

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

In the Matter of)
)
Implementation of Section 6002(b) of the)
Omnibus Budget Reconciliation Act of)
1993)
)
Annual Report and Analysis of)
Competitive Market Conditions with)
Respect to Mobile Wireless including)
Commercial Mobile Service)
)

WT Docket No. 09-66

To: The Commission

Reply Comments of Public Service Communications, Inc.

Public Service Communications, Inc. (“Public Service”) is a small rural carrier providing wireless services in central Georgia. It submits these Reply Comments in accordance with the Commission’s Notice of Inquiry DA 09-67 (August 27, 2009) (the “NOI”) seeking comment on the analytic framework and data sources, new market structures such as devices and infrastructure, and the vertical relationships between “upstream” and “downstream” market segments, all with an eye toward a better understanding of the competitive environment in which wireless services operate.¹ Specifically, Public Service supports the comments of the National Telecommunications Cooperative Association (“NTCA”) and the Rural Telecommunications Group (“RTG”) in the above captioned matter, and their assertions with regard to roaming obligations and handset exclusivity agreements.

¹ See NOI at ¶5.

I. All Types of Roaming Service should be Offered to Carriers on a Ubiquitous, Automatic, and Reasonable Basis

Carriers should be guaranteed access to voice and data roaming, regardless of whether it is in-market or out-of-market. Public Service has long argued for the kind of across-the-board roaming parity discussed by NTCA and RTG. Public Service pointed out the critical need for rural service providers to have access to roaming when the Commission first permitted the cellular giants Verizon and Alltel to merge, noting that without fair and unbiased access to roaming agreements, rural consumers find themselves “in the uncomfortable position of having to choose between supporting a local business that may provide superior rural coverage and customer service, and having greater access when they travel to a network that will support advanced services.”²

While the Commission already requires automatic roaming in the CMRS context, this requirement does not extend to in-market roaming or non-interconnected services, such as data. Moreover, the automatic roaming requirement has proven inadequate in ensuring reasonable roaming rates for rural carriers. While there may be some marketplace incentive for roaming agreements, that incentive is largely one-sided. As Public Service highlighted in the Verizon divestiture docket, the nation-wide coverage that giant carriers like Verizon enjoy means “these companies have little incentive to voluntarily offer fair and reasonable roaming terms – especially to rural competitors.”³ Indeed, Verizon has already demonstrated its unwillingness to contract reasonably with rural carriers, even when it still faced competition from pre-merger Alltel.⁴ Simply put, rural wireless carriers *must rely* on roaming partners to provide services to their customers while they are outside the local market(s); building out a larger network footprint, as Verizon suggests, is neither possible nor desirable. As RTG recognizes, “most operators are relatively new, have no practical ability to acquire a nationwide spectrum footprint even if they wanted to.”⁵ While the larger carriers were building out only the most profitable

² See December 10, 2009 Petition for Reconsideration of Public Service Communications, Inc., WT Docket No. 08-95, at pp. 11-14.

³ August 6, 2009 Reply Comments of Public Service Communications, Inc. WT Docket No. 09-104, at p. 3.

⁴ See, e.g., July 31, 2008 Petition to Dismiss or Deny of North Dakota Network, Co., WT Docket No. 08-95, (wherein Verizon refused to reduce its roaming rate for a rural wireless carrier below 20 cents per minute when the prevailing national rate was between 5 and 10 cents per minute).

⁵ Comments of RTG at p.5.

areas, rural carriers have been providing service to the difficult-to-serve, high cost rural areas. Public Service does not oppose competitive roaming policies, but urges the Commission to recognize that competitive negotiation does not occur in the rural context because rural carriers cannot leverage the same regulated facilities used in the provision of local services to capture customers as large carriers like Verizon do. With the merger of Verizon and Alltel, the only source of competitive roaming rates has been eliminated in many rural markets.

With regard to the in-market roaming issue, Verizon's September 30, 2009 Comments in this proceeding (at p. 59) supports "negotiated commercial agreements that allow for home roaming." Verizon indicates that it has offered a "compromise" that would allow all carriers to avail themselves of home roaming for two years. *Id.* While this is a step in the right direction, a one-time band-aid will not ameliorate the harmful effect of a denial of home roaming. Nationwide wireless carriers like Verizon are always going to be able to implement the next generation of wireless technology in their footprint before rural carriers have the opportunity to do so, due to increased purchasing power and priority in the supply chain, among other reasons. To the extent that a nationwide carrier's footprint overlaps the more populated portion of a rural carrier's service area, that rural carrier will be at a distinct disadvantage in trying to retain customers, and maintain the viability of its system, to the extent that it cannot offer (through a home roaming arrangement) the innovations that are being offered by the larger carriers.

The same dynamics point to the need for mandatory roaming to apply to data services as well. As Chairman Genachowski recognized, "[w]e are transitioning from a voice-centric world to a world of ubiquitous, mobile Internet access."⁶ Verizon claims that "carriers with advanced services are willing to offer favorable data roaming terms to other carriers that have implemented similar advanced technology, so that customers who buy a new product in their home market can use those capabilities when they travel."⁷ However, as described above, small rural carriers are at a disadvantage in implementing data services (and upgrades to such services) on the same timetable as giant carriers such as Verizon. Moreover, large carriers do not have a significant incentive to offer fair data roaming terms to rural carriers, to the extent that the large carriers

⁶ Comments of FCC Chairman Genachowski, NOI at p 15.

⁷ Verizon September 30, 2009 Comments at p. 59.

have already implemented overlapping coverage to the profitable portion of a rural carrier's coverage. Public Service therefore concurs with RTG in the assertion that the correct competitive framework for roaming "is an environment where the in-market roaming exception is abolished and data (or non-interconnected) roaming services are treated similar to voice."⁸ Given the increasing expectation of wireless access not only to voice but also email, navigation, internet browsing, and other data-centric services, automatic roaming for voice but not data essentially renders the existing protection impotent. Any framework for analyzing and regulating the competitiveness of the wireless market should recognize the growing expectation of broadband data access through wireless devices, and should produce safeguards necessary to maintain and promote genuine competition between all carriers.

II. Handset Exclusivity Agreements Harm Competition and Consumers.

Public Service further submits that the Commission should take this opportunity to ensure that small rural carriers and customers do not continue to be disadvantaged by handset exclusivity agreements. As shown in NTCA's comments, discriminatory access to hardware causes a migration of customers to the larger in-market competitors against which rural carriers have no way to compete.⁹ Other rural carriers, such as the membership of the Rural Cellular Association, have shown that many of the newest and most innovative devices are only available to customers of nationwide wireless service providers, and customers are being "channeled" to a particular carrier's service based on the carrier's "stranglehold" over the desired handset.¹⁰

But anti-competitive impact is not the only downside to these agreements, as such arrangements have even made it difficult for rural carriers to comply with regulatory mandates such as hearing aid compatibility. The Commission has recognized that rural carriers often struggle to obtain an adequate selection of the compliant handsets necessary to operate their

⁸ September 30, 2009 Comments of the Rural Telecommunications Group, Inc., WT Docket No. 09-66, at p. 5. ("Comments of RTG")

⁹ September 30, 2009 Comments of the National Telecommunications Cooperative Association, WT Docket No. 09-66, at pp. 2-3 ("Comments of NTCA"); Comments of RTG at pp. 6-7.

¹⁰ See May 20, 2008 Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Agreements Between Commercial Wireless Carriers and Handset Manufacturers, RM – 11497, at p. 2.

businesses.¹¹ As Public Service has argued in the past, “[t]his failure of the “trickle down” theory of handset availability is due in no small part to exclusivity agreements, because the newer (and more advanced) devices that rural carriers are contractually forbidden to acquire are more likely to include these features.”¹² Corr Wireless, in the above referenced Rural Cellular Association Petition for Rulemaking docket, demonstrated that handset exclusivity arrangements and/or favored customer arrangements are likely to delay the ability of small and rural carriers to acquire Assisted GPS (“APCS”) handsets as well, thereby depriving these carriers and their subscribers of a potentially important solution for rural E911 deployment.¹³

Arguments that handset exclusivity deals promote innovation likewise ring hollow. Innovation is done by the manufacturer, not the carrier, and would likely occur in the absence of exclusivity agreements. In fact, exclusivity agreements existed but were rarely employed before Apple’s iPhone was limited to AT&T’s network; if anything, their popularity now is just part and parcel of the iPhone phenomenon. The exclusivity agreement was not the reason Apple’s product was innovative or successful; Apple chose AT&T for its device because AT&T was willing to give Apple the kind of strict control over the device’s hardware and software it desired.¹⁴ Despite its support of such agreements, Verizon itself rejected an exclusivity deal with Apple because, according to Verizon’s Vice President of Communications Jim Gerace, the terms of Apple’s deal limiting sales of the device to Apple and Verizon stores would have put its other distribution partners, such as Wal-Mart and Best Buy, at a disadvantage.¹⁵ Clearly, Verizon recognizes that exclusivity agreements put competitors at a disadvantage. To argue, as Verizon does, that a device “may never have been developed absent an exclusivity deal” is unsupported and implausible.¹⁶

¹¹ *Memorandum Opinion and Order*, WT Docket No. 01-309, FCC 08-67, released February 27, 2008 (recognizing that Tier III carriers typically experienced significant delays in obtaining shipping commitments from their handset suppliers because handset manufacturers filled orders first for the larger Tier I and Tier II carriers.”), ¶ 16

¹² Reply Comments of Public Service, *supra* FN 3, at p 5

¹³ December 2, 2008 Comments of Corr Wireless, RM – 11497, at p 3.

¹⁴ See, e.g., “iPhone’s Network Hang-Up”, Business Week, July 12, 2007, available at http://www.businessweek.com/technology/content/jul2007/tc20070711_336357.htm

¹⁵ Leslie Cauley, “Verizon Rejected iPhone Deal”, USA Today, January 29, 2007, available at http://www.usatoday.com/tech/news/2007-01-28-verizon-iphone_x.htm?POE=TECISVA

¹⁶ September 30, 2009 Comments of Verizon Wireless, WT Docket No. 09-66, at p 124.

Likewise, while an exclusivity deal may allow a carrier to “distinguish itself in the marketplace,” it does so by creating an artificial monopoly over a consumer device. When consumers are required to purchase wireless service from that carrier just so that they can obtain a particular device, it has the effect of a tying arrangement. Tying arrangements have long been recognized by antitrust law as potentially harmful to consumers, and therefore must be carefully evaluated for anticompetitive impact. While the law regarding tying arrangements is evolving in an intellectual property context, it is still grounded in evaluating the harmful impact on consumers and competition, through inquiries such as “why are you doing this; what are the efficiencies, are there other ways to achieve the efficiencies; do you expect it to block competition?”¹⁷ As demonstrated in the record in this proceeding, consumers are being harmed by exclusivity arrangements, to the point that hundreds of thousands are trying to bypass the exclusivity restriction through the porting mechanism. And nowhere is this adverse effect on consumers felt more than in rural America, where a rural carrier may provide greater coverage to the communities of interest of a customer, but is contractually forbidden from offering the handset that the customer needs.

Finally, the fact that exclusivity deals eventually expire provides little comfort to rural wireless providers. Verizon argues that handsets typically come available to other carriers once the period of exclusivity comes to an end, citing its own “offer” to limit exclusivity vis-à-vis carriers with less than half a million customers to no longer than six months. However, six months is still a significant marketplace disadvantage (considering the average 2-year commitment most consumers are required to make with the larger wireless carriers), and a hindrance in the supply of compliant phones, and is hardly representative of the average period of exclusivity. The notorious iPhone exclusivity was extended until 2010, adding another year to the original 2-and-a-half year agreement,¹⁸ and some analysts indicate another extension is the likely outcome.¹⁹

¹⁷ See “Antitrust Issues in the Tying and Bundling of Intellectual Property Rights”, available at: http://www.usdoj.gov/atr/public/hearings/ip/chapter_5.htm.

¹⁸ Leslie Cauley, “AT&T: We’re All About Wireless”, USA Today, July 31, 2008, available at http://www.usatoday.com/tech/wireless/phones/2008-07-31-att-iphone-stephenson-apple_N.htm

¹⁹ Matt Hamblen, “Analyst: AT&T Likely to Keep iPhone Exclusive Deal”, MacWorld, September 11, 2009, available at http://www.macworld.com/article/142757/2009/09/att_iphoneddeal.html

III. Conclusion

Public Service applauds the Commission in taking the initiative on setting the foundation for wireless communications regulation in the advent of the age of broadband, and respectfully urges the Commission to maintain consideration for the rural carriers who for so long have provided service to the most expensive-to-serve and technically challenging areas of our nation. Public Service agrees with NTCA and RTG that it is time for the Commission to take action on the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, it should adopt rules that prohibit such arrangements when contrary to the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of October, 2009, a copy of the **Reply Comments of Public Service Communications, Inc.** was served via electronic mail to the following:

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