affordable, and Evolving* at 17 (July 2009) ("*USTelecom Report*") (noting the spectrum acquisitions of fixed wireless providers, such as FiberTower and Clearwire).

[196] *See* USCC Comments at 25; CFA Comments at 24.

of our finding of meaningful economic competition."[197] As AT&T has demonstrated, the market for wireless service has only become more competitive since that time, and there is accordingly no conceivable basis for the Commission to reverse course now and to re-impose a regulation that, as the Commission explained, was adopted in the first place only "to promote competition in [wireless] markets."[198] As TIA explains, "reinstating spectrum caps would constitute a step backward in the Commission's spectrum policies and would negatively affect the mobile and wireless broadband product market's competitive nature."[199]

Especially in light of the evidence that small carriers are among the fastest growing in the nation,[200] the call for a spectrum cap by such carriers is an obvious attempt to foreclose an entire set of potential bidders and spectrum holders from participating in the spectrum market, and thereby to constrain the price ultimately paid for spectrum and guarantee for themselves the spoils of the next auction. Apart from serving the narrow interests of the carriers that formulate this proposal, the only results to speak of would be to ensure that spectrum does *not* go to its highest and best use and that the U.S. Treasury is deprived of substantial revenue. What is more, arbitrary caps on spectrum for some carriers will hinder those carriers' efforts to provide the bandwidth-intensive next-generation services and capabilities that consumers demand. None of these results is remotely in the public interest.

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[197] Report and Order, *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, ¶ 47 (2001).

[198] *Id.* ¶ 51.

[199] TIA Comments at 8-9.

[200] *See* AT&T Comments at 25-26, *supra* pp. 14-15.

For similar reasons, proposals by some commenters that the Commission provide auction credits to smaller wireless providers are flawed.[201] As with spectrum caps, this proposal is little more than an effort by some carriers to seek a regulatory handout in the form of a subsidy – a proposal that would work to advance the narrow interests of some competitors, but that would have no beneficial effect on competition. In light of vigorous competition in the wireless market and the success of smaller carriers, there is no possible basis for regulatory intervention that would tilt the competitive scales in favor of some competitors and against others and thus risk undermining the efficient functioning of wireless auctions.

### B. There Is No Basis for Increased Regulation of Special Access

AT&T's opening comments established that there is likewise no conceivable justification for increased regulation of special access as a means to ensure the availability of wireless backhaul. First, as Dr. Willig explains and other commenters echo, the intense competition for mobile wireless services at every level of the value chain is itself powerful evidence that the structure of the market for backhaul services is in no way impeding wireless competition or investment, both of which are robust and increasing.[202] That conclusion is consistent with the D.C. Circuit's conclusion that the Commission's own data "clearly show that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic."[203] Second, as AT&T pointed out, the public statements of wireless carriers themselves confirm that they have

[201] *See, e.g.*, MetroPCS at 13.

[202] *See* Willig Decl. ¶ 76 ("there is no apparent evidence that [] there are competitive issues in special access services that have dampened the rivalry among wireless carriers"); AT&T Comments at 83-89; Verizon Comments at 95-100.

[203] *USTA v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) ("*USTA II*").

plentiful competitive alternatives for backhaul.[204] Third, the exploding demand for wireless broadband services will drive investment in and deployment of competitive alternatives for wireless and fiber backhaul, as the accelerating investment of cable companies and fixed wireless providers illustrates.[205] Finally, in the face of robust and increasing competition, as well as widespread consensus that the increasing demand for wireless broadband creates a prime opportunity for competitive backhaul suppliers, it would be a profound mistake of the Commission to impose further regulation on special access services, and thereby reduce the incentive of incumbents and competitive carriers alike to invest in next-generation infrastructure.[206]

Despite all of this, several parties predictably advocate increased special access regulation. To begin with, it bears noting that many of those parties advocating this approach do so while at the same time acknowledging that the downstream market for wireless services is robustly competitive (and, indeed, that the Commission's light regulatory touch should be credited for that result).[207] Those two positions simply cannot be reconciled: the presence of competition in the downstream market directly refutes the suggestion that special access rates impede competition.[208] These carriers' calls for rate regulation thus are nothing more than naked attempts to obtain an artificial price break on backhaul services.

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[204] *See* AT&T Comments at 85-86.

[205] *See id*. at 86-87; *see also* Verizon Comments at 95-97.

[206] *See* AT&T Comments at 88-89; Willig Decl. ¶ 83.

[207] *See Sprint Innovation Comments* at 22-23 (arguing that the downstream market is robustly competitive but that, "[u]nlike the downstream market, this upstream market [for backhaul] has not been characterized by competition on price, quality, service, or terms and conditions"); T-Mobile Comments at 2 ("today's wireless market is robustly competitive and well-functioning").

[208] *See supra* pp. 55-56.

Beyond that, commenters proposing special access regulation uniformly fail to provide any competent evidence that special access competition is deficient, and they – again, uniformly – ignore the evidence of the competitive supply provided by cable, fixed wireless, and microwave.[209] As just one example, CFA asserts that "[t]he current structure of the market for backhaul services has a dramatic, negative effect on competition in the mobile wireless ecosystem."[210] But CFA does not, presumably because it cannot, move beyond this conclusory assertion to explain *how* competition is adversely affected by the "current structure" of the market for backhaul, much less does it offer anything remotely resembling evidence of such impairment. Indeed, as AT&T has explained in detail, the record developed in the Commission's pending special access proceeding demonstrates that special access is highly competitive, and that is particularly true with respect to wireless backhaul.[211]

The broadband workshops held at the Commission during the past several months confirm this to be the case. Panelists in those workshops uniformly agreed that, with the huge increases in traffic resulting from anticipated adoption of wireless broadband, service providers will require vastly greater backhaul transmission capacity and speeds than are currently available.[212] They further agreed that the answer to these backhaul needs lies not with legacy

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[209] *See* AT&T Comments at 83-86; *see also* Verizon Comments at 95-100 (documenting the intensifying competition to provide wireless backhaul services).

[210] CFA Comments at 27-28.

[211] *See* Supplemental Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC filed Aug. 8, 2007); Supplemental Reply Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC filed Aug. 15, 2007); *USTelecom Report* at iv-v, 8-23, 34-41.

[212] *See, e.g.*, Transcript of National Broadband Plan Workshop; Deployment – Wired (Aug. 12, 2009), at 25-26 (Craig Moffett), *available at* http://www.broadband.gov/docs/ws_02_deploy_wired_ transcript.pdf ("NBP Workshop – Wired Tr.") ("[T]he 4G plan obviously carries with it an expectation of providing more than T1s in and

copper, TDM-based T1s, but with fiber and microwave transmission facilities.[213] And they recognized that ILECs have no inherent advantage in providing these high-bandwidth facilities; on the contrary, the record shows that carriers of all stripes are investing in facilities to meet the explosive demand for wireless backhaul that everyone recognizes is coming.[214]

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out of the towers. . . . It's a foregone conclusion you're going to have to bring fiber [to towers as you're planning LTE].").

[213] *See id*. at 31 (David Armentrout, FiberNet) ("obviously more and more of the towers will require fiber back haul"); *id.* at 45 (same) ("T1s are out . . . it's either going to be fiber or its going to be microwave."); *see also, e.g.*, Phil Marshall, Yankee Group, *The Inevitable Transformation of the Mobile Internet* at 3 (April 2009) ("Backhaul networks, which in most cases continue to be based on TDM and Frame Relay technologies cannot support the massive growth in broadband traffic demands.").

[214] *See* NBP Workshop – Wired Tr., at 35 (Dallas Clement, Cox) ("Relative to wireless back haul from cell sites . . . in our commercial business it's a growth area. We're getting calls in our franchises from wireless providers who are preparing for their 4G networks and they're looking for lower cost alternatives for back haul. And because we're there and we can do sort of spurs off of our network, we feel as though it's a big growth area and we're deploying capital to that area to be able to satisfy that demand."); Transcript of National Broadband Plan Workshop; Wireless Broadband Deployment – General (Aug. 12, 2009), *available at* http://www.broadband.gov/docs/ws_03_deploy_wireless_transcript.pdf ("NBP Workshop – Wireless Tr."), at 45-46 (Neville Ray, T-Mobile) ("And, you know, be that fixed Ethernet delivery in one form or another over fiber, over coax, whatever it might be, you know, we are seeing economic forces at work in major metro areas where that is starting to change. So if I look at our 3G footprint today, we are certainly moving to, you know, a fiber back haul solution environment which is significantly higher than 10%. And I think that competitive forces work in metro areas where there's a lot of fiber, be that from the utility company, from the cable company, from the existing, you know, telco provider."); *id*. at 46 (Neville Ray, T-Mobile) ("[A]s you move to suburban fringe and rural areas, those [fiber] opportunities are much tougher to find, but there are good microwave solutions, as Ed [Evans, Stelera Wireless] mentioned, and some carriers are totally deploying their back haul solutions on a microwave basis."); NBP Workshop – Wired Tr. at 30 (Hunter Newby, Allied Fiber) ("[I]t's the combination of fiber and microwave, which for back haul from towers that don't have much fiber can cover a much larger swath of the country along this way."); NBP Workshop – Wireless Tr. at 47 (Tom Swanobori, Verizon) ("There are microwave solutions of significant bandwidth that will support LTE and other fourth generation technologies."); *id.* at 46 (Jake Macleod, Bechtel Telecommunications) ("Obviously, a lot of carriers are now moving to Ethernet, and wireless is definitely a solution, but typically only where you can't get fiber or high-speed Ethernet solution.").

In short, all of the evidence in this and related proceedings – the robust competition that characterizes the downstream wireless market, the admissions by market participants who in more candid moments acknowledge that there is no difficulty obtaining backhaul on reasonable terms, and the testimonials of esteemed economists with decades of experience studying this industry – establishes that investment and innovation in special access are strong, that prices are declining, and that regulation is not necessary to ensure competitive supply.[215]

USCC nonetheless argues that the Commission should "fix[] the 'competitive triggers' for deregulation and re-set[] special access rates,"[216] relying on a study by the National Regulatory Research Institute ("NRRI"). This study, however, is fatally flawed. First, the NRRI study confirmed that special access prices for lower-capacity DS1 and DS3 circuits in fact *declined* substantially over the period studied (2006-07).[217] Second, the NRRI study substantially understates the level of competition: it assumes, for example, that cable operators and fixed wireless providers are still "fringe" competitors, and thus does not include either in its competitive assessment, when in fact the study's own findings – as well as the recently conducted Broadband Plan Workshops[218] and other evidence[219] – demonstrate widespread cable

[215] *See* AT&T Comments at 83-84; Willig Decl. ¶ 77; Verizon Comments at 99; *USTelecom Report* at 42, 57.

[216] USCC Comments at 12.

[217] *See* Peter Bluhm & Robert Loube, *Competitive Issues in Special Access Markets*, National Regulatory Research Institute at 59 & Table 7, *available at* http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf ("[d]ata in this table are the best estimate of the actual prices paid by large wholesale purchasers because these customers purchase a high percentage of their circuits at discounted rates," and "[e]ach of the discounted rates we measured declined from 2006 to 2007"); *see USTelecom Report* at 43 (discussing NRRI study).

[218] *See supra* pp. 62-63 & nn.212-14.

[219] *See USTelecom Report* at 16, 23, 57.

penetration and ease of entry into fixed wireless, both of which mean that cable companies and fixed wireless providers discipline prices charged by incumbent LECs for special access.

Adopting the party line, Sprint too contends that high special access prices "adversely affect the wireless services market,"[220] but, like its counterparts, Sprint too does not, because it cannot, explain *how* that can possibly be the case, when the evidence overwhelming establishes that both the downstream market for wireless services and the market for backhaul itself are robustly competitive. Nor does Sprint attempt to reconcile that claim with the observation of its own Chief Technology Officer, in a moment of candor that Sprint undoubtedly regrets, that microwave backhaul facilities are less prevalent in the United States than in Europe because legacy special access services are so inexpensive in this country.[221]

Sprint does suggest, without explanation, that consumers are harmed because certain wireless providers are affiliates of incumbent LECs.[222] But, unless incumbent LECs were using special access profits to offer artificially low prices or otherwise foreclose competition – a charge

[220] Sprint Comments at 13.

[221] *See* Stephen Lawson, *Sprint Picks Wireless Backhaul for WiMAX*, PCW Business Center (July 9, 2008), http://www.pcworld.com/businesscenter/article/148150/sprint_picks_wireless_backhaul_for_wimax.html (citing Sprint CTO Barry West).

[222] *See* Sprint Comments at 12-13; *see also* CFA Comments at 28; MetroPCS Comments at 48-49. The claim by Sprint (at 14) that incumbents' control over transmission facilities will slow the development of broadband services is answered by the fact that all wireless carriers are investing heavily in advanced broadband services, providing powerful marketplace evidence that access to backhaul facilities is sufficient. These levels of investment reflect a high degree of confidence that inputs for these advanced services can be obtained on reasonable terms. *See* Willig Decl. ¶¶ 61, 76-77.

Sprint does not make much less prove – the vertical integration of which it complains does not raise competitive concerns, but is instead beneficial to consumers and competition.[223]

Continuing its string of conclusory, unsupported assertions, Sprint next charges that "current special access rates . . . discourage investment."[224] As AT&T has explained, that is precisely backwards: in light of the exploding demand for wireless broadband services, multiple carriers have every incentive to invest in competitive backhaul; the risk here is not that incumbents will charge too much, but rather that regulation will cripple the incentives of incumbents *and* competitive providers to invest in new facilities.[225] As Dr. Willig explains, "[t]o keep pace with the projected growth in demand, incumbent wireless providers and new entrants alike will have no choice but to deploy new fiber" – unless, that is, "price regulation . . .

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[223] *See, e.g.*, Willig Decl. ¶ 25 (collecting authority for the proposition that "[i]t is well-accepted among economists that vertical integration, either through combination or contracting, can engender significant benefits to consumers"); Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 191 (2005) ("We find that significant benefits are likely to result from the vertical integration of the largely complementary networks and facilities of SBC and AT&T. The Applicants assert that their networks are complementary, with SBC providing an extensive network with substantial local fiber, Cingular having an advanced and extensive wireless network, and AT&T providing a global fiber optic long distance network and global data capabilities. . . . We find that the merger will permit the integration of the complementary networks and assets of SBC and AT&T, giving each carrier facilities it previously lacked. We further find that this network integration will permit the merged entity to offer a wider range of services to its broad range of customers. Moreover, customers will benefit not only from new services, but also from the improvements in performance and reliability resulting from the network integration.").

[224] *Sprint Innovation Comments* at 30.

[225] *See* AT&T Comments at 83-89; *cf. USTA II*, 359 F.3d at 573, 576 ("purpose of the [1996] Act is not to . . . guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate" but rather to "stimulate competition — preferably genuine, facilities-based competition," as opposed to the "synthetic" competition created by regulated wholesale access to network elements); *USTA v. FCC*, 290 F.3d 415, 424-25 & n.2 (D.C. Cir. 2002) ("low UNE prices" that result from TELRIC have the "direct effect" of "reduc[ing] the incentives for innovation and investment in facilities" and "inherently tend to expand . . . [that] effect[ ]").

undermine[s] the incentives of both incumbents and new entrants to invest in such deployment."[226]

Finally, T-Mobile argues in passing that, "in many rural markets especially, independent mobile providers like T-Mobile still must rely extensively on special access services provided by the ILECs for backhaul."[227] But, in an interview earlier this year, T-Mobile's chief technology officer candidly acknowledged that T-Mobile has a variety of options to meet its needs for backhaul, including cable, microwave and competitive fiber. Specifically, he stated that T-Mobile was pursuing multiple paths to address its need for backhaul, including obtaining fiber from "alternate access companies," and "more promising[ly] . . . the cable industry. . . . The third [approach], a more organic opportunity, is to simply build high-capacity microwave."[228] In view of these multiple alternative options for backhaul, T-Mobile plainly need not rely "extensively" on ILEC-provided special access in most areas, and in any case "typically rates for special access" in the rural markets about which T-Mobile specifically complains are already subject to "stringent price controls."[229]

### C. The Case for Roaming Regulation Is Misguided

AT&T's opening comments explained that the current roaming framework is sufficient to facilitate competition, and that further regulation of roaming is unnecessary. Not only is the

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[226] Willig Decl. ¶ 81; *see* T. Randolph Beard et al., *Market Definition and the Economic Effects of Special Access Regulation*, at 30, Phoenix Center Policy Paper No. 37 (Oct. 2009), *available at* http://www.phoenix-center.org/pcpp/PCPP37Final.pdf (special access "[p]rice regulation . . . may discourage competitive entry by reducing expected profits in the post-entry equilibrium").

[227] T-Mobile Comments at 27.

[228] Om Malik, *The GigaOM Interview: Cole Bordman, CTO T-Mobile*, GigaOM, http://gigaom.com/2009/05/12/the-gigaom-interview-cole-brodman-cto-t-mobile-usa.

[229] *USTelecom Report* at iii (emphasis added); *see id.* at 5.

wireless industry as a whole competitive – which itself signals the absence of a market failure with respect to inputs such as roaming – but also regional and smaller providers (those most likely to need roaming) are growing *faster* than other carriers.[230] We also pointed out that AT&T remains a net payor of roaming fees and, therefore, contrary to the claims of some, retains every incentive to enter into fair and reasonable roaming arrangements with other carriers.[231] Simply put, there is no evidence of a market failure that would warrant regulatory intervention by the Commission.

Some commenters nonetheless recycle their proposals for increased regulation of roaming arrangements. AT&T addressed these claims in its opening comments and elsewhere,[232] and it accordingly will only briefly address them here. First, as to requests that the Commission require *data* roaming arrangements,[233] mandatory data roaming could place undue strain on the providing carriers' networks, permitting free riding by other carriers and diminishing the quality of service for *all* customers.[234] This strain could be particularly

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[230] *See* AT&T Comments at 89-90; *compare* NTELOS Comments at 3 (stating that "NTELOS continues to make significant investments in its wireless network") *with id.* at 6 (conclusorily asserting that "[w]ithout roaming, NTELOS cannot effectively compete in the retail marketplace").

[231] *See* AT&T Comments at 90; *see also* T-Mobile Comments at 24 ("Because no mobile service provider has deployed facilities ubiquitously throughout the United States . . . roaming will continue to be important to the mobile marketplace.").

[232] *See* AT&T Comments at 89-94; Comments of AT&T Inc. at 6-10, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (FCC filed Oct. 29, 2007); Reply Comments of AT&T Inc. at 13-22, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (FCC filed Nov. 28, 2007).

[233] *See* NTELOS Comments at 6-7; CellSouth Comments at 18; CFA Comments at 29; T-Mobile Comments at 25; MetroPCS Comments at 13, 27, 32-35.

[234] *See* AT&T Comments at 92-93; *see also* Willig Decl. ¶ 88 ("data networks at present appear to be under stress, and this situation would only worsen, to the potential detriment of service quality, with roaming obligations that add to existing traffic burdens").

problematic if the Commission imposes net neutrality rules on wireless providers that impede their ability to manage traffic flow on their networks. Furthermore, data roaming requirements would undermine incentives for facilities-based competition. As Dr. Willig explains, the marketplace has historically been successful in spurring roaming arrangements between carriers that are in each carrier's economic interests, thereby ensuring that "a carrier's incentives to undertake network investments" are preserved.[235] Data roaming *requirements*, by contrast, would "carr[y] a significant risk that the required pricing will disrupt carrier investment incentives."[236] Upgrading wireless networks to accommodate exploding demand for data services will require substantial investments; regulations that undermine the incentives to make such investments will ultimately work to the detriment of all consumers.

Second, as to requests to eliminate the "in-market" exception to the Commission's existing roaming requirements, this proposal would likewise diminish the incentives of both the requesting and providing carrier to invest in network infrastructure.[237] The Commission has already recognized as much, explaining that, "if a carrier is allowed to 'piggy-back' on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage."[238] As the Commission explained, "[i]f there is no competitive advantage associated with building out its

[235] Willig Decl. ¶ 86.

[236] *Id.*; *see id.* ¶ 87 (citing evidence that some smaller carriers have publicly acknowledged they seek to rely on roaming arrangements rather than making investments in facilities in rural areas).

[237] *See* AT&T Comments at 90-91.

[238] Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 49 (2007).

network and expanding coverage into certain high cost areas, a carrier will not likely do so."[239] Nor does the fact that *some* wireless carriers are under build-out obligations under requirements of the 700 MHz auction suggest that an *across-the-board* elimination of the in-market roaming exception would do anything but diminish the incentives for genuine facilities-based competition in many markets throughout the country.

### D. Claims for Network Equipment Regulation Are Misguided

Like numerous other providers, AT&T invested billions to acquire spectrum in the 700 MHz band in order to expand the broadband capabilities of its network. Before making that investment, AT&T thoroughly researched the technical characteristics of that spectrum to ensure that AT&T could develop it consistent with its objective to provide high-quality broadband service to AT&T's consumers. AT&T ultimately decided, based on this investigation, to acquire spectrum in the lower B-Block of the 700 MHz band in Auction 73, as well as purchasing spectrum in the lower C Block through secondary market transactions. AT&T's B-Block spectrum cost considerably more than other blocks within the 700 MHz band, which, from AT&T's perspective, suffered from various limitations.[240] AT&T ultimately paid an average of $3.15 per MHz POP for its B Block spectrum, as compared to an average of $1.13 per MHz POP

[239] *Id.* MetroPCS admits "there is a certain logic that underlies the in-market roaming exception" in that "[w]ireless service providers should not be forced to provide roaming access to competing carriers who have the present ability to provide service in the same market over their own facilities," MetroPCS Comments at 29, and it fails to explain why a requesting carrier would undertake a full infrastructure build-out if it could simply piggy-back on the infrastructure of other carriers.

[240] For example, the A Block was located next to high-power broadcast channels that AT&T believed risked interference, and the C Block was encumbered with burdensome, experimental "open access" regulations.

paid for A Block spectrum and an average of $0.76 paid for C Block spectrum.[241] Having invested considerable sums to acquire this spectrum, AT&T has devoted substantial resources to working with wireless equipment manufacturers to ensure the availability of equipment that AT&T needs to develop its huge investment.

CellSouth and others suggest that, in its pursuit of this objective, AT&T (along with Verizon Wireless) has used its influence as a major wireless carrier to dissuade equipment manufacturers from making devices and equipments that would operate on the lower A Block.[242] Instead, CellSouth asserts, Verizon Wireless is encouraging the manufacture of devices that operate *only* in the upper C Block spectrum that Verizon Wireless purchased in Auction 73, and AT&T similarly seeks equipment that operates *only* in the lower B and C Blocks. This same argument also is the subject of a recent petition for rulemaking[243] and will be addressed as necessary there, but in any case there is no merit to CellSouth's claims.[244]

As CellSouth acknowledges, the 3GPP equipment standards for the 700 MHz band include a number of different band classes. Band Class 17 supports lower B Block and lower C Block spectrum; Band Class 13 supports only the upper C Block; and Band Class 12 supports the lower A Block, B Block, and C Block. Contrary to what CellSouth suggests, however, AT&T did not "press[] for the establishment of" Band Class 17 in order "to undermine efficient

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[241] *See* Blair Levin et al., Stifel Nicolaus, *Special Focus: The Wireless World After 700 MHz*, at 2, 4, Washington Telecom, Media & Tech Insider (Mar. 28, 2008).

[242] *See* CellSouth Comments at 8-15; RCA Comments at 6, n.13.

[243] *See* Petition of 700 MHz Block A Good Faith Purchasers Alliance, *Petition for Rulemaking Regarding the Need For 700 Mhz Mobile Equipment To Be Capable of Operating On All Paired Commercial 700 Mhz Frequency Blocks*, RM ____ (FCC filed Sept. 29, 2009).

[244] A more detailed response to these claims will also be included in AT&T's Reply Comments in response to the + NOI.

utilization of Lower A Block spectrum."[245] In fact, Motorola proposed the plan for a separate band (originally Band 15, later changed to Band 17) in the first instance. This was done for purely technical reasons – not to somehow disadvantage the A-Block, and AT&T supported Motorola's proposal on that basis. In particular, as Motorola noted in documents proposing the creation of Band Class 17, "[t]he rationale for this new band is to address possible co-existence issues with High power TV broadcast transmission in Channel 51 and other broadcast transmission in channel 55 (Block D) and channel 56 (Block E)."[246] In other words, Motorola was concerned that, because of interference issues, inclusion of the lower A Block spectrum bands in devices designed to operate on the lower B and C Blocks would invite interference from high power operations adjacent to the lower A Block, and it believed that limiting the operation to the lower B and C Blocks would alleviate this interference.

AT&T's decision to pursue equipment compatible with Band 17 (and not Band 12) is therefore based purely on technical considerations, not competitive ones as CellSouth alleges. Indeed, the likelihood that the lower A Block would be susceptible to interference from adjacent high-power uses accounts in large part for the relative difference in the prices between the A Block (which, again, sold for an average price per MHz POP of $1.13), and the lower B Block spectrum (which went for an average of $3.15 per MHz POP). In any event, the decision by equipment manufacturers to prioritize Band 17 by no means prevents parallel development of equipment for Band 12.[247]

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[245] CellSouth Comments at 9.

[246] Motorola, *TS36.101: Lower 700 MHz Band 15*, R4-081108, 3GPP TSG RAN WG4 (Radio) Meeting #47, Kansas City, April 5-9, 2008, *available at* http://www.3gpp.org/ftp/tsg_ran/WG4_Radio/TSGR4_47/Docs/R4-081108.zip.

[247] In addition to the issues addressed above, the comments raise a grab-bag of issues that affect wireless services, such as tower siting, pole attachments, universal service, intercarrier

## CONCLUSION

The Commission should conclude that there is effective competition throughout the mobile "value chain."

Respectfully submitted,

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compensation, and number portability. *See*, *e.g.*, USCC Comments at 4, 21; Sprint Comments at 15-20; T-Mobile Comments at 28-29; MetroPCS Comments at 37-38, 45, 49-51. Although many of these issues are important, this is not the appropriate proceeding to address them. Each of these issues is the subject of separate, focused proceedings with more complete records, and each of them should be addressed there. *See*, *e.g.*, CTIA Petition for Declaratory Ruling, *Petition for Declaratory Ruling 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*, WT Docket No. 08-165 (FCC filed July 11, 2008) (seeking declaratory ruling regarding tower siting and zoning issues); Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd 20195 (2007) (proposing amended pole attachment rules); Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, 24 FCC Rcd 6475 (2008) (proposing intercarrier compensation reform).