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

In the Matter of	)	
	)	
Implementation of Section 6002(b) of the	)	
Omnibus Budget Reconciliation Act of 1993	)	WT Docket No. 10-133
	)	
Annual Report and Analysis of Competitive	)	
Market Conditions With Respect to Mobile	)	
Wireless, including Commercial Mobile	)	
Services	)	
	)	

COMMENTS OF FREE PRESS AND MEDIA ACCESS PROJECT

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COMMENTS OF FREE PRESS AND MEDIA ACCESS PROJECT

Media Access Project, on behalf of Free Press (together, "Public Interest Commenters"), respectfully submits these comments in response to the *Public Notice*[1] issued in the above-captioned docket by the Wireless Telecommunications Bureau. The *Public Notice* follows the lead of the most recent annual report[2] and seeks comment on competition not only for commercial mobile services but throughout the entire mobile wireless industry. Public Interest Commenters applaud the more comprehensive approach in the *Fourteenth Report* – prompted by "fundamental transformations in the mobile marketplace"[3] that necessitate a broader inquiry – yet urge the Commission to focus even more attention on mobile wireless broadband and to recognize the persistent lack of effective competition for all mobile wireless services.

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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, WT Docket No. 10-133, *Public Notice*, DA 10-1234 (rel. June 30, 2010) ("*Public Notice*").

2 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, WT Docket No. 09-66, *Fourteenth Report*, FCC 10-81 (rel. May 20, 2010) ("*Fourteenth Report*").

3 *Public Notice* at 1.

INTRODUCTION AND SUMMARY

The *Fourteenth Report* represented a leap forward in terms of analysis and data collection by the Commission. The *Public Notice* follows the successful model for that most recent annual assessment, which still analyzed in detail the four categories of competitive indicators established by earlier reports: industry structure, provider conduct, market performance, and consumer behavior.[4] The *Fourteenth Report* bolstered that framework by considering competition among providers of Commercial Mobile Radio Service ("CMRS") across all mobile wireless services that these providers may offer, including different voice, broadband data, and messaging services.[5] The *Fourteenth Report* also analyzed competition in "upstream" market segments for inputs necessary to provide service, such as spectrum, infrastructure, and backhaul; and examined "downstream" or "edge" products and services that utilize or rely on mobile wireless platforms, such as devices, operating systems, applications, and mobile commerce.[6]

The Public Interest Commenters enthusiastically supported[7] the Commission's decision when preparing the *Fourteenth Report* to improve and expand its analysis of the full mobile wireless "ecosystem,"[8] including upstream and downstream segments so vital to mobile wireless service providers' ability to compete. Despite these welcome advances in terms of rigorous and robust analysis, however, Public Interest Commenters respectfully suggest that the Commission must take at least three more steps forward in the next report.

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4 *Id.* at 2 (listing factors typically analyzed in annual reports as early as 2004).

5 *Id.* at 1 (describing new frameworks adopted in the *Fourteenth Report*).

6 *See id.* at 1-2.

7 *See, e.g.*, Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 2 (filed Sept. 30, 2009) ("2009 NOI Comments").

8 *See Fourteenth Report* ¶ 2.

First, the Commission should focus even more of its attention and energies on collecting and analyzing data regarding competition for mobile wireless broadband services, which already are and will remain the driver for innovation, entry, and growth in the mobile wireless space. Mobile wireless broadband services are what end users increasingly need and demand, and such offerings must be available to end-users on reasonable and affordable terms. Unfortunately, the current level of competition for these services does not suffice to ensure achievement of that goal. Consumers of mobile wireless broadband services today face limited choices in terms of service plans and devices, and far too often pay supracompetitive service prices, penalties, and fees. Providers' engage in parallel conduct – both in setting their prices and in establishing their respective service plans' terms, conditions, and limitations – and such conduct demonstrates the lack of effective competition while depriving users of the value and savings they would realize in a truly competitive environment.

Second, assuming that the trends observed in the *Fourteenth Report* continue – as Public Interest Commenters previously have shown they do, and will again demonstrate here – the Commission should reach the logical conclusion to which its analysis in the *Fourteenth Report* leads: that there is not at the present time effective competition for mobile wireless services, including traditional voice, mobile wireless broadband data, text messaging, and other services. Public Interest Commenters appreciate the sentiment that a simplistic or "overarching, industry-wide determination" with respect to competition may not accurately capture the complex "multitude of factors" the Commission now considers in preparing these reports, and agree that the most important outcome of such reports are the Commission's decisions to use "policy levers" that "could produce superior outcomes."[9] Yet, there has been more than enough

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[9] *Id.* ¶ 3.

evidence in previous years for the Commission to determine that, on the whole, effective competition does not hold for mobile wireless services and adjacent markets. As these comments demonstrate, the record the Commission compiles in the instant proceeding likely will continue to compel that same conclusion.

As a result, the Commission must begin using these policy levers that the *Fourteenth Report* references. The *Public* Notice, along with several other pending proceedings and open dockets at the Commission, have teed up the right questions regarding chokepoints and practices that hinder competition. The Public Interest Commenters' submissions in previous mobile wireless annual assessment dockets, supplemented by filings in various other proceedings and refreshed in the comments that follow, resoundingly support the view that effective competition is not the norm in broad swaths of the mobile wireless services ecosystem. There is a lack of effective competition – and a corresponding dearth of good and affordable mobile wireless service offerings – in a wide range of geographic regions and product segments. While the Commission has asked the right questions, and received abundant evidence in response about failures in the workings of the market for mobile wireless services, it now must begin to answer the questions it has posed and render decisions in the inquiries it has launched. These Commission proceedings examine problems affecting mobile wireless service inputs such as spectrum availability, special access, and data roaming; early termination fees ("ETFs") and other parallel limitations in wireless plans; and handset exclusivity and handset design issues in downstream markets, along with similar problems hindering or diminishing competition in the mobile wireless industry.

Many of the Commission's own findings in the *Fourteenth Report* with respect to the four traditional CMRS report factors pointed toward the conclusion that effective competition is missing in too many areas. That report found that the current mobile wireless industry structure shows "continued industry concentration,"[10] and noted that high costs for backhaul may "affect the ability of entrants to compete successfully."[11] It showed parallel pricing at different levels of service, as well as other types of parallel conduct by the AT&T and Verizon Wireless, citing the "premium…higher prices" that subscribers apparently will pay "for access to preferred handsets and data offerings" often locked exclusively to these largest incumbents.[12] It reported market performance results that show declining capital investment relative to industry size, despite continued high profitability and strong revenue growth.[13] And it described the information costs that consumers face when they decide to consider switching service providers, along with the recently skyrocketing – and once again, strikingly parallel – early termination fees that represent the "probably the largest quantifiable cost to consumers who wish to switch service providers."[14]

For all of these reasons, Public Interest Commenters believe that the Commission should have little difficulty determining at the conclusion of the instant proceeding that, on balance, there is a lack of effective competition among providers of mobile wireless services. In a truly competitive environment, meaning one in which the entry and growth of smaller providers was not so readily and intentionally hindered by the largest incumbents, the types of supracompetitive profits, anti-competitive tactics, and anti-consumer practices described in these comments could not persist. Yet they do persist, and continue to worsen when it comes to the mobile wireless

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10 *Id.* ¶ 4.

11 *Id.* ¶ 64.

12 *Id.* ¶ 92 & tbl. 10; *see also id.* ¶¶ 239-241 (discussing consumer switching costs associated with carriers' handset locking practices and other handset purchasing issues).

13 *Id.* ¶ 4.

14 *Id.* ¶¶ 229-234.

broadband space increasingly dominated by the two largest providers because of their market power and other advantages they exploit.

***Third*,** the Commission should continue to focus in preparation of its next report on developing, supplying, and releasing its own data regarding the status of competition among mobile wireless service providers. The Public Interest Commenters warned during the *Fourteenth Report* proceeding against over-reliance on third-party data of insufficient granularity and sometimes questionable objectivity.[15] The Commission took strides forward in the *Fourteenth Report* in terms of identifying the limitations of existing data, seeking to develop new and more reliable resources, and for the first time releasing a portion of the data used in compiling the report in a downloadable and manipulable format.[16] In answer to questions posed in this *Public Notice* regarding additional data sources on which the Commission might rely to examine service availability, network deployment, industry concentration, and other questions,[17] Public Interest Commenters renew their call for the Commission to continue improving its own existing data collection processes, devising new methods for gathering data with objective and independent tools, or obtaining data directly from industry participants that have the best access to such information.

I. ANALYSIS OF MOBILE WIRELESS INDUSTRY STRUCTURE CONTINUES TO DEMONSTRATE A LACK OF EFFECTIVE COMPETITION.

As they did in submitting comments for the *Fourteenth Report*, the Public Interest Commenters welcome the opportunity to suggest new areas of focus for Commission data-gathering and quantitative analysis, and to suggest for the next Commission report an even more

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15 *See, e.g.*, 2009 NOI Comments at 30-35.

16 *Public Notice* at 20.

17 *See, e.g.*, *id.* at 4-6.

intensive focus on competitive issues for mobile wireless broadband services. Yet, as they have in previous submissions in the Commission's annual assessment dockets, Public Interest Commenters will build these comments around the traditional, four-pronged CMRS report framework, and review the symptoms of ineffective competition revealed by proper application of that framework to the data at hand about the entire mobile wireless ecosystem.

A. Industry Concentration Continues to Rise, Due to Consolidation and Other Factors That Have Increased the Market Share and Market Power of the Largest Incumbent Providers.

The *Public Notice* describes the Commission's standard methods for measuring horizontal concentration in the mobile wireless industry, and seeks comment on these measurement methods and mechanisms.[18] When it comes to such analyses, the *Fourteenth Report* confirmed that the overall industry structure has worsened from a competitive standpoint because of "continued industry concentration."[19] As the *Fourteenth Report* observed, "[o]ver the past five years, concentration has increased in the provision of mobile wireless services….. One widely-used measure of industry concentration indicates that concentration has increased 32 percent since 2003 and 6.5 percent" between 2007 and 2008, "the most recent year for which data is available."[20]

These increases can be attributed in part to a spate of mergers and acquisitions that the Commission approved in 2008 and that were completed, for the most part, in that same year. The Commission mentioned some but not all of these acquisitions in the *Fourteenth Report*,[21]

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18 *See id.* at 5-6.

19 *Fourteenth Report* ¶ 4.

20 *Id.* ¶¶ 4, 51.

21 *See id.* ¶ 51 (reporting on mergers of AT&T/Aloha (February 2008), T-Mobile/Suncom (February 2008), Verizon Wireless/Rural Cellular (August 2008), and Verizon Wireless/Alltel (January 2009)).

proving the predictions that Public Interest Commenters made in previous filings about the significant harmful effect that such transactions would have on concentration levels as measured by use of the Herfindahl-Hirschman Index ("HHI").[22] The current HHI values for the industry at the end of 2008 stood at 2848, well above the 1800 level at which previous governmental antitrust and merger guidelines would classify markets as "highly concentrated,"[23] and comfortably above the 2500 level that more recently proposed guidelines describe as highly concentrated.[24] On a regional rather than national basis, HHI values still show consistently high levels of concentration, with individual Economic Area ("EA") values ranging from a low of 2123 to an astronomical high of 8263.[25] The *Fourteenth Report* observed increases in concentration across the board, reporting that "[b]oth the lowest EA HHI value and the highest EA HHI value are…higher than preceding years' lowest and highest EA HHI values."[26]

The *Public Notice* asks about the usefulness of HHI in measuring concentration and competition, and seeks comment on the relationship between concentration and competition.[27] While there are other ways in which the Commission can and should analyze industry structure, concentration, and ultimate levels of competition, HHI measurements remain a useful indicator. As the Commission has observed, and as Public Interest Commenters and others have agreed,

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22 *See, e.g.*, 2009 NOI Comments at 7-8.

23 *See id.* at 7 (citing Department of Justice and Federal Trade Commission, *Merger Guidelines,* 1997, § 1.5; Neil B. Cohen and Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 Tex. L. Rev. 453, 461 (1983)).

24 *See* Federal Trade Commission, "Horizontal Merger Guidelines for Public Comment," at 19 (rel. Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf.

25 *Fourteenth Report* ¶ 51.

26 *Id.* ¶ 4 at page 15.

27 *Public Notice* at 5-6.

HHI values are just one factor, not the be-all and end-all of the analysis.[28] Yet, while national and regional HHI averages do not tell the whole story, they certainly do not tell a good story in terms of the level of effective competition for mobile wireless services throughout the United States. The Commission should analyze HHI, but rather than merely counting the number of competitors potentially offering mobile wireless services in a particular area, it must continue to refine its analyses of industry structure, market power, and barriers to entry and growth – along with its examination of provider conduct and market performance discussed below in Parts II and III of these comments – all of which continue to demonstrate a lack of effective competition in the mobile wireless ecosystem.

As the Public Interest Commenters have shown previously, certain anti-consumer and anti-competitive practices can arise and persist regardless of the number of competitors in a particular geographic market. This is especially true when providers have the incentive and the ability to charge higher rates by hiding the true cost of service through the use of impenetrable service "bundles" and non-transparent billing practices,[29] or when providers perceive a common interest in holding onto their own customers via the imposition of high ETFs rather than seeking out new customers by reducing or eliminating ETFs altogether. Such provider conduct and industry-wide incentives can create virtually a permanent limit on the ability of competition to discipline the market, but measures of concentration and other analyses of competition remain

[28] *See Fourteenth Report* ¶ 48 ("Measures of industry concentration aim to relate industry structure to industry performance. They can be useful indicators when evaluated together with firm conduct and actual industry performance."); *see also* Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 14 (filed Oct. 22, 2009) ("2009 NOI Reply Comments") ("HHI, along with other simplistic methods for simply counting up the number of competitors potentially offering service in a particular marketplace, are not enough to determine the level of competition in a market.").

[29] *See* Xavier Gabaix and David Laibson, *Shrouded Attributes and Information Suppression in Competitive Markets* (May 22, 2004).

valuable tools for explaining why there is insufficient competition and new entry to resolve such market failures.

B. The Commission Should Continue to Refine Its Analysis of Industry Concentration by Examining More Closely the Structure, Conduct, and Performance for Various Product and Service Segments.

The Public Interest Commenters repeatedly have called upon the Commission to refine its analysis of industry structure by independently assessing levels of concentration, as well provider conduct and market performance, for the various mobile wireless services and products that providers offer, such as voice, broadband data, and messaging services.[30] In the absence of such disaggregated and particularized analyses, the Commission's mobile wireless competition reports risk missing the fact that mobile wireless broadband service offerings appears to be even more concentrated and even less competitive than mobile voice offerings. The *Fourteenth Report* recognized appropriately that "[p]roviders of mobile wireless services offer an array of mobile voice and data services, including interconnected mobile voice services, text and multimedia messaging, and mobile broadband Internet access services," then indicated that the Commission would consider "information and data on the mobile wireless services industry as a whole as well as on each of the[se] individual segments where appropriate."[31] Nevertheless, the *Fourteenth Report* concluded that, "[f]rom the standpoint of competitive analysis," it only could consider "the mobile wireless services industry as a whole rather than providing separate competitive analyses of all of the various segments."[32]

Public Interest Commenters understand and appreciate the difficulties that the Commission faces in gathering data and disaggregating information for different mobile wireless

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30 *See, e.g.*, 2009 NOI Comments at 9-10.

31 *Fourteenth Report* ¶ 20.

32 *Id.*

services that may be provided using the same spectrum and infrastructure and received by consumers on a single end-user device.[33] Nevertheless, the Bureau can and should find ways to increase the reliability and granularity of its data on mobile wireless data service recipients, despite the limitations associated with using Number Resource Utilization / Forecast ("NRUF") data as a primary resource for analyzing mobile wireless data subscription and usage.[34] Mechanisms available to the Bureau include, as the *Public Notice* suggests, using data supplied under the Commission's revised Form 477 Local Competition and Broadband Reporting requirements.[35] Increased granularity based on heightened geographic specificity requirements for Form 477 would improve the reliability and usefulness of this data as well.

Notwithstanding any difficulties or challenges that use of NRUF, Form 477, and other such currently available data may pose, the Commission cannot afford to analyze competition measures and indicators such as industry structure and market performance on a larger geographic scale than the EA level used at present to examine market concentration and other factors.[36] While information at a more disaggregated geographic level would be welcome and useful, the Commission should not for any purposes make determinations at a ***less*** disaggregated level.

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[33] *See id.* ¶¶ 21-22.

[34] *See id.* ¶ 23 ("NRUF data provide an estimate of all mobile wireless devices in use that have a telephone number assigned to them…[but] do not distinguish by the type of device used."); *see also Public Notice* at 6 ("One limitation of NRUF data is that they do not reveal whether mobile wireless subscribers use their handsets for mobile data as well as mobile voice services, and therefore cannot be used to estimate market shares or concentration in the mobile data sector.").

[35] *See Public Notice* at 3.

[36] *See id.* at 11 ("Given the limitations of NRUF data, insofar as they are reported on the basis of the location of rate centers, would other geographic areas be appropriate to use in place of or in addition to EAs, such as states, MTAs, BTAs, CMAs, or counties?").

In sum, the Commission should strive in the next report to deepen and sharpen its analysis of mobile wireless broadband services first and foremost, seeking to establish separate HHI values and other measures of concentration for such services by EA. The mobile wireless broadband services that the Commission should measure in this regard must be defined in a meaningful way by reference to a broadband standard based on widely available services and speeds. Only by calibrating its analysis in this manner can the Commission avoid over-inclusive measurements that might count too many narrowband mobile wireless data offerings, but also avoid under-inclusive measurements that might exclude the majority of 3G mobile wireless data services and Internet offerings available today.

C. Beyond Consolidation Due to Acquisitions and Mergers, Industry Concentration Continues to Rise Because of Increasing Market Shares of the Largest Incumbents, Especially for Mobile Wireless Broadband Services.

The *Public Notice* seeks comment on the "extent to which increasing concentration is the result of consolidation."[37] As described in Part I.A above, mergers and acquisitions play a large role in the continued rapid rise of traditional market concentration measures such as HHI. Not to be overlooked, however, are the thoroughly documented observations and conclusions that the *Fourteenth Report* makes with respect to the disproportionate market share growth enjoyed over the last several years by the two largest incumbent providers of mobile wireless services, AT&T and Verizon Wireless.[38] As the *Fourteenth Report* noted, newly added subscribers "have not been distributed evenly among major service providers. The two largest providers garnered 12.3 million net new subscribers during 2008 and 14.1 million during 2009, while the two next largest providers combined ***lost*** 1.7 million subscribers during 2008 and gained 827,000 subscribers

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[37] *Id.* at 6.

[38] *See Fourteenth Report* ¶ 4 at page 9.

during 2009."[39] These trends have continued in 2010. Verizon and AT&T have added more than 6.3 million subscribers in the first half of 2010.[40] Meanwhile, the two next largest providers have seen a ***net loss*** of 41,000 subscribers.[41]

The *Public Notice* also seeks comment on whether "increasing concentration affected mobile data services differently than mobile voice services."[42] The number of mobile wireless data and mobile wireless broadband data subscribers by provider has been difficult to assess reliably because of the issues outlined above with NRUF and old Form 477 data. However, the Commission can and should look for its next report to improved Form 477 data and other sources, and should continue requiring providers to supply better information on their numbers of "mobile high-speed subscribers" at the state level and in further disaggregated geographic areas.[43] As noted above, the two largest wireless operators continue to add subscribers at a rapid pace. The 182.3 million wireless connections now controlled by AT&T and Verizon Wireless is "a staggering number" considering that these two companies "served 105.4 million wireless

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[39] *See id*. (emphasis added). The report indicated that Verizon Wireless actually added some 19.2 million new subscribers in 2009, but noted that more than 13 million of those were Alltel customers added as a result of the Verizon Wireless takeover of that carrier. Adding subscribers gained as a result of that merger back into the total "net adds" of the big two carriers would show a gain in 2009 by AT&T and Verizon Wireless of not just 14.1 million subscribers, but 27.3 million instead.

[40] Verizon Communications Investor Quarterly, Consolidated Statements of Income, Q2 2010, at 13 (July 23, 2010); AT&T Financial and Operational Results, Q2 2010, at 9 (July 22, 2010) ("AT&T 2010 Q2 Results").

[41] T-Mobile has not yet reported its Second Quarter Earnings. However, in the first quarter it experienced a net loss of 77,000 subscribers. *See* "Sprint Nextel Reports Second Quarter 2010 Results," Press Release (July 28, 2010); "T-Mobile USA Reports First Quarter 2010 Results," Press Release (May 12, 2010).

[42] *Public Notice* at 6.

[43] *Id.* at 3; *see also Fourteenth Report* ¶¶ 158-162 (describing wide variance in reporting practices on previous Form 477 mobile wireless submissions, but reporting data from CTIA, some individual providers, and some industry analysts regarding the growing number of mobile broadband data subscribers, smartphone users, and mobile wireless laptop connections).

connections at the end of 2005."[44] While one observer concluded on the basis of these most recent results that the mobile wireless industry is "not quite a duopoly yet," the analyst quickly added that "with the vast majority of growth going to two companies, it's close" to a duopoly.[45]

Even without precise or consistent numbers at present on concentration within the mobile wireless broadband data segment measured in terms of subscribers, there is ample evidence that most of the subscriber and revenue growth enjoyed by AT&T, Verizon Wireless, and other large incumbents is the result of growth in mobile wireless data subscribers and data usage by those subscribers. The question that the Commission must answer in its upcoming report (and in a range of pending proceedings on the substantive proceedings discussed immediately below) is why the largest providers add new subscribers so rapidly, and in disproportionate share, while new entrants and even established competitors struggle to keep pace. That answer, quite obviously in the Public Interest Commenters' view, is that these largest incumbents exploit their market power and other structural advantages in ways that create almost insurmountable barriers to entry and growth by other providers of mobile wireless services.

D. Barriers to Entry and Growth Persist, and the Commission Must Begin to Issue Decisions and Take Action in Various Proceedings Designed to Lower or Eliminate Such Barriers.

The *Public Notice* recounts the description in the *Fourteenth Report* of various barriers to entry and growth in the mobile wireless services industry, such as access to spectrum, costs of network deployment, and other input-related obstacles, as well as barriers in downstream

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44 *See* Jim Patterson, "Reality Check: Verizon and AT&T Earnings: Have We Touched Bottom?", RCR Wireless (July 27, 2010), *available at* http://www.rcrwireless.com/article/20100727/REALITY_CHECK/100729963/reality-check-verizon-and-att-earnings-have-we-touched-bottom.

45 *Id.*

markets and other industry conditions that may influence competition.[46] The *Fourteenth Report*, unlike the reports immediately preceding it, properly identified and discussed several such barriers to entry and growth by would-be mobile wireless competitors.[47] Moreover, as Public Interest Commenters demonstrated in their submissions for the *Fourteenth Report* docket, there is widespread recognition of these barriers and support for Commission action even among providers of mobile wireless services themselves, with virtually all carriers but AT&T and Verizon Wireless recognizing the problems that providers large and small face in today's insufficiently competitive landscape.[48] The Commission now must take the next necessary steps by finding that the mobile wireless services industry is not effectively competitive due to these barriers and, more importantly, by lowering or eliminating these barriers with prudent Commission policy choices and rules.

1. Mobile Wireless Service Inputs Such as Spectrum, Roaming, and Backhaul Lack Effective Competition or Regulation and Thus Act as Barriers to Entry and Growth.

The *Fourteenth Report* identified spectrum as one of the "critical input segments [that] may affect competition in the provision of mobile wireless service,"[49] and provided a thorough review of providers' spectrum holdings and Commission spectrum policies. The Commission could resolve some of the issues preventing greater access to spectrum, and lower or remove some obstacles to entry and growth, simply by monitoring and regulating the amount and type of spectrum that any one provider and its affiliates may hold, and by making more spectrum available in variety of ways.

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46 *See Public Notice* at 6.

47 *See, e.g.*, *Fourteenth Report* ¶¶ 249-332.

48 *See* 2009 NOI Reply Comments at 5-9.

49 *Fourteenth Report* ¶¶ 249-250.

As the *Fourteenth Report* observes when it comes to spectrum holdings, "five providers together – Verizon Wireless, AT&T, T-Mobile, as well as Sprint Nextel and Clearwire – hold more than 80 percent of all of the spectrum, measured on a MHz-POPs basis, that is suitable for the provision of mobile wireless services."[50] The same large companies hold the majority of spectrum under 1 GHz, which is the most efficient spectrum for mobile Internet usage.[51] For these reasons, the Public Interest Commenters continue to call upon the Commission to reinstitute spectrum caps and use meaningful spectrum screens whenever appropriate.[52]

The Commission also should continue its efforts to make more new spectrum available for mobile wireless broadband services, both on a licensed basis, and – critically – also on unlicensed, shared, and opportunistic bases beyond and in addition to the traditional leasing and dynamic leasing scenarios discussed[53] in the report. The *Public Notice* seeks comment on frequencies that lie fallow or are underutilized,[54] a topic on which Public Interest Commenters

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50 *Id.* ¶ 267 & tbl. 25.

51 *See id.* ¶ 275 (discussing spectrum holdings under 1 GHz); *see also id.* ¶¶ 269-271 (describing propagation characteristics of lower frequencies and their superiority for mobile broadband service).

52 The Commission eliminated spectrum caps in 2003. *See* Press Release, Federal Communications Commission, "FCC Announces Wireless Spectrum Cap To Sunset Effective January 1, 2003" (November 8, 2001), *at* http://www.fcc.gov/Bureaus/Wireless/News_Releases/2001/nrwl0129.html. Since that time, incumbents have increased their already large spectrum holdings, thereby increasing the substantial competitive advantages that the largest nationwide carriers enjoy and the overall level of concentration in an already concentrated market. *See, e.g.*, Reply Comments of the Public Interest Spectrum Coalition, RM-11498 (filed Dec. 22, 2008) (regarding *Rural Telecommunications Group, Inc. Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, RM-11498 (filed July 16, 2008)).

53 *Fourteenth Report* ¶ 264.

54 *Public Notice* at 15.

and others have written extensively.[55] In light of the amount of unused and underutilized spectrum, the Commission should complete the TV White Spaces ("TVWS") spaces proceeding as soon as possible.[56] It also should extend the TVWS database and opportunistic access model to other under-utilized bands and portions of the spectrum, in addition to allocating new spectrum under 3 GHz for unlicensed use.[57] With more routes to access spectrum, new providers could more rapidly deploy robust, competitive mobile wireless broadband offerings, but facilitating such improvements in competition depends largely on the successful completion of the Commission's pending TVWS, spectrum inventory, and spectrum reallocation proceedings to make spectrum inputs available under a variety of different models.[58]

While there have been in the last year a handful of advances and victories in terms of actions that can lower barriers to entry and growth, there is still much work for the Commission to complete. The *Fourteenth Report* noted that the Commission had released in April 2010 a *Roaming Order on Reconsideration* that eliminated the home roaming exclusion and thereby clarified carriers' obligations to provide automatic roaming no matter whether the requesting carrier holds spectrum rights in the market.[59] Yet, to improve competitive conditions for mobile

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55 *See* Reply Comments of the Public Interest Spectrum Coalition, GN Docket Nos. 09-157, 09-51 (filed Nov. 5, 2009).

56 *See* In the Matter of Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Second Report and Order and Memorandum Opinion and Order*, 23 FCC Rcd 16807 (2008).

57 *See, e.g.*, PISC Reply Comments at 18-22.

58 *See, e.g.*, Lawrence H. Summers, Director, White House Nat'l Econ. Counsel for President Barack Obama, Remarks at the New America Foundation on the President's Spectrum Initiative (June 28, 2010), *available at* http://www.whitehouse.gov/administration/eop/nec/speeches/technological-opportunities-job-creation-economic-growth.

59 *Fourteenth Report* ¶ 126 (citing Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, FCC 10-59 (rel. Apr. 21, 2010) ("*Roaming Order on Reconsideration*")).

wireless broadband services, the Commission must conclude the data roaming notice of proposed rulemaking proceeding initiated by the same order, and in that proceeding should decide that mobile wireless providers also have an obligation to provide automatic roaming for non-interconnected data services.[60]

The Commission also should conclude expeditiously its protracted special access inquiry,[61] having correctly found in the *Fourteenth Report* that wireless backhaul costs associated with wireless providers' purchase of special access services "currently constitute a significant portion of a mobile wireless operator's network operating expense."[62] The Commission's past competition policies and "streamlining" decisions regarding special access have created or exacerbated structural barriers to entry and growth. The *Fourteenth Report* found that "the demand for backhaul capacity is increasing," and noted, importantly, that "[w]ireless providers unaffiliated with a wireline provider often must rely on their competitors' affiliates for access."[63]

This type of concentration and vertical integration in upstream markets leads directly to a lack of effective competition in the provision of mobile wireless services. As the Public Interest Commenters have noted often, the operation and ownership of wireline facilities by affiliates of the two largest incumbent wireless carriers leads to disproportionate power for these vertically integrated, cross-platform giants with massive incumbent local exchange, transport, and wireless

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60 *See id.*; *see also* Comments of Free Press, WT Docket No. 05-265, at 9-10 (filed June 14, 2010); Comments of Media Access Project, WT Docket No. 05-265, at 3-6 (filed June 14, 2010).

61 *See, e.g.*, Comments of the NoChokePoints Coalition, WC Docket No. 05-25, RM-10593, at 5 (filed Jan. 19, 2010) ("NoChokePoints Coalition Comments") (noting that the Commission issued its most recent notice of proposed rulemaking on special access reform a half-decade ago, in 2005); Reply Comments of the NoChokePoints Coalition, WC Docket No. 05-25, RM-10593, at 2-4 (filed Feb. 24, 2010) ("NoChokePoints Coalition Reply Comments").

62 *Fourteenth Report* ¶ 296.

63 *Id.*

holdings. Such vertically integrated companies have distinct advantages in the market for crucial and costly backhaul "inputs" used to provide mobile wireless service. Verizon Wireless and AT&T likely enjoy lower special access costs by effectively self-provisioning these services, and they have an increased ability to capture and retain as wireless subscribers their own wireline customers and former customers. Finally, these barriers impact especially (though not exclusively) mobile Internet access providers, owing to the excessive backhaul rates imposed on Internet traffic.[64] The Commission should take into account when assessing the level of competition in the mobile wireless space these plain advantages that intermodal incumbents exploit to increase their market share and market power.

2. *Industry Concentration, and the Largest Incumbents' Resulting Market Power Over Downstream Segments Such as Handsets and Applications, Also Block Entry and Growth.*

The *Public Notice* seeks comment "on the role of handsets, handset locking, and handset application[s] in consumer switching costs."[65] Unfortunately, exclusive handset arrangement remain the norm, and popular smartphones capable of accessing and using mobile broadband and Internet access services are disproportionately available to large incumbent carriers – meaning the same providers who exploit the advantages outlined above in terms of spectrum holdings, bargaining power in roaming arrangements, and special access terms and conditions. These arrangements lead not only to high switching costs for consumers, but also to limited competition from smaller mobile wireless service providers simply unable to offer customers the

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[64] *See, e.g.*, Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 22 (filed June 15, 2009) ("2009 NPRM Comments"); *see also* NoChokePoints Coalition Comments at 4-5; NoChokePoints Coalition Reply Comments at 3-6.

[65] *Public Notice* at 14.

same types of popular devices that their larger rivals can offer.[66] The largest incumbents' advantages in handset design and distribution are due in large part to the exclusive arrangements that these most powerful carriers can require device manufacturers to enter. The Public Interest Commenters' have detailed in previous submissions the harms of handset exclusivity.[67] Briefly restated, such arrangements artificially limit consumer choice, restrict device innovation, and lead to higher prices. By tying devices to certain providers, these arrangements too often lead users to choose an inferior or more expensive service plan than they otherwise might purchase, simply in order to obtain a desired device.[68]

Concentration in the mobile wireless industry leads directly to greater limitations not only in consumers' choice of handsets from their preferred carriers, but also to choice limitations in downstream applications markets. This is evidenced by the fact that large providers of mobile wireless services can block both application developers' and handset manufacturers' access to

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66 *See* 2009 NOI Reply Comments at 8-9 & n.29 (citing comments filed in the *Fourteenth Report* docket by providers and associations such as Cellular South, Cincinnati Bell, Ntelos, US Cellular, NTCA, RCA, and RTG).

67 *See* 2009 NPRM Comments at 15-18.

68 *See Fourteenth Report* ¶ 138 ("As a sign that certain mobile consumers have switched to AT&T primarily to access an iPhone, AT&T reports that 40 percent of its iPhone customers switched to AT&T from another service provider.") (citing Roger Entner, "Is Handset Exclusivity Really the Issue of the Day?", Nielsen Wire (Aug. 27, 2009,) *available at* http://blog.nielsen.com/nielsenwire/online_mobile/handset-exclusivity/. In their submissions for the *Fourteenth Report* docket, Public Interest Commenters chronicled the history of AT&T's under-investment in its networks used by iPhone subscribers. *See* 2009 NOI Reply Comments at 17-25. Consumer Reports likewise documented the willingness of AT&T subscribers to put up with poor service in order to use the popular smartphone. *See* Jenna Wortham, "Verizon Leads Wireless Service Rankings, While AT&T Lags," N.Y. Times BITS Blog (Dec. 1, 2009), *at* http://bits.blogs.nytimes.com/2009/12/01/verizon-leads-wireless-service-rankings-while-att-lags/ ("The Consumer Reports survey found that iPhone owners are willing to put up with a creaky network just to have the device: The survey found that 98 percent of iPhone owners liked their phones enough to buy it again, despite the sub-par ratings for AT&T."). Of course, while the iPhone has been a prime example of the problems associated with handset exclusivity, it is by no means the only example of a high-capability handset locked to a single carriers' network. *See Fourteenth Report* ¶ 140.

millions of potential users. Therefore, as the *Fourteenth Report* concluded, "[e]xclusive handset arrangements held by existing providers can create a kind of adjustment cost for potential entrants if lack of access to the exclusive technology delays the entry of potential entrants."[69]

Finally, the largest incumbents also have attempted to use their influence not only to gain exclusive rights to handsets once manufactured, but also to gain advantages by influencing chipset and radio design.[70] In comments on a petition submitted by a coalition of four 700 MHz A Block licensees, Media Access Project joined with Public Knowledge, New America Foundation, Consumers Union, and Consumer Federation of America to support the request that the Commission "prohibit restrictive equipment arrangements" that would balkanize the 700 MHz band and limit consumer ability to obtain 4G handsets or switch providers.[71]

As MetroPCS noted in its own reply comments in that same proceeding, comments fell into "an increasingly familiar pattern," with the "two largest wireless carriers, [AT&T and Verizon Wireless]" pitted "against the rest of the industry, represented in this proceeding by a broad cross-section of small, rural, mid-tier and national carriers, as well as a number of public safety organizations."[72] The smaller carriers all hoped that the Commission would prohibit restrictive equipment arrangements, along with standards that would lead to lessened availability of advanced handsets for all competitors other than the two largest incumbents, with such providers asserting the need for development of 700 MHz band mobile wireless broadband

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69 *Fourteenth Report* ¶ 66.

70 *See, e.g.*, Mathew Lasar, "Small wireless carriers: always stuck with crappy phones?", Ars Technica, *available at* http://arstechnica.com/telecom/news/2010/05/a-single-radio-chip-standard-for-all-700-mhz-wireless-gadgets.ars (last visited July 30, 2010).

71 Reply Comments of the Public Interest Spectrum Coalition, RM-11592, at 1-2 (filed Apr. 30, 2010).

72 Reply Comments of MetroPCS, Inc., RM-11592, at 1-2 (filed Apr. 30, 2010).

services in a "competitively neutral fashion."[73] Meanwhile, MetroPCS argued persuasively that the "the Big 2 are happy to preserve the near-duopoly position they enjoy in the 700 MHz band after their domination in the 700 MHz auction which was skewed in their favor."[74]

As in so many other settings, the self-interest of these largest incumbents does not align with the public interest, nor with competitors' desire for a level playing field and consumers' need for competitive service offerings made available on reasonable terms and conditions. The Commission should continue its consideration of the various proceedings described herein and should act to remove barriers to entry, growth, and competition, as it simultaneously considers for the next report the impact that such barriers have in the mobile wireless ecosystem.

II. PROVIDER CONDUCT AND LACK OF CONSUMER CHOICE CONTINUE TO INDICATE A LACK OF EFFECTIVE COMPETITION IN MOBILE WIRELESS SERVICES.

The *Public Notice* seeks comment on various types of provider conduct, including especially any innovations that have occurred in 2009 and 2010.[75] The *Fourteenth Report* evaluated provider conduct in detail, examining price rivalry, non-price rivalry, advertising and other expenditures, and differentiation among service plans and devices.[76] This thorough analysis illustrated several examples of parallel conduct by large incumbent providers, whose pricing for different tiers and types of services, service plan limitations, and ETF structures were strikingly similar in several respects.

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73 *Id.* at 2.

74 *Id.*

75 *See Public Notice* at 7.

76 *See Fourteenth Report* ¶¶ 85-152.

A. Pricing Plan Developments Since the Release of the *Fourteenth Report* Demonstrate Provider Conduct Reflecting a Lack of Effective Competition for Mobile Wireless Services.

While Public Interest Commenters acknowledge some limited differentiation in pricing between the two largest incumbents and other carriers, and other handset pricing variations between the four largest rivals,[77] the *Fourteenth Report* also indicated that "Verizon Wireless and AT&T shared a virtually identical tiered pricing structure before and after" pricing changes announced in January 2010.[78] These trends in price-matching have continued since the release of the *Fourteenth Report*, as have other types of parallel actions and provider conduct indicating a lack of effective competition.

In response to the request in the *Public Notice* for information on new types of pricing plans, Public Interest Commenters note numerous developments worthy of the Commission's further attention. For instance, AT&T's move away from flat-rate billing for mobile wireless data services, announced just days after the release of the *Fourteenth Report*, represents a dramatic shift within the industry. AT&T previously charged $30 per month for unlimited mobile wireless data usage. Following the change, smartphone users can pay either $15 per month for 200 MB of data or $25 per month for 2 GB.[79] AT&T suggested that it made these changes to "make it more affordable for more people to enjoy the benefits of the mobile

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77 *See id.* ¶¶ 92-97.

78 *Id.* ¶ 93.

79 AT&T, "AT&T Announces New Lower-Priced Wireless Data Plans to Make Mobile Internet More Affordable to More People," Press Release (June 2, 2010) ("AT&T Release"), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30854.

Internet."[80] Quite to the contrary, the pricing structure for these changes will harm consumers and cause negative effects.[81]

Moreover, the numbers that AT&T cited as its basis for the change provide no justification for it. Prior to the move, AT&T had reported to investors that, on its wireless network, "it is costing [us] half of as much to move that bit today than it was a year ago."[82] Furthermore, while AT&T's public rhetoric focused on savings to consumers, CEO Randall Stephenson revealed the company's expectation that "average revenue per user – the amount of money spent each month by mobile customers – should increase with the abolition of unlimited data plans."[83] Indeed, there was no evidence AT&T was losing money on wireless data, as its wireless data revenues grew almost $2 billion dollars in the past two years and its wireless operating income margin ***increased*** more than three percent.[84]

The overage fees that AT&T will impose on mobile wireless data subscribers under the new pricing plan cast further doubt on the competitive justification, financial necessity, and supposed consumer benefits of such a dramatic switch in pricing strategies. For the 2 GB plan, AT&T charges $10 per GB over the limit. Meanwhile, the 200 MB plan charges users $15 for every 200 MB over the monthly limit – which translates to a whopping $75 per GB over the limit

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80 *Id.*

81 *See, e.g.*, Claire Cain Miller and Brad Stone, "App Makers Worry as Data Plans are Capped," N.Y. Times (June 6, 2010), *available at* http://www.nytimes.com/2010/06/07/technology/07data.html (explaining that "[s]ome software developers fear...the caps on data use that AT&T has imposed could also make consumers lose their appetite for the latest innovations").

82 AT&T Inc., Q4 2009 Earnings Call Transcript (Jan. 30, 2010).

83 Andrew Parker and Paul Taylor, "Tough calls for AT&T's embattled chief," Financial Times (July 18, 2010), *available at* http://www.ft.com/cms/s/0/70df6c78-928e-11df-9142-00144feab49a.html.

84 *See* AT&T 2010 Q2 Results.

for the so-called "affordable" plan users.[85] Thus, while consumers hoping to avoid such steep penalties must now keep close watch on their consumption, AT&T has reported significant reductions in the per-bit cost of transferring data on its wireless network, regardless of the consumption level of individual users. AT&T's other data offerings, on devices other than smartphones, impose similarly onerous overage costs on consumers.[86] The result is that transferring the same one GB of data could cost anything from $10 to as much as $2,000.[87]

Mobile wireless providers also typically require consumers to pay additional data fees in order to use their devices for certain functions. In the case of AT&T once again, the option of tethering your phone to your computer costs an additional $20 per month.[88] Despite this, customers are still required to adhere to the company's capacity cap. The effect of such limits is exacerbated by the fact that the personal computer industry has not developed under the artificial restraints of the wireless industry. Consumers who tether may expect a full and (near) unlimited experience with Internet usage. Instead, they are forced to pay $20 more per month simply to use the smartphone they have purchased in a certain way. This is the equivalent of charging a consumer with a portable DVD player more for the ability to simply plug it into a television.

Another development is the requirement that all mobile wireless subscribers purchase a data plan if they choose anything but the most basic device. On January 15, 2010, Verizon Wireless forced all customers with "advanced" or "multimedia" devices to purchase a data

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85 *See* AT&T Release.

86 For instance, AT&T's LaptopConnect card has an overage charge of $100 per GB. *See* http://www.wireless.att.com/cell-phone-service/cell-phone-plans/data-connect-plans.jsp (disclosing overage charges of 10 cents per megabyte).

87 This comparison is based on 2 GB data plan overage cost of $10 per extra GB to the basic, non-smartphone data fee charge of $2 per MB transferred.

88 *See* AT&T Release.

plan.[89] Soon thereafter, on January 29, 2010, AT&T forced consumers into a similar system under which subscribers with "quick-messaging" devices had to pay a $20 data fee and smartphone users a $30 charge.[90] Cynically, that early 2010 move is the primary reason that AT&T could later claim it was saving customers money by moving away from flat-rate billing. Of course, over the long term, Randall Stephenson's admission regarding expected revenues suggests that the change in pricing structures is meant to have the opposite effect.

While certain consumers might benefit from a mandatory flat-rate plan as opposed to paying outrageous, pay-as-you-go fees,[91] other consumers are now forced to pay more per month simply because they sought a device or plan allowing them to send text messages more efficiently.[92] Such changes represents a significant shift in wireless data usage and pricing plans. Verizon Wireless has indicated that "more than 30%" of its customers utilized one of the devices that falls under its mandatory data plan requirements.[93] The Commission should scrutinize these changes to determine the effects they have had on consumers, and to assess the meaning of such parallel changes and mandatory charges for its evaluation of effective competition in mobile wireless services.

Further illustrating the lack of effective competition in the mobile wireless market is that fact that the largest providers can require certain classes of customers to purchase a data plan

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89 *See* Sue Marek, "Verizon drops unlimited voice prices, overhauls data plans," FierceWireless (Jan. 15, 2010).

90 *See* Phil Goldstein, "AT&T requiring data plan for 'Quick Messaging' phones," *FierceWireless* (Jan. 29, 2010).

91 As noted above, *supra* note 87, AT&T charges customers $2,000 per GB. *See* http://www.wireless.att.com:80/learn/messaging-internet/media-entertainment/faq.jsp#pricing.

92 *See* Phil Villarreal, "AT&T Stuck My Girlfriend With A Data Plan She Didn't Want," Consumerist (Feb. 16, 2010).

93 Verizon, Q1 2010 Quarterly Call Transcript (Apr. 22, 2010).

whether those customers want one or not, but these providers typically do ***not*** allow subscribers to purchase data-only plans for their handheld devices.[94] In a well-functioning market, incumbent providers would be forced to respond to competitive pressures and demand for such services by offering more flexible plans tailored to customer wishes rather than carrier whims.

B. The Imposition of Matched and Increasing ETFs, Along With Imposition of Other Persistent Service Plan Limitations, Illustrate a Lack of Differentiation Between Providers.

The Commission should also examine further the device "subsidies" that providers claim to offer as justification for ETFs, which are common across the mobile wireless services industry. The Commission's brief inquiry examining such claims that ETFs constitute subsidy repayments raised more questions than it answered, as the Commission asked for the right information but received inadequate responses.[95] Indeed, Commissioner Clyburn noted that Verizon Wireless's answers to the Commission's detailed queries on ETFs were "unsatisfying and, in some cases, troubling."[96] New York Times personal technology columnist David Pogue was similarly dismayed, wondering why "monthly bills don't drop at the end of two years, once we've fully paid for the phone?" and why consumers who buy the phone outright still "have to

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94 *See* Howard Buskirk, "Panelists Ask Why U.S. Wireless Market Isn't Better," Comm. Daily (Apr. 5, 2010) (quoting Sascha Meinrath, director of the New America Foundation's Open Technology Initiative, who complained during a presentation that "I can buy a data-only plan for this laptop, but I can't buy a data-only plan in the form factor of my cellphone[.] It makes no sense…. [W]hy do I have to buy a voice plan and a text plan and a data plan for my cellphone?").

95 *See, e.g.*, Letter from Chris Riley, Free Press, to Ruth Milkman, Chief, Wireless Telecommunications Bureau, WT Docket Nos. 05-194, 09-66, CG Docket No. 09-158 (Jan. 6, 2010).

96 Statement of Commissioner Mignon Clyburn Regarding Verizon Wireless's December 18 Letter on ETFs, DOC-295371 (Dec. 23, 2009).

pay the same monthly fee as somebody who got the discounted price."[97] These questions and many others regarding device subsidies have yet to be answered.[98]

Public Interest Commenters have noted in past submissions in annual report dockets the high switching costs and other problematic aspects of ETFs, which penalize customers who might otherwise switch to a competing provider.[99] According to providers' proffered justifications, ETFs are not in fact assurance for recouping subsidies, but rather loans that mobile wireless customers pay back over time without ever knowing the terms of the arrangement. The Commission should continue to examine the impact on consumer behavior of high and matching $350 ETFs for smartphones offered by the four largest mobile wireless providers, as well as matching ETFs across all four providers for more basic devices.[100] The Commission also should assess the ways in which such parallel service limitations and penalties represent provider conduct that illustrates a lack of effective competition.

Finally, further illustrating a lack of differentiation between mobile wireless service providers is the way in which providers tightly control and limit the availability of applications for data-capable handsets. The *Public Notice* requests comment on the ways in which wireless operators differentiate themselves based on "the applications and Internet content that they offer

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97 David Pogue, "Verizon Responds to Consumer Complaints," N.Y. Times (Dec. 21, 2009).

98 The *Fourteenth Report* noted that Verizon Wireless subscribers can "opt out of ETFs altogether by paying the full retail price upfront for advanced devices or regular handsets and choosing Verizon Wireless's month-to-month contract option," *see Fourteenth Report* ¶ 94, but in Public Interest Commenters' understanding this month-to-month service price does not reflect the discount that should be present if customers were not "paying back" their subsidy over time under a pro-rated ETF scheme.

99 *See, e.g.*, 2009 NOI Comments at 14-16.

100 *See Fourteenth Report* ¶ 234.

or the level of choice that they allow[.]"[101] The framing of this query illustrates the continued problems that consumers face in the mobile wireless data services market.[102] It should be up to consumers, not mobile wireless service providers, to choose what applications and Internet content they care to consume. Certainly, consumers should face no greater restrictions on their smartphones then they do on netbook or mobile Internet connected laptops that receive data over the same networks used to provide service to handheld devices. Competition amongst wireless network operators should be focused on operation of the network, not on differentiating themselves on the basis of how closed or open their networks are.

In other words, to the extent operators are involved in allowing their subscribers to access certain types of content and applications, the actions that most providers take only limit the choices that otherwise would be available. For instance, AT&T has blocked third party application stores on Android phones,[103] blocked the Sling application[104] and prevented Apple from approving VoIP applications.[105] The mobile wireless carrier industry as a whole has a long history of deactivating numerous device capabilities.[106] Furthermore, the largest mobile wireless service providers have designed their own mobile web applications to activate on touch of a

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[101] *Public Notice* at 9.

[102] Other questions in the *Public Notice* likewise illustrate the problems of less-than-fully-open networks. *See, e.g.*, *id.* at 18 ("To what extent can consumers access and use the content and applications of their choice?").

[103] *See, e.g.*, Eric Zeman, "AT&T Backflip, A Backward Step For Android," InformationWeek (Mar. 8, 2010).

[104] *See, e.g.*, Erica Ogg, "Apple and AT&T playing favorites with the App Store?", Cnet (May 13, 2009).

[105] Apple Inc., "Apple Answers the FCC's Questions" (Aug. 22, 2009) ("There is a provision in Apple's agreement with AT&T that obligates Apple not to include functionality in any Apple phone that enables a customer to use AT&T's cellular network service to originate or terminate a VoIP session without obtaining AT&T's permission.").

[106] *See, e.g.*, Tim Wu, *Wireless Carterfone*, International Journal of Communications, at 390, (2007); Columbia Public Law Research Paper No. 07-154.

primary button on numerous phones, resulting in a variety of connection charges unintended and unwanted by customers.[107] Providers' terms of service offer further evidence of the type of control these companies exert over their customers, as well as the control they have over content providers and application developers who need access to mobile wireless platforms.[108]

All of the new developments and persistent problems outlined this Part II illustrate the problems with arbitrary pricing and service restrictions that arise within the insufficiently competitive mobile wireless industry. A December 2009 Consumer Reports study found that only 54% of respondents were "completely or very satisfied" with their cell phone service, and that "consumers cited the high cost of cell service as their chief complaint."[109] With increasing mobile wireless margins, exploding data revenues, and the net decrease (discussed in Part III below) in the relative levels of provider investment, the Commission must examine even more closely the competitive dynamics underlying these mobile wireless voice and data service pricing and non-pricing practices.

III. MOBILE WIRELESS SERVICE MARKET PERFORMANCE CONTINUES TO INDICATE A LACK OF EFFECTIVE COMPETITION.

Turning to the last of the four factors in the traditional CMRS report framework, the *Public Notice* seeks comment on market performance in the mobile wireless services industry.[110] The Commission should build upon the successful expansion of its previous framework for this prong of the test, continuing to use and refine the new performance metrics contained in the

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107 *See* David Pogue, "Verizon: How Much Do You Charge Now?" N.Y. Times (Nov. 12, 2009).

108 *See, e.g.*, Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, App. B, (filed Jan. 14, 2010); *see also See, e.g.*, Reply Comments of the Mobile Internet Content Coalition, GN Docket No. 09-191, WC Docket No. 07-52 (filed Apr. 26, 2010).

109 *See* W. David Gardner, "Cell Phone Users Unhappy With Service," InformationWeek (Dec. 2, 2009).

110 *Public Notice* at 9.

Fourteenth Report.[111] The Public Interest Commenters will endeavor in subsequent filings to provide additional analysis of market performance data that other commenters may supply. For now, the Public Interest Commenters offer the following two observations.

First, notwithstanding any U.S. mobile wireless industry claims that domestic service offering are superior to those available in other nations, a comparative analysis of mobile broadband plans reveals otherwise. For instance, in Ireland consumers can purchase 5 GB of mobile wireless Internet access for $22 per month.[112] This stands in contrast to the mobile Internet service offers of the two largest U.S providers, which typically charge consumers approximately $60 per month for equivalent access.[113] Other similarly unfavorable international comparisons appear below, confirming that providers elsewhere generally offer far more affordable service than do their U.S. counterparts:

Country	**Company**	**Cost of 5GB monthly plan (or other plan as indicated)**
USA	Verizon Wireless	$60
USA	AT&T	$60
UK	O2	$23 (3GB)
UK	Vodafone	$38
UK	Virgin	$23 (3GB)
Ireland	Meteor	$22
GER	T-Mobile	$46
GER	Vodafone	$46
Spain	movistar	$50
Spain	Vodafone	$63 (10GB)*
AUS	Telstra	$54
China	China Unicom	$47
Egypt	Mobinil	$33 (4GB)

* = speeds of 21.6 down, far greater than the usual 7.2mb down.

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111 *See id.*

112 These consumers also have the option of receiving 15 GB for $26. *See* Meteor, Mobile Broadband, http://www.meteor.ie/bbtg/bp/#pricing-tab.

113 *See* AT&T, DataConnect Plans, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/data-connect-plans.jsp; *see also* Verizon Wireless, Mobile Broadband - Plans, http://www.verizonwireless.com/b2c/mobilebroadband/?page=plans.

Nor do U.S. consumers obtain faster speeds in exchange for their higher payments. For instance, as the table above indicates, Vodafone users in Spain not only receive twice the capacity (10 GB) as do AT&T and Verizon Wireless subscribers for $3 more, but they also receive advertised download speeds of up to 21.6 Mbps.[114] Meanwhile, millions of U.S. customers receive service with advertised peak download speeds of just 0.6 to 1.4 Mbps.[115] In fact, 85 operators in nearly 56 countries have already deployed networks capable of 7.2 Mbps downstream.[116] This includes operators in places such as Qatar, Aruba, Tajikistan and Moldova. Another 37 international operators have already deployed networks that can reach even higher speeds.[117]

This type of performance from the largest mobile wireless service providers in the United States should be unsurprising in light of their declining network investment levels. The *Public Notice* seeks comment on such investment during 2009,[118] in the wake of the *Fourteenth Report*'s conclusion that while "industry revenue has continued to grow, [ ] sources show that capital investment has declined as a percentage of industry revenue" from 20 percent to 14 percent during the 2005 to 2008 time period.[119] Like other trends discussed in these comments, this relative decline in investment is indicative of an insufficiently competitive marketplace – one in which service providers can rely on market power, anti-competitive tactics, and entry barriers rather than service quality and performance to gain new customers.

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[114] Vodaphone, Tarifas, http://www.vodafone.es/particulares/tarifas/internet-en-movilidad/.

[115] *See, e.g.*, Verizon Wireless, Mobile Broadband – Coverage and Speed, http://www.verizonwireless.com/b2c/mobilebroadband/?page=coverage.

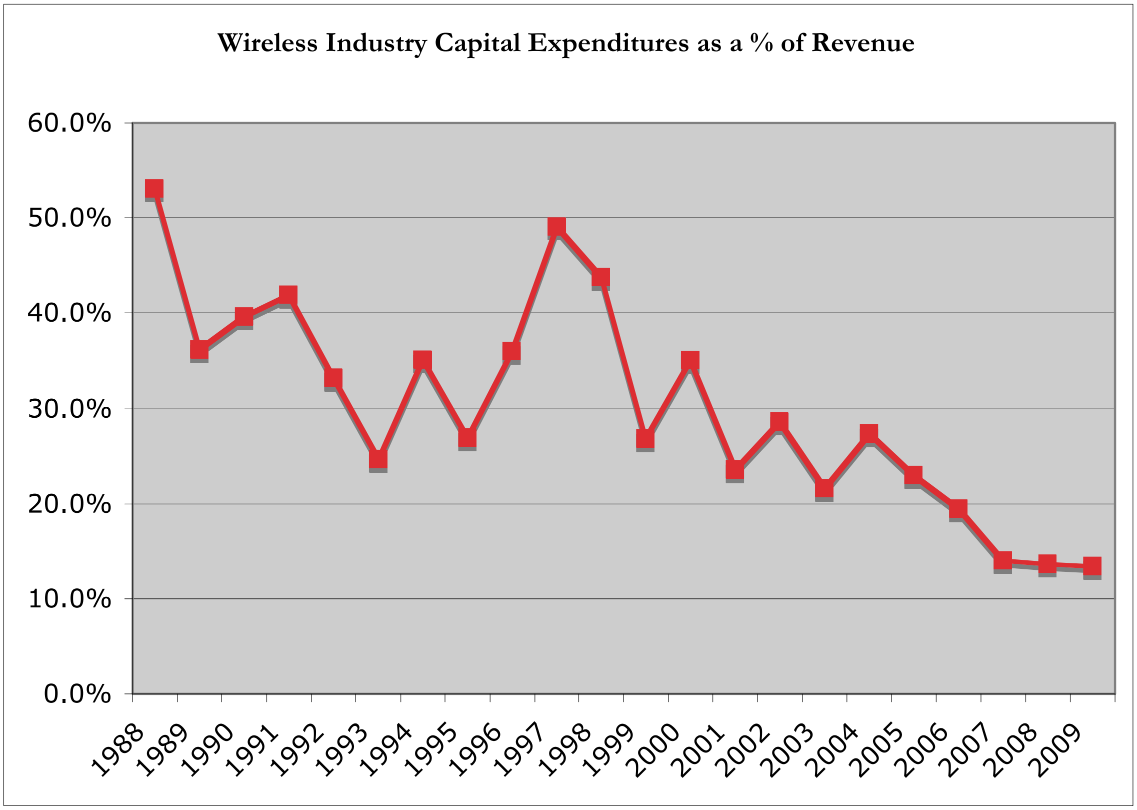
[116] *See* GSM Association, "HSPA – High Speed Packet Access – Available Networks," http://www.gsmamobilebroadband.com/networks/default.asp.

[117] *Id.*

[118] *See Public Notice* at 9, 12.

[119] *Fourteenth Report* ¶ 4.

The *Fourteenth Report* subsequently presented more detailed findings showing that "annual capital investment as a percentage of total industry revenue has been declining."[120] According to the CTIA data, this trend appears to have continued during 2009, with a relative investment level slightly lower than that for 2008, and thus the lowest on record.[121]



This continued drop in relative investment comes as the two dominant mobile wireless providers continue to experience margin growth even greater than reported in the most recent

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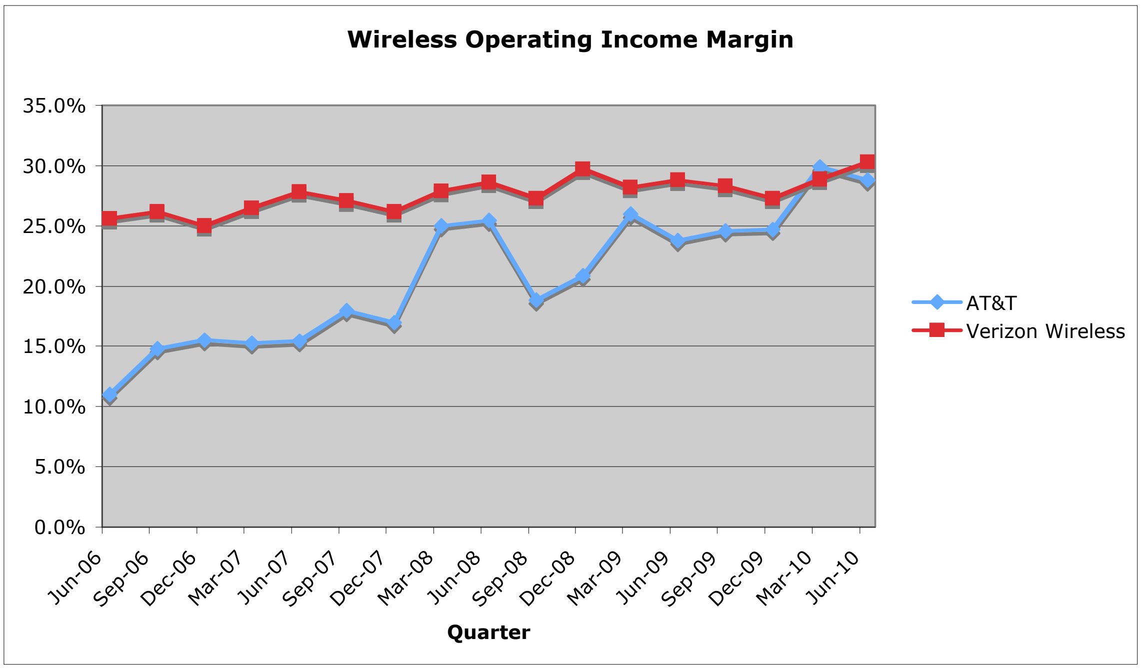
120 *See, e.g.*, *id.* ¶ 212.

121 This figure is derived from CTIA's Semi-Annual Survey. The Commission previously attached the results of this survey to nearly all the annual CMRS reports. Until 2004, CTIA publicly reported both revenue and *cumulative* capital investment. In 2005, CTIA began to publish only revenue figures (and therefore so did the CMRS reports). Thus, the capital investment figures for 2005-2009 were collected from CTIA comments filed with the Commission. In cases in which CTIA only submitted the capital investment figure for the first six months of the calendar year (2005 and 2007), that figure was doubled.

Commission annual assessment. Both AT&T and Verizon Wireless find themselves with a operating income margin of approximately 30%[122] For comparison, the average operating income margin for the Dow Jones Industrial Average companies between 2005 and 2008 was just over 17%.[123]



CONCLUSION

For the foregoing reasons, the Public Interest Commenters respectfully suggest that the Commission focus even more attention and analysis in the upcoming report on the vitally important and rapidly growing mobile wireless broadband market. Public Interest Commenters also urge the Commission to take other appropriate steps designed to remedy the lack of

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122 Data in this final figure derived from publicly available financial data of AT&T and Verizon.

123 *See* Free Press Reply Comments, GN Docket No. 09-51, at 23-24 (filed July 21, 2009).

effective competition illustrated in these comments, as well as by facts set forth in the *Fourteenth Report*, in Public Interest Commenters' prior submissions, and in the record of other Commission proceedings.

Respectfully Submitted,

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