
**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: The Commission

REPLY COMMENTS OF VERIZON WIRELESS

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SUMMARY

As the Commission considers the record gathered in response to the *Mobile Wireless Competition Notice of Inquiry*, it should first separate facts and data from bald assertions and empty rhetoric. What emerges from a data-driven assessment of the record is a remarkable picture of a dynamic U.S. industry sector – a hotly contested mobile wireless market teeming with innovation and investment. For American wireless consumers, these are the “best of times.” Consumers enjoy a range of choices, with multiple providers offering diverse service plans reflecting intensive price and non-price competition. Providers of all sizes, operating in all corners of the nation, vie to win and retain customers in a marketplace that permits seamless movement by consumers among providers. Rates for voice, messaging, and broadband have declined, while both the quality and quantity of service provided at those rates has increased, and customers are benefiting from intensely competitive “edge” markets for devices, applications, and content. Non-national providers and new entrants – relying on traditional mobile technologies and innovative offerings unimaginable even just a few years ago – continue to expand the already broad variety of service and device choices available to consumers.

The extraordinary pace of innovation and the state of competition in the mobile wireless marketplace are reflected in the stunning amount of change even in the three weeks since initial comments in this proceeding were filed. Since September 30, as detailed in the many examples cited in these reply comments, wireless providers have expanded their service areas and offerings; introduced numerous new next-generation wireless devices; continued to reduce prices and introduce innovative service plans; announced transactions that promise to expand coverage by non-nationwide providers; and taken groundbreaking steps to improve network openness. In short, competition in the mobile wireless marketplace is not only “effective” but accelerating.

In spite of these developments, as Verizon Wireless anticipated, commenters seeking vastly expanded regulation have presented an alternative “worst of times” narrative – but this rendering is premised on rhetoric and unsupported assertions that are often outdated, misleading, or false. In Part I of these reply comments, Verizon Wireless responds to each of these claims. The actual facts tell a different and far more positive story. The vast majority of Americans are served by four or more providers, and new providers are continuing to enter the market. Urban and rural areas alike benefit from the highly competitive wireless market, and are on the verge of enjoying even more competition. Price rivalry exists on all fronts; rates for text and multimedia messaging, as well as voice and data service, have been falling fast. Wireless providers are investing heavily in their networks, and this investment extends to many small and regional carriers who are moving quickly to deploy broadband offerings. Despite claims to the contrary, small carriers have access to spectrum and a multitude of cutting-edge smartphones that American consumers demand. The “walled garden” of yesteryear is no more, as customers can choose from a huge selection of content and applications provided by carriers or directly access third-party content and applications. Customers enjoy access to detailed information regarding wireless service plans and prices which enables them to make informed choices.

Unable to provide facts or data to demonstrate that the wireless market is not “effectively competitive,” advocates for expansive regulation instead stock their comments with regulatory demands bearing no relationship to the state of the market. These arguments all relate to separate petitions or proceedings, and have no place in response to the Commission’s call for facts and data or its preparation of the next report to Congress on wireless competition. Worse, many of these claims for rules would advance the interests of certain competitors, not the interests of consumers or competition. Nevertheless, these claims cannot go un rebutted; accordingly, in Part II Verizon Wireless responds to them. Specifically:

- Those seeking to impose new regulations on the successful market-driven roaming system ignore the facts that roaming rates are declining, that large carriers continue to negotiate voice and data roaming arrangements, and that the rules they seek would undermine incentives to invest and to deploy facilities.
- Those demanding a ban on handset exclusivity arrangements neglect to mention that they enjoy access to many of the most popular new devices on the market, and ignore the considerable economics literature which shows that exclusivity arrangements for producing and marketing products encourage investment, innovation, and competition.
- Those alleging a dearth of competition in the wireless backhaul market ignore the true nature of the current market, the role played by new entrants, and the increasing opportunities springing from growing demand for high-capacity backhaul.
- Those seeking regulation of text-messaging service and common short code provisioning as common carrier offerings misunderstand the nature of these offerings, the statutory preconditions for the regulation they seek, and the ways in which such regulation would harm consumers.
- Those alleging a lack of equipment suitable for the 700 MHz spectrum they plan to use fail to show they cannot obtain such devices, ignore the open nature of the international standards-setting process, and disregard the technical reasons as to why the current band plans for 700 MHz devices were adopted.

In Part III, Verizon Wireless addresses comments asking the Commission to introduce economically unsound metrics into its competitive analysis, or to impose sweeping new data-production requirements on mobile wireless providers. Most commenters generally support the Commission's structure-conduct-behavior framework. Thus the Commission should not place excessive reliance on market concentration, or focus its analysis on irrelevant metrics such as accounting profits or the relationship between prices and marginal costs. Those who argue for relying on these factors fail to make their case. Once arguments regarding these metrics are appropriately rejected, it becomes clear that the information relevant to this proceeding is already at the Commission's fingertips, both in this docket and elsewhere – and with recent Government initiatives, even more information is on its way. Similarly, those parties who demand that the Commission begin to require production and collection of vast amounts of additional information fail to justify that demand. The types of information they seek would be repetitive, unnecessary,

or irrelevant, or would duplicate the ample information that is readily available from public and Commission sources. These proposed information collection requirements on the competitive wireless industry would go far beyond what the Commission requires in the context of markets that are far less competitive. The Commission has all the information it needs to assess the state of wireless competition and prepare its report to Congress.

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REPLY COMMENTS OF VERIZON WIRELESS

INTRODUCTION

Verizon Wireless hereby submits these reply comments in response to the Notice of Inquiry in the above-captioned proceeding.¹ That *NOI* appropriately sought submissions containing facts and data rather than reheated rhetoric: “[W]e seek specific and granular quantitative and qualitative data and information on mobile wireless market segments and edge markets to inform and evaluate competition in the mobile wireless market.”² The Commission recognized that such “[d]ata and analysis will shed light on the current state of competition and provide a basis and foundation for the Commission’s ongoing understanding of the mobile wireless market....”³ Chairman Genachowski emphasized that only facts and data could “lay[] a

¹ 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, *Notice of Inquiry*, FCC 09-67 (rel. Aug. 27, 2009) (“*NOI*”).

² *Id.* ¶ 14; *see also id.* ¶ 6 (“In order to facilitate the Commission’s analysis of competitive trends over time, we request that parties submit current data as well as historic data that are comparable over time.”).

³ *Id.* ¶ 2.

solid foundation for predictable, fact-based competition policy in the wireless sector,” and expressed hopes that the *Fourteenth Report* “will help set a standard for fact-based, analytically deep analysis of the mobile industry....”⁴ Each of the other four Commissioners also highlighted the centrality of facts and data to the Commission’s inquiry.⁵

Verizon Wireless took seriously the Commission’s request for facts and data. It provided figures, charts, graphs and other information detailing (among other things):

- The broad and growing range of mobile service providers in the market.⁶
- The extraordinary level of competition and consumer usage in the United States in comparison to peer nations.⁷
- The ability of new providers to enter the mobile services market.⁸
- The ease with which customers can switch from one provider to another.⁹
- The fierce price and non-price competition in which providers are engaged.¹⁰
- High and rising levels of consumer satisfaction.¹¹

⁴ *Id.* at 15-16 (Statement of Chairman Genachowski). More recently, the Chairman reiterated that the Commission’s wireless policy agenda must be founded on “fact-based, data driven, open and transparent processes.” Julius Genachowski, Chairman, Federal Communications Commission, America’s Mobile Broadband Future, Remarks at International CTIA Wireless I.T. & Entertainment, 9 (Oct. 7, 2009) (“Genachowski CTIA Speech”).

⁵ *See, e.g., NOI* at 18 (Statement of Commissioner Michael J. Copps) (“For years I have advocated the benefits of a more granular, data-driven understanding of the current mobile wireless marketplace.”); *Id.* at 21 (Statement of Commissioner Robert M. McDowell) (“I hope that interested stakeholders will not simply resubmit the pleadings filed in response to the Wireless Bureau’s Fourteenth Report Public Notice, which was issued in May.”); *Id.* at 22 (Statement of Commissioner Mignon Clyburn) (“I’m particularly pleased that we are seeking specific qualitative and quantitative data on elements that affect consumers’ mobile wireless purchasing decisions and consumer behavior.”); *Id.* at 23 (Statement of Commissioner Meredith Attwell Baker) (“I applaud that, as part of this overall inquiry, we request quantitative and qualitative data to inform our analysis of how spectrum holdings and infrastructure affect overall competition.”).

⁶ *See* Comments of Verizon Wireless, WT Docket No. 09-66, 19-42 (filed Sept. 30, 2009) (“Verizon Wireless Comments”).

⁷ *See id.* at 42-47.

⁸ *See id.* at 47-60.

⁹ *See id.* at 60-64.

¹⁰ *See id.* at 64-90.

- Intense competition in the upstream backhaul,¹² infrastructure,¹³ and spectrum¹⁴ segments, as well as the edge markets for devices,¹⁵ applications¹⁶ and content.¹⁷

Verizon Wireless also submitted an economic analysis prepared by Dr. Michael Topper, Vice President and Head of the Antitrust & Competition Practice at Cornerstone Research and former member of the Economics faculties at Stanford University and the College of William & Mary.¹⁸ The detailed facts and analysis submitted by Verizon Wireless, as well as by other parties,¹⁹ demonstrated conclusively that the mobile wireless market is “effectively competitive” – indeed, *fiercely* competitive. The evolving market structure and other market developments in recent years have only improved the user experience.

In stark contrast, those commenters who allege the wireless market is not competitive disregarded the Commission’s request for facts and data. Instead, they merely recycled previous

¹¹ *See id.* at 90-94.

¹² *See id.* at 95-100.

¹³ *See id.* at 100-105.

¹⁴ *See id.* at 105-106.

¹⁵ *See id.* at 107-125.

¹⁶ *See id.* at 125-133.

¹⁷ *See id.* at 133-136.

¹⁸ *See* DECLARATION OF MICHAEL D. TOPPER, ASSESSING THE COMPETITIVENESS OF MOBILE WIRELESS: AN ECONOMIC ANALYSIS (Sept. 30, 2009), attached as Exhibit A to Verizon Wireless Comments (“TOPPER DECLARATION”).

¹⁹ *See, e.g.*, Comments of CTIA – The Wireless Association®, WT Docket No. 09-66, 31-57 (filed Sept. 30, 2009) (“CTIA Comments”); Comments of AT&T Inc., WT Docket No. 09-66, 8-75 (filed Sept. 30, 2009) (“AT&T Comments”); Comments of T-Mobile USA, Inc., WT Docket 09-66, GN Docket Nos. 09-157 & 09-51, 6-15 (filed Sept. 30, 2009) (“T-Mobile Comments”); Comments of Sprint Nextel Corporation, WT Docket No. 09-66, 2-8 (filed Sept. 30, 2009) (“Sprint Comments”); *see also, e.g.*, Comments of CDMA Development Group, WT Docket No. 09-66, 5 (filed Sept. 30, 2009) (citing “intense competition in the U.S. wireless marketplace [that] has directly contributed to the continued investment and innovation in services, which in turn has benefited consumers in terms of selection of services and products as well as affordable pricing”); Comments of Telecommunications Industry Association, WT Docket No. 09-66, 6 (filed Sept. 30, 2009) (discussing the “competitive wireless services market” and commending the FCC for its foresight in implementing “market-based policies [that] have resulted in making a variety of technologies, platforms, service, applications, and devices available to American consumers”).

requests for regulation clothed in conclusory rhetoric. As Verizon Wireless predicted, these commenters presented a “worst of times” narrative, filled with much talk of consolidation and concentration but little regard for evidence and analysis. These commenters relied instead on a series of *ipse dixit* assertions regarding the state of the market, virtually none of which were supported by data. Indeed, to the extent these commenters set out purported facts rather than mere rhetoric, the “facts” presented were often outdated, incomplete or simply *wrong*, as detailed at length below. These pervasive factual errors, coupled with tired arguments and repudiated theories, fail to advance the Commission’s examination of the wireless ecosystem, and cannot serve as the basis for any effort intended to topple the Commission’s longstanding wireless policy framework. That framework – focused on regulatory restraint – has triggered tremendous competition and innovation, providing American consumers with the most diverse and advanced wireless marketplace in the world.

As dramatically illustrated below, even in the short period since initial comments were filed on September 30, providers have announced an abundance of network upgrades and expansions, introduced new plans, and launched new customer-oriented policies. Within the *past three weeks*:

- Clearwire introduced its 4G mobile Internet service to Milledgeville, Georgia and Salem, Oregon.²⁰
- MetroPCS nearly *doubled* the number of cities and towns included in its MetroPCS Unlimited Nationwide(SM) offering.²¹

²⁰ Press Release, Clearwire Communications, LLC, Clearwire Introduces CLEAR(TM) 4G Mobile Internet Service to Milledgeville, Georgia (Oct. 1, 2009), <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1337299>; Press Release, Clearwire Communication, LLC, Clearwire Introduces CLEAR(TM) 4G Mobile Internet Service to Salem, Oregon (Oct. 1, 2009), <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1337297>.

²¹ See Press Release, MetroPCS, MetroPCS Expands Unlimited NationwideSM Service (Sept. 30, 2009), <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1336771>.

- U.S. Cellular expanded the reach of its network, with service enhancement announcements in 9 areas.²²
- Cellular South announced the acquisition of Corr Wireless, expanding Cellular South’s footprint into 18 new counties across Alabama and Georgia and increasing the company’s coverage by more than 1.3 million people.²³ Cellular South described the acquisition as a “new way[] to position itself for healthy growth so it can compete in an ever-evolving wireless industry.”²⁴ As Cellular South’s chief financial officer said when announcing the deal, “Even in this tough economy, Cellular South is continuing to grow its customer base and expand its service offerings.”²⁵
- Cellular South began accepting pre-orders for the HTC Hero, an Android™ phone.²⁶
- Cellular South unveiled a “Smartphone Unlimited Plan,” offering unlimited talk, text, Web and email for \$79.99 per month.²⁷
- Cricket announced that it has entered into an agreement with Target, which will make Cricket’s PAYGo products available in nearly 650 store locations.²⁸
- T-Mobile reduced the price of its 5GB data plan by \$10 to \$49.99.²⁹

²² See, e.g., Press Release, U.S. Cellular, U.S. Cellular Expands Network in Janesville Area (Oct. 6, 2009), http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press091006_1; Press Release, U.S. Cellular, U.S. Cellular Expands Network in Milwaukee (Oct. 6, 2009), http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press091006; Press Release, U.S. Cellular, U.S. Cellular Expands Network Near Burlington (Oct. 1, 2009), http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press091001_6; Press Release, U.S. Cellular, U.S. Cellular Expands Network Near Arpin (Oct. 1, 2009), http://www.uscc.com/uscellular/SilverStream/Pages/x_page.html?p=a_press091001_5.

²³ Press Release, Cellular South, Inc., Cellular South Announces Plans to Acquire Alabama’s Corr Wireless (Oct. 16, 2009), <https://www.cellularsouth.com/news/2009/20091016.html> (“Cellular South/Corr Wireless Press Release”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Press Release, Cellular South, Cellular South Begins Pre-order of HTC Hero™ Today; Introduces Ground-breaking New Smartphone Unlimited Plan (Oct. 5, 2009), <https://www.cellularsouth.com/news/2009/20091005.html>.

²⁷ See *id.*

²⁸ See Press Release, Cricket Communications, Inc., Cricket Enters Agreement with Target Corporation (Oct. 1, 2009), <http://www.mycricket.com/aboutcricket/pressroom/details?id=439>.

²⁹ T-Mobile USA Inc., Internet & Email Plans, <http://www.t-mobile.com/shop/plans/Cell-Phone-Plans.aspx?catgroup=Internet-Email-cell-phone-plan> (last visited Oct. 15, 2009).

- T-Mobile introduced the Samsung Behold® II and unveiled four other 3G handsets.³⁰
- Sprint added 4G WiMAX service in eight Texas cities.³¹
- Sprint announced the introduction of its second Android™-based handset, the Samsung Moment,³² featuring a 3.2-inch touch-screen and an 800 MHz processor.³³
- Sprint announced a new turnkey back-office solution for companies interested in reselling post-paid wireless service under their own brand.³⁴
- Sprint announced a Partner Interexchange Network (“PIN”) to provide business-to-business wholesale exchange of voice over IP traffic.³⁵
- Sprint announced that its service is now available in select underground stations in the Washington, D.C. Metro system.³⁶
- AT&T introduced or expanded its 3G wireless coverage in Colorado, Texas, Illinois, Indiana, Florida, North Carolina, and western Massachusetts.³⁷ AT&T also announced

³⁰ Press Release, T-Mobile USA, Inc., T-Mobile Unveils Holiday Handsets Including Broadest Selection of Android-Powered Devices (Oct. 7, 2009), http://www.t-mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20091007&title=T-Mobile%20Unveils%20Holiday%20Handsets%20Including%20Broadest%20Selection%20of%20Android-Powered%20Devices; Press Release, T-Mobile USA, Inc., Samsung Mobile and T-Mobile USA Introduce Samsung Behold® II (Oct. 5, 2009), http://www.t-mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20091005.

³¹ Press Release, Sprint Nextel, Sprint 4G Blazes into Killeen-Temple, (Oct. 5, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1338261&highlight.

³² Press Release, Sprint, Samsung’s First Android-Powered Phone, Samsung Moment with Google, Coming Soon to America’s Most Dependable 3G Network (Oct. 7, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1339737.

³³ *Id.*

³⁴ Press Release, Sprint, Sprint Offers Affordable and Easy Way to Break into Wireless Business (Oct. 8, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1340136.

³⁵ Press Release, Sprint, Sprint Establishes New Voice over IP (VoIP) Community Solution to Provide Significant Cost Savings to Wholesale VoIP Customers (Oct. 12, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1340810.

³⁶ See Press Release, Sprint, If You Use Metro in Washington, D.C., Maryland, or Virginia, Sprint has an Important Message for You: 'Welcome to the NOW Network,' (Oct. 16, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1342943&highlight.

³⁷ Press Release, AT&T Inc., AT&T Strengthens 3G Wireless Coverage in Boulder, Denver, Fort Collins, Greeley, Loveland, and Along the Front Range (Oct. 13, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27226>; Press Release, AT&T Inc., AT&T Brings 3G Mobile Broadband Network to Lockhart (Oct. 12, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27224>; Press Release, AT&T Inc., Customers Get More Mobile Broadband Coverage in Three Illinois Counties (Oct. 9, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27225>; Press Release, AT&T Inc., (continued on next page)

that it invested over \$50 million through the second quarter of 2009 alone to upgrade 3G wireless coverage in the Dallas/Ft. Worth area.³⁸

- AT&T announced a new prepaid plan with unlimited talk, text (including international), instant messaging, picture, and video messages for \$60/month.³⁹
- AT&T announced that it would open its network to mobile voice applications used on Apple iPhone devices.⁴⁰
- Verizon Wireless and Google entered into a groundbreaking agreement to leverage Verizon Wireless's world-class network with the Android™ platform that will deliver mobile applications, services and devices.⁴¹
- Verizon Wireless expanded the reach and capabilities of its network across the nation, with service enhancement announcements in over 30 communities.⁴²

AT&T Kicks Up 3G Mobile Broadband Coverage In Western Massachusetts (Oct. 9, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27220>; Press Release, AT&T Inc., AT&T Brings 3G Mobile Broadband Network to Champaign-Urbana Area (Oct. 8, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27217>; Press Release, AT&T Inc., AT&T Brings 3G Mobile Broadband Network to Wilmington (Oct. 1, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27193>; Press Release, AT&T Inc., AT&T Delivers More 3G Coverage for South Florida Customers (Sept. 30, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27188>; Press Release, AT&T, Inc., AT&T Customers Get More Mobile Broadband Coverage in Ten Indianapolis Area Communities (Oct. 16, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27248>; Press Release, AT&T, Inc., AT&T Customers Get More Mobile Broadband Coverage in Five Illinois Counties, (Oct. 15, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27246>.

³⁸ Press Release, AT&T Inc., AT&T Invests More Than \$50 Million Through 2Q09 to Strengthen 3G Wireless Coverage in Dallas-Fort Worth (Oct. 7, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27209>.

³⁹ Press Release, AT&T Inc., Let Freedom Ring with New GoPhone Unlimited Talk and Text Feature Package (Oct. 9, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27218>.

⁴⁰ Press Release, AT&T Inc., AT&T Extends VOIP to 3G for iPhone (Oct. 6, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27207> (“AT&T VoIP on iPhone Press Release”).

⁴¹ See Press Release, Verizon Wireless, 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>.

⁴² See, e.g., Press Release, Verizon Wireless, Verizon Wireless Expands 3G Wireless Network In Yukon, Pennsylvania (Oct. 9, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-09i.html>; Press Release, Verizon Wireless, Verizon Wireless Expands 3G Wireless Network In Washington County, New York (Oct. 9, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-12.html>; Press Release, Verizon Wireless, Valders, Wisconsin, Residents to Benefit From Verizon Wireless Network Enhancement (Oct. 8, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-08.html>.

- Verizon Wireless expanded its selection of mobile handsets by three with innovative offerings from Nokia, Motorola and HTC.⁴³
- Verizon Wireless announced a series of steps aimed at enhancing its Verizon Developer Community, the online portal for application developers. These steps include adding remote application testing and troubleshooting capabilities, streamlining application creation and publication, adding resources for developers interested in creating devices and applications to run on Verizon Wireless’s network, and incorporating developer input into the soon-to-be-deployed “V CAST Apps” mobile application storefront.⁴⁴

This list of very recent developments – which does not even address announcements by device manufacturers, applications developers, and content providers – further demonstrates the accelerating pace of wireless competition and innovation. As Chairman Genachowski recently recognized, innovations such as those just noted, and the resulting consumer benefits, have been driven by “the billions” of dollars that the wireless industry has invested, and “the billions [it] plan[s] to invest” to compete for America’s wireless consumers.⁴⁵ Ultimately, as Verizon Wireless emphasized in its initial comments, the Commission’s analysis must be guided by the advancement of this investment, and the innovation and consumer choice it generates – *not* by the demands of individual providers who seek regulation to advance their own business plans.

⁴³ See Press Release, Verizon Wireless, Connect In Color With The Nokia 2705 Shade (Oct. 1, 2009), <http://news.vzw.com/news/2009/09/pr2009-09-29f.html>; Press Release, Verizon Wireless, Verizon Wireless and Motorola Announce Motorola Barrage (Oct. 1, 2009), <http://news.vzw.com/news/2009/10/pr2009-09-30c.html>; Press Release, Verizon Wireless, Imagine The Possibilities For Work And Play With The HTC Imagio Exclusively From Verizon Wireless (Oct. 1, 2009), <http://news.vzw.com/news/2009/10/pr2009-09-30b.html>.

⁴⁴ See Press Release, Verizon Wireless, Amdocs Helps Build Verizon Developer Community (Oct. 6, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05h.html>; Press Release, Verizon Wireless, DeviceAnywhere Helps Build Verizon Developer Community (Oct. 6, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05j.html>; Press Release, Verizon Wireless, Netpace Helps Build Verizon Developer Community (Oct. 6, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05k.html>; Press Release, Verizon Wireless, Verizon Developer Community Continues To Grow And Add More Functionality For Mobile Apps Developers (Oct. 6, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05m.html>; Press Release, Verizon Wireless, Developers: The Verizon Wireless LTE Innovation Center Lab Opens (Oct. 5, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05.html>; Press Release, Verizon Wireless, Verizon Wireless Announces 4G Venture Forum, Designed To Encourage Innovation For Advanced Mobile Networks (Oct. 5, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-05a.html>.

⁴⁵ Genachowski CTIA Speech at 2.

DISCUSSION

I. COMMENTS FILED BY PROPONENTS OF INCREASED REGULATION ARE BEREFT OF SUPPORTING DATA AND PLAGUED BY ERRORS AND OTHER SHORTCOMINGS.

Commenters seeking far-reaching new regulation failed to provide reliable facts or meaningful data to make their cases, nor did they submit economist declarations in support of their claims. These are notable omissions in a proceeding in which the Commission specifically asked for data and analysis. Again and again, many commenters' allegations regarding the state of the market were not only unsupported, but *erroneous* as well. Examples are plentiful.

A. Claims Regarding Market Structure and Competition Are Erroneous.

Claim: **There is a “dangerous duopoly” in the provision of mobile wireless.**

Fact: **The majority of Americans are served by four or more providers, and new providers are continuing to enter the market.**

NTCA alleges there is a “dangerous duopoly” in the mobile wireless market.⁴⁶ This rhetoric is not supported by any economic analysis, and in fact does not comport with the facts. NTCA simplistically equates its claim of a duopoly with lack of competition, but as the economics literature makes clear, even a very high market share will not necessarily denote market power.⁴⁷ “A complete competitive analysis must look beyond market share data and measures of concentration to examine additional structural characteristics (*e.g.*, the conditions of

⁴⁶ Comments of the National Telecommunications Cooperative Association, WT Docket No. 09-66, 2 (filed Sept. 30, 2009) (“NTCA Comments”) (“NTCA points to the comments of the Rural Telecommunications Group (RTG) and its description of how mergers and acquisitions in the CMRS market have created a dangerous duopoly.”) (citing Comments of Rural Telecommunications Group, Inc., WT Docket No. 09-66, 4-5 (filed June 15, 2009) (claiming that “many commentators in the wireless industry” view Verizon Wireless and AT&T as “a textbook example of an industry duopoly”)).

⁴⁷ See, *e.g.*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 506d (2007) (“Substantial market power can persist only when there are significant and continuing barriers to expansion and entry.”); *id.* § 506a (“[T]he degree of market power depends on the response of buyers to price changes. Greater responsiveness (greater ‘elasticity’ of demand) minimizes market power.”).

entry).”⁴⁸ In any case, though, there is no duopoly. NTCA’s claim of a duopoly is simply false. Verizon Wireless and AT&T face stiff competition from T-Mobile, Sprint, a host of regional and smaller providers, new and emerging entrants, and intermodal competitors. According to analysts, most customers have a choice of at least *six* providers.⁴⁹ These providers, moreover, are investing billions to upgrade service and cutting prices in order to win and retain subscribers in the hotly contested mobile services market.

First, T-Mobile and Sprint compete aggressively against Verizon Wireless, AT&T, and other providers on a nationwide basis.⁵⁰ T-Mobile expects that its 3G network will “cover 200 million pops by year-end.”⁵¹ Indeed, in 2009 alone, T-Mobile is spending \$5 billion to upgrade its network.⁵² “T-Mobile will have HSPA+ up and running on a nationwide basis by 2010, which could make it the operator with the highest data speeds in the largest footprint.”⁵³

Presently, T-Mobile voice, messaging and data services are capable of reaching over 268 million

⁴⁸ MICHAEL KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 28 (July 13, 2009), attached as Exhibit A to the Reply Comments of AT&T, WT Docket No. 09-66 (filed July 13, 2009).

⁴⁹ See, e.g., AT&T Comments at 22 n.49 (citing CRAIG MOFFETT *ET AL.*, BERNSTEIN RESEARCH, SPRINT (S) AND T-MOBILE USA (DTE): FINALLY SOME GOOD NEWS IN U.S. WIRELESS . . . WINNERS AND LOSERS FROM A POSSIBLE DEAL 1 (Sept. 14, 2009) (“In most markets, there are as many as seven different price actors.”); MIKE MCCORMACK *ET AL.*, J.P. MORGAN, TELECOM BUZZ: A NEW LOOK AT WIRELESS SUBSCRIBER TRENDS 1, 5 (June 1, 2009) (“[C]onsumers now have a half dozen or more carriers to choose from when selecting a wireless provider.”)).

⁵⁰ The FCC recently found that 64.9% of Americans lived in census blocks with at least five competing providers. 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, *Thirteenth Report*, 24 FCC Rcd 6185, 6189 ¶ 2 (2009) (“*Thirteenth Report*”). Even if every single census block lost one provider since that Report’s release, two-thirds or more of Americans would still be served by four or more providers, and *another* 25.6 percent would be served by three.

⁵¹ See Lynnette Luna, *Will T-Mobile USA become the dark horse mobile broadband leader?*, FIERCEWIRELESS (Sept. 20, 2009), <http://www.fiercewireless.com/story/will-t-mobile-usa-be-dark-horse-mobile-broadband-leader/2009-09-21>; see also T-Mobile Comments at 12 (“T-Mobile’s investment in 3G will ensure that over 300 million Americans have access to high speed wireless broadband in the very near term.”).

⁵² T-Mobile Comments at 9.

⁵³ *Id.* at 12.

Americans, and the company has more than 32 million customers.⁵⁴ Over the past two years, T-Mobile has launched some of the “most advanced handsets in the world,” including the T-Mobile myTouch™ 3G and the T-Mobile G1™ with Google, which made T-Mobile the first U.S. carrier to offer a smartphone using Google’s Android™ platform. T-Mobile has also become a leader in the prepaid market, with prepaid offerings accounting for “[t]he bulk of [the company’s] new subscribers.”⁵⁵ T-Mobile continues to price its offerings aggressively, recently introducing a \$50 per month postpaid unlimited voice plan for existing customers.⁵⁶ The company also sells capacity to MVNOs such as KORE Wireless, TracFone, and TuYo Mobile, further fueling price and non-price rivalry.⁵⁷

Sprint provides additional intense competition nationwide. Sprint’s comments in this proceeding detail a great variety of plans and packages offered by the company, as well as numerous innovative and unique offerings, including the new “Any Mobile, Anytime” plan, which “enables customers to get unlimited mobile-to-mobile calls from the Sprint network to any other domestic wireless phone at any time.”⁵⁸ Sprint also offers cutting-edge devices including the eco-friendly Samsung Reclaim handset,⁵⁹ as well as the previously noted Samsung Moment, an Android™ phone that will feature access to Google services, a touchscreen, and advanced

⁵⁴ See T-Mobile USA, Inc., Notice of *Ex Parte* Presentation, GN Docket Nos. 09-47, 09-51 & 09-137, PS Docket Nos. 07-114 & 07-287, attachment at 3 (filed Oct. 5, 2009).

⁵⁵ Marguerite Reardon, *T-Mobile USA faces stiff competition*, CNET NEWS, Jan. 29, 2009, http://news.cnet.com/8301-1035_3-10152961-94.html.

⁵⁶ See Allie Winter, *T-Mobile Drops Unlimited Voice Plan to \$50**, RCRWIRELESS, Mar. 2, 2009, <http://www.rcrwireless.com/article/20090302/WIRELESS/903029987/t-mobile-usa-drops-unlimited-voice-plan-to-50>; CRAIG MOFFETT *ET AL.*, BERNSTEIN RESEARCH, QUICK TAKE – U.S. TELECOMMUNICATIONS: ANOTHER LEAP INTO THE ABYSS (OF PRE-PAID PRICING) 2, Exhibit 1 (Aug. 4, 2009).

⁵⁷ See Verizon Wireless Comments at 34.

⁵⁸ Sprint Comments at 6-8.

⁵⁹ See Sprint, Introducing the Samsung Reclaim™, <http://green.sprint.com/reclaim.php> (last visited Oct. 19, 2009).

processing power. In total, Sprint serves more than 39 million retail customers,⁶⁰ in addition to those relying on service sold through MVNOs such as Credo, Jitterbug, Time Warner, and Total Call Mobile.

But the analysis does not, of course, end with the other nationwide providers. Regional carriers and smaller providers hold significant market share in many specific areas – market share not readily apparent from exclusive focus on national figures. Regional providers such as Leap, MetroPCS and U.S. Cellular are competing successfully in markets across the nation.⁶¹ Smaller providers such as Cincinnati Bell and NTELOS also robustly compete in a variety of markets.⁶² In addition to these providers, the market also benefits from the wide variety of MVNOs/resellers and prepaid providers.⁶³

And, of course, even this analysis does not account for the many emerging and incipient providers in the mobile wireless market. Clearwire provides 4G WiMAX service in 14 markets covering over 10 million people,⁶⁴ with plans to cover up to 120 million people in more than 80 markets by the end of 2010 and to “support as many as three more [mobile wireless providers] in every market, and maybe more, with each setting price independently.”⁶⁵ Cable providers such

⁶⁰ See Press Release, Sprint, Sprint Nextel Reports Second Quarter 2009 Results, (July 29, 2009), http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1313470&highlight.

⁶¹ These markets include Los Angeles, San Francisco, Dallas, Atlanta, Detroit, Miami, Las Vegas, New York, Boston, Philadelphia, Houston, Denver, Portland, San Diego, Phoenix, Cincinnati, and Milwaukee, to name a few. See Verizon Wireless Comments at 25-29.

⁶² See *id.* at 29-31.

⁶³ See *id.* at 31-35.

⁶⁴ Press Release, Clearwire, Clearwire Introduces CLEAR(TM) 4G WiMAX Internet Service in 10 New Markets (Sept. 1, 2009), <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1326282> (“Clearwire Sept. 1 Press Release”).

⁶⁵ CRAIG MOFFETT, BERNSTEIN RESEARCH, WEEKEND MEDIA BLAST: TOO MANY COOKS IN THE KITCHEN 2 (Aug. 21, 2009) (emphasis in original); see generally Verizon Wireless Comments at 23-25.

as Cox Communications (“Cox”) have announced plans to use newly acquired spectrum to provide facilities-based mobile wireless services to large swaths of the nation.⁶⁶

The strength of nationwide, regional, smaller, and non-traditional providers, not to mention the continuing entry of *new* providers, refutes any facile claims asserting a “wireless duopoly.”

Claim: **Urban areas have not seen new competitive entry beyond the four nationwide providers.**

Fact: **Urban areas are highly competitive, and are on the verge of becoming more so with the arrival of emerging and nontraditional mobile providers.**

CFA *et al.* assert that “the economies of scale to be expected from providing service to densely populated urban areas have not resulted in the materialization of new competitors to [the four nationwide carriers].”⁶⁷ This claim is simply false. To begin with, non-nationwide mobile wireless carriers serve numerous cities throughout the United States and are major players in many urban markets, as noted above. At least one non-national carrier is competing in 61 of the 70 top markets that Verizon Wireless serves, or in 87% of those markets, based on data from The Nielsen Company, which provides market research on telecommunications and other industries. A non-national carrier has at least 5% market share in 39 markets, or 56% of these markets, and a non-national carrier has at least 10% of the market in 12 of the markets. Moreover, in 13 markets a non-national carrier is a top-four carrier, and in five markets a non-national carrier is a top-two carrier. Thus in many urban markets, non-national carriers are making significant inroads.

⁶⁶ See Verizon Wireless Comments at 35-36.

⁶⁷ Comments of Consumer Federation of America *et al.*, WT Docket No. 09-66, 8 (filed Sept. 30, 2009) (“CFA *et al.* Comments”).

The following chart shows that the top 20 markets have between 8 and 24 wireless licensees apiece and an average of more than 13 licensees each – a number that has significantly increased just since October 2006.

| Rank | BTA# | Market Name | Current # Licensees | # Licensees Added Since Oct. 06 |
|------|--------|---|---------------------|---------------------------------|
| 1 | BTA321 | New York, NY | 13 | 5 |
| 2 | BTA262 | Los Angeles, CA | 15 | 8 |
| 3 | BTA078 | Chicago, IL | 12 | 4 |
| 4 | BTA404 | San Francisco-Oakland-San Jose, CA | 14 | 5 |
| 5 | BTA346 | Philadelphia, PA-Wilmington, DE-Trenton, NJ | 12 | 5 |
| 6 | BTA101 | Dallas-Fort Worth, TX | 15 | 5 |
| 7 | BTA196 | Houston, TX | 15 | 5 |
| 8 | BTA112 | Detroit, MI | 12 | 4 |
| 9 | BTA461 | Washington, DC | 10 | 3 |
| 10 | BTA024 | Atlanta, GA | 15 | 6 |
| 11 | BTA051 | Boston, MA | 9 | 3 |
| 12 | BTA347 | Phoenix, AZ | 20 | 10 |
| 13 | BTA298 | Minneapolis-St. Paul, MN | 21 | 8 |
| 14 | BTA413 | Seattle-Tacoma, WA | 14 | 4 |
| 15 | BTA084 | Cleveland-Akron, OH | 13 | 5 |
| 16 | BTA394 | St. Louis, MO | 16 | 7 |
| 17 | BTA402 | San Diego, CA | 9 | 2 |
| 18 | BTA110 | Denver, CO | 25 | 8 |
| 19 | BTA488 | San Juan, PR | 17 | 7 |
| 20 | BTA440 | Tampa-St. Petersburg-Clearwater, FL | 11 | 4 |

Source: The data depicted in this chart was derived from FCC Universal Licensing System records and FCC Form 602 Ownership Reports for Cellular, Broadband PCS, AWS and 700 MHz Band licensees in the twenty most populated markets (based on FCC/BTA market definitions and 2000 population data from the U.S. Census Bureau). Commonly-owned, but differently-named licensees were treated as a single licensee for purposes of this chart.⁶⁸

Moreover, CTIA has demonstrated that in each of the 10 top Metropolitan Statistical Areas (“MSAs”), there are no fewer than 14 providers, including at least five facilities-based

⁶⁸ While a licensee is of course not necessarily competing in a given market at any particular time, even an inactive licensee reflects a potential competitor – one that could enter the market, and therefore exerts competitive pressure on active providers.

providers.⁶⁹ Similarly, in each of the 10 least populous Core Based Statistical Areas (“CBSA”), there are often 14 or more providers, with between 3 to 7 facilities-based providers.⁷⁰

In addition, as described above, consumers across the nation stand poised to benefit from the entry of new providers such as Clearwire, Cox and other cable providers. Thus, claims that competitors to the four nationwide providers have not materialized in urban markets simply cannot be taken seriously.

Claim: **Rural mobile consumers experience significantly less competition than urban mobile consumers.**

Fact: **Service in rural areas is expanding and improving, and rural consumers benefit substantially from competition in rural and urban areas.**

RTG asserts that “rural mobile consumers experience significantly less competition than urban mobile consumers.”⁷¹ While it is of course true that rural areas are often served by fewer providers than urban areas, customers in these markets still enjoy extensive choice shaped by competitive options in the nationwide market. RTG’s facile equation of the number of competitors with the degree of competition is not supported by any data showing a lack of effective competition in rural areas.

⁶⁹ CTIA Comments at 7. The 10 top MSAs include New York, Los Angeles, Chicago, Dallas, Philadelphia, Houston, Miami, Atlanta, Washington, D.C., and Boston. *Id.*

⁷⁰ *Id.* at 7-8. CBSAs are defined by the U.S. Census Bureau to include the 363 MSAs, which have an urban core population of 50,000 or more, and the 577 Micropolitan Statistical Areas, which have an urban core population of 10,000 or more but less than 50,000. The 10 least-populated CBSAs are Ames, IA, Great Falls, MT, Corvallis, OR, Danville, IL, Sandusky, OH, Columbus, IN, Hinesville-Fort Stewart, GA, Casper, WY, Lewiston, ID-WA, and Carson City, NV. *Id.* at 8.

⁷¹ Comments of Rural Telecommunications Group, Inc., WT Docket No. 09-66, 7 (filed Sept. 30, 2009) (“RTG Comments”).

In fact, as detailed in Verizon Wireless's initial comments, nationwide, mid-size and smaller carriers have brought aggressive competition to many parts of rural America.⁷² Coverage of rural areas is constantly rising, fueled by deployments by new and existing providers alike.⁷³ "Just among carrier members of the Rural Cellular Association (RCA) nearly 80% of the continental United States now benefits from and enjoys wireless service that is as good as, and in some cases better than the wireless service provided in urban America."⁷⁴ Indeed, the *Thirteenth Report* found that over 90 percent of rural markets have access to two or more wireless providers.⁷⁵ Moreover, that *Report* found that rural American customers enjoy choices that "compare favorably with those facing urban as well as rural residents of comparable foreign countries":

In particular, about 82 percent of U.S. consumers living in rural counties have at least as many mobile telephone competitors from which to choose as consumers living in countries with three competing mobile operators, including Japan, Finland, France and Canada, while about 65 percent of U.S. consumers living in rural counties have a choice of at least one more mobile competitor than consumers in these countries.⁷⁶

⁷² See Verizon Wireless Comments at 31, 37, 49, 52-53, 80; see also AT&T Comments at 70-74; Comments of NTELOS, WT Docket No. 09-66, 2-4 (filed Sept. 30, 2009) ("NTELOS Comments").

⁷³ See, e.g., Press Release, Verizon Wireless, Valders, Wisconsin Residents to Benefit from Verizon Wireless Network Enhancement (Oct. 8, 2009), <http://news.vzw.com/news/2009/10/pr2009-10-08.html>; Press Release, Verizon Wireless, Wyoming Customers to Benefit from Verizon Wireless Network Expansion in 2008 (Feb. 3, 2009), <http://news.vzw.com/news/2009/02/pr2009-02-02i.html>; Press Release, U.S. Cellular Expands Network Near Almond, WI (Oct 1, 2009), http://www.uscc.com/usccellular/SilverStream/Pages/x_page.html?p=a_press091001_4; Union Wireless, New Cell Sites in 2009, <https://www.unionwireless.com/Cellular.aspx?page=Cellular&subpage=New-Cell-Site&SiteID=98> (last visited Oct. 17, 2009); Press Release, Bluegrass Cellular, Bluegrass Cellular Adds 3G Coverage in Cane Valley (Sept. 15, 2009), <http://www.bluegrasscellular.com/about/news>.

⁷⁴ Eric Peterson, *Wireless Technology Advances in Rural America, Unless FCC USF Reform Kills It*, RCR WIRELESS, Oct. 28, 2008, <http://www.rcrwireless.com/article/20081028/WIRELESS/810279985/wireless-technology-advances-in-rural-america-unless-fcc-usf-reform>.

⁷⁵ *Thirteenth Report*, 24 FCC Rcd at 6239 ¶ 104.

⁷⁶ *Id.*

It is also important to recognize that rural consumers enjoy the benefits of competition in more densely populated areas, even if their own markets are supplied by fewer providers. Like other national carriers, Verizon Wireless primarily prices – and advertises – on a national basis.⁷⁷ For example, Verizon Wireless offers the same rates and plans in Missoula as in Manhattan, and the same in Cheyenne as in Chicago. These national plans must necessarily include terms and prices responsive to conditions in the *most competitive* markets in the nation. Thus, the plans available to rural consumers reflect the intense competition Verizon Wireless and other nationwide providers face in urban and suburban markets.

The most recent wireless mergers are also delivering benefits to consumers – as the Commission found they would.⁷⁸ For example, when it announced its plans to merge with Alltel, Verizon Wireless highlighted its ability to bring significant innovation and investment to rural America.⁷⁹ At the time, Alltel's licensed footprint covered 265 Rural Service Areas and 1,455 counties defined as “rural” (*i.e.*, having a population density below 100 persons per square mile). Many of these markets did not enjoy the types of 3G wireless broadband services offered in more urban areas. Alltel offered EV-DO Rev. 0 in service areas covering 76 percent of its POPs,⁸⁰ and

⁷⁷ See RTG Comments at 7 (“Additionally, rural operators still offer regional rate plans, a practice all but abandoned by national operators.”).

⁷⁸ See Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17497 ¶ 120 (2008) (“*Verizon Wireless/Alltel Merger Order*”) (finding that “public interest benefits are likely to be realized in the near term because of the proposed transaction”).

⁷⁹ See generally Description Of Transaction, Public Interest Showing and Related Requests And Demonstrations, Verizon Wireless, Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95 (filed June 13, 2008).

⁸⁰ Verizon Wireless’ EV-DO Rev. A network provides data rates of up to 3.1 Mbps (downlink) and 1.8 Mbps (uplink), as compared to Alltel’s EV-DO Rev. 0 network, which offered theoretical data rates up to 2.4 Mbps (downlink) and 0.15 Mbps (uplink).

offered 1xRTT in other areas. In approving the merger, the Commission noted that Verizon Wireless had committed to convert all of Alltel's EV-DO Rev. 0 cell sites to EV-DO Rev. A within one year of closing the transaction.⁸¹ Verizon Wireless will satisfy this commitment, ensuring that rural and urban customers alike have access to the latest 3G offerings. The Verizon-Alltel transaction will also accelerate the migration to 4G in rural areas. Prior to the deal, Alltel's LTE deployment was planned for at least three to five years in the future.⁸² Verizon Wireless now plans to use its 700 MHz spectrum, in conjunction with Alltel's existing 800 MHz spectrum and infrastructure, to deploy LTE in the primarily rural former Alltel territory much sooner.

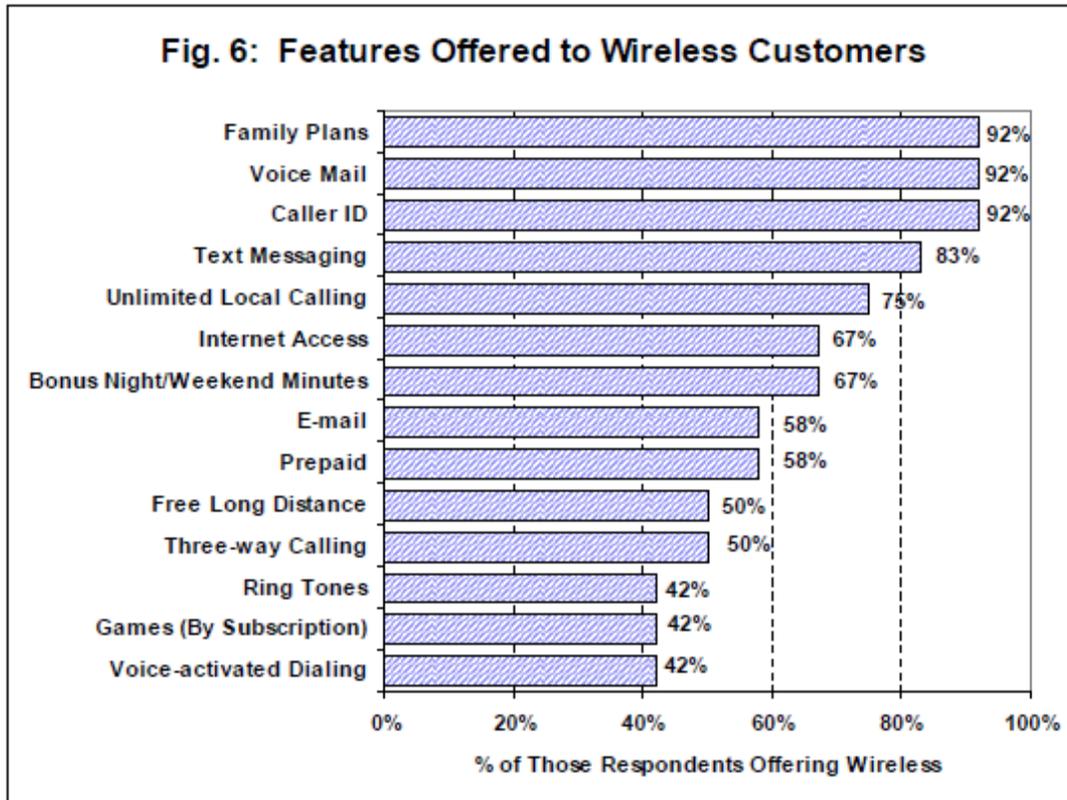
The competition and investment detailed above have brought to rural America the services and offerings that all users prize. A recent survey by NTCA itself assessing which services its rural providers offer to their wireless users⁸³ showed that the offerings provided by NTCA member companies closely track those enjoyed by users outside of rural areas:

⁸¹ See *Verizon Wireless/Alltel Merger Order*, 23 FCC Rcd at 17503 ¶ 130.

⁸² *Id.* at 17506 ¶ 135.

⁸³ See NTCA 2008 Wireless Survey Report, 10 (Jan. 2009), <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2008ntcawirelessurveyreport.pdf>.

Features Offered To Wireless Customers By NTCA Member Companies



Finally, Verizon Wireless emphasizes that existing and emerging providers continue to deploy new services and offerings to rural America. For example:

- Stelera Wireless now provides wireless broadband services in 35 communities in Texas, Colorado and New Mexico, offering speeds up to 7.2 Mbps downstream and up to 2 Mbps upstream.⁸⁴ The company is “in the process of building out 55 communities around the U.S. today,” and it plans to complete this deployment by the end of this year. In 2010, Stelera “will begin building out an additional 250 cities across the U.S.”⁸⁵

⁸⁴ See Stelera Wireless, Coverage and Pricing, <http://www.stelera.com/CoverageandPricing/tabid/101/Default.aspx> (last visited Oct. 17, 2009); Stelera Wireless, About Us, <http://www.stelera.com/AboutUs/tabid/55/Default.aspx> (last visited Oct. 17, 2009).

⁸⁵ FCC National Broadband Plan Workshop, Wireless Broadband Deployment – General, Transcript, 19 (Aug. 12, 2009) (Ed Evans, CEO, Stelera Wireless), http://www.broadband.gov/docs/ws_03_deploy_wireless_transcript.pdf; see also Press Release, Stelera Wireless, Stelera Wireless Launches Wireless Broadband Network; Cutting Edge Internet Services Launched in South Texas (Mar. 23, 2009), <http://dev.stelerawireless.com/Portals/0/docs/National%20STX%20Press%20Release.docx>; AT&T Comments at 72.

- In 2008, NTELOS completed EV-DO deployment in western Virginia and West Virginia.⁸⁶ In July of this year, NTELOS completed EV-DO deployment in eastern Virginia.⁸⁷ NTELOS boasts “more than 750 3G EV-DO mobile broadband cell sites in Virginia,” and “is well positioned to deliver best in class network coverage and performance to wireless customers, providing voice and next generation wireless data service.”⁸⁸ Also this year, NTELOS was awarded the Virginia Information Technology Agency’s mobile communications systems and devices contract, pursuant to which the company now provides wireless voice, text messaging and data services to Virginia state agencies.⁸⁹
- Atlantic Tele-Network (“ATN”) is about to become a leader in the provision of rural wireless services. Upon closing its transaction with Verizon Wireless, ATN will have wireless operations in more than 15 states and provide retail service to about 800,000 subscribers. In the second quarter of 2009, ATN reported revenues of \$60.3 million. “Wireless revenue increased 47% year-over-year and 15% sequentially, driven by significant growth in the Company’s U.S. domestic wireless business....”⁹⁰ For two years running, ATN has been included on Fortune Magazine’s list of fastest-growing companies.⁹¹
- Open Range Communications and Globalstar have entered into a deal that will provide “affordable high-speed broadband Internet and voice services to more than six million citizens in 546 underserved and rural communities, using WiMax technology, within five years.”⁹² Open Range recently secured a \$267 million Broadband Access Loan from the U.S. Department of Agriculture’s Rural Development Utilities Program, supplemented by an additional \$100 million loan from the private equity arm of JPMorgan Chase & Co.⁹³

⁸⁶ Press Release, NTELOS, NTELOS Completes \$46 Million Upgrade to 3G Network (July 8, 2009), <http://www.ir-site.com/images/library/ntelos/07-08-09.html>.

⁸⁷ NTELOS Comments at 3.

⁸⁸ *Id.*

⁸⁹ Press Release, NTELOS, NTELOS Wireless Awarded Virginia Information Technology Agency Wireless Service Contract (May 19, 2009), <http://www.ir-site.com/images/library/ntelos/05-27-09.html>.

⁹⁰ Press Release, Atlantic Tele-Network, Inc., Atlantic Tele-Network Inc. Reports Second Quarter and First Half 2009 Results (July 30, 2009), http://www.atni.com/pr_web.php?nd=090730&pr=01.

⁹¹ See Press Release, Atlantic Tele-Network, Inc., Atlantic Tele-Network Ranks on Fortune’s 100 List of Fastest-Growing Companies (Aug. 20, 2009), http://www.atni.com/pr_web.php?nd=090820&pr=01.

⁹² Press Release, Open Range, Open Range Communications Secures \$374 Million to Deploy Wireless Broadband Services to 546 Rural Communities (Jan. 9, 2009), http://www.openrangecomm.com/pr/pr_022009.html. Open Range promises to offer high speed broadband Internet service for less than \$40 per month and unlimited nationwide voice for less than \$30 per month. See Open Range Fact Sheet, http://www.openrangecomm.com/pdf/or_fact_sheet_feb09.pdf (last visited Oct. 17, 2009) (“Open Range Fact Sheet”).

⁹³ See Open Range Fact Sheet.

The Open Range network will provide service in 17 states including communities from Ocean City, New Jersey to Greeley, Colorado.⁹⁴

These providers, and others like them, continue to drive investment and competition across rural America.

B. Claims Regarding Investment Are Erroneous.

Claim: Wireless providers are not investing aggressively in their networks.

Fact: Wireless investment is robust and growing, and the alternative metrics proposed by critics are meaningless.

CFA *et al.* contend that based on “limited data available,” wireless carriers “do not appear to be investing aggressively.”⁹⁵ As discussed below, the “data” they rely on are immaterial, and this claim is utterly inconsistent with the facts. In fact, Verizon Wireless has presented a wealth of data showing network investment has not slowed, despite the most adverse economic climate in decades, and that investments are being made by new and non-traditional providers in addition to established carriers, both large and small.⁹⁶ New data reported by CTIA reveal a cumulative capex figure of \$273.6 billion as of June 2009.⁹⁷ Since 2001, America’s wireless carriers have made an average combined investment of more than \$22.8 billion *per year* to upgrade their networks.⁹⁸ Indeed, “[i]n the first quarter of 2009, ... spending continued with

⁹⁴ See USDA Rural Development, Broadband Search Results By Company – Open Range Communications, Inc., http://broadbandsearch.sc.egov.usda.gov/SearchResult_Company.aspx?CompanyId=d30fef89-b559-406d-af41-0a2ecba8e958 (last visited Oct. 17, 2009).

⁹⁵ CFA *et al.* Comments at 38-39.

⁹⁶ See Verizon Wireless Comments at v, vii, 29-31, 34-42, 80-84.

⁹⁷ CTIA Semi-Annual Wireless Industry Survey (Mid-Year 2009 Survey Results).

⁹⁸ Comments of CTIA – The Wireless Association®, GN Docket Nos. 09-157 & 09-51, 7 (filed Sept. 30, 2009).

\$4.7 billion ... by the four major carriers as they continue to deploy advanced technologies.”⁹⁹

And, as shown in Verizon Wireless’s initial comments, billions of dollars of investment continue to be made as the current market structure has evolved.¹⁰⁰

CFA *et al.* try to sidestep these enormous capital investment figures by claiming that these expenditures have declined *relative to the industry’s total revenues*.¹⁰¹ Their reliance on this particular metric (capex-to-revenues) is deeply misguided, and reflects a misunderstanding of how businesses invest in a competitive market. As the academic literature observes, capital investment levels are strongly affected by factors completely unrelated to a company’s revenues in the same year, and more closely linked to technological cycles, the cost of capital, and other factors.¹⁰² For example, CFA *et al.*’s argument overlooks the fact that capital-intensive firms are likely to undertake substantial capital investments early on, and to follow that initial period with a period of declining capex-to-revenues ratios, in part because over the life cycle of a technology, capital costs reduce due to scale, until technological developments and changing business conditions warrant a new round of heavy investment (again, as a percentage of revenue). This cycle is particularly relevant to the wireless industry, where providers begin

⁹⁹ See TOPPER DECLARATION at 34 (citing BANK OF AMERICA – MERRILL LYNCH, GLOBAL WIRELESS MATRIX 2Q09 VOICE AND DATA DIVERGENCE 187 (June 25, 2009)); *see also* AT&T Comments at 15-16 n. 29 (citing DAVID BARDEN ET AL., BANK OF AMERICA/MERRILL LYNCH, 2Q09 TELECOM RESULTS HEADS UP AND MODEL HANDBOOK, 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.”)); AT&T Comments at 16 (citing PHIL CUSICK ET AL., MACQUARIE RESEARCH, FOLLOW THE MONEY: 2Q TELCO AND CABLE CAPEX PREVIEW 1 (July 23, 2009) (“We believe the major carriers will maintain or increase their capex budgets for 2009.”)).

¹⁰⁰ See Verizon Wireless Comments at 81.

¹⁰¹ See CFA *et al.* Comments at 13-14.

¹⁰² See, e.g., WILLIAM L. MEGGINSON & SCOTT B. SMART, INTRODUCTION TO CORPORATE FINANCE 670-74 (2004) (discussing financial factors influencing long-term investment decisions); Duke K. Bristow, Benjamin D. King & Lee R. Petillon, *Venture Capital Formation and Access: Lingering Impediments of the Investment Company Act of 1940*, 2004 COLUM. BUS. L. REV. 77, 80, 128 n.4 (2004) (“Investment of risk capital is cyclical in nature....”).

operations with very high capex and very low revenues. Indeed, the capex-to-revenue ratio is likely to oscillate precisely *because of* the relationship between today's investment and tomorrow's revenues. Investment often will not give rise to additional revenues for years to come, and there is no reason to believe that investment will keep pace with revenues, or vice versa.¹⁰³ In fact, successful investment might have the effect of *decreasing* the capex-to-revenues ratio (by increasing the denominator in the equation in the years following an investment), and *failed* investment might have the effect of *increasing* the ratio (by decreasing it). Thus, a framework that afforded weight to the capex-to-revenues ratio would perversely punish success and reward failure. Moreover an analysis of capex alone does not take into consideration the expense of acquiring the spectrum asset. In the past four years alone, wireless carriers have invested more than \$32.5 billion in acquiring new spectrum in Auction 66 (AWS-1) and Auction 73 (700 MHz Band).¹⁰⁴

Also, the suggestion that the capex-to-revenues ratio should remain constant, or rise, ignores the basic fact that technological development is not linear, and there is no iron law suggesting that capital expenditures are to be preferred over other investment that benefits users. There will be periods when consumer needs are best met by the construction of facilities, and periods when those needs are best met by increased spending on spectrum resources, research and development, customer care, or other activities that generally are not booked as capital

¹⁰³ “[C]apital goods do not begin to yield benefits until they are actually being used. Often the decision to build a building or purchase a piece of equipment must be made years before the actual project is completed.” KARL E. CASE & RAY C. FAIR, PRINCIPLES OF ECONOMICS 262 (1989).

¹⁰⁴ See Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008); Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction 66, *Public Notice*, 21 FCC Rcd 10521 (WTB 2006).

expenditures under prevailing accounting conventions.¹⁰⁵ Given these conventions, an increase in spectrum-related spending relative to capital expenditures might appear to reflect a decrease in the capex-to-revenue ratio, even though that spending could be at very high levels and could more effectively serve consumer needs in a given period than spending that would fall into the “capex” category.

In sum, wireless providers have invested aggressively, and continue to do so. Efforts to reframe the debate in terms of capital expenditures as a percentage of revenues have no basis in economics or in sound business practice, and should be rejected.

C. Claims Regarding Pricing Are Erroneous.

Claim: **Nationwide providers have engaged in collusive parallel pricing.**

Fact: **The nationwide providers compete aggressively on all fronts, and price reductions have reflected this competition.**

CFA *et al.* contend – providing no data or economic analysis whatsoever – that mobile wireless providers “do not compete with each other on price or non-price terms – preferring instead to raise their prices in parallel fashion while shrouding the true costs of services sold to their customers.”¹⁰⁶ This *ipse dixit* assertion is completely without merit. In every segment of

¹⁰⁵ As Professor Michael Katz explains, “the accounting treatment of intangible assets, such as research and development, advertising, and elements of service that foster the creation and development of positive reputations, is particularly problematic.” KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 33. “According to FASB rules, research and development (R&D) is treated as a current expense....” *Id.*; see also Franklin M. Fischer, *Accounting Data and the Economic Performance of Firms*, 7 JOURNAL OF ACCOUNTING AND PUBLIC POLICY, 253, 255 (1988) (“The first such issue involves the treatment of intangibles such as advertising or research and development expenditures. Firms usually expense rather than capitalize such items, a treatment usually comporting with tax optimization and mandated in recent years in any case. But such expenditures are not made solely for the benefits they bring in the year they are made. Rather they may lead to benefits extending over several years.”).

¹⁰⁶ See CFA *et al.* Comments at iii; see also *id.* at 10 (“[C]arriers adopt[] parallel pricing structures for voice, data, and SMS services....”).

the market, *prices are falling, not rising*; moreover, they are doing so in ways that reflect simple and direct competition among wireless providers.

As an initial matter, Verizon Wireless observes that consumers have many choices among providers and among voice, data and messaging plans offered by those providers. As Topper states, “wireless providers offer a wide variety of bundled voice and data services with many features and pricing variables (free calling minutes, free off-peak minutes, rollover minutes, etc.) that change over time.”¹⁰⁷ This sort of product differentiation “makes it very difficult for carriers to coordinate pricing and monitor cheating from any agreement [to maintain specific prices],”¹⁰⁸ because a provider can change the terms of service – for example, by increasing the number of minutes or messages included in a given plan, or by improving quality of service – and such moves will have the effect of undercutting competitors even if prices remain facially “parallel.” Accordingly, even if prices were identical (which, as described below, they are not), this fact can be entirely consistent with the workings of a competitive market, as the Supreme Court recently emphasized.¹⁰⁹

¹⁰⁷ TOPPER DECLARATION at 55.

¹⁰⁸ *Id.*

¹⁰⁹ “For example, since wireless providers face similar costs for deploying and operating their networks and largely compete for the same demand, vigorous competition would tend to result in market equilibrium prices that are similar for similar products and services” TOPPER DECLARATION at 54-55. The Supreme Court recently affirmed this insight in connection with the telecommunications market, holding that “parallel conduct does not suggest conspiracy.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Indeed, “[e]ven conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions[,] is not in itself unlawful.” *Id.* at 553-54 (internal quotation omitted).

Second, and in any case, the facts belie CFA *et al.*'s assertion.¹¹⁰ Rather, the pricing plans of nationwide carriers for voice, data, and messaging services reflect a variety of offerings at a broad array of price points.

Voice. An examination of the offerings available to customers seeking voice service demonstrates that carriers are competing on multiple dimensions. An overview of available post-paid voice plans from the nationwide providers, organized by minutes of use (“MOUs”) and price, is provided in the following chart, produced by www.myrateplans.com. The chart depicts, for each carrier, the number of anytime minutes associated with various monthly rate plans.¹¹¹

Selected Post-Paid Voice Plans

| |  |  |  |  |
|----------|---|---|--|---|
| \$29.99 | | 200 | 300 | |
| \$39.99 | 450 | 450 | 1,000 600 300 | 450 |
| \$49.99 | | 450 | 600 1,000 | |
| \$59.99 | 900 | 900 | 1,000 1,500 | 450 900 |
| \$69.99 | | 900 450 | 1,500 | |
| \$79.99 | 1,350 | | | 900 1,350 450 |
| \$89.99 | | 900 | | |
| \$99.99 | Unlim. | Unlim. | Unlim. | Unlim. 1,350 900 |
| \$119.99 | | | | Unlim. 1,350 |
| \$139.99 | | | | Unlim. |

Source: MyRatePlan.com.¹¹² Multiple minute allotments reflect alternative plans offered at same price point.

¹¹⁰ See, e.g., CFA *et al.* Comments at 10-12.

¹¹¹ A carrier may offer multiple plans at the same price point but with different anytime minutes because different plans provide additional features such as text messaging or select unlimited call options. For example, Verizon Wireless offers two plans for \$59.99, one with 450 anytime minutes plus unlimited text messaging, and the other with 900 anytime minutes plus unlimited calls to the phone numbers of five friends or family members.

¹¹² MyRatePlan.com, Cellphone Rate Plans, National Calling Area (access “Single Line,” “Zip Code 20001”) http://www.myrateplan.com/wireless_plans/filter.php?zip=20001&filter_type=single&tm=1255029919 (last visited Oct. 17, 2009).

In addition to voice, many of the plans listed above include additional services such as free nights (beginning at different hours) and weekends, rollover minutes, friends-and-family options, text messaging, and more. Above all, the chart demonstrates that carriers are vigorously competing to offer consumers the best possible plan to suit their individual needs, resulting in plans that are anything but parallel. Just from the nationwide carriers, consumers have more than 30 options across a diverse range of dissimilar price points.

Verizon Wireless's own offerings show that the chart actually *understates* the pricing variations available from individual providers. For example, Verizon Wireless customers seeking voice service can choose from a variety of individual, family, and prepaid plans. A customer seeking an "individual" service plan can select from over 20 offerings in multiple categories (Basic, Select, Connect, Premium, 65 Plus, and Push-to-Talk). Wireless voice pricing is, in short, extraordinarily varied.

Price competition by mid-size and smaller carriers is also aggressive. As Cricket (Leap) notes, "[Cricket] disciplines prices in every market that it enters, and indeed, its presence spurs other carriers to offer a wide range of choices, including flat-rate pricing plans along the lines that Cricket [i]nnovated."¹¹³ As detailed at length in Verizon Wireless's initial comments, for example, the prepaid market is expanding dramatically, with prices falling by more than half in the past year alone.¹¹⁴ These price reductions, which put additional pressure on all wireless voice service prices, reflect carriers' competitive responsiveness to one another's pricing decisions, *not* collusive parallelism.

¹¹³ Comments of Cricket Communications, Inc., WT Docket No. 09-66, GN Docket Nos. 09-157 & 09-51, 9 (filed Sept. 30, 2009) ("Cricket Comments").

¹¹⁴ See Verizon Wireless Comments at 65-69.

Data. A similar multiplicity of pricing plans – and declining prices – prevails in the wireless data market. Here too, the diversity of service offerings and history of competition contradict any claim of parallel pricing. In late 2007, the four major carriers offered monthly data plans ranging in price from a high of \$79.99 (AT&T) to a low of \$49.99 (T-Mobile, whose broadband deployment was limited to EDGE technology at the time).¹¹⁵ In January 2008, AT&T set a cap of 5 GB per month for its \$79.99 plan.¹¹⁶ Then, in March, Verizon Wireless set a similar 5 GB cap for its \$59.99 plan and created a cheaper \$39.99 plan for users who only needed 50 MB per month.¹¹⁷ In August, Sprint dropped the price of its data plan. In November 2008 AT&T also revamped its pricing, dropping its 5GB per month plan to \$60 while offering 50MB and 10MB plans for \$40 and \$20, respectively.¹¹⁸ Even in the weeks since initial comments in this proceeding were filed, T-Mobile reduced the price of its 5GB data plan by \$10, to \$49.99.¹¹⁹ Today, six major carriers offer no fewer than 11 different types of plans.¹²⁰

¹¹⁵ See Current Analysis database (custom report). Current Analysis provides analysis and intelligence reports on markets, companies and products shaping telecommunications and related industries. See <http://www.currentanalysis.com/markets/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See T-Mobile USA Inc., Internet & Email Plans, <http://www.t-mobile.com/shop/plans/Cell-Phone-Plans.aspx?catgroup=Internet-Email-cell-phone-plan> (last visited Oct. 15, 2009).

¹²⁰ See Verizon Wireless Comments at 72 (Data Plans and Prices Table).

| DATA PLANS AND PRICES (2009) | | | |
|-------------------------------------|--|---|------------------------|
| Carrier | Plan | Max Monthly Traffic | Price |
| Verizon Wireless | Daypass | Unlimited for 24 Hours | \$15.00 |
| Verizon Wireless | Mobile Broadband 250MB | 250 MB | \$39.99 |
| Verizon Wireless | Mobile Broadband 5GB | 5 GB | \$59.99 |
| AT&T Wireless | DataConnect 200 MB | 200 MB | \$40.00 |
| AT&T Wireless | DataConnect 5 GB | 5 GB | \$60.00 |
| Sprint | Mobile Broadband Connection Plan - 3G | 5 GB | \$59.99 |
| Sprint | Mobile Broadband Connection Plan – 4G/3G | 4G: Unlimited; 3G: 5GB | \$69.99 |
| T-Mobile | WebConnect | 5 GB | \$49.99 ¹²¹ |
| Leap Wireless / Cricket | Cricket Broadband | Unlimited. Speeds may be reduced if total downloads exceed 5GB in one month. | \$40.00 |
| U.S. Cellular | Wireless Modem Plan | 5GB | \$49.95 |

Source: Company websites, September 2009

Mobile Messaging. Finally, allegations that carriers engage in parallel pricing with respect to text and mobile messaging – or that messaging prices are rising – also ring hollow.¹²² Verizon Wireless notes at the outset that economic theory does not support the argument that the messaging market should be analyzed independently of other services.¹²³ “Analyzing mobile voice and mobile data separately is inappropriate as a matter of economics, because it fails to account for consumer demand for bundled services, shared network resources that are used to provide both voice and data services, and innovation that is blurring the line between voice and data.”¹²⁴ Moreover, customers generally view voice, data and messaging services as part of the

¹²¹ This price reflects T-Mobile’s revised price for October 2009.

¹²² See CFA *et al.* Comments at 11-12.

¹²³ See Comments of Public Knowledge, WT Docket Nos. 09-66 & 08-7, 3 (filed Sept. 30, 2009) (“Public Knowledge Comments”).

¹²⁴ TOPPER DECLARATION at 29.

same offering – an unsurprising view, given that “[m]obile voice and mobile data are often received on the same consumer device, transmitted through the same wireless networks, and rely on much of the same infrastructure.”¹²⁵ An atomized approach that separated these offerings into distinct markets would ignore these facts, not to mention the fact that mobile messaging is in many cases a substitute for other services offered over the mobile device – in particular, voice communication or email. Under these circumstances, separate analysis of mobile messaging would offer a distorted view of the market and of the choices faced by consumers.

In any case, pricing for mobile messaging is far from parallel. For example, as of June 2009, Verizon Wireless offered 500 text messages and unlimited in-network texts for \$10 per month; at the same price point, Sprint offered unlimited text messaging, T-Mobile offered 1000 text messages, and U.S. Cellular offered 750 text messages.¹²⁶ As of June 2009, AT&T did not offer a package at the \$10 price point, though it offered 1500 messages for \$15.¹²⁷ As the following chart shows, this diversity extends to other price points as well:¹²⁸

¹²⁵ *Id.* at 28.

¹²⁶ *See Cell Phone Text Messaging Rates Increases and the State of the Competition in the Wireless Market: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess., Attachment at 5 (June 16, 2009) (testimony of Randal S. Milch, Executive Vice President and General Counsel, Verizon Communications, Inc.), <http://judiciary.senate.gov/pdf/06-16-09MilchTestimony.pdf> (“Milch Testimony”).

¹²⁷ *See id.*

¹²⁸ *Id.*

| Monthly Access | Verizon Wireless | AT&T | Sprint | T-Mobile | US Cellular |
|----------------|--------------------------------|---|------------------|-------------------------------|------------------|
| \$5 | 250 | 200 | 300 | 300 | 250 |
| \$10 | 500 (unlimited in-network) | Not offered | Unlimited | 1000 | 750 |
| \$15 | 1500 (unlimited in-network) | 1500 | Not offered | Unlimited | Not offered |
| \$20 | Unlimited | Unlimited | Not offered | Unlimited Family (\$24.95) | Unlimited |
| | 5000 (unlimited in-network) | | | | |
| \$30 | Unlimited Family | Unlimited Family | Unlimited Family | Not offered | Unlimited Family |
| Overage | \$0.10 | \$0.10 (\$5 plan) \$0.05 (\$15 plan) | \$0.20 | \$0.20 | \$0.25 |

Notes: Unless otherwise specified, numbers indicate plan limits for within-country SMS text messages, instant messages, picture or video messages.
 \$20 Verizon Wireless plan provides unlimited messages if customer is on select or premium voice plan.
 Allotments indicated for US Cellular refer to outgoing text messages only (there is no limit on incoming messages), excluding picture and video messages.
 Sprint unlimited packages are price differentials between plans with and without unlimited messaging; as an add-on to an existing plan, Sprint unlimited messaging costs \$20.

In sum, any objective review of actual pricing behavior in the wireless market shows precisely the types of creative pricing decisions and shrewd responsive maneuvers that one expects in a robustly competitive marketplace. There is simply no evidence of parallel pricing for voice, data, or messaging services.

Claim: **Text and multimedia messaging rates have been rising.**

Fact: **Text and multimedia messaging rates have been falling – and quickly.**

Public Knowledge wrongly claims that there has been a purported rise in text and multimedia messaging rates.¹²⁹ First, prices for text and multimedia messaging are falling, not rising. As the *Thirteenth Report* recognized, “[t]he average price of text messaging [as measured by revenues divided by total message volume] continued to decline in the past year,” falling from

¹²⁹ See Public Knowledge Comments at 7 (“Pricing for text messages vividly illustrates the failure of the unregulated text messaging market. Although carriers point to the falling per/message cost of text messages when questioned on this topic, they do so in the context of bulk and/or unlimited messaging plans. Carriers fail to address the rising costs of sending text messages to users who pay on a per message basis. What is noteworthy about this trend is not only that the costs rise together, but that they rise at all.”).

3.6 cents in 2006 to 2.5 cents in 2007.¹³⁰ The *Thirteenth Report* correctly noted that the decline is due to increased use of text messaging under volume-discounted or unlimited messaging plans.¹³¹ Notably, declining average prices not only refute claims that messaging prices are on the rise, but also debunk claims that carriers are somehow forcing users to purchase bucket packages including far more messages per month than they wish to send.¹³² If that were so, then the average price per message would be increasing, and would be much closer to the pay-per-message rate.¹³³

As the following chart demonstrates, Verizon Wireless's own average charge per message has declined dramatically. The average text message sent over Verizon Wireless's network costs the subscriber just *one cent*, as compared to about three cents in December 2006.¹³⁴

¹³⁰ *Thirteenth Report*, 24 FCC Rcd at 6277 ¶ 194.

¹³¹ *Id.*

¹³² See CFA *et al.* Comments at 21 (claiming that, “through discounts and punitive single-use fees for voice minutes, data transfers, and text messages, wireless service providers encourage customers to purchase higher usage service plans than they intend to or are able to use”).

¹³³ Price per message is calculated by dividing the price paid by the number of messages transmitted. If users were really being forced into more expensive plans with more messages than they needed or wanted, then the price-per-message figure would *rise* following the migration to the new plan, because the higher price would be spread over the same number of messages as before. Falling rates per message demonstrate that customer migration toward messaging plans has saved subscribers money.

¹³⁴ Verizon Wireless Comments at 76. AT&T has said its average price per message is now just 1.4 cents. See *Cell Phone Text Messaging Rates Increases and the State of the Competition in the Wireless Market: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess., at 4-5 (June 16, 2009) (testimony of Wayne Watts, Senior Executive Vice President and General Counsel, AT&T Inc.) (“As a result, the overall effective rate per message has plummeted, dropping from \$0.043 in January 2007 to \$0.014 in March 2009 – an almost 70% decline in just over two years.”), <http://judiciary.senate.gov/pdf/06-16-09WattsTestimony.pdf> (“Watts Testimony”); see generally Sprint Comments at 3-5.



Source: Verizon Wireless, Bureau of Labor Statistics.

Notes: Revenue used for calculations is based on actual price paid and actual messages used. Monthly billing cycle calculations are adjusted for a constant 30.5 day month.

Second, efforts to isolate the prices paid by “users who pay on a per message basis” have no basis whatsoever in sound economics.¹³⁵ To begin with, consumers choose among a wide variety of messaging options, designed to suit their needs. Less than *one percent* of text messages sent on the Verizon Wireless network are subject to pay-per-text charges.¹³⁶ For the very small percentage of customers selecting per-message payments, the prices charged reflect the sound economic principles that drive a competitive market. In almost every industry, those who commit to larger volumes generally enjoy more significant discounts. An eight-slice pizza pie costs far less than the sum total of eight individually purchased slices; a six-pack of soda costs less than six individual cans (and a 24-can case is less than four times the price of a six-pack), and so on. Pay-per-text customers tend not to use or need text messaging very often, and so, paying by the text meets their needs. For customers who use text messaging frequently,

¹³⁵ Public Knowledge Comments at 7.

¹³⁶ See Verizon Wireless, Response to Sen. Kohl’s Follow-up Questions for Hearing on “Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market,” Answer 1 (“Milch Responses”); see also Watts Testimony at 4.

Verizon Wireless works very hard to educate them about their options for texting plans, and get them into a plan that minimizes their costs.¹³⁷

Third, Public Knowledge's claim that "text messages are essentially free riders on existing network infrastructure" and therefore give rise to only "nominal cost" reflects a fundamental misunderstanding of cost allocation in the presence of joint and common costs.¹³⁸

Where multiple services rely on common infrastructure, the "recovery of fixed costs [associated with that infrastructure] needs to be shared across many services."¹³⁹ As Verizon

Communications General Counsel Randal Milch explained in response to questions posed by Senator Herb Kohl:

Verizon Wireless is a multiproduct firm, with all of those products provided over the same network. Every multiproduct firm has to recover all of its costs across its various products. An analysis that looks only at the cost of sending the next text message over a network ignores the fact that you have a network in the first place. Verizon had to make huge investments in spectrum, in cell sites and in computers and switching equipment in order to be able to carry even the first text message. Text messages have to carry all those shared and common costs along with every other product we have.¹⁴⁰

A mechanism that failed to account for such costs would place an excessive burden on traditional voice users, who would be forced to bear the entire fixed cost for facilities also used to provision messaging and other services.

¹³⁷ See *infra* notes 211-213 and accompanying text (discussing Verizon Wireless's efforts to ensure that customers have sufficient information about prices and terms of service so that they can buy the products and services they want).

¹³⁸ Public Knowledge Comments at 7.

¹³⁹ TOPPER DECLARATION at 23.

¹⁴⁰ Milch Responses at 2; see also TOPPER DECLARATION at 11 ("There are extra complexities associated with multiproduct firms and economies of scope in calculating average cost functions, primarily because of the extra difficulty in separating inputs and outputs.").

D. Claims Regarding Access to Spectrum By Mid-Size and Small Carriers Are Erroneous.

Claim: **Because of industry consolidation and FCC auction policy, mid-size and small providers are unable to obtain spectrum.**

Fact: **While all wireless providers would benefit from the identification and allocation of additional spectrum, small and mid-size providers have access to spectrum, and in fact have acquired substantial spectrum holdings.**

Several parties argue that consolidation in the wireless market has led to a lack of spectrum resources for smaller and regional carriers that restricts growth and market entry.¹⁴¹ CFA *et al.* allege that “market concentration and consolidation have increased spectrum acquisition barriers for new entrants...”¹⁴² MetroPCS alleges that recent auctions have been structured in ways that precluded small and mid-size carriers from obtaining spectrum.¹⁴³ And NTELOS likewise claims that “mid-tier regional and rural carriers” have “effectively been denied the opportunity to obtain the additional spectrum they vitally need in order to grow their businesses and remain viable competitors.”¹⁴⁴ These commenters supply no hard data or declarations to support these claims. Verizon Wireless agrees that there is a pressing need to identify and allocate new spectrum for commercial mobile wireless services and commends Chairman Genachowski’s recognition of “the looming spectrum crisis.”¹⁴⁵ However, as detailed

¹⁴¹ CFA *et al.* Comments at 23-26; Comments of MetroPCS Communications, Inc., WT Docket No. 09-66, 5-14 (filed Sept. 30, 2009) (“MetroPCS Comments”); NTCA Comments at 4; NTELOS Comments at 8-10; Comments of the Rural Cellular Association, WT Docket No. 09-66, at 4-6 (filed Sept. 30, 2009) (“RCA Comments”); Comments of United States Cellular Corporation, GN Docket Nos. 09-157 & 09-51, WT Docket No. 09-66, 24-26 (filed Sept. 30, 2009) (“U.S. Cellular Comments”).

¹⁴² CFA *et al.* Comments at 24.

¹⁴³ See MetroPCS Comments at 10.

¹⁴⁴ NTELOS Comments at 8.

¹⁴⁵ Genachowski CTIA Speech at 5.

below, it is beyond dispute that mid-size and smaller carriers already regularly acquire spectrum through market-based mechanisms such as auctions and secondary market transactions.

The Commission has taken several steps to ensure the continued ability of smaller providers to acquire spectrum. In addition to making bidding credits available to entrepreneurs as well as small and very small businesses, the Commission has adopted band plans intended to promote diversity in the allocation of spectrum among a wide variety of entities. For example, in the AWS-1 Auction 66 and the 700 MHz Auction 73, the Commission adopted band plans that contained licenses of various geographic area and spectrum sizes, including licenses covering smaller geographic areas, to respond to the stated needs of non-nationwide carriers.¹⁴⁶ Indeed, with these two auctions, the Commission returned to licensing the very smallest sized license areas it had ever used – the 734 Cellular Market Areas (“CMA”). Of the licenses awarded in the AWS-1 and 700 MHz auctions, 66.1% were licensed on a CMA basis.

The results speak for themselves. As Verizon Wireless documented in its initial comments, approximately 83% of all licenses sold in the AWS-1 Auction were acquired by non-nationwide wireless service providers, and over 50% were won by businesses claiming

¹⁴⁶ In the AWS-1 auction, the Commission offered 734 20-MHz CMA-based licenses, 176 20-MHz EA-based licenses, and 176 10-MHz EA-based licenses. Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66, *Public Notice*, 21 FCC Rcd 4562, 4568 ¶ 11 (2006). In the most recent 700 MHz auction, the Commission offered 734 12-MHz CMA-based licenses, 176 12-MHz EA-based licenses and 176 6-MHz EA-based licenses. Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76, *Public Notice*, 22 FCC Rcd 18141, 18147 ¶ 12 (2007). The Commission’s stated goal in taking these actions was “to promote dissemination of licenses among a wide variety of applicants, accommodate the competing need for both large and small licensing areas, meet the various needs expressed by potential entrants seeking access to spectrum and incumbents seeking additional spectrum, and provide for large spectrum blocks that can facilitate broadband deployment in the band.” Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd 15289, 15317 ¶ 64 (2007) (citations omitted).

designated entity status.¹⁴⁷ Likewise, 69% of all licenses sold in the 700 MHz Auction were acquired by non-nationwide providers, and 55% were won by small businesses claiming designated entity status.¹⁴⁸

In addition, mid-size and smaller carriers routinely acquire spectrum in the secondary market.¹⁴⁹ Since 2008 over 60% of the assignments of market-area and cellular licenses took place between non-nationwide carriers.¹⁵⁰ Of the remaining 40% of transactions, 12.5% involved the assignment of spectrum *from* nationwide carriers *to* non-nationwide carriers.¹⁵¹ Thus, almost 75% of the license assignments over the last two years involved non-nationwide carriers securing spectrum from nationwide or other non-nationwide carriers.

By way of example, the following table shows the transfers/assignments of cellular, PCS, AWS and 700 MHz spectrum involving various mid-size carriers since October 1, 2006:

Selected Mid-Size and Smaller Carrier License Acquisitions Since October 2006

| Carrier | Number of Transactions | Number of Licenses Acquired | POPs Covered |
|----------------|-------------------------------|------------------------------------|---------------------|
| Leap (Cricket) | 9 | 32 | 27,908,563 |
| MetroPCS | 7 | 35 | 19,451,167 |
| U.S. Cellular | 16 | 49 | 9,590,433 |

Source: FCC Universal Licensing System

And, as noted above, just last week Cellular South announced the acquisition of Corr Wireless, which, if approved, will expand Cellular South’s coverage to an additional 1.3 million people in

¹⁴⁷ See Verizon Wireless Comments at 48-49.

¹⁴⁸ *Id.* at 49.

¹⁴⁹ *Id.* at 52-53.

¹⁵⁰ *Id.* at 55.

¹⁵¹ *Id.*

18 counties across Alabama and Georgia.¹⁵² This transfer will augment Cellular South's existing wireless footprint, which covers Mississippi, Memphis, Tennessee, and coastal Alabama to Destin, Florida.¹⁵³ This acquisition is proof that, like many other regional carriers, "Cellular South continues to discover new ways to position itself for healthy growth so it can compete in an ever-evolving wireless industry."¹⁵⁴

Indeed, the evidence suggests that many smaller and regional carriers have access to the spectrum they need to aggressively build-out new broadband wireless networks, particularly in less densely populated areas.¹⁵⁵ For example, the start-up Stelera Wireless is currently offering wireless broadband services in southern Texas and has plans to expand service to 55 cities by year end and to continue building out in 2010.¹⁵⁶ Through a lease with Globalstar, Open Range Communications will provide high-speed broadband Internet and voice services in 546 underserved and rural communities, covering more than six million people, within five years.¹⁵⁷

¹⁵² Cellular South/Corr Wireless Press Release.

¹⁵³ Cellular South, Inc., The Cellular South Network, <https://www.cellularsouth.com/network/> (last visited Oct 18, 2009).

¹⁵⁴ Cellular South/Corr Wireless Press Release. As Cellular South's chief financial officer said when announcing the deal, "Even in this tough economy, Cellular South is continuing to grow its customer base and expand its service offerings." *Id.*

¹⁵⁵ See Comments of Verizon Wireless, GN Docket Nos. 09-157 & 09-51, 130-31 (filed Sept. 30, 2009) ("Verizon Wireless Innovation Comments") (discussing negligible demand for cellular spectrum in unserved areas).

¹⁵⁶ Press Release, Stelera Wireless, Stelera Wireless Launches Wireless Broadband Network; Cutting Edge Internet Services Launched in South Texas (Mar. 23, 2009), <http://dev.stelerawireless.com/Portals/0/docs/National%20STX%20Press%20Release.docx>.

¹⁵⁷ Press Release, Open Range Communications, Open Range Communications Secures \$374 Million to Deploy Wireless Broadband Services to 546 Rural Communities (Jan. 9, 2009), http://www.openrangecomm.com/pr/pr_022009.html. Open Range promises to offer high speed broadband Internet service for less than \$40 per month and unlimited nationwide voice for less than \$30 per month. See Open Range, Fact Sheet, http://www.openrangecomm.com/pdf/or_fact_sheet_feb09.pdf (last visited Oct. 19, 2009).

U.S. Cellular, MetroPCS and Leap all expect to begin LTE trials over the next year.¹⁵⁸ The Commission's auction and secondary markets policies are working, enabling access to spectrum for nationwide, regional and smaller wireless carriers alike.

Amid facts and figures such as these, there is no basis for claims that regional and smaller carriers lack access to spectrum or that the Commission's auction rules must be revised for the benefit of mid-size or smaller providers.¹⁵⁹ If, notwithstanding the opportunities provided by the Commission, certain local or regional providers remain unable to acquire spectrum resources, that outcome speaks more to their particular strategies than to the state of competition in the market.

Claim: **There is warehoused or severely underused spectrum that should be made available to all mobile wireless providers.**

Fact: **Mobile wireless providers are using spectrum intensively and efficiently.**

MetroPCS asserts that spectrum is being underutilized and that large carriers are warehousing spectrum, but it offers no facts or data to support its claim.¹⁶⁰ Rather, data on record with the Commission demonstrate that U.S. wireless carriers utilize their spectrum intensively and efficiently. U.S. wireless carriers serve more customers and carry more traffic

¹⁵⁸ AT&T Comments at 17-18 (citing U.S. Cellular and TDS Presentation at the Kaufman Bros. 12th Annual Investor Conference at 18 (Sept. 10, 2009), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTUyNjh8Q2hpbGRJRD0tMXxUeXBjPTM=&t=1>; Press Release, MetroPCS, Unlimited Wireless Carrier MetroPCS Announces Vendors for 2010 4G LTE Launch (Sept. 15, 2009), <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1331809>; DAVID BARDEN *ET AL.*, BANK OF AMERICA/MERRILL LYNCH, 2Q09 WRAP: TAKING OPTIMISM OUT OF THE MODEL; PO TO \$28 at 6 (Aug. 7, 2009) (noting that Leap “expects to have its first operational LTE trial system later this year and is considering launching a trial market in 2010”).

¹⁵⁹ MetroPCS Comments at 22.

¹⁶⁰ *Id.* at 19 (claiming that “any spectrum that is being warehoused or severely underused” should be made available to all mobile wireless providers); *id.* at 20 (asserting that the leasing rules “create an unfortunate potential for carriers with nationwide spectrum footprints to game the system and engage in impermissible spectrum warehousing.”).

than ever, all at speeds that meet or exceed those of most other countries.¹⁶¹ Independent studies have confirmed that commercial wireless spectrum is being heavily utilized.¹⁶²

Verizon Wireless and other U.S. wireless carriers have achieved this state of affairs by implementing technical innovations to their networks that enhance spectral efficiency. For example, wireless carriers have driven technological developments such as frequency reuse, antenna sectorization, cell splitting, and the migration from analog to digital technologies and next generation services, in order to gain significant efficiencies in spectrum use.¹⁶³ This innovation is ongoing, as the availability of new technologies and the increasing demand for wireless services “force wireless carriers to continuously re-evaluate ways to increase the value of the radio spectrum allocated to their licenses.”¹⁶⁴ As a result, U.S. wireless carriers overall serve an average of 660,073 subscribers per MHz of spectrum allocated, meaning that they maintain the most spectrally efficient networks in the world.¹⁶⁵

Verizon Wireless is a leader in spectral efficiency. It has invested in and expanded the capabilities of its network at a relentless pace, making huge investments in successive wireless technologies – CDMA, EV-DO Rev. A, and now LTE – each of which has brought major

¹⁶¹ See Verizon Wireless Comments at 45-46; Verizon Wireless Innovation Comments at 96; *see also* AT&T Comments at 76-78.

¹⁶² See, e.g., JOHN T. MACDONALD, A SURVEY OF SPECTRUM UTILIZATION IN CHICAGO 6-7 (Mar. 7, 2007), <http://www.ece.ilit.edu/~wemi/publications/spectrum.pdf>.

¹⁶³ See Verizon Wireless Innovation Comments at 94-96.

¹⁶⁴ Comments of Thomas Hazlett and Matthew Spitzer, ET Docket No. 03-237, 33 (filed April 5, 2004), *cited in* Verizon Wireless Innovation Comments at 96.

¹⁶⁵ See Letter from Christopher Gutman-McCabe, Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 09-51, Attachment at 13 (filed Aug. 14, 2009), *cited in* Verizon Wireless Innovation Comments at 96.

improvements in spectral efficiency.¹⁶⁶ As a result, in the cellular, PCS, and SMR bands that currently accommodate most commercial wireless customers, Verizon Wireless now serves 1.97 million customers per MHz of spectrum – a substantially greater intensity of use than that reported by U.S. licensees generally.¹⁶⁷

This intensity of use is not driven by regulatory intervention but by consumer demand and competitive market forces.¹⁶⁸ Moreover, as consumer demand for bandwidth-intensive data services grows, carriers will face greater competitive pressures to utilize spectrum intensively and efficiently.¹⁶⁹ As illustrated above and in Verizon Wireless’s initial comments,¹⁷⁰ the extremely active secondary market ensures that there would be a financial penalty for any spectrum not efficiently used. Warehousing spectrum is costly. It generally would be uneconomic for a service provider to obtain additional spectrum in order to warehouse it and thereby deter entry or expansion by rivals.¹⁷¹ Moreover, it would be subject to free riding by other incumbents. As noted by Professor Katz, “[a]ttempts to warehouse spectrum to prevent the entry of competitors are especially costly when an entrant needs only a small fraction of the available spectrum in order to be a viable competitor. This is so because the incumbent would

¹⁶⁶ Verizon Wireless Innovation Comments at 93, 97-100. Specific details of Verizon Wireless’s technology timetable and efficiency gains are shown in *Figure 8* of Verizon Wireless’s Comments in the innovation proceeding. *See id.* at 98.

¹⁶⁷ *Id.* at 99.

¹⁶⁸ *Id.* at 12, 92; Verizon Wireless Comments at 106.

¹⁶⁹ *See* Verizon Wireless Innovation Comments at 139 n. 422 (citing RYSAVY RESEARCH, LLC, MOBILE BROADBAND SPECTRUM DEMAND, 24 (Dec. 2008), http://www.rsavy.com/Articles/2008_12_Rysavy_Spectrum_Demand_.pdf (“There are a number of market factors that are acting together to increase spectrum demand at an accelerating pace including ever-more mobile life- and work-styles, greater device sophistication, new bandwidth-consuming applications, an increasing percentage of mobile users taking advantage of data applications, and ongoing industry innovation.”)).

¹⁷⁰ Verizon Wireless Comments at 50-56.

¹⁷¹ MICHAEL KATZ, AN ECONOMIC ANALYSIS OF THE RURAL TELECOMMUNICATIONS GROUP’S PROPOSED SPECTRUM CAP, 2 (Dec. 2, 2008), attached as Exhibit A to the Opposition of Verizon Wireless, RM-11498 (filed Dec. 2, 2008).

have to purchase licenses to all of the blocks of spectrum that the entrant might utilize, while the entrant need purchase a license to only one.”¹⁷² Professor Katz also noted that any attempt by an incumbent to deter entry by warehousing spectrum becomes even more costly as the total amount of spectrum available rises.¹⁷³ In short, there is no evidence that nationwide carriers are warehousing spectrum as MetroPCS suggests, and the competitive realities of the wireless marketplace are such that no carrier, large or small, has an incentive to warehouse spectrum.

The Commission should therefore reject MetroPCS’s misguided call for a spectrum audit that would include bands currently allocated for mobile wireless services. Such a procedure not only is unwarranted as a matter of fact and economics, but also would be poor public policy.¹⁷⁴ The CMRS spectrum bands are the most efficiently utilized commercial mobile spectrum bands in the world, and perhaps most densely used bands of any domestic allocation. Thus, there is no reason to inventory any spectrum bands the Commission has already identified for CMRS use.¹⁷⁵

As Chairman Genachowski noted, “the biggest threat to the future of mobile in America is the looming spectrum crisis.”¹⁷⁶ This “looming spectrum crisis” will be solved only by a targeted inventory to identify new spectrum that can be repurposed to auction for broadband use. The Commission, along with NTIA, should engage in a targeted inquiry to identify spectrum

¹⁷² *Id.* at 15.

¹⁷³ *Id.*

¹⁷⁴ The Commission’s experience with cellular spectrum demonstrates that forcing one carrier to give up allegedly “fallow” spectrum on the theory that it will be better used by another carrier is not an efficient mechanism for promoting the deployment of wireless services. *See* Verizon Wireless Innovation Comments at 130-31.

¹⁷⁵ *See* Comments of Verizon and Verizon Wireless on a National Broadband Plan, GN Docket No. 09-51, 70 (June 8, 2009).

¹⁷⁶ Genachowski CTIA Speech at 4.

below 5 GHz that could represent the best opportunities for *new* bands for exclusive use allocations.¹⁷⁷

Claim: **A spectrum cap is necessary to preserve competition.**

Facts: **There is no data that shows how or why a cap would promote competition; to the contrary, carriers clearly need more (not less) spectrum.**

There is no plausible ground for the Commission to reestablish a spectrum cap or adjust the spectrum screen, as advocated by U.S. Cellular and CFA, *et al.*¹⁷⁸ Parties in favor of a cap offer no economic, factual or data-driven analysis to support the assertion that the FCC should severely restrict spectrum ownership. As noted above, the crisis facing the mobile wireless industry is a lack of spectrum for all carriers. The International Telecommunication Union projects total spectrum requirements for the U.S. to reach 840 MHz by 2010, 1300 MHz by 2015, and 1720 MHz by the year 2020,¹⁷⁹ and these estimates may be understated based on a recent report by Cisco forecasting an explosion in mobile data growth.¹⁸⁰ Indeed, as the FCC has acknowledged, user demands are increasing exponentially.¹⁸¹ These requirements vastly

¹⁷⁷ Verizon Wireless Innovation Comments at 146.

¹⁷⁸ U.S. Cellular Comments at 24-26; CFA *et al.* Comments at 25-26; *see also* Comments of Rural Telecommunications Group, Inc., GN Docket Nos. 09-157 & 09-51, 4-5 (filed Sept. 30, 2009).

¹⁷⁹ *See* Verizon Wireless Innovation Comments at 142; *see also* AT&T Comments at 79.

¹⁸⁰ *See* CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2008-2013, 1-2 (June 9, 2009), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf (concluding that while the Internet will grow by a factor of 4 between 2009 and 2013, mobile data and Internet traffic will increase by a factor of 66 in the same timeframe); Verizon Wireless Innovation Comments at 143.

¹⁸¹ *See* Comment Sought on Spectrum for Broadband, *Public Notice*, DA 09-2100, 2-4 (Sept. 23, 2009) (“*Broadband Spectrum PN*”). For example, based on average customer usage patterns, a traditional handheld device consumes about 30 megabytes of data in a month; a single smartphone consumes 30 times that amount; and a single connected notebook or laptop 450 times that amount. *Id.* at 2. AT&T also has reported a 5000% increase in data usage in three years, and Clearwire estimates that individuals in the near future will be using applications that require access to and transfer of 10-20 GB of data. *Id.* at 3-4.

outstrip the Commission's current allocations,¹⁸² making it clear that individual providers will need more spectrum to meet growing demand.¹⁸³

A spectrum cap will do nothing to address this situation. To the contrary, a spectrum cap will actually *limit* competition by restricting output and preventing wireless operators from growing. As Professor Katz observed:

[C]onsider a carrier that was deciding whether to develop and introduce a new service or device that was projected to be very popular with consumers and would increase the carrier's need for spectrum. If the spectrum cap were a binding constraint on the carrier, it would find it more difficult and/or costly to introduce the new service or device. For example, introducing the new service while being unable to expand the carrier's network capacity might lead to network congestion and service degradation. The result would be to weaken innovation incentives and discourage dynamic competition.¹⁸⁴

The recent combination of spectrum held by Sprint and Clearwire demonstrates the benefits of the Commission's case-by-case approach. This joint venture promises to provide a new broadband wireless service in the 2.5 GHz band.¹⁸⁵ A spectrum cap, however, could well have *barred* this transaction, because there were 43 markets that exceeded the Commission's initial spectrum screen, requiring additional consideration by the Commission.¹⁸⁶

¹⁸² Verizon Wireless Innovation Comments at 142-43.

¹⁸³ See *Broadband Spectrum PN* at 3 (“Several commenters point to a need for additional spectrum. According to CTIA, mobile carriers in the United States operate with just under 450 MHz of spectrum, which CTIA contends compares poorly with many other OECD nations. CTIA further adds there is only 40 MHz of spectrum ‘in the pipeline’ for CMRS providers. WCAI suggests the need for spectrum for fixed wireless broadband could be 150 megahertz.”); see also Genachowski CTIA Speech at 5.

¹⁸⁴ KATZ, AN ECONOMIC ANALYSIS OF RTG'S PROPOSED SPECTRUM CAP at 4.

¹⁸⁵ See Clearwire Sept. 1 Press Release.

¹⁸⁶ See Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases and Authorizations, *Memorandum Opinion and Order*, 23 FCC Red 17570, 17601 ¶ 77 (2008) (“*Sprint/Clearwire Order*”).

Also, and as discussed in more detail in Verizon Wireless’s comments on the *Innovation NOI* and its Spectrum Cap Opposition, there are significant legal barriers to any Commission effort to reintroduce the spectrum cap.¹⁸⁷ A reintroduction of the spectrum cap can be justified only by persuasive evidence of changed facts that warrant the reversal of the FCC’s 2001 decision eliminating the cap.¹⁸⁸ The Commission’s burden is particular heavy here. The Commission eliminated the spectrum cap because the rule was unnecessary due to competition and its repeal was therefore statutorily *mandated* under section 11 of the Communications Act of 1934, as amended (the “Act”):

Section 11 further provides that ... the Commission “shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” ...

....
... In light of our finding of meaningful economic competition [], we conclude that long-term retention of the spectrum cap rule is no longer necessary in the public interest, and we therefore move to repeal that rule.¹⁸⁹

No party has offered any factual basis sufficient to overcome this conclusion; nor could they.

¹⁸⁷ See 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001) (eliminating the spectrum cap effective January 1, 2003) (“*Spectrum Cap Sunset Order*”).

¹⁸⁸ See Verizon Wireless Innovation Comments at 125-26 (citing *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (“[I]t is ‘axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.’”); *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985) (“This court has long held that an agency’s change in direction from a previously announced intention is a danger signal that triggers scrutiny to ensure that the agency’s change of course is not based on impermissible or irrelevant factors.”)).

¹⁸⁹ *Spectrum Cap Sunset Order*, 16 FCC Rcd at 22677 ¶ 22, 22693 ¶ 47 (quoting 47 U.S.C. § 161(a)(2)) (footnotes omitted); see *id.* at 22670 ¶ 6 (“[I]n light of the strong growth of competition in CMRS markets since the initiation of the spectrum cap, we decide today that we should move from the use of inflexible spectrum aggregation limits to case-by-case review of spectrum aggregation”); see also Opposition of Verizon Wireless, RM-11498, 2-7 (filed Dec. 2, 2008) (detailing the Commission’s Section 11 obligations).

Finally, the Commission should also decline to adjust the existing spectrum screen.¹⁹⁰ The Commission’s current screen includes cellular, broadband PCS, SMR, AWS-1, 700 MHz, and BRS spectrum. Given that all of this spectrum is used to provide competitive wireless service,¹⁹¹ there is no basis for the Commission to either remove any of these frequency bands from its spectrum screen, or give more weight to one band over another, as U.S. Cellular suggests.¹⁹² In any event, claims that the spectrum screen should be adjusted are really an untimely attempt to revisit the screen adopted in the *Sprint/Clearwire Order*, which was debated and approved in a unanimous decision more than two years ago.¹⁹³

E. Claims Regarding Network Openness and Handset Exclusivity Are Erroneous.

Claim: **Wireless consumers face a “walled garden” with respect to applications.**

Fact: **Wireless consumers have access to dozens of devices that allow them to access the content and applications of their choosing.**

CFA *et al.* complain about the “current ‘walled garden’ paradigm” for wireless applications.¹⁹⁴ This worry reflects a deep misunderstanding of the evolving wireless ecosystem. Verizon Wireless offers a variety of devices that allow consumers to access *any application*,

¹⁹⁰ See CFA *et al.* Comments at 25 (alleging the absence of “realistic spectrum screens”); see also U.S. Cellular Comments at 24-26 (discussing claimed failure of current spectrum screens to prohibit consolidation by large carriers and supporting limits on spectrum holdings and “meaningful scrutiny” of proposed transactions).

¹⁹¹ See Verizon Wireless Innovation Comments at 127 (citing *Sprint/Clearwire Order*, 23 FCC Rcd at 17592 ¶ 53).

¹⁹² See U.S. Cellular Comments at 25-26 (citing Reply Comments of U.S. Cellular, RM-11498, at 2 (filed Dec. 22, 2008) (“U.S. Cellular Spectrum Cap Reply Comments”)). According to U.S. Cellular, the various spectrum bands considered under the current spectrum screen should not be treated equally. Namely, “less valuable” BRS spectrum should not be used as a “shield” for a carrier’s acquisition of more valuable cellular, PCS, AWS-1 or 700 MHz spectrum. See U.S. Cellular Spectrum Cap Reply Comments at 2.

¹⁹³ See *Sprint/Clearwire Order*, 23 FCC Rcd at 17592-600 ¶¶ 54-73, 17629-31.

¹⁹⁴ See CFA *et al.* Comments at 17.

whether offered by the carrier itself or by a third party.¹⁹⁵ Likewise, Verizon Wireless *does not lock its postpaid subscribers' handsets*, and – as discussed below – *does not block text messages* sent by its subscribers or to its subscribers, except for spam and messages for which the user has imposed an affirmative block. Further, the company's Open Development Initiative ("ODI") is designed to *allow and encourage* third-party developers to create new products, applications, and services and provide these offerings over the Verizon Wireless network.¹⁹⁶ And most recently, Verizon Wireless expanded its open-network ecosystem still further, announcing that it will launch smartphones, feature phones, netbooks, and specialty devices running Google's Android™ operating system.¹⁹⁷ The Android™ operating system is open source and fully customizable, and enables users to run tens of thousands of third-party applications neither created nor reviewed by Verizon Wireless – exactly the opposite of a "walled garden."

Other large providers adhere to similar practices: T-Mobile and Sprint are founding members of the Open Handset Alliance.¹⁹⁸ AT&T allows any compatible GSM phone to operate on its system, and does not restrict text messaging or applications, even those that compete with AT&T's own applications, from any device – including the iPhone.¹⁹⁹ While AT&T had already

¹⁹⁵ See generally Verizon Wireless Comments at Part IV.B.2.

¹⁹⁶ See Verizon Wireless Comments at 120-121; Verizon Wireless Innovation Comments at 84-87.

¹⁹⁷ See Press Release, Verizon Wireless, 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>.

¹⁹⁸ See T-Mobile Comments at 13.

¹⁹⁹ AT&T Comments at 70.

allowed third-party VoIP applications to be used on some of its handsets,²⁰⁰ it announced on October 6 that it would open its network to mobile voice applications used on iPhone devices.²⁰¹

In short, talk of a “walled garden” reflects an outmoded and anachronistic understanding of the wireless market. While consumers may rely upon the “on-deck” content and applications offered by a provider, they are also free to reach beyond the provider’s offerings, and to enjoy the virtually unlimited opportunities made available by third-party developers. The recent announcements discussed above, moreover, demonstrate that wireless providers are developing new ways to make their networks even more open every day.

Claim: **Handset exclusivity limits smaller providers’ access to smartphones.**

Fact: **Providers of all sizes offer a wide variety of advanced smartphones, including some of the most advanced models offered by the nationwide providers.**

Cellular South argues that “exclusive device arrangements between national wireless carriers and device manufacturers are ... interfering with the opportunity of small rural and regional carriers to acquire new and popular devices for their customers.”²⁰² Verizon Wireless addresses the demands by Cellular South and others to ban these agreements below, but notes here that Cellular South’s factual claim is simply false.

Non-nationwide providers offer many of most highly demanded smartphone models available. The most popular smartphone in the nation for the first half of 2009 – the BlackBerry Curve (models 83XX)²⁰³ – is available to any carrier, and in fact is sold by Cellular South, as

²⁰⁰ AT&T VoIP on iPhone Press Release.

²⁰¹ *Id.*

²⁰² Comments of Cellular South, Inc., WT Docket No. 09-66, 3 (filed Sept. 30, 2009) (“Cellular South Comments”).

²⁰³ See *BlackBerry Curve is the top selling smart phone in the second quarter*, PHONEARENA.COM, Aug. 4, 2009, <http://www.phonearena.com/htmls/BlackBerry-Curve-is-the-top-selling-smartphone-in-the-U.S.-during-the-second-> (continued on next page)

well as MetroPCS, U.S. Cellular, Cellular One, Centennial, Cincinnati Bell, NTELOS, Alaska Communications System, Bluegrass Cellular, and Viaero. Indeed, Cellular South itself offers three BlackBerry models – the Curve 8330, the Pearl, and the new Pearl Flip – as well as three other smartphones – the HTC Touch Pro, the HTC Touch Diamond, and the HTC Touch Hero, an Android™-powered smartphone.

F. Claims Regarding the Terms and Conditions of Customer Service Contracts Are Erroneous.

Claim: **Wireless consumers are subject to automatic contract extensions and are “locked into” long-term contracts.**

Fact: **National carriers no longer employ automatic contract extensions, and consumers enjoy a wide array of options involving no long-term commitment whatsoever.**

CFA *et al.* assert that “automatic contract extension provisions present substantial obstacles for consumer movement between carriers,”²⁰⁴ but provides no facts or data to support its claim. New Jersey Rate Counsel similarly argues against “plans that lock in customers ... [and] thwart competition.”²⁰⁵ Both claims reflect an outdated understanding of the wireless market.

First, as the Commission has recognized, Verizon Wireless and other providers have eliminated automatic contract extensions. In the *Thirteenth Report*, the Commission found that “[a]s of June 2008, AT&T, Verizon Wireless, Sprint Nextel, T-Mobile, and Alltel ha[d] each implemented various policies that allow customers the option of changing elements of their

[quarter-article-a_6309.html#atuid-490f1ce33f7d279b](#); Lance Whitney, *BlackBerry Curve outsells the iPhone 3G*, CNET NEWS, May 4, 2009, <http://news.cnet.com/blackberry-curve-outsells-the-iphone-3g/>.

²⁰⁴ See CFA *et al.* Comments at 14.

²⁰⁵ Comments of the New Jersey Division of Rate Counsel, WT Docket No. 09-66, 7 (filed Sept. 30, 2009) (“Rate Counsel Comments”).

contracts without requiring a contract extension, and they each permit customers various periods of time to try their services so that if they are not fully satisfied they can change plans without penalties.”²⁰⁶ Simply stated, these providers permit customers to change calling plans without any required contract extension.²⁰⁷

Second, claims regarding “plans that lock in customers” reflect an extremely distorted view of the wireless industry. Customers may choose long-term contract agreements in exchange for the sort of term discounts that are common in nearly all businesses, and that enhance consumer welfare.²⁰⁸ Often, these customers also enjoy a heavily discounted price for their new devices, with carriers recouping some or all of the discount over the course of the customer’s term commitment. But, in today’s market, the suggestion that customers who do not wish to commit to contracts *must* do so is preposterous. As detailed at length in Verizon Wireless’s initial comments, these customers have many options. They may choose prepaid service on a time- or volume-limited basis, and at ever-falling prices, from a growing set of providers.²⁰⁹ In addition, customers not interested in prepaid service have the option to subscribe to month-to-month service plans. Verizon Wireless, for example, offers a month-to-month, no-

²⁰⁶ *Thirteenth Report*, 24 FCC Rcd at 6244-45 ¶ 114; *see also* TOPPER DECLARATION at 46 (“[T]he major wireless providers have put in place policies that allow consumers to change contract options without triggering a contract extension.”).

²⁰⁷ *See, e.g.*, Letter from Christopher Guttman-McCabe, CTIA-The Wireless Association ®, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 05-194 & 08-27 (filed June 11, 2008).

²⁰⁸ *Cf.* Access Charge Reform, *Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry*, 11 FCC Rcd 21354, 21435 ¶ 187 (1996) (“[Volume and term] discounts should be permitted . . . because they encourage efficiency and full competition.”).

²⁰⁹ These prepaid providers include not only nationwide providers such as Sprint and T-Mobile but also a host of other providers, such as TracFone, Leap, and Page Plus, offering facilities-based and resold prepaid services. *See generally* Verizon Wireless Comments at 65-69.

ETF option for all of its nationwide voice and data plans.²¹⁰ These plans permit a customer to cancel service in *any month* without incurring an ETF.

Thus, claims that carriers employ automatic contract extensions and otherwise “lock” customers in do not represent the reality of the current wireless market.

Claim: **Consumers do not have access to adequate information regarding their service plans, and incur “hidden” charges.**

Fact: **Providers offer existing and prospective subscribers a plethora of easily accessible information regarding all aspects of their service plans.**

CFA *et al.* incorrectly claim that the “information that carriers make available to customers and regulators alike about their prices and terms of service” is “incomplete,” and that providers “shroud[] the true costs of services sold to their customers.”²¹¹ Multiple carriers submitted to the Commission last week extensive data and other information documenting the constant efforts they make to ensure that present and potential customers have all the information they need to make informed decisions.²¹² For example, Verizon Wireless explained that, in a competitive market, it must strive to provide customers with sufficient information about prices and terms of service so that customers can buy the products and services they want. Indeed, Verizon Wireless has modified its bills on several occasions in response to input from focus groups who stressed that simpler information was preferable to more information.

²¹⁰ Press Release, Verizon Wireless, No Contract Required – New Month-To-Month Agreement Gives Verizon Wireless Customers Even More Freedom (Sept. 22, 2008), <http://news.vzw.com/news/2008/09/pr2008-09-22b.html>.

²¹¹ CFA *et al.* Comments at ii, iii.

²¹² Comments of Verizon and Verizon Wireless, CG Docket No. 09-158 *et al.* (filed Oct. 13, 2009) (“Verizon Wireless Truth-in-Billing Comments”); Comments of AT&T, Inc., CG Docket No. 09-158 *et al.* (filed Oct. 13, 2009); Comments of Sprint Nextel Corp., CG Docket No. 09-158 *et al.* (filed Oct. 13, 2009); *see also* Comments of MetroPCS, Inc., CG Docket No. 09-158 *et al.* (filed Oct. 13, 2009); Comments of Rural Cellular Association, CG Docket No. 09-158 *et al.* (filed Oct. 13, 2009).

At the point of sale, Verizon Wireless strives to ensure that every customer obtains the service plan and equipment he or she wants and takes a variety of steps to educate customers, because there is no benefit to the company in having a dissatisfied customer. For example:

- Customers are provided with comprehensive information about their service plan choices, access to detailed coverage maps, and the costs and features of devices.
- Customers are given a Consumer Brochure that describes all prices and terms of available voice and data plans, and a Welcome Guide that contains the customer service agreement.
- The customer signs an Agreement Receipt, which highlights the specific plan selected, the contract term (which may be month-to-month, or for one or two years), and any other services chosen.
- The customer also receives a First Bill Estimate receipt, which describes the expected charges that will appear on the customer's first bill.
- The customer is then sent a Confirmation Letter which provides yet another description of the customer's plan, the activation fee, the contract end date, and how the customer can check minutes used and the balance on the account.

To the extent anything in the confirmation letter is not what the customer expected, Verizon Wireless offers a Worry Free Guarantee that allows the customer to cancel service for any reason within the first 30 days.²¹³ In short, there is nothing “incomplete” about the information that customers obtain.

II. IN LIGHT OF THE FACTS AND DATA IN THE RECORD, THE REGULATORY INTERVENTIONS SOUGHT ARE UNWARRANTED.

Wholly unable to provide facts or data to demonstrate that the wireless market is not “effectively competitive,” advocates for expansive regulation instead stock their comments with regulatory demands bearing no relationship to the state of the market. These arguments all relate

²¹³ Verizon Wireless Truth-in-Billing Comments at 31. Verizon Wireless's comments in that proceeding included copies of all of these and other materials that are designed to ensure customers get the information they need.

to ongoing Commission proceedings, and have no place in this docket. Nevertheless, these claims cannot go un rebutted; accordingly, Verizon Wireless responds to the claims raised, and refers the Commission to its pleadings in the relevant proceedings for more comprehensive discussion.

A. Commenters Calling for the Imposition of New Roaming Regulations Provide No Relevant Facts or Economic Analysis to Support the Changes They Seek.

In the *NOI*, the Commission invited parties to provide “general comment on the proper treatment of roaming services in the broader analytical framework under consideration here,”²¹⁴ but noted its intent to resolve such issues based on the record developed in the ongoing roaming proceeding.²¹⁵ Some parties nonetheless took this opportunity to rehash, in full, arguments raised in the roaming docket. Their filings here, as before, are filled with the rhetoric of market failure and calls for new roaming rules. Once again, the facts tell a different story: roaming rates continue to drop dramatically, providing for efficient intercarrier arrangements that foster nationwide plans with roaming offered to consumers at no additional cost; carriers including Verizon Wireless are striking deals for data roaming with partner carriers of all sizes; and the Commission’s decision to refrain from mandating home roaming and data roaming preserves appropriate incentives for network investment.

²¹⁴ *NOI* ¶ 22.

²¹⁵ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007) (“*Roaming Order*”).

1. Parties Advocating Increased Regulation of Roaming Have Failed to Submit Facts or Data that Would Warrant Revision of the Current Regulatory Framework.

Some commenters suggest that the national carriers assess “unfavorable roaming rates” on non-national carriers²¹⁶ and allege that they are engaging in “anti-competitive” roaming practices.²¹⁷ These commenters, aside from failing to provide any relevant facts or data, turn a blind eye to the current framework for roaming and ignore the fact that agreements among carriers have enabled successful roaming for years.

As an initial matter, commenters rely on expansive rhetoric but gloss over the fact that the Commission requires CMRS providers, upon request, to enter into automatic roaming agreements for real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls, at just and reasonable rates, terms and conditions.²¹⁸ That rule has been in effect for over two years and, despite the vitriol in initial comments, to Verizon Wireless’s knowledge not a single carrier has filed a complaint alleging that a particular roaming agreement or practice is unjust or unreasonable or otherwise violates the Commission’s roaming rules.²¹⁹

²¹⁶ Comments of Bright House Networks, WT Docket No. 09-66, 9 (filed Sept. 30, 2009) (“Bright House Comments”).

²¹⁷ NTELOS Comments at 6.

²¹⁸ See 47 C.F.R. § 20.12(a)(1), (d).

²¹⁹ Pointing to a recent agreement between Verizon Wireless and TracFone, the nation’s largest reseller, Cricket alleges that it is improper for Verizon Wireless to charge TracFone less than it “charges facilities-based competitors for substantially similar wholesale services.” Cricket Comments at 7-8. Cricket’s premise is fundamentally flawed, however. As an initial matter, Cricket’s blanket statement fails to take volume discounts into account. As a general matter, moreover, it is not appropriate to compare roaming rates and reseller rates because those rates depend on the distinctly different factors that are present in each situation. For roaming, such factors include whether the roaming partner provides service in an area not served by Verizon Wireless, the size of the roaming partner’s customer base, the extent to which the roaming partner has implemented advanced digital technologies and other features, and the
(continued on next page)

Indeed, despite their vague and undocumented claims that larger carriers act in anti-competitive ways, the fact is that roaming rates have declined dramatically in recent years – and that decline has accelerated during the recent period of consolidation. On this point, Verizon Wireless noted in its initial comments that the rates set forth in Verizon Wireless’s roaming agreements have dropped, on average, roughly 60% in the last five years, and fell roughly 35% in the past two years.²²⁰ It is noteworthy that none of the commenters seeking new roaming regulations has provided any data to refute the proposition that roaming rates have declined dramatically in recent years to the benefit of consumers.

Claims of “unfavorable” roaming arrangements in reality signify smaller carriers’ concern with declining roaming revenues. The Rural Cellular Association, for example, cites the importance of roaming and notes that “roaming revenues typically account for a higher percentage of total service revenues for rural and smaller regional providers than for nationwide carriers.”²²¹ The Commission, however, has previously concluded that “lower [roaming] prices are a product of improved competition that benefits consumers” and that “[w]e do not agree that a reduction in roaming rates shows anticompetitive behavior.... Our statutory duty is to protect efficient competition, not competitors.”²²²

scope of geographic network coverage. Reseller rates, on the other hand, tend to vary based on the potential size of the reseller’s customer base and the perceived ability of the reseller to reach a market segment that the carrier is not otherwise reaching. Given that the rates for roaming partners and resellers are based on a mix of these disparate considerations, it is to be expected that the prices for the different service categories vary widely.

²²⁰ Verizon Wireless Comments at 57.

²²¹ RCA Comments at 11 (quoting the *Thirteenth Report*, 24 FCC Rcd at 6261).

²²² Bell Atlantic Mobile Systems, Inc. and Nynex Mobile Communications Company, *Memorandum Opinion and Order*, 12 FCC Rcd 22280, 22288 ¶ 16 (1997); see also *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (“The purpose of the antitrust laws ... is ‘the protection of *competition*, not *competitors*.’”) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (internal quotation marks omitted)).

Some commenters further contend – again with no facts or data – that the nationwide carriers, due to their expanded coverage, no longer have any incentive to enter into roaming agreements with the smaller carriers.²²³ These parties are again mistaken. T-Mobile rightly observes that “no mobile service provider has deployed facilities ubiquitously throughout the United States,” and thus roaming “will continue to be important to the mobile marketplace.”²²⁴ Indeed, despite network expansion and acquisitions, large carriers like Verizon Wireless continue to depend on roaming agreements with small, medium and large wireless carriers to gain more ubiquitous coverage.

For its part, Verizon Wireless currently has in place more than 50 active domestic roaming agreements,²²⁵ and continues to negotiate new roaming agreements, often involving data service. Further, despite the unsupported claim that “consolidation has made it much more difficult for new entrants and small, rural and regional carriers to negotiate reciprocal roaming agreements,”²²⁶ virtually all of Verizon Wireless’s roaming arrangements have terms that allow for the reciprocal exchange of traffic, and there are only two asymmetric agreements in which the company pays a lower rate than it charges – both legacy Alltel agreements.

MetroPCS asserts that with consolidation, “[i]n many instances, the acquired carriers have offered more favorable roaming arrangements” than acquiring carriers, citing to the

²²³ See MetroPCS Comments at 9; *see also* Comments of Cincinnati Bell Wireless LLC, WT Docket No. 09-66, 3-5 (filed Sept. 30, 2009) (“Cincinnati Bell Comments”); Bright House Comments at 9-10; NTELOS Comments at 6-7; CFA *et al.* Comments at 29-30.

²²⁴ T-Mobile Comments at 24.

²²⁵ This number does not include agreements that are still in effect but for which there is no traffic, nor does it include Alltel’s legacy CDMA and GSM roaming agreements.

²²⁶ MetroPCS Comments at 23.

Verizon-Alltel deal.²²⁷ This unsupported claim is contradicted by the facts. Perhaps most tellingly, pursuant to conditions imposed in connection with the Verizon-Alltel transaction,²²⁸ carriers that previously had roaming agreements with both Alltel and Verizon Wireless have the opportunity to choose whether they preferred their Alltel or Verizon Wireless roaming agreement. Of the 19 carriers that have made their election, 13 carriers, or nearly 70%, chose their Verizon Wireless agreement – a sure sign that the terms upon which Verizon Wireless offers roaming are not only competitive, but compare favorably to large regional providers such as the former Alltel. Nine of the carriers that elected the Verizon Wireless agreement obtained lower roaming rates (with rates decreasing from 20% to 77%); the other four, whose rates either stayed the same or increased slightly, improved or are in the process of implementing improvements in their data roaming position as a result of their election, meaning that they received more for the same or a slightly increased rate. The facts thus undermine claims that the Verizon Wireless/Alltel transaction had an adverse impact on the roaming marketplace.²²⁹

Finally, MetroPCS and others also claim that the so-called “roaming market” is undermined by the purportedly small number of providers supporting the CDMA and GSM air interfaces, respectively.²³⁰ This argument is doubly flawed. First, there is no justification for the separate evaluation of the “roaming market” given the fact that the fiercely competitive retail

²²⁷ *Id.* at 10 n.18.

²²⁸ *See Verizon Wireless / Alltel Merger Order*, 23 FCC Rcd at 17524 ¶ 178.

²²⁹ Rehashing arguments raised in the Verizon Wireless/Alltel merger proceeding, MetroPCS and NTELOS allege that Verizon Wireless is not abiding by the roaming commitments it agreed to as part of the merger. *See* MetroPCS Comments at 31-32; NTELOS Comments at 7. These claims are false; as Verizon Wireless has demonstrated conclusively, it has complied fully with those commitments. *See* Letter from Helgi C. Walker, Counsel to Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 08-95 (filed Sept. 30, 2009); Letter from Helgi C. Walker, Counsel to Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 08-95 (filed July 31, 2009).

²³⁰ MetroPCS Comments at 9; *see also* Cincinnati Bell Comments at 4-5; Cricket Comments at 4, 6-7.

market provides consumers with the service options they desire. Consistent with this principle, the Commission has held repeatedly in the roaming context that “competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices.”²³¹ Second, even if there were cause to evaluate the “roaming market” on its own, CDMA and GSM are each supported by two nationwide providers as well as other regional and smaller providers. The Commission previously concluded that the continued presence of two nationwide carriers along with other regional and local carriers all relying on the same air interface technology is “sufficient to ensure the availability of [] roaming services at competitive rates.”²³² Of course, carriers are not limited to roaming arrangements with the nationwide providers. MetroPCS and Leap, for example, have entered into a mutual roaming agreement which has expanded these companies’ respective abilities to provide roaming services to their customers over a large geographic area.²³³ As MetroPCS observed, “[t]he new nationwide roaming agreement, which has an initial term of 10 years, covers the companies’ existing and future markets, which the parties expect could ultimately encompass virtually all of the top 200 markets in the nation.”²³⁴

²³¹ Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463 (2008) (citing Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21591 ¶ 180 (2004) (“*AT&T/Cingular Merger Order*”); *Roaming Order*, 22 FCC Rcd at 15822 ¶ 13; Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc., *Memorandum Opinion and Order and Declaratory Ruling*, 21 FCC Rcd 13580, 13602 ¶ 36 (2006); Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 11526, 11563-64 ¶ 104 (2006)).

²³² *AT&T/Cingular Merger Order*, 19 FCC Rcd at 21590 ¶ 177.

²³³ See Press Release, MetroPCS Communications, Inc. and Leap Wireless International, Inc., Leap Wireless International, Inc. and MetroPCS Communications, Inc. Enter into National Roaming Agreement and Spectrum Exchange Agreement and Settle Litigation (Sept. 29, 2008), <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1203115>.

²³⁴ See *id.*

All of these facts demonstrate conclusively that the roaming marketplace is functioning properly to the advantage of consumers. Accordingly, the Commission should reject the unsupported claims of the parties advocating increased roaming regulation.

2. The Absence of a Home Roaming Obligation Results In System Expansion and Benefits Consumers.

In the *Roaming Order*, the Commission thoroughly analyzed the implications of home roaming (or in-market roaming) and concluded that an automatic roaming mandate in overlap markets would undercut the goal of facilities-based competition, “negatively affect[ing] build-out in these markets.”²³⁵ As the Commission explained, “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.”²³⁶ In turn, consumers would be “disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage.”²³⁷ The Commission’s reasoning remains sound, and commenters’ arguments to the contrary are unavailing. Carriers of all sizes have continued to expand their footprints in the absence of a home roaming obligation, and this process has worked directly to the benefit of consumers. As even home roaming proponent MetroPCS concedes, “there is a certain logic that underlies the in-market roaming exception. Wireless 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.”²³⁸

²³⁵ *Roaming Order*, 22 FCC Rcd at 15835 ¶ 49.

²³⁶ *Id.* (citation omitted).

²³⁷ *Id.*

²³⁸ MetroPCS Comments at 29. MetroPCS nonetheless asserts that there is a “clear mandate with respect to roaming found in Section 201(a) of the Act,” *id.* at 28, and that the Commission’s finding that the home roaming exception “will somehow promote facilities-based competition does not nearly rise to the level of reasoning necessary to (continued on next page)

Nonetheless, some commenters challenge the Commission's earlier determination that a home roaming mandate would create a disincentive for network deployment.²³⁹ These commenters contend that they would have ample incentive to build in less populated areas even if they were able to piggyback on their competitors' networks. According to MetroPCS, for example, "because the Requesting Carrier is required to pay a roaming rate that includes profit for the Supplying Carrier, the Requesting Carrier will still be incented to build its own competing network on which it can supply its own roaming at a lower cost."²⁴⁰ These claims are not credible. Indeed, the business models of some mid-size carriers tell a very different story. Leap's Corporate Profile readily acknowledges that its business strategy is to build only in the most populous areas:

Leap is a wireless communications provider that offers innovative, high-value wireless services under the "Cricket" brand.... *Leap keeps costs low by engineering high-quality, efficient networks covering only the urban and suburban areas where its potential customers live, work and play* enabling it to sell its wireless minutes for less than it costs other carriers to produce theirs.²⁴¹

Leap's business plan thus acknowledges that the company has no intention of investing in the cost of maintaining a network outside "urban and suburban areas." This business profile explains why Leap and others are so eager for the Commission to impose a home roaming

ignore" that mandate, *id.* Insofar as the Commission found roaming to be a common carrier service, the Act prohibits only unjust and unreasonable discrimination, and the Commission is well within its authority to decide what practices are "reasonable" in a particular context. A notable example involves the Commission's decision to eliminate the CMRS resale requirement despite the fact that resale had been deemed a common carrier obligation. Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd 18455 (1996). The Commission's determination that home roaming would deter buildout followed a detailed analysis and was fully supported by the record in that proceeding.

²³⁹ MetroPCS Comments at 29-30; NTCA Comments at 3-4.

²⁴⁰ MetroPCS Comments at 30.

²⁴¹ Leap, Corporate Profile, http://phx.corporate-ir.net/phoenix.zhtml?c=95536&p=irol-homeProfile_pf (emphasis added) (last visited Oct. 19, 2009).

mandate. But there is no basis for the Commission to reverse its earlier finding that a home roaming obligation would deter buildout.

Elsewhere, MetroPCS asserts that the home roaming exception acts as a deterrent to small and mid-size carriers who will avoid acquiring spectrum in new markets rather than lose their roaming rights in those markets by acquiring spectrum and not building out.²⁴² But there is no evidence to support this assertion; to the contrary, small and mid-size carriers participated heavily in previous spectrum license auctions notwithstanding the absence of a home roaming right.

For these reasons, Verizon Wireless supports the *Roaming Order's* approach, which favors negotiated commercial agreements that allow for home roaming based on market conditions rather than blunt mandates. Nonetheless, as noted in its initial comments, Verizon Wireless has offered a proposal that would allow all carriers to avail themselves of home roaming for two years if the carrier holds spectrum but does not offer service in the requested market(s), with the possibility of extending that period under certain circumstances.²⁴³ Notably, home roaming proponent U.S. Cellular expressed some support for such a policy, asserting there could be “a reasonable time limit to ensure eventual system buildout.”²⁴⁴

²⁴² MetroPCS Comments at 30.

²⁴³ Verizon Wireless Comments at 59.

²⁴⁴ U.S. Cellular Comments at 15.

3. Parties Advocating Data Roaming Regulation Fail to Provide Data Demonstrating Any Market Failure or Any Other Reason to Impose Such Economic Regulation.

Some commenters also call on the Commission to “extend[] the automatic roaming obligation to all mobility services, including broadband voice and data services.”²⁴⁵ Cellular South has suggested – without any facts – that “large national wireless carriers have shown little inclination to negotiate with small rural and regional carriers to enter into mobile data roaming agreements with reasonable rates, terms, and conditions.”²⁴⁶ Yet large providers, including Verizon Wireless, are entering into reasonable data roaming agreements. Once again, these commenters allege the need for Commission action without providing data or economic analysis, and the limited facts they provide are often wrong.

Verizon Wireless makes data roaming available to technologically compatible requesting carriers today, and 1xRTT data roaming is commonplace. Similarly, roaming agreements with small and rural wireless carriers for CDMA EV-DO are becoming available as other CDMA carriers invest in their own EV-DO networks.

Of Verizon Wireless’s active roaming agreements, approximately 33 percent include data roaming today, and another roughly 30 percent involve roaming partners that have not requested data. With regard to the remaining roaming partners, data roaming arrangements have been reached with seven parties (although these agreements have not yet been implemented), and discussions are still ongoing with the remaining 15 carriers. AT&T likewise has roaming agreements for 2G data services and anticipates similar agreements as more carriers deploy

²⁴⁵ Bright House Comments at 4; *see also* U.S. Cellular Comments at 16.

²⁴⁶ Cellular South Comments at 18; *see also* Cincinnati Bell Comments at 3-4.

networks supporting 3G and ultimately 4G services.²⁴⁷ These facts demonstrate that the competitive marketplace can and will ensure that data roaming agreements will be negotiated in response to market and technological developments.

Specific factual claims raised by Cellular South and NTELOS regarding data roaming are false. In response to Cellular South's particular allegation regarding larger carriers' lack of interest in reaching data roaming agreements, it is worth noting that Verizon Wireless has a roaming agreement with the company for EV-DO traffic and recently reached agreement to extend the arrangement. NTELOS suggests that Verizon Wireless has been unwilling to enter an EV-DO roaming arrangement provided for in its legacy Alltel roaming agreement.²⁴⁸ Specifically, NTELOS states that it has deployed EV-DO, that its roaming agreement with Alltel "provided for such data roaming," and that NTELOS "mistakenly believed" that Verizon would "honor the terms of NTELOS' roaming agreement with ALLTEL on broadband data roaming."²⁴⁹ The obvious inference is that Verizon Wireless refused to accept NTELOS's request for EV-DO roaming as part of its roaming agreement with Alltel. There is no truth to this allegation – NTELOS never implemented data roaming with Alltel and Verizon Wireless has not received a request for EV-DO roaming from NTELOS.

Further, some parties propose a data roaming mandate applicable "to each step of future technology evolution."²⁵⁰ As Verizon Wireless observed in its initial comments, such an expansive data roaming obligation would undermine the incentives for investment, innovation

²⁴⁷ AT&T Comments at 91.

²⁴⁸ NTELOS Comments at 7.

²⁴⁹ *Id.*

²⁵⁰ *See, e.g.*, U.S. Cellular Comments at 16-17.

and next-generation buildout. The Commission properly concluded in the *Roaming Order* that “allowing competitors in a marketplace to gain competitive advantage from their own innovations results in value to subscribers – in terms of new service offerings and features.”²⁵¹ Accordingly, carriers offering a new product have an incentive to provide their customers with these new service offerings and features, and then to negotiate with roaming partners who have implemented similar advanced technology to ensure their customers have access to the same services when they travel. The Commission should allow market forces benefitting consumers to continue to work, and should not disrupt them through regulatory intervention.

Finally, the Commission lacks legal authority to impose data roaming obligations in any event. The Commission previously concluded that wireless broadband Internet access services are information services.²⁵² As such, the Commission is precluded from imposing Title II common carrier-based regulatory requirements. In addition, neither Title I nor Title III provide a proper jurisdictional basis for the Commission to require data roaming.²⁵³

B. Handset Exclusivity Arrangements Benefit the Public, and Critics Provide No Evidence to the Contrary.

Several commenters argue that exclusive handset arrangements between the four national carriers and equipment manufacturers restrict competition. According to these claims, smaller rural and regional carriers are at a competitive disadvantage because consumers increasingly pick

²⁵¹ *Roaming Order*, 22 FCC Rcd at 15845 ¶ 79.

²⁵² Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Declaratory Ruling*”).

²⁵³ See Comments of Verizon Wireless, WT Docket No. 05-265, at 1-7 (filed Oct. 29, 2007); Reply Comments of Verizon Wireless, WT Docket No. 05-265 (filed Nov. 28, 2007).

carriers based on the availability of handset models and the four national carriers use their market power to restrict access to the latest handsets and smartphones.²⁵⁴

The facts concerning the distribution of mobile handsets in the United States simply do not support these claims. Indeed, all the assumptions underlying these allegations are incorrect. As noted above, the records compiled here and in the FCC's docket opened specifically to receive comment on these claims²⁵⁵ demonstrate that the mobile handset market is robustly competitive, and increasingly more so, and that exclusive handset arrangements promote rather than harm competition.²⁵⁶ Moreover, no mobile provider or handset manufacturer has sufficient market power to restrict competition for handsets.²⁵⁷

Critics of handset exclusivity arrangements do not document their claims of harm. For example, MetroPCS cites no facts at all supporting its claim that exclusive handsets harm

²⁵⁴ See Cellular South Comments at 16; CFA *et al.* Comments at 27; MetroPCS Comments at 39-41; NTCA Comments at 2-3; NTELOS Comments at 4-6; RCA at 6-8; RTG Comments at 6-7; U.S. Cellular Comments at 9-11; see also Cincinnati Bell Comments at 3. NTELOS asks the FCC to look into software programs used on handsets, claiming that the use of differing software programs for various carriers makes it more difficult to offer handsets with the latest features. NTELOS Comments at 5. Even if the FCC had jurisdiction to review the content of software programs, which it does not, see *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), the record in this docket reflects a substantial array of operating systems for mobile handsets, some of which offer open platforms for any developer. See Verizon Wireless Comments at 129-31; AT&T Comments at 62-64. MetroPCS suggests that the FCC should examine whether it should regulate content licensing agreements between mobile providers and content providers. MetroPCS Comments at 41. There is, obviously, no legal basis for the FCC to impose restrictions on delivery of content to mobile subscribers. See *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (striking down a FCC requirement that television programmers provide video descriptions services, because the FCC had no authority to adopt such content regulation).

²⁵⁵ Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (filed May 20, 2008).

²⁵⁶ See Verizon Wireless Comments at 122-25; AT&T Comments at 41-48, 54-59; Comments of Verizon Wireless Requesting Dismissal or Denial of Petition, RM-11497, at 11-28 (filed Feb. 2, 2009).

²⁵⁷ TOPPER DECLARATION at 29-31, 38-40; DECLARATION OF ROBERT D. WILLIG ¶¶ 49-53 (Sept. 30, 2009) ("WILLIG DECLARATION"), attached as Exhibit to AT&T Comments; B. NIGRO & M. TRAHAR, AN ANTITRUST PERSPECTIVE IN RESPONSE TO SKYPE'S PETITION, 3-4 (Apr. 26, 2007), attached as Exhibit D to Opposition of CTIA—The Wireless Association®, RM-11361 (filed Apr. 30, 2007).

competition or consumers.²⁵⁸ RCA alleges that 46 of the top 50 best selling handsets are subject to exclusivity arrangements, but provides no list of devices, no demonstration of what it deemed to be an exclusivity arrangement, and no other details that would allow review of this claim.²⁵⁹

When the facts are reviewed, it becomes clear that competition in the handset market is robust in terms of both the sheer number of handsets available and the availability of high-tech functionalities. There are literally hundreds of devices available, through nearly three dozen manufacturers.²⁶⁰ And, while exclusive arrangements may restrict availability of a specific handset model, no wireless carrier or handset manufacturer can restrict access to the latest technologies.²⁶¹ The end result is that any mobile provider, large or small, rural regional or national, can market compelling devices – and many do – all to the benefit of U.S. consumers.²⁶²

Indeed, the facts demonstrate that small carriers have access to handsets incorporating new and innovative technologies. For example, RCA’s members offer a wide array of handsets, including handsets with Internet access, email, touch screens, and music applications.²⁶³

- The top-selling smartphone in the United States, the BlackBerry Curve (models 83XX),²⁶⁴ is distributed by over a dozen mobile providers, including the very providers

²⁵⁸ See MetroPCS Comments at 39-41.

²⁵⁹ See RCA Comments at 6.

²⁶⁰ See CTIA Comments at 17-18; AT&T Comments at 4, 13, 46; Verizon Wireless Comments at 107.

²⁶¹ See TOPPER DECLARATION at 29-31; AT&T Comments at 47-48; WILLIG DECLARATION ¶¶ 52-56.

²⁶² See Verizon Wireless Comments at 109-10; AT&T Comments at 41-54; MICHAEL KATZ, AN ECONOMIC ANALYSIS OF THE RURAL CELLULAR ASSOCIATION’S PETITION FOR RULEMAKING REGARDING EXCLUSIVITY ARRANGEMENTS BETWEEN COMMERCIAL WIRELESS CARRIERS AND HANDSET MANUFACTURERS (Feb. 2, 2009), attached as Exhibit to Comments of AT&T Inc., RM-11497 (filed Feb. 2, 2009) (“KATZ HANDSET EXCLUSIVITY DECLARATION”).

²⁶³ KATZ HANDSET EXCLUSIVITY DECLARATION at 20, 29 Table 1 (listing specific devices and features).

²⁶⁴ See Marin Perez, BlackBerry Curve Outsells iPhone 3GS, Information Week, Aug. 5, 2009, http://www.informationweek.com/news/mobility/smart_phones/showArticle.jhtml?articleID=219100117; AT&T Comments at 42.

that make these claims here (Cellular South, Cincinnati Bell, MetroPCS, NTELOS and U.S. Cellular).²⁶⁵

- The BlackBerry Pearl, also among the top-selling smartphones, is distributed by a similar number of providers (including Cellular South, Cincinnati Bell, NTELOS, and U.S. Cellular).
- The HTC Touch Pro2 and Touch Diamond, also in the top-ten smartphones, are distributed by multiple providers.²⁶⁶

In fact, one of the major critics of handset exclusivity agreements, Cellular South, just announced on September 21, 2009, the introduction of the HTC Touch Hero, an Android™-powered smartphone that “gives consumers access to the Company’s Superior 3G Network, Unique Apps and Discover Center Support.”²⁶⁷ Cellular South’s announcement stated that the Hero was the “first of a variety of Android-powered smartphones Cellular South plans to offer in the near future.”²⁶⁸ In addition, several other carrier critics each carry devices that are offered by no other carrier:

- Cincinnati Bell Wireless is the only carrier to offer the Nokia 5800, a touchscreen phone with a 3.2” display (nearly the size of the iPhone’s screen) which offers rich media-playing capabilities, a 3.2 megapixel camera with video recording, integrated FM radio, and more.²⁶⁹

²⁶⁵ The wireless providers include: AT&T, Alaska Communications Systems, Bluegrass Cellular, Cbeyond, Cellular One, Cellular South, Centennial Wireless, Cincinnati Bell, MetroPCS, NTELOS, Sprint, T-Mobile, U.S. Cellular, Verizon Wireless, Viaero Wireless, and Virgin Mobile. See BlackBerry, Smartphone by Carrier, <http://na.blackberry.com/eng/devices/blackberrycurve8300> (last visited Oct. 16, 2009).

²⁶⁶ See HTC, Where to Buy, http://www.htc.com/us/where_to_buy.aspx (last visited Oct. 16, 2009).

²⁶⁷ Press Release, Cellular South, Cellular South Announces Launch of the HTC Hero; Android-Powered Smartphones Poised for Success (Sept. 21, 2009), <http://www.cellularsouth.com/news/2009/20090921.html>.

²⁶⁸ *Id.*

²⁶⁹ Cincinnati Bell, Cincinnati Bell Wireless Phones & Devices, http://www.cincinnati-bell.com/consumer/wireless/phones_and_devices/ (last visited Oct. 18, 2009) (claiming the Nokia 5800 as a “Cincinnati Bell Exclusive Touch Phone.”); see also Darren Murph, *Cincinnati Bell lands Nokia’s XpressMusic 5800: \$149.99*, ENGADGET, May 3, 2009, <http://www.engadget.com/2009/05/03/cincinnati-bell-lands-nokias-xpressmusic-5800-149-99-on-contr/> (noting that “[f]or the second time in as many months, the aforesaid carrier [Cincinnati Bell Wireless] has somehow managed to land a white-hot Nokia handset before any other operator in America.”).

- U.S. Cellular is the only carrier to offer the LG Bliss, one of the thinnest and lightest touchscreen phones, with a full HTML browser and 2.0 megapixel camera.²⁷⁰

Coupled with claims that exclusivity arrangements harm competition are claims that handset exclusivity arrangements provide no benefits to consumers, and in fact harm consumers and consumer choice.²⁷¹ Again, the facts do not support these claims.²⁷² Multiple economists and other industry experts have gone on record stating that handset exclusivity arrangements promote competition and provide substantial benefits to consumers.²⁷³ Exclusive handset agreements promote competition by allowing carriers to distinguish themselves from their competition and engage in targeted development and promotional activities to better meet

²⁷⁰ U.S. Cellular, LG Bliss, [http://www.uscc.com/uscellular/SilverStream/Pages/b_phonedetail.html?phoneID=245&price=\\$](http://www.uscc.com/uscellular/SilverStream/Pages/b_phonedetail.html?phoneID=245&price=$) (last visited Oct. 18, 2009); *see also* U.S. Cellular, Home Page, <http://www.uscc.com/uscellular/SilverStream/Pages/uscellular.html> (last visited Oct. 18, 2009) (advertising the LG Bliss as “So cool only one wireless company has it – Us; Find your bliss exclusively at U.S. Cellular®: get the LG Bliss™ and use it on our 3G Network”).

²⁷¹ *See* MetroPCS Comments at 39-40; NTCA Comments at 3. One economist did provide limited support to handset exclusivity critics. *See* WILLIAM P. ROGERSON, AN ECONOMIC ANALYSIS OF EXCLUSIVITY ARRANGEMENTS BETWEEN THE BIG FOUR WIRELESS CARRIERS AND HANDSET MANUFACTURERS AND A PROPOSAL FOR A MODEST RESTRICTION ON THESE EXCLUSIVITY ARRANGEMENTS 7, attached to Reply Comments of U.S. Cellular Corp., RM-11497 (filed Feb. 20, 2009). Rogerson proposes that the exclusivity agreements entered into by the “Big Four” nationwide providers would apply only against the other Big Four. But, if U.S. Cellular launched the next iPhone with an exclusivity agreement, then all the consumers in rural areas which U.S. Cellular does not serve would be denied the U.S. Cellular iPhone in the same manner that U.S. Cellular criticizes the current market for denying those same consumers the AT&T iPhone. This proposal serves only to show that the proponents of restrictions on handset exclusivity care nothing about which handsets subscribers can get, but only which handsets a mobile provider can sell.

²⁷² Verizon Wireless Comments at 122-25.

²⁷³ *See* TOPPER DECLARATION, at 37-40; KATZ HANDSET EXCLUSIVITY DECLARATION; WILLIG DECLARATION ¶¶ 52-56; Comments of Everett M. Ehrlich, *et al.*, GN Docket Nos. 09-157 & 09-51, WT Docket No. 09-66 (filed Sept. 30, 2009); ROBERT W. HAHN & HAL J. SINGER, WHY THE IPHONE WON’T LAST FOREVER AND WHAT THE GOVERNMENT SHOULD DO TO PROMOTE ITS SUCCESSOR (Sept. 1, 2009), <http://ssrn.com/abstract=1477042>; R. HAHN *ET AL.*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, THE ECONOMICS OF ‘WIRELESS NET NEUTRALITY’, 21-24 (Apr. 2007), attached as Exhibit E to Opposition of CTIA-The Wireless Association®, RM-11361 (filed Apr. 30, 2007); *The Consumer Wireless Experience, Hearing before the Senate Committee on Commerce, Science & Transportation*, 111th Cong., 1st Sess. 6-15 (June 17, 2009) (written Statement of Barbara Esbin, Progress and Freedom Foundation), http://commerce.senate.gov/public_files/EsbinTestimonyConsumerWireless.pdf; MARK LOWENSTEIN, THE EVOLVING ROLE OF HANDSETS IN THE U.S. WIRELESS INDUSTRY, 7-8 (Jan. 2009), attached as Exhibit A to Comments of Verizon Wireless Requesting Dismissal or Denial of Petition, RM-11497 (filed Feb. 2, 2009).

consumer needs.²⁷⁴ Exclusive handset arrangements facilitate investment in development and marketing of new designs or technology to attract consumers, who, in this market, can and do switch carriers.²⁷⁵ They also spur innovation throughout the industry as other handset manufacturers and service providers attempt to compete with new products.²⁷⁶ Such conclusions are consistent with the overwhelming weight of economic analyses that innovation is one of the principal benefits of such vertical arrangements between providers and equipment manufacturers.²⁷⁷

Of course, to the extent these complaints regarding access to “new and popular devices” refer specifically to the iPhone and iPhone 3G, Verizon Wireless notes that it, too, lacks access to these devices. The same is true of the Google G1 and other handset models. Verizon Wireless recognizes, however, that consumers are served by the current freedom of device manufacturers and carriers to enter into mutually beneficial agreements that promote investment and risk-taking, not only by the device manufacturers themselves but also in conjunction with the carriers, who may contribute to research and development and promote new devices in exchange for exclusive rights to a device. Sometimes these risks bear fruit; in those cases, consumers reap the benefits of innovation and those who staked their capital are rewarded. Other times the risks

²⁷⁴ See WILLIG DECLARATION at 13; *see also* KATZ HANDSET EXCLUSIVITY DECLARATION at 9-15.

²⁷⁵ See TOPPER DECLARATION at 37; KATZ HANDSET EXCLUSIVITY DECLARATION at 9-15; WILLIG DECLARATION at 13-14.

²⁷⁶ See TOPPER DECLARATION at 38; WILLIG DECLARATION at 14; KATZ HANDSET EXCLUSIVITY DECLARATION at 6.

²⁷⁷ See KATZ HANDSET EXCLUSIVITY DECLARATION at 1 (“It is widely accepted in legal, public policy, and economic analysis that exclusive contracts frequently promote competition and consumer welfare. Exclusivity arrangements can promote competition and increase incentives for suppliers to engage in: (a) facilities investment and innovation, and (b) customer service and promotional activities. These effects arise because exclusive contracts provide a means for parties to commit to dealing with one another and, thus, such contracts can increase the incentives for the parties to invest in their economic relationship.”).

do *not* pan out, and the entities investing must bear the losses.²⁷⁸ Critics appear to covet the rewards of *successful* risk-taking associated with handsets, without indicating any willingness to take the risks themselves, or to bear potential losses. As T-Mobile explains: “Eliminating these agreements will erode, not enhance, competition and – more specifically – innovation.”²⁷⁹

Some commenters recite a litany of other alleged consumer harms associated with exclusivity arrangements. For example, they claim that such deals drive up prices of handsets generally²⁸⁰ and restrict access to innovative mobile applications.²⁸¹ But the documented facts are that handset prices are falling, including the prices for smartphones.²⁸² Moreover, the allegations that exclusive handset deals restrict access to innovative mobile applications is patently ridiculous. There has been explosive growth in the number of mobile applications available on various competing platforms, and new “app stores” are announced almost daily.²⁸³ As recently as four years ago, virtually none of these applications even existed.²⁸⁴ Indeed, the mobile application market is characterized by openness to any developer and user.²⁸⁵

²⁷⁸ See *Ex Parte* Letter from John T. Scott, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, RM-11497, WT Docket No. 09-66 (filed July 17, 2009) (attaching letter from Verizon Wireless President and CEO Lowell C. McAdam to legislators) (“We work closely with our vendors to develop new and exciting devices that will attract customers. When we procure exclusive handsets from our vendors we typically buy hundreds of thousands or even millions of each device. Otherwise manufacturers may be reluctant to make the investments of time, money and production capacity to support a particular device. This of course constitutes a major risk for us, because if the device is not popular in the marketplace we end up with excess inventory and potential competitive losses.”).

²⁷⁹ T-Mobile Comments at 38.

²⁸⁰ See NTCA Comments at 3; RCA Comments at 10.

²⁸¹ See CFA *et al.* Comments at 17.

²⁸² See Verizon Wireless Comments at 118-19; WILLIG DECLARATION ¶ 49.

²⁸³ See Verizon Wireless Comments at 125-33; Matt Richtel & Laura Holson, *Play Flute, Name a Tune (or Make a Call)*, NEW YORK TIMES (Jan. 1, 2009) (the popularity of applications for Apple’s iPhone “is driving a fierce competition among the makers of the BlackBerry and Palm devices, and even Google and Microsoft”).

²⁸⁴ Even two years ago, wireless applications were in their nascent stages. Comparing Q2 2007 to Q2 2009, the differences are astounding. In Q2 2007, approximately 13 million mobile consumers downloaded a mobile application on their phone. See Press Release, Increased Availability of GPS on Mobile Phones Drives (continued on next page)

In addition, some critics of exclusive handset arrangements allege that they create a barrier to new entry into the wireless market and a barrier to growth of broadband services because they force reduction in revenues to rural and small carriers.²⁸⁶ But, as the facts above demonstrate, there are no barriers to entry and investment into the mobile wireless industry created by such arrangements.²⁸⁷

As the FCC has recognized, the competition laws are designed to protect consumers and competition, not competitors.²⁸⁸ Competition in the wireless handset market is robust and consumers benefit from the competitive environment in all areas of the United States.²⁸⁹ Mobile handset exclusivity arrangements promote competition and innovation and benefit consumers.

C. The Backhaul Marketplace Is Increasingly Competitive, and Commenters Provide No Credible Evidence or Data to the Contrary.

The competition in backhaul services is particularly vigorous in urban and suburban areas where demand for high-capacity services from cell sites and commercial businesses is most concentrated. Even in less concentrated, more rural areas, there is emerging demand for high-

Consumption of Navigation and Other Location-Based Services, Telephia Says” (Oct. 10, 2007), <http://www.marketwire.com/press-release/Telephia-779241.html>. Q2 2007 also brought in \$118 million in revenue from mobile applications. *Id.* Two years later, Apple alone earns between \$60 million to \$110 million in quarterly revenue from its App Store. See Nick Wingfield, *Sizing Up Apple’s App Store*, WALL STREET JOURNAL, Sept. 24, 2009, http://blogs.wsj.com/digits/2009/09/24/sizing-up-apple%e2%80%99s-app-store/?mod=rss_WSJBlog?mod=

²⁸⁵ Verizon Wireless Comments at 127-33; TOPPER DECLARATION at 40-43.

²⁸⁶ See MetroPCS Comments at 40; RCA Comments at 8; U.S. Cellular Comments at 10-11.

²⁸⁷ Verizon Wireless Comments at 47-60; CTIA Comments at 12-13; see *supra* notes 255-270 and accompanying text.

²⁸⁸ *E.g.*, Applications of Craig O. McCaw, Transferor, and American Tel. & Telegraph Co., Transferee, *Memorandum Opinion and Order and Order on Reconsideration*, 10 FCC Rcd 11786, 11792-93 ¶ 9 (1995).

²⁸⁹ *Thirteenth Report*, 24 FCC Rcd at 6189 ¶ 2, 6238-43 ¶¶ 102-109.

capacity services.²⁹⁰ As Verizon Wireless and other wireless providers have upgraded to 3G and 4G networks,²⁹¹ wireless traffic volumes have increased exponentially, boosting demand for backhaul services. Because no carrier has existing facilities to meet this exponential growth in demand, no carrier has an inherent advantage in the marketplace. A host of providers – including cable companies, CLECs, fiber providers, and fixed wireless companies – are competing to provide these high-capacity services.

Several commenters, however, attempt to paint a different picture and assert that competitors are not providing high capacity services for backhaul. These assertions are not credible. Clearwire, for example, asserts that “lack of affordable backhaul access may limit the ability even of well-funded providers like Clearwire to enter markets where competition is unavailable.”²⁹² Clearwire’s assertion stands in stark contrast to the story it is telling investors. Clearwire claims to have “one of the largest wireless backhaul networks in the world”²⁹³ and has told analysts that it is investing in microwave equipment so it can self-provision facilities to meet “roughly 80 percent of its [wireless] backhaul [needs] ... from microwave links.”²⁹⁴

U.S. Cellular argues that the “there are no effective competitive alternatives for many cell sites, particularly in rural areas,” because “[t]he capacity required to serve most cell sites and their locations do not support a dedicated fiber or wireless backhaul connection,” preventing

²⁹⁰ While there are some very remote areas where high capacity backhaul facilities are unavailable, and such areas may need additional government support for new facilities, they do not present a situation where any one carrier has an advantage.

²⁹¹ See, e.g., AT&T Comments at 2 (“AT&T is expanding the availability and quality of its 3G mobile broadband network, while at the same time investing heavily in 4G Long-Term Evolution (‘LTE’) technology.”).

²⁹² Comments of Clearwire Corporation, WT Docket No. 09-66, 8 (filed Sept. 30, 2009).

²⁹³ *Leap Wireless International at Jefferies Panel Discussion*, Fair Disclosure Wire, Transcript 090908ay.703 (Sept. 9, 2008) (statement by Scott Richardson, Chief Strategy Officer, Clearwire).

²⁹⁴ JOHN HODULIK, UBS INVESTMENT RESEARCH, CLEARWIRE CORP., 13 (Dec. 19, 2008).

parties other than the incumbent carrier from self-provisioning facilities.²⁹⁵ U.S. Cellular’s argument is based on the assumption that a “typical single cell site requires one or two DS-1 lines.”²⁹⁶ But this assumption is no longer valid, as Verizon Wireless and other wireless providers (including U.S. Cellular) are upgrading their networks to support much higher traffic volumes associated with 3G and 4G services and the high-bandwidth applications they facilitate.²⁹⁷ These network upgrades are driving up the demand for backhaul services and making it necessary to upgrade to higher-capacity facilities. With these upgraded networks, a cell site may require as much as 100 Mbps of capacity, which is the equivalent of about 65 DS1s (i.e., more than two DS3s). These increased demands for higher-capacity services make it more attractive for competitors to deploy facilities to cell sites, even in rural areas.²⁹⁸

Moreover, in many cases, competitors already have facilities near cell sites and do not need to deploy a new dedicated fiber or wireless backhaul connection. Given their extensive networks, cable companies can readily serve cell sites in the areas where they operate. In 2008, the Chief Operating Officer of Comcast told Wall Street that backhaul services using the facilities that Comcast “already [has] out there” offer the company a “huge opportunity,” and that Comcast will be able to provide backhaul “cheap[er] than the typical alternative.”²⁹⁹ Similarly, the Chief Operating Officer for Time Warner Cable has indicated that, because the

²⁹⁵ U.S. Cellular Comments at 12.

²⁹⁶ *Id.*

²⁹⁷ See *LTE Standard Nailed Down as Carriers Carefully Plan Deployments*, COMMUNICATIONS DAILY, Sept. 01, 2009; Ian Channing, *Twelve Operators Commit to LTE Deployment in 2010*, FIERCEWIRELESS, Jun. 17, 2009, <http://www.fiercewireless.com/europe/story/twelve-operators-commit-lte-deployment-2010/2009-06-17>.

²⁹⁸ As discussed below, even DS1 facilities are becoming less expensive to provision. See *infra* note 306 and associated text.

²⁹⁹ Comcast Corporation at Merrill Lynch Media Fall Preview-Final, Fair Disclosure Wire, Transcript 090908aw.749 (Sept. 9, 2008) (statement by Steve Burke, President and Chief Operating Officer, Comcast).

company's fiber is close to cell towers, it will not require "much incremental expense" for Time Warner Cable to provide backhaul services to those towers.³⁰⁰ And Cox has indicated that it is prepared to provide backhaul services to wireless providers deploying their 4G networks "because we're there and we can do sort of spurs off of our network" and "we're deploying capital to that area to be able to satisfy that demand."³⁰¹

Sprint and MetroPCS make assertions about competitive alternatives for special access services based on a study prepared by the National Regulatory Research Institute ("NRRI").³⁰² But the authors of that report acknowledge that they lacked the data necessary to draw conclusions about the market for high-capacity services. For example, the "[a]bsence of seller data from competitive fiber providers, from broadband wireless providers, and from cable TV providers limited our ability to verify market concentrations and to verify buyer reports on the prices charged by non-ILEC sellers."³⁰³ And even with the limited data they collected, the NRRI report indicates that "many firms compete in special access markets, including wireline CLECs, cable television providers, and fixed wireless providers" and that those competitors "are claiming larger market shares."³⁰⁴ The report also acknowledges that cable companies and fixed wireless

³⁰⁰ Time Warner Cable, Inc. at Merrill Lynch Media Fall Preview-Final, Fair Disclosure Wire, Transcript 090908au.781 (Sept. 9, 2008) (statement by Landel Hobbs, Chief Operating Officer, Time Warner Cable).

³⁰¹ See FCC National Broadband Plan Workshop, Wired Broadband Deployment – General, Tr. at 35 (Aug. 12, 2009), http://www.broadband.gov/docs/ws_02_deploy_wired_transcript.pdf.

³⁰² Sprint Comments at 12-13; MetroPCS Comments at 48.

³⁰³ PETER BLUHM WITH DR. ROBERT LOUBE, NATIONAL REGULATORY RESEARCH INSTITUTE, COMPETITIVE ISSUES IN SPECIAL ACCESS MARKETS, NO. 09-02 at 38 (Jan. 21, 2009) ("NRRI Report").

³⁰⁴ *Id.* at 53; *see also id.* at 44.

providers have “low entry and exit costs where their networks are currently established” and predicts that fixed wireless providers will have a large market share in the next five years.³⁰⁵

Moreover, the NRRI report acknowledges that the incumbent carriers’ prices for special access services are declining. The report concluded, based on data received from the buyers that responded to NRRI’s survey, that between 2006 and 2007, in nominal terms, the discounted rates for DS1 and DS3 channel terminations declined by 12% and 27%, respectively for the RBOCs, and 12% and 23%, respectively, for all ILECs.³⁰⁶ The report further concluded, again based on data received from buyers that responded to NRRI’s survey, that during this same period, discounted rates for DS1 and DS3 transport (fixed) decreased by 9% and 10% respectively, in nominal terms for all RBOCs.³⁰⁷ Discounted rates for DS1 and DS3 transport (variable) likewise decreased, by 13% and 18% respectively, in nominal terms for all RBOCs.³⁰⁸ Once inflation is accounted for, the *real* prices customers pay to Verizon for these special access services have declined by approximately 24% between 2002 and 2008.

Finally, CFA *et al.* wrongly argue that “[v]ertically integrated telecommunications companies have a distinct advantage in the market for . . . backhaul facilities, which non-vertically integrated carriers must obtain as special access services.”³⁰⁹ The Commission has already addressed this issue and implemented safeguards that ensure a level playing field. Under the Commission’s rules, Verizon Wireless and other wireless providers with wireline incumbent affiliates must obtain special access services from those affiliates at the same tariff rates, terms

³⁰⁵ *Id.* at 80.

³⁰⁶ *Id.* at 59.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ CFA *et al.* Comments at 27.

and conditions as are available to other wireless carriers.³¹⁰ By contrast, nothing prevents competing wireless carriers, such as Sprint, from entering into special deals with their non-incumbent affiliates. In fact, Clearwire has publicly stated that Sprint is providing infrastructure to Clearwire, and that Clearwire in turn “w[ould] make its metro wireless backhaul networks available to Sprint at preferred rates, creating additional real revenue opportunities for Clearwire and reducing costs for Sprint.”³¹¹

D. Requests to Regulate SMS and Common Short Code Provisioning Lack Any Factual or Legal Support.

In comments filed in this proceeding and in the Commission’s related innovation docket, GN Docket Nos. 09-157, Public Knowledge, MetroPCS and Myxer³¹² all urge the Commission to act on the pending Petition for Declaratory Ruling to clarify the regulatory classification of short message service (“SMS” or “text messaging”) and common short codes (“short codes”).³¹³ These arguments have nothing whatsoever to do with the state of competition in the mobile wireless market, and are therefore especially inappropriate for consideration here. Verizon Wireless responds merely to correct the alleged facts in these comments and foreclose any suggestion that it failed to address these claims.

³¹⁰ See 47 C.F.R. § 20.20(a)(3).

³¹¹ Sprint Nextel Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolff, Chief Executive Officer, Clearwire).

³¹² Public Knowledge Comments at 9; Comments of Myxer Inc., GN Docket Nos. 09-157 & 09-51, 12 (filed Sept. 30, 2009) (“Myxer Innovation Comments”); MetroPCS Comments at 35.

³¹³ See Petition for Declaratory Ruling of Public Knowledge *et al.*, WT Docket No. 08-7 (filed Dec. 11, 2007). Text messaging, or SMS, is an information service that wireless operators offer to their customers to send and receive short data messages. By contrast, the provision of short codes is a network capability that wireless operators can implement to enable advertisers and other third parties to reach customers of multiple wireless operators through the use of an abbreviated 5- or 6-digit dialing code.

1. Claims of Anticompetitive Conduct Are Without Merit.

Myxer – a provider of mobile content that markets to wireless subscribers via short codes – makes a number of patently inaccurate factual claims regarding alleged anticompetitive conduct involving text messaging and short code campaigns.³¹⁴ Myxer first claims that Verizon Wireless “block[s] text messages.”³¹⁵ This claim is not only inaccurate, it also ignores the important distinction between an entity’s access to short codes, on the one hand, and the ability to send text messages on the other. Verizon Wireless does not block text messages sent by its subscribers, and does not block text messages sent to its subscribers except for spam and messages for which the subscriber has imposed an affirmative block.³¹⁶ While Verizon Wireless may decline to support a particular short code campaign proposed by a content provider for failure to meet Verizon Wireless’s requirements for such mobile marketing campaigns, discussed below, this means only that the content provider (1) will not be able to circumvent traditional means of sending messages by “blasting” multiple messages simultaneously through a direct connection to the wireless carrier’s messaging gateways, thereby avoiding spam filters, and (2) will not be able to have the end user charges for premium content collected through Verizon Wireless’s billing system. Any attempt to characterize such action as the “blocking” of text messages that Verizon Wireless “deems ‘controversial’” is not only factually incorrect but also misleading.³¹⁷

³¹⁴ See Myxer Innovation Comments at 12-13, 21-23.

³¹⁵ *Id.* at 12-13.

³¹⁶ See Comments of Verizon Wireless, WT Docket No. 08-7, 7-8 (filed Mar. 14, 2008) (“Verizon Wireless SMS Comments”).

³¹⁷ See Myxer Innovation Comments at 12-13.

Myxer also claims that “Verizon blocked access to Myxer’s short code messages,” and only agreed to stop blocking “so long as Myxer severely limited the content that was available to Verizon customers.”³¹⁸ Again, this allegation is incorrect and misleading. The reality is that Verizon Wireless was forced to limit support of Myxer’s short code in 2008, because Myxer was using that capability to offer large amounts of copyrighted content without any apparent licenses from the copyright holders. In fact, shortly after Verizon Wireless took this action, a number of music labels filed lawsuits against Myxer alleging that its services infringe their copyrights.³¹⁹ Myxer does not mention these lawsuits, asserting only that its services are legal.³²⁰ While Verizon Wireless terminated the use of the short code to deliver premium content through the picture and media messaging service, it did not terminate the use of Myxer’s short code for standard rate text messages. Thus, Verizon Wireless subscribers could continue to sign up for, and Myxer could continue to send, SMS alerts to Verizon Wireless subscribers about the products and artists Myxer was promoting.

Once Myxer agreed to remedy Verizon Wireless’s concerns in 2008 regarding its premium content offerings, Verizon Wireless agreed to relaunch Myxer’s short code campaign for delivery of premium content – an agreement Myxer has trumpeted on its web site.³²¹ Even when Verizon Wireless was not supporting Myxer’s short code campaign for delivery of

³¹⁸ *Id.* at 21.

³¹⁹ See Giselle Tsurulnik, *Major record labels sue Myxer for copyright infringement*, MOBILE MARKETER, Dec. 24, 2008, <http://www.mobilemarketer.com/cms/news/legal-privacy/2347.html>. On March 13, 2009, mediabistro.com reported that Arista Records and Sony Music had filed suits against Myxer in California and Florida alleging copyright infringement. *Arista, Sony Sue Myxer in Florida*, MEDIABISTRO.COM, Mar. 13, 2009, http://www.mediabistro.com/mobilecontenttoday/mobile_music/arista_sony_sue_myxer_in_florida_111331.asp.

³²⁰ Myxer Innovation Comments at 22 (claiming Verizon Wireless has asserted a right to “censor lawful content”).

³²¹ See Myxer, *Good News for Verizon Wireless Users!*, Feb. 19, 2009, <http://blog.myxer.com/2009/02/19/good-news-for-verizon-users/>.

premium content, however, Verizon Wireless customers who chose to do so could still access and purchase Myxer's content directly on the Internet, and Myxer could deliver its content to Verizon Wireless subscribers directly via email or text messages.

Finally, Myxer's utterly unsupported contention that content providers are "beholden to the wireless providers for billing and must often share revenue at the wireless provider's demand" is again factually inaccurate.³²² While short code campaigns may be set up to permit charges for content to be routed through the wireless provider's billing system – a mechanism under which charges for content appear on the bill rendered by the wireless provider – customer complaints about the charges are handled by the carrier, and the carrier is responsible for paying a portion of the charges through to the operator of the short code. And, this is not the only option for content providers such as Myxer. As Myxer admits, it is always free to collect payment directly from its end users – for example, by seeking credit card information in connection with the purchase of a ringtone or other media content.³²³ This approach has presented little problem to the myriad e-tailers selling goods and services online for more than ten years, and its availability here belies the claim that content providers are impaired by policies limiting their reliance on the use of common short codes. In any event, wireless carriers are under no obligation to provide access to billing services to Myxer or any other content provider. Billing and collection services have long been declared by the Commission to be non-common carriage,

³²² Myxer Innovation Comments at 23.

³²³ *See id.*

not subject to Title II regulation.³²⁴ Myxer’s protestations to the contrary have no legal or factual basis.

2. Text Messaging Is an Information Service, and the Provision of Common Short Codes Is Not a Communications Service At All.

Text Messaging. Public Knowledge and Myxer next argue that text messaging should be classified as a telecommunications service subject to Title II of the Communications Act, claiming that such classification is necessary to allow competing services to develop and users to have access to the services and content of their choice.³²⁵ MetroPCS argues that SMS cannot be an information service because the message is not changed from end to end, and therefore must be a telecommunications service.³²⁶

Verizon Wireless has addressed these claims fully in the Commission’s open docket addressing the classification of SMS and common short code provisioning, and refers the Commission to the more comprehensive discussions submitted there.³²⁷ In summary, text messaging fits squarely within the Act’s definition of an “information service”: “the offering of a capability for generating, acquiring, *storing, transforming*, processing, *retrieving*, utilizing, or making available information via telecommunications.”³²⁸ First, SMS transmissions involve the

³²⁴ See *Detariffing of Billing and Collection Services, Report and Order*, 102 FCC 2d 1150, 1167-69 ¶¶ 30-34 (1986).

³²⁵ See Public Knowledge Comments at 8-9; Myxer Innovation Comments at 12, 14, 21.

³²⁶ See Comments of MetroPCS Communications, Inc., WT Docket No. 08-7, 6 n. 18 (Mar. 14, 2008), *cited in* MetroPCS Comments at 36.

³²⁷ See Verizon Wireless SMS Comments; Reply Comments of Verizon Wireless, WT Docket No. 08-7 (filed Apr. 14, 2008). Myxer’s suggestion that the FCC has previously found text messaging to be subject to all Title II regulation is incorrect. See Myxer Innovation Comments at 11-12. In the case it cites, the FCC found only that the Telephone Consumer Protection Act prevents voice calls or text messages using auto-dialing or prerecorded messages to numbers where the called party is charged. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd 14014, 14115 ¶ 165 (2003).

³²⁸ 47 U.S.C. § 153(20) (emphasis added).

“transform[ation]” of the information sent, *not* – as would be required for SMS to be classified a telecommunications service – “transmission ... without change in the form or content of the information as sent and received.”³²⁹ To permit the transmission of an SMS message, a wireless carrier must often add headers, callback numbers, dates, or nicknames; truncate intercarrier text messages; process them through a message aggregator; and translate them between protocols.³³⁰

Second, text messaging involves the “storing” and “retrieving” of information. A text message is initially routed to a short messaging center, where it is “stor[ed]” while the system attempts to locate the intended recipient – a process that might take hours if the recipient’s device is turned off or otherwise out of range. The message will be held pending the message’s “retriev[al]” by the recipient.³³¹ Subscribers also can use SMS to “retriev[e]” information stored in a central database, including news or sports updates or other special alerts.³³²

³²⁹ *Id.* § 153(43).

³³⁰ SMS messages generally utilize SMPP protocol, while email or instant-messaging typically use utilize SMTP or TCP/IP protocols, respectively. In order for the systems to be compatible, a carrier must delete, add or truncate information. For example, emails contain “subject” lines which must be deleted when sent to an SMS number, while text messages often contain callback numbers or other headers which must be modified or stripped when the message is sent to an email or instant-messaging platform. The Commission has repeatedly held that services that involve net protocol conversion like SMS are enhanced or information services, because such conversion “transforms” the information. *See* Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, 21956-57 ¶¶ 104-05 (1996).

³³¹ *See id.* at 32-33. By analogy, in concluding that email is an information service, the Commission specifically relied on the fact that email utilizes storage and retrieval capabilities. *See* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11538-39 ¶ 78 (1998).

³³² *See* Verizon Wireless SMS Comments at 32-33; *see also* Northwestern Bell Telephone Company Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 2 FCC Rcd 5986, 5988 ¶¶ 19-20 (1987) (finding that a service involving “subscriber interaction with stored information” is an “enhanced service” not subject to Title II regulation) (quoting 47 C.F.R. § 64.702(a)), *vacated on other grounds*, 7 FCC Rcd 5644 (1992). Prior to the Telecommunications Act of 1996, an “information service” was referred to as an “enhanced service.” *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) (subsequent history omitted) (determining that “the differently-worded definitions of ‘information services’ and ‘enhanced services’ ... should be interpreted to extend to the same functions”).

Contrary to MetroPCS's claim,³³³ the fact that SMS is properly classified as an information service precludes its simultaneous classification as CMRS, as the Commission has expressly recognized.³³⁴ The fact that SMS does not give the end user the capability "to communicate to or receive communications from *all other users* on the public switched network"³³⁵ further defeats any claim that text messaging is a CMRS offering.

Short-Code Provisioning. Public Knowledge and Myxer also argue that the provision of short codes should be classified as a telecommunications service subject to Title II. In fact, the provision of short codes is neither a telecommunications service nor an information service. Rather, it is a business arrangement, whereby a provider agrees to support a content provider's "campaign." A wireless operator's decision to accept or reject a messaging aggregator's request on behalf of an advertiser or other third party to activate a short code does not involve the provision of any communications service to any subscriber, and is not "incidental to" communications.³³⁶ Rather, the activation of the code occurs prior to and apart from any transmission, and denial of a short code application does not preclude a content provider from communicating with consumers, e.g., via text-messaging.

³³³ MetroPCS Comments at 36 (asking the Commission to find that SMS services are "CMRS services for all regulatory purposes").

³³⁴ See Verizon Wireless SMS Comments at 36-37. The Commission has previously made clear that a service is "not included in the commercial mobile service definition" if it constitutes a mobile information service. *Wireless Broadband Declaratory Ruling*, 22 FCC Rcd at 5920 ¶ 52. Contrary to the suggestion of MetroPCS, the Commission's automatic roaming order does not guide the classification of text messaging. See MetroPCS Comments at 36. In that order, the Commission specifically declined to classify subscriber-based SMS as a Title II service. *Roaming Order*, 22 FCC Rcd at 15819 ¶ 2.

³³⁵ Yet, SMS only provides connectivity to devices capable of receiving the messages. *Wireless Broadband Declaratory Ruling*, 22 FCC Rcd at 5917 ¶ 43 (quoting 47 C.F.R. § 20.3 (emphasis added); see also 47 C.F.R. § 20.3 (defining "CMRS" as "[a] mobile service that is ... provided for profit ... interconnected ... and ... available to the public").

³³⁶ Title I of the Act provides only limited jurisdiction to regulate communications by radio or services or apparatus "incidental to" such communications. See Verizon Wireless SMS Comments at 38-39 (citing 47 U.S.C. § 153(33)); *American Library Ass'n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005).

3. The Regulatory Classifications Discussed Above Will Benefit Consumers and Competition.

Clarifying that neither SMS nor short-code provisioning are Title II services (and that the latter is not even a Title I information service) will benefit competition and consumers, because such clarification will provide carriers with the certainty and flexibility they need to effectively compete in the marketplace and continue to offer the innovative services customers demand with the protections they have come to expect.

With respect to text messages, in the absence of regulation, consumers have experienced explosive growth in the availability and types of messaging services³³⁷ and (as discussed above) falling prices.³³⁸ The absence of regulation has also given Verizon Wireless and other carriers the flexibility they need to protect subscribers from spam.³³⁹ The imposition of Title II nondiscrimination requirements on SMS, however, could impede a carrier's ability to protect its customers from unwanted messages.³⁴⁰

³³⁷ See *Thirteenth Report*, 24 FCC Rcd at 6185, ¶ 2 (noting that “[t]he monthly volume of text messaging traffic grew to 48.1 billion messages during December 2007, up from 18.7 billion messages during December 2006, 9.8 billion messages during December 2005, and 4.7 billion messages during December 2004”).

³³⁸ See *supra* Section I.C; see also *Thirteenth Report*, 24 FCC Rcd at 6277-78 ¶ 194 (explaining that prices have dropped as use of volume-discounted monthly text messaging packages and unlimited text messaging plans proliferated). Public Knowledge's suggestion that regulation is needed to prevent the prices for text message from rising in concert, see Public Knowledge Comments at 7, is also without merit. See *supra* Section I.C (demonstrating that rates for text messaging do not reflect parallel pricing).

³³⁹ See Verizon Wireless SMS Comments at 7-8. As noted, Verizon Wireless does not otherwise block text messages to its subscribers unless the subscriber has imposed an affirmative block, and does not block text messages sent by its subscribers.

³⁴⁰ See *id.* at 25-28. The Commission has previously recognized the utility of spam prevention in the context of email. See Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Order*, 19 FCC Rcd 15927, 15942 ¶ 39 (2004) (“We believe that it is the industry itself that can help give consumers additional protections and abilities to avoid unwanted electronic mail from sources other than legitimate businesses.”).

With respect to short codes, in the current self-regulating environment, carriers have put in place numerous safeguards to protect subscribers from offensive or deceptive short code campaigns. Verizon Wireless screens requests to activate short code campaigns to ensure they meet its standards regarding campaign format, messages to subscribers, and content delivered on its network. These standards are consistent with the guidelines that other operators and mobile content providers developed for mobile marketing and mobile content.³⁴¹ These guidelines ensure that consumers receive sufficient information before opting in to a campaign, and require a double opt-in for premium campaigns that impose more than per-message charges. The guidelines also do not approve, for example, short code campaigns that promote the use of alcohol, tobacco, drugs, or gambling, or contain excessively violent or sexual material.³⁴²

Public Knowledge suggests that carriers should be required to support short-code campaigns featuring any legal content without regard for content standards adopted by the industry.³⁴³ However, the advertising and other materials that Verizon Wireless contracts to place on its network affect the image of the company and its relationship with its diverse subscriber base – which includes parents, young adults and even children. The ability to adopt safeguards that extend beyond the exclusion of illegal content – for example, to limit campaigns featuring graphic nudity or violence or those promoting alcohol or gambling – is therefore essential. Likewise, because short code campaigns may trigger customer charges on Verizon Wireless bills, the company must ensure that campaigns will not give rise to excessive or

³⁴¹ The Mobile Marketing Association has established “best practices” for enrolling and supporting subscribers, and CTIA has developed content guidelines for mobile products. *See* Verizon Wireless SMS Comments at 3, 15-19.

³⁴² *See id.* at 3, 17-18.

³⁴³ *See* Public Knowledge *et al.*, *Ex Parte* Notice, WC Docket No. 08-7, at 8 n.26 (Oct. 2, 2008).

improper charges, or charges for what may turn out to be illegal content, for which Verizon Wireless itself will be held liable.

Grant of the Public Knowledge Petition would undermine these consumer protection policies – and for no valid public policy reason. Verizon Wireless began accepting short codes in 2004. It has accepted over 4,500 different short code campaigns. Verizon Wireless applies the same review process to each short code request it receives, regardless of who is making the request or the content or services offered by the requesting party. It usually grants short code requests within 10-15 days, and in only a very small number of cases (less than 5%) has it declined a campaign proposal. This small class of rejected campaigns includes those whose sponsors included nudity or links to adult content on their websites; made available copyrighted material for purchase without adequate safeguards; or made available ringtones that contain profanity or racial slurs or promote drug use.³⁴⁴ Some rejected campaigns, of course, are activated after the proponent resolves the problems identified during the review process. Even where Verizon has declined to activate a short code campaign proposal, however, this decision in no way “blocks” its customers from texting the advertiser directly using a standard 10-digit code – they merely cannot do so through a Verizon Wireless-enabled short code.

E. Arguments that the Commission Must Regulate Equipment Development in the 700 MHz Band Are Meritless.

In another effort to distort the facts for regulatory gain, Cellular South claims that Verizon Wireless and AT&T have somehow used their market power to manipulate the standards setting process and the equipment manufacturing market for 700 MHz LTE to the

³⁴⁴ Verizon Wireless SMS Comments at 18.

detriment of competition generally and A Block spectrum holders specifically.³⁴⁵ According to Cellular South, the end result is that holders of Lower 700 MHz A Block spectrum will not have equipment available at affordable prices while Verizon Wireless and AT&T move forward in other 700 MHz spectrum segments.³⁴⁶ But, as described below, the open standards process and the technical complexities of the A Block account for the pace of A Block equipment development, not any nefarious schemes by large carriers.

Verizon Wireless has every reason to support the development of A Block equipment. The company holds 25 A Block licenses for markets that cover over half the U.S. population. Verizon Wireless paid nearly \$2.57 billion for these licenses, which cover major metropolitan markets such as New York, Los Angeles, Philadelphia, Washington, DC, and Miami, among others. If Cellular South's assertion were correct, Verizon Wireless would be taking steps to block development of equipment that is essential to capitalize on the company's own \$2.57 billion investment. Cellular South offers no plausible suggestion for why such a state of affairs would be true, and indeed, it is not.

Cellular South also repeatedly refers to this as an "emerging" issue or one that has developed recently. The development of 700 MHz devices is based on many factors: the technical characteristics and limitations of the spectrum bands, which were known to all auction participants prior to Auction 73; the specific set of spectrum bands held by individual operators; the business plans of individual operators with respect to their spectrum holdings; and the ability

³⁴⁵ Cellular South Comments at 8-15.

³⁴⁶ Cellular South's claims here mirror those of a Petition for Rulemaking filed on September 29, 2009, by the 700 MHz Block A Good Faith Purchasers Alliance, of which Cellular South is the lead member. Verizon Wireless will file a response to that petition, explaining the facts regarding development of 700 MHz equipment and urging the FCC to dismiss the petition.

of manufacturers to develop equipment in the time frames desired by operators. None of these factors has “emerged” recently. Moreover, none of the factors – *whenever* they arose – limits Cellular South’s ability to compete. There are no facts in Cellular South’s comments that demonstrate any market-based barrier that would prevent it from working with manufacturers to develop devices that operate on A Block. Cellular South is asking the FCC to intervene with regulation to benefit its own individualized circumstances. That clearly is not, and should not be, the goal of the FCC’s competition analysis.

While Cellular South correctly outlines some of the technical challenges arising from use of the A Block spectrum – challenges Verizon Wireless also faces – its allegations regarding anti-competitive delays in equipment development are completely false. The LTE standards for the various 700 MHz band classes have been established by the 3rd Generation Partnership Project (“3GPP”), an international standards-setting organization. 3GPP was formed in the late 1990s to establish standards for the IMT-2000 family of technologies.³⁴⁷ 3GPP brings together six standards organizations from Asia, North America and Europe to publish mobile standards.³⁴⁸ Any member of the six partners can become a 3GPP member. The North American partner, ATIS, has over 250 member companies. Based on publicly available membership lists, Cellular South has not joined either ATIS or 3GPP, notwithstanding its ability to do so at any time.³⁴⁹

³⁴⁷ The LTE standard adopted by 3GPP is an outgrowth of GSM technology. Its sister organization, 3GPP2, primarily works on standards for cdma2000® technologies. See <http://www.3gpp2.org/> (last visited Oct. 22, 2009).

³⁴⁸ The six partners are ARIB (The Association of Radio Industries and Business) based in Japan, ATIS (The Alliance for Telecommunications Industry Solutions) based in the United States, CCSA (China Communications Standards Association), ETSI (European Telecommunications Standards Institute), TTA (Telecommunications Technology Association) based in Korea, and TTA (The Telecommunications Technology Committee) based in Japan. See 3GPP, Organizational Partners, <http://www.3gpp.org/partners> (last visited Oct. 21, 2009).

³⁴⁹ See 2009 ATIS Members, <http://www.atis.org/membership/members.html> (last visited Oct. 21, 2009).

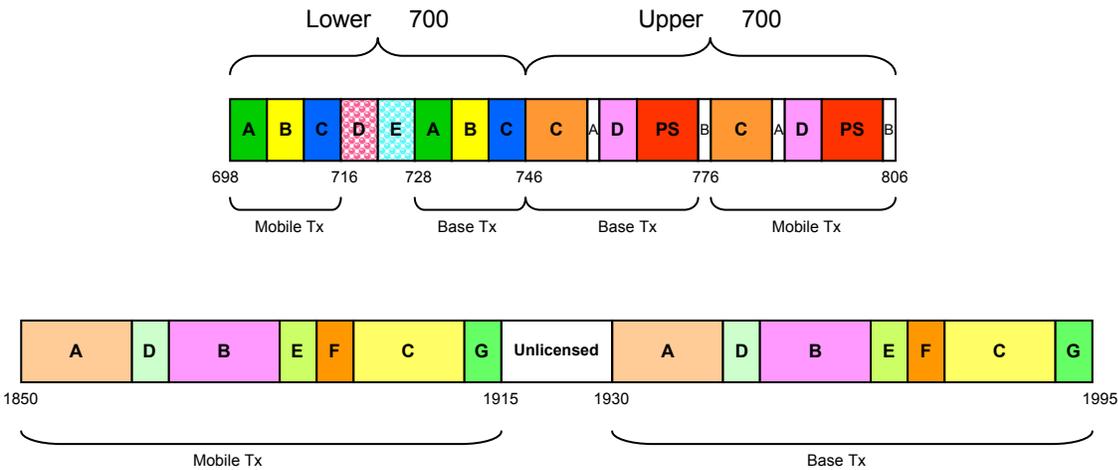
The 3GPP LTE standard includes four 700 MHz band classes: 12 (Lower A, B, C Blocks), 13 (Upper C Block), 14 (Upper D Block), and 17 (Lower B and C Blocks). The submissions recommending the creation of these Band Classes were submitted in 2008.³⁵⁰ None was submitted by Verizon Wireless.³⁵¹ Throughout the consideration, participants could have objected or proposed modifications; in addition, objections can be raised through the various 3GPP partner organizations. The proposals to create these band classes were non-controversial.

Given that the standards process was open and transparent, it seems Cellular South is actually complaining that the development of equipment for A Block is progressing on a different track than equipment for Upper C Block or the Lower B and C Blocks. There are, however, technical reasons for this distinction. The principal reason why the Lower and Upper 700 MHz bands are treated differently is that they are, in fact, distinctly separate bands. Unlike the PCS band, for example, neither the Lower 700 MHz band nor the Upper 700 MHz band can be considered as a single contiguous band of spectrum, because the frequencies used for mobile transmission are not all contiguous. (See Figure 1.) Instead, the transmit band used for Lower 700 MHz (698-716 MHz) is separated by 60 MHz from the spectrum used in the Upper 700 MHz band (776-806 MHz).

³⁵⁰ Like other standards organizations, 3GPP uses an open participation process for standards setting, in which any member can submit a proposal and participate in the deliberations. Proposals are considered in a working group for the specific topic, and the recommendations of the working group are considered at a plenary.

³⁵¹ AT&T sponsored the establishment of Band Class 17.

Figure 1. Comparison of 700 MHz and PCS Bands



Given the configuration of the 700 MHz band as established, it is not possible to support both the Lower and Upper 700 MHz spectrum blocks in the same duplexer.³⁵² While it is possible to build a device with multiple duplexers, it comes with additional cost and complexity that must be weighed against other factors, including whether other bands outside 700 MHz will be included in the device.

The Lower 700 MHz band also introduces additional technical challenges for the design of mobile devices. First, the band plan includes a narrow duplex gap (12 MHz), a relatively

³⁵² A duplexer is a device that allows two-way communications over a single channel. It is, effectively, the combination of two RF filters (one for transmit and one for receive) with a common antenna port. The duplexer must be designed for operation in the frequency band used by both the receiver and the transmitter, and must provide sufficient isolation between the transmit and receive bands to prevent the transmitter from desensitizing the receiver. Theoretically, it is possible to design a device that includes a receive filter that covers the Lower A, B, and C Blocks, as well as the Upper C Block, since these blocks are all contiguous (728-757 MHz). However, it is not possible to design a single duplexer filter that passes both mobile transmit bands (698-716 MHz and 776-806 MHz), while still providing sufficient isolation from the mobile receive band.

small duplex spacing (30 MHz), and the presence of strong interfering signals that could impede the deployment of two-way mobile services.³⁵³

Second, the operation of high-power broadcast services in the adjacent Lower E Block creates a significant potential for interference into Lower A Block receivers (at 728 MHz). The Lower D and E Blocks are unpaired licenses that are best suited to one-way broadcast-like services such as Qualcomm's MediaFLO. Indeed, the FCC established rules that permit these blocks to be used for high-power (50 kW) broadcast services. To operate effectively, mobile devices operating in the Lower A Block must employ sufficient selectivity to reject the interfering E Block signal. Since these bands are directly adjacent, there would be little or no attenuation provided by the duplex filter in the block adjacent to the desired pass band. Lower B and C Block licensees would suffer the same fate were they to use devices that employ duplexers covering the Lower A, B, and C Blocks. Importantly, filters and duplexers experience less out-of-band rejection when they are designed to pass a wider bandwidth. Consequently, a device designed to pass blocks A, B, and C would be less able to reject harmful interference from the E Block than one designed to only pass B and C.

Finally, the presence of broadcast TV services also presents technical challenges for Lower A Block licensees. The Commission recognized the potential for mobile systems operating at 700 MHz to cause interference to a DTV receiver and established rules requiring that Lower A Block licensees meet a minimum desired signal-to-undesired signal ratio (D/U). While this might be possible for fixed wireless services, compliance with such rules using

³⁵³ The "duplex gap" is the amount of frequency separation between the transmit and receive bands. For the Lower 700 MHz A, B, and C blocks, the gap between the mobile transmit and base transmit bands is 12 MHz (716-718 MHz). The "duplex spacing" or "duplex distance" is the frequency separation between the beginning of the mobile transmit band and the beginning of the base transmit band. For the Lower 700 MHz band, this is 30 MHz.

current technology is likely to be difficult for mobile devices without limiting functionality. This is especially true if the Commission were to allow new TV stations to be deployed in channel 51.

Given these and other significant technical issues and complexities inherent in the 700 MHz band plan, the consensus of all parties to the 3GPP standard-setting process was to adopt band plans that did not combine the Upper 700 MHz blocks with the Lower 700 MHz blocks. But nothing in the LTE standard in any way prevents A Block licensees from working with manufacturers to design devices that will operate on A Block spectrum pursuant to one of the band plans that 3GPP adopted. The Alliance's claims are unsupported, ignore the technical realities involved with using the 700 MHz spectrum, and deserve no consideration by the Commission.

III. THE FCC SHOULD MAINTAIN ITS ANALYTICAL FRAMEWORK, REJECT RELIANCE ON UNHELPFUL METRICS, AND DECLINE TO MANDATE UNNECESSARY INFORMATION PRODUCTION.

Commenters generally agree that the Commission's existing framework for analyzing mobile wireless competition reflects sound economics. While the Commission may wish to expand the class of information considered under this framework,³⁵⁴ it should not place excessive reliance on market concentration, or focus its analysis on irrelevant metrics such as accounting profits and the relationship between prices and marginal costs, as some commenters propose. Once arguments regarding these misleading metrics are appropriately rejected, it becomes clear that the information relevant to this proceeding is already at the Commission's fingertips, both in this docket and elsewhere – and that even more information is on its way.

³⁵⁴ See, e.g., CFA *et al.* Comments at 2; Verizon Wireless Comments at 11 (“[T]he range of factors to be considered in evaluating market performance is necessarily broad...”); *id.* at 8 (“New developments in the mobile wireless space may warrant the consideration of data not previously addressed, but those data can and should be evaluated within the contours of the existing framework.”).

A. The Commission Should Maintain the Existing Framework for Evaluating Mobile Wireless Competition.

Comments filed in this docket offer virtually *no* opposition to the basic structure-conduct-performance framework. The Commission should retain that framework, which considers (1) market structure; (2) provider conduct; (3) consumer behavior; and (4) market performance.³⁵⁵ This analytical approach reflects sound economic principles, as Verizon Wireless explained in its initial comments.³⁵⁶

Even while claiming support for the Commission’s current approach, however, several commenters seek to accord special weight to specific metrics that they believe demonstrate a dearth of competition. The Commission should reject these efforts. First, the Commission should reject any suggestion that market concentration figures (as measured by the Herfindahl-Hirschman Index (“HHI”) or otherwise) should be determinative in its evaluation of concentration.³⁵⁷ As Topper writes, “market structure indicators such as the number of competitors, market shares, or concentration ratios should only be a first step in a competition inquiry,”³⁵⁸ and “[e]ven in highly concentrated markets, producer rivalry can lead to competitive

³⁵⁵ *NOI* ¶ 8.

³⁵⁶ *See* Verizon Wireless Comments at 7-17.

³⁵⁷ CFA *et al.* complain about purportedly high HHI figures in the wireless industry. *See* CFA *et al.* Comments at 7-8. MetroPCS spends pages arguing that “consolidation in the industry” has led to reduced competition, MetroPCS Comments at 3-14, but it also concedes that “consolidation of industry players is not against the public interest *per se*,” *id.* at 11, and states that “the retail CMRS marketplace” is “competitive ... at the present time,” *id.* at 3; *see also* NTCA Comments at 2.

³⁵⁸ TOPPER DECLARATION at 16; *see also* Declaration of Robert W. Hahn, Robert E. Litan and Hal J. Singer ¶ 17 (Apr. 2008) attached as Exhibit A to Reply Comments of CTIA – The Wireless Association®, WT Docket No. 08-27 (filed Apr. 10, 2008); GREGORY L. ROSSTON AND MICHAEL D. TOPPER, AN ANTITRUST ANALYSIS OF THE CASE FOR WIRELESS NETWORK NEUTRALITY 21 (Stanford Institute for Econ. Policy Research Discussion Paper 08-040, Aug. 2009) (“While structural measures such as HHIs provide a starting place, industry structure is just a first step in an antitrust analysis assessing the competitiveness of the wireless market. The next step is to assess the actual performance of the industry, as measured by prices and quantities consumed.”).

outcomes.”³⁵⁹ Thus, in evaluating mergers, the Commission has applied a “multi-factor, market-specific analysis” drawing “conclusions based on the totality of the circumstances present in a given market....”³⁶⁰ Excessive reliance on HHI figures would give inadequate weight to matters other than concentration. It would also ignore the nature of the wireless industry, in which “substantial fixed costs [mean that] it will be inefficient and not commercially viable for a very large number of facilities-based firms to operate in the same geographic area.”³⁶¹

Second, the Commission should reject calls for “[c]omprehensive data” showing carriers’ “return on investment (‘ROI’), return on invested capital (‘ROIC’) ... and profit margins.”³⁶² This request reflects CFA *et al.*’s view that the Commission should assess providers’ “profits” in determining whether the market is competitive.³⁶³ However, as Verizon Wireless explained in its initial comments, reliance on accounting profits would be incompatible with sound economics.³⁶⁴ “It is well-recognized among economists that accounting measures of profitability are ill-suited for gauging competitive intensity. There are several well-known ways in which accounting profits diverge from economic profits. This divergence is a serious issue because economic profits are the measure relevant to the assessment of market performance.”³⁶⁵ Simply

³⁵⁹ TOPPER DECLARATION at 7.

³⁶⁰ See, e.g., *Verizon Wireless / Alltel Merger Order*, 23 FCC Rcd at 17489 ¶ 94; Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp., *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463, 12497 ¶ 70 (2008); *AT&T / Cingular Merger Order*, 19 FCC Rcd at 21557 ¶ 69; Applications of NYNEX Corp. and Bell Atlantic Corp., *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 19987 ¶ 2 (1997).

³⁶¹ TOPPER DECLARATION at 10 (footnote omitted); see also KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 11 (“In the presence of economies of scale and density, it is economically inefficient and unlikely to be commercially viable to have a large number of suppliers, each operating at a small scale or low density.”).

³⁶² See, e.g., CFA *et al.* Comments at 5.

³⁶³ See *id.* at 21.

³⁶⁴ See Verizon Wireless Comments at 16-17.

³⁶⁵ KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 5 (emphasis omitted).

put, evaluations of profit do not necessarily reflect the *economic* value of assets and investments, and thus may well overstate returns.³⁶⁶ Furthermore, attempts to infer economic profits from accounting profits ignore “the fact that the returns to most investments are highly uncertain,” and that after-the-fact “profits” often reflect gambles that paid off without reflecting the *ex ante* risks associated with the investment. Professor Katz illustrates this point using the following example:

Consider a potential project that requires a \$1 million investment this year and has a 50-percent chance of success next year. In the event of success, the project yields \$2 million in additional revenues, while failure leads to no new revenues. In this case, the undiscounted expected value of the project is \$0 and the discounted expected return is negative for any positive interest rate (*i.e.*, accounting for risk and the time value of money). Suppose that the firm nonetheless undertook the project and was successful. It clearly would be a mistake to conclude from the fact that the firm was earning a net return of \$1 million (\$2 million minus the \$1 million investment) that it was somehow earning excess profits as the result of market power. Such a calculation would completely fail to account for the fact that the firm had only a 50 percent chance of succeeding. The existence of such “profits” would not indicate that the supplier had market power; rather, it would illustrate the fact that using *ex post* profits to measure market power may lead to erroneous conclusions.³⁶⁷

CFA *et al.* argue, in effect, that the Commission should account only for the *post hoc* success of wireless investments, without accounting at all for the risks undertaken by providers in pursuit of that success.

³⁶⁶ See TOPPER DECLARATION at 23 (explaining that “‘return on equity’ depend[s] on the accounting treatment of assets, which can be quite divorced from their economic treatment”); *see also id.* at 22-23 (“For example, opportunity cost is virtually ignored under accounting profits, thereby neglecting the very important concept of risk and the returns to wireless providers for bearing the risk.”); Franklin M. Fisher & John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 AMERICAN ECONOMIC REVIEW 82 (1983).

³⁶⁷ See KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 34; *see also id.* ¶ 4 (“Even if it were possible to estimate economic profits accurately, the existence of positive economic profits does not indicate that competition is ineffective or that regulatory intervention is warranted. It is necessary to account for both the stochastic nature of competitive outcomes and the costs and limitation of governmental intervention.”) (emphasis omitted).

Third, as discussed in Verizon Wireless’s initial comments, the Commission should reject arguments that the mobile wireless market can be judged on the basis of prices that exceed marginal cost.³⁶⁸ “Marginal cost pricing is not a realistic benchmark in an industry that requires ongoing investment and has significant economies of scale and/or density – a supplier pricing at marginal cost would be unable to cover its overall costs and, consequently, would not be financially viable.”³⁶⁹

B. Ample Reliable Data Is Already Available to the Commission and Extensive New Information Collections Are Not Warranted.

Several commenters argue that the Commission needs to go far afield of its current information collection efforts and impose excessively granular data production and reporting requirements on mobile wireless providers.³⁷⁰ The specific data productions proposed range from the imposition of full Automated Reporting Management Information System (“ARMIS”) reporting that has largely been eliminated even for incumbent wireline carriers,³⁷¹ to actual price

³⁶⁸ See, e.g., CFA *et al.* Comments at 8 (alleging “continuing immunity to price decreases that would reflect carriers’ declining marginal costs”).

³⁶⁹ KATZ, MEASURING EFFECTIVE CMRS COMPETITION ¶ 5. Moreover, computation of marginal costs would be extremely complex: “[N]etwork and investments can be used to deliver voice services along with these other services, obvious complementarities exist, and recovery of fixed costs needs to be shared across many services. In addition, use of shared network resources by one service can affect the quality and availability of network resources for other services. This makes proper estimates of marginal and average costs, and even average prices within different services complicated to estimate and interpret.” TOPPER DECLARATION at 23 (footnote omitted).

³⁷⁰ See Rate Counsel Comments at 7-9; CFA *et al.* Comments at 4-5, 30-31, 35-42; MetroPCS Comments at 14, 52-54; Bright House Comments at 12; U.S. Cellular Comments at 14. Rate Counsel further recommends that the Commission “provide a public clearinghouse of the rates, terms, and conditions of wireless offerings,” claiming this information is “essential to an efficient market.” Rate Counsel Comments at 5. This is plainly an insufficient basis to justify FCC intervention in a competitive market given the plethora of information available to consumers. See Verizon Wireless Comments at 60-62; see also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”) (citations omitted); Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1478 ¶ 173 (1994) (“*CMRS Second Report*”) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of ... terms and conditions of service by carriers who lack market power.”).

³⁷¹ See Rate Counsel Comments at 7-8.

per minute paid data at the census block level.³⁷² At least one commenter would arbitrarily impose requirements only on the four largest wireless carriers.³⁷³ In all, commenters seek additional information covering *nearly fifty* data points, in a range of categories including pricing, services offered, churn, investment, service quality, spectrum, roaming, devices, applications and content, and consumer demand.³⁷⁴ Given the breadth of reliable data already or soon to be available, the dynamically competitive nature of the mobile wireless marketplace, and the fact that these disclosures seem designed to facilitate findings that would in any case be irrelevant, there is no basis for mandating the disclosures requested.

Moreover, these commenters offer no explanation (even theoretical) of what they think the data requested would show or why government action is warranted. For example, CFA *et al.* seek detailed pricing information at the census block level, but fail to show how differing prices between census blocks (to the extent they even exist in an era of nationwide pricing plans) would constitute anticompetitive price behavior.³⁷⁵ Under these circumstances, the proponents of the proposed data collection and reporting requirements simply cannot “clear [the] substantial hurdles” needed to show that there has been market failure sufficient to justify imposing new sweeping reporting requirements.³⁷⁶

³⁷² See CFA *et al.* Comments at 4, 36-37.

³⁷³ MetroPCS Comments at 14. Another commenter questions the quality of the available data. See RTG Comments at 3.

³⁷⁴ See, e.g., CFA *et al.* Comments at 4-5, 35-42; Rate Counsel Comments at 7-8; MetroPCS Comments at 14, 19, 52-54; Bright House Comments at 12.

³⁷⁵ See CFA *et al.* Comments at 36.

³⁷⁶ See Petition of the Connecticut Department Public Utility Control To Regulate Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd 7025, 7027 ¶ 4 (1995) (quotation omitted), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

These far-reaching data requests should be rejected. As discussed above, reliance on the specific metrics at the heart of many of the data requests at issue would be analytically unsound. Moreover, the FCC already has its own good data, or access to reliable data from third-party sources, addressing many of the issues on which further information has been sought.³⁷⁷ Additional valuable data has been submitted to the FCC in this docket.³⁷⁸ Indeed, with respect to a number of the requested data points, commenters ask the FCC to have carriers report information that is *already* publicly available. For example, “[m]obile wireless provider churn statistics” are readily discernable from publicly available number porting data.³⁷⁹ Likewise, carriers advertise sought-after information on “current ... service coverage”³⁸⁰ on their websites, and detailed information regarding “spectrum holdings on a market-by-market basis, coupled with buildout statistics”³⁸¹ can be found in the FCC’s licensing databases.³⁸²

³⁷⁷ See, e.g., *Thirteenth Report*, 24 FCC Rcd at 6243-45 ¶¶ 111-15, 6274-78 ¶¶ 188-95 (citing pricing data); *id.* at 6271 ¶¶ 180-81 (citing churn data), 6260 ¶ 155 (citing investment data), 6262-64 ¶¶ 159-63 (citing service quality data), 6219-6243 ¶¶ 64-109 (citing spectrum data), 6260-61 ¶ 156 (citing roaming data). These sources include information filed directly with the FCC, including Numbering Resource Utilization/Forecast data and FCC Form 477 Local Competition and Broadband Reporting data; information derived from the FCC’s own databases, including the Universal Licensing System and Integrated Spectrum Auction System; data from other government agencies, such as the Consumer Price Index from the Department of Labor’s Bureau of Labor Statistics; highly-respected annual and semi-annual wireless industry surveys conducted by CTIA; Wall Street investment reports (e.g., from Bank of America, Morgan Stanley and UBS Investment Research); research analyst reports (e.g., from Nielson Mobile and SNL Kagan); carrier SEC filings (Form 10-Ks and 10-Qs); and carrier websites.

³⁷⁸ See, e.g., Verizon Wireless Comments at 65-78 (citing pricing data), 63 (citing churn data), 80-84 (citing investment data), 91-94 (citing service quality data), 47-49, 105 (citing spectrum data), 57-60 (citing roaming data), 106-36 (citing device, application and content data), 85, 109-17, 120-22, 129-33 (citing consumer demand data).

³⁷⁹ CFA *et al.* Comments at 5. The Commission publishes quarterly reports regarding the number of wireless-to-wireless number ports, a figure that should serve as a close proxy to the quarterly churn figure.

³⁸⁰ See, e.g., *id.*

³⁸¹ See, e.g., *id.*

³⁸² See Verizon Wireless, <http://www.verizonwireless.com/b2c/index.html> (access “Plans” and “Coverage Map” hyperlinks) (last visited Oct. 16, 2009); Sprint Nextel, <http://www.sprint.com/index.html> (access “Coverage” hyperlink) (last visited Oct. 16, 2009); U.S. Cellular, <http://uscellular.com/uscellular/SilverStream/Pages/uscellular.html> (access “Products & Services” and “Maps & Coverage Indicator” hyperlinks) (last visited Oct. 16, 2009); FCC, Universal Licensing System, <http://wireless.fcc.gov/uls/index.htm?job=home> (last visited Oct. 16, 2009).

More data is also coming. Just last year the Commission revised the FCC Form 477 to require broadband providers to report the number of subscribers in individual census tracts, and recently submitted information has yet to be made publicly available.³⁸³ In addition, the National Telecommunications and Information Administration (“NTIA”) recently revised rules under which states must collect from carriers (or other sources) geographic information, transmission speed and other data needed to produce a national map that will help consumers and regulators assess broadband service availability for any given area.³⁸⁴ There has also been significant legislative action related to data-gathering, including both the Broadband Data Improvement Act and the American Recovery and Reinvestment Act.³⁸⁵ Thus, the Commission should analyze and take into account the utility of the data it already has and what may soon be available before considering the imposition of additional data collection requirements.

³⁸³ See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data, *Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 9691 ¶¶ 1-2 (2008) (“*Broadband Data R&O*”), *Order on Reconsideration*, 23 FCC Rcd 9800 (2008); FCC Form 477, <http://www.fcc.gov/form477/> (last visited Oct. 16, 2009); see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future, *Notice of Inquiry*, 24 FCC Rcd 10505, 1507 ¶ 2 (2009) (“*Section 706 NOI*”) (noting that this collection will provide the Commission with “significantly more comprehensive broadband data”).

³⁸⁴ See NTIA, State Broadband Data and Development Grant Program, Notice of Funds Availability; Clarification (Aug. 7, 2009), <http://broadbandusa.sc.egov.usda.gov/files/State%20Broadband%20Data%20and%20Development%20Grant%20Program%20NOFA%20Clarification.pdf>; see also State Broadband Data and Development Program (Broadband Mapping Program), Frequently Asked Questions, 3 http://broadbandusa.sc.egov.usda.gov/files/BroadbandMappingFAQs%20_090812.pdf; State Broadband Data & Development Program, Frequently Asked Questions: Clarification of the Notice of Funds Availability (NOFA), 1-2, http://broadbandusa.sc.egov.usda.gov/files/FAQ%20Additions%20_8-11_%20FINAL.pdf.

³⁸⁵ See Broadband Data Improvement Act, Pub. L. No. 110-385, § 103(c)(1), 122 Stat. 4096, 4097 (2008) (requiring the Commission to conduct and make public periodic surveys of consumers to determine, *inter alia*, the technology used for broadband service, the monthly price paid, and the actual transmission speeds); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 6001(k)(2), (l), 123 Stat. 115, 515-16 (2009) (requiring the Commission to prepare a National Broadband Plan and requiring NTIA to develop a “nationwide inventory map of existing broadband service capability and availability ... that depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State”).

Some parties assert that the Commission should not rely on third-party data. For example, CFA *et al.* criticize the FCC's extensive past reliance on third-party data from American Roamer, yet, in virtually the same breath, they say they have no reason to believe this data set is inaccurate, and in fact compliment it.³⁸⁶ Before the Commission jettisons its use of such data, and considers new data collection requirements, it must take into account the legal requirements that it must satisfy before it embarks on that path. Under the Paperwork Reduction Act, for example, any information collection must have a demonstrated practical utility, and reasonable efforts must be made to minimize the collection.³⁸⁷ Where commercial data are available, the best use of taxpayer resources may be for the agency to purchase the data rather than spending government money to collect and analyze new data. As noted above, there are a wide variety of data sources already available and expanding in the marketplace, much of which consumers can already access (*e.g.*, coverage maps). The Commission and the public would be ill-served by expending resources to reinvent the proverbial wheel in collecting data already publicly available.

The all-encompassing reporting and data collection requirements proposed in the record would also be inconsistent with the Commission's market-based policy for overseeing the wireless industry. Indeed, for nearly fifteen years, starting with the Commission under Chairman

³⁸⁶ See CFA *et al.* Comments at 34 (“The Public Interest Commenters offer no assessment here of the validity of American Roamer data, and appreciate the fact that information supplied by this company is more granular than other sources the Commission has used in the past.”).

³⁸⁷ See 44 U.S.C. §§ 3506(C)(3)(A), (C); 5 C.F.R. § 1320.5(d)(1). The Office of Management and Budget (“OMB”) has not hesitated to disapprove of proposed information collections that fail to meet these requirements. See General Services Administration, Office of Management and Budget, Information Collection Regarding Emergency Backup Power for Communications Assets as Set Forth in the Commission’s Rules (47 CFR 12.2), ICR Reference No: 200802-3060-019 (Nov. 28, 2008), http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200802-3060-019 (access “Retrieve Notice of Action (NOA)” hyperlink).

Reed Hundt, the FCC has been *removing* reporting obligations for wireless carriers based on this competition.³⁸⁸

CFA *et al.* cite to the Commission’s recent decision in its video programming competition proceeding as a basis for the proposed data collection requirements,³⁸⁹ but the data collection in that context was vastly different from that at issue here. There, the Commission had a statutory obligation to determine whether specific numeric benchmarks in the 1992 Cable Act had been satisfied, and the “only way” to accurately determine compliance with the benchmarks was to require the submission of data in two discrete areas.³⁹⁰ Here, CFA *et al.* cite to no specific numeric benchmark at issue, let alone one that requires production of new data – and their approach, seeking data in literally dozens of areas, is far from discrete. Similarly, in the Local Competition and Broadband Reporting proceeding, the Commission required the submission of data to help monitor “the opening of previously monopolized local telecommunications markets,” as well as to “assess the availability of broadband service[]” –

³⁸⁸ In 1994, the Commission found the CMRS marketplace sufficiently competitive to forbear from applying a number of Title II reporting and other filing requirements, including tariff filings, market entry and exit requirements, and rate regulation. *See CMRS Second Report*, 9 FCC Rcd at 1418-19 ¶ 16, 1478-81 ¶¶ 175-182, 1510-11 ¶ 272. The FCC found such obligations “could cause unwarranted burdens for [CMRS] carriers” and should be imposed “only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers.” *Id.* at 1418-19 ¶ 16. Several years later, the Commission exempted CMRS carriers from its international service discontinuance requirements based on a prior determination that such obligations are unnecessary to protect consumers in a competitive marketplace. *See 2000 Biennial Regulatory Review; Amendment of Parts 43 and 63 of the Commission’s Rules, Report and Order*, 17 FCC Rcd 11416, 11424 ¶ 19 (2002) (“*2002 International R&O*”); *see also CMRS Second Report*, 9 FCC Rcd at 1481 ¶ 182 (stating that “if adequate substitute services are abundantly available, the discontinuance application is unnecessary to protect consumers”). The Commission has also exempted CMRS carriers from the filing of quarterly international traffic reports because they lack market power to engage in traffic distortion schemes. *See 2002 International R&O*, 17 FCC Rcd at 11429 ¶ 30.

³⁸⁹ CFA *et al.* Comments at 33-35.

³⁹⁰ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd 542, 558-60 ¶¶ 37-43 (2009).

which was then “in its infancy.”³⁹¹ The wireless market, however, is a mature market repeatedly found to be competitive by Democrats and Republicans alike. In any event, the Commission in that case sought only targeted information and “d[id] not propose to ask carriers for information about ... investments, rates, revenues, earnings, traffic volumes, or other aspects of their operations.”³⁹²

Moreover, the proposed reporting requirements are far more aggressive than those that apply to other, *less competitive*, industries. For example, while cable operators that provide broadband services are subject to reporting requirements common to all broadband service providers (*e.g.*, FCC Form 477),³⁹³ they are *not* subject to the highly burdensome reporting requirements CFA *et al.* recommend here. Indeed, OMB has rejected attempts to impose “kitchen sink” reporting requirements even with respect to cable’s core video business.³⁹⁴ With respect to dominant wireline carriers, ARMIS reports arose out of the Commission’s ILEC price cap regulation³⁹⁵ – a regulatory paradigm Congress has expressly rejected for the wireless marketplace.³⁹⁶ The “full range of ARMIS reporting”³⁹⁷ that the Rate Counsel seeks to impose

³⁹¹ See Local Competition and Broadband Reporting, *Report and Order*, 15 FCC Rcd 7717, 7718-19 ¶¶ 2-3, 7723 ¶ 9 (2000).

³⁹² See Local Competition and Broadband Reporting, *Notice of Proposed Rulemaking*, 14 FCC Rcd 18100, 18103 ¶ 4 (1999).

³⁹³ See, *e.g.*, *Broadband Data R&O*, 23 FCC Rcd at 9693 ¶ 5.

³⁹⁴ See General Services Administration, Office of Management and Budget, Sections 76.970, 76.971, 76.972, 76.975 and 76.978, Commercial Leased Access, OMB Control No. 3060-0568, ICR Reference Number 200804-3060-012 (July 9, 2008) (rejecting Commission’s paperwork requirements related to new rules for cable leased access channels), http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200804-3060-012 (access “Review Notice of Office of Action (NOA)” hyperlink).

³⁹⁵ See Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, 6810 ¶ 197 (1990), *recon.*, 6 FCC Rcd 2637 (1991).

³⁹⁶ See Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd 7988, 8004 ¶ 29 (1994).

³⁹⁷ Rate Counsel Comments at 8.

on wireless carriers would mandate production of such wireline-focused information as installation and repair intervals and the number of switches capable of providing equal access, as well as information duplicated in other Commission reports.³⁹⁸ These obligations have been scaled *back* for ILECs in recent years,³⁹⁹ as the advent of competition has minimized concerns that ILECs would reduce quality or fail to invest to the detriment of consumers.⁴⁰⁰ These ARMIS reports never required the production of information as extensive as that advocated by commenting parties here,⁴⁰¹ such as intercarrier pricing and CPE-related information. Finally, some of the information proposed for mandatory production could not even be provided, given the manner in which the data are collected and maintained. For example, many carriers now offer national price plans that do not differentiate at the census block level, and churn data is not maintained on the basis of the type of device (smartphone or otherwise) that a subscriber uses.

Ultimately, blanket claims that these unprecedented data collections are needed to “monitor” and “enhance” the Commission’s understanding of the market fail to provide the

³⁹⁸ Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission’s ARMIS Reporting Requirements, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 23 FCC Rcd 13647, 13670-71 (2008) (“*ARMIS Forbearance Order*”), *pet. for recon. pending, pet. for review pending, NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008).

³⁹⁹ See Petition of Qwest Corporation for Forbearance from Enforcement of the Commission’s ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c), *Memorandum Opinion and Order*, 23 FCC Rcd 18483 ¶ 1 (2008); *ARMIS Forbearance Order*, 23 FCC Rcd at 13648 ¶ 1; Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 1, *Report and Order*, 15 FCC Rcd 8690, 8692-93 ¶ 3 (2000); 1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, *Report and Order and Fifth Memorandum Opinion and Order*, 14 FCC Rcd 11443, 11443 ¶ 1 (1999).

⁴⁰⁰ See *ARMIS Forbearance Order*, 23 FCC Rcd at 13701-02 (Separate Statement of Commissioner Deborah T. Tate).

⁴⁰¹ In a 2008 *Notice of Proposed Rulemaking*, the Commission sought comment on whether to impose some ARMIS-type reporting requirements on all facilities-based providers of broadband and/or telecommunications. *ARMIS Forbearance Order*, 23 FCC Rcd at 13664-65 ¶¶ 33-36. In so doing, the Commission recognized that the data “would be useful only if they are collected from the entire relevant industry.” *Id.* at 13664 ¶ 34.

substantial evidence needed to justify the collection.⁴⁰² Rather, pervasive data production is an overly broad solution in search of a speculative problem,⁴⁰³ and any new information that would be derived would almost certainly be outweighed by its costs.⁴⁰⁴ For all these reasons, the proposals should be rejected.

⁴⁰² See *Burlington*, 371 U.S. at 168; see also, e.g., *Association of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 681-86 (D.C. Cir. 1984) (noting the applicability of the substantial evidence standard to informal rulemaking).

⁴⁰³ Cf. *National Mining Association v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) (vacating as arbitrary and capricious regulation that is “irrationally overbroad”).

⁴⁰⁴ In the case of established carriers, it could require unwarranted diversion of resources away from other goals, like investing in infrastructure and service enhancements. And in the case of emerging providers, the extra resources spent compiling the data could be particularly costly and burdensome.

CONCLUSION

For the reasons discussed herein, the Commission should find that the mobile wireless market and adjacent markets subject to this review are effectively competitive and are producing substantial – and growing – consumer benefits.

Respectfully submitted,

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