

AN EXAMINATION OF COMPETITION IN THE WIRELESS INDUSTRY

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS

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THURSDAY, MAY 7, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY,
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2123, Rayburn House Office Building, Hon. Rick Boucher [chairman of the subcommittee] presiding.

Present: Representatives Boucher, Markey, Rush, Eshoo, Doyle, Inslee, Christensen, Castor, Space, McNerney, Welch, Waxman (ex officio), Dingell, Stearns, Upton, Shimkus, Shadegg, Blunt, Buyer, Radanovich, Walden, Terry, and Barton (ex officio).

Staff Present: Roger Sherman, Chief Counsel; Pat Delgado, Chief of Staff for Representative Waxman; Tim Powderly, Counsel; Shawn Chang, Counsel; Greg Guice, Counsel; Sarah Fisher, Special Assistant; Amy Levine, Counsel; Neil Fried, Minority Counsel; Amy Bender, Minority Counsel; and Sam Costello, Minority Assistant.

OPENING STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

Mr. BOUCHER. The committee will come to order.

The movement of personal communications to mobile services is dramatic and accelerating. Just this week, it was announced that, for the first time, the number of homes having only a cell phone and no landline service now exceeds the number of homes having only a landline and no cellular service. Daily, new, attractive, and useful applications are coming to wireless services, and data rates continue to increase, ensuring that consumers can obtain faster access to mobile applications.

Today the subcommittee is beginning its examination of possible ways in which Federal telecommunications policy may be adjusted in light of these developments, with the goal of enhancing the consumer experience and facilitating the future growth of mobile services. Our goal is to develop on a bipartisan basis legislation that will make timely needed policy changes respecting mobile services, and as we construct the measure, we intend to consult with both consumer representatives and cellular telephone companies.

This morning, we begin this process by surveying possible areas in which policy changes may be needed. Today most Americans can choose among wireless service providers that offer a truly nation-

wide service. It is not uncommon for people to live in one State, work in another State, and travel to many other States, all while using their cellular telephones. These consumers expect and deserve the same useful features and quality of service to be provided no matter where in our Nation they may be using mobile services.

Today, State governments have authority over consumer protection for wireless services, including such matters as customer billing information and practices. With a highly mobile Nation using an inherently mobile service with a truly national footprint, I think it is hard to argue that for millions of mobile users, one State's consumer protection standards are particularly relevant to that user to the exclusion of others.

The mobile industry presents a compelling example where a uniform national set of consumer protection standards would be more relevant to today's patterns of living, work and travel. In exchange for meaningful national standards, the States would be preempted from standard setting but, as a practical matter, should have enrolled in dispute resolution and standard enforcement.

Another clear need is for the identification of additional spectrum that can be made available in the future for commercial wireless services. As more people use wireless devices and as advanced applications require ever higher data rates over time, additional spectrum will be needed in order to accommodate projected growth. Our legislation should direct that NTIA undertake a survey of possible new spectrum that could be auctioned in the future for that future growth.

Other possible subjects of interest may include modifications to the rules relating to cellular tower siting, particularly where the application is to place transmitters on existing structures that already have transmitters attached.

We should also examine whether the rules relating to roaming agreements should include data as well as voice services, which are covered by roaming agreement requirements presently.

We should examine whether policy adjustments are needed to assure the adequate availability of backhaul in order to accommodate the growing volume of cellular traffic, and whether any policy adjustment is appropriate to assure that the newest handsets are available to a wider group of cellular providers.

One relevant question would be whether a wider use of the requirements that the Commission imposed last year on the auction of the C-block could be a creative and perhaps helpful way of addressing that need.

The testimony of today's witnesses on these and other legislative avenues we may consider pursuing will be very welcomed.

And I want to say thank you to our witnesses for taking part in our discussion this morning.

Members will note the presence at the table of a variety of consumer representatives and also cellular telephone companies. Perhaps members have noted the absence of the two largest cellular telephone providers, AT&T and Verizon, from our conversation today. I want to note that invitations were extended to both of those carriers. Both wanted to attend, but the witnesses who they wanted to testify were not available because of other previously scheduled company events that required those witnesses' attend-

ance. Both companies have been invited to submit their comments for this record, and I do anticipate their being a part of the record of today's hearing accordingly and of also being a part of any future conversations that we have on the subject of structuring provisions for legislation addressing local services.

At this time, I am pleased to recognize the ranking Republican member of the subcommittee, the gentleman from Florida, Mr. Stearns, for his opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman, for holding this hearing.

As you pointed out, the wireless industry has become one of the fastest growing and most competitive sectors of the United States economy because Congress has allowed consumers to rule the market.

Now, the way in which consumers use wireless services varies widely from person to person, and thus, obviously, we should resist imposing a one-size-fits-all regulation that would likely reduce choice and innovation.

The industry has transformed from an all-analog duopoly to almost an all-digital, multi-carrier industry where consumers can choose from four national providers and over 100 regional or local providers with a variety of plans and devices at a range of prices to meet the consumers' needs.

Indeed, more than 99 percent of the consumers have one or more wireless carriers to choose from, while 90 percent have four or more choices. So, obviously, consumers are the big winners here.

Between 1993 and 2008, the cost per minute has dropped to 4 cents from 44 cents, and the number of wireless subscribers increased from 11 million to 270 million, an increase of over 2,000 percent.

Wireless technology will, obviously, transform our lives from health and education to banking and transportation. Imagine if an EMT at an accident site can send images of the scene to the ER so that trauma teams can be preparing themselves instantaneously, or if teachers could stream live video from a zoo instead of reading about animals in an elementary school textbook?

Applications in mobile banking could eventually mean that our wireless devices will replace our wallets, and airlines are already experimenting with electronic boarding passes that are shipped directly to one's handheld wireless device, saving time and saving money. We are limited by our imagination and, of course, by our temptation to regulate.

The purpose of this hearing is to focus on a variety of issues, such as handset exclusivity, wireless net neutrality, special access, and maintaining a national regulatory framework.

On the issue of handset exclusivity, some say it is anticompetitive and limits consumer choice. However, when the iPhone was introduced, consumers flocked to AT&T, challenging Verizon, T-Mobile and Sprint to offer their own improved devices, services, and rate plans to remain competitive.

On the other hand, I sometimes hear from constituents that they would like to use their iPhone on any network that they wish. I hope our witnesses can address both sides of this very complicated issue.

Wireless net neutrality is another important issue. I have already expressed concern that wireless net neutrality can jeopardize investments in innovation. This is especially true in the wireless context since capacity constraints make the need for flexibility and traffic management all that more critical.

Also, I hope our witnesses will address special access. In 1999, the FCC allowed limited deregulation of the special access market where providers could demonstrate evidence of competition. Some now argue that the market is no longer competitive, and we should consider re-regulating. Both sides assert that the evidence proves their position. If that is the case, then perhaps we need to get all the data and resolve the issue once and for all.

Innovation is occurring because carriers are looking for ways to drive usage on their networks in this competitive environment, not because of any government mandates. For example, without any government intervention, the application market is exploding. iPhone users have the choice of more than 35,000 apps with more than 1 billion downloads in the 9 months that they have been live. It is important to point out that this occurred without a government mandate on AT&T. Therefore, instead of imposing new mandates, we should remove existing regulatory barriers, such as the disparate, costly State regulation of service plans and fees.

In 1993, we preempted State regulation of wireless rates and entry. That decision has fueled the tremendous growth. Since then, States have created a patchwork of regulations on service and billing practices that threaten their growth. So now is the time to create a national consumer protection framework.

Finally, I would also like to request that the committee start the process of identifying where the next allocation of spectrum for commercial use will come from. These inventory efforts generally have a long life between the start of the process and when the spectrum actually comes to market. Thus, the time to start is before America's carriers are spectrum constrained. Identifying spectrum will help ensure that the U.S. wireless market continues to be the world leader.

So, Mr. Chairman, I thank you for holding the hearing, and I welcome our witnesses, and I look forward to their testimony.

Mr. BOUCHER. Thank you very much, Mr. Stearns.

The gentleman from Michigan, Mr. Dingell, chairman emeritus of the full Energy and Commerce Committee, is recognized for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Thank you, Mr. Chairman, and I commend you for holding today's hearing on competition in the wireless industry, a very important subject.

Although the Organization for Economic Cooperation and Development, OECD, recognizes the United States as having one of the

most competitive wireless industries in the industrialized world, the continued consolidation of that industry in this country behooves us to remain vigilant in ensuring robust wireless competition.

Indeed, the fact the two largest domestic carriers, AT&T and Verizon, control 60 percent of the market alone naturally leads one to question the veracity of several conclusions reached in the Wireless Telecommunications Bureau's January 16, 2009, report; most notably that consumers continue to reap significant benefits from competition in the Commercial Mobile Radio Services, CMRS, marketplace.

As you are all aware, I have long maintained that greater competition is beneficial to consumers. Today's debate on issues related to handset availability, voice and data roaming, and special access must not lose sight of their potential to increase competition in the marketplace. I welcome the opinions of witnesses assembled here today concerning these matters, but I would like to offer a few observations of my own before engaging in that discussion.

With regard to handset availability, I continue to question why a consumer is constrained to using a single particular handset, for example, an iPhone on only one wireless provider's network. Although I understand this is due to contractual obligations, I wonder if a consumer would not benefit from greater choice in the networks available to his handset. I also wonder what it is that the Congress ought to do about this matter. Clearly, this is a matter into which the committee should go today and at other times.

Further, given the profusion of so-called smartphones in the marketplace, I feel it is imperative that we expand roaming requirements to include not only voice services but also data services.

Lastly, with regard to special access, I would reiterate my insistence from the 110th Congress that competitive carriers, CLECs, should make the same disclosure about their facilities as must incumbent local exchange carriers, the ILECs. I think this is a very important matter into which the committee should go.

I look forward to a lively discussion of these matters and others this morning, Mr. Chairman. I want to thank you not only for your courtesy but for your vigor in addressing these questions.

I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Chairman Dingell.

The gentleman from Illinois, Mr. Shimkus, is recognized for 2 minutes.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. Sorry, Mr. Chairman. I am talking about energy up here. I got distracted.

Let me just highlight the issue on the competitive nature of the cell phone industry. It is highly competitive, and the simple example I would use is that my 2-year contract expired in December. So, in my local community, there is a development called Collinsville Crossing, new, and part of that development is part of a strip of buildings which are like 10 businesses. And as I researched, in 10 of those office sections, three are full-time national carriers who are selling their products, and a fourth one is in the Radio Shack.

So what I was able to do was to visit four competitive cell phone companies within less than a tenth of a mile, and not only visit them and figure out the deal and their products and the services, but I was able to walk back and forth, comparing prices, comparing models, comparing options, until I found the provider and the equipment that not only I wanted to do at my price but also that my 16-year-old son wanted. And nowhere else, in no other industry, in that short amount of space, not even in a big mall where you may have two wireless carriers or maybe three in the little subsections, but this is in Collinsville, Illinois.

So I reject the premise that there is not a highly competitive nature to the cell phone industry. It is what makes this committee great, and it is what makes this industry so exciting for conservative capitalist Republicans, because you move too fast for us to regulate, and I am going to stand and make sure that we don't.

Mr. BOUCHER. Thank you very much, Mr. Shimkus.

The gentleman from Massachusetts, Mr. Markey, is recognized for 2 minutes.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Thank you, Mr. Chairman, and thank you for having this extremely important hearing today.

Last year, when I chaired the subcommittee, we held a legislative hearing on a draft consumer protection and broadband bill, with your support and with the support of many of our colleagues. That draft bill proposed a strong nationwide consumer protection policy for wireless subscribers. It had effective Federal and State enforcement, the promotion of community broadband deployment and a plan for Federal agencies to assess their spectrum inventory and to utilize frequencies using spectrum-efficient and cost-effective technologies. This last issue holds great promise for our future innovation and job creation.

I congratulate you, Mr. Chairman, for your leadership in this area.

The wireless industry has suggested that Congress should preempt States from regulating the terms and conditions of wireless service, as it did over a decade ago, with respect to the price for wireless services. Many States have initiated attempts to take action to provide consumer protection policies for their residents, particularly with respect to regulation aimed at wireless contract terms, early termination fees, privacy issues, and others.

To the extent that wireless service is, by its nature, an interstate service, this hearing will provide an opportunity for us to explore whether further preemption is advisable, how consumer protection can be enhanced if regulatory treatment is nationalized, and how best to ensure rigorous enforcement of consumer protection.

Since the subcommittee's hearings last year, problems posed by the current marketplace and regulatory structure have persisted with roaming arrangements among carriers; with a lack of devices available to smaller regional carriers; with respect to the portability of devices to other carriers, remaining limited or non-existent; with a lack of clarity and uniformity with respect to bill-

ing terms and conditions; and with an inability for consumers to effectively compare plans; and for many consumers to sometimes feel trapped after buying an expensive device or for getting locked into long-term contracts with significant penalties for switching.

This is a very important hearing. I thank you for your continuing leadership, Mr. Chairman.

I yield back the balance of my time.

Mr. BOUCHER. Well, thank you very much, Mr. Markey.

You did excellent work on this general subject during the last Congress. We are using the legislative draft that you assembled as the foundation for our consideration this year, and I want to thank you and commend you for that outstanding work.

The gentleman from Indiana, Mr. Buyer, is recognized for 2 minutes.

Mr. BUYER. I reserve my time for questions.

Mr. BOUCHER. The gentleman reserves his time and will have his time added to his question time for this panel.

The gentleman from Illinois, Mr. Rush, is recognized for 2 minutes.

Mr. RUSH. Thank you, Mr. Chairman, for holding this very important hearing.

In all of my years on this subcommittee, I have always been concerned with the lack of diversity and competition in the telecommunications market. I have found the lack of diversity in the wireless marketplace to be particularly disturbing because the spectrum used by wireless companies is a public asset, owned by all of the American people and not by just these companies. I continue to be dismayed over the fact that women and minority businesses have little, if any, presence in the wireless industry.

Given that the market for advanced wireless services is rapidly growing and will likely soon displace traditional wireline telecommunication services, it is vital that we ensure diversity in the market now and not kick the can down the road for another day.

As such, Mr. Chairman, I hope that these fine witnesses who are gathered here can comment on this longstanding interest of mine, and I further hope that, with the new administration, we will finally find some public commitment to ensure that all Americans can partake in the multimillion dollar wireless industry.

Mr. Chairman, with that, I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Mr. Rush.

The gentleman from California, Mr. Radanovich, is recognized for 2 minutes.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman, for holding this hearing and for examining the competition in the wireless industry. I appreciate the effort on this.

As cochair of the Wireless Caucus with Mr. Inslee, I appreciate the opportunity to explore the ways we can work together to ensure that the wireless customers will have the most innovative, best quality services at competitive prices.

One area I believe that is hindering effective competition is tower siting. The ability to deploy wireless systems and expand services, thereby increasing competition for customers, relies on the ability to construct and place towers and transmitters. Yet 3,300 wireless siting applications are pending before local jurisdictions awaiting a decision. Approximately 760 have been pending final action for more than a year, while 180 of those have been waiting for more than 3 years.

The problem is that the Communications Act is very ambiguous about the time in which a decision on these applications has to be made, requiring only that it be done within a reasonable time frame. This potential for delaying action discourages investment and prevents consumers from receiving the full benefits that come from increased service and competition.

I am sympathetic to the demands that zoning authorities must be given enough time to properly review these applications. However, this process must have an end to it so that carriers are not continuing to be left wondering whether they will get an answer at all.

I look forward to working with the interested parties and with the committee toward a resolution to this matter.

I am also aware that there is an effort to have the FCC reset price caps for special access, and I do not believe that this is possible or should be possible until the FCC has all the relevant data on the full scope of high-capacity services.

Nevertheless, I am thrilled that this hearing is taking place, and I look forward to the testimony from the witnesses.

Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you, Mr. Radanovich.

The gentleman from Pennsylvania, Mr. Doyle, has just returned, and is recognized for 2 minutes.

OPENING STATEMENT OF HON. MICHAEL F. DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Mr. Chairman. I apologize.

Thanks for holding this hearing.

Mr. Chairman, you know, some people who have my cell phone number are very interested in my car. I just want to say for the record that my car warranty is not about to expire. I am not really happy that they call my cell phone, and I am not happy that they keep calling me, even though I am on a "do not call" list and even though calling my cell phone is blatantly illegal. And even though I have tried to get on these companies' "do not call" lists, they still keep calling me, so I just want to say: Stop doing that.

I hope the FTC and the FCC hunt each and every one of you down and make a lesson out of you by interrupting every one of your meals that you eat for the rest of your lives with a telemarketing call. OK. I feel better now.

Now on to more happy topics.

Since we last looked at the wireless industry, we have seen dramatically improved customer service. Consumers generally better understand the contracts they sign and the services that are available to them.

That is not to say it is all perfect. In fact, many of us up here have had problems with our bills, and I do agree with those who say that text messages are still priced way above cost. For example, if you were to send enough text messages to fill this 1.5-mega-byte floppy diskette at 20 cents a message, you would have to pay over \$2,000. If you were to send enough text messages to equal the size of an MP3 song, that would cost almost \$6,000.

But I think most of the companies have improved. One example: Verizon Wireless has successfully sued several companies for illegal telemarketing and for text message spam. I am glad to see that the company, the FTC, and the FCC are working on this problem, and I am glad to see that most of the carriers have clearer bills and prorated contracts.

Mr. Chairman, if you decide to move a national framework bill, I look forward to seeing that. It will give consumers across America peace of mind with a baseline of reliable consumer protections. Thanks for your patience, and I yield back my time.

Mr. BOUCHER. Thank you very much, Mr. Doyle.

The gentleman from Oregon, Mr. Walden, is recognized for 2 minutes.

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciate this hearing as well.

A lot has already been said about the positive competitive nature of the wireless marketplace.

I would like to ask unanimous consent to put in the record a Consumer Reports story I found very interesting on this issue, dated January of 2009, which our colleagues may find of interest.

Mr. BOUCHER. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. I am one of those people who, you know, has three cell phones, Mr. Chairman, one official, one personal, one campaign, so I get experience on a lot of them.

Fortunately, I have not been called about a car warrant yet. I suppose I should not admit that, but I am not going to give out the number either.

I know that this marketplace has changed dynamically and rapidly in a way that is very positive. As rates have come down, service has been expanded, and options have increased, and so I look forward to seeing where we can help this very mature industry move forward and keep the competition going that drives down prices and that makes these devices available.

With that, Mr. Chairman, I yield back.

Mr. BOUCHER. Thank you, Mr. Walden.

The gentlelady from the Virgin Islands, Mrs. Christensen, is recognized for 2 minutes.

OPENING STATEMENT OF HON. DONNA M. CHRISTENSEN, A REPRESENTATIVE IN CONGRESS FROM THE VIRGIN ISLANDS

Mrs. CHRISTENSEN. Thank you, Mr. Chairman and Ranking Member Stearns, for holding this hearing to examine issues related to wireless competition in our country.

The wireless industry has a tremendous impact on the U.S. economy. It includes about 600 companies with a combined annual rev-

enue of over \$110 billion. It is projected that, by 2016, this revenue will increase to \$427 billion annually.

However, some argue that the industry is highly concentrated with four national wireless carriers earning about 85 percent of the industry revenue and two controlling 90 percent of special access. It is important to preserve competition within the wireless industry in order to ensure the consumers, especially in rural areas and in places like the U.S. Virgin Islands, that I represent, have access to reasonable rates and to the best of services.

Competitive local exchange carriers, such as the ones testifying today, rely heavily on the incumbents for services like special access. Yet they are limited in options for service providers. This inevitably raises prices for the CLECs and makes it difficult for them to remain competitive.

Mergers also can pose a significant threat to competition, especially if the conditions are not imposed and then implemented. The wireless industry is thriving and steadily growing at an enormous rate, but for some carriers, it is still difficult or virtually impossible to compete in this industry.

So I look forward to hearing from our witnesses on this issue and on the recommendations for keeping the industry competitive, and I thank them for being here.

Mr. BOUCHER. Thank you very much, Mrs. Christensen.

The gentleman from Nebraska, Mr. Terry, has waived his opening statement and will have additional question time added.

The gentleman from Michigan, Mr. Upton, is recognized for 2 minutes.

Mr. UPTON. Well, thank you, Mr. Chairman.

I just want to say that I noticed today the same stats that you apparently cited in your opening statement that, for the first time, there are more American families with wireless phones than with hardline phones, and we know that all families are really struggling, that all American families are really struggling in these very tough economic times. They are looking for any savings that they can in their household budgets.

And thanks to more competition, providing more spectrum, something that this committee did in lifting many of the burdensome regulations, the cost to families has gone down, and we can congratulate many in this room for seeing that happen.

I would just say to Mr. Doyle, who has stepped away, maybe he is listening until the anteroom, there is a provision in most contracts, at least with mine. I have two teenagers. There is such a provision as an "unlimited text message" section, and I think it is about 4 bucks a month. I would suggest it, as it has saved me a lot of money after the first abuse of my son, Stephen.

Thank you. I yield back my time.

Mr. BOUCHER. Thank you very much, Mr. Upton.

The gentleman from California, Mr. McNerney, is recognized for 2 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman, for holding this important hearing.

I am interested in today's hearing because of how dynamic the industry is. We have seen a tremendous transformation in the last decade or so. I would like to see that competition continue, and I

want to make sure that Federal regulation is not part of the problem and that it is part of the solution. So, right now, there does seem to be a consolidation going on in the industry, and I am looking forward to seeing what you have to say about what that is doing to the competition.

In particular, the handset exclusivity or tower siting, are those issues that are part of the problem or do we need to look at how those are being regulated right now?

So, with that, I yield back.

Mr. BOUCHER. Thank you, Mr. McNerney.

The ranking member of the full committee, the gentleman from Texas, Mr. Barton, is recognized for 5 minutes.

Mr. BARTON. Well, Mr. Chairman, I will not take that time. I am going to submit my full statement for the record.

I am a three-cell-phone person if you count BlackBerrys. In my immediate family, there are seven. We contributed to that \$75 billion of revenue fairly substantially last year, and we enjoy it. I am told that there are about 280 million cell phone customers, which is almost one per person. This is obviously an industry that is thriving. There is consolidation going on. That is not necessarily a bad thing. We have two market participants that each have, I think between them, the top two have about 60 percent of the market.

The thing that I would bring to the committee's attention is this issue of States regulating terms and conditions. If you want to call it a loophole, we left that open several years ago. I think this subcommittee would be wise to take a look at that and to see if we do now need to set up a national regulatory framework for terms and conditions. That might help continue the growth of the industry that is thriving.

With that, I am glad we are having a hearing where we are not arguing over free allowances for CO2. So this is a good hearing, and I look forward to listening to our witnesses.

Mr. BOUCHER. Thank you very much, Mr. Barton. We will have a discussion later on that very subject.

Mr. BARTON. Yes, I know. That is what I am afraid of, Mr. Chairman.

Mr. BOUCHER. The gentlelady from Florida, Ms. Castor, is recognized for 2 minutes.

Ms. CASTOR. Thank you, Mr. Chairman. I will waive my opening.

Mr. BOUCHER. Thank you, Ms. Castor.

The gentlelady from California, Ms. Eshoo, is recognized for 2 minutes.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman.

And, welcome, to the panel of witnesses.

Compared to much of the telecommunications industry, the wireless sector might look like it is wildly competitive. Most consumers actually have some degree of choice for service, unlike the broadband sector, where 90 percent of Americans have two or fewer

choices for service, or the wireline industry, where the choices are largely nonexistent.

Wireless technologies are bridging some of these gaps and are improving the competitive landscape, but there remain major choke points and anticompetitive practices that inhibit true competition and tilt the playing field steeply in favor of a pair of dominant carriers.

I think my colleagues are aware of whom I speak, and I am disappointed that Verizon and AT&T are not here today. I hope that they will decide to come in the future. After all, the top three wireless firms control nearly 80 percent of the wireless phone business in America. That is a real stronghold.

A particular concern I have in the wireless industry is the market for special access services. Special access is the high-speed middle-mile between the Internet backbone for wireless phone and data towers, hospitals, banks, retailers, and other medium and large businesses. For wireless carriers, the cost of special access carriage is up to a third of the expense of running a wireless tower. Special access is a significant choke point in the telecommunications system since Verizon and AT&T control 80 to 90 percent of the special access market nationwide.

In 1999, the FCC moved to deregulate special access, and not surprisingly, with such limited competition, prices have skyrocketed. Recent data indicate that, for the three large, regional Bell companies, the rates of return on special access range from 15 to 38 percent.

In 2005, the FCC initiated a proceeding to review special access rates. Four years later, the Commission's review is still pending.

In November 2006, the GAO issued a report entitled, right here, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition and Dedicated Access Services." I think Chairman Martin must have missed that one.

So I am pleased that the Senate has finally scheduled hearings to confirm a new chairman of the FCC. I hope the Commission, and I would urge them, pursues this proceeding aggressively and determines where there is actual competition and fair pricing in this important market.

I also want to mention one other important competitive issue in the wireless industry, access to spectrum. In the most recent major auction of wireless spectrum, the 700 megahertz auction last year, 84 percent of the winning bids went to Verizon and AT&T. Again, it is difficult to see how the wireless sector can be competitive when two players dominate in so many respects. There are new entrants trying to break up this dominance, and some of them happily are on the panel today, and we look forward to hearing from you.

I think another avenue for a disruptive new entrant would be the auction of the AWS-3 spectrum now lying fallow. So, again, I hope the FCC proceeds on this matter. It has been pending for over 2 years, and I hope it will finally be taken up.

So, welcome, to all of you. I look forward to hearing your testimony.

Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Ms. Eshoo.

The gentleman from Arizona, Mr. Shadegg, is recognized for 2 minutes.

Mr. SHADEGG. Mr. Chairman, other than to thank you for holding this hearing and to thank our witnesses, I will waive my opening statement.

Mr. BOUCHER. Thank you very much, Mr. Shadegg.

The gentleman from Vermont, Mr. Welch, is recognized for 2 minutes.

OPENING STATEMENT OF HON. PETER WELCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VERMONT

Mr. WELCH. Thank you, Mr. Chairman and Ranking Member Stearns.

Thank you to the witnesses.

Vermont is a very rural State, and it has had some experience in trying to deal with some of the issues that we are going to be dealing with as a committee, tower siting, roaming, a lack of competition. Most Vermonters are actually pretty pleased with the wireless service that they get, but it is incredibly critical to our economy to have wireless service everywhere.

The Vermont legislature has passed legislation calling on doing whatever it is we can do to extend wireless throughout the State, and our goal is to achieve 90 percent of coverage. Some of us think it ought to be 100 percent. We are in the process of installing tower sites and of using some of our barns and silos to actually help us along the way. We are working on streamlining the permitting process for new telecommunication towers and antennas that will facilitate our reaching our goals, but there are many issues remaining:

The cost of wireless backhaul is obviously a big one. Roaming rates are an enormous problem for many of our users. Vermont has not been able to attract the interest of some of these larger national carriers to serve some of our most rural areas. So they are kind of skimming the good economic opportunities and are ignoring where we need a lot of help.

The progress in my State has been largely as a result of local efforts, so we would have some significant concern about this balance between a national plan and a freezing out of the ability of States to actually play a very aggressive role in trying to extend the benefits of wireless to their citizens.

Thank you, Mr. Chairman and Ranking Member, for convening this subcommittee hearing. I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Mr. Welch.

Mr. Inslee was here earlier. I do not see him now. Unless he is planning to appear momentarily, we are going to turn to our first panel of witnesses. We will turn to our first panel of witnesses.

STATEMENTS OF PAUL SCHIEBER, VICE PRESIDENT, ACCESS AND ROAMING, SPRINT; ROBERT J. IRVING, JR., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, LEAP WIRELESS INTERNATIONAL, INC., CRICKET COMMUNICATIONS, INC.; VICTOR H. "HU" MEENA, PRESIDENT, CELLULAR SOUTH; RAVI POTHARLANKA, CHIEF OPERATING OFFICER, FIBER TOWER CORP.; CHRIS MURRAY, SENIOR COUNSEL, CONSUMERS UNION; GEORGE S. FORD, CHIEF ECONOMIST, PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES

Mr. BOUCHER. I want to welcome the attendance of each here this morning. I will say a brief word of introduction.

Mr. Paul Schieber is vice president for Access and Roaming for Sprint. Mr. Robert Irving is senior vice president and general counsel for Leap Wireless. Mr. Victor Meena is president of Cellular South. Mr. Ravi Potharlanka is chief operating officer for FiberTower. Mr. Chris Murray is senior counsel for Consumers Union. Dr. George Ford is chief economist of the Phoenix Center.

We welcome each of our witnesses this morning, and we thank you for sharing your views with us.

Without objection, your prepared written statements will be made a part of our record, and we would now welcome your oral summaries and would ask that you keep those summaries to approximately 5 minutes so that we have ample time for questions.

Mr. Schieber, we will be happy to begin with you.

If you will turn your microphone on, we will hear you better.

STATEMENT OF PAUL SCHIEBER

Mr. SCHIEBER. Thank you.

Good morning, Chairman Boucher, Congressman Stearns, and members of the subcommittee.

I am Paul Schieber, vice president of Access and Roaming at Sprint Nextel Corporation. Thank you for the opportunity to testify today about competition in the wireless industry in the United States.

For years, Sprint has been a leader in the development and deployment of data services, including a 3G mobile broadband platform throughout most of its network as well as the development of 4G technology. In recent years, Sprint has spent billions of dollars to deploy its 3G EVDO network, improve its performance capabilities, and increase the array of advanced services that are available to consumers through its mobile broadband platform.

Through our investment in Clearwire, we are also committed to maintaining our leadership role in making 4G broadband services widely available to U.S. consumers and businesses. These mobile broadband services will undoubtedly fuel significant economic development and job growth.

Unfortunately, there continue to be several impediments to Sprint and to other wireless and wireline provider efforts to make broadband services ubiquitously accessible and reasonably priced for all Americans.

In Sprint's view, the biggest of these impediments is the failed special access market, but I want the members of the subcommittee to know that Sprint is also supportive of efforts to reform the Na-

tion's cell-siting laws. We need laws which make it easier for wireless carriers to collocate facilities and to share the timely approval of cell site construction.

I focus my testimony on special access reform, however, because Sprint believes that should be a top priority of the FCC and this subcommittee.

Special access is the lifeblood of the telecommunications industry. It touches virtually every communications product and is a critical part of the services consumers use every day. When consumers make wireless calls, access the Internet, send e-mails, swipe their credit cards at stores, or use automated teller machines, they are using services that rely on special access.

The importance of middle-mile facilities to the wider deployment of broadband was underscored by Susan Crawford, a member of President Obama's National Economic Council, who recently stated, and I quote, "Investments in backhaul or middle-mile networks, particularly in rural communities, will likely be particularly useful."

When Sprint and other carriers provide mobile broadband services, we need other providers to link together into a seamless network our facilities. In the simplest configuration, a broadband provider must interconnect three segments of an end-to-end service: A local network, middle-mile facilities and a backbone network.

In Sprint's case, its local wireless broadband facilities connect a caller or a laptop user to a nearby cell site. Sprint then needs middle-mile transmission circuits to transport the customer's traffic from a Sprint cell site, between a mobile telephone switching office and, from there, to Sprint's Internet backbone network.

As has been repeatedly demonstrated by Sprint and other wireless and wireline broadband service providers as well as by reports issued by the GAO and the National Regulatory Research Institute, we are overwhelmingly dependent on special access facilities provided by incumbent LECs.

Despite the central role of special access in mobile and fixed broadband deployment and the benefits that would come from robust competition, incumbents control 91.7 percent of the special access market, and two dominant carriers, AT&T and Verizon alone, receive 81 percent of all special access revenues nationwide, generating a rate of return of up to 138 percent on these revenues in the case of AT&T. This is obviously not a competitive market.

The monthly payments for middle-mile special access Sprint incurs in its wireless business represents about one-third of the cost of operating a cell site. In most cases, Sprint simply has no competitive alternatives to the incumbent LEC for these facilities.

Today, Sprint buys access from vendors other than the LEC at only 4 percent of its cell sites. The excessive prices that incumbent LECs charge for these middle-mile connections harm consumers, cost us jobs and divert needed jobs from Sprint's broadband network and services.

Fortunately, the FCC has the legal authority and the evidentiary record to fix the problem and spur broadband deployment. Reform of special access will promote mobile and fixed broadband growth by freeing resources that can be used to invest in new facilities, create new jobs and contribute to the Nation's economic recovery.

I respectfully ask this subcommittee to urge the FCC to act now. The special access rulemaking, now pending for more than 6 years, must be completed now to rein in anticompetitive special access prices and practices by incumbent LECs, allowing Sprint and other competitive providers to accelerate the deployment of mobile and fixed broadband. Stimulating broadband deployment in this way will generate economic growth and will expand consumer access to broadband communications, and it will do so without spending a dime of taxpayers' money.

Thank you.

[The prepared statement of Mr. Schieber follows:]

WRITTEN TESTIMONY

OF

PAUL SCHIEBER
VICE PRESIDENT ACCESS AND ROAMING
SPRINT NEXTEL CORPORATION

ON

AN EXAMINATION OF COMPETITION IN
THE WIRELESS INDUSTRY

BEFORE THE
HOUSE SUBCOMMITTEE ON
COMMUNICATIONS, TECHNOLOGY AND THE INTERNET

MAY 7, 2009

**WRITTEN TESTIMONY OF
PAUL SCHIEBER
VICE PRESIDENT ACCESS AND ROAMING
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AN EXAMINATION OF COMPETITION IN
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MAY 7, 2009

I. Introduction and Executive Summary

Good Morning, Chairman Boucher and Members of the Subcommittee. I am Paul Schieber, Vice President Access and Roaming, Sprint Nextel Corporation. Thank you for the opportunity to testify today about competition in the wireless industry in the United States.

Sprint for years has been a leader in the development and deployment of data services, including a 3G mobile broadband platform throughout most of its network and the development of 4G technology. Over the past several years, Sprint has spent billions of dollars to deploy its 3G EVDO network, improve its performance capabilities, and increase the array of advanced services that are available to consumers through its mobile broadband platform. Through our investment in Clearwire, we also are committed to maintaining our leadership role in making 4G broadband services widely available. These mobile broadband services will fuel significant economic development and job growth.

Unfortunately, there continues to be a major impediment to the ability of Sprint and other wireless and wireline providers to make their broadband services ubiquitously accessible and reasonably affordable for all American consumers: “middle mile” special access telecommunications links.

Special access is the lifeblood of the telecommunications industry, both narrowband and broadband, and touches virtually every communications product. It is a critical part of the services consumers use every day. When consumers make wireless calls, access the Internet, send e-mails, swipe their credit cards at stores, or use automated teller machines, they are using services that rely on special access. Because of its central role in the deployment of mobile and fixed broadband services, reform of the current FCC regime governing incumbent local exchange carrier (LEC) special access services must be an urgent priority if Congress's vision of universal, affordable access to broadband services is to become a reality. The importance of middle mile facilities to the wider deployment of broadband was underscored in a recent article on the Wall Street Journal's web site. According to the article, Susan Crawford, a member of President Obama's National Economic Council, stated that requests for stimulus funds to underwrite "investments in backhaul (or middle-mile) networks, particularly in rural communities, will likely be particularly helpful."¹

Sprint offers a comprehensive array of wireless and wireline telecommunications and information services to consumers, businesses and government users. Sprint is widely recognized for developing, engineering and deploying innovative technologies, including two robust mobile networks serving 49 million customers, cutting-edge mobile data services, instant national and international walkie-talkie capabilities, and a global Internet backbone. "Middle mile" special access facilities are an essential input to every one of Sprint's businesses – broadband, wireless, long distance, and enterprise.

¹ Amy Schatz, *Broadband Funding Hopefuls Pair Up in Search of Stimulus Dollars*, The Wall Street Journal Blogs, April 30, 2009, available at <http://blogs.wsj.com/digits/2009/04/30/broadband-funding-hopefuls-pair-up/>.

When Sprint and other carriers provide mobile broadband services, we need other providers to link together – into a seamless network – our facilities. In the simplest configuration, a broadband provider must interconnect three segments of an end-to-end service: a local network, middle mile facilities, and a backbone network (see attached Appendix).

In Sprint's case, its local mobile broadband facilities connect a caller or a laptop user to a nearby cell site. Sprint then needs middle mile transmission circuits to transport the customer's traffic from the Sprint cell site to a mobile telephone switching office or another point on Sprint's mobile backbone network and from there to Sprint's Internet backbone network. As has been repeatedly demonstrated by Sprint and other wireless and wireline broadband service providers, as well as by reports issued by the Government Accountability Office (GAO) and the National Regulatory Research Institute (NRRRI), we are overwhelmingly dependent on special access facilities provided by incumbent LECs, particularly AT&T and Verizon in their respective home regions, for these middle mile links.

Despite the central role of special access in mobile and fixed broadband deployment, two dominant carriers, AT&T and Verizon, control overwhelming shares of the special access marketplace. Their dominance is apparent from their billions (and increasing) in special access revenues, from their inflated special access prices, and from their anti-competitive contract terms and conditions. Sprint pays AT&T, Verizon and other incumbent LECs hundreds of millions of dollars annually for middle mile special access facilities (the monthly lease payments for these facilities represent more than one-third of the costs of operating a cell site) and, in most cases, Sprint simply has no competitive

alternatives to the incumbent LECs for these facilities. The excessive prices that incumbent LECs charge for these middle mile connections harm consumers and cost jobs by diverting needed resources from Sprint's broadband network and services.

Fortunately, the Federal Communications Commission (FCC) has the legal authority and the evidentiary record to fix the problem and spur broadband deployment. Reform of special access will promote mobile and fixed broadband growth by freeing resources that can be used to invest in new facilities, create new jobs, and contribute to the nation's economic recovery. I ask this Subcommittee to urge the FCC to complete its long pending special access rulemaking proceeding by implementing the reforms that will rein in anticompetitive special access prices and practices by incumbent LECs and thereby allow Sprint and other competitive providers to accelerate their deployment of mobile and fixed broadband. Stimulating broadband deployment in this way will generate economic growth and expand consumer access to broadband communications.

II. Middle Mile Special Access Facilities

A. Overwhelming Market Share

The incumbent LECs overwhelmingly dominate the special access market. Despite the pro-competitive initiatives adopted by Congress in the Telecommunications Act of 1996, the incumbent LECs' share of wholesale special access services has remained in excess of 90%. According to data collected by the FCC, the incumbent LECs' share of the wholesale special access market amounted to 92.7% in 2001 and declined only slightly to 92.1% of an even larger market in 2006.²

² FCC Monitoring Report Table 1.5, line 305. These data are compiled by the FCC from revenue data reported by all carriers on Form 499-A. The FCC has not yet released data for 2007 or 2008.

During this period, Sprint has become even more dependent on incumbent LEC special access services, despite the fact that it would be commercially advantageous to Sprint if it could reduce its reliance on incumbent LECs. In 2001, for example, Sprint obtained 91% of the DS1 channel terminations³ for its wireline business in the top 50 metropolitan statistical areas (MSAs) from an incumbent LEC. By 2007, that number had risen to almost 98%.⁴

AT&T and Verizon are by far the dominant providers of special access services. Indeed, SBC's acquisition of AT&T (forming the "new AT&T") and Verizon's acquisition of MCI further solidified their dominant position. Those two transactions eliminated not only two of the most prominent advocates for special access reform, but also the two largest competitive providers of special access services. AT&T and Verizon now account for 81% of incumbent local exchange carrier special access revenues nationwide.⁵ In the meantime, these two new "mega-BOCs" have dramatically increased their share of the wireless marketplace through acquisitions funded in no small part by excessive special access revenues.

Moreover, revenues generated by special access services have grown exponentially, driven by demand for data services, from approximately \$2.5 billion annually in 1990 to \$18.1 billion in 2007.⁶ Today, interstate special access service revenues account for more

³ A DS1 circuit is equivalent to 24 voice-grade (DS0) circuits and has a capacity of 1.5 Mbps.

⁴ See Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 29-30 (Aug. 8, 2007) ("Sprint Nextel Comments") and attached Declaration of Gary B. Lindsey, ¶ 8 and n.

⁵ 2007 FCC ARMIS Report 43-01, Table 1 – Cost and Revenue, Row 1090 (Total Operating Revenues), Column (s) (Special Access).

⁶ Special Access revenue is reported on ARMIS 43-01, row 1190, column (s).

than half of the incumbent LECs' total revenues from interstate telecommunications services.

Although Sprint actively pursues alternatives to BOC-provided special access, such alternatives are rarely available. For example, many of our cell sites are located in areas other than those where cable companies have typically deployed alternative facilities and wireless backhaul has not yet developed into an economically viable alternative. Today, Sprint buys access from vendors other than the LEC at only 4% of its cell sites.

The absence of geographically broad alternatives to the incumbent LECs for middle mile transmission links has been well-documented in the FCC record over several years.⁷ The Ad Hoc Telecommunications Users Committee, an organization of major U.S. businesses, for example, demonstrated that as recently as 2005, the incumbent LECs remained the sole source of dedicated access at roughly 98% of all business premises nationwide, even for the largest corporate users.⁸ Similarly, T-Mobile showed that it has few if any alternatives to incumbent LEC special access, especially for initial links connecting its base stations to wire centers.⁹

⁷ See, e.g., AT&T Reply Comments, RM-10593, at 12-16 (Jan. 23, 2003) ("AT&T 2003 Reply Comments"); Economics and Technology, Inc., "Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets," at 16-22 (Aug. 2004) ("ETI Report"), appended as Attachment A to Ad Hoc Telecommunications Users Committee Reply Comments, WC Docket No. 05-65 (May 10, 2005) ("Ad Hoc 2005 Reply Comments"). In addition, Ad Hoc's analysis shows that intermodal technologies do not offer competitive alternatives to high speed special access services. Reply Declaration of Susan M. Gately, appended as Attachment B to Ad Hoc 2005 Reply Comments, ¶¶ 19-25 ("2005 Gately Decl."). It appears undisputed that competitive alternatives are available only at a "tiny percentage" of commercial buildings. AT&T 2003 Reply Comments at 13 (stating that the Bell operating companies (BOCs) do not dispute the conclusion that competitive alternatives are available only in a small number of buildings).

⁸ 2005 Gately Decl. ¶ 18.

⁹ Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 6-7 (Aug. 8, 2007) ("T-Mobile Comments").

Even in large urban areas, the incumbent LECs continue to dominate the provision of special access service, particularly for the DS1 and DS3 circuits that Sprint needs to connect our cell sites to our network. Sprint remains heavily dependent on the incumbent LECs for DS1s, currently purchasing 95% of the DS-1 channel terminations needed to reach our cell sites from incumbent LECs.

B. Excessive Prices

The dramatic growth in incumbent LEC special access earnings in recent years coincided with FCC decisions granting incumbent LECs, especially the BOCs, greater freedom to set special access prices and keep them high regardless of declining costs. According to a 2006 report of the United States Government Accountability Office (GAO), the FCC gave the BOCs some form of special access pricing flexibility in 97 of the 100 largest markets.¹⁰

The Commission's pricing flexibility decisions assumed that competition to the incumbent LEC middle mile special access services would develop and, consequently, marketplace forces would be adequate to constrain the prices and practices of the incumbents. Regrettably, that assumption proved to be utterly unfounded. As the former AT&T noted several years ago, "[t]he Commission adopted its aggressive deregulation of the Bells' special access services based on a predictive judgment that competition would provide sufficient safeguards to protect against the Bells' exercise of monopoly power over

¹⁰ See GAO Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, GAO Report No. GAO-07-80, at 6 (Nov. 2006) (GAO Report).

special access customers. Years of data now confirm that the Commission's predictive judgment was wrong."¹¹

Further, reports issued by the GAO and the NRRI in recent years affirm that competitive wireless and wireline carriers have few, if any, alternatives to incumbent LEC middle mile special access services. The November 2006 GAO Report to Congress concluded that in the 16 metropolitan areas that it had analyzed, "facilities-based competitive alternatives for dedicated access are not widely available."¹² More recently, Peter Bluhm and Robert Loube issued a report commissioned by the National Association of Regulatory Utility Commissioners (NARUC) under the auspices of NRRI that found that incumbent LECs possess "strong market power in most geographic areas, particularly for channel terminations and DS-1 services."¹³ Both reports also concluded that prices for DS-1 channel terminations were consistently higher in geographic areas where a BOC had obtained more extensive pricing flexibility (Phase II).¹⁴

The premium that Sprint and other wireless and wireline broadband competitors of the incumbent LECs must pay in the form of excessive prices for middle mile special access facilities is substantial. In many instances, the BOCs' special access prices are nearly *twice the price* of the comparable unbundled network elements (UNEs) which continue to be subject to tighter pricing regulation.

Special access prices are also multiples of the prices set by competitive marketplaces for similar capacity connections. For example, compare the price for

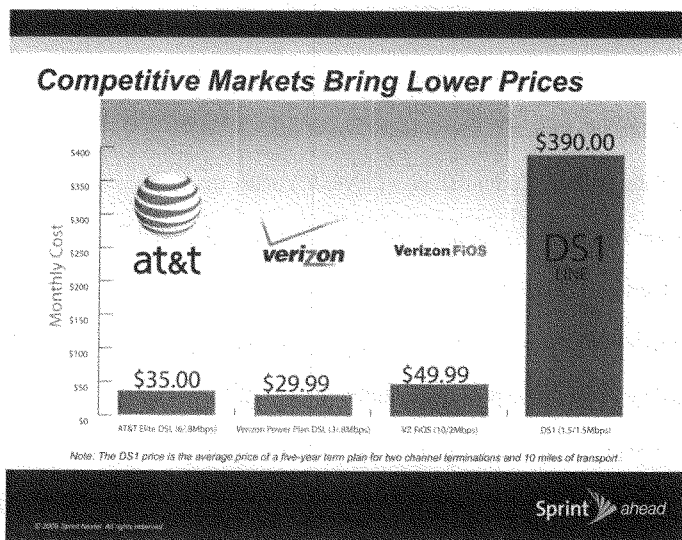
¹¹ AT&T Petition for Rulemaking, RM-10593, at 38 (Oct. 15, 2002).

¹² GAO Report, Highlights at 1.

¹³ See NRRI, *Competitive Issues in Special Access Market*, at iii (Jan. 2009) (NRRI Report).

¹⁴ See GAO Report at 27; NRRI Report at 69.

Verizon's FiOS service, \$49.99 a month for speeds of up to 10 Mbps, to the \$390 average monthly charge for the much lower-capacity (1.5 Mbps) DS1 circuits that are the backbone of Sprint's middle mile links.¹⁵ Granted, there are some differences between the services, but certainly those differences do not justify a price that is many times higher than the competitive price.



The anticompetitive effects of excessively priced special access services are exacerbated by the fact that the billions of dollars of special access charges are paid to two of Sprint's most formidable competitors, AT&T and Verizon, the largest providers of long distance and cell phone services (Commercial Mobile Radio Services or CMRS). Sprint

¹⁵ See also *ex parte* presentation of Sprint, WC Docket No. 05-25, at Slide 11 (Aug. 22, 2007) (AT&T's Elite DSL service provides speeds of 6/8 Mbps, Verizon's Power Play DSL service provides speeds of 3/8 Mbps, Time Warner's Road Runner Service provides 5 Mbps, and Verizon's FiOS provides speeds of 5/2 Mbps; a DS1 provides speeds of 1.5/1.5 Mbps).

and the other long distance and wireless carriers have no choice but to purchase over-priced special access from our two biggest competitors.

AT&T and Verizon plainly have a strong incentive to maintain the high special access costs of their wireless, long distance and broadband rivals. Given their dominant position in providing middle mile transmission links, these carriers also are able to act on that incentive. Moreover, the mergers of the BOCs have only provided greater geographic opportunity to impose high special access costs on their wireless rivals.

C. Anti-Competitive Terms and Conditions

The incumbent LECs, particularly AT&T and Verizon, have bolstered their dominance in special access services by engaging in practices that are designed to discourage nascent competition.¹⁶ For example, special access agreements frequently include exclusionary “lock up” and pricing arrangements that require customers to commit to purchasing virtually all of their access service needs from the incumbents.¹⁷ Approximately 93% of Sprint’s wireline DS-1s are “locked up” in volume or term agreements.

In addition, incumbent LECs may condition an offer of more attractive prices for special access service in one area on a customer’s acceptance of proposed rates, terms and conditions for other services in the same area or other areas. AT&T and Verizon offer special access pricing plans that link lower prices to a customer’s commitment to continue

¹⁶ See GAO Report at 14, 18, 27, 30 and Table 4.

¹⁷ See, e.g., *id.* at 30-31. Other strategies involve poor performance in the ordering, provisioning, maintenance and repair of special access services (see *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001)), and practices designed to discourage or slow customers from migrating circuits from the BOC network or “grooming” circuits to reduce circuits or transport mileage costs.

to purchase service in quantities at or above its historic demand levels over a multi-year period.¹⁸ For example, in 2005, Sprint entered into a five-year agreement with the legacy SBC LECs (Ameritech, Pacific Bell, Nevada Bell, SNET and Southwestern Bell) for dedicated customer DS3, OC3 or OC12 point-to-point circuits in order to avoid the exorbitant non-discounted month-to-month rates. If minimum demand quantities are not met, harsh shortfall penalties apply.

Given the paucity of competitive alternatives and the sole option of even higher priced month-to-month rates, customers of the BOCs have little opportunity to pursue economically viable alternatives. These exclusionary “lock up” terms and conditions reinforce the BOCs’ dominance of the middle mile transmission marketplace and deter new entry.

D. Exorbitant Special Access Earnings

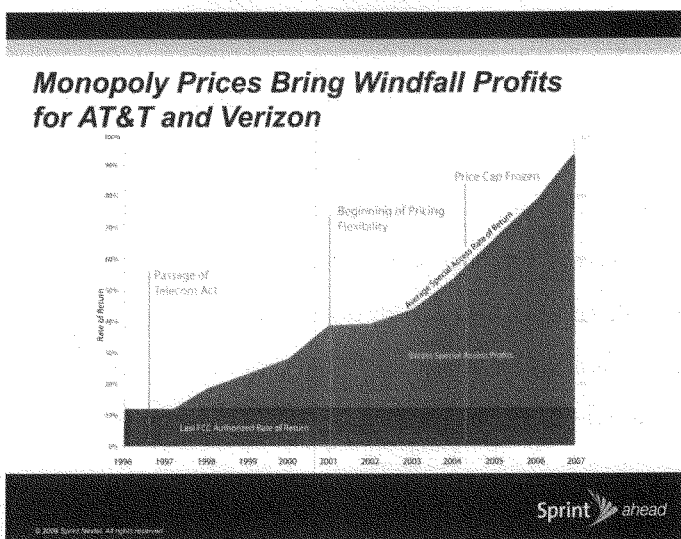
Unconstrained by effective competition, the two largest BOCs – AT&T and Verizon – annually generate billions of dollars in excess earnings from special access offerings – and they are increasing year after year. The after-tax rate of return that AT&T reported to the FCC for interstate special access services grew from an already-excessive 40% in 2000 to 138% in 2007.¹⁹ Verizon’s reported rate of return for interstate special access more than quadrupled over the same period, growing from 15% to 63%.²⁰ It bears emphasis that rate of return reports and other metrics that enable the FCC and interested parties to assess the financial and operational performance of the BOCs will no longer be kept current. The FCC last year granted the BOCs forbearance from their obligation to file

¹⁸ See Sprint Nextel Comments at 24-29.

¹⁹ FCC ARMIS Report 43-01, Table 1 – Cost and Revenue, Column (s) (Special Access), Row 1915 (Net Return) divided by Row 1910 (Average Net Investment).

²⁰ *Id.*

annual reports with the Commission's Automated Reporting Management Information System (ARMIS).²¹



The scale of the excessive special access profits is breathtaking. In 2004, what the BOCs actually earned above what they would have earned at a healthy 11.25% rate of return²² was more than \$7.8 billion. By 2007, the annual over-earnings grew to \$11.0 billion, with Verizon and AT&T accounting for over \$9.0 billion of that total.²³

²¹ See AT&T Cost Assignment Rules Forbearance Order, 23 FCC Rcd 7302 (2008); ARMIS Forbearance Order, 23 FCC Rcd 13647 (2008); and ARMIS Legacy Reporting Forbearance Order, 23 FCC Rcd 18483 (2008).

²² The most recent rate of return that the Commission prescribed for cost-of-service incumbent local exchange carriers is 11.25%. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 7 (1990), *aff'd sub nom. Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993); *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, ¶ 1 (1990).

²³ Over-earnings were computed using Automated Reporting Management Information System ("ARMIS") data ((Reported rate of return – 11.25)*ANI*Tax Factor). As noted,

III. Excessive Special Access Prices Will Discourage and Delay Wireless Broadband Build-Out to the Detriment of Consumers

Mobile broadband services offer unique benefits to consumers that set these services apart from fixed broadband offerings. Most importantly, mobile services can offer all consumers – urban and rural – continuous, ubiquitous access to broadband. The mobility advantage is particularly important in rural areas where, for example, health care professionals can use mobile broadband services to diagnose, monitor, and treat patients remotely and to obtain access to relevant patient medical information. Public safety and first responders in urban areas similarly can benefit greatly from mobile broadband services that allow them access to advanced information at the scene of an emergency.

Mobile broadband services also enjoy a distinct cost advantage over fixed services in areas with a widely dispersed population or challenging terrain. Because mobile broadband services rely on a single tower in a geographic area to deliver high-speed transmission services, mobile providers are not required to incur the substantial costs of constructing individual, “last mile” connections to each end user location. As a result, deploying a mobile broadband offering to a geographic area instantly provides a universally available high-speed service.²⁴ Coverage in these areas with lower density

earnings data for these companies are unavailable for 2008 because they are no longer required to update their ARMIS reports.

²⁴ In addition to the adverse effects of the incumbent LECs’ special access prices on wireless broadband availability, other parties have emphasized that those prices have also discouraged wireline broadband growth. *See, e.g.*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), GN Docket No. 07-45, at 10-11 (May 16, 2007) (special access prices affect the availability of broadband in rural areas); Comments of OPASTCO to NTIA and RUS on the American Recovery and Reinvestment Act of 2009, Broadband Initiatives, Docket No. 090309298-9299-01 (April 13, 2009) (“Internet backbone providers increasingly compete with rural broadband providers in the retail market as a result of consolidation...giv[ing] backbone providers both the ability and incentive to discriminate against rural providers that are dependent upon them for backbone access.”); Comments of the New Jersey Division of

populations would more often be economically viable if special access services were not priced at prohibitive levels.

High priced special access has had a direct impact on Sprint's deployment of mobile broadband services. Sprint has been forced to defer the deployment of mobile broadband services in its acquired affiliate territories because of the high cost of special access. In addition, the high cost of special access has forced us to delay adding additional special access capacity to our mobile broadband network which limits bandwidth availability to consumers during peak usage periods.

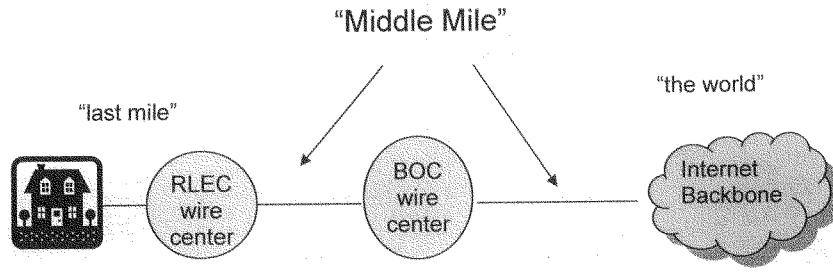
IV. The FCC Can and Must Reform its Regulation of Middle Mile Special Access Services

Congress has made clear that universally available and affordable broadband service is a critical element of its plan for restarting the nation's economic engine. Sprint and other wireless carriers' abilities to deploy these services, however, have been undermined by the excessive, ongoing special access costs associated with every cell site. The FCC has the evidentiary record and the legal obligation to do its part to accelerate broadband deployment by reforming the rules that govern middle mile special access facilities and services and making those services and facilities available at just and reasonable prices, terms, and conditions.

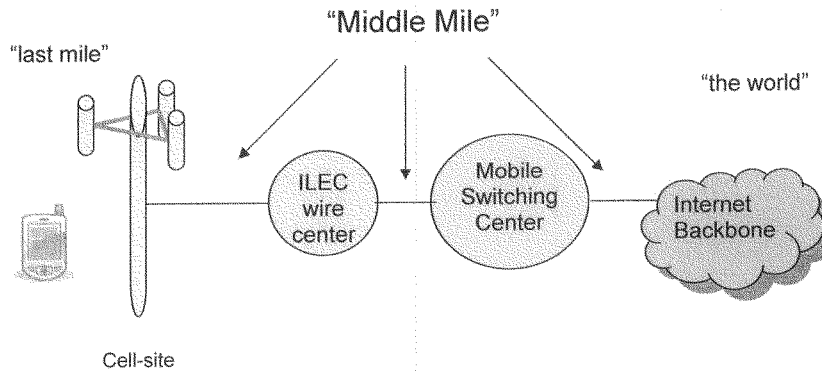
Rate Counsel, WC Docket No. 05-25, at 16-17 (Aug. 8, 2007), quoting Reply Comments of the New Jersey Division of Rate Counsel, GN Docket No. 07-45, at 14 (May 31, 2007) ("Artificially high special access rates are jeopardizing the Commission's ability to achieve its broadband deployment goals.").

APPENDIX

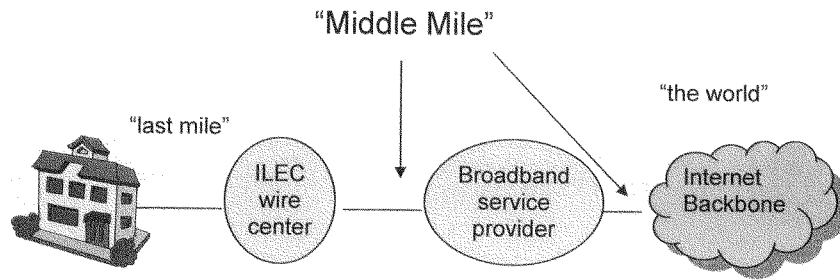
Scenario 1 Fixed Rural Broadband



Scenario 2 Mobile Broadband



Scenario 3 Fixed Office Broadband



Mr. BOUCHER. Thank you very much, Mr. Schieber.
Mr. Irving.

STATEMENT OF ROBERT J. IRVING, JR.

Mr. IRVING. Chairman Boucher, Ranking Member Stearns, and members of the subcommittee, thank you for allowing me to testify today on behalf of Leap Wireless and its subsidiary, Cricket Communications. I would also like to thank you and the Congress for your leadership in appropriating stimulus funds to expand broadband services and to improve access to broadband by public safety agencies.

While you are addressing many important issues today, I would like to offer Cricket's perspective on one of them, the importance of automatic voice and data roaming to ensure effective competition in the wireless industry.

First, I would like to note for you where Cricket fits in the industry and briefly explain why small- and mid-sized carriers like Cricket promote innovation and competition. Cricket and its joint venture partners have built digital networks covering almost 84 million individuals in 32 States, and we are continuing to grow steadily. In fact, we will launch service in Washington, D.C., and in Baltimore in the next several months.

Cricket's services are specifically tailored to bring wireless communication to consumers who have been left behind by other providers. We offer consumers unlimited voice and data wireless services for a flat monthly rate with no fixed-term contracts, no credit check and no early termination fees. We also recently introduced an affordable wireless broadband product at \$35 to \$40 per month for unlimited service. Our customer base reflects our commitment to the underserved. A majority of our customers are Hispanics, African Americans and other minorities, and our customers tend to be younger and less affluent than our competitors' customers.

We recently partnered with the nonprofit group, One Economy, to provide very low-income families in Portland, Oregon, with computers, modems and free Cricket wireless broadband for 2 years. This pilot program has been tremendously successful in promoting broadband access and in increasing the Internet savvy of program participants. One participant reported to us that he is now enrolled in an online English class. Another said that she now uses e-mails to apply for jobs. Cricket hopes to expand this program to reach other very low-income families who can benefit from affordable broadband service.

Our growth and our commitment to a diverse customer base illustrate the type of competition that Congress and the FCC has tried to promote, and our success demonstrates those innovative, pro-consumer benefits that small- and mid-sized carriers bring to the wireless marketplace. We show that being pro-consumer can be good for business. We discipline prices in every market that we enter, and our presence prompts other carriers to offer a wide range of choices, including flat rate and unlimited usage plans like the plans we pioneered.

In recent years, we have been concerned with the increasing consolidation of spectrum and market share into the hands of the Nation's largest carriers and of the consequence of this trend for

small- and mid-sized carriers and, more importantly, for consumers.

Cricket and other small, rural and regional carriers increasingly face anticompetitive business practices, such as the largest carriers' refusal to provide wholesale roaming on reasonable, nondiscriminatory rates and terms. Automatic roaming agreements play a critical role in the wireless industry. They plug coverage holes that exist in every carrier's network.

Reliable service is not simply a marketing tool. Whether we are trying to get emergency text message alerts, seek help if we have car trouble, or contact family members in the wake of a hurricane or of a terrorist attack, consumers should not suffer dropped calls when they travel away from home.

Unfortunately, the Nation's largest carriers have institutionalized policies of charging very high wholesale rates or of denying roaming services all together to other carriers' customers in the areas where the requesting customer can theoretically provide service. These behaviors weaken emerging competitors' service offerings, in spite of the fact that the largest carriers, themselves, have relied on roaming agreements for over 30 years to expand their own networks and to improve service.

These anticompetitive practices harm all consumers by reducing competition, but they disproportionately burden disadvantaged and rural populations, many of whom cannot afford or qualify for wireless service provided by the Nation's largest carriers.

In my written testimony, I have described several proceedings in which the FCC has an opportunity to improve its current policies with regard to automatic roaming. I urge Congress to monitor these proceedings closely, to encourage the FCC to adopt a pro-consumer, pro-competitive approach to roaming and, if necessary, to consider legislative solutions that ensure all consumers have access to affordable, nationwide wireless coverage.

Thank you very much.

[The prepared statement of Mr. Irving follows:]



Written Testimony of

Robert J. Irving, Jr.

Senior Vice President and General Counsel

Leap Wireless International, Inc. and Cricket Communications, Inc.

Before the

U.S. House of Representatives Subcommittee on

Communications, Technology and the Internet

Committee on Energy and Commerce

On

Thursday, May 7, 2009



Chairman Boucher and Members of the Subcommittee, thank you for the opportunity to testify before you on behalf of Leap Wireless International, Inc., and its wholly owned subsidiary, Cricket Communications, Inc. (collectively, "Cricket"). Cricket is a mid-sized wireless provider striving to offer innovative and affordable wireless service to customers that have long been under-served by other wireless telecommunications providers. Cricket is pleased today to offer its perspective on the importance of automatic voice and data roaming to ensure effective competition in the wireless industry. In my testimony today, I will explain why automatic roaming is such an important issue for competition in the wireless industry and will briefly discuss three pending proceedings in which the federal government will have an opportunity to advance wireless competition and ensure that all consumers have access to affordable, ubiquitous wireless coverage.

I. OVERVIEW OF CRICKET'S SERVICES AND SUBSCRIBERS

I would first like to note for the Subcommittee where our company fits within the ecosystem of U.S. wireless carriers and explain briefly why we are unique. Leap is a mid-sized carrier that offers digital wireless service under the Cricket brand. Along with our joint venture partners, we have built a network covering almost 84 million individuals in 32 states, and we are steadily expanding into new markets where the telecommunications needs of the community are not being met by existing providers.

Cricket offers customers unlimited voice and data wireless services for a flat monthly rate without requiring a fixed-term contract, credit check or early termination fees. These services are specifically tailored to bring the benefits of wireless telecommunications to consumers left behind by other providers. And Cricket's unique and diverse customer base reflects the company's commitment to reach the underserved. Hispanics, African-Americans, and other minorities comprise the majority (56 percent) of Cricket's customers, compared with just 29

percent of other wireless carriers' customers. Additionally, 74 percent of Cricket's customers have annual household incomes of less than \$50,000 and 62 percent have annual incomes of less than \$35,000. In contrast, just 32 percent of other wireless carriers' customers have annual household incomes of less than \$50,000. Cricket's customers are also relatively young—50 percent of them are younger than 35 years of age.

The usage patterns of Cricket's customers also differ from other wireless consumers. Company surveys indicate that Cricket's customers use almost twice as many minutes per month as the industry average. Approximately 70 percent of Cricket's customers have "cut the cord" and live in a household without traditional landline phone service, compared to the industry average of 15 percent. And nearly 50 percent of customers subscribing to Cricket's flat-rate wireless broadband service have never had Internet access at home—not even dial-up.

Cricket has demonstrated its commitment to bring the advances of wireless technology to all individuals in other ways besides offering innovative and affordable services. For instance, Cricket recently partnered with the non-profit group One Economy to provide 100 low-income families in Portland, Oregon with computers, modems, and free Cricket wireless broadband service for two years. We have found Cricket wireless phone users receptive to using our wireless broadband service—even though many of these individuals had no previous experience with the Internet—because they have come to know and trust our company and its services. This pilot program has been tremendously successful, not only in promoting broadband access but also in increasing the digital literacy of those participating in the program. For example, one participant reported that he enrolled in an online English course; another said that for the first time she interacted with prospective employers by email; and a 13-year-old girl stated that she was able to learn more online about her kidney disease than her local doctors could teach her.

Cricket hopes to expand this program to reach many more households across the nation that could also benefit from broadband service.

II. AUTOMATIC ROAMING IS ESSENTIAL TO PROMOTE COMPETITION AND PROTECT CONSUMERS

A. Background

Cricket's growth and its commitment to a diverse customer base illustrate the sort of competition that Congress and the FCC have tried to promote, and Cricket's success demonstrates the pro-consumer benefits that small and mid-sized carriers bring to the wireless marketplace. Cricket disciplines prices in every market that it enters, and indeed, our presence spurs other carriers to offer a wider range of choices, including flat-rate pricing plans along the lines that Cricket offers.

Nonetheless, we have been concerned in recent years with the ever-increasing consolidation of spectrum and market share into the hands of the nation's largest carriers, and the consequence that this trend portends for small and mid-sized carriers—and, most important, for consumers. Since 2001, the nation's largest carriers have systematically absorbed dozens of smaller competitors and also acquired the lion's share of spectrum that the FCC auctioned in recent years. Two firms—AT&T and Verizon—now have a majority of market share, both in terms of revenue and subscribers, and four firms account for more than 90% of revenue and subscribers.¹

Historically, competition flourished in the retail wireless industry during the 1990s and early into this century, driving market participants to reduce prices and explore innovations in

¹ See, e.g., *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Thirteenth Report, WT Docket No. 08-27 (rel. Jan. 16, 2009) at Table A-4; P. Cramton, A. Skrzypacz, and R. Wilson, "The 700 MHz Spectrum Auction: An Opportunity to Protect Competition in a Consolidating Industry" (Nov. 13, 2007), at 2.

technology and service. Today, however, the nation's largest carriers now have both the incentive and the ability to foreclose competitors from entering new markets. Cricket and other small, regional, and rural carriers have increasingly encountered abusive and anti-competitive business practices, such as the largest carriers' refusal to provide wholesale automatic roaming at just, reasonable, and non-discriminatory rates, terms and conditions.

Automatic roaming agreements play a critical role in the wireless industry, plugging coverage holes that exist in every carrier's network so that consumers can obtain seamless coverage wherever they travel. Reliable service is not simply a marketing tool. Without an automatic roaming obligation, for example, there is no guarantee that consumers traveling outside their provider's network will receive emergency alerts sent via SMS text message. Whether seeking help with car trouble—or even contacting family and receiving critical information in the wake of a hurricane or terrorist attack²—consumers “should [not] have to see the words ‘No Service’ on their wireless device” in a time of need.³ Consumers simply should not be stranded when they travel away from home.

There is no procompetitive justification to explain the largest carriers' refusal to provide automatic roaming to other carriers on just, reasonable, and nondiscriminatory rates, terms and conditions. They clearly have adopted these practices in an effort to weaken the service offerings of their competitors—in spite of the fact that they have relied on such agreements to expand their own networks. These anti-competitive practices harm all consumers, but they

² See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Red 15817, 15888 (2007) (“*Roaming Order*”), Statement of Commissioner Deborah Taylor Tate (observing that roaming can benefit “public safety, or even homeland security”).

³ *Id.*, Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part.

disproportionately burden disadvantaged and rural populations, many of whom cannot afford or qualify for the wireless services provided by the nation's largest carriers.

There are several proceedings pending before the FCC in which the agency has an opportunity to reevaluate its current policies regarding automatic roaming, which I will briefly describe. We urge Congress to monitor these proceedings closely, encourage the agency to adopt a pro-competitive approach to roaming, and, if necessary, consider legislative solutions in order to promote the long-term competitive goals for the wireless industry and ensure that all consumers have access to affordable, ubiquitous wireless coverage.

B. 2007 Roaming Order

In 2007, the FCC clarified that automatic roaming is a common carrier service that must be provided on just, reasonable, and non-discriminatory terms and conditions, and found that roaming benefits all wireless subscribers by promoting nationwide, seamless coverage.⁴ That clarification was an important victory for consumers and a reaffirmation of the competitive principles that have driven the wireless industry's progress. In the same ruling, however, the FCC limited that determination in two critical respects, both of which seriously undercut the application of the traditional common carrier rule.

First, the FCC crafted an "in-market" exception that allows a carrier to refuse roaming service in any area where the requesting carrier holds a wireless license or spectrum usage rights. This loophole is extremely broad—we lawyers would say that the "exception swallows the rule." More colorfully, the exception is large enough to drive a truck through. No matter how it is described, the exception effectively guts the rule and defeats many of the public interest benefits that the FCC sought to promote in the first place. Several carriers, including Cricket, have filed

⁴ See *Roaming Order*, 22 FCC Rcd at 15827–28 ¶ 26

petitions asking the FCC to reconsider this in-market exception, and those petitions are still pending.

Second, the FCC limited its ruling to apply only to real-time, two-way switched voice or data services that are interconnected with the PSTN, along with push-to-talk and SMS services. The agency has thus far declined to impose any automatic roaming obligation for non-interconnected services, such as data roaming for wireless broadband Internet services. In 2007 the FCC sought comments as to whether the agency should mandate data roaming, but since that time it has not given any indication whether a data roaming rule is on the horizon.

With respect to the first limitation, the in-market exception runs counter to the FCC's stated goals of "encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area."⁵ It is simply infeasible for a carrier to build and maintain facilities that provide service to 100% of its licensed area—particularly where a carrier holds licenses that cover very large regions, such as the Economic Area ("EA") licenses and Regional Economic Area Grouping ("REAG") licenses sold in Auction 66. Even the largest carriers, including Verizon and AT&T, are nowhere close to building out facilities to cover all of their licensed service areas and must therefore rely on roaming to fill holes in coverage. Furthermore, some spectrum licenses remain encumbered by federal government use, and carriers must work with government entities to clear this spectrum before using it to provide retail service.

Nearly all carriers—large and small, rural and urban, incumbent and competitive—have agreed in connection with pending petitions for reconsideration of the *Roaming Order* that the

⁵ *Id.*, 22 FCC Rcd at 15835 ¶ 49.

FCC should close the in-market loophole.⁶ Only Verizon and AT&T support affirmance of the current rule, which is hardly surprising: They clearly have much to gain by protecting their market power, and the in-market exception allows them to extract above-market prices from other carriers at the expense of consumer welfare, or even to deny roaming outright to the customers of competing carriers.

Verizon and AT&T argue that an automatic roaming obligation without any geographic restrictions would encourage smaller carriers to “free-ride” on carriers that have already invested in facilities construction.⁷ But this argument is belied by the facts. Cricket, for example, has a demonstrated history of aggressively building out its licenses, despite the fact that it has limited resources and capital in comparison to the nation’s largest carriers. Moreover, it is self-serving for these two carriers to argue that Cricket and other small and mid-sized carriers must build facilities reaching every corner of their licensed areas when they themselves still have not built out significant portions of their own networks—and despite that they have had more than 20 years to do so and received their original licenses for free. Other national carriers recognize that automatic roaming is necessary to fill in coverage gaps and agree that the in-market exception does not make sense.⁸ Even with an automatic roaming obligation, carriers still have the incentive to expand their own network while using roaming agreements to supplement service in the interim, just as the largest carriers have historically done.

⁶ Carriers and organizations supporting elimination of the in-market exception include Leap, MetroPCS, Sprint, T-Mobile, United States Cellular Corporation, SpectrumCo (a joint venture that includes cable operators Comcast, Time Warner, and Cox), SouthernLINC, the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASCO”), and the Rural Telecommunications Group.

⁷ *Id.* at ¶ 49.

⁸ *See, e.g.*, Sprint Nextel Corp. Petition for Reconsideration (Oct 1, 2007) at 9–10; T-Mobile USA, Inc., Petition for Partial Reconsideration (Oct. 1, 2007) at 2–3.

It is important to stress that Cricket and other carriers are not asking the FCC to adopt regulations that would prevent carriers from charging competitive rates and reaping a profit from their investments. Instead, Cricket and others merely urge the FCC to reevaluate an ill-considered loophole that effectively allows the largest carriers to adopt anti-competitive practices and stymie the efforts of small, regional, and rural carriers to expand their network and offer consumers a competitive alternative. In the end, the in-market exception forces consumers—particularly low-income and underserved consumers—to pay more for less coverage, or in some cases to lose coverage altogether.

The same of course is true for data roaming. A roaming obligation for data services will enhance the ability of small, regional, and rural carriers to enter the data services market and effectively compete against the largest carriers. Such a rule would also promote facilities investment and improve the provision of data services to poor and rural communities caught on the wrong side of the digital divide. Automatic roaming for data services—again, with no “in-market” exceptions—is integral to future wireless competition.

C. Verizon-Alltel Merger

In addition to the FCC’s 2007 Roaming Order, which requires further tailoring, and a data roaming proceeding, which needs to move forward, I would like to discuss briefly the roaming conditions that the FCC created at the time it approved the Verizon-Alltel merger in 2008. The FCC subjected its approval to several roaming conditions, which Verizon itself proposed, in order to ensure that the merger would not lead to anti-competitive harms.⁹ Among other things, the FCC conditioned approval of the transaction on Verizon’s commitment to give roaming partners the option of selecting either the Verizon or Alltel agreement to govern all

roaming traffic with the merged company, and to keep the rates provided in those agreements frozen for at least four years after the consummation of the merger.¹⁰

Since the merger, Verizon has attempted to circumvent the limited conditions that the FCC imposed in order to free itself of any restraints on the exercise of its market power. Specifically, Verizon has advanced a reading of those merger conditions that would render meaningless its commitment to honor rates for four years, because Verizon argues it can terminate existing roaming agreements within that time frame and then demand whatever non-rate conditions it chooses.

Cricket has asked the FCC to clarify that the four-year commitment applies to all terms of existing roaming agreements—not just the rates. This understanding is consistent with a plain and ordinary reading of the merger conditions and Verizon’s own statements in filings with the FCC, and indeed it is confirmed by the statements of three Commissioners who voted to approve the merger.¹¹ Verizon has offered no legitimate policy or other justification to support its reading of the conditions—because there is none. The FCC adopted these conditions to protect consumers from potential abuses of market power and they should be strictly enforced.

I raise the Verizon-Alltel merger proceeding because it demonstrates the importance of adopting regulatory safeguards to prevent the nation’s largest carriers from abusing market power. This transaction is one of many over the past several years that have consolidated the nation’s scarce spectrum assets into the hands of a few, and as a result, these carriers have even

⁹ Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless, Memorandum Opinion and Order, 23 FCC Rcd 17444, 17525 ¶ 178 (2008) (“*Verizon-ALLTEL Order*”).

¹⁰ *Id.*

¹¹ *Id.*, Statement of Commissioner Deborah Taylor Tate; *id.*, Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part; *id.*, Statement of Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part.

greater incentive and ability to adopt anti-competitive practices, including the denial of automatic roaming, which will harm consumers in the long run. It is critically important that Congress and the FCC remain vigilant to ensure that the wireless industry is competitive and that all consumers have access to wireless service at just, reasonable, and non-discriminatory rates.

D. Broadband Stimulus

Finally, with regard to broadband deployment, Congress recently appropriated \$4.7 billion to establish a Broadband Technology Opportunities Program (“BTOP”) for awards to eligible entities to develop and expand broadband services to unserved and underserved areas and improve access to broadband by public safety agencies. Cricket enthusiastically supports these goals. Because of its long-term focus on offering innovative and affordable wireless service to customers that have long been under-served by other wireless telecommunications providers, Cricket is well-situated to help expand broadband access to low-income individuals and other disadvantaged groups and is looking forward to working with the NTIA and the FCC in implementing this program.

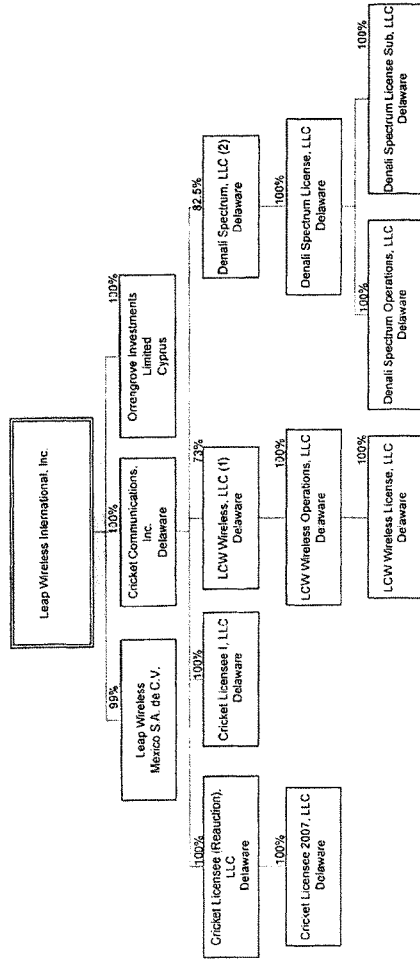
The NTIA (in consultation with the FCC) is currently determining the rules for participating in the Broadband Technology Opportunities Program, and Cricket has encouraged these agencies to take into account whether households have the ability to pay for services that may otherwise be available in their area when defining “underserved.” Limited financial resources currently prevent millions of Americans from enjoying the myriad benefits that broadband service has to offer.

Cricket also believes that the NTIA should refrain from imposing unnecessary restrictions relating to transmission speeds that would only stymie broadband adoption and prevent innovative companies who are ideally situated to carry out the objectives of the BTOP from participating in this critically important program. Furthermore, for policy reasons

discussed above, Cricket agrees with those parties who have urged the NTIA to impose an automatic roaming obligation for both voice and data services as a condition to receiving funds under the program.

* * * *

Chairman Boucher, I thank you and the Subcommittee again for allowing me to express the views of Leap and Cricket on these important topics.



Mr. BOUCHER. Thank you, Mr. Irving.
Mr. Meena.

STATEMENT OF VICTOR H. "HU" MEENA

Mr. MEENA. Good morning, Mr. Chairman and members of the subcommittee. Thank you for allowing me this opportunity to testify before you today.

I have been in the wireless industry for over 20 years with Cellular South, the Nation's largest, privately held wireless carrier, serving all of Mississippi and four other southeastern States.

In my years in the wireless industry, I have seen the duopolistic role of the early cellular licenses when there were two, and only two, carriers in each market. The rise in wireless competition is a result of the later spectrum options and of the growth and innovation throughout the industry as a result of the Telecommunications Act of 1996.

However, today I am convinced that, unless things change quickly, the industry is coming full circle and is progressing or is, rather, regressing into a duopoly once again.

Today, AT&T Wireless and Verizon Wireless have almost 65 percent of the national market. Over 90 percent of the wireless market is in the hands of those two, plus Sprint and T-Mobile. This should come as no surprise after the parade of acquisitions over the past several years.

One of the effects of the market concentration, of this market concentration, is that the largest carriers now use their market power to demand and receive long-term, exclusive agreements with device manufacturers for the latest and greatest technological handsets. Exclusivity agreements prevent other carriers from acquiring these devices, and they are particularly harmful to wireless consumers. The practice has worked so well for the large carriers that they are now using the same formula for the emerging netbook market as well.

What would happen if merchants sold computers that only worked with one Internet service provider? For example, imagine a world in which Macintosh computers only worked on AT&T DSL. That, of course, is exactly the world we live in with iPhone and Apple's exclusivity agreement with AT&T Wireless. If a consumer wants that handheld computer, he or she must subscribe to that service through AT&T.

This battle among the industry titans has left consumers as collateral damage because device manufacturers are prohibited from offering cutting-edge devices to the smaller carriers who many times serve rural areas.

Even in the areas that are served by the largest carriers, consumers are not free to choose the latest devices without being forced into accepting services from a specific carrier. If you live in New York City and want an iPhone, then you are obligated to be an AT&T Wireless customer. If you live in Washington, D.C., and want a BlackBerry Storm, then you will be a Verizon Wireless customer, whether you want to be or not.

The situation with exclusivity agreements is bad and is only getting worse. Cellular South and customers like us have tried to find solutions to this problem without resorting to help from policy-

makers. We have attempted several solutions within the industry, including direct talks with device manufacturers, industry association working groups, and consolidating purchasing power through buying grids, but all of these efforts have been fruitless. Without legislation from Congress or action from the FCC, there will be no solution to this issue.

On the topic of roaming, far and away the most important issue is that of automatic roaming for data services, specifically roaming for broadband. When I began in this industry, roaming agreements could be negotiated in a matter of an afternoon and usually finalized within a week. Today, the largest carriers use their market power to dictate unreasonable roaming terms or they refuse data roaming agreements all together; 700 megahertz licensees not named AT&T or Verizon cannot build out their next generation networks without high-speed data roaming agreements. This is increasingly important as carriers deploy new data technologies that provide services anywhere, any time, such as telemedicine applications and Voice services over Internet Protocol, somewhat better known as VoIP.

I ask you, is VoIP voice roaming or is it data roaming? Better yet, why should it matter?

We are at a critical period in the wireless industry. Although the wireless industry may no longer be in its infancy, it is no more mature than an awkward adolescent. There is much innovating left to be done. There are many people of all socioeconomic backgrounds and of geographic locales who have yet to benefit fully from the wireless experience.

Before it is too late, Congress must step in and put an end to the largest carriers' anticompetitive stranglehold on devices as well as ensure full roaming access. The future of free markets in our industry and the delivery of wireless broadband services to rural America depends on it. A light regulatory touch today will prevent the reemerging duopoly in which two companies will control all of the customers, all of the best devices, all of the prime spectrum, and will become too big to fail.

Thank you.

[The prepared statement of Mr. Meena follows:]

WRITTEN STATEMENT

of

**MR. VICTOR H. "HU" MEENA
PRESIDENT and CEO
CELLULAR SOUTH, INC.**

**Before the
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES**

May 7, 2009

INTRODUCTION

Good morning Mr. Chairman and members of the Subcommittee. Thank you for allowing this opportunity to testify before you today regarding a number of important issues related to competition in the wireless industry. I have been in the wireless industry for over twenty (20) years with Cellular South, the nation's largest privately-owned wireless carrier serving all of Mississippi and portions of four other southeastern states.

In my years in the wireless industry, I have seen the duopolistic world of the early cellular licenses, the rise in wireless competition as a result of the later spectrum auctions, and the growth and innovation throughout the industry as a result of the Telecommunications Act of 1996. However as I sit before you today, I am convinced that, unless things change quickly, the industry is coming full-circle and progressing -- or, rather, regressing -- into a duopoly once again.

The Justice Department broke up the AT&T monopoly in 1983. In 1993, the wheels were set in motion for spectrum auctions that would open the duopoly in wireless markets to competition. In 1996, Congress rewrote the Telecommunications Act to further promote competition in telecommunications services. Today, however, the industry is trending back towards consolidation and the days of Ma Bell. The largest carriers continue with acquisition after acquisition -- Centennial Wireless, Alltel, Rural Cellular Corporation, Dobson Communications, just to name a few -- with seemingly no interest from regulators in the effects that this consolidation has on the market.

Today over ninety percent (90%) of the wireless market is in the hands of AT&T Wireless, Verizon Wireless, Sprint Nextel and T-Mobile. Combined, AT&T Wireless and

Verizon Wireless have approximately sixty-five percent (65%) of the market. This should come as no surprise after the parade of acquisitions over the past several years.

One reason that this is a problem is that the largest carriers use their market power to prevent competitors from having access to devices and roaming. If this trend continues, and I believe it will without intervention from Congress, then there will once again be a duopoly in the wireless industry. Our country's banking and finance policy mistakenly believed that free reign in the marketplace with little oversight was the best course of action and that certain institutions were simply too big to fail. This reasoning will lead to the same market failures in the wireless industry. Congress must take action now to ensure that the wireless industry remains the competitive and innovative marketplace that consumers have come to expect.

I. EXCLUSIVE AGREEMENTS FOR DEVICES

One effect of the market concentration described above is that the largest carriers now use their market power to demand (and receive) long-term exclusive agreements with device manufacturers for the latest and greatest handsets. Exclusivity agreements prevent other carriers from acquiring these devices and are particularly harmful to wireless consumers.

Wireless service has evolved from a market where consumers were primarily concerned with attractive monthly plans and a provider's network, to a market where a carrier's wireless devices reign supreme. Cellular South and other regional and rural carriers have competed with the largest carriers for years on issues such as network quality, network coverage and price. These are all issues that are within our control. If we lose a customer because we don't offer the right plan or because we drop too many calls, that blame falls squarely on our shoulders – and I can and will fix that problem. However, regional and rural carriers are unable to compete on devices because the largest carriers lock up devices in exclusivity agreements which ensure that

those devices will not reach the subscribers of smaller carriers. Put simply, regional and rural carriers cannot gain access to the latest, cutting-edge devices which puts us in the impossible position of competing in an area that our competitors control. Focus groups of customers who have left Cellular South for the largest carriers repeatedly say that they are buying the device, not the network and certainly not the company.

Historically, exclusive agreements lasted three (3), maybe even six (6), months. Agreements of this length were certainly obstacles to competition, but they were not the anti-competitive weapons that today's long-term agreements have become. Today, handset manufacturers tell us that the largest carriers are demanding more as well as longer exclusive agreements for devices. The largest carriers are increasingly demanding "lifetime" exclusives on handsets. At least one large carrier is demanding that all of the devices it accepts from a particular manufacturer be provided under exclusive agreements. Another large carrier has convinced a device manufacturer to provide all of the handsets that it makes to that carrier exclusively. Manufacturers know that they must cater to the largest carriers in order to secure any kind of market share in the U.S. market. Increasing demands for customization and exclusive handset arrangements by the largest carriers further strain suppliers' limited resources to the point that smaller carriers are precluded from any relevant products.

The latest example of this is in the emerging area of netbooks. Netbooks are devices that fit somewhere between a handheld personal digital assistant ("PDA") and a laptop computer. These devices offer Internet access and common laptop functionality, but are priced at a level at or near most top-of-the-line PDAs. These devices will offer the perfect solution for a number of wireless users who find PDAs too small for extensive use, but find a laptop to be too cumbersome to be convenient. We have been in touch with several netbook manufacturers and,

as you may have guessed, the largest carriers are already demanding exclusive models of these wireless devices.

What would happen if merchants sold computers that only worked with one Internet service provider? Imagine a world in which Macintosh computers only worked on AT&T's DSL. That's exactly the world we live in with the iPhone and Apple's exclusivity agreement with AT&T Wireless. If you want that handheld computer, you must have service through a particular wireless voice and Internet provider. Of course, as I mentioned earlier, the largest carriers are now trying to do this in the netbook market as well.

As another example, what would happen if a pharmaceutical company developed a lifesaving drug that could be purchased exclusively from one pharmacy chain in the country, but you didn't have a branch of that chain in your city? That is similar to what consumers experience without access to some of the latest devices. Potentially lifesaving applications are being developed for devices that are exclusive to a single carrier. If that carrier doesn't serve your area, then you are simply out of luck.

A. Consumers are Collateral Damage

This battle among the industry titans has left consumers as collateral damage because device manufacturers are prohibited from providing the cutting-edge devices that consumers desire to the smaller carriers. Vast portions of America are not served by any of the largest carriers, so Americans in these areas are prohibited from acquiring the newest and most innovative devices. Even in areas that are served by one of the largest carriers, consumers are not free to choose the latest devices without being forced into accepting service from a particular carrier. If you live in New York City and want an iPhone, then you are obligated to be an AT&T.

Wireless customer. If you live in Washington, D.C. and want a Blackberry Storm, then you will be a Verizon Wireless customer whether you want to or not.

B. Impact on Consumers, Economic Development, Public Safety & Health Care

If a regional or small carrier cannot get access to the latest devices, then it cannot roll out next-generation services. No carrier can justify the expense of deploying a new technology unless it can also deliver the devices necessary to make that technology work. While this is bad for the carrier, it is ultimately the consumer who pays the price for not having access to the devices necessary to use mobile broadband services. Without access to the latest devices, consumers are ill-equipped to respond to natural disasters, they cannot access many benefits of telemedicine applications, and they cannot adequately protect themselves in emergency situations. Today's advances in wireless technology will not be realized until the latest wireless handsets are available to all of rural America.

Collectively, a lack of access to the latest devices means that rural communities cannot maximize economic development. One of the first questions Toyota asked when considering building a plant in Mississippi was whether rural Blue Springs, Mississippi had access to wireless 3G (third generation) technology. Thankfully, for the town of Blue Springs and the surrounding area, that answer was "yes." However, without access to modern wireless devices, large portions of America will be left behind as the industry continues to deploy third generation or "3G" technologies and eventually deploys "4G" technology. Yesterday's economic development infrastructure meant rail and road access. Today's global economy requires wireless broadband and the latest wireless devices to compete in the global economy.

C. Attempts at Non-Governmental Solutions

The situation with exclusivity agreements is bad and is only getting worse. Without action from Washington, there will be no solution. Cellular South and carriers like us have tried to find solutions to this problem without resorting to help from policymakers. We have attempted several solutions within the industry, but all have been fruitless insofar as resolving this problem.

1. Device Manufacturers

Our efforts with the equipment manufacturers have produced information, but no solution to the problem of exclusive agreements for devices. Manufacturers tell us that they would like to open their portfolios to us, but that they cannot show us a number of their devices – much less sell them to us – because the largest carriers will not allow it.

2. Industry Groups

The Cellular Telecommunications and Internet Association (“CTIA”) convened a working group late last year in an effort to resolve the device exclusivity issue. The CTIA brought large and small carriers to the table along with manufacturers, and the effort began with an early hope of promise. However, it quickly became apparent that the largest carriers had no incentive to participate, the manufacturers remained virtually silent on the matter, and the effort proved futile.

3. Consolidation of Purchase Power

One frequent response from the few carriers that profit from exclusive handset arrangements is the suggestion that smaller carriers should consolidate purchasing power in order

to gain access to cutting-edge devices. While that idea is good in theory, it does not work in practice.

The Associated Carrier Group (“ACG”) was formed a number of years ago for just this purpose. ACG has almost 30 carriers who, at this time, are exclusively CDMA service providers. For the past two years, representatives of ACG have traveled to South Korea to plead for access to cutting-edge devices, but these South Korean manufacturers have made it clear that exclusive arrangements insisted upon by the nation’s largest carriers prevent them from selling the most appealing handsets to ACG members.

Commonly, it is suggested that ACG should push for its own exclusive devices. Although ACG did have a device several years ago that was not sold by another carrier, the suggestion that small carriers join together for their own exclusive device ignores our belief that exclusives are not good for consumers nor for the industry. It is not our position that exclusives are bad because we don’t have them – it is that exclusive agreements negatively impact consumers by unfairly impeding competition.

Furthermore, it strains the limits of credibility to suggest that the smaller carriers can pool their purchasing power in order to acquire devices, because market power has been concentrated in the hands of the few largest carriers over the past several years. As discussed previously, the largest four carriers have over ninety percent (90%) of the wireless market, with AT&T Wireless and Verizon Wireless combining for approximately sixty-five percent (65%) of the market. These carriers have grown through acquisition after acquisition with seemingly no regulatory consideration given to market concentration. As a result, all remaining carriers regardless of technology have less than ten percent (10%) of the market. If the largest carriers are allowed to

continue using their market power to thwart competition, we will once again have a duopoly for wireless services.

A second flawed argument is that there are plenty of device manufacturers from whom the smaller carriers can acquire handsets that are not bound by exclusivity agreements. This argument essentially boils down the concept that smaller carriers should offer the devices that the largest carriers do not want. If the non-exclusive devices were the type of cutting-edge, game-changing devices that attracted customers, you can be assured that the mega-carriers would not be arguing that those devices are the solution to this problem.

D. Efforts at the FCC

On May 20, 2008, Rural Cellular Association (“RCA”), of which Cellular South is a member, filed a Petition for Rulemaking (“Petition”) with the Federal Communications Commission (“Commission”), asking the Commission to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.

Only the four largest carriers and one manufacturer expressed opposition to the RCA Petition. In contrast, over two hundred (200) parties representing the rest of the wireless industry and the public interest community expressed their unconditional support for RCA’s petition either individually or in groups. The message of the majority was clear: free market competition and innovation has been strangled by large carrier demands for exclusive access to the latest advanced devices.

The market is distorted when a single carrier is allowed to have a monopoly on a device. Action is needed now to restore competition in the handset market and to ensure that consumers have the option to choose both the device and the service provider that they want.

II. ROAMING

On the topic of roaming, far and away the most important issue is that of automatic roaming for data services – specifically, roaming for high-speed data such as EV-DO, HSPA, and as we go forward, both WiMAX and LTE. An equally important aspect of roaming is the issue of interoperability which allows seamless transitions between networks.

A. High Speed Data Roaming

When I began in this industry, roaming agreements were a natural part of doing business. Consumers came to rely on the ability to use their device wherever they happened to be, regardless of who they chose as their service provider. Roaming agreements could be negotiated in a matter of an afternoon and usually finalized within a week.

As technology has advanced in the industry, the largest carriers have begun using data roaming agreements – actually, withholding data roaming agreements – as a means to restrict competition. Today's wireless devices do so much more than just make phone calls, and new applications are being introduced every day. Consumers literally have access to the world at their fingertips with today's wireless services. However, this world is often unavailable to many consumers because the largest carriers refuse roaming agreements for high-speed data.

Regional and rural carriers offer network access in areas that the largest carriers have not and, likely, will never build out on their own. These smaller carriers do not seek these roaming agreements as a means to actively market outside their footprint because 1) that is not the goal in

seeking roaming, and 2) even if that were the goal, roaming rates are too high to make an economic case for that type of growth. Our customers travel just like the customers of the big carriers and we believe that consumers should be able to use their devices wherever they may be.

The FCC has addressed the issue of automatic roaming for voice services, but it has not taken final action on the data roaming issue. Unfortunately, there is concern at the Commission as to whether data roaming is within its powers. While we believe that the Commission has the power to resolve this issue, there is no doubt at all that Congress has the power to address high-speed data roaming obligations. By requiring carriers to provide automatic data roaming to requesting carriers that use a compatible technology, Congress can ensure that consumers never again find themselves unable to utilize the indispensable data features of their wireless device when traveling outside of their home carrier's footprint.

B. Interoperability

A related matter in the roaming discussion is the issue of interoperability between wireless carriers. At its most basic, interoperability allows consumers to move seamlessly from one network to another. In other words, the networks are configured in such a manner that the consumer gets full access to the features on his or her device whether that consumer is at home, or traveling on the other side of the continent. The applications that are possible with interoperable networks are virtually limitless:

- Navigation – the ability to provide turn-by-turn directions to end users outside the home footprint.
- Tracking – the ability to track a device, package, or other shipment nationwide instead of just inside the home footprint
- Child finder – the ability to use a child's phone to find a lost child outside the home footprint

- Weather Applications – the ability to passively provide the current and forecasted weather conditions in the location where the end user is currently located. This would include severe weather alerts and warnings to move out of a storm’s path

Each day, consumers rely more and more on the data capabilities of their wireless devices. As wireless providers deploy 3G and 4G technologies, we are entering a world where even voice communications are treated like data transmissions. It is not acceptable in this era of wireless technology that there would be a roaming requirement for yesterday’s voice traffic, but not for the data services of today and tomorrow. Consumers need a solution and Congress is in the clearest position to provide it.

III. STATE PREEMPTION AND A NATIONAL CONSUMER PROTECTION FRAMEWORK

Given the nature of telecommunications services – interstate service, footprints and licenses that cross civil boundaries of all sizes, etc. – there is a growing need for uniform regulation of the wireless industry. Consistent regulations can only enhance the relationship between consumers and wireless providers because consumers will be guaranteed the same protections regardless of the jurisdiction in which they live. By contrast, patchwork regulation is harmful to any industry that operates in multiple states as it can significantly raise the cost of doing business, which is passed along to consumers in the form of higher rates. To be clear, we don’t oppose appropriate consumer protection laws. Having to comply with materially different criteria from state to state, however, requires a huge investment that consumers ultimately fund without receiving any corresponding benefit from the multiple requirements. Cellular South supports the concept of a national framework of regulation for the wireless industry.

IV. TOWER SITING

Cellular South has experienced delays in the past in getting decisions on tower sites. We support the idea of a deadline by which officials must make a determination as to whether or not a tower site is approved. This has become a problem in some areas but, as carriers face buildout deadlines for recently-acquired 700 MHz spectrum, this will become an increasingly critical issue. Congress should address this problem before it becomes more acute.

V. NUMBER PORTABILITY

It is unfortunate that number portability continues to be a problem between carriers. As more and more consumers choose a wireless-only life, policymakers should ensure that landline-to-wireless porting and wireless-to-wireless porting is as expeditious as possible for the consumer. Any unnecessary delay in number porting is a disservice to the consumer.

VI. BACKHAUL

Backhaul for wireless services is an increasingly important issue in the industry. All of the traffic between handsets and towers has to go somewhere and that somewhere is the system of backhaul facilities. As wireless technologies continue to advance, usage of bandwidth is growing by corresponding leaps and bounds. Congress should examine the rules that regulate backhaul providers to ensure that these services are promoting the best interests of the consumer.

CONCLUSION

As you can see, we are at a critical juncture in the wireless industry. Decisions made today will determine whether our industry becomes more consumer-friendly and innovative as a result of increased competition, or whether the trend towards a duopoly will continue and competition will be eliminated.

Although the wireless industry may no longer be in its infancy, it is no more mature than a gangly teenager. There is much innovation left to be done. There are more people of all socio-economic backgrounds and geographic locales who have yet to benefit fully from the wireless experience. Before it is too late, Congress must step in and put an end to the largest carriers' stranglehold on devices, as well as ensure full roaming access. A light regulatory touch today will prevent the re-emerging duopoly in which two companies control all the customers, all the devices, all the prime spectrum, and become "too big to fail."

Thank you again for the opportunity to be here today. I appreciate your time and your interest in these issues and look forward to discussing them here this morning. With that, I welcome any questions you may have.

Mr. BOUCHER. Thank you very much, Mr. Meena.
Mr. Potharlanka.

STATEMENT OF RAVI POTHARLANKA

Mr. POTHARLANKA. Good morning, Chairman Boucher, Ranking Member Stearns and members of the subcommittee.

Thank you for the opportunity today to testify about the importance of middle and last mile backhaul services in the context of competition in the wireless industry.

My name is Ravi Potharlanka. I am the Chief Operating Officer of FiberTower Corporation.

Formed in 2000, FiberTower is the Nation's leading alternative carrier for middle and last mile backhaul. FiberTower operates hybrid fiber microwave networks in 13 U.S. markets. The top eight mobile carriers and the government are amongst our largest customers. We have a national scope of 24-gigahertz and 38-gigahertz spectrum licenses and access to over 100,000 towers. We also offer fixed wireless services across the Nation. We have been offering backhaul services for the last 6 years and are in a position to offer a unique perspective. Let me explain.

Backhaul connects last mile end users, including those who serve first responders, Homeland Security, municipal buildings, medical facilities, schools, and libraries to the Internet and to other network-switching centers.

Absent backhaul infrastructure, broadband networks cannot operate. Also, backhaul and transport infrastructure must be built before end users can fully realize the benefits of broadband. In fact, backhaul is often considered the Achilles' heel to achieving broadband connectivity.

This lack of development in unserved and in underserved areas has inhibited the growth of broadband services. Our modular network is relatively inexpensive to deploy when compared to fiber and can often be up and running in a matter of days.

I want to applaud the subcommittee on its leadership in producing the broadband stimulus programs. This subcommittee and the committee have identified middle mile and last mile backhaul appropriately as a critical piece in achieving broadband expansion. We see the access to this capital as a unique opportunity to capitalize on the expansion.

For example, we could build in the western half of Virginia backhaul networks similar to those that have been built elsewhere. In just months, we could get people working throughout the unserved and underserved communities and make broadband accessible. This will create long-term jobs while permanently enhancing the economy. This model can most definitely be deployed in other areas of the Nation. I would now like to draw your attention to four important matters.

First, mapping of unserved and underserved areas must include middle and last mile backhaul. The FCC, NTIA and RUS should consider an area with an adequate backhaul or transport coverage as underserved. Even if such an area has an end user broadband service provider, an area without backhaul is unable to support multiple broadband networks that drive the economy.

Second, ensure that multiple-use backhaul platforms, which are called MuniFrames, are accessible to all end users. Doing this truly brings broadband to the area while greatly reducing costs. It is important to ensure that all parties have the ability to access these platforms in a nondiscriminatory manner.

Third, reinforce the existing Federal preemptions or burdensome zoning and permitting restrictions for fixed wireless antenna placements. Restrictions that impair the installation of small antennas for fixed wireless are not permitted under a very specific FCC rule. Zoning and permitting requirements often add substantial delays in costs of deployments.

Fourth, make a limited number of the numerous, vacant TV white space channels available for point-to-point licensing. The recently completed FCC TV white space order is a first step in unleashing broadband deployments to unserved and underserved areas. The lack of backhaul and transport services is particularly problematic in rural areas when great costs and great distances slow or prevent connections to switch locations of the Internet.

However, white space channels make long range promulgation possible, thereby reducing the number of required towers to reach the same distance. There is no Member of this Congress more committed than you, Mr. Chairman, to bringing high speed broadband to America. I submit to you today that should FCC grant point to point licensed use for limited number of TV white space channels, it could stimulate rural broadband. This proposal involves a small number of numerous vacant rural channels and only in a fashion that protects incumbents and promotes plentiful and healthy sustained growth for unlicensed devices.

100-mile connection using white spaces would typically cost less than \$200,000 to deploy, while the same connection using some proposed bands like in six or 3.65 gigahertz spectrum would likely cost more than \$3 million, almost 15 times as much. Similarly, a new transfiber build in the same distance would normally cost at least 20 or 30 times more expensive and be slow to deploy.

In conclusion, making a limited number of TV white space channels available before the initial stimulus grant filing deadline is very critical. Finally, we strongly recommend the following: Continued reinforcement of FCC rules that preempt burdensome zoning and permitting restrictions for small fixed wireless antennas, comprehensive mapping of middle mile and last mile backhaul, and an express eligibility for backhaul and transport projects under the BTOP and RUS programs. This now concludes my oral testimony, and I thank you for the opportunity.

Mr. BOUCHER. Thank you very much, Mr. Potharlanka.

[The prepared statement of Mr. Potharlanka follows:]

Written Testimony of Ravi Potharlanka, COO
FiberTower Corporation

House Energy and Commerce Committee's subcommittee on
Communications, Technology and the Internet

Hearing: Competition in the Wireless Industry

10am, Eastern, Thursday, May 7, 2009
Room 2322, Rayburn House Office Building

Executive Summary: Middle mile and last mile backhaul enables wireless competition to exist and to thrive. Our country has an interest in ensuring its growth and availability. The decisions that are made along the way (encouraging the use of multiple-use backhaul platforms known as MuniFrames® and ensuring equal and non-discriminatory access to those platforms, making a limited number of the numerous vacant TV white space channels available in rural areas, re-enforcing FCC rules that prevent burdensome and preempted zoning or permitting restrictions, and implementing FCC, NTIA, and RUS rules) can create (or destroy) the necessary environment. Making a limited number of TV White Space channels available before the initial broadband grant filing deadlines will greatly increase the ability to bring broadband services to many more unserved and underserved communities, while sparking short term and long term job growth and ensuring wise efficient use of taxpayer funds.

Good morning Chairman Boucher, Ranking Member Stearns, and members of the subcommittee. My name is Ravi Potharlanka and I am the Chief Operating Officer of FiberTower Corporation.

FiberTower operates a 100% facilities-based telecommunications network using fiber optic and wireless assets and leads the nation in providing backhaul services to mobile wireless carrier cell sites. Facilities-based providers like us own or lease a substantial portion of the property, plant and equipment necessary to provide backhaul services. Backhaul is the transport of voice, video and data traffic from a customer location (such as a cell site) back to a switching center or to the Internet.

FiberTower utilizes its partnerships and master lease agreements with tower operators to deploy carrier-class and government-class networks. We own a national spectrum portfolio of 24 GHz and 39 GHz wide-area spectrum licenses, including over 740 MHz in the top 20 U.S. metropolitan areas and, in the aggregate, approximately 1.55 billion channel pops calculated as the number of channels in a given area multiplied by the population, as measured in the 2000 census, covered by these channels. We believe our spectrum portfolio represents one of the largest and most comprehensive collections of millimeter wave spectrum in the U.S. Our licenses extend over substantially all of the continental U.S., with a population of approximately 300 million.

We offer our services to mobile wireless carriers, competitive and local exchange carriers, 1st responder networks, and to government and enterprise customers. Our network currently covers approximately 12,000 route miles with 7,000 miles covered using fixed wireless and another 5,000 miles using dark fiber. Through our partnership and master lease agreements we have the ability to access over 100,000 towers nationwide

When the customer is a mobile wireless carrier, the backhaul typically runs from a mobile base station, or cell site, to the carrier's mobile switching center, or MSC, or other exchange point where the traffic is then switched onto a wireline telecommunications network. We utilize our comprehensive spectrum assets and extensive fiber service provider relationships to provide backhaul services nationally through a hybrid fixed wireless/fiber network architecture. Our services allow mobile wireless carriers to optimize their networks, enable significant improvements in their availability, reliability, scalability and reduce costs, while providing a long-term solution for the increasing demand for backhaul capacity.

- As of December 31, 2008 we provide backhaul service to over 6,000 mobile base stations (or cell sites) in 13 markets;
- We have customer agreements with the eight largest U.S. wireless carriers;
- We hold a master service agreement with Verizon as their fixed wireless partner on the General Services Administration Network contract.

We offer our customers service that consists of time division multiplexing, or TDM, transport at speeds starting with T-1s (a standardized telecommunications service offering at 1.54 megabits per second of capacity) and scaling up to 300 megabits per second and beyond. We have designed our network architecture to accommodate other transport services that our customers may implement in the future, including Ethernet-based backhaul, which launched in 2007, and other packet-based protocols.

Our network is designed to be modular and is relatively inexpensive to deploy as compared to fixed wireline networks. The point to point fixed wireless networks we presently deploy use mature and proven technologies, allowing us to operate at carrier-class and government-class network reliability standards. We also offer the ability to deploy physically diverse network connectivity in accordance with the federal standard established through Public Law 108-447, section 414. We deploy networks to existing towers, rooftops, or other sites where wireless carriers have deployed cell sites. At each of these physical locations, or sites, there may be more than one wireless carrier's cell site - each of which we refer to as a customer location.

When possible, we provide service to multiple customers at a single site, using a shared infrastructure in order to increase capital efficiency. We generally generate revenue in proportion to the number of customers on a site, the amount of bandwidth used by each customer at that site, and the price charged for each increment of bandwidth. This revenue, after subtracting the cost of fiber service transport (which is a semi-variable expense), is available to cover a fixed cost base consisting of items such as rent, insurance, utilities, and field technicians.

FiberTower congratulates Congress, and in particular this subcommittee, on creating language in the 2009 Stimulus bill that truly identifies key elements necessary to bring broadband to the unserved and the underserved. FiberTower also congratulates this subcommittee on its ongoing work on a National Broadband Plan. Concerning next steps, FiberTower believes that government policies to overcome "middle mile" and "last mile" broadband backhaul and transport facility shortages - particularly in unserved and underserved areas - are best addressed by:

- 1) Encouraging the installation of multiple-use backhaul platforms. Such platforms provide unserved and underserved areas with all the benefits of a Municipal Network, or "MuniFrame®."¹ For example, these platforms in broadband-

¹ See Attachment 1.

enabled municipal areas will be able to provide backhaul for mobile wireless carriers, wireline carriers, schools, libraries, 1st responder networks, and local, state, and municipal government;

- 2) Ensuring equal and non-discriminatory access to those multiple-use backhaul platforms. Without access to backhaul many broadband services will remain undelivered;
- 3) Re-enforcing the existing federal preemptions over burdensome zoning and permitting restrictions for fixed wireless antenna deployments. Unnecessary zoning and permitting requirements often add substantial delay and cost to deployments, and may create barriers to entry; and
- 4) Providing point-to-point licensed access to a limited number of the numerous vacant channels in TV White Space. This spectrum provides the ability to swiftly bring middle mile and last mile backhaul transport to areas that cannot afford fiber optic or traditional fixed wireless connectivity.

Utilizing Multiple Use Backhaul Platforms

The private sector discovered that shared access backhaul platforms save funds and allow more broadband services to be deployed to more areas more swiftly. Still, historically, many areas exist where the initial capital remains scarce to start even a shared access backhaul platform. We believe that the 2009 stimulus bill, if enacted wisely, will enable middle mile and last mile service providers to economically address the backhaul needs of unserved and underserved areas.

Taxpayers' funds will be dispersed more efficiently if NTIA and the RUS encourage providers to deploy backhaul and transport platforms that are designed to support, among others, mobile wireless carriers, public safety, government, education and medical entities, incumbent and competitive local exchange carriers ("ILECs" and "CLECs"), and enterprise customers. In other words, if an end user network provider builds their own backhaul to an unserved or underserved area, then the middle mile and last mile backhaul to that area for all the other priority broadband services will remain unavailable. A backhaul platform that shares access for all the end users identified in the legislation truly brings broadband to the area while greatly reducing costs.

Middle mile and last mile backhaul and transport services are critically necessary for all broadband networks, whether they ultimately support carrier, enterprise, or government operations. Backhaul and transport infrastructure connects last mile end-user networks, including those that serve first responders, municipal buildings, medical facilities, schools, and libraries to the Internet or to network switching centers. In short, absent such infrastructure, broadband networks cannot operate. Moreover, backhaul and transport infrastructure must be built before end users can fully realize the benefits of new unlicensed and licensed broadband networks and devices. In fact, backhaul is often considered the "Achilles heel" to achieving broadband connectivity to end users, whether in mobile networks or direct transport to a building. This lack of development in

unserved and underserved areas has inhibited the growth, service quality and operational efficiencies of broadband services.²

Ensuring Equal and Non-Discriminatory Access to Multiple-use Backhaul Platforms

The stimulus bill seeks to see broadband service reach mobile wireless carriers, 1st responder networks, wireless internet service providers, wireline carriers, government agencies, educational and health services institutions, and others in unserved and underserved communities. Backhaul availability for all the interested parties is critical to achieving this goal. It is important to ensure that all parties have the ability to access multiple-use backhaul platforms in a non-discriminatory manner.

Additionally, the backhaul infrastructure (not just the wireless connections from a tower or building to a consumer) enables wireless competition to exist and to thrive. Without backhaul the mobile wireless networks cease to function. So our country has an interest in ensuring backhaul availability for *all* end user services the stimulus legislation deems “mission critical” to our communities.

Re-Enforcing the Existing Federal Preemptions Over Burdensome Zoning and Permitting Restrictions for Fixed Wireless Antenna Deployments

The Federal Communications Commission’s (FCC) rule, Section 1.4000 of Title 47 of the Code of Federal Regulations, preempts restrictions that impair the use of small antennas (one meter or less in diameter) that receive and/or transmit various types of broadcast, satellite, and fixed wireless signals. This rule expressly prohibits private restrictions, such as lease provisions and homeowners’ association rules. Furthermore, this law takes precedence over state and local regulations.

Restrictions that impair the use or installation of small antennas that receive or transmit data, telecommunications, or video are not permitted. For example, fixed wireless carriers and their customers have the right to install antennas one meter or less in diameter that receive or transmit fixed wireless signals. Antennas for all types of service, whether voice, data, or video, are covered. These antennas may be installed in any area under the exclusive control of the user (either the carrier or its customer), whether owned or leased and whether the premises are residential or commercial.

Governments and municipalities cannot impair installation and use of qualifying antennas by requiring zoning variances, building permits, or construction permits, whether prior to or after installation. Landlords or homeowners’ associations cannot use lease provisions, covenants, or other forms of private agreement to impair the installation

² See FiberTower Corporation, the Rural Telecommunications Group, Inc., COMPTTEL, and Sprint Nextel Corporation, Letter and Petition for Reconsideration, FCC GN Docket No. 09-29, at 2 (filed March 25, 2009) (“*FiberTower, et. al. Ex Parte*”).

and use of these antennas. While it may be permissible to require reasonable prior notice before installing an antenna, such a provision cannot be used, directly or indirectly, to suggest prior approval is needed.

A private or governmental party that desires to restrict the installation of these antennas can do so only if it can demonstrate to the FCC or a court that it has good reason to have such a restriction. The restriction is unenforceable until the FCC or a court has made a finding that the proposed private restriction or local regulation should be allowed.

Continued re-enforcement of these federal preemptions is paramount to rapid deployment of middle mile and last mile backhaul and transport services using fixed wireless infrastructure.

Allowing Access to TV White Spaces Spectrum

The lack of backhaul and transport services is particularly problematic in rural areas when great distances or barriers exist between a local network and an Internet connection. The further the transport distance, the more costly the service is to provide. The high cost and difficulty of constructing and deploying middle mile and last mile backhaul and transport facilities has become a barrier to the widespread availability of affordable broadband services.

Trenched fiber may cost \$10-to-\$35 per foot to install, and if rocky terrain, rivers, airports, roadways, graveyards, parks or other obstacles appear, the costs can climb rapidly. A single fixed wireless link using a 3-foot or smaller antenna in the 11 GHz band typically may cover distances from less than a mile up to 7 miles. In the 6 GHz band a carrier-grade link may be established at up to 20 miles with a single radio pair, though that requires 6-foot or taller dishes which in turn require very sturdy towers. It is important to note that microwave links at these bands also require line of sight.

Covering 50-to-100 miles, requires either millions of dollars in fiber expenses, or multiple microwave links and towers which is often too great an obstacle. However, a solution exists in lower spectrum bands.

Today, over 300 licensed systems exist in the U.S. that use the TV White Spaces to deliver point-to-point connections over great distances.³ This is done through the Broadcast Auxiliary Service (BAS) and it exists to allow TV stations to deliver programming to other stations over long distances. A 100-mile wireless broadband connection using the White Spaces would typically cost less than \$200,000 to construct, while the same connection using 6 GHz or 3.65 GHz spectrum would likely cost more than \$3 million, more than 15 times as much. A new trenched fiber build would normally be at least 20 or 30 times more expensive, not to mention the extended time period to build and implement. Fixed wireless links can often be installed in a matter of days.

³ See Attachment 2.

Most White Space spectrum lies fallow in unserved, and some underserved, areas, and ample spectrum exists in those areas to accommodate wireless backhaul. Typically, rural areas possess anywhere from 15-to-48 vacant TV White Space channels. The fixed wireless TV White Space equipment that the broadcasters use is sold off-the-shelf now and can be adapted for use in the White Spaces. Thus, if the FCC were to adopt a fixed, licensed regime for a portion of the White Spaces, it would immediately spur broadband deployment to long-unserved and -underserved areas. The FCC possesses enough information on the record to make a declaratory ruling now. Even more importantly, since the FCC last ruled on TV White Spaces in November 2008, the U.S. Congress and the President made it a priority to swiftly bring broadband to the unserved and underserved areas.

Authorizing fixed use on a 47 CFR Part 101 point-to-point licensed basis also fosters regulatory certainty and protects incumbent users operating in the White Spaces against harmful interference. In particular, the proposed technical rules for fixed, licensed use of the White Spaces set forth on the FCC record are designed to address and mitigate harmful interference from new fixed operations to other pre-existing operations in the band, including broadcasters, low-power television stations, wireless microphone users, medical devices, radio astronomy, TV studio transmitter and relay links, and pre-existing fixed operations, as well as potential cable headend and television receiver direct pickup interference. These proposed rules are the result of a consensus reached through extensive communications among the incumbent licensee organizations principally responsible for spectrum interference issues and will fully protect incumbents operating in the TV bands. Thus, unlike the unlicensed use authorized in the recent FCC White Spaces order, there are no interference concerns with respect to licensing a portion of the White Spaces for fixed operations such as critical wireless backhaul and transport. Finally, providing point-to-point licenses through the Part 101 process allows for the provisioning of backhaul and transport networks in a manner that meets carrier-grade and government-grade service level agreements (SLAs) for signal availability, interference protection and other key factors.

The FCC should designate six UHF TV Bands channels (where vacant second-adjacent channels exist) in rural areas for fixed, licensed operations, similar to the Canadian Remote Rural Broadband Systems model. That model is fully consistent with U.S. policy, and, by setting aside these UHF channels in rural areas (*e.g.*, counties with a population density of 100 people or less per square mile), the Commission can encourage the deployment of new fixed, licensed services with sufficient capacity and scalability and help expand wireless backhaul facilities to facilitate rural broadband deployment. The White Spaces in Channels 33-35 and 49-51 are particularly well-suited for point-to-point services, while the technical characteristics of VHF Channels 2-13 prevent the economic use of directional antennas that are essential for establishing backhaul links.

Making TV White Spaces available also assists in short term job creation. For example, for the price of one community 100-mile trenched fiber project, broadband TV White Space systems could be simultaneously built to 20 or 30 isolated communities. The long term job creation factors look even better, as all those communities set to work with broadband to their medical facilities, their local businesses, their mobile networks and more. In addition, obvious benefits flow to all the schools, libraries, first responder networks and other public safety functions that receive broadband in all those communities.

Establish NTIA and RUS Broadband Implementation With FCC Guidance

As recognized by Congress, the FCC, NTIA and RUS possess a significant role in helping to establish the definitions used to administer funds under BTOP. The FCC should use its discretion and expertise to recommend definitions that ensure that the Congressional directives to expand broadband deployment are met in a manner that ensures that a wide variety of providers and services. Specifically, it should recognize, as Congress has, the importance of middle mile and last mile and backhaul and transport capabilities, and accordingly, propose to NTIA definitions that would facilitate the receipt of grant funds by entities providing these services.

Participation rules should reflect industry standards and create an inclusive and technology-neutral environment.

The FCC should recommend the adoption of definitions that satisfy Congress's explicit intent that "as many entities as possible be eligible to apply for a competitive grant."⁴ Defining eligibility broadly would satisfy Congress's explicit intent that the Commission and NTIA ensure that a broad variety of entities are "eligible to receive grants . . . including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public-private partnerships, and tower companies."⁵ Broad definitions would also satisfy Congressional intent by ensuring that applicants, such as middle mile and last mile backhaul and transport providers, are selected based on their ability to "best meet the broadband access needs of the areas to be served, whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle mile, or long haul facilities."⁶ Thus, the definitions should include providers that can implement projects that have the capability of facilitating many different types of broadband service and ensure that the broadband funding is, in effect, multiplied in impact and scope.

A. Unserved/Underserved Areas.

In recommending definitions to NTIA, the Commission should not focus solely on the provision of service to end users when determining whether areas are unserved or underserved. The FCC should recommend that NTIA consider various forms of

⁴ See, H. CONF. REP. NO. 111-16, at 775 (2009) ("Conference Report") American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁵ Conference Report at 775.

⁶ Id. at 774.

broadband -- all of which are critical to creating a nationwide broadband network -- and ensure that all of them are eligible for funding. The FCC should propose that NTIA consider not only the availability of end-user services but whether an area has middle mile and last mile backhaul and transport facilities available. An area without such capabilities is unable to support the multiple broadband networks -- for carriers, enterprise customers, public safety entities and health care providers -- that will drive economic recovery.

The FCC, NTIA and RUS should therefore consider an area without adequate backhaul or transport coverage as “underserved” even if such area has a broadband service provider.

Applying a broader definition of “unserved” and “underserved” to encompass middle mile and last mile backhaul and transport facilities also reflects Congress’s intent to ensure that a variety of providers and services receive BTOP funding.⁷ Moreover, ensuring that additional middle mile and last mile backhaul and transport providers deploy facilities will further the priorities of many in Congress to ensure that BTOP funds are used for broadband deployment that “spur[s] job creation in rural areas hardest hit by the recession . . . [and is] central to improving educational opportunities and delivering health care more efficiently, important benefits that also contribute to economic growth.”⁷

B. Broadband Service.

As a threshold matter, the FCC, NTIA and RUS should ensure that the definitions it implements embody Congress’s directive that broadband service be defined in a technologically-neutral manner. As noted above, Congress provided that grants should be awarded to any “recipient that will best achieve the broad objectives of the program” and those agencies distributing support funds are to do so to any recipient they “judge will best meet the broadband access needs of the area to be served, whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile, or long haul facilities.”⁸

The Commission should ensure that any definition of “broadband” that includes upload/download broadband speeds accurately reflects the differences between broadband wireline and broadband wireless services and also promotes inclusiveness among the many existing and emerging broadband solutions. Any criteria for transmission speeds should consider whether the end user networks are expandable and scalable so that providers can evolve their networks in the future.

⁷ *Id.* at 774-775.

⁸ *Id.* at 774.

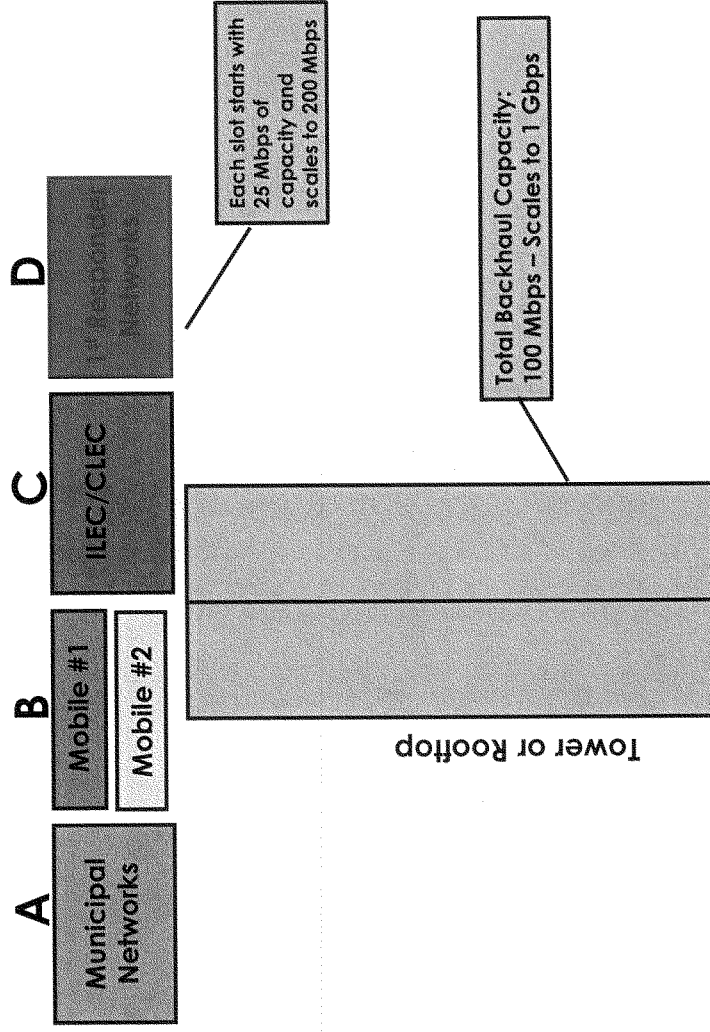
Conclusion

Middle mile and last mile backhaul enables wireless competition to exist and to thrive. So, our country has an interest in ensuring its availability. The decisions that are made along the way (encouraging the use of multiple-use backhaul platforms and ensuring equal and non-discriminatory access to those platforms, making a limited number of the numerous vacant the TV white space channels available in rural areas, re-enforcing FCC rules that prevent burdensome and preempted zoning or permitting restrictions, and implementing FCC, NTIA, and RUS rules) can create (or destroy) the necessary environment. Making a limited number of TV White Space channels available before the initial grant filing deadlines will greatly increase the ability to bring broadband services to many more unserved and underserved communities, while sparking short term and long term job growth and ensuring wise efficient use with taxpayer funds. Thank you for the opportunity to testify today.

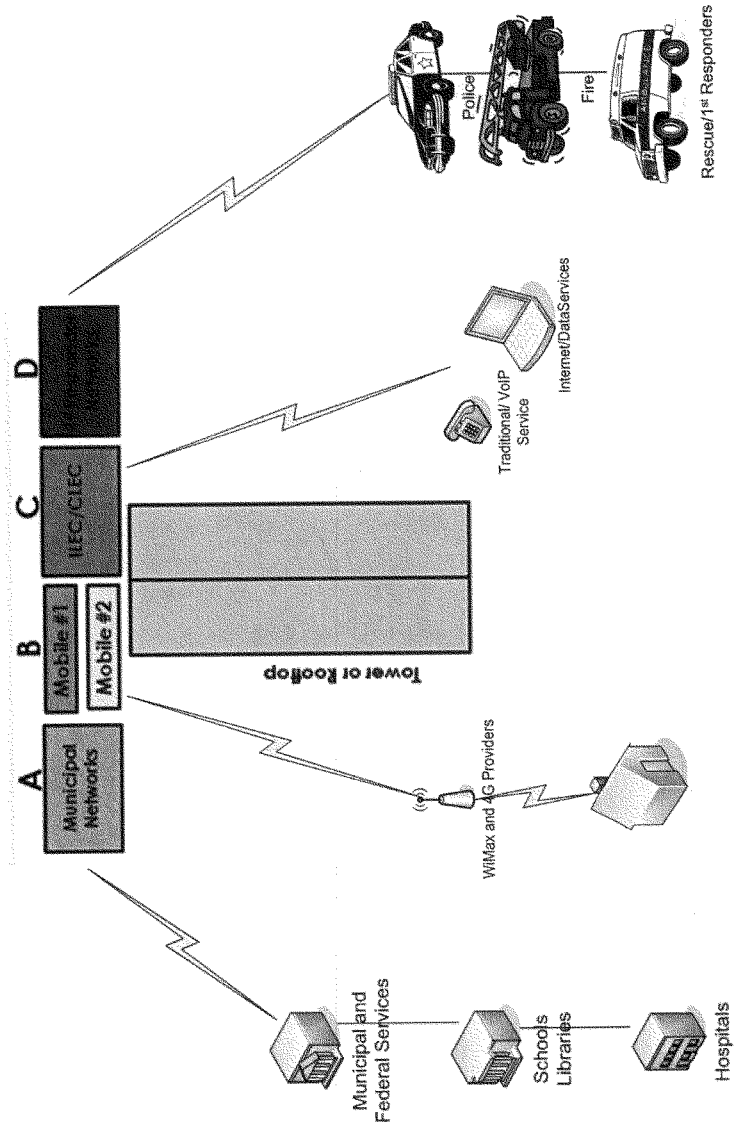
Attachment 1

Multi-Purpose Backhaul Platform

MuniFrame™ Multi-Use Infrastructure



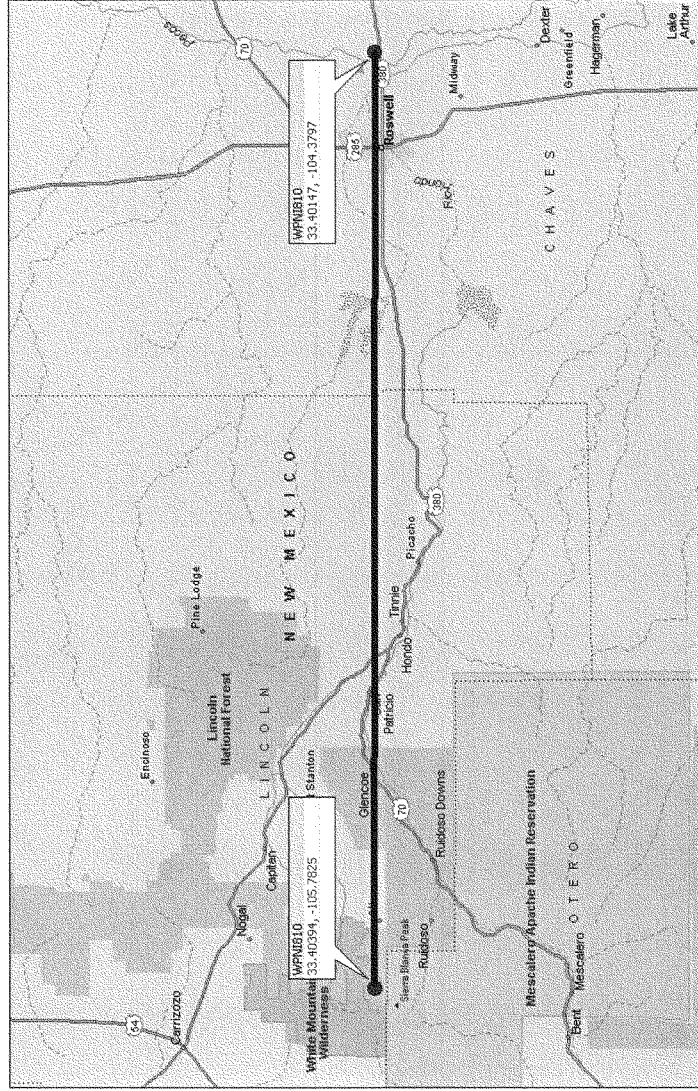
Multi-use Infrastructure - Detail



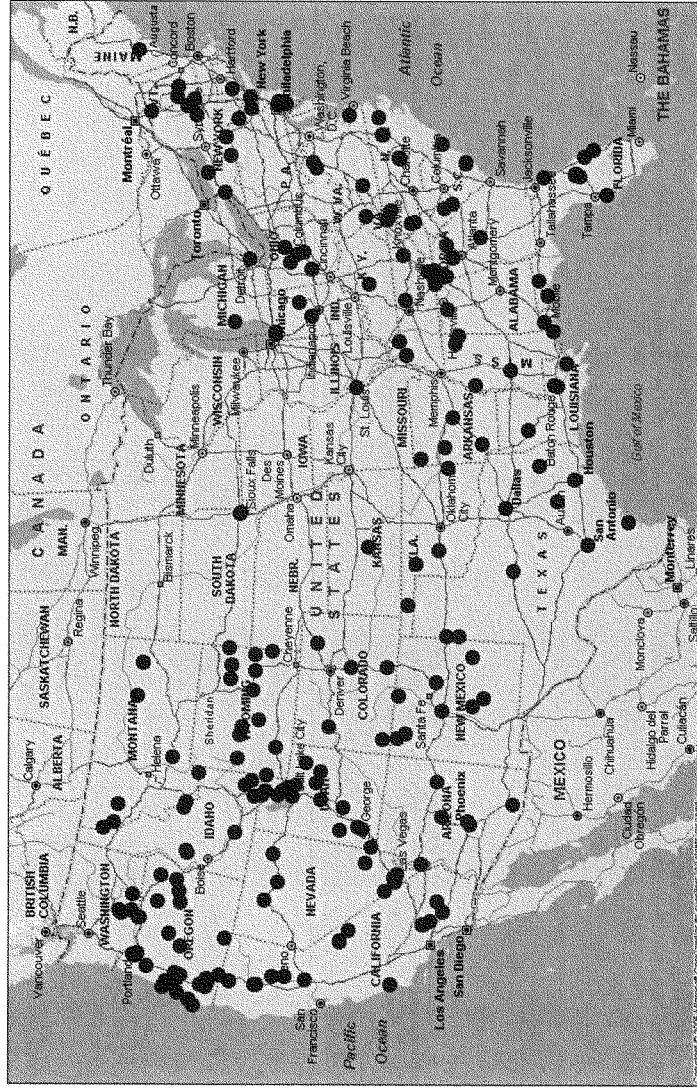
Attachment 2

Fixed Wireless TV White Space Links in the U.S.

BAS Fixed wireless link (WPNI810) – 80.5 miles



BAS Locations – National Map



Mr. BOUCHER. Mr. Murray.

STATEMENT OF CHRIS MURRAY

Mr. MURRAY. Good morning, Mr. Chairman, Mr. Ranking Member and members of the committee. I appreciate the opportunity to appear before you once again on behalf of consumers and on behalf of Consumers Union, the publisher of Consumer Reports Magazine.

I am pleased to report that this year the satisfaction of consumers in the cell phone industry does seem to be headed upwards. You may remember last year it was bottom of the barrel. It was 18th out of 20 services that we rate. But this year it seems to be moving closer to average, and we are happy about that. Fewer consumers are complaining about automatic contract extension, and fewer consumers are complaining about early termination penalties as vociferously, although we still believe that, because these fees are starting from a very high level, we agree with State courts that are finding they may be illegal, so we think that scrutiny is warranted.

But we have a new top concern of consumers this year, and that is the high price of cell phone service. And you may recall the last time I was here I said that U.S. consumers pay more than consumers around the world for cell phone service. Now, on a per-minute basis, as the industry is quick to note, because U.S. consumers talk an awful lot, we pay a little bit less. But if you look at just the dollars, the amount of money that people spend every year, U.S. consumers spend more on cell phone service than in any other industrialized nation.

We also see that SMS text revenues are up for the carriers over 150 percent per texting subscriber. That is not overall over the whole network, that is just for the people who text. It is up 150 percent over the last 4 years.

We see this year the rage is consumer overcharges for data plans. And we see one subscriber—I had an account of somebody who bought a netbook and got a data plan from AT&T. Five gigabytes is what she got for \$60. She exceeded that plan by five gigabytes. And guess what the bill came back? \$5,000. It is astonishing to me that the first five gigabytes somehow cost \$60 and then the second five gigabytes cost about as much as a pretty decent used car.

So what is going on here?

I saw a McKenzie report that was fascinating, which basically said this industry is moving very quickly towards duopoly or towards a quasi-duopoly, and that concerns us. Basically, in sum, what I would like to say is that if we want competition to work better in this market, and I believe it can, is this market more competitive than some of the other rather monopolistic sectors of telecom? Well, yes. But that is sort of like saying a horse and buggy is a much better way to get around than a unicycle. We can do better than that.

So if you want competition we need to reduce switching costs for consumers. That includes things like number portability, allowing consumers to take their phone numbers with them. We initially, when we first started talking about this 4 years ago, the cell phone industry said this is going to cost billions of dollars, and nobody

wants it, and nobody will use it. Well, that wasn't the truth. The truth was people use this every day. They have been very happy with it, and it not only didn't cost so much, but it has actually allowed some carriers to really win in the marketplace.

So the FCC is considering a proposal to reduce the interval from 4 days to one. We obviously support that, and we hope that the agency will recognize the arguments of the carriers as relatively transparent protectionism.

The other thing, if we want competition, switching costs need to come down. And early termination fees are still a major concern for us. I will note that we are talking about a national model, but we do have a national model in the uniform commercial code, which is the law in 50 States. And what that says is that if you want subscribers for actual damages, that is ok. But if you are charging them a penalty that is designed to prevent them from switching, that is illegal, right? The law of contracts says you can't do that because we want competition to work as vigorously as possible.

So now the cell phone companies are up here saying we want a national model. Exempt us from the law of contracts in 50 States. I hope that the Congress will not go for that opportunity.

As we look at a national model, we have to look at what is the price of preemption. If we think that we can put in very strong national consumer standards, it is not totally anathema to consumers, but I do worry when I hear Members of Congress discussing how little this industry needs oversight and then, in the next breath, talking about a national consumer protection model. That seems to me to be code for we are going to eliminate some strong consumer protections in States.

The last thing I want to briefly touch on—I apologize I don't have time to talk about roaming and data roaming and special access. But I am very concerned about anti-competitive behavior I see in the industry, and I really would beg this committee for more oversight.

Recently we saw AT&T saying they would not allow Skype to be used by users on the 3G radio. They will allow to use it on WiFi but you can't use it on the 3G radio. And the top public policy executive for AT&T says, we absolutely expect our vendors not to facilitate the services of our competitors.

This is the Internet. It is supposed to be different. This is what is supposed to bring us competition. And if what we are saying is we are just going to treat all these Internet companies as competitors and we are not going to let them use our Internet connections, well, we have fundamentally broken the Internet.

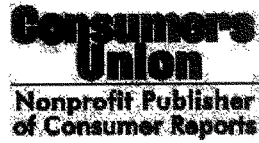
So I am not stepping up today saying regulate the Internet. What I am saying is, let's get some oversight. When we have clear examples of anti-competitive behavior we need action.

The last thing I will say is on access to consumer devices handset exclusivities, I will note that Ranking Member Barton has a bill which aims to eliminate exclusives for automotive diagnostic software in an industry which is, arguably, more competitive than this one. And I think that is good, because you are breaking the stranglehold of automotive dealers, and allowing smaller repair shops to get in on a game that would otherwise be a complete monopoly for the dealerships.

Well, similarly, here we have some carriers who are absolutely too small to have the market power to get the devices that consumers are demanding. And if we want 3G to be built out in rural areas, I am telling you we have to look at this problem.

So I thank you again for the opportunity to appear before you today. And I hope that we can engage in further oversight. Thank you.

[The prepared statement of Mr. Murray follows:]



Testimony of

Chris Murray
Senior Counsel
Consumers Union

On behalf of

**Consumers Union, Consumer Federation of America,
Free Press and Public Knowledge**

Regarding

“Competition in the Wireless Industry”

Before the

U.S. House of Representatives Subcommittee on
Communications, Technology and the Internet, Committee
on Energy and Commerce

On

May 7, 2008

Chairman Boucher, Ranking Member Stearns and members of the Committee, thank you for the opportunity to testify again before you on behalf of Consumers Union¹ (non-profit publisher of Consumer Reports), the Consumer Federation of America,² Free Press,³ and Public Knowledge.⁴

The wireless industry has grown to a point where nearly every man, woman and child in the United States has a mobile phone, with more than 270 million cell phones in use in the U.S. While we are beginning to see some improvement in the public's perception of the wireless industry, we have some significant concerns. *Consumer Reports'* reader satisfaction survey this year indicates that the industry's customer service has inched closer to average. This is a material improvement from where it was a year ago, near the bottom of the barrel (18th out of 20 services rated, according to our *Consumer Reports* survey)⁵. Fewer consumers this year were likely to cite automatic contract extension as their top concern, and most carriers have begun to pro-rate the early termination penalties that lock consumers into lengthy contracts—although we agree with courts that are finding these fees may be illegal considering the unjustifiably high levels they start from, and they are most certainly a detriment to competition.

Our reader survey this year found a **new top consumer concern: the high price of cell phone service**⁶—and this was even before the most recent chapter of our economic crisis unfolded.

¹ **Consumers Union** is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 8 million print and online subscribers) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² The **Consumer Federation of America** is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

³ **Free Press** is a national, nonpartisan organization working to reform the media. Through education, organizing and advocacy, we promote diverse and independent media ownership, strong public media, and universal access to communications.

⁴ **Public Knowledge** is a Washington DC based public interest group working at the intersection of communications policy and intellectual property law. Public Knowledge seeks to ensure that all layers of our communications system are open and accessible.

⁵ *Consumer Reports*, "Upfront: News, Trends, Advice," p. 8 (October 2007).

⁶ *Consumer Reports* (January 2009).

As the industry continues to consolidate, as most investment analysts seem to agree it will—policymakers should expect this problem to get worse, not better.

Unfortunately, analysts now suggest that the **U.S. wireless market is headed towards a quasi-duopoly**, with the top two companies controlling the vast share of revenues, and profit margins increasing for those carriers, even including the upcoming cost of \$80 billion in network upgrades for next-generation wireless technology.⁷ And even more unfortunately for those of us who pay the bills, these profits come straight out of consumers' pocketbooks.

The last time consumer groups testified before this committee, we noted that **U.S. consumers pay more for wireless service than consumers in just about any other country in the world**. The largest providers want to obscure this fact with notions of per minute pricing.⁸ But it is the cost to the consumer that matters, and **U.S. consumers pay more for wireless service than other developed nations—an average of \$506 each year**, higher than the OECD⁹ average of \$439, and way above countries such as Sweden (\$246), Spain (\$293), and Germany (\$371).

The way carriers continue to raise prices on text messaging services is a clear example of the negative ramifications of market power in this industry. According to industry analysis, **average revenue per texting subscriber has risen 150% in the last four years**. Why are the dominant wireless carriers all raising prices on a service that according to experts¹⁰ costs them almost nothing to run? Because doing so is profitable, and because they can. A number of public interest groups and wireless competitors have also raised related competition and speech issues with regard to text

⁷ See e.g. McKinsey & Company, "Perspectives on the Evolution of the U.S. Wireless Industry." (April 3, 2009).

⁸ U.S. consumers talk more than consumers in other countries, so our average of 800 minutes of use each month indeed means lower per minute prices. But we see all the carriers rolling out unlimited plans at present, and virtually no one offering plans without flat fees and low per minute pricing. It seems clear that that this is a high fixed-cost industry, and per-minute pricing does not mean much for consumers. It is what consumers pay in the end that hits them in the pocketbook. If the wireless carriers wanted to offer consumers rate plans with no flat fees and per minute billing at that "average" per minute rate of 7 or 8 cents, we would have a different outlook.

⁹ Organization for Economic Co-operation and Development, "OECD Communications Outlook 2007."

¹⁰ Randall Stross, "What Carriers Aren't Eager to Tell You About Texting." *New York Times* (Dec. 26, 2008). Available at: www.nytimes.com/2008/12/28/business/28digj.html.

messages in a petition for declaratory ruling that has been pending before the FCC for the past 18 months.¹¹

When there is a highly concentrated industry—as the wireless industry is according to Department of Justice merger guidelines—that raises prices on consumers for services that have declining costs, reporting revenues that are way up in the midst of an economic recession, this should raise more than a few policymaker eyebrows.

The news abounds these days with tales of **gross overcharges for ordinary Internet** activities. It is little wonder that “data” is where the carriers are finding amazing revenue growth in the midst of an economic depression. Consider the story of Wayne Burdick, who watched a Chicago football game over AT&T's wireless network while at a port in Miami before embarking on a Caribbean cruise. He was billed \$27,000 by AT&T for the privilege. He tried to talk to AT&T about it, and they lowered the charge to \$6,000. After his story appeared in the Chicago Sun-Times, AT&T dropped the charges altogether. Or, consider Billie Parks, who purchased a netbook bundled with AT&T mobile broadband service at a Radio Shack. She thought she was getting quite the deal – a \$99 netbook and a \$60/month data plan - but at the end of the month, she faced a \$5000 bill from AT&T for data overages. These numbers are shocking, and have nothing to do with the actual costs of providing service. After crossing a small 5 gigabyte initial limit using mobile broadband service from Verizon, each additional gigabyte of data transfer costs \$250. From AT&T, after the same 5 gigabyte initial limit, each additional gigabyte costs \$480.

The FCC and Congress made a decision that competition, not rate regulation, will be the preferred method to keep telecommunications market power in check, but Congress needs to revisit ways to keep competition vibrant in the wireless industry. Considering that the very same companies who this industry was supposed to compete against, telephone monopolies, have now

¹¹ See Public Knowledge, et al. Petition for Declaratory Ruling, WT Docket No. 08-7, (Dec. 11, 2007). Available at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf>.

purchased and merged their way to be the two dominant wireless companies, some serious oversight is warranted.

We urge policymakers to eliminate anti-competitive practices and foster competition in the industry by helping to: 1) **reduce switching costs for consumers**, 2) **ensure companies can compete**, and 3) **scrutinize the behavior and market power of dominant carriers**.

Reduce switching costs for consumers

If we want robust competition, by definition we have to make it easier for consumers to switch carriers, to vote with their feet and their wallets. Two prominent switching costs that warrant scrutiny are early termination penalties and number portability.

Number portability – Strong competition requires allowing consumers to take their phone numbers with them when they switch wireless carriers without undue cost or inconvenience. Even after Congress passed a law requiring number portability, the dominant carriers successfully blocked our efforts to let consumers take their numbers with them for several years. The industry’s principal arguments were that no one wanted or needed portability, and that it would be hugely expensive to do it. In 2004, the FCC finally took action to require number portability. Were the industry’s tales of runaway costs and lack of consumer interest accurate? Not at all. The real story is **that number portability benefits consumers, people use this flexibility regularly, and it has not cost the industry nearly as much to implement as they said it would.**

Presently, there is a proceeding before the FCC which would reduce the number portability interval from four days to one day.¹² We applaud this potential change—after all, wireless carriers

¹² Local Number Portability Porting Interval and Validation Requirements, FCC WC Docket No. 07-244; CC Docket No. 95-116.

can port between each other in less than 30 minutes at present because they have automated systems in place. Yet again, the dominant carriers are crying wolf, telling tales about runaway costs, and trying to distract from the real issue at hand with ancillary issues. We hope the Congress and the Commission will see the arguments of the dominant carriers for what they are: transparent protectionist nonsense. It is critical that the FCC move to make it more difficult for companies to hold consumers' numbers hostage.

Early Termination Penalties – the biggest switching cost to wireless consumers are the ubiquitous early termination penalties carriers charge for subscribers who want to leave before their (generally two-year) contract is completed. These fees are penalties designed to stop consumers from switching companies for better service and better price. **These early termination penalties do not save consumers money as the carriers claim,¹³ they rob consumers of the benefits that an open and competitive market would otherwise bring.**

The wireless carriers say they want a national framework, but the truth is that they already have one. The Uniform Commercial Code (UCC) provides standards for “liquidated damages clauses” in contracts that are the same in all 50 states. However, what the industry seeks is nothing more than special treatment that would exempt it from the laws that all other businesses have to follow.

The Uniform Commercial Code provides an important distinction, which is the law in 50 states: it says that **liquidated damages clauses can be used to recover actual damages, but they cannot be used as arbitrary penalties designed to prevent consumers from switching**

¹³ Evidence was presented at trial in California (*Ayyad v. Sprint*, CA Superior Court, Alameda County) that one carrier's early termination fee program actually cost them more money to implement than they recovered from it. In other words, this program does not save consumers money—it costs them extra. Further, according to internal memos, the company performed one calculation and one calculation only in determining the ETF: the effect on subscriber churn.¹³ That is, they did not examine whether they fully recovered “subsidies” they offered consumers, they simply said this will make it harder for consumers to switch. Clearly, this is about penalizing consumers for voting with their feet and pocketbooks, not about saving them money.

companies.¹⁴ Where the carrier can prove that they have suffered actual economic harm because of subsidies they have given to the consumer, ETFs are reasonable. But the early termination penalties the wireless industry is charging consumers are so far and above the value¹⁵ of subsidies provided that something else is clearly going on.

The wireless industry is quick to note that they have other costs they recoup through the ETF, namely marketing and customer acquisition costs. But should consumers really have to pay for wireless companies' advertisements? Should consumers have to bear the costs of multi-million dollar Super Bowl commercials? Do we really believe it is fair or legal to force a customer who is going to another carrier to pay for the cost of finding another subscriber for her old carrier?

The answer is clearly no. If all businesses with customer acquisition costs were to be exempted from the law of liquidated damages, there would be no law at all. Furthermore, indicators like customer acquisition costs (CAC) are simply a measure of the efficiency of a carrier's marketing operation, and are NOT a measure of any value being given to the consumer. If a wireless carrier is doing a good job of advertising one quarter, they have lower CAC; if they do a bad job the next quarter, CAC goes up. But consumers should not have to pay a penalty fee related to whether the company is running effective ads or not. **If Congress is to take any action to constrain or condition ETFs, it must absolutely exclude advertising and marketing expenditures from the definition of a "reasonable" fee.**

¹⁴ Cal. Civ. Code, Sections 1671(d) and 1670.5.

¹⁵ \$14.33 is the average phone subsidy provided to the consumer according to the best data we have seen so far on carrier subsidies. In data submitted by the wireless carriers to the International Trade Commission, the average value of wireless handsets in 2006 was \$115.¹⁵ The wireless industry's trade association (CTIA) says that the average price paid for phones in 2006 was \$65.67, and the carriers also charge a \$35 activation fee that they treated as handset revenues on their books—for a total of \$100.67 paid by the average consumer for their handset. That leaves us \$14.33 in average upfront savings. Do consumers pay that off in their first month of service? Their second? Surely it does not take two full years. If the carriers were to reduce their ETFs to \$14.33—or even triple that amount—no one would be here today asking questions. But considering these penalties (at a minimum of \$175 from the two largest carriers) are more than 12 times the benefit consumers are receiving, something else is going on.

Ensure companies can compete by fixing roaming and special access

If policymakers value competition from non-dominant wireless carriers, urgent attention is needed to fix roaming and special access.

Roaming - Automatic roaming agreements have been a standard industry practice for decades in the wireless industry. These agreements assist all carriers in filling inevitable gaps in network coverage, and in a real sense, comprise a “safety net” that permits all consumers to obtain comprehensive wireless service when they travel throughout the United States. Two years ago, the FCC appeared to recognize the importance of automatic roaming, but at the urging of the nation's largest carriers, also created an “in-market” exception that allows a carrier to refuse roaming service in any area where the requesting carrier merely has spectrum usage rights.¹⁶ Predictably, the nation's largest carriers continue to defend this gaping policy loophole in various proceedings now pending at the FCC, and exploit it to the detriment of smaller, rural and regional carriers and their subscribers. The continued consolidation in the wireless industry in our view has led to increased market power by certain carriers and led correspondingly to a spike in anticompetitive roaming practices.

Congress should ensure that automatic voice and data roaming is available to all consumers on reasonable terms and conditions, at reasonable prices, and with no geographic carveouts.

Special Access – competitive wireless carriers, Internet providers, and vital institutions like hospitals, universities and banks all need “special access” lines which are like on-ramps to the “backbone” of our telecommunications systems. AT&T and Verizon collectively control more than 90% of special access lines, and by some estimates, this market power is being used to generate profits of more than 125% in special access revenues.

¹⁶ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143 (rel. Aug. 16, 2007), summarized at 72 Fed. Reg. 50,064 (Aug. 30, 2007) (“Roaming Order”).

Virtually every wireless competitor, Internet companies, and businesses across America rely on these lines to bring their services to the public. If the dominant carriers can continue to overcharge these innovators, this broken market will ensure a slowed economic recovery for all but one small sector of our economy.

Policymakers must scrutinize application blocking and exclusive handset contracts

Among our greatest concerns are the stark signals the dominant carriers are sending that they intend to continue to move towards closed networks, away from the open Internet model. For years we have been warning that this would happen, and in response we were told “watch and wait, and let us see if the industry will work this out.” We are here today to tell you they have not worked it out and worse, there are clear examples of where they are breaking the Internet. We urge Congress to hold further oversight hearings immediately on these important issues.

Application blocking - we see continued evidence that network providers are acting as gatekeepers, disabling or restricting applications created by Internet innovators. This behavior should not be countenanced by Congress or the FCC.

Many thousands of AT&T subscribers have downloaded the **iPhone Skype application, and these users are barred from using the application over the mobile broadband service they pay for. In response, AT&T’s top public policy executive said “we absolutely expect our vendors not to facilitate the services of our competitors.”**¹⁷ Based on the number of restrictions in their terms of service, the company apparently envisions a lot of competitors – including unlikely companies such as Sling Media. AT&T has a disappearing, reappearing prohibition on the use of video redirecting over its network. After beginning with a broad general prohibition, they changed the terms of service to make clear that the use of Sling Media’s technology to redirect video was impermissible over AT&T’s network. Following massive consumer complaints, AT&T backed

¹⁷ Leslie Cauley, “Skype’s iPhone limits irk some.” USA Today (Apr. 2, 2009).

down and removed the prohibition entirely - only to reintroduce the original, broad prohibition after a few days.

Furthermore, as a Wall Street Journal article¹⁸ noted, handset manufacturers have been trying to offer consumers services for free on new handsets, but network operators have said “no” to those free services because they compete with services that the wireless carriers want to charge for.

According to the article, RIM (manufacturer of the Blackberry) wanted to offer a free mapping service to customers who buy the Blackberry, but again AT&T refused, because they had a service that they wanted to charge users \$10 a month for.

Handset exclusives - Handset exclusivity arrangements worsen the divide between major carriers and competitors, and further concentrate the market. Because of handset exclusivity arrangements, 8 of the 10 most popular smartphones are available to only one carrier. Popular phones, particularly innovative smartphones, drive growth in the market for wireless services, and offer the best chance for wireless carriers to survive and grow. Small carriers lack the market power and the promise of nationwide advertising needed to get the best deals. This is a downward spiral: small carriers cannot get innovative devices, and thus cannot grow, while large carriers get exclusive deals and grow larger.

Without the ability to offer affordable and functional PDAs, rural wireless carriers can not attract enough customers to justify investment to build out their 3G networks. Without the threat of competition in the network marketplace, the big four national providers have no incentive to expand and increase the capacity of their own 3G data networks.

In Europe and Asia, wireless consumers have better choices. They can buy cell phones in London, and simply swap out a small card (called a SIM card) in the back of the phone and it works across any other European network. **This decoupling of networks and handsets has created a**

¹⁸ Jessica Vascellaro, “*Air War: A Fight Over What You Can Do on a Cell Phone – Handset Makers Push Free Features for Which the Carriers Want to Charge.*” Wall Street Journal (June 14, 2007).

vibrant European handset market, where manufacturers innovate relentlessly to keep customers loyal. In stark contrast, the U.S. handset market lags European and Asian markets, precisely because wireless operators have the power to dictate which phones will interoperate with their networks, keeping out the competition.

Conclusion

Wireless Internet services will increasingly become the way that consumers connect to the Internet. **If we allow anti-consumer, anti-innovation practices to continue—such as unjustified early termination penalties, application blocking and handset exclusives—we should expect our international broadband rankings to continue to slide, innovation to be less robust, and our mobile phone markets to continue to lag behind Europe and Asia.**

Free markets and competition can help solve many of the problems noted above, but only when consumers are armed with reliable information about the services they buy and when they do not encounter undue obstacles to voting with their feet and pocketbooks. Right now, this market is not free, and it is not fair. **We ask policymakers to reject the anti-competitive behavior of companies who control consumers' on-ramps to the Internet, to take real action and engage in earnest oversight so that innovation can blossom and our Internet economy can help boost our economic recovery.**

Mr. Chairman, we are grateful for the opportunity to testify before your Subcommittee today. Thank you.

Mr. BOUCHER. Thank you very much, Mr. Murray.
Dr. Ford.

STATEMENT OF GEORGE S. FORD

Mr. FORD. Mr. Chairman and Ranking Member Stearns and members of the subcommittee, good morning, and thank you for the invitation. My name is Dr. George Ford. I am the chief economist of the Phoenix Center, a nonprofit 501(c)(3) organization that focuses on the publishing of academic quality research on the law and economics of telecommunications and high tech industries.

Our research is consistently targeted at providing policymakers information about the important role that pro-entry policies must play in the communications industry. Our substantial research production has been published in academic journals, and several of our papers cover many of the topics discussed in this hearing today.

The Phoenix Center makes it a policy not to endorse or support any particular piece of Federal or State legislation or proposed regulation. Our mission is not to tell policymakers what to think, but more how to think about it.

By most accounts, the wireless industry today is workably competitive. The statistics have been cited here today by many members of the subcommittee and many of the panelists. But it is not perfectly competitive. No industry is. Workably competitive means that competitiveness is effective enough at sustaining good performance, even if not matching the textbook concept of perfect competition.

Regulation is unlikely to improve market performance in a workably competitive market. Nor is the industry static, but it is constantly changing. The dynamic nature of the industry requires constant reformulation and testing of pricing plans, product offerings and network capabilities. Some changes are successful. Some not. That is the nature of the business.

You mentioned earlier, Mr. Chairman, that most Americans have access to four or so wireless carriers, and some feel that this makes it a concentrated market, and by some definitions it would. But the relatively concentrated nature of wireless communications is natural and to be expected, given the large amounts of capital expenditures required to participate in the industry. The industry incurs about \$20 billion in capital expenditures annually. Economics teaches us that in industry with such large capital costs relative to retail expenditures, only a relatively few number of firms will be able to survive and continue to offer service. The industry structure is, for the most part, pre-ordained by its cost and demand structure.

While it is often assumed that observing that there are only a few firms implies that there is little competition, there is no unambiguous theoretical support for this position. Duopoly is not a dirty word.

In the 1992 Cable Act, rate regulation was abandoned with the presence of 1½ firms, and that was in the statute. OK. That is an HHI of 8,600, according to the rules.

I do not mean to imply that industry concentration is irrelevant, but it must be placed in the correct context. Recognizing that the

industry is driven by its underlying cost and demand conditions is vital for good policymaking.

Let me give you a few examples. Take spectrum caps. Contrary to widely held beliefs, it is not possible to increase a sustainable number of firms in the wireless industry by increasing the amount of spectrum. Whether there are two or 10 firms the cost to deploy and upgrade a wireless network is roughly the same. Dividing the market into smaller pieces by divvying up spectrum into smaller pieces will not increase the number of carriers that can survive. What it will do is cause a nonsustainable industry structure and, inevitably, result in mergers, bankruptcies or both.

On the other hand, in a world of limited spectrum, having a few firms may actually be a very good thing for society. The more spectrum a firm has, the higher bandwidth services it can offer. If we cut the spectrum into little pieces to make more firms, we might get a little more price competition for low bandwidth services, but we lose the enormous value offered by higher bandwidth innovative services like mobile broadband. There is a tradeoff between lots of guys with a little, and a few guys with a lot.

My research has also shown that, given the relatively concentrated nature of telecommunications markets, regulators must be very careful not to exacerbate the factors that generate that outcome. However well-intentioned, regulatory driven open access or wireless card phone proposals do exactly that. They both are likely to spark further industry concentration and increase prices for mobile handsets, without necessarily benefiting consumers.

There could be some benefits to such proposals, but all regulation comes at a cost. And my research leads me to believe that the costs are likely to outweigh the benefits.

In a recent paper using auction results show that Carterfone style open access obligations could reduce industry profitability by 32 percent and reduce industry investment by \$50 billion over the next 10 years. This large reduction in profitability could literally mean the difference between the survival or demise of weaker wireless providers. Open access regulations would, in fact, reduce the number of carriers in the industry and possibly result in significantly less competition and choice for consumers.

Moreover, regulations that control handset equipment, a common feature of wireless Carterfone policies invariably leads to higher handset prices but not necessarily lower service prices. And many of the people who propose those rules recognize this outcome, but ignore its implications. This would not be good for the average American, not the high user American, but the average American, and would be particularly harmful to those with low incomes who are prolific users of mobile technology and are more likely to be cord cutters.

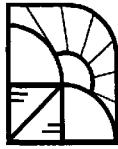
Another feature of the wireless industry that is typically forgotten, policy debates that is multi product industry. The typical wireless carrier offers local calling, national calling, international calling, e-mail, text messaging, picture messaging; they will even fix your flat tire. The economic implications of this are important.

The wireless firm doesn't offer a price and a service. It offers a set of prices and a set of services. All these services are inter-related. The price of one goes up. The price of the other goes down.

The quantity of one goes up, the price of the other ones may change. You cannot take one thing, text messaging or phones, and focus on that one thing and say, oh, there is market power in this market because a high price in one service may sustain a low price in the other service. We are not in here talking about restaurants who mark up wine three or four times and give you water and bread. But it is the same kind of argument that people are making.

Finally, we have a paper here that we recently published on the national framework for wireless regulation. What is a little different about our approach is that we are not, we allow the state regulator to make efficient decisions for its people. It is acting in the interest of its people. It is not acting incompetently or anything like that. But even still, it makes sense, if those decisions in one State spill over into another, whether it be cost or prices, that the regulation move up to the national level. So it is not a debate about the competence of regulation. It is a debate about how the industry and how a particular regulation in one location could impact another. And that is what I am driving at. Thank you for your time.

[The prepared statement of Mr. Ford follows:]



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Written Statement of

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**Phoenix Center for Advanced Legal & Economic Public Policy
Studies**

Before the

House of Representatives

Committee on Energy and Commerce

Subcommittee Telecommunications and the Internet

Hearing on

“An Examination of Competition in the Wireless Industry”

May 7, 2009

Testimony of George S. Ford, PhD

**Chief Economist, Phoenix Center for Advanced Legal & Economic
Public Policy Studies**

**House Committee on Commerce and Energy
Subcommittee on Telecommunications and the Internet
“An Examination of Competition in the Wireless Industry”**

May 7, 2009

I. Introduction

Mr. Chairman, Ranking Member Stearns, and members of the Subcommittee, good morning and thank you for inviting me to testify today.

My name is Dr. George S. Ford, and I am the Chief Economist of the Phoenix Center for Advanced Legal and Economic Public Policy Studies, a non-profit 501(c)(3) organization that focuses on publishing academic-quality research on the law and economics of telecommunications and high-tech industries. Our research agenda is consistently targeted at providing policymakers information about the important role that pro-entry policies must play in the communications industry. In the last decade, we have written nearly fifty papers on telecommunications policy, many of which have been published in academic journals. Moreover, we make all of our research—as well as rebuttals by those who do not agree with us—available free at our website, www.phoenix-center.org. I hold a Ph.D. in Economics from Auburn University, and the economics of the communications industry has been the focus of my career—starting with my Ph.D. dissertation on competition in the cable television industry. Before joining the Phoenix Center full time, I worked at MCI and Z-Tel Communications, Inc.,

in addition to a stint at the Competition Division in the Federal Communications Commission's Office of General Counsel. I have authored numerous research studies that explore this industry, and many of these studies have been published in peer-reviewed academic journals, books and other academic outlets.

Before beginning my testimony today, I wish to make it clear that the Phoenix Center makes it a policy not to endorse or support any particular piece of federal or state legislation or proposed regulation. Our mission is not to tell policymakers *what* to think about an issue but more *how to think* about it. As such, our contributions to communications policy are decidedly more analytical than most, and we refuse to ignore the institutional realities and economic constraints of the communications business.

That realistic analytical perspective is particularly important for the topic of today's hearing—competition in the wireless industry. You no doubt have seen statistics on the industry demonstrating consistent and sizeable price declines over time, rising subscription, the number of competitors in various markets, and so forth.

By most accounts, the wireless industry today is *workably* competitive. Note that I did not say it was *perfectly* competitive. Perfect competition is a textbook Nirvana that is not a realistic benchmark for any industry, much less the wireless industry. By workably competitive, I mean to imply that the rivalry among the firms in the industry is sufficiently intense that regulatory intervention is unlikely to render any positive outcomes and highly likely to produce costly unintended consequences. In much of the debate over wireless regulation, one side argues that competition is flawless, while the other side argues that competition stinks and regulation is flawless. In truth,

WRITTEN STATEMENT OF DR. GEORGE FORD
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competition is rarely perfect, but regulation is *never* perfect.¹ Effective regulation is very difficult to achieve even under the best of circumstances. Even a little competition trumps regulation in almost all instances.

What evidence is there to support the hypothesis of workable competition? First, industry data show that the vast majority of Americans have access to at least three or four wireless service providers with choices of literally dozens of handsets. There were 270 million wireless subscribers in 2008, or 87% of the U.S. population with a wireless phone.² I am not fond of international comparisons because there is too much put into the “other things constant” column,³ but prices for wireless services in the United States are far lower than they are in Europe, for example, and American citizens have far more choice in providers as well. Minutes of use in the United States literally dwarfs usage in other OECD countries. Mobile broadband is growing rapidly as well. The growth in

¹ As both the courts and the FCC have consistently recognized, ratemaking is “far from an exact science”. See, e.g., *Federal Power Commission, v. Conway Corporation et al.*, 426 U.S. 271, 278 (1976); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457 (2001); *Southwestern Bell Telephone Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir.1995); *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983); see also *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) at ¶ 14483, where the FCC justified its special access deregulation triggers by noting that “regulation is not an exact science”.

² This information was gathered by CTIA-The Wireless Association from its members. See http://www.ctia.org/media/industry_info/index.cfm/AID/10323.

³ See, e.g., Testimony of George S. Ford, PhD, Chief Economist Phoenix Center for Advanced Legal & Economic Public Policy Studies, Before the House Committee on Commerce and Energy - Subcommittee on Telecommunications and the Internet Hearing on “Digital Future of the United States: Part IV: Broadband Lessons from Abroad” (April 24, 2007)(available at: <http://www.phoenix-center.org/FordRankingTestimony24April2007.pdf>); see also G.S. Ford, T.M. Koutsky and L.J. Spiwak, *The Broadband Performance Index: A Policy-Relevant Method of Comparing Broadband Adoption Among Countries*, PHOENIX CENTER POLICY PAPER NO. 29 (July 2007)(available at: <http://www.phoenix-center.org/pcpp/PCPP29Final.pdf>); G.S. Ford, T.M. Koutsky and L.J. Spiwak, *The Broadband Efficiency Index: What Really Drives Broadband Adoption Across the OECD?* PHOENIX CENTER POLICY PAPER NO. 33 (May 2008)(available at: <http://www.phoenix-center.org/pcpp/PCPP33Final.pdf>); G. Ford, PHOENIX CENTER PERSPECTIVES NO. 08-03 (Second Edition): *Broadband Expectations and the Convergence of Ranks* (October 1, 2008)(available at: <http://www.phoenix-center.org/perspectives/Perspective08-03Final.pdf>).

mobile broadband is reaching the United States rapidly. In 2007, 68% of all broadband subscribers added in the United States were mobile connections. Prices and quality in the industry have risen so significantly that recent studies show that about 17% of the U.S. households have abandoned wireline phone service altogether in favor of mobile telephony.⁴ Most significantly, there is not a shred of evidence of which I am aware that shows collusion or a lack of competition in the wireless industry.⁵

These data reflect favorably on the economic performance of the industry and are important. But equally as important is a meaningful framework with which these data can be converted into information that is useful for developing policy. In this testimony,

⁴ Nielsen Media, CALL MY CELL: WIRELESS SUBSTITUTION IN THE UNITED STATES (Sept. 2008)(available at <http://www.nielsenmobile.com/documents/WirelessSubstitution.pdf>).

⁵ *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report & Order, FCC Docket No. 94-31 (rel. Mar. 7, 1994) at ¶ 149 (“[c]omplex pricing structures, such as are used in the cellular industry, make it difficult for a carrier to sustain collusive pricing.”). Indeed, economic theory suggests that product differentiation often impedes oligopolistic coordination. As observed by Kaserman and Mayo:

[W]here firms in the market produce a product whose differences are either nonexistent or so minor that the only dimension of competition between firms is price[,] it is relatively easy for firms to agree to establish an anticompetitive price. Where firms compete in many dimensions (for example, price, quality, and new service or product innovations), however, it becomes more difficult to successfully collude because firms will need to establish limits on competition in each of the relevant dimensions.

D. Kaserman and J. Mayo, GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION (1995) at 159; see also, F.M. Scherer & David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1990) at 279 (“When products are heterogeneously differentiated, the terms of rivalry become multidimensional, and the coordination problem grows in complexity by leaps and bounds.”); P. Areeda and H. Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (2d Ed. 2002) at ¶ 404a (product complexity, differentiation, or variety “multiplies avenues of rivalry and hence the decisions that must be coordinated, because even if firms reach a coordinated price, they may continue to compete by improving product quality.”); see also, *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report & Order, FCC Docket No. 94-31 (rel. Mar. 7, 1994) at ¶ 149 (“[c]omplex pricing structures, such as are used in the cellular industry, make it difficult for a carrier to sustain collusive pricing.”); but cf., S. Martin, ADVANCED INDUSTRIAL ECONOMICS (1993) at 116-7 (“[p]roduct differentiation reduces the incremental profit to be gains by departing from a joint-profit-maximizing configuration because product differentiation insulates rivals’ markets and reduces the extent to which a single firm can lure rivals’ customers into its own market.”).

I hope to provide you with a few key economic ideas that will help put the data into context. My testimony is not, of course, a complete framework, and is driven by economic science. Understanding competition in the wireless industry is more complex than any single piece of testimony can portray. To this end, I will spend the bulk of my time discussing a few economic principles relevant to evaluating wireless industry competition and firm conduct. After which, I will briefly describe my research on the merits of a single, national regulatory framework for wireless services, which I know is a topic of great interest for this committee.

II. Concentrated Markets and Public Policy

We must recognize that being a provider in the mobile telecommunications industry requires significant capital expenditures, both on an upfront and continuing basis. The industry incurs about \$20 billion in capital expenditures annually, operates nearly one-quarter of a million cell sites (242,130), and employs about the same number of persons (268,500).⁶ Industrial economics teaches us that in industries with large fixed and sunk costs relative to retail expenditures, only a relatively few number of firms will be able to survive and continue to offer service.⁷ In my professional opinion, even in a “best case scenario,” only a handful of firms, say three or five, will be able to provide mobile services, including mobile broadband, to consumers. A three to five firm equilibrium is outstanding in telecommunications, and the wireless industry is the most

⁶ CTIA, *supra* n. 2.

⁷ G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Competition After Unbundling: Entry, Industry Structure and Convergence*, PHOENIX CENTER POLICY PAPER NO. 21 (July 2005); and reprinted in 59 FEDERAL COMMUNICATIONS LAW JOURNAL 331 (2007).

competitive in this regard of any industry segment. This fewness is a consequence of the underlying economics of the industry. Any discussion that begins with the notion that large numbers of competitors and entrants are possible in this industry is fundamentally incorrect. More importantly, accepting such a premise can lead to incorrect policy choices.

However, the fact that only a few number of firms may be viable in the industry need not be a cause for concern, though it may be a reason for regular review of the industry. Congress requires that the Federal Communications Commission ("FCC") conduct an annual review of competition in commercial mobile radio service (CMRS), and the FCC has generated thirteen such reports. Those reports go into great detail about actual economic performance in the industry, important insights beyond simple analysis of market concentration ratios.⁸ Indeed, in some models of competition, a competitive outcome can be observed with only two firms, and, moreover, intense price competition in an industry with high fixed costs can result in a concentrated market. In that latter case, market concentration is an *indicator* of intense competition, not a symptom of a problem.⁹ In industries such as wireless communications there is a trade-off between intense competition and the number of firms. The more intense is the competition, whether naturally occurring or induced by regulation, the fewer the number of firms that can survive. In this environment, with large fixed costs, the textbook observation "more firms means more competition" is not very useful.

⁸ *Id.*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL at 339-40, 346-50 and citations therein.

⁹ *Id.*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL at 346-50.

I do not mean to imply that market concentration information should be ignored, but it must be placed in the correct context. Observing that a market in the wireless industry is more or less concentrated does not lead one to any one set of unambiguous conclusions as to what to do about it. While it is often assumed that observing that there are only a few firms implies that there is little competition, there is no unambiguous theoretical support for that position. When a person or group associates a few firms with little competition, all we know is which, among many, theoretical possibilities has been chosen. This choice says nothing about the facts or empirical regularities of the industry.

An equilibrium of a few firms in the wireless industry, say about four or five in larger metropolitan markets and even fewer in smaller markets, is a result of the underlying economics of the industry. Wishing for a large number of network providers in mobile telephony and broadband is a waste of wishes. Policies deliberately designed to de-concentrate the market to more than the equilibrium number of firms are destined to fail and are likely to spawn a series of inefficiencies and market distortions, and inevitably mergers.

There may be a time, in the future, when the cost structure radically changes, or the market size dramatically increases, or hopefully both, when one or more additional firms may be economically feasible.¹⁰ But based on the evidence that I have seen and my experience, I do not believe that day is today. Deployments of new wireless services still

¹⁰ VoIP was transformative in the wireless phone market, reducing the cost of entry by cable systems into the wireline telephone market, creating widespread competition in that market in very short order.

require considerable investment in antennae, handsets, and large customer and operational support systems. The technologies appear to be changing faster than investment decisions can be made. Simply to keep up, network providers invest billions in those assets every year, and these assets are expected to have very short economic lives. There is no reason to believe that next-generation technology will require any less of an effort.

The inherent economic limitations on the number of providers is relevant for policies limiting the amount of spectrum held by a single firm—commonly called spectrum caps. Contrary to widely held beliefs, it is not possible to increase the equilibrium number of firms in the industry simply by increasing the amount of spectrum. Whether there are two or ten firms, the cost to deploy and upgrade a wireless network is roughly the same. Dividing the market in smaller pieces by divvying up spectrum will not increase the equilibrium number of firms, it will only cause an unstable, non-equilibrium condition. While important, spectrum is only one input into the industry and is only one part of the industry cost structure.

Economic logic also suggests that there should not be limits placed on the amount of spectrum one firm or an incumbent provider may bid upon, subject to antitrust review. The consideration of spectrum caps involves a tradeoff. You can divide the spectrum into small pieces and try to force a many-firm outcome of sellers selling low bandwidth offerings, or give larger blocks to a fewer firms and let them compete on price, quality, and innovation in higher bandwidth services. In most cases, the latter provides greater social value than the former, and only in part because the

former is unlikely to be sustainable. Broadband competition (competition over quality) offers significant gains to consumers, whereas the gains from the price cuts of the fourth or fifth narrowband firm could be relatively small.

More spectrum means more value in wireless communications. I recommend that as much spectrum as possible, as quickly as possible, get auctioned off to the highest bidder. The more spectrum a firm has, the more that can be done with it. Mobile broadband is possible only when there is sufficient access to spectrum. I also recommend that the bulk of spectrum be licensed. Licensed spectrum allows for secondary markets to emerge where spectrum assets can be traded, borrowed, and shared.¹¹ This promotes more efficient spectrum usage without the interference and congestion problems inherent to unlicensed spectrum. There may be a role for some unlicensed spectrum, and we have seen significant benefits from some uses of it. However, economic theory points to higher expected gains from licensed spectrum. A well functioning secondary market may be a more effective tool for innovation as unlicensed spectrum.

III. The Wireless Industry as a Multiproduct Industry: Policy Consequences

The wireless industry is a multiproduct industry. A typical wireless carrier offers local calling, nationwide calling, international calling, email, text messaging, picture messaging, broadband Internet, narrowband Internet, Blackberry services,

¹¹ G.S. Ford and T.M. Koutsky, *Unnecessary Regulations and the Value of Spectrum: An Economic Evaluation of Lease Term Limits for the Educational Broadband Service*, PHOENIX CENTER POLICY BULLETIN NO. 15 (February 2006)(available at <http://www.phoenix-center.org/PolicyBulletin/PCPB15Final.pdf>).

handsets, netbooks, broadband access cards, home phone equipment, home VOIP telephony, equipment insurance, local repair and replacement services, and even assistance if you have a flat tire. The economic implications of the multiproduct nature of these firms are critical to understand. A wireless carrier does not offer a price for a service, it offers a set of prices for a set of services. Furthermore, many of these services are bound together with both cost and demand interdependencies. In other words, one cannot say the price of service is X without also saying the price for all other services offered are A, B, C, D, and so forth. All the prices are part of the offering. If one price changes, then the others are likely to change as well. This fact implies that it makes no sense to pick a single product or service, such as text messaging or handsets, and compare its price to some inherently artificial measure of cost. With strong demand complementarities, for example, it is quite possible for the price of a product or service to be below its costs, and another to be well above costs, even if the firm is making no profit. The former is not predatory and the latter is not monopolistic, but both prices are entirely consistent with the maximization of consumer well being. The restaurant business is intensely competitive, yet the price of wine is three-times its costs and the bread and water are free.¹² In wireless communications, subsidized handsets are a great example.

In a multiproduct setting, the only meaningful measure of competitive outcomes is the price and profit of the entire range of services offered and sold. Any attempt to

¹² T. Beard and J. Stern, *Continuous Cross Subsidies and Quantity Restrictions*, 56 JOURNAL OF INDUSTRIAL ECONOMICS 840-861 (2008).

single out individual products or service for price-cost comparisons is largely meaningless. All the demand and cost interdependencies relevant to the firm's pricing decision must be included in any analysis of a single product.

IV. Network Management, Terms and Pricing

The capacity of the wireless networks are limited, far more so than landline networks.¹³ These limitations are put under even greater strain with the advent of bandwidth hogging applications such as "peer to peer" or "P2P" applications such as BitTorrent and Skype.¹⁴ As such, operators must sometimes limit the use or operation of particular applications on their networks. The aim of such network management efforts is typically to maintain quality of service to all users. It is not possible to exclude the potential for anticompetitive motivations, but such limitations are not, in and of themselves, anticompetitive in intent. Even in the case of Skype, there is no anticompetitive claim on a carrier's refusal to offer its network to a potential rival—or, indeed, anyone—for free.

As for congestion, ideally it could be managed via the price system, rather than blocking or limiting access via terms and conditions. In fact, it is legitimate to interpret blocking as a pricing solution, where the service is never sensible to offer so the price is

¹³ See William H. Lehr and John M. Chapin, *Rethinking Wireless Broadband Platforms* (2009) (available at:http://people.csail.mit.edu/wlehr/Lehr-Papers_files/Lehr%20Chapin%20Rethink%20Wireless%20Broadband%20Apr2009.pdf).

¹⁴ As even the U.S. Supreme Court has recognized, "The creator of [P2P] software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network." *Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 545 U.S. 913, 920 (2005).

set at infinity. Practically, it is not always easy to implement a pricing solution, so cruder and cheaper methods may better serve the purpose for both consumers and providers until more sophisticated pricing models can be developed.

In the multiproduct setting, prices for individual products or services may appear strange to some observers and anticompetitive to others. Yet that need not be the case. When considering a price or pricing approach, the relevant question to ask is whether or not a particular pricing decision could be supported by a pricing algorithm that seeks to make consumers best off while the firm makes just enough profit to stay in business.¹⁵ While some pricing decisions in the wireless industry are criticized by some groups, it is most often the case that a pricing decision comports with those of a welfare maximizing social planner. Some may not like the prices, but changing them reduces the overall well being of society. This is not surprising, since firms often behave in a manner consistent with that algorithm by merely seeking profits. If the pricing decision of firms cannot be supported in this way, then there may be good reason to scrutinize the prices more carefully. The common notion that “these prices are bad because I don’t like them” is not a meaningful standard of review.

Again, consider the case of Skype on the wireless network. Assume, for the moment, that the technological problems with Skype on the mobile platform are not too severe. My understanding is that they are, but we can ignore that for the moment to

¹⁵ This algorithm is called Ramsey Pricing. See, e.g., S. J. Brown and D. S. Sibley, *THE THEORY OF PUBLIC UTILITY PRICING* (1986), Ch. 3.

make another point. Say that the Skype users substitute to Skype minutes and thereby reduce their minutes purchased from their wireless carrier to save money. While it has been argued that this is competition, it really is not. What has happened, in fact, is that the broadband service of the wireless carriers has now become a substitute for its voice service. This change results in a different price vector in that the price of broadband will be increased relative to voice to offset the lost profits from the voice traffic.¹⁶ Given that pricing is often not very precise, and any attempt by the wireless carrier to raise the price of broadband solely to those using Skype will be discouraged by some policymakers, the firm may increase the price to all customers with few voice minutes, or offer a block pricing approach in an effort to capture those substituting for its voice service. Notably, this decision is not anticompetitive. The exact same price change would result if the network was run by a social planner intent on maximizing consumer well being subject to a zero profit constraint on the firm.¹⁷

V. The Effect of "Wireless Carterfone" Policies on Industry Structure

Another aspect of the wireless industry that has received considerable policy attention in recent years has been the practice of bundling services and equipment. The topic is frequently described as "Wireless Carterfone," referencing the 1960's decision allowing consumers to attach their own telephones to the wireline network. The problem, however, is that the market conditions warranting *Carterfone* at that time are

¹⁶ T.R. Beard, G.S. Ford and L.J. Spiwak, *Why ADCo? Why Now? An Economic Exploration into the Future Industry Structure for the "Last Mile" in Local Telecommunications Markets*, PHOENIX CENTER POLICY PAPER NO. 12 (November 2001); reprinted in 54 FED. COM. L. J. 421 (May 2002)

¹⁷ This change in prices is consistent with Ramsey pricing.

significantly different than the current conditions in wireless industry.¹⁸ The wireless industry is not a monopolist, is not rate of return regulated at all levels, and is not vertically integrated into the handset market. The response of the wireline network to handset entry was motivated, in large part, by the regulation itself.

The need for *Carterfone*-style regulation is by no means certain. In fact, the industry is in period of significant change in regard to the treatment of equipment. Just a few years ago, wireless carriers offered mobile telephone service, and that was it. In that environment, the devices were simple and performed a single task. Today, the voice portion of the business is increasingly small part of the business. The handset is not longer a phone, it is a small computer. It is an advanced device capable of many services, both related to the wireless network and not. As a consequence, the industry is evolving to a more open network with regard to attaching devices, recognizing that the value of the network is driven as much by the equipment as the network service itself. This evolution is a natural consequence of the changes in the industry.

The inherent evolution toward more open networks could be interpreted as reducing the harm to regulating or even mandating such openness, but that is not the case. Regulators have no more idea where the wireless market is heading than the government regulators knew where the mortgage industry was heading, and the latter

¹⁸ G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Wireless Net Neutrality: From Carterfone to Cable Boxes*, PHOENIX CENTER POLICY BULLETIN NO. 17 (April 2007)(available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB17Final.pdf>), portions of which are to be reprinted in 25 SANTA CLARA COMPUTER AND HIGH TECHNOLOGY LAW JOURNAL (forthcoming Spring 2009).

was a lot easier to predict than the former. Openness will be driven by the interactions of sellers and buyers, and the information contained in those interactions is far greater than that contained in a hundred FCC proceedings. There is a big difference between a firm responding to consumers' desires with nuanced packages and bundles of services versus a heavy-handed government-mandated "openness" that could have severe unintended consequences on industry structure.

In fact, mandated openness can sharply reduce the profitability of the network service provider, potentially even to the point that such a mandate could reduce the equilibrium number of firms in the industry. As a result, mandated openness can result in significantly *less* competition and choice for consumers of network service operators. We had a measureable example of this impact at the recent auction of the C block in the 700 MHz band, which carried with it an open network mandate. This auction occurred parallel to auction of similar unencumbered spectrum, so we had a real world example as to how the market viewed the effects of the open network mandates upon firm profitability.

Our findings were significant.¹⁹ In particular, we found that that imposition of wireless *Carterfone* mandates reduced the expected profitability of the firm providing broadband wireless services using that spectrum by approximately 32%. Chopping a firm's profitability by nearly a third—particularly in difficult economic times—clearly

¹⁹ G. S. Ford, T. M. Koutsky and L.J. Spiwak, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*, PHOENIX CENTER POLICY BULLETIN NO. 20 (Second Edition) (May 2008)(available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB20Final2ndEdition.pdf>).

matters, and it certainly can mean the difference between staying in market or closing shop.

Because of the significant fixed and sunk costs involved with building and operating a facilities-based wireless network, such a dramatic change in industry profitability could have a radical impact upon market structure and result in a more highly-concentrated market. Markets may shrink from four or three providers to two or one—or, worse yet, zero. Thus, if the argument is that wireless *Carterfone* is required because of a purported lack of competition, the wireless *Carterfone* is, by definition, a self-defeating exercise and would cause the exact opposite result it is intended to remedy.

We also estimated, albeit admittedly crudely, that applying the open platform regulations imposed upon the Upper C block to all CMRS spectrum could cause a \$50 billion decrease in wireless carrier network investment over the next ten years. Given Congress's and President Obama's stated effort to stimulate additional broadband investment, wireless *Carterfone* again appears to be a self-defeating exercise.

Finally, by shrinking and commoditizing the market for broadband wireless services, applying such regulation across the board is likely to cause particular harm to small or medium-sized wireless firms by enhancing the role of scale economies in determining industry structure. As these small and medium often serve the unserved

and underserved areas that the American Recovery and Reinvestment Act of 2009 is targeted to, we again find ourselves working at cross purposes.²⁰

In addition, my research shows that wireless *Carterfone* policies also could lead to higher handset prices.²¹ This result is particularly harmful to low income persons.

There are many facets of handset subsidies and other handset practices that are misunderstood. First, handset subsidies can occur in a competitive setting, so such subsidies are consistent with competitive rivalry.²² This finding conflicts with arguments that such practices are anticompetitive. The coupling of handsets and services is a mode of competitive rivalry, benefitting consumers and reducing the profits of firms.²³ Handset features and deals are used to induce switching, and switching often results in lower prices paid for services.

²⁰ See also G.S. Ford, T.M. Koutsky and L.J. Spiwak, *The Burden of Network Neutrality Mandates on Rural Broadband Deployment*, PHOENIX CENTER POLICY PAPER NO. 25 (July 2006)(available at: <http://www.phoenix-center.org/pcpp/PCPP25Final.pdf>)(Using publicly available network cost models and data, we show that under plausible conditions, while network neutrality mandates negatively impact broadband deployment in all geographic areas regardless of average cost characteristics, such rules could disproportionately impact broadband deployment in high-cost areas. Moreover, our analysis that suggests the differential reduction in service availability for high-cost rural areas is six times as much as in lower cost, more urbanized markets.)

²¹ G. S. Ford, T.M. Koutsky and L.J. Spiwak, *Consumers and Wireless Carterfone: An Economic Perspective*, PHOENIX CENTER POLICY BULLETIN NO. 21 (September 2008)(available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB21Final.pdf>).

²² Recently, J.D. Power estimated that 36% of wireless customers received a free phone from their carrier, and many more consumers received highly subsidized handsets. J.D. Power and Associates, U.S. WIRELESS MOBILE PHONE EVALUATION STUDY (2007). Even without conventional complementarity, below cost pricing of a good is possible. See T.R. Beard and M. Stern, *Continuous Cross Subsidies and Quantity Restrictions*, JOURNAL OF INDUSTRIAL ECONOMICS (Forthcoming 2008).

²³ See, e.g., Amol Sharma, *AT&T's Bet on the iPhone*, WALL STREET JOURNAL (June 9, 2008)(quoting Ralph de la Vega, CEO AT&T Wireless: "It seems like \$199 is the right kind of price point to get significant mass-market adoption. It's going to impact earnings in 2008 and 2009 in a negative way, but will turn very profitable in the long term."); *AT&T Takes Shot At Verizon Wireless With Subsidized iPhone*, DOW JONES NEWS SERVICE (June 9, 2008) ("the iPhone's significant price highlights the escalating battle between it and Verizon

Second, theory (and common sense) indicates that steep discounts and subsidies on wireless handsets require a strong complementarity between the equipment and the services. The so-called "restrictive practices" like phone locking, termination fees, functionality "crippling," and even exclusive distribution rights for equipment all have the effect of increasing the degree of complementarity between the device and the services. This increased complementarity drives the price cut for equipment, thereby creating consumer benefits. In this light, actions deemed anticompetitive by some are, in fact, a feature of competitive rivalry and benefit consumers substantially.

Finally, as wireless *Carterfone* regulations explicitly lower the complementarity between handset and service sales, wireless *Carterfone* regulations *lower* the incentive for wireless providers to offer handset subsidies. As a result, should policymakers impose wireless *Carterfone* obligations, consumers would pay *more* for mobile handsets. Regulating early termination fees is likely to have a similar consequence – higher prices for handsets. Our analysis also indicates, however, that under certain conditions wireless service prices may not fall as a consequence of elimination of handset subsidies. In short, wireless *Carterfone* regulation can force consumers to pay more for the same bundled service they receive today, a decidedly anti-consumer outcome. As such, one feature of wireless *Carterfone* regulation is to affect a transfer from consumers to wireless

Wireless, the nation's two largest carriers, especially for a demographic of users that tend to spend more per month on data services. 'The pricing is extremely aggressive and will definitely result in far more consumers getting their hands on the device,' said Ross Rubin, an analyst at consumer research firm NPD Group. 'They understand that to build market share in this new wireless world, they have to be a lot more aggressive.'")

service providers. The notion that wireless *Carterfone* is unequivocally beneficial to consumers, therefore, is simply not supported by economic analysis.

VI. The Importance of a Single, National Wireless Regulatory Framework

When I was a young staffer at the FCC, a senior economist was fond of pointing out that the “m” in CMRS stands for “mobile.” As such, regulation of a single aspect of service in one geographic area can have effects well beyond the borders of the regulating state or municipality.

Recently, the Phoenix Center looked at this problem and found that that when local regulation in one jurisdiction has sufficiently large “extra-jurisdictional” effects in other locations, overall social welfare. The idea is not necessarily new, but our approach was unique in this area. We showed that welfare can be reduced *even if state and local governments act as efficient regulators*. This observation is important because it shows that the debate over the proper regulatory framework for the wireless industry *need not* be driven by an assessment of which set of regulators, federal or state, is more competent. Accordingly, because state and local regulation in the wireless industry has the tendency to spill across borders, our analysis suggests that society is likely better to be off with a single, national regulatory framework for wireless services.²⁴

²⁴ G. S. Ford, T. M. Koutsky and L. J. Spiwak, *An Economic Approach to Evaluating a National Wireless Regulatory Framework*, PHOENIX CENTER POLICY BULLETIN NO. 19 (October 2007)(available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB19Final.pdf>) and reprinted as T.R. Beard, G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Developing A National Wireless Regulatory Framework: A Law And Economics Approach*, 16 COMLAW CONSPLECTUS 391 (2008).

Indeed, competition or consumer marketing demands frequently cause wireless firms to have a national uniform pricing structure and uniform, comprehensive billing systems.²⁵ The competitive and technology conditions of such communications services do not generally permit a provider to establish fifty different business models, one for each state. In that situation, a regulatory environment that differs from state-to-state can erode a provider's ability to offer cost-efficient service through uniform national service and pricing plans.²⁶ Similarly, if one state tries to force an industry to re-design multistate facilities or services solely to meet that single state's individual mandate, and if a firm cannot confine those state-imposed cost increases to the particular state, then the increased costs will have an effect across the industry and not simply in the state that established the regulation. One such example is the continued effort in California to enact a telecommunications "Bill of Rights" that would regulate such matters as font size in bills.²⁷ In sum, unless new costs imposed by one local or state authority can be contained to the local jurisdiction, those costs will tend to raise prices for consumers everywhere and possibly alter industry structure. Importantly, while the incremental impact of any one local regulation may be tiny, the presence of dozens of such changes can have a large cumulative impact and add significant costs for society.

²⁵ See, e.g., *In the Matter of Truth-in-Billing and Billing Format*, 20 F.C.C.R. 6448 (2005) at ¶¶ 49-54 (available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-55A1.pdf) at ¶¶ 49-54.

²⁶ As noted by former FCC Chief Economist Thomas W. Hazlett, "[w]hen economic realities dictate that production of goods is efficiently done across jurisdictions (i.e., economies of scale stretch beyond state borders), decentralized regulations lack effective feedback." T.W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 176 (2003).

²⁷ See A. Rojas, *Phone 'Bill Of Rights' Battle Resumes*, SACRAMENTO BEE (May 6, 2007) (available at: <http://www.consumercal.org/press/battleresumes>).

VII. Conclusion

In sum, I think we can all agree that wireless service is a transformative technology that has benefited greatly from the “hands off” approach started back in 1992 in the Clinton/Gore Administration. The industry has grown in ways that would have been difficult to predict by regulators, and this growth has had substantial benefits. That said, there are still numerous policy relevant barriers to entry—i.e., eliminating piecemeal local regulation, streamlining the tower siting process, making more unencumbered spectrum available, improving the number porting process, facilitating an efficient secondary market for licensed spectrum, reducing onerous taxes on wireless services, etc.—that we can work together to remove in order to provide American consumers with better, faster and more ubiquitous wireless service. Equally as important, we need to make sure that we undertake a rigorous cost/benefit analysis before we decide to pass a new law or impose any new regulation on this complex and wonderful industry. Regulation is not always a bad thing, but it certainly can be if done improperly or under the wrong circumstances.

Mr. Chairman, thank you again for the invitation to testify today. I would welcome any questions the Subcommittee might have.

Mr. BOUCHER. And we now have a recorded vote pending on the House floor. I am going to ask my questions, and then we will declare a brief recess, and we will ask our witnesses to stay with us pending the return of members. It shouldn't take very long. We just have one recorded vote to respond to.

Let me ask any of the witnesses who want to respond, because several of you mentioned this during the course of your testimony. Several of you have talked about your reliance on the major carriers, Verizon and AT&T, for the special access lines that connect facilities, and you depend upon those lines to connect your facilities. And you have talked about various ways that that problem might be addressed. One possible way to address it is to apply for stimulus funds under the Economic Recovery Act. And there is language in that Act that specifically makes middle mile services eligible as a target for grantmaking under the law.

So my question to those who have that concern is, are you planning to apply for stimulus funding for these middle mile links? Mr. Schieber, let's begin with you.

Mr. SCHIEBER. Yes, thank you, Mr. Chairman. Sprint's position is, you know, we are closely monitoring that legislation as the terms in that legislation are defined and if, depending on how those terms are defined, unserved, underserved rural backhaul, etc., we may very well apply for those funds. It is unclear at this point until there is more clarification.

Mr. BOUCHER. Well, let's assume that the criteria make it possible for you to apply and, should you be awarded the grants, would enable those grants to be useful in addressing your middle mile needs. Would you then apply?

Mr. SCHIEBER. We may very well. And I will tell you that our friends from FiberTower on the panel here are the experts in providing wireless backhaul services. In all honesty, we may look to someone like FiberTower.

Mr. BOUCHER. All right. Well, let's ask Mr. Potharlanka that same question.

Mr. POTHARLANKA. Thanks for the question, Mr. Chairman. Special access, or middle mile as we have called it, in terms of creating alternatives there, we have to build other types of facilities-based networks. We cannot resell the stuff. You have to actually invest capital to actually build networks so that various end users networks actually have options, much like, you know, we talked about options.

Mr. BOUCHER. Well, but Mr. Potharlanka, would you rely to some extent if it is available on stimulus funds in order to help you make that investment?

Mr. POTHARLANKA. Absolutely. Our technology and what we do is very well suited to actually building these types of networks, and we fully expect that, you know, depending on the rules, we would actually apply.

Mr. BOUCHER. OK. That is good. One of the subjects that interests me is possible barriers that might exist to the siting of additional transmitters by carriers on structures that are already in existence, to which transmitters are already attached. And within the general category of tower siting, where I understand there are a number of tensions between the local governments that have deci-

sionmaking authority with regard to this and the carriers that want to site towers, it strikes me that that is one discrete area in which, if it truly is a problem, we might be able to offer some ready solutions.

And so let me just ask the question. Where you have got a circumstance where there is an effort and an application to attach an additional transmitter to a tower, to which other transmitters are already attached, is there resistance on the part of local governments today to rapidly processing those applications? Are you experiencing that problem? Mr. Potharlanka or others.

Mr. POTHARLANKA. Sure. I mean, we certainly experience, you know, zoning or permitting delays and cost associated with—

Mr. BOUCHER. That specific example, if you could answer that, please.

Mr. POTHARLANKA. With a specific example?

Mr. BOUCHER. Yes. That specific example.

Mr. POTHARLANKA. Sure. I mean, we have several instances in the northeastern States where our applications do take a long time.

Mr. BOUCHER. This is an example, and let me state it again, where a tower already exists, transmitters are already attached to that tower. The application is to attach an additional transmitter to that tower already containing other transmitters. In that instance, do you know of instances where delays are being experienced and those applications are not being rapidly processed?

Mr. POTHARLANKA. Absolutely. We attach transmitters to existing sites, existing towers. We don't install new towers, and so that is exactly what we face.

Mr. BOUCHER. All right. Do others have examples? Mr. Schieber?

Mr. SCHIEBER. Mr. Chairman, we experience the same thing at Sprint that, whether it is a new site or an existing site, there are often delays in getting zoning approvals from the local authorities.

Mr. BOUCHER. What is the appropriate remedy for that, in your mind?

Mr. SCHIEBER. From our perspective, I think something like a shot clock that encourages local zoning authorities to make a decision quickly and not stretch the time frame out over many, many years, which is what we experience sometimes would be very, very helpful.

Mr. BOUCHER. All right. I have some additional questions, but I am going to interrupt those so that we can respond to our recorded vote on the floor. And this subcommittee will stand in recess.

I would encourage Members to come back as quickly as they have voted so we can continue our questioning. And we will ask for the patience of our witnesses until we return.

[Recess.]

Mr. BOUCHER. The subcommittee will reconvene. I thank the witnesses for their patience. And we are missing Mr. Murray, but I suppose he will join us in due course.

I was interested in the testimony that was asked by—that was provided by a number of the witnesses regarding the current roaming rules, and I would like to just ask each of you, if you want, to comment on this.

Given the importance of the growing use of mobile data, and the fact that so many people are now relying on their mobile devices

as a major Internet access and e-mail application, in fact, I have got an iPhone. I guess I probably shouldn't advertise particular products, but I like it a lot. And I am probably using that for e-mail more now than anything that sits on a desk. And I am sure that there are millions of other people having similar experiences with that device or other similar kinds of portable devices.

And so, given the growing importance of mobile data uses, has the time come, in your opinion, for us to provide automatic roaming rights for data, similar to the automatic roaming rights that exist for voice services today?

Mr. Murray, you have joined us, and we will ask you first if you would like to comment.

Mr. MURRAY. I think absolutely the answer to that is yes. We value competition and we value rural consumers being served as robustly as urban. That is part of the promise of universal service. And unquestionably, these smaller carriers will tell you they can't get data roaming. It is not that it has been taken away, it has just never been there. So I think we have absolutely come to the point where this is essential. If we want to not hit a brick wall and see consolidation really accelerate, I think data roaming is essential.

Mr. BOUCHER. Others care to comment very briefly? My time really has expired. Mr. Meena.

Mr. MEENA. Yes, sir. I wanted to comment on that because it is such an important issue. Yes, we, all carriers need access to automatic data roaming. The VOIP example I gave in my testimony is a perfect example. In the future with 4G, is VOIP voice or is it data? Why would it matter? And there are countless telemedicine and other applications that customers need to use in their home footprint, as well as their travel anywhere throughout the country, and that is a goal of ours, to provide the type of services that customers want, no matter where they go.

Mr. BOUCHER. All right. Anyone else want to offer a view? Mr. Irving.

Mr. IRVING. I would agree that now is the time for data roaming to also be included in carriers, common carrier obligations. We have begun entering into data roaming agreements generally with smaller and mid size carriers who tend to be more receptive to those roaming agreements.

I would add one clarification. You asked whether we should enter into data roaming agreements or data roaming obligations similar to the voice roaming obligations. We would like to see the voice roaming obligations and the data roaming obligations improved.

Mr. BOUCHER. I understand that. Mr. Schieber.

Mr. SCHIEBER. Yes. Sprint spent billions of dollars on a DVDO network and as we have seen competition unfold, we are increasingly open to considering people who want to roam on our ABDO network. Whether we need automatic roaming, as we have with voice or not, is an open issue, I think. I will say though that, you know, if we have to have something like that, the in market exception really needs to be addressed so that we were all on the same level playing field. The in market exception precludes us from getting roaming from folks if we have spectrum in a particular market, so addressing that issue in that context would be very helpful.

Mr. BOUCHER. This would be spectrum you have in that market that you haven't built out in yet presumably.

Mr. IRVING. That is correct.

Mr. BOUCHER. All right. Mr. Upton, you are recognized for 5 minutes.

Mr. UPTON. Well, thank you, Mr. Chairman.

Dr. Ford, I have the results of the Consumer Reports most recent wireless survey which was published in January of this year. They concluded that, 1, overall cell phone service has become significantly better service. Two, contract terms for cell phone services are less onerous, and there were fewer problems with call quality in this year's survey, which obviously 2008. There was substantial improvement over the 2007 survey results, and that there has been a surge in satisfaction. Those are their words.

In your testimony you stated that the wireless industry is, in fact, workably competitive. And I know that as an economist and consumer satisfaction surveys may not be the tools of your trade. But would you agree that these positive consumer satisfaction surveys results are consistent with what we might expect from consumers enjoying the benefits of a competitive marketplace?

Mr. FORD. Oh, sure. I mean, I think, to some extent, that the progression of the industry is part of the dynamic competitive nature of it, and you would expect things to change and improve over time. And with the advent of new services and broadband and new telephones, people are going to get increasingly happy. And we are looking at nearly 20 percent of the people falling off the wire line network. Mobile service would have to get better for that to happen. So sure, it is very consistent with that outcome.

Mr. UPTON. Thank you. Mr. Schieber, AT&T and Verizon claim that see CLEX and other proponents of special access reform have not provided comprehensive data on the networks as the Bell companies have. Are you willing to provide the FCC with the same data that the Bell companies have given the FCC?

Mr. SCHIEBER. Congressman, we respectfully disagree with AT&T and Verizon. We feel like the FCC has a strong record of evidence. The FCC has what they need to act on this. However, if there is additional information that we can provide that will help the FCC get better clarity in the State of competition and special access we will be more than happy to provide that. But we would like the FCC to act on that and act on it quickly though.

Mr. UPTON. So the FCC, do they have any outstanding requests in for more information at this point or not?

Mr. SCHIEBER. I am not aware of any outstanding requests at this point. I think that they are working on something at this point, a request for information.

Mr. UPTON. Thank you. Mr. Potharlanka, in my view, we squandered an opportunity to make sure that backhaul capacity was available when we gave the white spaces away, rather than auction them off. Do we still have an opportunity to correct that mistake in the FCC's reconsideration of the white spaces order?

Mr. POTHARLANKA. Our general opinion about white spaces, the channels available in the white spaces, in rural areas is that we could actually have multiple uses for it. I think several applications

can coexist. And we are not sure that limiting options is the right way to do it, either through an auction process or—

Mr. UPTON. But if they are valuable, wouldn't we all benefit if they had been auctioned off rather than parts of it given away?

Mr. POTHARLANKA. We are not disagreeing whether there would be enhanced value out of it. All we are saying is there are some parts of the spectrum, I think, which are best served by set asides for certain types of applications which, where you would be able to enable broadband over extended distances. And I think what we have proposed is we want to have multiple applications coexist at the same time. And I think different types of approaches could be used to putting that spectrum to work.

Mr. UPTON. Well, do you think that they ought to be used for unlicensed parts? Should those white spaces be allowed to be unlicensed?

Mr. POTHARLANKA. Sure. Yes. We believe that our proposal—and let me touch on that specifically. Our proposal specifically states that we would like a few channels in the rural areas to be allocated for point-to-point licensing in a manner that they can coexist with income bands as well as allow for unlicensed devices to operate. And there is a way to do it. There are lots of rural areas where you have 15 sometimes, all the way up to 40, 45 channels. And I think the trick is to figure out a mechanism where you can actually have a lot of these things coexist, and it is possible, given the amount of spectrum that is available.

Mr. UPTON. Thank you. Yield back.

Mr. BOUCHER. Thank you very much, Mr. Upton.

The gentlelady from California, Ms. Eshoo, is recognized for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman. And thank you to all of the witnesses. I think it has been a terrific panel, and I think that you have built a very strong case around the whole issue of whether we have real competition and what the outcomes are if we don't and the state of affairs that we are in.

Dr. Ford, I don't have a question for you. But there are two things that really take my breath away about what you said; and that is that a duopoly is natural. I just, I have to tell you, that just flies in the face of what I think America is about and what our whole system and belief in competition. I just don't buy into that. And so I needed to comment because I still can't get it out of my head.

But at any rate, I want to talk, I focused on special access in my opening comments. And while I think that, you know, much of the focus on special access has been the competitive issues that result from wireless companies who, due to a lack of competition and choice, have to pay largely whatever the incumbent Bell company decides. What I want to touch on is the broader impact of this bottleneck in the middle mile.

Now, for years I worked very hard on HIT legislation, on getting the legislation passed here. We were successful in getting substantial funding, so we got the policy, then we got significant funding in the stimulus package. And that is going to create jobs. It is going to build an infrastructure to reduce health care costs. It is

going to help reach people who don't have immediate access to hospitals.

But my question is, in listening to the panel and examining this issue, how are these hospitals and other providers who don't have immediate access to the network to transmit large amounts of health care data, health records, MRIs, x-rays and the rest, how are they going to get this to providers and to patients?

I mean, we use, you know, we kind of dive down into a whole alphabet soup of the telecom industry here, and yet members need to really understand that because of these bottlenecks, the work that we have already done and we are congratulating ourselves for, how is this going to work? So I pose that question to you. I mean, it is special access services. And now we are preparing ourselves for an energy bill. The smart grid has to be a part of it. The data transmission requirements to monitor, to send information, control the flow of energy access, energy across the grid, has to be in a very intelligent and efficient manner. And it will be substantial. And again, we bump up against special access fees.

So, and I just want to put my own personal example on the table and that is, last year, I explored the possibility of installing Cisco's telepresence technology in both my D.C. and Palo Alto office. And while it was fairly expensive, it was going to really do a lot for us and my constituents. But what we couldn't afford, what we couldn't afford out of our budget was the monthly cost of the special access lines that were needed. They were in the range of 2,000 bucks a month. So, you know, I mean, I just start with my own operation on that.

So I open it up to the entire panel on the special access fees and the exploration of these very key areas that we need, you not only need, but we need to operate to transmit information.

And we have the information technology. But in the 21st century, with these fees, I think that we are in real trouble. We are saying, on the one hand, congratulations Congress, we did all of this. But look what these special access fees are doing.

So whoever would like to comment. Dr. Ford's not going to agree with me, so the rest of you can chime in. But congratulations, Dr. Ford. There aren't too many people that leave a few words with me that will remain just about forever.

Mr. MEENA. Yes, ma'am. I would like to try to answer that. Any time you have two carriers that have a disproportionate power, then the prices that you experience are going to be prevalent. And the way to solve that is introduce, allow more competition, or maybe a light touch of regulation. That will stimulate those duopolistic providers to do what they need to do. We had that same issue in the handset arena. The larger carriers are coalescing and bringing together market power to acquire the largest, a significant number of the most attractive handsets, and we are not able to provide those to our customers because of this market power that they exert. So that is why it is so important that Congress step in and require that companies like us can sell the handsets we want, that other companies can get into the special access business and do what they need to do to provide services at the rates that are competitive.

Ms. ESHOO. Now, the chairman said something earlier, which was a very good question, asking about the stimulus funds and making use of them in order to, if I heard it right, to accomplish the goal of what some of us would like to see in policy. I think, straightaway, we need a new policy. I want the companies to make good use of the stimulus funds. And I am proud that we did what we did for underserved and unserved areas, and it is a good place to start. But I don't think that takes the place of a policy.

But anyway, I think others of you wanted to weigh in on what I raised.

Mr. POTHARLANKA. If I may add something to this. In terms of a specific example of a hospital needing access to bandwidth is a great one. The key is to create alternatives so that these costs go down. That is the key. Having, trying to regulate so much from the medium to long term actually serves the purpose, so we need to create alternatives by, you know, enabling investment. And so our thought is, and this is what I think we, as a company, having been doing for some time is make sure that we invest capital where we create broadband hot spots, places across the nation where various entities can have equal access to bandwidth. It could be hospitals, it could be a government facility, frankly, it could be any of the wireless carriers which is who we focus on today. But frankly it could be anybody else.

And I think under the stimulus problem and the BTOP program, I think we have a unique opportunity to direct some of those funds to creating broadband hot spots so that we get the multiplier effect of opening broadband up to a larger community of users and not focused on just one segment of the marketplace.

And we also believe that, you know, approaches like this could be expanded on an ongoing basis, much beyond the stimulus program.

Mr. MURRAY. I will just add briefly that I think Mr. Potharlanka is right. We need alternatives. But at the same time, when we say data that show that in some places we have got profit margins exceeding 125 percent on these services, we have to acknowledge that there will be some places where there will not be alternatives, whether that is rural areas, whether that is just areas of the country that get left behind for whatever reason. And for those areas, the question is are we just going to orphan them?

Ms. ESHOO. Not a natural duopoly. It is hope for a lack of that somewhere.

Mr. SCHIEBER. And I will tell you, 96 percent of our cell sites are served by the ILEC. 96 percent of the special access we buy on our wire—

Ms. ESHOO. 96 percent are?

Mr. SCHIEBER. 96 percent of the wire line special access we pay for is paid to the ILEC.

In all honesty, in the interim and the short-term, I would be happy with a duopoly. It is not a duopoly, it is a monopoly today. We need to have more competition. And the broadband stimulus funding may be an option down the road. It may be an opportunity.

But, in all honesty, we have a short-term issue. And I don't think that we can predict that that will necessarily solve the special access problem. It is an operating expense problem we have. The

broadband dollars are spent on capital. That is great. I support that. But we have an operating expense problem in this nation with respect to special access. And it is a monopoly right now. We have extremely difficult terms and conditions we have to put up with with the LECS, and I support that.

Ms. ESHOO. Thank you very much. I think you have been a terrific panel. Thank you, Mr. Chairman, for allowing them to answer the questions.

Mr. BOUCHER. Thank you very much, Ms. Eshoo.

The gentleman from Florida, Mr. Stearns, is recognized for 5 minutes.

Mr. STEARNS. Thank you, Mr. Chairman. And I will probably take a little bit different approach than the gentlelady from California. She goes on to talk about the state of affairs that we are in and these bottlenecks. But if you look across the world and you see the concentration, the United States is more competitive than almost all the other countries. Isn't that true, Dr. Ford that, I think out of all the OEC countries, the United States has more, I mean, we have AT&T, Verizon, Sprint is in the mix and so is T Mobile.

So isn't it true that, contrary to what the gentlelady said, there is, the United States has more competition than almost any other country in the world? Is that true.

Mr. FORD. That is true.

Mr. STEARNS. And Dr. Murray, I know you are talking about these 125 percent, and that is probably access, and Sprint is probably very aware of that. And I think Sprint makes a very good point. You know, the other side of the evidence shows that the market is competitive. You know, the real larger question is, can you have a large wireless market with 12 carriers, or is it going to come down to three or four? And I think there seems to be some quantitative law here that, when you get this kind of market, to have the capital to invest, and to have the innovations required, you probably can't have 12.

So Dr. Ford, you might want to just touch on that, because it appears to me that if we are the most competitive in the world, there is a quantitative rule that says you have got to have at least maybe just two or three that can carry the load.

Mr. FORD. Absolutely. I mean, we regulated the electricity business. We regulated the telephone, local telephone business for years because it was a natural monopoly. Only one firm could survive. And as technology has developed, we have created opportunities to get costs down and to have more firms. Markets grow, costs go down, we can have more firms. So, yes, I mean, our policy paper 21 sort of lays out the economics of what these industries are going to look like, using formulas. I mean, basically, there is formula to tell you what this industry is going to look like.

Mr. STEARNS. Recently, the FCC came without a report and this is what they said. They are talking about the commercial and mobile radio services. They said, "the metrics indicate that there is an effective competition in the wireless market and demonstrate the increasingly significant role that the wireless services play in the lives of American consumers." So the FCC sort of agrees with you,

Dr. Ford, and this is a recent report this year which indicates the competition.

Notwithstanding that fact, Mr. Schieber, Mr. Upton asked you the question about advocating increased special access regulation. You know that U.S. Telecom indicated, sent a letter to the FCC outlining a lot of questions; and you have seen this report, have you?

Mr. SCHIEBER. Yes, I have.

Mr. STEARNS. OK. So they are indicating that the evidence shows the market is competitive. You are indicating the market isn't. So they, the incumbent phone companies submitted this filing with the FCC listing the type of information that needs to be collected to answer this question, which is a fundamental question for this hearing today. Do you agree that these questions are relevant? You obviously have read them. Do you think they are pertinent and would provide us an answer whether the market is competitive or not?

Mr. SCHIEBER. I think it is very relevant to determine whether the market is competitive. I can speak from personal experience in managing access on a day-to-day basis, Congressman, that it is, it is very difficult with, to find alternatives to the incumbent LECs. You have to look at the complete circuit that is being provided, the whole middle mile facility. There are certain portions of the middle mile facilities where there is more competition than the others. But for that very last mile in the middle market facilities there is very little competition.

Mr. STEARNS. OK. So we have these questions from the incumbents and others, and they submitted them. And you say these questions are pertinent. By and large you agree with these questions. And I guess a real question is, if the FCC answered this question, could they make an objective decision whether there is enough competition in the market?

Mr. SCHIEBER. We believe that the FCC—

Mr. STEARNS. Just a yes or no on this. On these questions that are in here that you have read, would you say yes, these are sufficient to answer your concern about whether there's market competition or not?

Mr. SCHIEBER. No, sir.

Mr. STEARNS. OK. And would you also, your group and others, provide another list of questions that you think are more pertinent so we can solve this question from the FCC's standpoint, because I think, as Members of Congress, this is so difficult for us to regulate. I think the gentlelady from California mentioned possibly we should step in. But I think many of us are sort of, you know, trying to sort this out. And maybe the FCC can do this instead of the government, the United States Congress coming in and mandating this thing. So we are trying to say, look, the U.S. Telecom has these list of questions. You don't think they are pertinent. Do you have your own set of questions that you and your group could submit so that the FCC could make an objective analysis?

Mr. SCHIEBER. We would be happy to. Congressman, as I said earlier, we honestly believe that the FCC has all the information necessary to make this determination. But if there is additional information that we can provide, we would be happy to. If there are

additional questions that we think they need to be asking, we will happy to provide those questions. With all due respect, what we would really like is for the FCC to act. This issue has been with them for six years.

Mr. STEARNS. So the FCC, in your opinion, does not need these questions from the U.S. Telecom association to bring bearing and answer to this because they already have the information.

Mr. SCHIEBER. I think there are questions that are relevant besides the ones that the ILECs have.

Mr. STEARNS. Do you think these are self-serving then? Is that what you are saying?

Mr. SCHIEBER. Without question, sir.

Mr. STEARNS. OK. Dr. Ford, what is your feeling? Can the FCC determine this, based upon the information they have without these questions?

Or you probably haven't seen these questions. But I think many of us would just like the FCC to act. And all respect to Sprint, they have got a good point. If the information is there, why isn't the FCC acting?

Or are you going back on your original statement is that there is sufficient competition that the FCC does not have to act.

Mr. FORD. I don't know how much competition there is in special access, and nobody knows how much competition there is in special access. They keep doing these huge studies. The NRI just did a study. The GAO has done studies. And every time they come back with these studies, they say, well, the data is really bad and we need to do something else. The FCC needs to collect more data. The evidence, you know, I don't know, but the evidence for regulating special access is really pathetic. I mean, if there was a 138 percent rate of returning on special access I wouldn't be sitting here talking to you. I would be building a special access plant.

Mr. STEARNS. Mr. Murray says it is 125 percent. Isn't that what you said, Mr. Murray?

Mr. FORD. I mean, it is just insane. These are regulatory books that the FCC has rejected as being relevant to this proceeding. The FCC, they collect the data and present it to people, and they said this is not relevant. I mean, a 138 percent rate of return? I mean, we would all be building plants. We would be nuts not to. It just doesn't make any sense. But that doesn't say that they don't have a point, OK? The point is that somebody needs to get in there and do a really serious job and get data from everybody because if there is going to be two or three people providing service, OK, you can't miss one. If you don't have data from one guy, you have missed everything.

Mr. STEARNS. Madam Chairman, I have asked my question. Is there anybody else on the panel that would like to tackle this, in addition to Dr. Ford and Mr. Schieber? Anybody else?

Mr. MURRAY. I guess I just want to challenge the economics for a brief second. I will humbly do so since I am not a tenth of the economist that Dr. Ford is. But the classic monopoly behavior is not, hey, let's figure out how much output we can get out there. Let's produce the maximum amount. It is quite the opposite. Classic monopoly behavior is let's reduce output so we can raise price on the services that we have. And, you know, we are seeing, like,

I mean, I guess would anybody deny that in more than 90 percent of U.S. markets there is only one choice for special access? Is anybody going to deny that fact? Because I don't think anybody will challenge that. And that looks like a really concentrated market to me.

Mr. FORD. Look, we have—95 percent of the people in this country have a telephone, and it was served by a monopoly. So restricting output is kind of silly in this business. Carriers are required to provide service to people. OK? It is not a choice of restricting output. And if there is an output level that has been chosen, then the pricing is a little bit tricky, OK? Because you are not just going to put it out there and then not do anything with it. I mean, it is sunk. If he could make a marginal profit, a monopolist would make a marginal profit on it. So the argument is not correct.

Mr. STEARNS. Thank you.

Ms. ESHOO. [presiding.] Too bad Judge Black isn't still alive to come and testify.

Let's see. Just exercising the prerogative of the Chair, which I very, very seldom have ever had, I think that just to set something down for the record, in terms of competition and the foreign markets have been referred to, they do regulate. They do regulate the top. They also insist that that there is regulation of the wholesale market. And there is a difference, Mr. Stearns. And I think that that needs to be taken into consideration.

I would like to recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you very much. As I have said before, the debate over special access should really be called critical access because these special access lines are critical to broadband deployment and competition. These lines allow America's businesses to bring innovation and development to far-flung areas, and they allow us to stay connected to our data and the world around us. These are not small issues with funny names. They are our link to the broadband future, and we can't get this one wrong.

The FCC deregulated special access in 1999, anticipating new competition driving down prices. I probably would have supported deregulation then. But since then, competition has grown, then decimated with MCI and the old AT&T getting purchased by incumbents, then grown again a little bit, but it does not appear to have flourished.

The GAO in the Bush administration said that, where the FCC has completely deregulated special access prices, special access prices have gone up. NARUP commissioned a study that concluded, "overall, the market concentration data portray special access as one firm such as the ILEC dominates, and other providers, both individually and collectively, have a small market share and little influence on price."

The report also said that the time is "certainly ripe for reform."

Now, the incumbents say that the markets are highly competitive, and that these reports aren't relying on the right data. I suppose I shouldn't be surprised, but these independent analysis are interesting.

I would like to ask Mr. Schieber, Mr. Meena and Mr. Irving, can you provide me any examples where a Bell company doesn't hold at least 90 percent of the market?

Mr. SCHIEBER. Sir, I can't provide any such example. As I have already stated in my testimony, and then question and answers here, 96 percent of our special access circuits are with—I can't think of a single market where they don't have more than 90 percent.

Your comments about this being critical access, as I said in my oral testimony, it is the lifeblood of the industry. And we, in fact, see access rates going up, as you discussed.

A specific example, we have a situation where we have had a 9-year contract with an ILEC. We had to renew that just last week, and I had two choices. I could renew under a new plan that was made available to me at a 28 percent increase for those circuits, or alternatively, I could elect not to renew under a term, volume and term plan, and I would have to pay 108 percent more than I had been paying for the last 9 years.

Mr. DOYLE. Mr. Irving.

Mr. IRVING. We at Cricket have been following the debate carefully. Special access is, in fact, as has been discussed, going to become increasingly important as we move to greater capacity and greater data. We are, at Cricket, very interested in seeing increasing competition in this field. But I am not specifically aware of our own experience with middle access providers.

Mr. DOYLE. Mr. Meena, are you aware of any Bell company that doesn't hold at least 90 percent of the market?

Mr. MEENA. No, sir. I am not familiar with exactly what the percentages are, but I do know that a free market is defined by willing buyers—

Mr. BOUCHER. Pull the microphone up so everyone can hear you because I think everything you are saying is important, and especially so because I agree with you. So we want you right in the microphone.

Mr. MEENA. Appreciate that. Yes. I don't know specifically what the percentages are. But I do know that a free market is defined by willing buyers and willing sellers, not seller. And that is what is seen to be a bottleneck for my cohorts here. Our big issue is related to devices and roaming, and special access doesn't matter if our customers can't get the devices they need, can't get access to data roaming nationwide.

Mr. DOYLE. Mr. Irving, in your testimony you mentioned several proceedings pending at the FCC that deal with roaming. Can you explain to the committee your understanding of the roaming conditions of the Verizon Wireless Alltel merger? And in your opinion, do you think those merger conditions have been violated?

Mr. IRVING. I do. In connection with the merger, the wireless merger proceedings and, in fact, with all major wireless merger proceedings in the last several years, the issue of roaming has been raised to the FCC. And the reason it has been raised is because mergers of major companies eliminate one of few roaming partners that are available in the industry. The issues with respect to Alltel and Verizon merging, roaming came up. Verizon has a policy of carving out large geographic areas from competitors where they

prohibit roaming, and there was concern that the elimination of an Alltel partner would further exacerbate that problem.

So, in connection with the roaming, with the merger proceeding, Congress, excuse me, the FCC imposed a condition that said that small and midsize carriers who dealt with Verizon and Alltel could choose either the Alltel agreement or the Verizon agreement to cover their roaming traffic. Verizon is known for having large geographic carve-outs in which they prohibit roaming. The Alltel agreements didn't have that. And so this merger condition insured that roaming would be available.

Although the condition has been in place, and although the merger has occurred, Verizon is taking the position that not only can they use geographic carve-outs for their own markets, but they are free to do that with Alltel markets also. So I believe that they are violating the condition that the FCC put in place. They are not violating it. They are making—they are reserving the right to violate it. They are putting competitors like Lieb in a difficult position. We have asked the FCC to clarify and we hope the FCC will clarify rapidly.

Mr. DOYLE. I see my time has expired. I thank the Chair.

Ms. ESHOO. Thank you. The gentleman from Illinois, Mr. Shimkus, is recognized for 5 minutes.

Mr. SHIMKUS. Thank you Madam Chairman.

Steve, do you want to go?

OK. Thank you, Madam Chairman. Thank you for sitting in the Chair, and you all for waiting through the votes, and I am sorry about missing some of the testimony.

Let me just ask a simple question. Do you believe the auction of more spectrum with fewer conditions will benefit the consumer? Yes or no. And maybe why, if you have got a short answer. Mr. Schieber.

Mr. SCHIEBER. Sir, I am not a spectrum expert. I am not sure that I am qualified to answer.

Mr. SHIMKUS. OK. That is fine. Mr. Irving.

Mr. IRVING. Absolutely. I think the answer is yes. I was prepared to tell the committee that spectrum was the lifeblood of the wireless industry. Special access apparently is the lifeblood. And spectrum also. But we would like to see additional spectrum auctioned off with few conditions so that small and mid size carrier can continue to compete.

Mr. SHIMKUS. Great.

Mr. MEENA. Yes. I don't think the name of the game in our industry is necessarily access to any kind of spectrum. Access to low band is particularly important. When I say low band spectrum, I mean 800 megahertz, 700 megahertz. Last year we were able to acquire 700 megahertz spectrum that we are not able to actually build out because of the issue related to handsets and not having access to automatic roaming, auto data roaming.

Mr. SHIMKUS. Let me ask because the question really is about if we place additional conditions on the spectrum that we are auctioning off, would that make it more difficult to you and to your decision to purchase or to bid on it.

Mr. MEENA. It just depends on what those special conditions are.

Mr. SHIMKUS. So, if we added conditions without a definition, that does change your parameters a little bit?

Mr. MEENA. Well, let me give you an example for specifically what you are asking.

We were hoping there would be special conditions tied into the 700 auction that would require automatic data roaming for those who bought, I believe it was, the C-Block spectrum last year. That did not occur. If that special condition had been in place—and we would have been supportive of it—we would have been very pleased if that would have come about.

Mr. SHIMKUS. OK. Sir.

Mr. POTHARLANKA. We really were not qualified to talk about spectrum as it relates to middle mile. Our opinion is making more spectrum available for middle mile, I think, will create more options, and actually targeting—

Mr. SHIMKUS. OK. I have limited time, so let me just go to Mr. Murray and then to Dr. Ford.

Mr. MURRAY. So more spectrum would clearly benefit consumers, but the central tragedy of the last 10 years of policymaking, I would say, is the fact that we had the best opportunity of a swath of spectrum coming up. Who got it? The same two dominant carriers that were trying to create competition—

Mr. SHIMKUS. But the question is: If we put restrictions on spectrum, do you like that?

Mr. MURRAY. Well, you are referencing, I guess, the C-Block openness conditions, and I see—you know, if those conditions help the marketplace to move towards more openness and to get more devices and more applications out there for consumers, I think that is a net win for consumers, and I actually think—

Mr. SHIMKUS. But, obviously, the return on investment from the government on some of the auctions, because of restrictions, was less?

Mr. MURRAY. Well, let us remember that this is the public's spectrum; it is actually not the government's spectrum. What is the value of a public park, you know? Could we presumably earn a little bit more revenue if we sold that land for the public park? Well, sure.

Mr. SHIMKUS. But you also have to remember that people have to put in a lot of capital to make that spectrum worth anything. Otherwise, it is worth nothing.

Mr. MURRAY. Right. But some would actually argue the opposite—that in some cases, by putting on certain kinds of conditions, you may actually increase the number of bidders who get into it.

Mr. SHIMKUS. Does anyone agree with that? Those of you who cannot debate this issue, I understand that.

Mr. IRVING, do you agree that adding additional conditions will bring in more bidders or less bidders?

Mr. IRVING. You know, there are conditions that could bring in more bidders. Right now, we have—so it is hard to—

Mr. SHIMKUS. Does it restrict the ability of us to get a better return on the investment of spectrum, if we view it as a public asset, that we do so?

Mr. IRVING. I am sorry. I apologize. I did not hear your question.

Mr. SHIMKUS. Well, I mean, if we put in conditions, does it inhibit our ability to raise the revenue from the bidders as we specify what goes on there? Let me just move on to another question because I am——

Mr. MEENA. Could I take a shot at that, please?

Mr. SHIMKUS. No. Actually, I just need to go. I have got about four questions, and I have only dealt with one.

So let me just go to Mr. Schieber. How would Carterphone rules, requiring all wireless networks to support all devices, impact your ability to manage your network?

Mr. SCHIEBER. It would have a significant impact. I am not a network engineer; but, you know, we are very cognizant of managing traffic to ensure that all of our customers have equal access to our network, and putting other devices——

Mr. SHIMKUS. And let me just, if I may, Madam Chair, finish with this: Would service quality be affected?

Mr. SCHIEBER. It very well could be. Yes, sir.

Mr. SHIMKUS. Thank you, Madam Chair.

Ms. ESHOO. [presiding.] Thank you, Mr. Shimkus.

The gentleman from California, Mr. McNerney, is recognized for 5 minutes.

Mr. MCNERNEY. Thank you, Madam Chair.

I want to thank the panel for your testimony this morning. I have learned a lot, and I find it especially helpful, especially regarding special access and backhaul. I know it is not easy to testify, so I appreciate your coming up here.

I would like to see a competitive marketplace in which the little guy has a chance to become a big guy, and that is kind of what we are talking about here. I particularly liked your comments, Mr. Murray, that it is not necessarily about overregulating but that we need to use our oversight authority to haul noncompetitive players in here and to make them explain themselves in front of us. That is something that I hope the committee can follow up with.

My first question goes to you, Mr. Murray, and to you, Dr. Ford. I definitely appreciate your economic perspective on this, but there are a few large telecom players that dominate the field, especially regarding the spectrum, while several smaller companies are clawing it out for the scraps, for the crumbs.

How do you propose to run the next auction so that it is more competitive for the little guys to get a part of it?

Mr. Murray, could you take that first?

Mr. MURRAY. I think, frankly, we just need to look at rules that perhaps have a filter which looks at dominant carriers. If you have already got a ton of spectrum, if you are already massively dominant in the industry, you know, it is possible that we should consider a spectrum block, which is a competitive spectrum block.

Mr. MCNERNEY. So, by its very nature, that would get more people to bid if you were blocking?

Mr. MURRAY. Exactly.

Mr. MCNERNEY. Dr. Ford.

Mr. FORD. You can hope for some things that you can never have, and this industry is very costly to be in, and you can try to force somebody in it, but that does not mean they are going to survive, OK? They are going to have to spend billions of dollars every

year to keep that network running. If they cannot generate the business, then all you are doing is waiting for some bigger guy to gobble him up, and you have created a massive inefficiency, OK?

What we have to have in this industry is a dramatic rise in either the market size—the expenditures, and maybe broadband will help with that—or a significant reduction in the cost of the network. I have not seen either of those really happen.

I mean we are really at the point now where we are about to lose possibly another wireless carrier, and it is not because of some malfeasance or government incompetence in regulating the industry. It is just that it is too competitive for four or five people. It is just too competitive. It is just the nature of the business, man.

Mr. MCNERNEY. Like Ms. Eshoo, I have trouble stomaching that geez, we need to let the bigger players get bigger so that they can spend the money they need to spend.

Mr. FORD. Well, you are going to have to subsidize them—

Mr. MCNERNEY. From the market.

Mr. FORD. That is the only choice because they are going to lose money. If you have five of them beating their brains out, they are going to lose money. They have a debt to pay when they build that network. They have to have revenue to cover that cost. That is the only point, right? That is the only point. The costs are exceedingly high in this business.

Mr. MCNERNEY. I have a technical question. I want to move on to a technical question.

Mr. MURRAY. California alone is the ninth largest economy in the world. Are we seriously suggesting that that cannot support an independent, strong carrier? I think Leap is a testament to that is just not true. If it were so damned competitive, why is that its profit margins keep creeping up in the midst of a recession? We have got these guys making gangbuster profits in the midst of a time when the rest of the country is really struggling it out.

That, to me, says market power. We have got evidence of market power left to right in this industry. We have got anticompetitive behavior, blocking applications. You cannot get, you know, exclusive contracts on handsets. You know, you cannot get special access. What more evidence do we need that this market needs some oversight?

Mr. MCNERNEY. Thank you. I would like to move on to a technical question, actually.

Mr. Schieber, you said you are not a technical person regarding the spectrum, but you are about to make massive investments in G4, I understand; is that correct?

Mr. SCHIEBER. I am sorry. G4?

Mr. MCNERNEY. Yes.

Mr. SCHIEBER. Oh, 4G.

Mr. MCNERNEY. Oh, 4G. Excuse me.

Mr. SCHIEBER. I am sorry. Yes. Yes.

Mr. MCNERNEY. I am a little dyslexic.

Mr. SCHIEBER. Through a company, Clearwire, that we own a portion of, yes.

Mr. MCNERNEY. So is there a problem with 4G in regard to the interference between neighboring portions of the spectrum?

Mr. SCHIEBER. In all honesty, I believe anytime that you have spectrum that butts up against itself, that you always run the risk that there is some sort of interference. I know that it is something that our engineers deal with on a regular basis.

Mr. MCNERNEY. Is that a particular problem? I mean 4G has a tremendous amount of bandwidth and content. There must be some spillover that exceeds that of prior generations of technology.

Mr. SCHIEBER. I have not heard anything that indicates that the engineers cannot manage the spectrum appropriately to ensure that there is not interference.

Mr. MCNERNEY. Does anyone else on the panel have a comment on that question?

Mr. MEENA. I think Mr. Schieber is right.

You have that in any spectrum band. You could have bleed-over and interference if it is not managed properly. I do not know of any special situations with 4G other than incumbent broadcast TV stations at the 700-megahertz level that there might be some interference with when companies like ourselves offer 4G services at the 700-megahertz band.

Mr. MCNERNEY. OK. Thank you. My time has expired.

Ms. ESHOO. All right. Thank you, Mr. McNerney.

The Chair recognizes the gentleman from Oregon, Mr. Walden, for 5 minutes.

Mr. WALDEN. Thank you, Madam Chair. I appreciate that.

Mr. Schieber, my understanding is that more than half of all the backhaul in Europe and in Asia is wireless. If wireless backhaul is successful elsewhere, why doesn't Sprint use it more comprehensively in the U.S. given your partial ownership of Clearwire? What is the issue behind that?

Mr. SCHIEBER. The majority of the cell sites where we do have an alternative vendor is, in fact, a wireless backhaul. It is technology that we are seeing an increasing amount of. I mentioned earlier that we work with FiberTower to bring wireless backhaul to our own cell sites.

One of the single biggest issues that we are faced with in migrating to wireless backhaul or to any other alternative access vendor is the fact that we are subject to very onerous terms and conditions associated with the special access and the middle mile facilities we buy from the ILEC today. We have situations where if we buy too much we are penalized; where if we buy too little, we are penalized. If we want to migrate a circuit from the ILEC to an alternative vendor, we have to pay in excess of \$900 in some cases. It is very, very difficult and very onerous to move, and so we have to be very cautious to avoid incurring termination liabilities.

Unfortunately, we were forced to sign up for those contracts because, without signing up for those contracts, we would have had to have paid even higher rates above and beyond what we are paying today, which, as we heard today, we are already seeing exorbitant rates of return on special access and ILECs.

Mr. WALDEN. So it is not because T1 lines are so cheap?

Mr. SCHIEBER. No, sir, T1 lines are not cheap. One-third of our operating costs associated with operating a cell site are for T1s and for the middle mile facilities.

Mr. WALDEN. OK. Because your CTO, Barry West—I guess in 2008—made some comment about that, that T lines are cheap and that that is part of the reason, so I was just wondering.

Mr. SCHIEBER. In certain parts of the country—in very dense, urban areas—if there is a relatively short distance between a cell site and a LEC central office, you may very well see some less expensive T1s, but it is not a cheap technology for us to buy.

Mr. WALDEN. OK. Dr. Ford, you were making some comments about just the extraordinary cost of whoever is building this out over time and about the need to get return on that. Mr. Murray, I think, had a little different perspective on that in terms of—I think your line was “the gangbuster profits right now.”

I am curious, Dr. Ford, if you want to respond to that.

Mr. FORD. Well, I mean I do not see any evidence of gangbuster profits. I mean, you know, you could say, well, there are gangbuster profits in special access. Well, I thought we were talking about the wireless industry. There are four or five wireless carriers in California. I mean there is enough market in places for that to exist, and there are areas—we heard earlier from members of the subcommittee—where they do not have enough wireless, right? They are rural areas where the markets are very small but where the cost of deploying the network is not that much different or is even higher in rural areas. So the economics drives this thing. I mean you cannot just say, “I want more competition.” The economics are going to tell you whether or not you can have what you want.

So, you know, firm profits are the only reasonable measure of how competitive the business is, because any given product may be above cost or any given product may be below cost. So it is across the whole scheme of the business venture from which you have to measure the competitiveness or the profitability of the business.

Mr. WALDEN. I will tell you that it seems like this Congress and administration certainly have an attitude of nationalizing everything, once it is broke. So I hope we do not create something else to go after.

I think I read in some testimony that 99 percent of America has access to cellular coverage right now. I must be the winner, then, of that 1 percent, because up until a year ago, at least two county seats—well, at least one that I know of for sure—in my district did not have cellphone coverage. U.S. Cellular came in there, and I know they are considering another town in my district. There are still lots of these rural areas where we do not even have one carrier.

It would not be fair, Mr. Murray, if I did not let you respond now to what Dr. Ford said.

Mr. MURRAY. There is a lot to respond to there, sir.

One thing I would say is I do not see this at all as moving away from a market economy. In fact, this is quite the opposite. This is, how can we maintain free markets? How can we maintain competition? That is what I am saying.

My perspective has always been that I prefer competition to regulation, and in this market, while we do have some competition, there are really clear indicators that they are a market power. You know, the Department of Justice uses things like four firm con-

centration ratios, like HHI indices. The fact of the matter is those numbers have been creeping steadily up in this industry, and to complement that consolidation trend we see evidence of abuse.

So all I am saying is in order so that we can have a free market and have these companies stay strong and thrive, what we need to do is make sure that the dominant carriers are not abusing their market power. This has been the story of competition for more than a century.

Mr. WALDEN. Mr. Irving, do you want to respond?

Mr. IRVING. Yes. Very quickly, I would just like to point out that, I think, small and medium carriers help make the industry vibrant, innovative and competitive.

What I would like to see is—I would like to make sure, to the extent that there are forces essentially tending toward elimination or toward the marginalization of small and medium carriers, that we act to address those forces so that we can continue to be innovative driving forces in the industry.

Mr. WALDEN. All right. Thank you.

Thank you, Madam Chair, for your indulgence on the time.

Ms. ESHOO. I thank the gentleman who is always so thoughtful and well-prepared.

Dr. Ford, you talked about California. You mentioned this. I want to set something down for the record here.

Now, according to the GAO report on special access, in Silicon Valley—most specifically in San Jose, California, perhaps the most data-hungry area of the world—competitors have access to only 6.2 percent of all buildings. To put it another way, the incumbent provider, AT&T, is the only provider of access in 93.8 percent of all buildings. So, if you think that is competitive, I will eat my hat. This is so worthwhile to drill down into this, but I just wanted to get that on the record.

Mr. FORD. Is that a question?

Ms. ESHOO. No.

I am going to recognize now the gentleman from Indiana, Mr. Buyer, for 7 minutes.

Mr. BUYER. Actually, I have to go back, Mr. Meena, and look at your testimony again.

Your word “duopoly” has sort of stuck in my mind, and so I was trying to think of other industries in our country that have that type of system. I was thinking about the tire industry, perhaps. There are industries out there that have really dominant players. You might want to call them “duopolies,” but they really are not. So you have got Coke and Pepsi, right? Then there are a whole bunch of others.

Mr. MEENA. Right.

Mr. BUYER. That is exactly what you have here, too. I don't know, I don't want to be a lawyer and be nitpicking at your testimony here.

Mr. MEENA. Well, I do not agree with that.

Mr. BUYER. You can't say “duopoly” and then can't count, OK? So whoever wrote that for you can't count. So don't call it a “duopoly.” That is the only point I would like to make. It is an easy thing to—

Mr. MEENA. I would like an opportunity to respond.

Mr. BUYER. Fine. It is an easy thing to throw out there. I am just being very cautious to you.

Sure, go ahead.

Mr. MEENA. Yes. Well, what I am saying is that when I was in college, I walked out to play football at Ole Miss. There were two scholarship quarterbacks and five walk-ons. Were there really seven quarterbacks or two?

Mr. BUYER. Seven.

Mr. MEENA. No. I tell you, there were two because there were only two who got to go to the scrimmages and two who got to put the game jerseys on and those types of things. Yes, you could count one, two, three, four, five, six, and seven.

Mr. BUYER. Oh, I see. So the other five did not make the other two better players?

Mr. MEENA. No, sir. Here is why. Here is the example.

Mr. BUYER. Where did you go to school?

Mr. MEENA. I went to the University of Mississippi, but let me finish, please, sir.

The two who are duopolistic in our industry have built their companies on low-band spectrum—850 megahertz—and they have put together licenses throughout the Nation on the most attractive beachfront property spectrum. When the auctions occurred last year and when more of that low-band spectrum was let, or was auctioned, they were able to acquire more and more of that. That allowed them to continue to build their businesses on the best spectrum possible in the wireless industry. That is the best advantage they have.

Mr. BUYER. Let me reclaim my time, then, because I am getting a sense that you would believe that all wireless carriers should have equal access to precisely the same type of wireless headset regardless of who made it.

Is that what you believe?

Mr. MEENA. What is that?

Mr. BUYER. Is that what you believe?

Mr. MEENA. I do believe that every wireless user should have—

Mr. BUYER. I am trying to figure out what you believe.

Mr. MEENA. OK.

Mr. BUYER. Then, if that is the belief and if you are asking us to adopt that belief, where is the incentive to collaborate and to innovate and to create differentiating products?

Mr. MEENA. I will tell you where the incentive is. It is in competition. These manufacturers want to sell every device they possibly can. For example, the iPhone. The iPhone today is limited to just selling to AT&T customers. Manufacturers desire to sell their products just like we desire to sell our products.

Mr. BUYER. Well, if in fact we had a paradigm—actually, strike the word “paradigm.”

If we had a predicate of your belief, where is the incentive for someone to adjoin and to put at-risk capital into the marketplace to create anew? That is the iPhone. So, when you have someone who actually wants to innovate and to do something new and different and to create something new and different, it excites the consumer, and then everybody goes chasing after the mark.

Mr. MEENA. Sure. All smartphones—

Mr. BUYER. Would you agree with that?

Mr. MEENA. I do agree with that, and I can even add onto that.

Mr. BUYER. Well then, if you agree to that, explain to me how that is congruent to your predicate?

Mr. MEENA. Here is how it is congruent. All users want access to the latest and greatest devices, especially smartphones, this day. We are seeing a great migration from the plain old cellular phones to smartphones, including iPhones. BlackBerries are another example of that.

Our average revenue per user in smartphones is \$10 less than other companies' average revenue per user. If you have one company that has one device, they do not have that opportunity to take advantage of the price differential that we might offer and that others might offer.

Mr. BUYER. You know, I could use your same analogy in the pharmaceutical market. We deal with these exclusivity arrangements. When someone goes to the marketplace and they take the risk—meaning they are willing to also accept the loss of the marketplace—and when they have a blockbuster drug or when they have a blockbuster product, then everyone dives for the product. They want access to it, and they demand their access, and then they demand their subjective belief under an objective standard called “fairness,” and they want us or the FCC to determine it.

Mr. MEENA. OK.

Mr. BUYER. The reality is that—I suppose King Solomon, so long ago, said: When it comes to human vice—in particular, greed—that there is nothing new under the sun.

Now, let us be pretty doggone honest with each other. That is what this is about. It is about money. It is about how we gain access to that dollar. We want to chase it. We want to benefit from somebody else's investment. So would we be just as equally willing to pay for their loss for products that do not make it on the market? The answer is no. That is the reality. The answer is no.

Mr. MEENA. Let me tell you—

Mr. BUYER. So let me—no. Time out. I understand your predicate. Respectfully, I disagree with your philosophy. I want to protect the marketplace is what I want to protect.

So as you look out there and you say, OK, not only does AT&T have an exclusivity with the iPhone, Sprint with the Palm Pre, Verizon with the BlackBerry Storm, T-Mobile now hooking up in an agreement with Google, but if these companies want to do this and if they are creating products which consumers like and they are new and innovative, I think it is pretty healthy, that is what I look at. I think of it as something that is very healthy.

I want to ask this question to—let me turn to Dr. Ford. Help me here.

If Congress were to say that we would ban exclusivity—do a prohibition of exclusivity agreements—what would be the impact upon innovation and true competitiveness in the marketplace?

Mr. FORD. The wireless industry—a lot of the competition in the wireless industry occurs in the device. I mean most of the commercials you see on television are talking about the device. So the device is a very important component of competition in that industry.

Plus, they are giving it to you a lot of times, and they are giving it to you for a very low price, so that is a very important piece. They want to be able to differentiate in that piece to attract business.

Necessity is the mother of invention. When AT&T came out with the iPhone, every single manufacturer was working exceedingly hard to try to match the quality of that product. And Apple drove this. It wasn't the wireless industry, OK? This was Apple's decision. Whether or not that was a wise decision for Apple, I don't know. You could go either way. AT&T had to upgrade its network significantly to handle that in terms that maybe they didn't put in as much investment as they needed to, given the enormous demands that that device puts on the network. I think, unquestionably in this industry, if you prohibit that kind of arrangement, you are going to reduce competition.

I think their points may be a little different in the sense that I am out here in this rural area, and I am not really competing in that space.

You know, I do not think that—I mean, there is the issue also of whether or not a carrier would say, I am going to make a device for you, if you can't sell 5 million of them. It may not be efficient for the manufacturer to sell to very small firms, so it might not necessarily be an issue with the big carriers in trying to keep other people from their goodies.

Mr. MURRAY. Congressman, if I may—

Mr. BUYER. I only have one comment. My time has expired. So if the Chair would indulge me, I would note that, out of the Organization of Economic Cooperation and Development, of all of the countries, the United States has the most minutes of use, the lowest revenue per minute and the least concentrated market of, and, what I would say, the most efficient use of spectrum of any of the countries.

Mr. MURRAY. And consumers pay more in this country than in any other country, right?

Mr. BUYER. Geez. If we use more, we pay more. Hello. Hello.

Mr. FORD. Thank you.

Mr. MURRAY. Sir, here is my question for you.

Mr. BUYER. If you want the best and if you get the most efficient use out of the spectrum and if you use it a lot, you are going to pay more. It is a free market enterprise system.

Mr. MURRAY. And that is why we are all moving towards unlimited—

Mr. BUYER. Wow.

Ms. ESHOO. Wow. This really did something for the volume. I have a bill on advertising volume—

Mr. FORD. I am all for that.

Ms. ESHOO. —that blows people out of the room.

Thank you, Mr. Buyer.

I just want to make a comment about what is tied to what. We have many successful companies in the country that really are not tied to other services. TiVo? How many people in the room use TiVo? How about IMAX? Slingbox? Xbox?

So the notion that there has to be a nexus between the two is something I do not necessarily buy into, and we have got some very good examples of that.

Mr. Murray, you started to say something, and I would like to give you time to answer and anyone else who is on the panel. There is not any other member to call on, so we have got a few minutes here, and then we will adjourn.

Mr. MURRAY. Briefly, I wanted to address Mr. Buyer's point, which was that the network is not the innovator here. It is the handset company who is doing the innovation. I challenge the premise—that is, a free market—that we are going to maximize returns to that handset manufacturer by telling them to limit the universe of people with whom you can contract. That is just fundamentally wrong.

If we want to maximize the incentive for people to build sexy new devices, let them sell it to everybody. The only reason that manufacturers have not come out against these exclusive deals is because they are scared of the retribution that they will get back from the carriers. The carriers are not innovating here; it is the handset manufacturers. It is just wrong if we say we are going to maximize their incentives by limiting the universe of people that they can sell to.

Mr. BUYER. Were they working together?

Ms. ESHOO. Well, the gentleman has not been recognized.

Mr. MEENA. Most of the innovation is coming from the manufacturers. Most of it is coming from the manufacturers.

Ms. ESHOO. Does anyone else want to chime in on this?

Mr. MEENA. Can I speak to the pharmaceutical issue?

Ms. ESHOO. Quickly.

Mr. MEENA. In a rural area, what if there were just one—let us just say there was a Walgreens and not a CVS, and that CVS had access to a lifesaving drug. Is it not fair for those who live in the rural area to have access to that lifesaving drug? That is what we are dealing with here. Is it not fair that those who live in rural areas do not have access to the latest and greatest devices?

Ms. ESHOO. Well, I think that today's hearing has been highly instructive and that there obviously are divergent views on the committee, but I think that we have not just skirted along the surface but that we have really dipped our wings into the important issues here. I think the area of special access is something that deserves a great deal of attention, not only by the Congress but by the FCC.

I hope again that the new composition of the FCC will come together soon. There is an enormous amount of work to be done there and some very clear thinking about what the state of competition is in the United States of America. We are all for competition. I mean it is in the DNA of every American, but—well, I will not editorialize that.

So I want to thank the audience. You have been a patient one. I do not know if we have so mesmerized you by the great content of the hearing or if you are employed by some of the interests here; but whatever, it is nice to see that the room remained full.

I want to ask for unanimous consent to keep the record open for 10 days for members to submit their opening statements and follow-up questions.

Ms. ESHOO. Also, not the Acting Chairwoman, but the Chairman has also included AT&T and Verizon to submit statements for the record, which I find very interesting, but that is what he would like to do. They did not testify today, but they are going to be allowed to submit statements for the record.

[The information appears at the conclusion of the hearing.]

Ms. ESHOO. So that is the unanimous consent request. Not hearing any objections, so be the order. And the subcommittee will now adjourn. Thank you, everyone.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

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ROY BLUNT
DRAFT OPENING STATEMENT
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
HEARING

May 7, 2009

Mr. Chairman:

Thank you for holding this important hearing.

Wireless communications are at the center of the modern American economy in every industry sector. For many Americans, it would be hard to imagine life today without a cell phone or blackberry, even though that technology barely existed 20 years ago.

Technological innovation in this area has been remarkable and serves as a model of a healthy and competitive industry. Since 1993, the number of wireless customers has increased almost 27 times to 270 million. Consumer Report recently reported that the industry scored broadly well on customer satisfaction and is showing improvements in critical areas. Wireless consumers today have greater choice and service flexibility than almost any other comparable industry.

In light of all those successes, today I want to focus on some important issues I'm hoping to hear from our panelists about.

First, I'm concerned about efforts to create open access regulations on wireless networks. This concept has been called a lot of things – network neutrality, network fairness, network discrimination. What I don't hear talked about nearly as often is what has made this industry succeed – a competitive marketplace, in which carriers manage their networks carefully and efficiently. These principles need to be protected going forward and I'm looking forward to hearing from our panelists on their views on that.

Second, I am looking forward to hearing from our panelists about how regulations governing handset exclusivity would impact the options available to consumers. Because the industry has thrived on an innovative approach to combining handset production with service options, I want to make sure that any steps we or the regulators take is cognizant of its impact on consumers.

Finally, I am interested in hearing from our panelists on Special Access arrangements. This is a multi-billion dollar question and there are multiple views on how or even whether the market is truly broken. I understand that this issue is challenging and I have good friends on both sides of this debate. I'm hopeful that, should this issue be examined more carefully either by this body or by the FCC, all parties will be willing to provide the kind of information needed to make the right determination.

All of that being said, Mr. Chairman, I'm looking forward to hearing from our panelists and I think you again for the opportunity to learn from them today.

Thank you.

Statement of the Honorable Marsha Blackburn (TN-07)
The Committee on Energy and Commerce
Subcommittee on Communications, Technology and the Internet
Hearing: "An Examination of Competition in the Wireless Industry"
May 7, 2009

Mr. Chairman, I thank you for holding today's hearing and appreciate the witnesses for dedicating their time and valuable perspective.

As I always say, the focus of the technology policy debate – whether the issue is before the FCC, copyright office or here in Congress – must begin and end with the user of technological services or products.

When government oversight in the communications space maintains strict focus on the consumer, Congress and the FCC can avoid picking winners and losers and allow the marketplace to determine victory and defeat.

Light touch regulation can be appropriate to cure a marketplace ill that cannot be resolved amongst industries themselves. However, Congress must refrain from taking action that would place a regulatory straightjacket on technologists and their industry partners in a manner that limits competition or investment.

The wireless industry is vibrant, growing market due in part to the regulatory framework adopted by Congress in the 1990's, and the visionary efforts of wireless community professionals to create a better mouse-trap.

- By the end of 2008 more than 270 million Americans subscribed to a wireless service.
- 68% of all broadband connections are wireless.

- 17% of house-holds abandoned wire-line altogether, opting-into a 100% wireless world.

What do these statistics demonstrate? To me, the numbers indicate that the wireless industry is alive and well, successful and competitive. According to our witness Dr. Ford, “there is not a shred of evidence of which I am aware that shows collusion or a lack of competition in the wireless industry.”

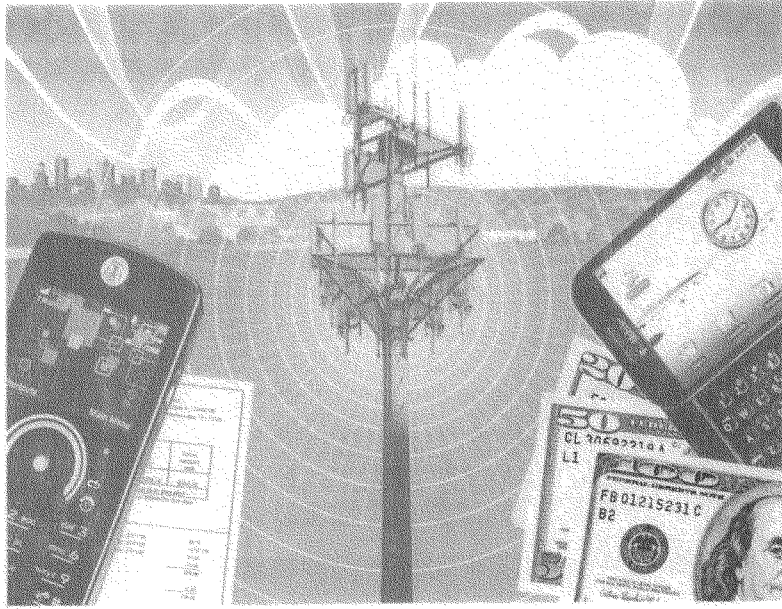
The wireless industry incurs roughly \$20 billion in capital expenditures annually, more than 240,000 cell sites, and employs roughly 270,000 workers.

Given these extraordinary figures, the most prudent course of action appears to be providing targeted tax relief. Congress can do this immediately by taking up and passing H.R .1521, the Cell Tax Fairness Act, to restrict local jurisdictions from imposing new discriminatory taxes on cell phone services, providers, or property.

Tax relief, not aggressive new regulation, will promote further job growth and industry success. In this economy, these two goals should be Congressional priority #1 and #1A in the telecommunications space.

Thank you Mr. Chairman, I yield back.

COVER STORY



Best cell-phone service

51,700 readers reveal that carriers are improving and that a pay-as-you-go plan could be a good option for more people

Inside

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VERIZON IS A STANDOUT cell-phone carrier for most people, based on our exclusive survey of readers in 23 cities. The company received high marks from survey respondents in overall satisfaction and customer service, and service is available in most of the country.

Overall, cell-phone service has become significantly better, judging by the annual survey conducted in September by the Consumer Reports National Research Center. Contract terms for cell-phone service are less onerous, and there were fewer problems with call quality in this year's survey. The best carriers even

came through after a hurricane hit one of our survey cities.

Sixty percent of readers were completely or very satisfied with their service. That appears to be a substantial improvement over 2007, even though we made some changes to our survey this year, including expanding the number of cities we rate and the coverage areas within them.

The improvement means cellular satisfaction is now closer to the average among all services we rate; it had previously been among the worst.

What's behind this surge in satisfaction? There were fewer problems with connectivity, the ability to widely receive

service that's free of static and dropped calls. Overall, 42 percent of readers reported that they had no major complaints about service, up from 29 percent in our previous survey. In particular, they were less likely to cite as a top complaint the automatic extension of their cell-phone contract as a result of changing their service.

Carriers have curbed such practices because of increasing competition and the threat of consumer-rights legislation in Congress. Added pressure came from more than 100 class-action and other lawsuits coast to coast, including one by the Minnesota attorney general, and several key court rulings favorable to consumers.

In apparent response to the legal and regulatory action, all the carriers have stopped automatically extending contracts when consumers make changes to their service plan. And now all but Alltel reduce early-termination fees of \$175 to \$200 as the contract term progresses.

One of the biggest concerns identified by our survey was the high cost of cell service, the top complaint for 14 percent of respondents. Since we surveyed readers in September, before the onset of the economic crisis, that might not reflect today's heightened concern for reining in costs.

Our analysis of the carriers' pricing uncovered a cost-cutter you might not be aware of: pay-by-the-minute, or prepaid, service. It's offered by all major carriers as well as providers such as Virgin and

TracFone. Some prepaid plans could save you a lot, especially if you use your phone infrequently or want unlimited voice calling. (See "How to Buy a Prepaid Phone," page 31.)

Our Ratings show that Verizon ranks among the top carriers in every city we surveyed, along with Alltel where it was rated. (Verizon was awaiting approval to acquire Alltel as we went to press.) T-Mobile was statistically on par with the top carriers in almost two-thirds of the cities where we were able to rate it.

The cell shell game

While major carriers make no secret of their prepaid plans, traditional plans are so lucrative that carriers have little reason to promote prepaid. Regular plans are also appealing because of their apparent inclusion of a "free" or deeply discounted phone as an incentive to sign a contract, which isn't required with prepaid plans.

Yet our investigation of cell-phone contracts over the past year reveals that you actually end up repaying the claimed savings on your phone. That's because cellular companies recoup their up-front phone subsidies through charges built into the monthly service fee over the one- or two-year term of the contract.

About \$4.50 of an average Sprint subscriber's monthly bill in 2007 was devoted to repaying the carrier for the cost of its equipment subsidies, based on data con-

tained in the company's required filings with the Securities and Exchange Commission. At Alltel and T-Mobile, the average 2007 subsidy repayments were \$2.55 and \$3.29 per month, respectively. AT&T and Verizon bury handset-subsidy data in bigger revenue and expense categories, so we can't calculate their numbers. But Lowell McAdam, president and CEO of Verizon Wireless, said that his customers' monthly subsidy repayment is com-

High cost was one of the top complaints about cell service.

parable with Verizon's \$5-per-month reduction in its early-termination fee. AT&T similarly reduces its termination fee by \$5 per month.

Such phone repayment might not be clearly communicated to consumers. We found no mention of it, for example, among about 40,000 words of legalese in the major carriers' contracts. Since August, when CONSUMER REPORTS raised questions about this industry practice, the Federal Trade Commission has been studying whether such claims comply with the agency's guidelines governing use of the word "free." It still hasn't com-

AD WATCH

Bar wars: Verizon vs. AT&T

In a series of TV ads last year, AT&T claimed its subscribers would enjoy "more bars in more places" than with other carriers. Verizon cried foul, and the Council of Better Business Bureaus has now supported some of the company's objections.

AT&T said the claim was based on its superior geographic coverage, and fine print in the ads indeed included the phrase "based on global coverage." In its decision, the BBB's National Advertising Division noted that even Verizon didn't challenge the superior breadth of the AT&T network. But the challenger complained that the ads equated network coverage with overall network performance, which it said depends on many factors.

The NAD, the ad industry's

self-regulatory body, agreed with that objection. It recommended that AT&T modify or discontinue two of the commercials, which showed users getting calls indoors, where all cellular networks commonly suffer service gaps. The group said two other commercials, depicting users in remote outdoor locations, were not problematic.

To arrive at its decision, the NAD considered evidence including last year's CONSUMER REPORTS Ratings, in which Verizon received higher scores than AT&T for connectivity in most of the 20 cities in which we surveyed.

AT&T disagreed with the NAD finding on the two ads with indoor settings. The decision is nonbinding, but the company says it is no longer broadcasting those two ads.

AT&T Nation
Calling Plans

More Bars in
More Places

The biggest digital wireless
voice and data network
in America

COMMERCIAL CHALLENGE AT&T withdrew two TV ads suggesting it had superior service after criticism from the Better Business Bureau.

COVER STORY BEST CELL-PHONE SERVICE

mented on the matter. Sprint CEO Dan Hesse told us he believes "consumers understand" that a free phone with a contract means "no up-front charge." Outside the U.S., consumers typically pay full retail for their phones up front.

Consumers Union, the nonprofit publisher of *CONSUMER REPORTS*, is now asking the FTC to enforce its "free" guidelines. It's also asking the Federal Communications Commission to require disclosure to subscribers of their subsidy repayment, along with the dollar amount of the subsidy, under its Truth-in-Billing regulations. CU also says that consumers should be told that the subsidy is not a true discount but something of a loan that gets paid back through monthly service fees.

After you've fully paid back the handset subsidy at the end of your contract term, your monthly service bill doesn't decrease by the amount of that subsidy repayment. So you continue paying for the phone for as long as you hang onto it. Ten to 15 percent of people hang onto their phone longer than the two-year contract period, McAdam says. Indeed, 14 percent of those we surveyed who had a monthly plan said they had fulfilled their contract and were still using the old phone they received with it. And 10 percent said they were under a contract but were not using a new discounted or "free" phone they got for signing it—many because they kept using a phone from an older contract.

How to cut your bill

There's no need to overpay for cellular service. Here are five ways to trim your bill:

Consider going prepaid. Prepaid cellular, now used by 15 percent of cell customers, is no longer just for those with poor credit. In a separate analysis of survey respondents who used prepaid, 76 percent bought it for lower cost, compared with monthly plans, and 70 percent chose it because they use their cell phone infrequently. About 47 percent liked the no-contract aspect of prepaid service.

The flexibility of prepaid plans is especially appealing in tough economic times because it allows you to easily cut back on monthly use and expense.

In addition to the major carriers' prepaid plans, there are other carriers that typically own no cell towers and instead operate on major carriers' networks. These include Virgin, which uses Sprint's network; TracFone, which uses the AT&T network; Boost (owned by Sprint); Metro PCS; and Net10.

When we calculated the costs, we found that the price of prepaid can be competitive for many customers. The phones themselves typically cost \$20 to \$100 and are often subsidized like those for traditional plans (though without a required contract term or early termination



A two-cell-phone family could save \$220 per year going prepaid.



fees). A customer who talks only 100 minutes per month could pay as little as \$10 to \$15 per month using a prepaid plan offered by Alltel or T-Mobile.

By contrast, the cheapest monthly contract plans from the major carriers start at \$30 to \$40. Savings can be comparable for bigger talkers, too. An average two-cell

family that talks 700 minutes per month could save \$100 to \$220 a year buying per-minute packs from Virgin Mobile. Monthly costs would average about \$53 with Virgin, compared with \$60 to \$70 with one of the big carriers' contract family plans. Heavier talkers could also save \$240 per year on Virgin's \$80 prepaid unlimited plan compared with unlimited contract plans from the major carriers.

Only 7 percent of survey respondents who were using prepaid service said it was a hassle prepaying and replenishing the minutes for a prepaid cell phone. Still, prepaid isn't for everyone. You pay for every minute you gab and every text message, so the plans aren't for incessant talkers and texters. Indeed, the top complaints about prepaid plans were that they did not provide free calls to customers on the same network or free nights and weekends. And not all prepaid plans are a bargain, so shop carefully.

Review your plan minutes. If you talk 700 minutes a month, the national average for cell subscribers, you might be drawn to AT&T's 900-minute Nationwide plan for \$60 per month. (AT&T doesn't offer a 700-minute plan.) But that plan and most others offer free unlimited night, weekend, and in-network minutes. If those sorts of calls make up half or more of your usage, you'd get more than enough time with AT&T's 450-minute Nationwide plan, which offers 5,000 free night and weekend and unlimited in-network minutes for \$40 per month. You'd save \$240 per year by switching.

Average your billable and free minutes from your past six months' statements, then shop accordingly. If travel or a family crisis causes a spike in usage, switch to a plan with more minutes until things return to normal. Carriers no longer require a contract extension for such changes.

Consider going local. National plans give you a "home" area as big as the lower 48 states to avoid roaming fees. But you might not need that much space for many, perhaps most, of your calls. Consider local plans offered by Alltel, Boost, and Metro PCS. Alltel's \$50, 1,000-minute-per-month local plan is \$120 per year cheaper than its \$60, 900-minute national plan. Metro PCS offers unlimited local calling for as little as \$30 per month prepaid but operates in only 11 areas, including Atlanta, Dallas, Detroit, and multiple cities in Florida and California. Roaming charges, of course, apply outside the local area.

How to buy a prepaid phone

A whopping 94 percent of surveyed readers have a traditional cell-phone plan, so you might be unfamiliar with prepaid phones and plans. Here's how to get started with prepaid:

Choose a carrier. There were few differences in satisfaction among T-Mobile, TracFone, Verizon, and Virgin prepaid users, but AT&T lagged behind those four carriers. Verizon customers complained less than those of other carriers about prepaid plans that don't offer free in-network calls or free nights and weekends.

Select your phone. Prepaid models are available online from the carriers and at walk-in stores, including dedicated wireless retailers, discounters, and drugstores. Prices range from free (with airtime purchase) for the likes of the Motorola W376g camera phone from TracFone, to \$180, which buys a Motorola Krzr mobile Web-capable handset with MP3 player from Boost. Verizon's S100 Blitz prepaid handset has a 1.2-megapixel camera, Bluetooth, Web browsing, GPS navigation, and a slide-out QWERTY keyboard. (That \$100 price is about what the Blitz costs with a two-year Verizon contract.)

Some carriers' phones work under both contract and prepaid plans. You might, then, be able to use a phone you received under contract with the same carrier's prepaid service. But check first with the carrier, and be aware that you might have to see out any remaining contract term on the phone or pay the early-termination fee to end the contract.

Because price is often a big reason to go prepaid, we tested four budget-priced (\$20 to \$60) models from major prepaid carriers. Shown above, all performed competently in our tests, with very good voice quality when talking and good quality when listening (comparable with many phones in our Ratings) and sufficient talk time. Most of these phones are relatively lightweight. All are easy to use and tell or show you how many minutes are

If local-only cell calling is too restrictive, it might make financial sense for you to retain long distance on your cell phone but curtail it on your landline. New cordless phone systems even facilitate the use of your cell phone at home. Although a growing minority of households don't have even basic landline service, we recommend having it for safety reasons because emergency services can more reliably locate you quickly from a 911 call on a landline than from a cell phone.

Bundle multimedia messages. More of our readers are using their cell phone



Motorola W175g (TracFone), \$50
Decent listening quality for a GSM phone. 7¼-hour talk time. Lightweight. But display is low-res.



Nokia 2610 (AT&T), \$20
Decent listening quality for a GSM phone. 6¼ hours of talk time. Lightweight. But display is low-res.



LG Flare (Virgin Mobile), \$30
Offers Bluetooth support. Lightweight. But rather short 3-hour talk time. Works on only one CDMA band.



Samsung SCH-u340 (Verizon), \$60
4 hours of talk time. Has voice command and a VGA camera.

left in your account. But their displays are smallish and they're light on features such as mono Bluetooth support (now almost universal on phones offered under contract), a music player, 3G support, and GPS navigation.

Pick the best plan. You always pay in advance, rather than after you get a monthly bill. But carriers have devised a variety of charging schemes. You can pay a monthly fee for a set number of included minutes; pay no monthly fee and 5 to 20 cents per minute; pay a daily access charge, every day or only on days you use the phone, plus a per-minute fee; or pay a monthly fee (\$30) for unlimited local calling or more (\$50 to \$80) for unlimited national calls and no roaming fees, with free long distance.

Free nights, weekends, and in-network calls are available on some plans. You can prepay online using your credit card, as needed or automatically with a scheduled credit-card

payment. You then draw down your balance based on use and monitor your time left via the handset display. Minutes do expire, but usually not if you add more money to the account, typically \$15 to \$50, in which case the leftovers roll forward.

To figure which plan would be cheapest for you, check your recent cellular bills and tote up how many day, night, weekend, and in-network minutes you use per month. Then compare, to one another and to your existing plan, what you'd pay under prepaid plans at the carriers our readers rated well: TracFone, T-Mobile, Virgin, and Verizon.

Do you want the same cell-phone number?

The same regulations that allow you to transfer your cell-phone number from one traditional carrier to another, upon request as long as you stay in the same geographic area, also apply to prepaid. Your new carrier will take care of the transfer process.

Monthly bundles are economical for heavy texters.

for text messaging (63 percent) and photos (35 percent), and to go on the Internet (29 percent). Shop all of your options. A la carte, messaging costs 15 to 25 cents a pop at major carriers, and those fees have risen in lockstep across carriers (see page 5). If you're a big messenger, consider a monthly bundle. T-Mobile had the lowest rates at

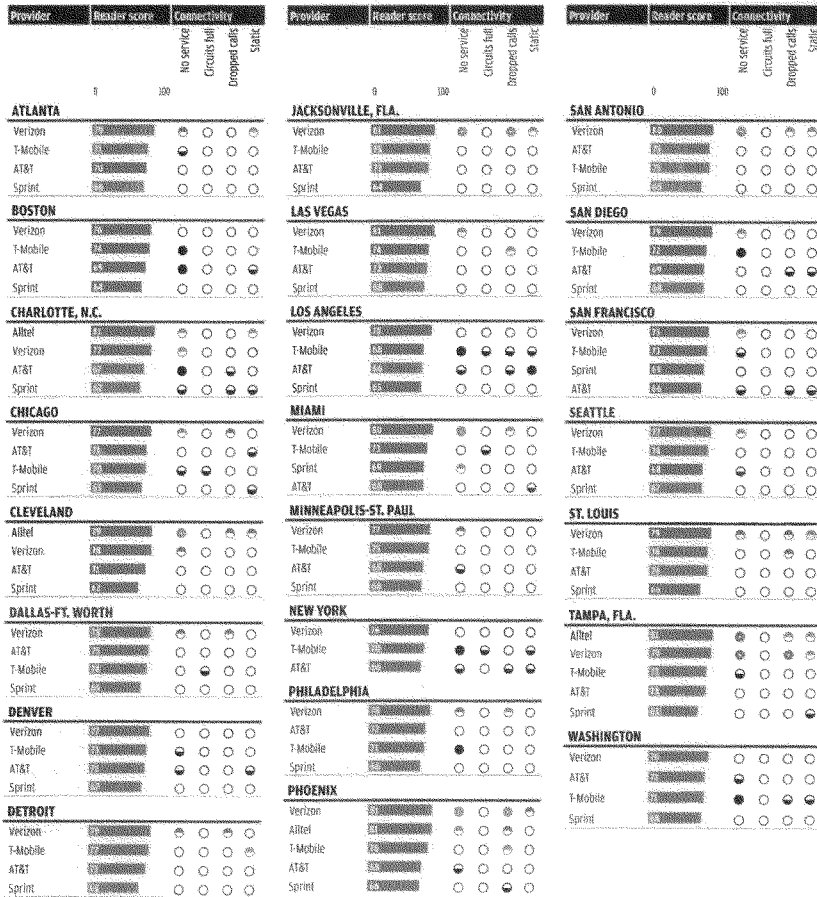
press time: 400 messages for \$5. Some higher-priced plans include unlimited messaging and Internet. Alltel, Sprint, and T-Mobile offer the best add-on mobile Web pricing: unlimited access for \$6 per month. By contrast, AT&T and Verizon charge by the megabyte or kilobyte outside of a plan or package.

Skip cell-phone insurance. Don't waste your money. If you lose or damage your phone, buy a cheap, basic phone or use an old phone until your contract commitment is up and you can get a new phone with a new contract.

COVER STORY BEST CELL-PHONE SERVICE

Ratings Cell-phone service

In order of reader score within metropolitan areas.



Guide to the Ratings

Ratings based on 51,240 responses from ConsumerReports.org subscribers surveyed in September 2008. **Reader score** reflects respondents' overall satisfaction with their cell-phone service and is not limited to factors listed under connectivity results. A score of 100 would mean all respondents were completely satisfied; 80 would mean very satisfied, on average; 60, fairly well satisfied. Differences of fewer than seven points are not meaningful. **Connectivity** reflects

how many times respondents said they experienced these problems making calls on their phones in the previous seven days: no service, circuits full, dropped calls, and static, or difficulty hearing. Ratings are based on the percentage that responded 'none,' statistically adjusted for cell-phone usage rates. Ratings are relative, reflecting differences from the average of all providers in all areas. Respondents might not reflect the general U.S. population.

Overview

Overall satisfaction with the carriers, reflected in their reader scores, generally corresponds to their connectivity scores. Among those who contacted their carriers for help, however, customer support was a more important factor.

Recommended

These carriers stand out for the reasons cited below.

A standout choice for most people:

Verizon

Widely available, among the leaders in satisfaction and connectivity in every rated city, and the standout in customer support, its prepaid service is as highly rated as its traditional plans. It also offers Vcast mobile TV, a live-TV service offering cable and broadcast channels.

A fine alternative where available:

Altel

Though Altel service is available to only 26 percent of the U.S. population (vs. 87 percent for Verizon), this provider typically matched Verizon for overall satisfaction and connectivity. It's also among the least expensive carriers for Web access. Its My Circle plan allows unlimited free calls to as many as 20 designated phone numbers, including wireless and landline on any network.

Worth considering, especially if you frequently travel overseas:

T-Mobile

Overall satisfaction is similar to Verizon in most cities, though it doesn't match Verizon in connectivity or customer service. It's among the least expensive carriers for Web access and for text and multimedia messages. Its My Faves plan allows unlimited free calls to five designated phone numbers on any network.

Also consider:

AT&T and Sprint might be an option if they're competitive in the Ratings for your city or if their exclusive phones or plan features appeal to you. AT&T is home to the iPhone and allows you to carry over unused minutes for almost a year and control kids' phone usage and access. Sprint, though inferior overall, has the Samsung Instinct and HTC Touch Diamond and unlimited free calling that starts at 7 p.m. weekdays, earlier than other carriers.

How customer service stacks up

Our first Ratings of customer service for cellular reveal that carriers that stood out in our city-by-city Ratings of reader satisfaction and connectivity also tended to do well in customer service.

Verizon was rated above average on five of the seven service attributes. Altel was a standout for resolving issues promptly. T-Mobile was noted for the courtesy of its staff but did worse than average at promptly responding to e-mail inquiries. AT&T and Sprint were each below average for five of the seven attributes, making them clearly worse for customer service.

Overall, about two-thirds of respondents who contacted their cell-phone carrier with a problem said the issue was satisfactorily and promptly resolved. An additional

Provider	Survey results						
	Issue resolved	Staff courtesy	Staff knowledge	Calling ease	Web site	E-mail promptness	E-mail quality
Verizon	●	●	●	●	●	●	○
Altel	●	○	○	○	○	○	○
T-Mobile	○	○	○	○	○	○	○
AT&T	○	○	○	○	○	○	○
Sprint	○	○	○	○	○	○	○

18 percent of respondents said the issue was resolved, but it required excessive time and effort. The remaining 15 or so percent of respondents said their problem wasn't solved at all.

CLOSE UP

Houston, you had a problem

We've separated out the survey results from Houston this year because Hurricane Ike swept through town just as we e-mailed our survey to respondents. The result provides a rare and informative snapshot of what can happen to cell-phone service during a disaster.

Compared with other cities rated this year, Houston's scores were down across the board for connectivity, which respondents are asked to base on experiences over the previous seven days. For many subscribers in Houston, that was exactly when they were coping with Ike and its aftermath. But carriers' relative performance mirrored their Ratings in other cities, and most of the overall-satisfaction scores were little-changed, too.

Severe weather stresses a cellular network: Evacuees and others on the road boost call traffic, while wind, floodwaters, and lightning attack cell-transmission sites and towers. In response, cellular carriers typically deploy emergency-response teams and mobile-transmission sites and generators to the affected area. Cells on wheels and cells on light trucks—COWS and COLTS, in industry parlance—help restore service and meet the cellular traffic needs of rescue workers.



HELP ON WHEELS Trucks with cell transmitters were rolled out to restore service to Houston and other areas affected by Hurricane Ike.

Provider	Reader score	Connectivity			
		No service	Circuit busy	Dropped calls	Static
HOUSTON					
Verizon	82	○	○	○	○
T-Mobile	78	●	○	○	○
AT&T	75	●	○	○	○
Sprint	72	●	○	○	○

WRITTEN STATEMENT OF

AT&T INC.

*on*AN EXAMINATION OF COMPETITION IN
THE WIRELESS INDUSTRY*before*SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET
UNITED STATES HOUSE OF REPRESENTATIVES

The wireless marketplace in the United States is, and has long been, one of the most exciting, dynamic, and competitive industries in this or any country. Over the last two decades, lawmakers and regulators across the political spectrum have recognized that wireless consumer welfare is thus best promoted through market discipline, not inflexible and costly government regulation. The result has been an explosion of carrier investment, lower prices and increased value for consumers, and revolutionary new wireless devices and services. These changes are literally transforming the way Americans live and work.

Wireless has been one of the great success stories in American business, and the wireless industry of today represents a true bright spot in an otherwise weakened economy. Indeed, during troubled times when other industries are pulling back, the wireless industry is on the brink of yet another huge leap forward, as wireless carriers prepare to invest in even faster networks designed to take advantage of the next generation of revolutionary devices and applications. Those multi-billion dollar investments would be put at risk and discouraged, however, if, as some have urged, the government were suddenly to reverse its policies and impose intrusive restrictions on the providers of these services.

Wireless Competition and Consumer Benefits

Few businesses are more intensely competitive than today's wireless industry. According to the FCC's latest statistics, more than 95 percent of the U.S. population lives in census blocks with at least three competing wireless carriers, and more than half of the population lives in census blocks with at least five competing carriers.¹ The FCC continues to make additional spectrum available, and major new providers, such as Clearwire and the cable companies, continue to enter. As the FCC's detailed annual reports to Congress time-and-again confirm, the wireless

¹ Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, ¶ 2 (January 15, 2009) ("Thirteenth Report").

marketplace is and will remain demonstrably competitive.² In fact, as a recent study shows, the U.S. enjoys the *least* concentrated wireless industry of any major industrial country.³

Because of this intense facilities-based competition, output continues to soar and prices continue to fall. There are now 270 million wireless subscribers in the United States, and in 2008 they used more than 2.2 *trillion* minutes – a tenfold increase since 2000.⁴ Americans sent more than one trillion wireless text messages in 2008 – triple the amount in 2007. At the same time, prices have declined precipitously. Revenue per minute has fallen 89 percent since 1994, and U.S. wireless prices are much lower than in any other major industrialized country in the world.⁵

Consumers are also getting far more value for their wireless dollars than they did even a few years ago. Carriers, device manufacturers, and operating system and applications developers compete fiercely to provide consumers with an increasingly broad array of new features, functions and capabilities. This is especially true of wireless broadband services. Carriers have invested tens of billions of dollars in recent years to upgrade their networks to increase speeds and to support a wave of revolutionary new broadband devices and applications. Americans today do not just talk on their wireless “phones” – they surf the Internet, listen to music, send emails, edit documents, use GPS-enabled features, watch videos and even live televised events, play games, and much more.

The wireless industry is just beginning to tap these possibilities. Seemingly every month a new and innovative wireless device bursts onto the scene, from the Amazon Kindle – a wireless e-reading device that does not even support voice calls – to wireless mini-laptop computers, medical monitoring devices, and specialized devices tailored to the needs of particular businesses. AT&T alone currently supports specialty devices from more than 100 manufacturers. Because of this intense competition and furious pace of innovation, wireless services are transforming American life.

For its part, AT&T has responded to and, indeed, helped shape these industry dynamics by investing in its networks and offering its customers a broad array of high quality services and options. AT&T has invested \$38 billion in its wireless and wireline networks in the past two years; AT&T’s capital expenditures this year alone will approach \$17 billion – more than any other company in America in *any* industry. AT&T has deployed 3G technology in almost 350 markets, and now boasts the fastest 3G network in the nation. AT&T has established tens of thousands of Wi-Fi hot-spots across the country that provide free broadband connectivity to AT&T customers. In addition, AT&T offers an extraordinary variety of wireless devices, which give consumers a choice of capabilities and operating systems and thousands upon thousands of

² *Thirteenth Report*, ¶ 2.

³ See *The United States and World Wireless Markets: Competition and Innovation are Driving Wireless Value in the U.S.*, Presentation by CTIA-The Wireless Association at 6-7 (submitted in FCC WC Docket Nos. 09-51, May 12, 2009) (“*CTIA Study*”).

⁴ *CTIA Study* at 4, 9.

⁵ *CTIA Study* at 3, 9; *Thirteenth Report*, ¶ 192.

applications.⁶ And, AT&T has introduced a multitude of consumer-centric policies and product options, including, just to name a few, unlimited calling plans; rollover minutes and unlimited mobile-to-mobile; family plans; parental controls; pro-rated early termination fees; prepaid options and postpaid plans that require no long term commitment; a “Bring Your Own Device” program that gives customers the option of using their own compatible wireless devices on the AT&T network; online billing and account management; and the freedom and capability to download virtually any application without restriction from the Internet, including the more than 4,000 applications that have been created by third-party developers who have worked with AT&T to optimize those applications for the AT&T network.

This embarrassment of riches is due to a single factor: competition in the wireless marketplace is white hot. If government continues its thoughtful policies that allow the vibrant marketplace to work, wireless carriers will compete even harder in the coming years to build the wireless broadband networks of the future and to find ways to increase value for their customers. If, on the other hand, government were to impose a new set of restrictions on these services, carriers would be able to undertake fewer of those risky, multi-billion dollar investments – which, in turn, would slow down the economic recovery. Neither Congress nor the FCC should try to “fix” one of the few things in the American economy that is not broken.

Special Access “Middle Mile” Competition

A good example of the benefits – for consumers and providers – of forward-thinking policy approaches is the introduction of progressive, flexible regulations for the communications services that wireless carriers use as inputs. The Clinton Administration adopted a set of “pricing flexibility” rules for special access services (“middle mile” facilities) that have resulted in more competitive pricing and huge costs savings for wireless carriers. These rules are measured in their approach. If an ILEC can show, with hard evidence, that competitors have *already* deployed competing facilities widely in a city, the ILEC is then freed from inflexible monopoly-era price regulation and given the ability to negotiate individualized contracts in that city that are tailored to particular customers’ needs. The result has been that, for the last decade, ILECs have had the freedom to respond to their facilities-based competitors by offering substantial *discounts* from their tariffed special access rates (and by providing numerous other individualized concessions and benefits). As a result, the special access marketplace today exhibits all of the hallmarks of an intensely competitive market: falling prices, rising output, improving service quality, rapid innovation, and enormous expansion and entry by both intramodal and intermodal competitors.

There is no real dispute that the FCC’s special access policies have led to steady, substantial price *decreases*. AT&T, Verizon, Qwest, and others have all provided the FCC with detailed data, taken from their actual billing records, showing that the prices that customers *actually pay* for special access services have declined across all services and in all areas since 2001, even for the lowest capacity circuits. AT&T has shown that the prices its customers pay in pricing flexibility areas fell by more than 18% (for DS1 circuits) and 10% (for DS3 circuits) in real

⁶ See www.att.com/choice. iPhone users alone have downloaded over 1 billion applications from the iTunes applications store in its first year of its existence.

inflation-adjusted terms from 2001 through 2004, and fell again by 23.7% (DS1) and 20.9% (DS3) in real inflation-adjusted terms from 2004 through the third quarter of 2007.⁷ Verizon and Qwest have made similar showings. No one has refuted this evidence, and it has been confirmed in independent studies. The GAO found that that ILECs' average revenues "for both DS-1 and DS-3" circuits declined (or remained flat) from 2001 through 2005.⁸ Another recent study relying on data from non-ILEC sources confirmed that special access prices for lower-capacity DS1 and DS3 circuits declined substantially over the period studied (2006-07).⁹ Most notably, competition and pricing flexibility for special access have benefited wireless carriers in particular: for example, AT&T showed that the prices that Sprint pays AT&T for special access have declined substantially.¹⁰

Prices are declining and service quality is increasing for one simple reason: special access purchasers, including wireless carriers, have abundant options. Competitive special access providers have been deploying alternative special access facilities since the 1980s. Today, there are dozens of CLECs that operate alternative fiber networks in the commercial areas of America's cities where special access demand is heavily concentrated.¹¹ These alternative fiber networks are connected to or within striking distance of the locations that account for the vast majority of special access demand, and those CLECs provide service at all levels of bandwidth from T-1s to the very high capacity optical circuits that now serve many locations.¹² And because ILECs set their special access rates over broad geographic areas, this intense facilities-based competition necessarily disciplines special access prices and practices *everywhere* – not merely with respect to the individual buildings and other locations CLECs currently serve.

In addition, cable, wireless, and other competitors are rapidly deploying new and existing technologies to provide non-ILEC special access alternatives even outside downtown areas – in no small part to seize the opportunity provided by rapidly increasing special access demand from wireless carriers that are providing ever more broadband services to consumers.¹³ As they

⁷ See Letter from Robert W. Quinn, AT&T, to Marlene S. Dortch, FCC, WC Docket No. 05-25 (filed February 6, 2009) at 5-6 (citing record evidence). Not accounting for inflation, AT&T's prices still fell by more than 13% (DS1) and 5% (DS3) from 2001 through 2004, and fell again by 13.2% (DS1) and 10% (DS3) in from 2004 through 2007. *Id.* n.14.

⁸ See Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access*, Report 07-80 (November, 2006) ("*GAO Report*") at 13, 32-33.

⁹ See Peter Bluhm & Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, at 59 (January 21, 2009, rev. ed.) ("*NRRRI Report*") ("[d]ata in this table are the best estimate of actual prices paid by large wholesale purchasers because these customers purchase a high percentage of their circuits at discounted rates," and "[e]ach of the discounted rates we measured declined from 2006 to 2007").

¹⁰ AT&T 2007 Reply, Casto Supp. Reply Decl. ¶ 4.

¹¹ See, e.g., AT&T 2007 Comments, Casto Supp. Decl. ¶¶ 10-13 & Attachment (maps plotting CLEC fiber); Verizon 2007 Comments at 15-17 & Attachment H (maps plotting CLEC fiber); Qwest 2007 Comments at 20-24.

¹² See, e.g., AT&T 2007 Comments, Casto Supp. Decl. ¶¶ 10-13 & Attachment (maps showing known CLEC fiber in wire centers that account for more than 80% of AT&T's DS_n level demand); Verizon 2007 Comments, Lew Decl. ¶¶ 22-33, Lew Decl. ¶¶ 27-30 & Attachment H (same); Qwest 2007 Comments at 20-23 (demonstrating that CLECs can serve the vast majority of Qwest's DS_n level demand).

¹³ See, e.g., AT&T Supplemental Reply Comments, FCC WC Docket No. 05-25, at 7-23 (filed August 15, 2007).

recently confirmed to the FCC, “cable operators provide high-capacity services that compete with special access services offered by incumbent local exchange carriers,” and, indeed, “view such services as a growing segment of their businesses.”¹⁴ Wireless “backhaul” – connecting cell towers to wireless networks with wireless microwave transmitters and receivers – is rapidly becoming more prevalent. Outside the U.S., this microwave technology already accounts for the *majority* of cell tower middle mile connections, and AT&T, for one, already purchases thousands of wireless backhaul circuits here in the U.S.¹⁵

Of course, we continue to hear the same tired claims regarding the competitiveness of the special access marketplace. Some claim that the DOJ and the GAO have found that special access purchasers have no options, but that is not true. The DOJ alleged that the SBC-AT&T and Verizon-MCI mergers might reduce competition in a few hundred buildings scattered throughout the country,¹⁶ and that limited concern was put to rest when AT&T and Verizon divested fiber facilities serving those buildings.¹⁷ And the GAO concluded that it did not have enough data to make a judgment about the extent of competitive facilities deployment.¹⁸ Nor is there merit to claims that incumbent carriers have “locked up” wireless and other special access customers by offering substantial discounts from their list prices in return for volume purchase commitments

¹⁴ See Letter from Steven F. Morris, National Cable & Telecommunications Association, to Marlene Dortch, FCC, FCC WC Docket No. 05-35 (filed May 8, 2009). For example, Comcast noted in its most recent earnings announcement that Business Service revenue had increased 47 percent in the first quarter of 2009, and that it would continue to invest in its Business Services throughout the rest of 2009. Comcast 1Q09 Earnings Presentation at 5, 7. Time Warner Cable’s CEO recently stated that commercial services represented the company’s biggest opportunity; its commercial service revenues grew 17 percent in the first quarter of 2009 and accounted for 15 percent of the company’s total growth in revenue. “Time Warner Puts Pressure Back on Telcos,” *TelephonyOnline.com*, April 29, 2009.

¹⁵ Sprint’s views on this topic are vexing. Sprint claims that there is virtually no wireless backhaul market. Written Testimony of Paul Scheiber, Sprint, at 3. But FiberTower, one of Sprint’s microwave backhaul suppliers, makes clear that it has a “100% facilities-based telecommunications network” extending “over substantially all of the continental U.S.,” comprising “approximately 1.55 billion channel pops,” and representing “one of the largest and most comprehensive collections of millimeter wave spectrum in the U.S.” Written Testimony of Ravi Potharlanka, FiberTower, at 3-4 (“As of December 31, 2008 we provide backhaul service to over 6,000 mobile base stations (or cell sites)”). Sprint’s statements here are also impossible to reconcile with the real world experience of its affiliate Clearwire, which has indicated that it already self-supplies or purchases from non-ILEC sources the vast majority of its wireless backhaul. Indeed, a Sprint officer recently admitted that the only reason microwave backhaul is not already more prevalent here is that market-based rates for T-1s (also known as DS1s) from the ILECs are so cheap. See Stephen Lawson, *Sprint Picks Wireless backhaul for WiMAX*, *The Industry Standard*, July 9, 2008, available at <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax>.

¹⁶ See Complaint, *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05-CV-02102 (D.D.C. Oct. 27, 2005); Complaint, *United States v. Verizon Communications Inc. and MCI, Inc.*, No. 1:05-CV-02103 (D.D.C. Oct. 27, 2005).

¹⁷ See *SBC Comm’ns and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18290, ¶ 24 (2005) (“We conclude, however, that the consent decree” by which “the Applicants agreed to certain divestitures . . . should remedy any likely anticompetitive effects”); *Verizon Comm’ns and MCI Inc., Applications for Transfer of Control*, 20 FCC Rcd. 18433, ¶ 24 (2005) (same); *United States v. SBC Communications, Inc.*, 489 F. Supp. 2d 1, 70 (D.D.C. 2007) (upholding the merger and finding the divestiture and other merger commitments to be “in the public interest”).

¹⁸ Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-08, at 40 (Nov. 2006); see also *id.* at 50-52.

based upon the customer's total special access spend. In fact, AT&T has discount offerings that do not require any such minimum spending requirements and such volume discounts arrangements are, in any event, entirely unobjectionable.¹⁹ As for the rhetorical chestnut that ILEC profits are too high, those claims are based on FCC accounting data that the FCC itself has repeatedly acknowledged were never designed to be used to calculate service-specific rates of return. Recently, a study by the research arm of the National Association of Regulatory Utility Commissioners agreed that "rates of return" estimated from this FCC accounting data are "meaningless."²⁰

Of course, even customers in the most competitive markets would always *like* to have lower prices and some have urged the FCC arbitrarily to slash ILEC special access prices below market-driven levels. This would be a disastrous policy, especially at this critical juncture, that could only lead to reduced broadband investment and lost jobs. The telecommunications industry is one of the very few areas in the American economy that is experiencing healthy growth in demand. Special access providers have abundant incentives today to invest in new infrastructure that can meet that demand, improve the lives of Americans, and provide new jobs. But these carriers' investment decisions are based on the assumption that the prices for these services will remain market-driven and allow a reasonable return on the invested dollars. If the government were to intervene and suddenly mandate the sorts of massive rate reductions Sprint and others are advocating, all carriers – both incumbents and new entrants – would lose the incentive to invest in that new infrastructure. Just when we want companies to commit to enormous investments and to hire workers to build the broadband networks of the future, the last thing we should do is mandate huge rate reductions that would eliminate any incentive to make those investments.

Misguided Proposals to Substitute Regulation for Market Discipline

Given that conditions in the wireless marketplace are so unambiguously competitive, government policy should be to continue to encourage competition and investment through market discipline, not heavy-handed government mandates. Thus, calls for government to dictate terms of contracts for handset distribution between device manufacturers and carriers or for roaming arrangements between carriers should be rejected. Congress and the FCC should instead focus on measures to ensure that Congress's original intention to remove roadblocks to investment and competition, such as spectrum scarcity, delays in tower siting approvals and conflicting state laws, are given fuller effect.

¹⁹ AT&T 2007 Reply Comments, FCC WC Docket No. 05-25, at 60-62 (filed August 15, 2007). Volume and term discounts are hardly unique to special access. Such discounts are common not only throughout the telecommunications industry but in all competitive industries. The FCC has repeatedly and correctly held that ILECs should not be prohibited from making such offerings, which, after all, facilitate *lower* prices for consumers. See, e.g., *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶¶ 28, 33, 36 (1991). The courts have specifically held that special access discount plans are "most naturally viewed as a bargain containing terms that both benefit and burden its subscribers." *BellSouth v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (Tatel, J.). It is extraordinary that a sophisticated carrier like Sprint would now ask Congress to help it get out of bargains that it voluntarily negotiated.

²⁰ See *NRRRI Report*, at 70 ("the RBOCs contend that the ARMIS figures are virtually meaningless. We agree with the RBOCs"); see also *2005 NPRM*, FCC WC Docket No. 05-25, at ¶ 129.

Proposals to Prohibit Exclusive Handset Distribution Arrangements. Wireless carriers battle fiercely to attract and retain customers. Each carrier strives to differentiate its offerings from those of its rivals by offering more attractive service plans, improved coverage and service quality, innovative features and content, and a mix of handsets that it believes will best meet consumers' widely varying needs. And, as is common in highly competitive industries, wireless competitors sometimes seek to set themselves apart through exclusive offerings – *i.e.*, a wireless carrier may ink a deal with a like-minded manufacturer to be the exclusive distributor of a new handset in the hope that it will prove popular.

It is widely recognized in economics and the law that such exclusive distribution arrangements, which have been a feature of the U.S. wireless marketplace since its inception, promote innovation, product differentiation, consumer choice and competition. Exclusive handset distribution arrangements encourage collaboration that optimizes handset performance and accelerates the delivery of next-generation features. They increase a carrier's incentives to make purchase commitments and to invest in promotions, network improvements and special training of sales staff. They lower manufacturer entry barriers and serve as a key tool to maintain brand value. And, as an important form of competition, they encourage other carriers and manufacturers to do better, by improving their own handset portfolios or the prices, features and other characteristics of their existing offerings.

It should be obvious that consumers would be the ultimate victims of any prohibition on exclusive handset arrangements. Government interference with carrier/manufacturer distribution agreements could only dampen and delay innovation and investment, reduce consumer choices and raise prices, all in the name of protecting individual competitors *from* the pressures of competition and allowing them to free-ride on the investments and risk-taking of others.²¹

There is no clearer proof of this than the iPhone arrangement that regulation advocates have adopted as their poster child. There is, quite simply, no more dramatic example of an exclusive arrangement creating enormous benefits for all consumers. The popularity of the iPhone and its innovative features and applications has provoked an unprecedented competitive frenzy, palpably accelerating not only handset innovation but the pace of wireless broadband investment and applications development. Before the iPhone, mobile handheld "computers" tended to be clunky, expensive devices with traditional applications; now, the marketplace is awash with innovative devices that allow consumers to do things that no one even imagined only a year earlier and that cost consumers less than their more limited predecessors.

The exclusive arrangement between AT&T and Apple is in no small part responsible for these spectacular public interest benefits – both for the close collaboration and enormous investment

²¹ Even if public policy was concerned with protecting small competitors *from* competition, rather than protecting competition and consumers, claims that exclusivity prevents smaller wireless carriers from obtaining desirable handsets on terms that allow them to remain competitive are simply false. In fact, an entire industry has developed for the wholesale distribution of wireless handsets to smaller carriers. These wholesale distributors buy in bulk (some, in greater quantities than any single U.S. wireless carrier), operate worldwide, and plainly have the clout to obtain favorable terms for popular handsets from the scores of manufacturers that compete in the vigorously competitive global handset market. Thus, even the smallest carriers offer dozens of handsets, from basic voice phones to the highest of the high end, including "smartphones" from multiple manufacturers that include the latest features. And smaller carriers also can (and do) band together to obtain their own handset exclusives.

that deal made possible and for the competitive envy and activity it engendered when it proved successful. With the benefit of hindsight it is easy to view the iPhone as a great boon for AT&T and Apple. In fact, both companies risked a great deal when success was by no means guaranteed. AT&T and Apple both invested heavily in bringing the iPhone to the market; brought to consumers brand-new innovations, such as visual voice mail, through deep collaboration; and risked billions of dollars on the device and its rollout. Press reports suggest that other wireless carriers were simply unwilling to take such enormous risks and make such enormous investments – the massive handset subsidies alone dwarf anything ever before experienced in the wireless industry – on an untried handset manufactured by a company with no wireless handset track record.

Those now calling for bans on such exclusive arrangements – and even government abrogation of existing contracts – should ask themselves whether they would be just as willing to repay wireless carriers and handset makers that took risks on new handsets that did *not* pan out as expected.²² The answer is, of course, no. And there is likewise no conceivable basis to conclude that it could be in the “public interest” to forgo future opportunities to unleash market forces through exclusive distribution arrangements: heavy-handed intervention in manufacturer and carrier choices would dramatically decrease the chances that consumers would reap the pro-competitive benefits of the next iPhone or whatever other as-yet-unimagined handset innovation is on the horizon.

Proposals to Expand Roaming Regulation. Nor is there any legitimate reason to expand the FCC’s current automatic roaming rules.²³ The FCC adopted comprehensive automatic roaming requirements for wireless telephone services in 2007.²⁴ The FCC’s rules contain a “home market” exception, and they do not apply to emerging broadband Internet and other “non-interconnected” data services. Contrary to the claims of participants here, both limitations are essential to promote wireless investment and avoid serious harm to consumers.

The FCC correctly has explained that, “if a carrier is allowed to ‘piggy back’ on the network coverage of a competing carrier in the same [home] market [where it has its own spectrum], then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage.”²⁵ Consumers would, then, be severely “disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage.”²⁶ The home market exception

²² The Motorola ROKR E680 is just one of many examples of an investment risk that failed. Despite significant investment by Cingular, Apple and Motorola, and the anticipation that this would be a game-changing device, the ROKR failed to connect with consumers. In turn, such a failure usually causes significant customer defections for the wireless carrier that took the risk.

²³ “Roaming” permits a customer to use other wireless carrier’s networks when traveling outside of the areas served by the wireless provider from which the customer purchases service. Roaming is typically implemented through agreements between carriers.

²⁴ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, ¶¶ 23, 28 (2007) (“*Automatic Roaming Order*”).

²⁵ *Id.* ¶ 49.

²⁶ *Id.*

encourages carriers to compete and invest by building out service in areas where they have spectrum. Those benefits are particularly important in rural and underserved communities, and the home market exception also produces significant public safety benefits, through increased wireless capacity and redundant networks.

The FCC has also correctly declined to extend roaming obligations to non-switched services such as wireless broadband Internet services. The provision of wireless broadband Internet services is an emerging marketplace with still-developing standards and practices that must address the enormous technical complexities of data network management and interconnection. The wide array of developing “data” services, devices and applications make it impossible to craft an automatic roaming rule without severe detrimental effects: network overload on account of unanticipated roaming demand, for example, would be felt broadly across all users, voice and data alike, roaming and home users alike. And, in the end, any such mandates would only encourage “piggy backing” and deter investment in and expansion of broadband wireless services.

Here, too, the proposals for increased regulation are directly at odds with the core public interest goals of encouraging investment, competition and employment.

Roadblocks To Wireless Investment And Innovation

Although increased regulation of wireless services is clearly unwarranted and would harm consumers, Government action is necessary to address the few remaining roadblocks to continued wireless investment and competition.

National Consumer Protection Rules. In 1993, Congress enacted section 332(c) of the Act, which recognizes that the wireless industry can operate efficiently only if regulation is uniform. Nonetheless, some state and local authorities have taken advantage of unresolved ambiguities in section 332(c) – particularly section 332(c)(3)(A)’s provision that states may regulate the non-rate “terms and conditions” of mobile service provision – to adopt the very patchwork of differing regulatory requirements that Congress was trying to eliminate. If state regulation forces wireless carriers to abandon a single, integrated service and instead tailor particular service offerings to particular local jurisdictions, service costs will inevitably increase and innovation will be slowed. Study after study has shown this to be the case.²⁷

Congress should preempt state attempts to impose their own wireless codes of conduct. States would retain the same, robust enforcement and regulatory role that they play with respect to any other national, competitive industries. State attorneys general and other state enforcement officers would still apply generally applicable consumer protection and fraud statutes to particular instances of conduct by wireless carriers, just as they do today against practices of a range of retailers that compete in national markets.

²⁷ See, e.g., T. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?* 56 Fed. Comm. L.J. 155, 176 (2003); S. Largent, *Statement before the Subcommittee on Telecommunications and the Internet*, at 14 n.20 (Feb. 27, 2008) (collecting sources).

Tower Siting Approvals. Delays in approving cell towers and related facilities obviously impair a wireless carrier's ability to provide better service coverage and to introduce new services. Congress sought to prevent these outcomes by directing in 47 U.S.C. § 332(c)(7)(A) that state and local authorities act "within a reasonable period of time" after a siting request is filed, set forth a valid basis for their decisions in writing, ensure that decisions do not discriminate among carriers, and be subject to judicial review within 30 days following their "failure to act." Unfortunately, the FCC has not fleshed out those statutory terms with more specific rules.

The resulting regulatory uncertainty has defeated Congress's intent, with state and local authorities in many cases delaying action on siting requests for many months or even years. Worse, those authorities often delay action even for "collocation" requests to place additional facilities on *existing* towers. As CTIA has described: "Of 3,300 tower and antenna applications pending in the Spring of 2008, 760 were pending for more than one year, and 180 were pending for more than 3 years. 135 of the 180 applications pending for more than 3 years are collocation applications."²⁸ Horror stories abound. In one case, a tower siting application has been the subject of 41 zoning hearings; in another case, a carrier experienced a delay of four years and seven months for a simple collocation request.²⁹

The FCC could easily solve this problem by adopting authoritative constructions of the statutory phrases "reasonable period of time" and "failure to act." CTIA has proposed that these phrases be construed to require local authorities to take final action on a collocation application within 45 days and act on other applications for siting authority within 75 days from submission of the application. If a local authority does not act within those reasonable periods of time, the application should be deemed granted.

Spectrum. There are limits to what can be achieved by accelerating tower siting decisions, important as that is. More significant improvements in service quality and innovation depend, in the end, on the amount of spectrum allocated to commercial uses. Over the medium and longer term, increasing the spectrum available for carriers to use will be the key regulatory change that will ensure that wireless carriers can continue to deliver the astounding array of cost reductions and innovative services that have benefited consumers over the past decades.

²⁸ See Letter from Christopher Guttman-McCabe, CTIA, to Marlene Dortch, FCC, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165 (filed February 13, 2009).

²⁹ See, e.g., Reply Comments of CTIA, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, at pp. 4-7 (Oct. 14, 2008) (cataloguing patterns of extreme delay).

COMMITTEE ON ENERGY AND COMMERCE

**SUBCOMMITTEE ON COMMUNICATIONS,
TECHNOLOGY AND THE INTERNET**

U.S. HOUSE OF REPRESENTATIVES

Hearing on "An Examination of Competition in the Wireless Industry"

WRITTEN SUBMISSION OF VERIZON WIRELESS

May 21, 2009

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WRITTEN SUBMISSION OF VERIZON WIRELESS

Verizon Wireless thanks the Subcommittee on Communications, Technology and the Internet for the opportunity to make this submission for inclusion in the record of the Subcommittee's May 7, 2009, hearing on competition in the wireless industry.

SUMMARY

In 1993, this Subcommittee and the full Congress established a deregulatory framework for the wireless industry.¹ This limited regulatory approach led to explosive growth in innovation, competition, and investment in wireless networks, providing huge benefits to the national economy. Companies are constantly expanding services and benefits to customers because they know they must fight fiercely to attract and retain those customers. As the FCC found in January 2009, "U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS."² *Consumer Reports* declared the same month that there is a "surge in satisfaction" among cellular customers, and that "Overall, cell-phone service has become significantly better. ... Sixty percent of readers were completely or very satisfied with their service."³ And this week, the American Customer Satisfaction

¹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. As the FCC stated, the "overarching congressional goal" of this statute was "promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Third Report and Order*, 90 FCC Rcd. 7988, 8012 (1994).

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 Commercial Mobile Services, *Thirteenth Report*, WT Docket No. 08-27, FCC 09-54 (released January 16, 2009) (hereinafter "Thirteenth CMRS Competition Report"), at 5.

³ Consumer Reports, "Best Cell-Phone Service," January 2009, at 28.

Index, an organization that measures customer satisfaction with the quality of various products and services, reported that “Customer satisfaction with wireless telephone services reaches a new all-time high for the third consecutive year.”⁴

As Chairman Boucher noted in his opening statement, “daily, new, attractive and useful applications are added to wireless services and data rates continue to increase ensuring that consumers can obtain faster access to mobile applications.” The Chairman defined the Subcommittee’s task as examining “possible ways in which federal telecommunications policy may be adjusted in light of these developments with the goal of enhancing the consumer experience and facilitating the future growth of mobile services.”

Verizon Wireless supports the Subcommittee’s effort. We offer below four specific actions that Congress should take to promote the further growth of wireless infrastructure, and to unlock the tremendous potential for Fourth Generation (“4G”) broadband services to serve consumers, businesses and the public safety community:

1. Adopt national consumer protection rules that will provide the industry and consumers with a single, consistent set of requirements. This framework would end the harmful impact of patchwork state utility-style regulation, while preserving states’ authority to police unfair or deceptive wireless company practices – just as they can police such practices by other industries.
2. Streamline the long and cumbersome siting process for wireless facilities that directly impedes improved public safety and commercial services. Congress should impose deadlines for zoning decisions on new towers as well as antenna collocations on existing towers, and take additional actions to expedite more reliable and expanded service to public safety agencies and individual consumers.
3. Direct NTIA and the FCC to identify government and commercial spectrum that is suitable for broadband services, so that this spectrum can be licensed and

⁴ “ACSI: Customer Satisfaction Rises Again, Now Jointed by Other Economic Indicators,” May 19, 2009 (http://www.theacsi.org/images/stories/images/news/0901q_Press_Release.pdf). ACSI also reported that satisfaction with Verizon Wireless jumped 3% “to continue its lead over the industry.”

cleared in sufficient time to make it available to meet the burgeoning demand for wireless communications.

4. Designate the D Block of the 700 MHz band for public safety licenses, in order to provide the nation's first responders with immediate access to spectrum to meet their future broadband needs.

During the May 7 hearing, however, some parties advanced proposals for new regulation that will not promote wireless investment and innovation, but will instead harm them. Government should always proceed cautiously with new regulation. Caution is imperative when regulation would be imposed on competitive enterprises, particularly those that are making major investments to meet consumers' needs despite a major economic recession. Unfortunately the actions proposed at the hearing would constitute the most intrusive and harmful form of Government intervention – economic regulation of private contracts among businesses. They would drag the Government into setting some of the prices, terms and conditions of commercial agreements. There is no factual or policy basis for taking these actions – and ample reason not to do so.

- Neither Congress nor the FCC should regulate the terms of device supply arrangements between manufacturers and providers. Exclusivity arrangements are common throughout the American economy (and statutorily mandated for patent holders), and drive innovation. Restricting them would clearly undermine innovation and disserve consumers. Moreover, Verizon Wireless has offered to limit exclusivity for devices manufactured by two of its largest suppliers – LG and Samsung – for a period not to exceed six months so that smaller carriers can gain access to those devices sooner.
- Congress and the FCC should also not expand regulation of roaming agreements among wireless companies to mandate home roaming or include all data services. The Commission's existing regulation, supplemented by the right of any company to file a complaint seeking relief from unreasonable or discriminatory roaming practices, has served consumers well. By intruding into the terms of commercial agreements, additional roaming rules would discourage providers from investing in their own networks by allowing companies to improperly piggyback off the investments of competitors.

- Finally, there is no basis for the FCC to intervene in the wireless backhaul market by reimposing price regulation. Wireless providers have a steadily increasing array of competing wireless as well as wireline backhaul providers to choose from, and prices for backhaul capacity are declining.

WIRELESS COMPETITION AND INNOVATION ARE SERVING CONSUMERS

The 1993 amendments Congress made to the Communications Act placed the wireless industry on a path toward innovation, expanded service, and competition that has well served consumers and the American economy. Wireless companies compete against each other every day to win and retain customers, and consumers and the economy have benefited enormously from this competition. For example:

- The FCC has consistently found that despite the consolidation that has taken place, the CMRS industry remains competitive and carriers continue to behave in a competitive manner. As recently as January 2009, in its annual report to Congress on the wireless industry, the FCC provided more than 150 pages of data to support its central findings that there is “effective competition” in the industry, and that “U.S. consumers continue to reap substantial benefits – including low prices, new technologies, improved service quality, and choice among providers,” from that competition.⁵
- Consumers are paying less today than they did 10 years ago while enjoying almost seven times as many minutes of use per month.⁶
- One study found that in 2006, approximately 3.6 million U.S. jobs were directly or indirectly dependent on the U.S. wireless industry, and that an additional 2-3 million jobs will be created in the next 10 years.⁷
- To secure and retain customers, providers know they must invest in networks. CTIA reports that as of June 2007, the wireless industry had invested more than \$233 billion (excluding the cost of spectrum) in building networks to deliver an

⁵ Thirteenth CMRS Competition Report at 5-11.

⁶ Letter from Christopher Guttman-McCabe, CTIA, to Secretary, FCC, PS Docket No. 06-229, January 28, 2008 (CTIA January 28 Letter”), at 2.

⁷ Entner, Roger and David Lewin, “*The Impact of the US Wireless Telecom Industry on the US Economy*,” Ovum-Indepen, September 2007, at 3.

increasing array of services to consumers, and the pace of substantial investment is continuing.⁸

- Driven by the imperative of retaining customers, providers have taken numerous pro-consumer actions, including adhering to CTIA's Consumer Code, which sets forth detailed practices that members must follow in marketing their services and in billing customers. In part due to these efforts, consumer complaints to federal and state regulators are few. During each month in 2008, the rate for complaints from Verizon Wireless's customers to the FCC, state PUCs, or state Attorneys General was about 8 complaints for every 1 million customers – a rate of only 0.0008%.
- Over 630 different handsets, manufactured by at least 33 companies, are sold in the U.S., and consumers have access to over 40,000 applications sold through numerous application stores.⁹

One of the witnesses at the hearing asserted that U.S. consumers fare worse than European consumers, but another witness disagreed.¹⁰ Data demonstrate that in fact, U.S. consumers enjoy lower prices and stronger competition:

- A recent study found that the price per minute of service in the U.S. is the lowest among 26 OECD countries, that U.S. customers have the highest minutes of use per month, and that the U.S. has the most competitive market among those 26 countries.¹¹
- U.S. consumers have access to more innovative devices, including the iPhone and many Blackberry and Treo models that are introduced here first. CTIA notes that in the last 18 months, many of the most advanced handsets have been launched in the United States, including Apple's iPhone 3G, LG's Voyager, Samsung's Instinct, Google's G1, and four Blackberry devices (Blackberry Storm, Blackberry Bold, Blackberry Pearl Flip and Blackberry Curve 8900).¹²

⁸ CTIA January 28 Letter, at 2.

⁹ Letter from Christopher Guttman-McCabe, CTIA, to Secretary, FCC, WC Docket No. 07-52, May 12, 2009 ("CTIA May 12 Letter"), at 2 and accompanying charts. We understand that CTIA has provided copies of this letter to the Subcommittee.

¹⁰ Written Testimony of Chris Murray, Senior Counsel, Consumers Union, May 7, 2009. Compare Written Statement of George S. Ford, Chief Economist, Phoenix Center for Advanced Legal and Economic Public Policy Studies, May 7, 2009.

¹¹ Merrill Lynch, "Global Wireless Matrix 4Q08," cited in CTIA May 12 Letter, at 3-4.

¹² CTIA May 12 Letter, at 11.

- Two studies filed with the FCC found numerous comparative advantages that U.S. consumers enjoy. One concluded, “A comparison of international statistics suggests that the U.S. wireless market, in fact, leads its European counterparts, and the U.S. wireless market, compared to Europe, appears to be more competitive and vibrant.”¹³

Wireless companies do not need regulation to incent us to protect our customers – we do it on our own. Verizon Wireless has brought numerous lawsuits against spammers, telemarketers, pretexters, and others who seek to deceive and defraud our customers. Earlier this month, for example, Verizon Wireless filed civil suits against two companies harassing its customers by selling automobile warranties. It also reached a settlement with several other companies which committed to stop illegal spoofing and telemarketing in selling auto warranties, and donated the settlement proceeds to charity. Verizon Wireless took these actions before the Federal Trade Commission brought its own lawsuits earlier this month against purveyors of these warranties.

Innovation is obvious not only in the hundreds of new devices, features and applications that consumers can obtain every year, but also in the deployment of new technologies that allow them to send and receive data at faster speeds. Verizon Wireless, for example, has invested billions of dollars to make not one but two major 3G network upgrades, and is now building an even faster 4G network. First, we implemented EvDO Rev 0, which offered customers average download speeds in the range of 400-700 Kbps. We then again upgraded our network to EV-DO Rev A, which further increases speeds and enables customers the ability to send and receive files much faster than before. With

¹³ American Consumer Institute, “Comparison of Structure, Conduct and Performance: U.S. versus Europe’s Wireless Market (August 22, 2007); <http://www.theamericanconsumer.org/2007/08/22/comparison-of-structure-conduct-and-performance-us-versus-europe%e2%80%99s-wireless-markets/>; see also Mark Lowenstein, “Comparisons Between U.S. and European Markets for Wireless Services and Devices: Myth vs. Reality”, attached to Letter from John T. Scott, III, Verizon Wireless, to Secretary, FCC, RM-11361, filed August 28, 2007.

Rev A, customers experience average download speeds of 600 Kbps to 1.4 Mbps and average upload speeds of 500-800 Kbps. This translates to being able to download a 1 Megabyte e-mail attachment – the equivalent of a small PowerPoint presentation or a large PDF file – in about eight seconds and upload the same file in less than 13 seconds, not only while sitting at a desk but also while traveling.

In 2009 and beyond, much of Verizon Wireless's investment will be to deploy 4G LTE technology, which multiplies both up and down speeds many times, using the 700 MHz spectrum we paid the Government nearly \$9 billion for last year. We are the first carrier – in the U.S. or abroad – to test and deploy LTE. We plan to have service up and running for customers in 25-30 markets in 2010, with a nationwide deployment completed over the following five years.

The multi-billion dollar investments that we and our competitors are making in jobs and infrastructure are driven by our industry's unstinting effort to demonstrate value to customers through network coverage, service reliability, and the products we offer. This is exactly how free markets are supposed to work, and it validates the significant benefits of maintaining a very limited regulatory framework.

However, there are four concrete actions Congress should take to improve the benefits that consumers and the national economy reap from this competitive, innovative industry: It should enact a national framework for wireless consumer protection, change existing law to expedite tower siting that will provide improved service and speed infrastructure investment, identify new spectrum for broadband, and provide public safety with spectrum for broadband. We stand ready to provide additional information to the

Subcommittee that will help it to develop legislation in these areas, and thereby set a national wireless policy that will support continued growth, investment and innovation.

ACTIONS THAT CONGRESS SHOULD TAKE TO PROMOTE WIRELESS COMPETITION AND INNOVATION

1. Enact a National Framework for Wireless Consumers.

While wireless services are increasingly nationwide, and allow customers to benefit from national rate plans that offer the same prices and services across state boundaries, some states continue to attempt to assert monopoly utility-type regulation over the wireless industry.¹⁴ Left unchecked, these re-regulatory efforts will force wireless carriers to follow different rules in different states and undo the benefits of deregulation – a result antithetical to Congress’ goal in 1993.¹⁵

The wireless industry is an intensely competitive consumer electronics business, no different than Apple and Dell and other high-tech businesses – yet state PUCs do not regulate those companies. Wireless providers should not receive special treatment, only the same treatment accorded other competitive businesses. The federal government is in

¹⁴ For example, Minnesota sought to regulate wireless prices through a detailed set of requirements for contracts. Although the U.S. Court of Appeals for the 8th Circuit struck down the law in *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005), the wireless industry had to fight this attempt to impose utility-type regulation for two years. Yet Minnesota is now proposing another set of wireless-specific rules. The California PUC is proposing onerous rules that would impose outage reporting rules at variance from the comprehensive FCC outage reporting system and require particular materials to be available in stores. New Mexico prohibits certain types of charges on bills that require carriers to have different bill formats and limit products and services carriers can offer to customers in that state.

¹⁵ States and local governments also continue to impose onerous and discriminatory taxes and fees on wireless companies and subscribers. The average combined rate for federal, state and local taxes is more than 15%, and over 20% in Florida, Nebraska, New York and Washington. These rates are well above the rates imposed on other competitive goods and services. Hearing on H.R. 5793, the “Cell Tax Fairness Act of 2008, before the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Testimony of Scot Mackey, Kimbell Sherman Ellis LLP, September 18, 2008. Consumers would benefit greatly from a national policy that prevents new discriminatory taxes from being imposed. We thus ask the Subcommittee to refer to the Judiciary Committee with a favorable recommendation for H.R. 1521, the “Cell Tax Fairness Act of 2009.”

the best position to oversee this national industry, which serves the public across and without regard to state lines.

The answer to patchwork, utility-type regulation is for Congress to complete the job it started 16 years ago, and adopt a national framework for wireless oversight. That framework would direct the FCC to set national consumer protection standards in areas including disclosure of the terms of customer service agreements, service coverage, and billing practices. State PUCs would no longer have authority to impose utility-style regulation on a competitive industry that is nothing like a utility. But the states would retain all of their power through their Attorneys General to protect against unfair and deceptive consumer practices if and when they determine such practices exist, under their generally applicable consumer protection statutes.¹⁶

National regulation serves the public interest because it benefits all consumers in all states by setting uniform protection and service quality standards for wireless consumers. Individual state-by-state regulation cannot do that. And, it avoids disparate state requirements that raise operational costs and cause uncertainties for companies, create confusion and inconvenience for consumers, delay new services or options that consumers would otherwise enjoy, and discourage investment.

States would not lose power to address unfair and deceptive practices. Under the national framework, states would continue to enforce their consumer protection statutes of general applicability, but would not be able impose state specific wireless regulations. State Attorneys General would thereby lose none of their authority to go

¹⁶ Two witnesses at the May 7 hearing discussed the harms to consumer welfare of state-by-state regulation and the benefits of a single set of rules, and supported national framework legislation. Written Statement of George S. Ford, Chief Economist, Phoenix Center for Advanced Legal and Economic Public Policy Studies, Written Statement of Victor H. "Hu" Meena, President and CEO, Cellular South, Inc., at 11.

after practices that they believe are unfair or deceptive. States may also adopt consumer education programs, refer complaints to carriers for resolution, bring formal complaints against carriers they believe are acting unlawfully, and investigate wireless practices. This new framework will maximize protections to all consumers nationwide, while avoiding the harms of patchwork state-by-state regulation.

Last year, the Subcommittee developed a discussion draft of a national wireless consumer protection bill. We stand ready to work with the Subcommittee to refine that bill to achieve a single set of national consumer protection standards while preserving states' ability to challenge what they believe to be unfair and deceptive practices.

2. Streamline Tower Siting to Expedite Investment in Wireless Infrastructure.

One of the biggest barriers wireless companies face in reaching consumers in unserved and underserved areas, or in adding capacity to meet consumers' needs for more bandwidth, are the costs and delays associated with the laborious tower siting process. Investment suffers from long and unreasonable waiting times for new sites to gain state or local zoning approval. This is a public safety problem as well. Thousands of public safety agencies and first responders depend on reliable and expansive wireless networks to help citizens and respond to emergencies. Public safety agencies also depend on access to new or modified towers to meet their growing needs.

Congress should take steps to eliminate barriers to public safety as well as commercial wireless deployment by placing and enforcing meaningful bounds on the state and local zoning process. These steps would not prohibit lawful zoning practices. But they would expedite investments in wireless infrastructure, thereby meeting Congress' and the Administration's goals of encouraging investment in order to stimulate

the economy and expand broadband's availability to consumers. There are three aspects of the state/local process that need to be fixed.

First, Congress should amend Section 332 of the Act to exempt certain antenna collocations and tower modifications from zoning approval. Companies are often required to seek zoning approval to add new antennas to an existing building or structure or to replace existing antennas, even if the change in appearance of the tower is minor and often invisible. These requirements impact broadband buildout because deploying broadband in new areas often involves locating antennas on existing towers. Congress should amend Section 332(c)(7) of the Communications Act to limit state and local authorities' authority to require zoning approval for collocations that do not result in a "substantial increase" in the tower.¹⁷ Similarly, antenna modifications that do not constitute a "substantial increase" should be excluded from the zoning process.

Second, Congress should amend Section 332 of the Act to impose a "shot clock" on the zoning process. Zoning delays frustrate wireless company efforts to meet FCC buildout requirements and slow deployment of broadband services that will benefit consumers. In July 2008, CTIA thus filed a *Petition for Declaratory Ruling* ("CTIA Petition") asking the FCC to define when a state or local zoning authority has "failed to act" on a zoning application.¹⁸ CTIA, Verizon Wireless and others provided many

¹⁷ The term "substantial increase" has been defined by the FCC in the context of historic preservation reviews on existing towers to include significant changes in appearance of the tower or its site. *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 16 FCC Rcd 5574, 5577 (Wireless Tel. Bur. 2001) ("*Collocation Agreement*").

¹⁸ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 (2008).

examples of unreasonable zoning delays and the resulting harm to broadband services.¹⁹ They demonstrated that these delays are particularly unjustified and harmful for changes to existing tower sites in order to improve coverage, add broadband capability, or expand the number of wireless competitors in a community.

To curb these delays and give effect to Section 332(c)(7) of the Act, CTIA asked the Commission to declare that a “failure to act” under this Section has occurred if a zoning authority fails to render a final decision within 45 days on a wireless facilities siting application proposing to collocate on an existing structure or within 75 days for all other applications.²⁰ If a zoning authority fails to issue a decision within these timeframes, the application will be deemed granted. In the alternative, CTIA asked the Commission to establish a presumption that when a zoning authority cannot explain a failure to act within these time frames, a reviewing court should find a violation of Section 332(c)(7)(B)(ii) and issue an injunction granting the underlying application.

Nearly a year later, the Commission has not acted on CTIA’s Petition. While we will continue to urge the FCC to do so, Congress should enact legislation, because unreasonable zoning delays impede expanded public safety as well as commercial communications, and slow investment in infrastructure, directly undermining Congress’s and the Administration’s economic stimulus and broadband objectives.

Third, Congress should amend Section 253 of the Act to clarify that zoning ordinances that materially interfere with wireless services violate that section. Another cause of delay in expanding wireless coverage is the proliferation of zoning ordinances

¹⁹ CTIA Petition at 13-16; Verizon Wireless Comments, WT Docket No. 08-165 (filed September 29, 2008) at 6-7; Verizon Wireless Reply Comments, WT Docket No. 08-165 (filed October 14, 2008) at 4-6 (citing examples from other party comments).

²⁰ CTIA Petition at 24-26.

that are designed to make wireless facilities siting far more difficult or to extract unreasonable fees from wireless companies. The effect of many of these ordinances is to prohibit wireless facilities siting in a particular area, impeding expansion of public safety as well as commercial wireless networks.²¹

Wireless companies should be able to overturn particularly egregious zoning ordinances by showing that the ordinances violate Section 253(a) of the Act by erecting requirements that “*may prohibit or have of the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*”²² Last year, however, the U.S. Court of Appeals for the 9th Circuit reversed its prior interpretation of Section 253(a) and held that that “a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”²³ This ruling imposes a stricter standard for demonstrating a Section 253(a) violation than the FCC has itself set. While the FCC, joined by several circuits, has required a carrier to show that a local requirement materially inhibits a carrier’s ability to compete in a fair and balanced legal and regulatory environment,²⁴ the 9th Circuit’s

²¹ Examples include ordinances which dictate use of a particular technology, set forth no standards for approving wireless tower applications and reserve unfettered authority to the zoning authority, impose unreasonable or impractical minimum parcel size or tower fall zone requirements, impose severe height or coverage limitations, and mandatory review by a consultant (often the very consultant who assisted the locality in drafting the ordinance) with excessive fees for the consultant’s services.

²² 47 U.S.C. § 253(a).

²³ *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 551 (9th Cir. 2008). *See also Level 3 Communications, L.P. v. City of St. Louis*, 477 F.2d 528 (8th Cir. 2007).

²⁴ *In the Matter of California Payphone Ass’n*, 12 FCC Rcd 14191, 14206 ¶ 31 (1997); *see also In the Matter of Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶¶ 3, 22, 81 (1997). The FCC’s interpretation of Section 253(a) has been endorsed by the First, Second and Tenth Circuits. *See Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004).

decision effectively requires a showing that the ordinance creates an insurmountable barrier to entry or drives the provider out of a market entirely.

The FCC's construction of Section 253(a) is consistent with both the language and intent of the statute. The statute's preemption of local requirements that "have the effect of prohibiting the *ability* of any entity to provide" service does not naturally lend itself to a strict concept of "prevent" or "preclude."²⁵ Moreover, the statutory purpose of eliminating barriers to entry would be thwarted if preemption was not available for local actions that materially inhibit the efficient functioning of competitive markets. Congress should fix this problem by codifying the FCC's interpretation of Section 253(a) and preempting local actions that materially inhibit a carrier's ability to compete in a fair and balanced legal and regulatory environment.

3. Direct NTIA and the FCC to Identify Spectrum Suitable for Broadband.

There is no doubt that consumers' reliance on wireless devices for broadband services, and thus their need for more bandwidth, will continue to grow. Wireless providers need suitable and sufficient radio spectrum in order to meet this need. The Government has the responsibility to identify and license that spectrum in the public interest. As Chairman Boucher recognized in his opening statement, one way to accomplish this is to "direct NTIA to undertake a survey of possible new spectrum that can be auctioned for this purpose." Congress's and the industry's experience with repurposing spectrum from federal to commercial use teaches that this will be a multi-year process. Reallocating the AWS spectrum, for example, consumed many years, yet portions of that band still remain uncleared of federal agency users. The sooner Congress

²⁵ See *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004).

directs NTIA to identify candidate government spectrum bands, the sooner Congress can move toward making more spectrum available for the growing bandwidth demands of consumers and businesses.

Congress should also direct the FCC to identify which non-federal bands can be reallocated for commercial wireless services. While several bands have recently been made available for broadband services, e.g., the AWS, 700 MHz, and BRS bands, the anticipated growth of bandwidth-intensive services will require additional spectrum allocations. The FCC should take proactive steps now to ensure such spectrum is available when it is needed. It should start by conducting a spectrum inventory to determine which bands suitable for broadband can be made available for that purpose.

It is not necessary, however, for legislation to direct the FCC to conduct an exhaustive inventory of all spectrum bands it manages, as many of those bands would not be suitable for broadband, and some are already allocated and available for such services. For example, conducting a detailed inventory of spectrum bands used for commercial mobile radio services would not produce useful information that would lead to the identification of more spectrum for broadband. Some of these bands have already been widely deployed for broadband services (e.g., cellular and PCS), while others have not yet been cleared and made available for use (e.g., AWS and 700 MHz).

Limited NTIA and FCC resources should be devoted to inventorying those spectrum bands that provide the best candidates for future allocation, licensing, and deployment for broadband services. Moreover, the agencies should focus on identifying spectrum bands that can be harmonized with spectrum allocations in other parts of the world. Global harmonization of spectrum allocations can lead to significant public

benefits, including lower equipment cost, more rapid deployment, and greater interoperability of advanced wireless systems worldwide.

4. Designate the 700 MHz D Block Spectrum for Public Safety Use.

The 700 MHz auction is generally viewed as a tremendous success, raising nearly \$20 billion for the U.S. Treasury and licensing new spectrum to meet growing consumer demand. But it failed to achieve one important objective: It did not address public safety's dire need for a national, interoperable, wireless broadband network.

It has been nearly eight years since the 9/11 attacks exposed the serious lack of interoperability that plagues the nation's public safety communications networks. We should not arrive at the ten-year anniversary of 9/11 without having a plan to address public safety's needs once and for all. It is time for Congress to step up and enact a bold new plan to address this national security imperative.

Licensing the D Block through another FCC auction is the wrong path. The D Block auction failed for many reasons. For one thing, its economics were fundamentally flawed. The FCC's concept was that someone would be willing to spend the money to build a network for public safety, in exchange for gaining access to public safety's adjoining spectrum. But the unavoidable problem with that concept is that the cost of building such a network far exceeds the value of the spectrum, particularly given first responders' desire for stringent performance standards. The auction also failed because the rules created far too much uncertainty for bidders. Too many essential details were left to post-auction negotiation, leaving prospective bidders without knowing what obligations they might incur.

Public safety can benefit when government and commercial interests develop effective partnerships. But a “redo” of the failed D Block auction is not the answer, because the goals of auctioning spectrum to the highest bidder, and building a state-of-the-art public safety broadband network, are fundamentally at odds. The more the FCC tips the rules to encourage broad and vigorous participation by bidders, the less it can ensure public safety’s objectives. The FCC’s D Block “conditioned license” approach is not the solution, as the last auction results made clear. It is economically flawed and fraught with inevitable uncertainty and risk – both for public safety and for bidders.

Verizon Wireless has thus been advocating a plan based on a new public-private partnership approach being put forward by New York City and other large cities. This approach would ensure that control over the process remains in the hands of those that best understand public safety’s needs – state and local law enforcement and first-responder agencies. It has four key, interdependent principles.

First: Congress should reallocate the D Block to Public Safety, directly. By providing public safety with both access to sufficient spectrum and direct control over its use, Congress can ensure that the D Block is used to meet public safety’s expanding communications needs.

Second: Congress should direct the FCC to license the D block spectrum and the adjoining 10 MHz of public safety broadband spectrum to public safety agencies on a state and local (or regional) basis. Direct assignment of all of the spectrum to state and local public safety entities will enable them to have greater control over network design and day-to-day operation, based on local factors such as geography, population distribution, public safety capacity needs, and existing commercial networks.

Third: Congress should direct the FCC to adopt a national technical framework that will ensure nationwide interoperability. While local or regional networks may be the best way to satisfy public safety diverse needs, letting them develop independently without any guiding national principles would repeat the mistakes of the past. This problem can be avoided by using IP-based solutions and establishing national technical standards that ensure these IP networks work together as one.

Fourth: public safety should be free to select the commercial partner or partners of their choice, using an RFP process or similar competitive approach. Local or regional partnerships that are tailored specifically to meet the needs of individual public safety agencies across the country are more likely to succeed than attempting to establish a single national partnership through an auction, which would require public safety to commit to a single model that may not satisfy local public safety agencies' needs.

By establishing a national plan that follows these principles, and providing state and local governments with federal funding to implement the plan, Congress will put the country in the best position to address emergency communications needs. Public safety agencies get control over use of the spectrum, control over how the networks are built, and control over who they partner with. By partnering with the private sector, these agencies leverage the tremendous investment in networks that have already been made, eliminating significant costs for state and local government. We urge the Subcommittee to move quickly toward legislation accomplishing this approach because it best meets the urgent need to achieve interoperable public safety networks.

NEW REGULATION OF AGREEMENTS WIRELESS CARRIERS USE TO OBTAIN HANDSETS, ROAMING, AND BACKHAUL WOULD BE UNJUSTIFIED. AND WOULD HARM INNOVATION AND COMPETITION.

While Congress should enact single set of national consumer protection rules, streamline tower siting, identify new spectrum for broadband, and provide public safety more spectrum, some parties have called for new regulation of contracts wireless carriers use to build and run their business. Specifically, they want Congress or the FCC to intervene into the private agreements wireless carriers negotiate to purchase handsets for resale to their customers, to obtain roaming rights, and to secure network backhaul capacity to transmit their traffic.

The Government should always be extremely wary of intruding into contracts that are negotiated among private businesses. It is axiomatic that regulation can distort markets and create inefficiencies by affecting the behavior of competitive businesses. Regulation that intervenes into private contracts to set prices, terms or conditions is particularly harmful, because it affects the very essence of a free market – firms competing to differentiate themselves and attract customers through negotiation of contracts for the goods and services they need. Calls for regulating private business agreements should be suspect in any competitive market. They are especially misguided in the context of the hypercompetitive wireless industry, where literally hundreds of suppliers, application developers and service providers compete every day to develop and market hundreds of constantly evolving products, features and services.

1. Regulating Exclusivity Arrangements In the Competitive Device Market Would Be a Radical Government Intrusion That Would Hurt Innovation.

The Rural Cellular Association (RCA) has asked the FCC to examine exclusive handset arrangements in supply contracts between wireless service providers and equipment manufacturers and to “adopt rules that prohibit such arrangements when contrary to the public interest.”²⁶ In testimony to the Subcommittee, Cellular South asked for legislation to restrict exclusivity agreements. The claim is that equipment vendors do not offer smaller wireless providers an adequate array of handsets, and, therefore, consumers would rather obtain equipment and service from a large provider with more handset selections.

Neither Congress nor the FCC should accede to these requests because:

- The wireless device market is fiercely competitive. No regulation is needed to enable consumers obtain the innovative devices that fit their needs.
- Exclusivity arrangements are beneficial to consumers because they drive a broad array of innovative and constantly evolving wireless devices. Restricting these arrangements would, by contrast, mean that putting resources at risk for R&D and new devices has *zero* value, because a competitor could immediately market the same device, without investing any capital or incurring any risk of its own. Just as patent and copyright laws safeguard and encourage innovation, so does device exclusivity promote investment and innovation, which in turn benefits consumers.
- There is no economic rationale for regulating handset procurement agreements. Doing so would be a radical and unwarranted intervention by the Government into private contracts.
- Regulating “exclusivity” would be unworkable given the innumerable variations in how devices are developed, customized, and marketed. The requested ban will not put any specific device into the product line-up of any particular provider.

²⁶ Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497, filed May 20, 2008.

The Wireless Device Market is Highly Competitive.

The U.S. handset market is characterized by significant competition among about three dozen well-established and newer, independent manufacturers, including Motorola, Nokia, LG, Samsung, Research in Motion, Palm, HTC, and ZTE. From these manufacturers, hundreds of wireless phones and devices are available to U.S. consumers. CTIA recently noted that consumers have access to 630 different wireless handsets and devices, compared to, for example, less than 150 in the U.K.²⁷

Equipment manufacturers offer their products to consumers through many channels, including big box stores, wireless providers, and the manufacturers' own websites. In short, consumers have choices, and they make selections based on what features they find attractive. Exclusive handset arrangements that manufacturers might have with service providers are not preventing them from selling equipment to *multiple* service providers, and such arrangements are not preventing service providers from offering communications services featuring *multiple* manufacturers' handsets. No single manufacturer or service provider has sufficient market power in its respective market to control the wholesale or retail distribution chain or prevent a handset manufacturer from working with its wireless carrier competitors. The relevant question is not whether two or more wireless providers can distribute the same device such as the LG Voyager, but whether wireless providers can work with equipment manufacturers to develop a device competitor to the LG Voyager. That answer is clearly "yes."

RCA and Cellular South assert that the market share of larger providers is a barrier to distribution of desirable handsets by smaller carriers, but offer no supporting

²⁷ CTIA May 12 Letter at 2 and accompanying charts.

facts. While manufacturers want to sell as many units as possible and to get a firm commitment from large providers to buy as many units as possible, there is nothing to stop smaller providers from banding together, and so representing potentially millions of subscribers, to get products. That is exactly what Bell Atlantic NYNEX Mobile, AirTouch Cellular and US West New Vector did when they were regional carriers to secure new handsets. Some rural providers have taken similar steps to jointly purchase devices, and can expand those efforts to form larger buying consortia.

Exclusivity Arrangements Benefit Consumers and Drive Innovation by Protecting Intellectual Capital and Promoting Risktaking.

Desirable new devices generally arise from exclusive arrangements because having the latest and greatest device is a primary driver for competitive differentiation in the wireless marketplace. Verizon Wireless and its suppliers spend substantial resources to develop new devices. Exclusivity arrangements – like copyrights and patents – encourage handset developers and carriers to take risks that lead to innovation, by protecting innovation and intellectual capital and discouraging “free riding.”

Offering “exclusive” handsets is a critical way to implement new devices and features, and serves as a point of competitive differentiation among wireless providers. Exclusive arrangements, including time-to-market based arrangements, also promote innovation and consumer choice. Competition for “exclusive” handsets has repeatedly produced innovations in technology and features that benefit consumers and ultimately all wireless service providers. However, wireless providers would have less incentive to develop and promote a handset that every other provider will have immediate access to without having to make a comparable investment in research and design. Requiring every handset to be available to competing providers, who can “free ride” and pick and

choose among the handsets that have been successful, will only deter investment in the innovation that has benefited consumers.

The substantial cost to design the increasingly sophisticated devices consumers want – many of which function as handheld computers – will be borne by the service provider or by the consumer. Exclusive arrangements have the economic benefits of encouraging branding and promotional efforts by the provider, which generally will include offering the “exclusive” handset at a subsidized price to help it ensure a revenue stream from the handset and to help shift the costs of the new device away from the consumer to make it more affordable. Conversely, allowing competitors to market the same devices – without incurring any of the extensive research and development investment that these devices require – would clearly undercut the economics of (and deter investment in) innovative new products.

RCA and Cellular South would like to perpetuate an inaccurate view of the development of wireless devices: that manufacturers create an array of handsets, and then the large carriers go in and tell them which ones to put into a lockbox. In fact, devices do not result merely from manufacturers’ innovation. Rather, they result from collaboration between manufacturers and carriers. Most devices that Verizon Wireless offers are products of enormous investment of time, money and personnel by both companies. For example, Verizon Wireless starts developing a line of handsets months ahead of the time those handsets would be marketed. We work very closely with manufacturers to develop the technical and “look-and-feel” requirements for each handset. Beyond the basic operating system and service chips – which are available to all manufacturers and providers – these requirements may include programs to access certain

features that we offer, such as location-based services or music services. They may also include features that we determine are important to customers, for example, the width of the handset, the sensation from a touch screen, the configuration of a QWERTY keyboard, and colors. Once all these requirements have been determined, they are provided as a package of specifications to the manufacturers who produce the finished products. The resulting devices can reflect various combinations of generic, exclusive and proprietary elements, depending upon the handset and manufacturer.

For another carrier to market the “same” device, it would have to intervene in this development process – which obviously raises concerns about access another carrier’s confidential and proprietary market research and development process. Government intervention into this process by regulating device contracts would dampen if not kill individual carrier research into creativity and consumer preferences because suppliers and providers would not be able to protect their proprietary work.

There is No Economic Support for Intervening in Private Agreements.

Neither RCA, in its petition to the FCC, nor Cellular South in its testimony to the Subcommittee, offered any economic analysis or evidence supporting their demand that the Government regulate the terms of agreements between handset manufacturers and carriers. Their assertions of lack of consumer choice ring hollow given the conflicting evidence amassed by the FCC in its yearly competition reports and other data placed in the record of the RCA proceeding.²⁸ Their efforts are more about seeking a Government “thumb on the scale” to assist them, than it is about serving wireless consumers.

²⁸ RCA’s Petition and comments on the petition are available on the FCC’s Electronic Comment Filing System under Docket No. RM-11497.

In fact, there is extensive economic evidence that exclusivity agreements are pro-competitive and drive innovation. For example, economist Michael Katz recently submitted a detailed declaration to the FCC in opposition to RCA's petition. He concluded, "It is widely accepted in legal, public policy, and economic analysis that exclusive contracts frequently promote competition and consumer welfare," and that "The evidence indicates that use of exclusive contracts between wireless carriers and handset manufacturers promotes competition and benefits consumers."²⁹

The economic value of exclusivity arrangements is apparent because they are common among many industries, including the consumer electronics industry. Consumers are familiar with products being associated with certain retailers (MACs with Apple), or some products only working in conjunction with certain other products (certain games with Xbox or Sony's Playstation). Toyota automobiles are not available at Ford dealerships, and Dell PCs are not available at Apple's stores. Many retailers develop "house" brands that are uniquely available at their stores. Handsets are built with many functions and features that provide multiple opportunities for differentiation. As in other industries, each provider must determine what combination of features and functions will attract customers. For the Government to intrude into private contracts by regulating exclusivity terms would undermine the very innovation and differentiation that the Government should want to promote.

²⁹ Michael Katz, "An Economic Analysis of the Rural Cellular Association's Petition for Rulemaking Regarding Exclusivity Arrangements," attached to Comments of AT&T on RCA Petition, RM-11497, filed February 20, 2009.

Regulating Exclusive Arrangements Would Be Totally Unworkable.

There would also be enormous and intractable obstacles to regulating exclusivity agreements. First, U.S. wireless devices are broadly divided between CDMA, GSM and iDEN, technologies that are not interoperable. AT&T operates a GSM network, and the iPhone is only marketed in the United States as a GSM device. Would regulation require Apple to build a CDMA version? Sprint Nextel offers Motorola push-to-talk devices using iDEN technology, which is generally not available through other providers. Would Motorola be required to build a GSM version of an iDEN device? In both cases, these devices are “exclusive” in that customers of carriers using different technologies cannot buy them. There are other intervening barriers based on provider technology choices and equipment vendor business choices. Historically, some handsets have always been “exclusive” in that the vendor for business reasons excludes certain carriers, for example, by technology choice (Motorola’s iDEN devices) or by business planning (Nokia’s focus on GSM technology). Regulating exclusivity would improperly intervene in the device sector’s technology choices.

Second, there are many forms of exclusivity agreements, ranging from the exclusive marketing arrangement to exclusive deals for specific handset colors. Simply identifying what agreements to regulate would be problematic. If Samsung designs a device with a user interface developed by Verizon Wireless, does that device have to be made available to any competitor? What about other shapes and features? What about agreements to sell a device only in certain retail outlets or markets? What about the device’s name and branding? Most devices are “exclusive” in that they are customized

for particular carriers, who then use the devices to differentiate their offerings. When and how would the Government force suppliers to offer these devices to other providers?

Third, the nature of wireless networks makes close collaboration between network providers and device manufacturers essential, and may lead to exclusive agreements or *de facto* exclusive devices. Wireless devices are *part* of the wireless network. Devices like the Blackberry and iPhone depend upon tight integration between the hardware, software, and network to enable a high-quality and successful user experience, and an exclusive handset developed by collaboration between the service provider and equipment vendor ensures that successful handset. Verizon Wireless works with manufacturers to design the many different technical and “look-and-feel” requirements for each handset, ranging from available applications like location-based services and music services, to “form factors” such as the style of keyboard. It would make no sense to obligate the manufacturer to sell that device to other carriers.

Fourth, the unique user experience on wireless devices developed by specific providers, essential to competition-driving differentiation, would be negated by a mandate that manufacturers offer the devices to other providers. Most Verizon Wireless handsets provide the user with the same user experience, such as how calls are made and what features are available. Subscribers can move from a Motorola, to a Samsung, to an LG handset without noticing who made the handset yet experience the same look and feel and features. Exclusive arrangements help ensure that the manufacturer will build a handset with a consistent user experience, resulting in easier procedures for customer switching and facilitating the provision of customer service and repair. Forcing providers

to offer “the same” handset for every device model would undermine the creativity and differentiation that goes into the internal software and feature specifications.

It would be impossible to force providers to offer “the same” handset for every device model without eliminating the creativity and differentiation that goes into the internal software and feature specifications. If a manufacturer stripped out the specific proprietary elements, so that it could be sold by other providers, the handset may be an LG Voyager, but it would not be the same LG Voyager offered by Verizon Wireless. The idea that any provider can sell the same iconic handset is true only to a certain extent – the handset each provider sells will ultimately be tied to the quality, features, and functionality of what the provider has put into the network based on its own views of what the market demands. Ultimately, the process requires the wireless provider to go to market with a device that may or may not be successful. The provider has to absorb that risk. But RCA or Cellular South notably do not complain about not getting the devices that did not succeed.

Verizon Wireless Agreed to Limit Exclusivity at the Request of Small Providers.

Cellular South testified before the Subcommittee that the largest wireless companies lock up popular handsets with exclusivity agreements. It did not advise the Subcommittee that in fact, more than two months ago, and at CellSouth’s request, Verizon Wireless voluntarily agreed to eliminate long-term exclusive agreements with two major handset makers for CellSouth and 24 other small providers. Cellular South informed these companies, which comprise a the Associated Carrier Group (ACG) consortium, “In a spirit of cooperation with ACG, Verizon Wireless has agreed to limit any exclusivity arrangements covering Verizon Wireless handsets that are produced by

equipment vendors LG and Samsung to no longer than six months following launch of the handset." It also referenced this agreement in a letter to the FCC.³⁰ Verizon Wireless has advised RCA that it is willing to extend this agreement to other smaller providers.

From its testimony it now appears that what Cellular South seeks is not simply a limit on contractual exclusivity terms, which by definition restrict the marketing of a device for some period of time after it launches in the market, but a Government-granted right to barge into the device development process before devices are launched. It asserts that it "needs" to gain access to devices in development in order to have competing devices. This request is breathtaking in its implications as well as totally unjustified. Cellular South would overturn the fundamental rationale of trade secrets – the right of manufacturers and carriers to work on new products without fear of competitors gaining access to their obviously proprietary work. Never to our understanding has the Government compelled companies to allow competitors to access products that have not yet even been launched. That Cellular South would make such a request exposes the illegitimacy of its call for Government intervention into the handset device market.

2. New Roaming Regulation Is Unwarranted and Would Deter Investment in New Infrastructure and Technology.

The FCC relies on limited regulation of intercarrier roaming, which recognizes the benefits of leaving carriers largely free to work out mutually advantageous agreements, as carriers do with other contracts they use to run their businesses. It allows carriers to negotiate roaming contracts subject to the obligation to deal in good faith and

³⁰ Letter from David Nace, Counsel for Cellular South, to Secretary, FCC, RM-11497, April 23, 2009.

not seek unreasonable or discriminatory terms and conditions. The Commission emphasizes that it will vigorously enforce those bedrock requirements.³¹

The current system of market-based automatic roaming agreements has spurred innovative new services and lower prices.

The FCC's roaming policy has paid off in three ways: Service providers are investing in new technologies, roaming charges have steadily declined, and carriers are building out in rural areas in order to minimize the high "tollgate" roaming charges formerly imposed by rural carriers.

Providers are investing to expand their footprints and upgrade their networks from analog to 2G and 3G digital technologies and soon to 4G networks. Competitive roaming policies promote this trend by incenting carriers to develop networks capable of providing advanced services to customers. Carriers with advanced services are willing to give favorable roaming terms to other carriers that have implemented similar advanced technology in their networks so that when customers roam they can use these same advanced services. The marketplace thus drives carriers to modernize their networks. Customers that buy a new product or service in their home market want to have those capabilities when they travel. Accordingly, carriers offering the new product or service have the incentive to negotiate when to make the innovations available to their roaming partners at competitive rates.

Roaming prices have also declined. Customers increasingly demand the ability to travel outside of their home markets and use their wireless services as they travel. In response, service providers have developed regional and national calling plans that allow

³¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) ("CMRS Roaming Order").

customers to roam onto other networks. Competitive pressures have also forced providers big and small to lower costs in an effort to offer lower prices to their customers. One of the most significant costs carriers face is the cost of roaming. Thus, the healthy competition in the CMRS marketplace has exerted a downward pressure on CMRS roaming rates. Indeed, the Commission recently found that “the contribution of roaming revenues to total service revenues continued its decline . . . to 2.7 percent in 2007, down from over ten percent seven years ago.”³² Verizon Wireless’ experience is that the average roaming rates today are less than ten percent of what they were ten years ago.

The Commission’s policy to allow competitive forces to work in the roaming services market has also caused carriers to build out in rural areas. For years, some cellular carriers serving rural markets extracted high roaming rates from carriers looking to offer their customers an expanded service area through roaming. Rather than seeking regulatory intervention by the FCC to lower these “tollgate” rates, carriers chose to work within the market structure to address the problem. Carriers have elected to eliminate the most egregious roaming costs by expanding into rural markets through acquiring new licenses or building out their footprint. Due to these efforts, competition has expanded into rural markets more rapidly and roaming rates have steadily declined.³³ Indeed, the Commission recently found that “[t]here is no evidence in the record to indicate that wireless carriers in rural areas have the ability to raise prices above competitive levels or to alter other terms and conditions of service to the detriment of rural consumers.”³⁴

³² Thirteenth CMRS Competition Report, at 76-77.

³³ *Id.*, at 6.

³⁴ *Id.*, at 58-59.

Despite the tangible benefits that have resulted from the Commission's pro-competitive roaming policies, some providers continue to urge the Congress and the FCC to adopt more regulation. In particular, these providers have asked the Commission to require carriers to offer in-market roaming and roaming for non-interconnected services such as wireless Internet access services.³⁵ As discussed below, such regulation would hinder carriers' ability to differentiate themselves on the basis of superior coverage in home markets, remove incentives to build out networks more rapidly and to invest in advanced technologies, and would conflict with the Administration's goal of incenting carriers to invest in building broadband networks, particularly in rural areas.

Mandating In-Market Roaming Would Deter Investment and Distort Competition.

In-market or "home" roaming refers to a carrier's ability to obtain automatic roaming agreements from competitors in markets where the requesting carrier owns spectrum rights and therefore competes or plans to compete head-to-head for customers in the market. In fact, when a requesting carrier seeks to use a competitor's spectrum rather than build out coverage in its own home market, that requesting carrier wants to enjoy the fruits of a competitor's investment in a market where it could itself deploy service. Government should not encourage, let alone mandate, home roaming where a carrier has unencumbered access to spectrum that it can use to deploy its own network.

³⁵ In an effort to get expanded in-market and non-interconnected services roaming rights, some carriers have asked the FCC to expand the roaming conditions adopted by the FCC in approving the Verizon Wireless/Alltel merger through petitions for reconsideration and/or "clarification." Some have even suggested that Verizon Wireless is failing to honor those roaming conditions. Verizon Wireless recently responded to those petitions and allegations in an extensive filing. Letter from Helgi Walker, Counsel to Verizon Wireless, to Secretary, FCC, Docket No. WT 08-95, May 8, 2009. In brief, these parties want to leverage the merger process to impose home roaming requirements on Verizon Wireless alone. But the proper place for considering roaming rules is through a rulemaking. To the extent these parties believe Verizon Wireless has violated a merger condition, they can bring a complaint, which they have not done.

Demands for a home roaming requirement cannot be squared with the FCC's findings less than two years ago, in the *2007 Roaming Order*. Based on an extensive record, the Commission found that an automatic in-market roaming obligation would "not serve our public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area." Rather, such an obligation would allow a carrier "to 'piggy-back' on the network coverage of a competing carrier in the same market." Under such a regime, "both carriers [would] lose the incentive to build-out into high cost areas in order to achieve superior network coverage." Thus, the Commission found that an in-market roaming obligation would *disincent* wireless carriers from investing in new infrastructure and ultimately harm consumers:

If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so. Consequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage. In other words, we believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality, reliability and coverage.³⁶

The rationale for the in-market exception is self-evident – a carrier that can piggyback off its competitor, and tout the competitor's network as its own, has less incentive to invest in its own network there. As the FCC recognized in the *2007 Roaming Order*, the in-market roaming exception fosters competition among rivals firms in the home market and provides incentives to invest in building out the home market. To illustrate, some carriers elect only to construct enough facilities in a market to serve the population centers and major highways to keep costs low. They can thus offer lower

³⁶ CMRS Roaming Order at 15835, ¶ 49.

rates than carriers that invest the money to build facilities to less populated parts of the market. In these markets, the higher cost provider's main competitive advantage over its lower cost rivals is its superior network coverage and quality. Customers in such markets can choose to pay less for service, or to pay more and receive better coverage and quality. At the same time, the lower cost provider has the choice to invest more in its network to improve coverage and quality. If the Commission were to adopt mandatory home roaming, firms would lose the ability to compete on the basis on network coverage and quality, and low-cost providers would have less incentive to invest in their networks beyond what is required by the Commission.

A mandatory home roaming obligation would also undermine a key objective of the American Recovery and Reinvestment Act of 2009 ("ARRA"),³⁷ to promote construction of new wireless broadband infrastructure and job creation. In the conference report accompanying the ARRA, the conference committee emphasized that ARRA broadband grants should be distributed in a way to "ensure, to the extent practicable, that grant funds be used to assist *infrastructure investments*."³⁸ The conferees also emphasized that "the construction of broadband facilities capable of delivering next-generation broadband speeds is likely to result in greater job creation and job preservation"³⁹

A home roaming obligation which would allow providers to avoid building out networks in licensed areas directly contravenes the President's and Congress's goals of stimulating infrastructure investments and broadband deployment. Where a carrier seeks

³⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

³⁸ H.R. REP. No. 111-16, at 774 (emphasis added).

³⁹ *Id.* at 775.

to piggy-back on another provider's network in areas where the requesting carrier already holds spectrum, requiring carriers to grant in-market roaming would deprive the local economies in those areas of much-needed jobs and capital. Under the current roaming rules, if a carrier wants to expand coverage in a market where it holds spectrum, it likely would need to deploy its own infrastructure. This would require an influx of capital and generate jobs in that market for workers to engineer and construct the system and to oversee its operations.

Mandated Access to Advanced Data Services Would Also Undercut Innovation.

Some parties want the FCC's current automatic roaming rule to be expanded in another way, to require carriers to provide all data features and technologies they offer to their own customers to roaming customers of other carriers. But such a sweeping data roaming obligation would discourage carriers from deploying advanced services. It creates the risk that competitors will piggyback on that investment through demanding roaming agreements that give them access to those advanced services, rather than investing in those services on their own.

The Commission found in its *2007 Roaming Order and FNPRM* that "allowing competitors in a marketplace to gain competitive advantages from their own innovations results in value to subscribers – in terms of new service offerings and features."⁴⁰ In the highly competitive CMRS market, carriers are constantly investing in new advanced services that will enable them to provide additional value to customers. Decisions to invest in new services involve a significant amount of risk and require large investments in network upgrades. Carriers will be more willing to make these investments where the

⁴⁰ CMRS Roaming Order, 22 FCC Red at 15845 (¶ 78).

investments will differentiate them from their competitors and therefore be more likely to earn a positive return. Conversely, carriers will be less willing to take the risks associated with investing in innovative technologies if a roaming rule mandates carriers to offer the benefits of that innovation to competing carriers. The Subcommittee should thus not consider legislation to require advanced data services roaming.

Some parties have argued that including advanced wireless services as part of the automatic roaming requirement is the only way to ensure ubiquitous access to mobile services. However, history has shown that the competitive marketplace can and will ensure that roaming agreements for such services will be negotiated in response to market conditions. When a carrier decides to invest in advanced services or new capabilities, there is a considerable incentive to preserve the benefit of the new service or capability for the carrier's own customers in order to provide additional value that will help to retain existing customers, attract new customers, and competitively differentiate its service. As a carrier's customers use the new services made possible by the investment, however, those customers begin to expect those services to be available as they travel outside of their home markets. Carriers thus are incented to negotiate roaming agreements with other carriers to enable customers to use the services and features when they travel. Carriers will inevitably reach a cross-over point where the benefits of enabling ubiquitous access to advanced services and features outweighs the benefits of preserving access to those services for their own customers. Once that cross-over point is reached, carriers will negotiate to include these services in their roaming agreements.

The evolution of CDMA data roaming illustrates how these market incentives work. Before Verizon Wireless deployed CDMA EvDO technology, CDMA 1xRTT data

was its premier data technology. When Verizon Wireless first implemented 1xRTT on its network, it did not offer 1xRTT data to its roaming partners so that it could differentiate itself from competitors. However, as other CDMA providers implemented 1xRTT and Verizon Wireless' customers began to want the services and features that depend upon 1xRTT data as they traveled, roaming arrangements were formed. As a result, today 1xRTT data roaming is commonplace. Similarly Verizon Wireless used its multi-billion dollar investment in EvDO as a competitive differentiator when it was first launched. As other CDMA carriers invest in their own EvDO networks, roaming agreements for CDMA EvDO are becoming more commonplace. Verizon Wireless already has EvDO data roaming agreements in place in some markets, including agreements with small and rural wireless carriers.

Because the competitive marketplace already incents carriers to enter into roaming agreements for data services, policymakers should allow market forces to work and should not disrupt market forces through regulatory intervention. The FCC already has a proceeding underway to consider whether to expand the existing roaming rules to reach advanced data services. The Subcommittee should allow the Commission to continue its inquiry into this issue, rather than consider legislation. The FCC could, for example, apply its data roaming requirement to services that the requesting carrier has deployed to some threshold percentage of its coverage area or its customers. This would reduce the risks discussed above of one carrier piggybacking off of a competitor's innovation and investment. It would also encourage carriers to upgrade their own networks to provide data services, because that action would enable them to secure expanded roaming rights.

3. Vigorous and Growing Competition for Wireless Backhaul Undercuts Any Basis for Reregulating Wireline Backhaul Prices.

In Verizon's and Verizon Wireless's respective capacities as a provider and a purchaser of backhaul services,⁴¹ we see numerous alternatives for backhaul services. As a provider of wireless backhaul and other high-capacity services, Verizon typically competes against a number of different types of providers, including cable companies, fixed wireless providers and traditional fiber-based providers. As a purchaser of wireless backhaul services, Verizon Wireless receives bids from a number of different types of providers when it solicits bids for backhaul services. The result of this extensive competition has been that widespread, low-cost backhaul services are available in the United States. Indeed, the Industry Standard has reported that the Chief Technology Officer for Sprint Nextel indicated that T-1 lines, the most common type of high-capacity connection to cell sites, are "[r]elatively abundant and inexpensive" in the United States.⁴² Likewise, Clearwire says it can provide 80%⁴³ of its own backhaul and that it will also provide backhaul to Sprint Nextel at "preferred rates."⁴⁴

⁴¹ Wireless backhaul services are simply a type of dedicated high-capacity services that are used to transport voice and data traffic from cell sites and towers to wireless providers' mobile switching centers for switching to the Internet backbone or wireline telecommunications network. More broadly, "high-capacity services" include dedicated large capacity telecommunications transport sold to other carriers and large businesses. "Special Access" is a regulatory term used for some high-capacity services provided by regulated carriers including Verizon.

⁴² S. Lawson, *Sprint Picks Wireless Backhaul for WiMAX*, Industry Standard, <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (July 9, 2008)(citing Sprint CTO Barry West).

⁴³ See John Hodulik, UBS Investment Research, *Clearwire Corp.* at 13 (Dec. 19, 2008).

⁴⁴ Sprint Nextel /Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolff, Chief Executive officer, Clearwire)..

The extensive competition for wireless backhaul services is particularly vigorous in urban areas where demand for high-capacity services from cell sites and commercial businesses is most concentrated. The concentration of demand in these areas makes it worthwhile for a variety of competitors to construct facilities that offer competing backhaul services. For example, as a result of this concentration, traditional fiber providers such as Level 3 Communications and Global Crossing have built networks in these areas and offer competing services. In addition, as addressed further below, cable companies have ubiquitous networks in these areas and are aggressively marketing competing backhaul services. Finally, fixed wireless providers such as FiberTower and NextLink (a division of XO Communications) offer new backhaul service alternatives that are provided using microwave facilities.

In some more remote locations, there may be instances where no provider historically had deployed higher-capacity facilities because the traffic volumes were not sufficiently large to warrant doing so. In those circumstances, in order to deliver the higher capacity required by newer generation wireless broadband networks, any backhaul provider will have to deploy fiber, microwave and other non-copper facilities in the first instance that are needed to deliver those higher capacities. And there are a number of providers contending to do so in these circumstances as well, including cable companies and fixed wireless providers as well as traditional telephone providers.

Indeed, as Verizon Wireless and other wireless providers have upgraded to third generation (3G) and soon to fourth generation networks (4G), wireless traffic volumes have increased exponentially, boosting demand for backhaul services and making it necessary to upgrade to higher-capacity facilities in all areas. Independent analysts at

Raymond James have estimated that the size of wireless backhaul marketplace in the United States could grow from approximately \$3 billion annually to approximately \$8 to \$10 billion in the next three to five years, driven in large part by increase in the amount of wireless data traffic.⁴⁵ This exponential growth in demand and need for upgraded high-capacity facilities has led many providers, including several new entrants, to focus on providing backhaul services. Where higher-capacity facilities must be constructed in the first instance, no backhaul provider has any inherent advantage. Thus, although Verizon is constructing new connections to meet the growing demand for high-capacity backhaul services, it is also competing with a variety of alternative providers.

In recent years, cable companies have been particularly aggressive in providing backhaul services. Given their ubiquitous networks, cable companies can readily serve cell sites. In 2008, the Chief Operating Officer of Comcast told Wall Street that backhaul services are a “huge opportunity” using the facilities that Comcast “already [has] out there” and that Comcast will be able to provide backhaul “cheap[er] than the typical alternative.”⁴⁶ Similarly, the Chief Operating Officer for Time Warner Cable has described backhaul services as the next “great opportunity” for Time Warner Cable and has also indicated that because Time Warner Cable’s fiber is close to cellular towers, it will not require “much incremental expense” for Time Warner Cable to provide backhaul services to those towers.⁴⁷

⁴⁵ F. Louthan, IV et al., Raymond James & Associates, Inc., *Examining the Convergence of the Telecom and Cable Sectors*, at 16 (Aug. 18, 2008).

⁴⁶ *Comcast Corporation at Merrill Lynch Media Fall Preview-Final*, Fair Disclosure Wire, Transcript 090908a1928849.749 (Sept. 9, 2008) (statement by Steve Burke, President and Chief Operating Officer, Comcast).

⁴⁷ *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).

Fixed wireless providers, including FiberTower and NextLink are also rapidly expanding to new areas. Like cable companies, fixed wireless providers have boasted about their ability to serve cell sites rapidly at relatively low cost compared to other providers. In testimony to this subcommittee, FiberTower stated that it “leads the nation in providing backhaul services,” and already “provides backhaul service to over 6,000 mobile base stations (or cell sites) in 13 [major] markets.”⁴⁸ FiberTower’s written testimony also states that FiberTower has “customer agreements with eight of the largest U.S. wireless carriers.” *Id.* Similarly, NextLink has an extensive network, “with fixed wireless licenses covering 95% of the top U.S. business markets”⁴⁹ and targets as primary customers “mobile wireless and wireline telecommunications carriers, large commercial enterprises and government agencies.”⁵⁰

Competing wireless providers and cable companies have also entered into various arrangements with new entrants in the marketplace. For example, Clearwire, with investment from Sprint Nextel, Google and certain cable companies, has deployed extensive fixed wireless facilities nationwide. Clearwire claims to have “one of the largest wireless backhaul networks in the world”⁵¹ and has told analysts that it is investing in microwave equipment so it can self-provision facilities to meet “roughly 80

⁴⁸ Written Testimony of Ravi Potharlanka, Chief Operating Officer, FiberTower Corporation: House Energy and Commerce Committee’s Subcommittee on Communications, Technology and the Internet; Hearing: Competition in the Wireless Industry, at 3 and 4 (May 7, 2009).

⁴⁹ XO Communications Network Overview, <http://www.xo.com/about/network/Pages/overview.aspx>.

⁵⁰ XO Holdings Inc., Form 10-Q, http://www.xo.com/SiteCollectionDocuments/about-xo/investor-relations/Annual_Reports/XOH_1Q_2009_10Q.pdf at 11 (March 31, 2009).

⁵¹ *Leap Wireless International at Jefferies Panel Discussion*, Fair Disclosure Wire, Transcript 090908ay.703 (Sept. 9, 2008)(statement by Scott Richardson, Chief Strategy Officer, Clearwire).

percent of its [wireless] backhaul . . . from microwave links,” and expects this investment “will pay for itself in 10 months.”⁵² Clearwire has described its operating costs as “negligible”⁵³ and has publicly stated that Sprint Nextel 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.”⁵⁴

While facing all of this competition for its high-capacity services used to provide backhaul, Verizon and other regulated carriers remain subject to price regulation for their high-capacity services. In fact, the vast majority of high-capacity connections that Verizon and other regulated carriers provide to cell sites and commercial buildings are still subject to FCC mandated price-caps, constraining rates. In the case of Verizon, nearly 89% of the basic connections that Verizon has deployed to cell-sites and other end user locations are subject to prices capped by the FCC, including in major urban areas such as New York, Washington, D.C., Philadelphia, Boston, Baltimore, Tampa and Los Angeles.

Extensive competition has also led to significant price declines in backhaul and other high-capacity services. Indeed, the real prices customers pay to Verizon for these services have declined by approximately 24% between 2002 and 2008. These significant price declines reflect the steep discounts Verizon offers carrier customers to compete.

⁵² John Hodulik, UBS Investment Research, *Clearwire Corp.* at 13 (Dec. 19, 2008).

⁵³ Q4 2008 Clearwire Corporation Earnings Conference Call-final, Fair Disclosure Wire, Transcript 030509a2078472.772 (Mar. 5, 2009)(statement of Perry Satterlee, Chief Operating Officer, Clearwire).

⁵⁴ Sprint Nextel Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolf, Chief Executive officer, Clearwire).

Independent reports confirm similar price declines industry-wide. For example, in 2006, the Government Accountability Office (“GAO”) released a report which found that average revenue for traditional wireline facilities connected to cell sites and commercial buildings declined by 5 to 17 percent between 2001 and 2005.⁵⁵ More recently, the National Association of Regulatory Utility Commissioners (“NARUC”) commissioned a report which observed similar substantial declines in the prices carrier customers paid for high-capacity services between 2006 and 2007.⁵⁶

Claims that wireless backhaul and other high-capacity services are overpriced based on purported rates of return for those services have widely been discredited. These claims are not derived from actual company financial reports. Rather, they are derived from regulatory cost allocations that were never created or intended for calculating a company’s earnings, let alone a company’s earnings for specific services. Long ago, the FCC rejected using this type of regulatory data for ratemaking purposes.⁵⁷ More recently, the NARUC sponsored study described earnings calculations from this regulatory data as “virtually meaningless.” *NRRI Report* at 70.

Claims that regulated carriers dominate more than 90% of the marketplace for wireless backhaul and other high-capacity services are likewise misplaced. These claims are based on special access revenue data that carriers report to the FCC for purposes of determining the amounts that each carrier must contribute to the FCC’s various subsidy

⁵⁵ *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, House Representatives, GAO-07-80, App. II. At Table 7 (Nov. 2006) (“*GAO Report*”).

⁵⁶ Peter Bluhm, Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, at 59 (Jan. 21, 2009) (“*NRRI Report*”).

⁵⁷ *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, ¶ 199 (1991) (noting that financial and operational data reported to the FCC through the Automated Reporting Management Information System “do[] not serve a ratemaking purpose.”)

programs. However, this data is not intended to calculate market shares and in fact overlooks significant segments of the marketplace, including self-provisioning and high-capacity services for which competitive providers may not fully report revenue because they do not characterize those services as “special access,” which is a term often used for regulated carriers’ high-capacity services. For example, Clearwire says it can self-provision 80% of its own backhaul and none of this would show up in its reports to the FCC.

Finally, claims that term and/or volume discount plans for high-capacity services lock up the marketplace are wrong. Verizon offers a wide variety of pricing plans that are entirely voluntary and provide discounts of up to 65% off of Verizon’s month-to-month rates. Some discounts are based on the length of time a circuit is in place (term plans) and others are based on volume commitments. With term plans, a customer can obtain a substantial discount on even a single circuit. Customers can select the plan whose requirements and discount levels best meet their needs.

Moreover, even customers who choose to participate in a term plan may leave that plan early. Generally, where a customer exits a term plan early, the customer retains a significant portion of the discounts it received for participating in the plan. For example, in the event that a customer exits an optional pricing plan at the end of the second year of a five-year term, the customer would receive the discounts they would have received if they had originally signed up for a two-year term plan. This effectively prorates the termination liability.

In short, the facts on wireless backhaul competition – extensive and growing supplier competition, declining prices, and existing regulatory price constraints –

demonstrate that this is a functioning marketplace and there is no basis for imposing additional price regulation on wireless backhaul services or other high-capacity services.

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Again, we thank the Subcommittee for the opportunity to submit our views on how the Subcommittee and Congress can best guide the development of the Government's policies to promote wireless competition and innovation. We would be happy to supply to the Subcommittee any of the materials that are referenced in this statement.



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Paul Schieber
VP, Roaming & Access Planning

July 23, 2009

The Honorable Henry A. Waxman
Chairman, Committee on Energy and Commerce
House of Representatives
Congress of the United States
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Roy Blunt
Member, Committee on Energy and Commerce
House of Representatives
Congress of the United States
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Marsha Blackburn
Member, Committee on Energy and Commerce
House of Representatives
Congress of the United States
2125 Rayburn House Office Building
Washington, DC 20515

Re: Follow-Up Questions Regarding Competition in the Wireless Industry

Dear Chairman Waxman, Congressman Blunt, and Congressman Blackburn:

It was my pleasure to appear before the Subcommittee on Communications, Technology, and the Internet on May 7, 2009, at the hearing on "An Examination of Competition in the Wireless Industry." On July 9, I received follow-up questions from Mr. Blunt and Ms. Blackburn. Attached are my responses to those questions.

If you have any questions, or require further information, please feel free to contact me at (913) 794-3400.

Sincerely,

Paul Schieber

c: Earley Green, Earley.Green@mail.house.gov
Jennifer Berenholz, Jennifer.Berenholz@mail.house.gov

Question from the Honorable Roy Blunt:

I understand that many carriers are concerned about how or even whether to move forward on changes to Special Access. There's still a docket outstanding on this topic at the FCC and it's a multibillion dollar question for the industry. In light of these varying views – including differing views over whether the Special Access market is actually even broken or not – would your company be willing to fully share any requested data with the FCC to ensure that the agency has all the resources it needs if it moves forward on this matter?

Response:

Yes, Sprint is prepared to cooperate fully with the FCC and to provide it with relevant information relating to the lack of competition in the special access market. As I emphasized in my May 7 testimony, Sprint's real-world experience proves that the special access market is broken: we pay exorbitant rates that generate up to *triple-digit* rates of return to the incumbent LEC affiliates of our two primary competitors – AT&T and Verizon -- because we have no competitive alternatives in the vast majority of areas in which we need to obtain critical special access facilities. The lack of competitive special access alternatives is impeding broadband deployment, and Sprint applauds the Subcommittee for its efforts to get to the bottom of this market failure and, hopefully, for its efforts to push the FCC to appropriate and expeditious corrective action.

Over the past several years, Sprint has repeatedly provided voluminous information to the FCC¹ and to NRRI² that documented this lack of competition and the excessive prices we have been forced to pay to dominant carriers such as AT&T and Verizon for special access services. Although Sprint believes that the evidence already in the record below unequivocally demonstrates the lack of competition in the special access market, we have offered to provide, yet again, a massive amount of information, including:

¹ See, e.g., Sprint's submissions in FCC WC Docket No. 05-25 (*Special Access Rates for Price Cap Local Exchange Carriers*) dated June 13, 2005 (comments); July 29, 2005 (reply comments); August 8, 2007 (comments in refresh proceeding); August 15, 2007 (reply comments on refresh); August 22, 2007 (*ex parte* letter from Anna Gomez, Sprint, to Marlene Dortch, FCC); October 5, 2007 (*ex parte* letter (and accompanying white paper) from A. Richard Metzger and Regina M. Keeney (Lawler, Metzger, Milkman & Keeney, LLC) and Christopher J. Wright and Timothy J. Simone (Harris, Wiltshire & Grannis, LLP), counsel for Sprint, to Marlene Dortch, FCC. See also, comments filed in FCC GN Docket No. 09-51 (*A National Broadband Plan for Our Future*) by Sprint on June 8, 2009. pp. 8-34.

² Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, released January 21, 2009 (study commissioned by the National Association of Regulatory Utility Commissioners). Sprint responded to two NRRI data requests in 2007 and 2008.

- The address, V&H coordinates, and CLLI code of each Sprint cell site served by special access transmission facilities;
- Information that identifies whether the owner of the transmission facilities that serve each cell site is an incumbent local exchange carrier (LEC) or an alternative vendor, as well as the type of transmission facilities provided;
- The address, V&H coordinates, and CLLI code of each building or cell site served by transmission facilities owned or controlled by Sprint;
- The type of service(s) owned or controlled by Sprint that connect to end-user locations, and the number of units provided in such manner;
- A description of the analysis conducted by Sprint to determine whether to deploy a new transmission facility to a building (*e.g.*, its build/buy analysis; factors that prevent Sprint from deploying transmission facilities to end-user locations that otherwise meet its build criteria; and, for a representative subset, the number of commercial buildings to which Sprint has not deployed transmission facilities but that meet Sprint's criteria for deploying transmission facilities);
- Total number of buildings served via transmission facilities that Sprint does not own or control and that it purchased from incumbent LECs;
- Type and units of special access services Sprint purchases from incumbent LECs;
- Total number of buildings served via transmission facilities that Sprint does not own or control and that it purchased from non-incumbent LECs;
- Type and units of special access services Sprint purchases from non-incumbent LECs;
- The number of collocation arrangements Sprint has established in incumbent LEC central offices that are connected to transmission facilities owned or controlled by Sprint;
- The number of transmission facilities connected in buildings or cell sites served via a transmission facility owned or controlled by Sprint, that terminate in incumbent LEC collocation arrangements;
- Demand data requested in the NRRP purchaser's data request for the top 50 MSAs.

A copy of Sprint's data request proposal is included as Attachment 1.³ Because this information is highly confidential and proprietary, Sprint also has proposed that the FCC adopt a comprehensive protection regime for any data submitted.⁴

³ This *ex parte* letter was filed in FCC WC Docket No. 05-25 on June 3, 2009 by Sprint and several other major purchasers and/or providers of special access services (CCIA, Ad Hoc Telecommunications Users Group, BT Americas, Inc., T-Mobile USA, Inc., Integra Telecom, One Communications, tw telecom, inc., Cbeyond, Inc., and XO Communications).

⁴ See *ex parte letter* dated June 22, 2009, submitted in FCC WC Docket No. 05-25 by Christopher J. Wright, Paul Margie and Joseph C. Cavender, Wiltshire & Grannis, LLP, counsel for Sprint, included as Attachment 2.

Sprint believes that its most recent data request proposal will put to rest, once and for all, the question of “whether the Special Access market is actually even broken or not.” It is our hope that the FCC will adopt Sprint’s proposals, analyze the information provided, and implement appropriate remedies to address the clear market failure in the provision of special access services by incumbent LECs, in an expeditious manner.

Question from the Honorable Marsha Blackburn:

Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?

Response:

Yes, Sprint supports eliminating discriminatory state and local taxes on wireless users. Wireless providers and their customers are subject to discriminatory state and local taxes in almost two-thirds of the states. Unfair and excessive wireless taxes and fees exceed 24% in some states, and average about 15% combined nationwide – more than double the tax rate for most other goods and services. The excessive state-local tax rate on wireless service increased more than 4 times faster than the rate on other taxable goods and services between January 2003 and July 2007. As the National Conference of State Legislatures and the National Governors' Association have both stated, there is no justification for continuing these discriminatory and excessive taxes.

Sprint, therefore, supports H.R. 1521 – the Lofgren-Franks “Cell Tax Fairness Act of 2009” – and the Senate companion bill S. 1192 – the Wyden-Snowe “Mobile Wireless Tax Fairness Act.” These anti-tax, pro-consumer bills would prohibit states and local governments from imposing any new discriminatory tax on mobile services, mobile service providers, or mobile service property for five years. The passage of such federal legislation is also consistent with a *national framework* for the regulation of the wireless telecommunications industry – as Congress originally envisioned for this clearly interstate, borderless service.

Wireless tax relief would be a tremendous benefit to consumers, businesses and wireless providers. Wireless services would become more affordable to consumers struggling in this difficult economy. The elimination of discriminatory wireless taxes would also generate tax savings for businesses as they try to grow and free-up business resources for additional innovation and investment. And, tax relief would lead to faster deployment of advanced generation (3G and 4G) wireless infrastructure. In many states, wireless providers pay discriminatory property and sales taxes on their network investments that most competitive businesses do not pay. Elimination of these taxes would immediately reduce the cost of network investments, which in turn would make capital investment dollars go further and would make some unprofitable investments profitable.

ATTACHMENT 1

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

June 3, 2009

Re: *WC Docket 05-25 – Special Access Rates for Price Cap Local Exchange Carriers*

Dear Ms. Dortch:

Access to reasonably priced high-capacity broadband services by large and small businesses, educators, and health care professionals is critical to the Nation's economy. Unfortunately, the market for these so-called "special access" services is broken. Every day that the special access broadband market remains broken, a wide range of companies, government entities, and non-profits are drained of financial resources they need to protect jobs, innovate, and serve consumers.

AT&T, Verizon, and a handful of other incumbent price-cap carriers have dominant positions in the provision of special access in their home markets. For example, Sprint Nextel and T-Mobile, two large purchasers of special access circuits, have both indicated that they have in most cases, for years, purchased the vast majority of their high-capacity circuits from incumbent LECs—their competitors in the wireless market. Careful scrutiny clearly reveals that the market for special access service is not competitive.

The result of this lack of competition is predictable. Rates for special access service are extremely high. Even the most favorable prices available under long-term contracts are much higher than the regulated, cost-based prices for equivalent unbundled network elements. Special access prices are also many times higher than incumbent prices for services of comparable speeds in residential broadband markets.¹ Additionally, the Commission's own ARMIS data shows that incumbent price-cap carriers earn astonishing rates of return on their special access services.

Incumbent LECs have objected to comparing special access pricing to the prices of unbundled network elements and the use of ARMIS data to calculate rates of return. But they have failed to offer any better way to evaluate their prices, refusing to supply the relevant cost study information and relying instead on well-worn invocations of the potential

¹ See *ex parte* proposal attached to letter from Christopher J. Wright and A. Richard Metzger, Jr., on behalf of Sprint Nextel Corporation, to Marlene Dortch, FCC Secretary, at 26 (Oct. 5, 2007).

effects of competition and emphatic—though erroneous—assertions that sufficient competition is here to discipline prices, or will be soon. The truth is that incumbent price-cap carriers insist on onerous and anticompetitive terms and conditions on their special access offerings to strangle the very competition that they claim exists.

We are pleased that correcting the deficiencies of the high-capacity broadband market appears to be at the top of the Commission's agenda for 2009. This effort is fully consistent with the Commission's commitment to and the Administration's focus on improving broadband access across the country. The Commission understands that it must address not only residential broadband but also special access services because the economic engine of the country depends more and more on high-capacity broadband facilities, such as DS1s, DS3s, and Ethernet.

Year after year, every independent study has shown that there is virtually no competition for special access services. The currently available data allows the Commission to act immediately to address this problem. But we understand the Commission's desire for additional data so that it can present even stronger empirical support for correcting the market failure that has led to excessive special access prices and onerous contractual terms. Thus, we urge the Commission to make any data request focused on the Commission's specific needs and to keep the time frame as short as possible.

The United States Telecom Association's ("USTA") recent *ex parte* demonstrates that the RBOCs' intention is to use a data request as political gambit rather than to engage in a productive exchange of information. Amazingly, USTA asks the Commission to require every large and small business, school, and hospital to provide the geocoded location of every special access facility across the country. And, USTA goes so far as to ask for every competing offer each business, school, and hospital has ever received for special access as some sort of price of admission to comment in this rulemaking proceeding. USTA goes on to argue that the Commission should require the RBOCs' competitors to provide highly sensitive data down to the building level everywhere in the country, but does not offer to provide any of the important RBOC-derived data that the RBOCs have consistently refused to provide in other data requests.

USTA's request is a blatant attempt to tie the Commission's hands by forcing a multi-year data-fishing exercise. They ask the Commission to gather information that is largely irrelevant to the FCC's proceeding but that provides insight about their competitors' operations so that RBOCs can cherry-pick clients, or so they can make it difficult or risky for their customers to participate in the special access proceeding. The Commission should see this tactic for what it is: a political maneuver rather than a real attempt to help fashion a useful data request.

The undersigned, companies that are sellers and purchasers of special access services, take the Commission's interest in analyzing additional data more seriously. We commit to working with the Commission to find a solution to this important problem. The first step in this process is to identify the goals of a data request. This will enable the Commission to

request data that are relevant to these goals. Toward this end, we propose that the Commission adopt the following goals for any data request:

1. Establish financial performance and productivity for incumbent price-cap carrier special access by gathering historical data on revenues, costs, and inputs;
2. Identify whether there are any areas of the country where there is enough competition in the special access market to protect consumers;
3. Determine how the current "Phase II" trigger, based on collocation, can be modified to reflect actual competition;
4. Evaluate what demand and pricing data derived from the largest buyers and sellers of special access services indicates about competition; and
5. Identify terms and conditions imposed on purchasers of incumbent price-cap carrier special access that thwart competition.

The undersigned have attached a proposed data request that would enable the Commission to accomplish these goals. We do not submit this proposal lightly – it includes a commitment to provide significant, difficult to produce, and highly sensitive information drawn from our companies.

Accordingly, we support the attached data request only if the Commission adopts a careful plan for ensuring that the agency obtains the data it needs, that commenters have the ability to review and comment on material on which the FCC bases any decision, and that data suppliers' proprietary information remains confidential. Many companies consider the data requested in the attached proposal to be their "crown jewels."

The FCC will likely need only rely on aggregated data to reach its decision in this proceeding. It need not rely on company-specific data. Given this fact, and in light of the need to establish the most robust protections possible against disclosure of company-specific data, the Commission should explicitly state in its data request that it will ensure confidentiality by: (1) collecting confidential, company-specific data from each party; (2) making this company-specific data available only to Commission staff and Commission-contracted consultants who then aggregate the data into a report that identifies both the presence of indicators of actual competition and the "build/buy" decision by geographic area but does not include, or enable the reader to infer, company-specific data; (3) making this report available for public review and comment; and (4) relying only on this report in making a decision. This system is superior to a system based solely on non-disclosure agreements in two ways. First, it is more protective of highly sensitive information. Second, and at least as important, it allows commenters to understand and comment on the market information that will form the basis of the FCC's decision far better than would a system where only a select group of attorneys have access to otherwise-secret information.

We look forward to working with the Commission in the coming weeks on a meaningful plan for reform.

Sincerely,

/s/
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Proposed Data Request

- I. Definitions.
 - A. Transmission Facilities: Any channel facility that is currently capable of providing to customers the high-capacity transmission services offered as special access under the FCC's rules, including standard compliant DS1, DS3, OCn, switched Ethernet or dedicated Ethernet service, SONET, etc.
 - B. Own or control: Transmission Facilities that an entity either owns or controls pursuant to a long-term IRU agreement (i.e., 25 years or longer).
 - C. Volume Commitment Agreement: Any contract for the sale of special access in which a discount on special access prices is conditioned on the customer (1) maintaining a particular number of circuits in service with the service provider (e.g., where the customer must maintain 1,000 DS1 circuits in service over a 5-year term); (2) maintaining a particular percentage of special access demand with the service provider (e.g., where the customer must maintain 90 percent of its DS1 circuit purchases with the service provider over a 5-year term based on a given number of circuits purchased at the inception of the agreement); and/or (3) maintaining a particular spending level (in dollars) with the service provider (e.g., customer must maintain \$25 million dollars in overall spending for eligible special access services over a 5-year term).
- II. Data to establish financial performance and productivity for incumbent price-cap carrier special access.
 - A. RBOCs should provide ARMIS 43-01 Table I and II data for 2008.
 - B. RBOCs should provide ARMIS 43-02 Table I1 data on employee counts and compensation, and Table B1B data on capital additions, end of year, and beginning of year plant amounts for 2008.
 - C. RBOCs should provide ARMIS 43-08 Table III data on switched and special access lines for 2008. In order to allow assessment of the effect of changes in the types of special access circuits purchased, RBOCs should also provide DS1, DS3, Ethernet and OCn channel terminations from 1985 to 2008.
 - D. RBOCs should provide any revisions to their previously filed ARMIS 43-01 and/or ARMIS 43-02 Table B1B revenue, expense and investment data to correct for any alleged special access misallocations for all years that

need correction. Any correction prior to 2001, the year the separations freeze was adopted, should be explained.

- III. Data to identify whether there are areas of the country where there is enough competition to protect consumers:
- A. Data on actual competition.
1. From all CMRS carriers.
 - a. Provide the address of each cell site served by Transmission Facilities. For each cell site listed, provide street address and, if available, information sufficient to geocode (e.g. V&H coordinates, CLLI code) the location.²
 - b. Provide information that identifies whether the owner of the Transmission Facilities that serve each cell site is an ILEC or alternative vendor, and the type of Transmission Facilities provided (i.e., DS1, DS3, or above DS3).
 2. From sellers of special access services.
 - a. Provide the address of each building or cell site that the seller of special access services serves via a Transmission Facility that it owns or controls. For each building listed, provide street address, and if available, information sufficient to geocode (e.g., V&H coordinates, CLLI code) the location.
 - b. Identify the type of service(s) (e.g., DS1, DS3, Ethernet) that the special access services provider provides via Transmission Facilities it owns or controls that connect to end-user locations and for each service provide the number of units provided in such manner (e.g., channel terminations, circuits or Ethernet ports). If it does not own or control its own Transmission Facilities, provide a response that makes clear that it neither owns nor controls facilities.

² Since these data (as well as the data supplied in response to III.A.2.a.) will need to be processed once the Commission receives them, the Commission should specify the format in which these data are to be provided. In addition, if carriers are able to provide only addresses, the Commission will have to process the data to obtain geocoded data. This may require the use of outside contractors, as it did in the context of developing the High Cost Proxy Model for universal service.

- B. Data on the “build/buy” decision.
1. Non-ILEC facilities-based competitors should provide, if available, a description of the analysis they conduct to determine whether to deploy a new Transmission Facility to a building. If possible, such a description should include the following.
 - a. A description of the competitor’s “build/buy” analysis, including its average cost of deploying a Transmission Facility of a specified length (e.g., one mile or less) to a building and the revenues required to recover such costs from one or more end-user customers in a building.
 - b. For a representative subset of the areas in which the alternative provider offers service, provide the number of commercial buildings to which the competitor has not deployed Transmission Facilities but that meet the competitor’s criteria for deploying Transmission Facilities pursuant to its build/buy analysis.
 - c. A description of the factors that prevent the competitor from deploying Transmission Facilities to end-user locations that otherwise meet its build criteria (e.g., capital constraints, access to public rights of way, building access, customer demands for delivery of service in a short time frame, insufficient addressable market demand due to lock-in terms and conditions imposed by the incumbent provider, and similar barriers to Transmission-Facility deployment).
 2. To the extent each non-ILEC service provider can do so from records it keeps as a normal course of doing business, it should, for each geographic area³ in which it provides service.
 - a. Provide the total number of buildings served via Transmission Facilities that it does not own or control and that it purchased from ILECs.
 - b. Identify the type of special access service(s) (e.g., DS1, DS3, Ethernet) and UNEs (e.g., DS1, DS3) it purchases from ILECs and for each service provide the number of

³ The Commission may wish to specify which geographic areas it considers relevant for its analysis, e.g., state, Metropolitan Statistical Area (MSA), census tract, etc. Since the parties supporting this data request maintain differing levels of data for their general business purposes, we urge the Commission to consult further with the parties who would be subject to the data request to determine what levels of aggregation are feasible.

units it purchases (e.g., channel terminations, circuits, or Ethernet ports), breaking out special access and UNE units separately.

- c. Provide the total number of buildings it serves via Transmission Facilities that it does not own or control and that it purchases from non-ILECs.
 - d. Identify the type of special access service(s) (e.g., DS1, DS3, Ethernet) it purchases from non-ILECs and for each service provide the number of units it purchases (e.g., channel terminations, circuits or Ethernet ports).
- IV. Data to establish that the current "Phase II" trigger is inappropriate.
- A. Non-ILEC facilities-based competitors should provide the number of collocation arrangements they have established in ILEC central offices that are connected to Transmission Facilities that they own or control (i.e., fiber-based collocations used for purposes of the pricing flexibility rules).
 - B. Non-ILEC facilities-based competitors should provide the number of Transmission Facilities connected to buildings listed in response to III. A. 2. a. that terminate in collocation arrangements listed in response to IV.A.
- V. Data to evaluate what demand and pricing data derived from the largest buyers and sellers of special access services indicates about competition.
- A. The three largest national CMRS providers and the three largest IXCs should provide the demand data requested in the NRRI purchaser's data request for the top 50 MSAs.
 - B. For 2001 to 2009, the three largest ILECs should provide all changes to the channel termination, and fixed and per mile transport rates (separately for DS1/DS3/OCN/Ethernet services), that were not the result of either a price cap change or compliance with a merger condition. These changes should be shown separately for rack rates, each individual contract and each tier in generally available term and volume discount plans. Responses should indicate the year when a new pricing option with different terms and conditions became available and should provide the total volume (revenue) sold of each pricing element for each year.

- VI. Data to identify terms and conditions imposed on purchasers of incumbent price-cap carrier special access that forestall competition from having a chance to develop to evaluate the state of competition for special access services.
- A. Incumbent price-cap carriers should provide, by year for 2002 through 2008, (1) the percent of their revenue (separately for DS1/DS3/above DS3), by geographic area⁴ that is subject to Volume Commitment Agreements; (2) total special access revenue; (3) the number of special access circuits, by geographic area that are subject to Volume Commitment Agreements; and (4) the number of special access circuits, by geographic area that are not subject to Volume Commitment Agreements.
 - B. Incumbent price-cap carriers should provide the number of special access circuits (separately for DS1/DS3/above DS3) they sell that are subject to an early termination penalty, and the number of circuits not subject to such a penalty.
 - C. Each incumbent price-cap carrier should compute for 2008 the total amount of early termination penalties and forgone discounts (separately for DS1/DS3/above DS3) that would be due to it if all special access service subject to Volume Commitment Agreements were transferred by buyers to alternative providers.
 - D. Incumbent price-cap carriers should provide (separately for DS1/DS3/above DS3) the number of access circuits it sells that are: (a) purchased without any term commitment; (b) purchased under contracts with a term commitment of one year or less; (c) purchased under contracts with a term commitment of more than one year but no more than 3 years; (d) purchased under contracts with a term commitment of more than 3 years but no more than 5 years; and, (e) purchased under contracts with a term commitment of more than 5 years.
 - E. Incumbent price-cap carriers should provide a description of their Volume Commitment Agreements (separately for DS1/DS3/above DS3), and, for each such plan, (1) the volume levels required; (2) the covered/available geographic areas; (3) associated commitment requirements; (4) the associated true-up interval time frames; (5) the penalties for failing to meet commitment levels and/or terminating early; and (6) associated renewal requirements.

⁴ As above, the Commission may wish to specify which geographic areas it considers relevant for its analysis, e.g., state, Metropolitan Statistical Area (MSA), census tract, etc. Since the parties supporting this data request maintain differing levels of data for their general business purposes, we urge the Commission to consult further with the parties who would be subject to the data request to determine what levels of aggregation are feasible.

ATTACHMENT 2



June 22, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *WC Docket 05-25 -- Special Access Rates for Price Cap Local Exchange Carriers*

Dear Ms. Dortch:

We understand that the Commission is considering gathering additional data on the market for special access services, including detailed information on specific business and cell-site locations served by special access. This data is highly sensitive proprietary information both for Sprint and for alternative providers of special access. Sprint submits this letter to outline steps the Commission can take to ensure that such information is protected and to facilitate its collection.

Reform of special access regulation is of great importance to the Nation's broadband future and Sprint supports the Commission's timely access to the data it believes would assist it as it moves to restore sensible regulation to this market. Because of the highly sensitive nature of this information, however, the Commission will need to establish greater protections than it might ordinarily provide if it is to receive information from as many parties as possible, as quickly as possible. The Commission should guarantee that persons outside the Commission will not have access to it, even under the terms of the existing protective order.¹

Sprint proposes that the Commission adopt a comprehensive protection regime for any data submitted. In particular, Sprint proposes that any request for detailed location information about competitive carriers' special access networks should provide that all such information would be disclosed to the Commission in confidence.² The Commission would release the raw data only to those retained by the Commission to assist it in its assessment and analysis. The Commission would, on the basis of the data provided, compile a report concerning competition in special access markets that would include tables presenting aggregated data, which it would place into the public record and on which it would allow comment.

¹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Order*, DA 05-1635 (June 8, 2005).

² Similar data provided by price cap carriers about the extent of their networks – which will be necessary for the Commission to develop an accurate understanding about the nature of competition in the market – should be treated in the same manner if those carriers consider the data confidential.

Such a process would be lawful, and the Commission has ample authority to proceed in such a manner. The Commission's rules provide flexibility to devise an appropriate confidentiality regime, and allow anyone to submit information to the Commission with a request for confidentiality.³ The Commission's general policy regarding confidentiality in rulemaking proceedings recognizes that, in many cases, a protective order such as the one that has already been entered in this docket strikes the right balance between openness and protection.⁴ But the Commission has also expressly provided that it possesses authority to use a different approach when appropriate.⁵ This is a case where additional protection is needed because Sprint and many competitive special access providers regard the data the Commission is likely to request as their "crown jewels."⁶ Importantly, Commission actions that adequately protect company-specific data will lead to more companies being willing to volunteer data.⁷

Providing such confidentiality would not be new for the Commission; it provides similar protection in many other reporting contexts. For example, both to ensure the accuracy of reported information and to protect carriers from competitive harm, the Commission provides for confidentiality of network outage reports, even though they are of obvious interest to the public as well as to competitors.⁸ In contrast, there is little reason for the public to want to know precise building-by-building information about competitive special access providers' networks. The Commission's practice with regard to its Form 477 reports is similar; the reports are confidential, and the Commission publishes data in aggregate form.⁹ Reports of international revenue likewise protect the confidentiality of carrier information.¹⁰

³ 47 C.F.R. § 0.459.

⁴ See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24843-45 (1998) ("Confidentiality Order").

⁵ See *id.* at 24833 (¶ 23).

⁶ Letter of CCIA, Ad Hoc Telecommunications Users, tw telecom, inc., Sprint, et al., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket 05-25 (June 3, 2009) at 3.

⁷ There is no question that the information of concern to the competitive special access providers is protected from release under the Freedom of Information Act ("FOIA") by Exemption 4. See *Confidentiality Order*, 13 FCC Rcd at 24820 (¶ 5) ("Exemption 4 allows an agency to withhold business competitive information from public disclosure"). Accordingly, the Commission would be justified in denying any FOIA request seeking access to raw data provided by competitive special access providers.

⁸ See MSNBC Interactive News, LLC; On Request for Inspection of Records, *Memorandum Opinion and Order*, 23 FCC Rcd 14518, 14523-27 (¶¶ 11, 14-17) (reaffirming that outage reports will not be disclosed despite FOIA request).

⁹ See Local Telephone Competition and Broadband Reporting, *Report and Order*, 19 FCC Rcd 22340, 22352-53 (¶¶ 24-25 & n56) (2004); *Center for Pub. Integrity v. FCC*, 505 F. Supp. 2d

Sprint proposal that the Commission treat raw data confidentially, while obtaining comment and basing any final decision on reports presenting aggregated data, is fully consistent with the Administrative Procedure Act (“APA”). The APA requires that “studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”¹¹ Thus, the test is whether commenters have “meaningful notice and an opportunity for comment” – and, as explained below, that does not require access to raw rather than aggregated data in this proceeding.

As an initial matter, it is important to ensure that the raw data on which revised rules are based is reliable. But it is not necessary to make the raw data available to other carriers to do so. Indeed, because ILECs and other competitive carriers do not know the locations served by a particular competitive carrier, they are not well-positioned to determine the accuracy of data that is submitted. The Commission and its consultants must ensure the validity of the raw data.

As a basis for rulemaking, aggregated data is more useful than raw data. The purpose of collecting data about the deployment of competitors’ networks is to resolve disputes about the state of competition in the provision of special access services. That requires aggregation. For example, the Commission will need to determine what percentage of cell sites and office buildings are served by competitive special access providers to assess the level of competition that exists – which requires the aggregation of data concerning cell sites and office buildings. It will no doubt be important to produce more detailed analyses, such as differences in the level of competition at locations with different levels of demand. But the key point is that it is aggregated rather than raw data that is critical for meaningful comment on the level of competition.

Moreover, the rules the Commission develops based on its collection of data on the special access market are sure to be phrased in terms of aggregated data. For example, the Commission might determine that for a geographic area to be presumptively competitive a certain percentage of locations must be served by competitors. It is not necessary for commenters to examine raw data about individual buildings to comment meaningfully on what the appropriate thresholds for such regulations should be.

It could not be the rule that the APA prohibits reliance on studies unless the raw data underlying them is subject to review. Many studies, such as medical studies, necessarily rely on a promise of confidentiality in order to gather the raw data that will then be analyzed. Similarly,

106 (D.D.C. 1998) (upholding Commission’s refusal to disclose Form 477 data in the face of a FOIA request).

¹⁰ See, e.g. FCC Releases “Trends in the International Telecommunications Industry” Report, 2005 FCC LEXIS 5049, app. A n.4 (rel. Sept. 14, 2005) (explaining reporting of confidential international telecommunications revenues).

¹¹ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

a study assessing the impact of watching violent television on children need not reveal the names of the children involved in order for the Commission to rely on it, or for commenters to be able to critique it. Likewise, a study assessing the level of competition in a special access market that surveys providers to determine the precise extent of their networks need not reveal that company-specific information in order for the Commission to rely on it or for commenters to be able to weigh in on the study. In each case, publication of the data in summary form should be sufficient. Indeed, in many cases, data underlying a published study might not be available. That mere fact cannot mean that a rule that finds support, in part, in the study's conclusions, must be overturned.

The recent GAO study of special access also shows that the unavailability of raw data does not preclude reliance on a study.¹² The GAO study provided plentiful data, although it did not always provide it in the most granular form. This did not prevent commenters from being able to discuss the study, and there can be no serious question that the Commission could reasonably refer to such a study in promulgating new rules.¹³

The conclusion that raw data need not be made available for comment is nothing new for the Commission. The Office of General Counsel filed a brief in 2005 stating as much. As the brief explained, while courts have required crucial factual information on which a rule is based to be made available to the public and "exposed to refutation," those cases "do not support the proposition that the record must contain the raw data underlying a study that itself has been placed in the record."¹⁴

The D.C. Circuit's recent decision in *American Radio Relay League*, where the court held that the Commission needed to make unredacted studies relating to interference tests available for comment, is not to the contrary. The issue in that case was not whether raw rather than aggregated data needed to be included in the record, but whether the Commission could rely on redacted studies where the court examined the redacted material and concluded both that the redacted material was not exempt from disclosure under the Freedom of Information Act and that it "could call into question the Commission's decision to promulgate the rule" at issue.¹⁵ The court emphasized that "[t]he narrowness of our holding under section 553 of the APA is

¹² Government Accountability Office, Report to the Chairman, FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, GAO 07-80 (Nov. 2006).

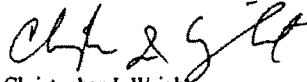
¹³ See, e.g., *American Public Communications Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000) (rejecting the claim that the Commission could not rely on industry coalition's summary data along with an explanation of the methodology used to generate the summary data).

¹⁴ Brief for Respondents, *EchoStar Satellite, L.L.C. v. FCC*, No. 04-1304 (filed July 25, 2005) (internal quotation marks and citations omitted).

¹⁵ 524 F.3d at 227.

manifest."¹⁶ This case would be comparable if the Commission were to produce a report analyzing the state of competition using aggregated data and then redact any portions of the reports not supporting the rule the Commission prefers. Of course, we are not proposing such an approach. Rather, the Commission should gather the data it believes it needs and then produce fully accurate reports on which the parties may comment and on which the Commission may base revised special access rules.

Sincerely,



Christopher J. Wright
Paul Margie
Joseph C. Cavender

¹⁶ *Id.*

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July 9, 2009

Mr. Robert J. Irving, Jr.
 Senior Vice President and General Counsel
 Leap Wireless International, Inc;
 Cricket Communications, Inc.
 10307 Pacific Center Court
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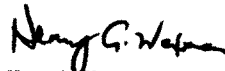
Dear Mr. Irving:

Thank you for appearing before the Subcommittee on Communications, Technology, and the Internet on May 7, 2009, at the hearing entitled "An Examination of Competition in the Wireless Industry".

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions and include the text of the question with your response, using separate pages for responses to each Member.

Please provide your responses by July 23, 2009, to Earley Green, Chief Clerk, in Room 2125 of the Rayburn House Office Building and via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,



Henry A. Waxman
 Chairman

Attachment

The Honorable Marsha Blackburn

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?



August 13, 2009

The Honorable Marsha Blackburn
 217 Cannon House Office Building
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Ms. Blackburn:

In response to your question following the May 7, 2009 Subcommittee on Communications, Technology, and the Internet hearing entitled "An Examination of Competition in the Wireless Industry," I submit the following response on behalf of Cricket Communications, Inc. "Cricket":

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?

Cricket is concerned with the alarming increase in discriminatory state and local taxes on wireless consumers and supports pro-consumer legislative efforts to reduce these taxes and impose moratoriums to limit their growth. The average effective rate of taxes and fees on wireless consumers is now more than 15%, compared to an average general tax on goods and services of 7%.¹ Further, between 2003 and 2007, taxes and fees on wireless services increased four times faster than taxes on other goods and services.²

Cricket specifically designed its business to bring the benefits of wireless telecommunications to consumers left behind by other wireless providers. Consequently, these unfair and increasing discriminatory taxes have a particularly detrimental impact on Cricket's customers who are more ethnically diverse and lower-income than the industry average. Hispanics, African-Americans, and other minorities comprise the majority (56 percent) of Cricket's customers. Additionally, 74 percent of Cricket's customers have annual household incomes of less than \$50,000 and 62 percent have annual incomes of less than \$35,000. In contrast, just 32 percent of other wireless carriers' customers have annual household incomes of less than \$50,000.

Cricket's customers can least afford these increasing taxes on a service that is essential to their daily lives. Reducing discriminatory wireless taxes, especially during these difficult economic times, will benefit consumers and provide additional opportunities for vulnerable populations to access essential wireless services.

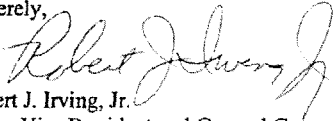
¹ Mackey, Scott; *Excessive Taxes and Fees on Wireless Service: Recent Trends*; State Tax Notes (Feb. 2, 2008) p. 519.

² *Id.* at p. 521.

Cricket Communications, Inc.
 10307 Pacific Ctr Ct
 San Diego, CA 92121
 www.mycricket.com

With regard to tax relief proposals for wireless providers and the potential benefits for consumers, Cricket would be pleased to provide input on specific proposals.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Irving, Jr.", written in black ink.

Robert J. Irving, Jr.
Senior Vice President and General Counsel
Leap Wireless International, Inc.
Cricket Communications, Inc.

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July 9, 2009

Mr. Victor H. "Hu" Meena
 President
 Cellular South
 1018 Highland Colony Parkway
 Suite 300
 Ridgeland, MS 39157

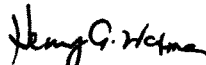
Dear Mr. Meena:

Thank you for appearing before the Subcommittee on Communications, Technology, and the Internet on May 7, 2009, at the hearing entitled "An Examination of Competition in the Wireless Industry".

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions and include the text of the question with your response, using separate pages for responses to each Member.

Please provide your responses by July 23, 2009, to Earley Green, Chief Clerk, in Room 2125 of the Rayburn House Office Building and via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,



Henry A. Waxman
 Chairman

Attachment

The Honorable Marsha Blackburn

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?

The Honorable Marsha Blackburn

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?

Answer:

Cellular South does support eliminating discriminatory state and local taxes on wireless users. Wireless service is no longer a luxury for the rich but instead is a mainstream service that allows users to truly have person-to-person communication rather than point-to-point communication.

We believe that tax relief for wireless providers would benefit consumers. Wireless providers such as Cellular South are constantly seeking to reduce operating costs, and wireless taxes are one category in this area. When we are able to reduce operating costs, we are often able to pass these reductions along to our customers. In addition to lowering costs, this can also promote competition and lead to greater choices for consumers.

**RESPONSE OF AT&T INC. TO
QUESTIONS FROM REPRESENTATIVE MIKE DOYLE**

1. On page five of your testimony you note that AT&T purchases “thousands of wireless backhaul circuits.” Please provide an estimate as to what percentage of backhaul circuits you have that these represent? Additionally, what percentage comes from companies that are not an ILEC?

Answer: Although AT&T cannot provide a precise percentage estimate at this time, microwave wireless backhaul is a very significant and rapidly growing component of AT&T’s backhaul portfolio. The vast majority of the wireless broadband circuits AT&T uses for wireless backhaul are obtained from third-party providers like FiberTower and TTM Inc. AT&T also self-provides wireless broadband services for wireless backhaul using 11 GHz, 18 GHz, and 23 GHz spectrum, which is spectrum that is available to any carrier that obtains FCC approval to use it. In addition, AT&T self-provides wireless backhaul using 38 GHz spectrum for which AT&T owns licenses.

Wireless broadband technologies have already captured the majority of the wireless backhaul market in Europe, and globally nearly two thirds of mobile base stations are linked via wireless backhaul.¹ As Sprint’s Chief technology officer has pointed out, the reason microwave backhaul not yet as prevalent in the U.S. as it is in the rest of the world is that “relatively abundant and inexpensive T-1s have stifled the technology here.”²

The prevalence of microwave backhaul varies by carrier, but analysts have estimated that at least 20% of mobile base stations in the U.S. are already backhauled via wireless technologies, and that percentage is expected to double by 2011.³ Notably, Clearwire is deploying a wireless telephone and data network (backed by Google, Intel, Sprint, and the major cable companies) and, according to its 2008 Annual Report (page 15), it “intend[s] to rely *almost exclusively* upon microwave backhaul” to “to wirelessly transmit data traffic from one location to another, such as from our tower locations to our network core” (emphasis added).

2. You state that “GAO concluded that it did not have enough data to make a judgment about the extent of competitive facilities deployment.” How is this claim consistent with the statement at page 19 of the GAO report that “[b]ased on the data available to us, facilities-based competition for dedicated access services to end users at the building level (*i.e.*, analogous to channel terminations to end users) does not appear to be extensive in the MSAs examined”?

¹ Visant Strategies, *US Mobile Backhaul: Evolving Market 2007*, available at <http://www.visantstrategies.com/Prback2007.html>).

² Stephen Lawson, Sprint Picks Wireless backhaul for WiMAX, *The Industry Standard*, July 9, 2008, available at <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax>.

³ Visant Strategies, *US Mobile Backhaul: Evolving Market 2007*, available at <http://www.visantstrategies.com/Prback2007.html>).

Answer. The two statements are consistent. The GAO qualified the second statement by noting that it was “[b]ased on the data available to us.” As GAO explained in its report, all of its observations were based on “limited data on competitors’ provision of dedicated access services,” and it made clear that it had “no specific or current data . . . on the extent to which competitors have extended their networks.”⁴ Indeed, the overall conclusion of the report is, as reflected in the title, that the “FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services.” The GAO’s data was quite limited: for example, Verizon later confirmed that the GAO’s data missed more than 40 percent of the buildings to which MCI (a Verizon affiliate that provides competitive special access services outside of Verizon’s territory) has connections.⁵

3. Please provide specific examples of state regulations that you have concerns about. Please include examples of how different states have adopted different requirements covering the same issue.

Answer. Examples of the types of state legislation attempting to micromanage the customer-carrier relationship include laws on type-font, bill format, advertising, and even the establishment of rate elements. If wireless carriers are required to comply with different rules for such matters as bill format or advertising from state to state, such a patchwork of requirements substantially raise costs, to the detriment of both consumers and competition.

⁴ Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-08, at 40 (Nov. 2006) (“*GAO Report*”); see also *id.* at 50-52 (“To conduct our analysis, we contracted with two firms: Telcordia Technologies, Inc., and GeoResults. . . . According to Telcordia, the information in the registry may be less comprehensive for competitive firms than for incumbent firms because some smaller competitive firms do not subscribe to the service, and there may be some underreporting of competitors’ locations due to competitive concerns. However, Telcordia is unable to estimate the extent to which competitors’ data are underreported”).

⁵ See, e.g., Comments of Verizon, FCC WC Docket No. 05-25, at 17 (Aug. 1, 2007).

**RESPONSE OF AT&T INC. TO
QUESTION FROM REPRESENTATIVE MARSHA BLACKBURN**

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would benefit consumers?

Answer: AT&T does not oppose state and local taxes of general applicability that happen to apply to wireless services, such as sales taxes. AT&T does support eliminating state and local taxes that are targeted at wireless consumers. A number of states impose double-digit state and local transaction taxes on wireless services. AT&T believes that eliminating such taxes would benefit consumers, by making wireless services less expensive and encouraging greater use of wireless services (including wireless broadband services), which in turn would further encourage investment in wireless infrastructure.



Thomas J. Tauke
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thomas.j.tauke@verizon.com

July 23, 2009

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn HOB
Washington, DC 20515

Dear Chairman Waxman:

Attached are the responses for questions to my testimony to the Subcommittee on Communications, Technology, and the Internet on the May 7, 2009, hearing entitled "An Examination of Competition in the Wireless Industry."

I will be happy to address any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Tom Tauke".

Attachment

COPY TO:
The Honorable Joe Barton
The Honorable Rick Boucher
The Honorable Cliff Stearns
The Honorable Mike Doyle
The Honorable Marsha Blackburn

Responses to Questions from The Honorable Henry A. Waxman

- 1. Please comment on the current scope of your data roaming agreements, especially with smaller and rural carrier, and any technical challenges involved in these arrangements.**

Verizon Wireless' policy is to enter into 1xRTT data roaming arrangements with all roaming partners of like technology with whom we currently have existing voice and SMS (text messaging) roaming arrangements who request such arrangements. In addition, Verizon Wireless has entered into EvDO data roaming arrangements with requesting carriers that have implemented EvDO technology substantially in their home markets and that provide coverage to Verizon Wireless.

There are technical requirements that must be in place prior to launch of data service. These include establishing connectivity with a data exchange service provider to be able to exchange data traffic and bill for the traffic exchanged. Additionally, Verizon Wireless requires that the roaming partner supports Mobile IP protocol to serve Verizon Wireless customers. Mobile IP protocol allows the customer's home network to assign the IP address for the data session and enable the security measures put in place by the home carrier to protect the network to follow the customer. If the roaming partner does not have Mobile IP in place, it must add this protocol to their network to allow all customers to be given seamless data roaming capabilities.

- 2. On Page 32 of your written testimony you state that "carriers with advanced services are willing to give favorable roaming terms to other carriers that have implemented *similar advanced* technology in their networks." Please explain why a network that is capable of supporting 4G services should not be required to enter into a roaming agreement with a provider capable of supporting 3G.**

Decisions to invest in advanced technologies, such as fourth generation LTE, involve a significant amount of risk. Network upgrades necessary to implement advanced services cost billions of dollars. Carriers will be more willing to make these investments where they believe the investment will differentiate them from their competitors and therefore be more likely to earn a return on the investment. Conversely, carriers will be less willing to take the risks associated with investing in new technologies if they must immediately offer the benefits of that investment to competing carriers who thereby avoid making their own investments.

There are also several technical impediments to making 4G services available to roaming partners that have not implemented that technology in their home markets. First, the handsets used by the customers of the requesting carrier would need to be compatible with the new technology. In order for a customer to be able to roam on a LTE network, it

must have LTE capabilities in the device. Second, Verizon Wireless plans to implement LTE over 700 MHz spectrum. Therefore, devices used by a requesting carrier's customers will need to be capable of operating on this spectrum. Unless the requesting carrier's customers have devices that are compatible with both the LTE air interface technology and spectrum used by the host carrier, roaming arrangements between carriers will not be feasible.

3. On page 34 of your written testimony, you raise the issue of "in-market" roaming.

a. Has Verizon Wireless ever utilized in-market roaming? If so, please explain under what circumstances.

The FCC defines in-market roaming as roaming in any area where the requesting carrier currently holds spectrum rights. By virtue of the AWS and 700 MHz spectrum Verizon Wireless has acquired, it now holds spectrum rights throughout the United States (except Alaska). By definition, then, everywhere Verizon Wireless roams except Alaska it is utilizing in-market roaming. Verizon Wireless invests billions of dollars every year to extend its network to cover unserved parts of its markets, but in areas where it has not yet built service, it relies on mutually beneficial roaming agreements to fill in coverage gaps.

b. Is Verizon Wireless aware of any other carriers that do not allow in market roaming?

The relationships between other carriers and their roaming partners are confidential. Verizon Wireless does not have any specific information about other carriers' in-market roaming practices.

c. Does Verizon Wireless insist on this condition in all of its roaming agreements? If not, please explain why this policy is not applied to all roaming partners.

No. Any decision to restrict in-market roaming is based on the extensive investment Verizon Wireless has made in its network and to differentiate itself from competitors in each market on the basis of network quality and coverage. If a carrier has access to Verizon Wireless' network in markets where the requesting carrier and Verizon compete directly for subscribers, then Verizon Wireless may lose the ability to differentiate itself in the eyes of potential customers, and the requesting carrier may benefit by being able to divert financial resources away from building network facilities in that market. Moreover, unlimited use of Verizon Wireless' network by competing carriers in a market may require Verizon Wireless to make additional capital investment to handle the additional traffic.

d. Are there any circumstances in which in-market roaming should be permissible?

Negotiated agreements that allow for in-market roaming are already permissible under the FCC's rules. Verizon supports these rules and, as indicated above, has agreements that allow in-market roaming where such terms are mutually beneficial to the parties.

In addition, Verizon Wireless is prepared to make the following proposal for a change to the current FCC rule with respect to in-market roaming:

A carrier is required to offer automatic roaming to a requesting carrier's subscribers in any area where the requesting carrier holds spectrum but does not offer service:

- (a) For a period of 2 years from the date this rule takes effect.
- (b) After that period, if all of the spectrum usage rights held by the requesting carrier in the area is encumbered by U.S. Government users; or
- (c) After that period, if all of the spectrum usage rights held by the requesting carrier in the area was originally licensed by the FCC for CMRS purposes less than 2 years earlier.
- (d) After that period, for an additional one year if the requesting carrier has met build-out benchmarks to be established by the FCC.

Charges for home roaming will be subject to Sections 201 and 202 of the Act, but requesting carriers seeking home roaming and non-home roaming will not be deemed "similarly situated" for purposes of Section 202.

This proposal must apply to all carriers, on a competitively neutral basis. Efforts to require in-market roaming on an individual carrier basis (such as requests to change the Alltel merger conditions after the fact) should be rejected.

Responses to Questions from The Honorable Mike Doyle

1. **On page 40 of your written testimony you mention that Verizon Wireless receives bids from numerous providers when it solicits bids for backhaul services. How often do you solicit such bids? Does Verizon give a “preferential rate” to Verizon Wireless like that provided by Clearwire to Sprint Nextel? Please provide an estimate as to what percentage of backhaul circuits you have that these represent? Additionally, what percentage comes from companies that are not an ILEC?**

Verizon Wireless frequently solicits competitive bids for backhaul services. These bid solicitations typically occur in situations where there are no existing facilities or where the existing facilities need to be replaced or upgraded. For example, when Verizon Wireless deploys a new cell site, Verizon Wireless solicits competitive bids from ILECs and competitive providers because they would need to deploy facilities to that new cell site in order to provide backhaul services. When Verizon Wireless solicits bids for backhaul services at new cell sites, the solicitation process typically yields bids from ILECs and several competitive providers, but Verizon Wireless has not tracked the backhaul services it obtains through those bids.

Verizon Wireless also solicits bids where existing backhaul facilities need to be replaced or upgraded. For example, Verizon Wireless is deploying a 4th Generation wireless broadband network throughout the United States based on the 4G technology standard called Long Term Evolution (LTE). In order to support this LTE deployment, most existing backhaul facilities will need to be replaced or upgraded. Verizon Wireless is therefore soliciting bids from ILECs and competitive providers to replace or upgrade its existing backhaul services as needed to support its LTE deployment. As part of this LTE deployment Verizon Wireless has thus far received at least 20 bids from ILECs, 12 bids from cable companies, four bids from fixed wireless providers, and more than 35 bids from other competitive providers. Verizon Wireless does generally purchase backhaul services from Verizon in areas where Verizon has wireline operations.

In the areas where Verizon has wireline operations, Verizon does not provide Verizon Wireless “preferential rates” for wireless backhaul. The vast majority of “last mile” traditional special access services that Verizon Wireless purchases from Verizon remains under price cap regulation. This regulation means that Verizon’s special access rates are subject to an FCC determined cap and must be made available to other customers pursuant to tariff. Even in areas where the FCC’s pricing flexibility rules have removed price cap regulation, Verizon still is required to make its tariffed offerings (including those purchased by Verizon Wireless) available to all customers for the same price level and on the same terms and conditions. Any contract tariff that Verizon offers Verizon Wireless for

special access services must be publicly filed in tariffs at the FCC, and Verizon must make that same contract tariff, including the prices, available to all similarly-situated companies.

- 2. On page 10 of your testimony you state that “the wireless industry is an intensely competitive consumer electronics business.” Please elaborate on this statement. Does Verizon Wireless consider itself to be a wireless service provider and a consumer electronics provider?**

Verizon Wireless and other mobile providers offer traditional wireless communications services as well as information services. They also market, sell, and service some of the most innovative and sophisticated consumer electronics devices available in the United States, such as the Apple iPhone, Blackberry Storm and Tour, Palm Treo and Pre, Google G1, and a host of other smartphones, netbooks and the like. The referenced statement points out that the mobile communications industry has evolved beyond traditional mobile telephone communications, and so, should not be restrained with traditional utility-style regulation, particularly since its competitors in the consumer electronics industry are not so restrained.

- 3. Please provide specific examples of state regulations that you have concerns about. Please include examples of how different states have adopted different requirements covering the same issue.**

States often attempt to impose requirements that would regulate various aspects of the relationship between a wireless service provider and its subscribers. Our May 7, 2009, submission to the Subcommittee provides examples of “patchwork” regulation in Minnesota and California. Early termination fees (ETFs) are a frequent subject of such efforts. For example, during the 2009 legislative season, bills were introduced into the legislatures of Iowa (HSB 142), New Mexico (HB 885), Nevada (AB 316), and Washington (SB 5860), to regulate wireless service ETFs. Each provided a different method for imposing a restriction on the level of the ETF, and thus offered conflicting outcomes for subscriber cancellations. They would have resulted in different payments for early termination depending on the state of residence of a subscriber.

Another example of disparate state regulation is state “cramming” laws that attempt to prohibit unauthorized third-party charges from appearing on subscriber bills. California requires a separate bill section for disclosure of third-party product and charges, and a toll-free number associated with the product provider for resolution of any dispute. Cal. Pub. Util. Code § 2890(d). On the other hand, New Mexico prohibits the placement of charges for goods or services that are not telecommunications services on a telephone company’s bill. New Mex. Stat. Ann. § 63-9G-2(C)(2). As a result, Verizon Wireless does not offer certain products available elsewhere to residents of New Mexico. Residents of California and New Mexico have different products available due in part to the differing approaches the states have taken to regulate cramming. This confuses customers and imposes additional operating costs because we must maintain different billing and marketing practices in these states.

Response to Question from the Honorable Marsha Blackburn

1. Do you support eliminating discriminatory state and local taxes on wireless users? If not, why not? Do you believe tax relief for wireless providers would help benefit consumers?

The excessive and discriminatory taxation that applies to the entire communications industry today is a carryover from the days that the industry operated as a rate-regulated utility. Those days have long passed. The industry has thus argued that the current tax structure needs to be reformed to reflect the highly competitive nature of the industry that exists today and to ensure it is taxed like any other general business. A critical element to achieving that goal is to eliminate any discriminatory taxes that may apply to communication services, including wireless services.

The most recent study on wireless taxes by Scott Mackey of Kimball Sherman & Ellis finds that the average rate of taxation on wireless services is 15.19% and the average rate of taxes imposed upon other goods and services is 7.07%. Setting aside any specific impositions for E911 and Universal Service, this tax differential should be eliminated so that wireless services are taxed like any other general business. Taxing wireless consumers at a rate that approaches the level of “sin” taxes -- levels that are meant to discourage consumption -- is counterintuitive to the policy goal of providing affordable access to communications services to all Americans.

Verizon Wireless is committed to paying its fair share of taxes. However, we take exception when our business and our investments are targeted for additional tax burdens not borne by other businesses. Those discriminatory taxes drive up our cost of doing business, which will ultimately impact the consumer and increase our cost to deploy our network infrastructure. Targeted taxes on providers hinder broadband deployment and thus undermine policymakers’ central goal of promoting expanded broadband.