

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

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

**REPLY COMMENTS OF
CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION,
FREE PRESS, MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION,
AND PUBLIC KNOWLEDGE**

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SUMMARY

Initial comments in this proceeding – and investigations conducted by the House and Senate – demonstrate numerous problems with the wireless market. Prices are rising, consumer choice is artificially limited, and valuable innovations are being delayed or kept from the market altogether; and smaller competitors cannot get the spectrum, the backhaul, the roaming, or the handsets they need. Meanwhile, the major carriers' arguments in this proceeding emphasize the existence of growth and innovation in the wireless market, which they contend indicates effective competition. These arguments are incorrect. A closer examination of the data in the Commission's *Thirteenth Report* and other sources indicates that insufficient competition has led to reductions and delays in investment, innovation, and growth. For example, the *Thirteenth Report* indicated a reduction in capital expenditures by 20% from 2005 to 2007, although revenue increased 20% during the same time period. Little surprise, then, that the two largest carriers that together hold over 60% of the national market reported profits of 40% or more in the first quarter of 2009.

Even as revenues and profits rise, investment continues to decline, growth continues to disappoint, and wireless carriers persist in constructing artificial and anti-consumer obstacles to innovation – all telltale signs of insufficient competition.

The Commission should not be fooled by the superficial analytical metrics proffered by industry, metrics that paint the false picture of a flourishing market. The major wireless operators, enjoying immense profits thanks to market power, seek to have the Commission maintain an empty analysis, to ensure that they continue to enjoy the favorable regulatory environment that has allowed them to amass spectrum and market share without consequences.

As with our initial comments, we ask the Commission to follow the examples of the House, the Senate, and the Department of Justice to look more deeply into the wireless market structure and to examine all of the evidence and all of the barriers impeding growth and competition in the wireless market. In a world in which only AT&T and Verizon believe there is adequate competition – because the lack of meaningful competition is adequate for them – the Commission’s public interest duties demand a closer examination.

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The Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge (“Commenters”) respectfully submit these reply comments in response to the *Public Notice* of the Federal Communications Commission seeking input on the state of competition in the Commercial Mobile Radio Service (“CMRS”) market for the Commission’s upcoming *Fourteenth Report*.

INTRODUCTION

Initial comments in this proceeding demonstrate numerous signs of insufficient competition in the wireless market. Prices are rising, consumer choice is artificially limited, and valuable innovations are being delayed or kept from the market altogether; and smaller competitors cannot get the spectrum, the backhaul, the roaming, or the handsets they need. Carrier arguments in this proceeding emphasize the existence of growth and innovation in the wireless market, which they contend indicates effective competition. These arguments are

fallacious. Even in a monopoly, there are incentives to invest, innovate, and grow – the existence of some does not demonstrate effective competition. Rather, without sufficient competition, investment, innovation, and growth will be reduced or delayed relative to a competitive market. And, a closer examination of the data in the Commission’s *Thirteenth Report* and other sources indicates that this is in fact the case. Even as revenues and profits rise, investment declines, growth disappoints, and wireless carriers persist in constructing artificial and anti-consumer obstacles to innovation.

The Commission has largely ignored these problems in past CMRS reports, focusing on a subset of metrics that paint the picture of a flourishing market. This studious and selective evaluation stands in stark contrast to other branches of the federal government – the House and Senate have conducted multiple hearings on rising prices, exclusive deals, and other anti-consumer practices in the wireless industry. News reports indicate that the Department of Justice may soon be entering the fray as well.¹ In a world in which only AT&T and Verizon believe there is adequate competition – and where AT&T and Verizon have 60% of the market share² and report 40% profits, or more, on their wireless services³ – the Commission’s public interest duties demand a closer examination.

We ask the Commission to take a more detailed and substantive look at the wireless market, including specific factors drawn from industrial economics that elaborate on the existing framework of structure, conduct, and performance. We ask the Commission to emphasize in its

¹ See, e.g., Howard Buskirk, “DoJ Said to Investigate Anti-Competitive Wireless Practices,” *Communications Daily*, vol. 29 no. 128 (July 7, 2009).

² See, e.g., Cecilia Kang, “Key Senator Backs Telecom Probe,” *Washington Post* (July 7, 2009), at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/06/AR2009070603526.html>.

³ See p. 7, *infra*.

report ongoing barriers to entry and competition faced by smaller and rural carriers, as these barriers also have a direct impact on consumers and consumer choice.

I. DESPITE CARRIERS' ASSERTIONS, CURRENT LEVELS OF GROWTH AND INNOVATION ARE NOT SUFFICIENT TO PROVE EFFECTIVE COMPETITION.

A. Even in a Monopoly Market, Growth and Innovation Will Occur, Though at a Lower Level.

The Commission must consider the impact of barriers to entry and growth on competition and on consumers, regardless of any positive signs that it may find in penetration statistics or other market features. One of the most substantial misconceptions in industry comments is that the existence of growth and innovation in a market necessarily reflect effective competition. The industry's intended implication is that barriers to entry, if any, must not be very substantial and need not be considered in the Commission's CMRS market analysis. Among other flaws with this approach, such arguments fail to recognize that growth and innovation can occur without effective competition, although they are likely to occur at a delayed and/or reduced rate.

1. Even in a monopoly market, participants have incentive to innovate and grow.

Industry comments heavily emphasize new devices and increased penetration and offerings as overwhelming evidence of competition. AT&T says that "the real story" in 2008 is innovation, and the development of the iTunes store and devices such as the Kindle.⁴ AT&T's introduction discusses the reduction in size, increase in utility of handsets, and the growth in number of subscribers in great detail, spending a single sentence on the number of choices available to consumers, and concluding somewhat hyperbolically (and with a conclusion not following its premises) that "anyone who is not sleep-walking through life knows, competition,

⁴ AT&T Comments at 4-5.

investment, and innovation in the wireless industry are at a fever pitch.”⁵ CTIA praises investment into infrastructure,⁶ increased offerings of broadband and other high-speed services,⁷ software development kits,⁸ and increased usage,⁹ all as overwhelming signs of competition. CTIA even praises the development of “consumer friendly practices” such as pro-rating early termination fees as a sign of competition,¹⁰ ignoring that such practices from many carriers were likely motivated not from competition but from fear of government intervention, demonstrated by a Senate bill in September of 2007,¹¹ a Senate Commerce Committee hearing in October,¹² and a FCC hearing in 2008.¹³

Although innovation and growth are certainly factors worth considering by the FCC in the *Fourteenth Report*, they are not, purely by themselves, sufficient to demonstrate competition. Even in a market where prices are set at monopoly levels—whether through actual monopoly or through collusion—the participant(s) would have incentives to grow and innovate to increase their total revenue and total profits. In a monopoly market, a monopolist that raises prices above the monopoly price threshold would see lower profits from a lower number of subscribers. However, expanding the company’s service territory or offerings without lowering the price would result in increased subscribers at the monopoly price. Similarly, additional innovation in

⁵ AT&T Comments at 1-3.

⁶ CTIA Comments at 12-13.

⁷ CTIA Comments at 14-23.

⁸ CTIA Comments at 37-41.

⁹ CTIA Comments at 42-44.

¹⁰ CTIA Comments at 29-30.

¹¹ Eric Bangeman, “Cellular freedom: bill would cut early termination fees, hidden charges,” *Ars Technica* (Sept. 10, 2007), at <http://arstechnica.com/gadgets/news/2007/09/cellular-freedom-bill-would-cut-early-termination-fees-hidden-charges.ars>.

¹² Anne Broache, “Democrats take aim at un-‘friendly’ wireless carriers,” *CNET News* (Oct. 17, 2007), at http://news.cnet.com/8301-10784_3-9799045-7.html.

¹³ See, e.g., Allie Winter, “Pro-rated ETFs becoming rule, not exception,” *RCR Wireless News* (Oct. 20, 2008), at <http://www.rcrwireless.com/article/20081020/VIDEO/810179979/video-pro-rated-etfs-becoming-rule-not-exception>.

the devices and service offerings increases the value of the service to consumers, and can allow the company to shift up the consumer demand curve and thereby raise the monopoly price threshold and increase revenue further from the same subscribers. In communications networks, which reflect an exponentially decreasing cost for the raw inputs to networks and devices, these are even more pronounced.

2. *Reductions or delays in investment, innovation, and growth indicate insufficient competition.*

Innovation and growth in markets can be driven by factors other than robust competition. In a concentrated market, participants face limited competition, and often have incentive and opportunity to limit their output to keep prices high. But, some innovation and growth will nevertheless occur, to meet the demands of stockholders and investment markets as well as to meet the demands of secondary markets. Insufficient competition does not eliminate investment, innovation, or growth in a market, but rather delays or reduces them – or more broadly, it bends the direction of innovation and growth to the benefit of the largest participants, rather than allowing the open market to evolve naturally.

In the wireless market, carriers exert substantial, if not complete, control over the pace of network investment, the increased deployment of networks including broadband services, and the additions of features to handsets. If the pace of these developments appears reduced or limited compared to what it might be in a more competitive market structure, this pace should be interpreted as a sign of insufficient competition in the wireless market.

As one concrete example of this, the release of Apple's 3G iPhone and resulting usage loads revealed substantial underinvestment in AT&T's underlying network,¹⁴ problems that

¹⁴ See, e.g., Brian X. Chen, "Wired.com's iPhone 3G Survey Reveals Network Weaknesses," *Wired.com* (Aug. 25, 2008), at <http://www.wired.com/gadgetlab/2008/08/global-iphone-3/>.

AT&T has acknowledged and pledges to correct,¹⁵ to placate angry customers and reassure investors. In a more competitive market, in which AT&T would have risked losing iPhone customers to other service providers over any lapses in service, AT&T may have invested more into the network in preparation for deployment.

Innovation and growth cannot be sole indicators of the presence or absence of competition, as these could efficiently occur (likely at a much reduced rate) even in highly concentrated markets. Even if the Commission finds substantial growth and innovation in the CMRS market, the existence of demonstrable barriers to competition would still indicate that the market could demonstrate *even more* growth and innovation with the removal of these obstacles. The Commission should look for any indications that investment, innovation, and growth have been reduced or delayed as a result of insufficient competition.

B. Data Indicates Delays and Reductions in Investment and Growth Resulting from Insufficient Competition.

Detailed examination of relevant data in fact indicates reduced investment and limited growth as a result of insufficient competition over wireless services. Revenues increase, capital expenditures decrease, growth slows, and profits soar – taken together, telltale signs of insufficient competition in the CMRS market.

1. Wireless providers have reduced investments despite increased revenues.

On investment, the carriers' rhetoric does not match the reality – despite rising revenues and profits, wireless carriers are substantially reducing their capital expenditures. In the

¹⁵ See, e.g., John Paczkowski, “AT&T CEO Randall Stephenson: ‘Wireless Is the Priority of This Business,’” *D7* (May 27, 2009), at <http://d7.allthingsd.com/20090527/randall-stephenson/> (“Walt: Let’s talk for a moment about the iPhone. It’s a data-intensive device. You weren’t ready when you first launched the iPhone 3G. What happened? Stephenson says the company wasn’t quite ready. “But we’re improving.””).

Commission's *Thirteenth Report*, the description of technological advancements was thorough – 29 full paragraphs were spent characterizing the “technology deployment and upgrades” of U.S. carriers.¹⁶ The lone, next, paragraph spent on capital expenditures tells a different story – after a healthy 15% increase in capital expenditures from 2004 to 2005, capital spending stayed flat in 2006, and then went down by a striking 19% in 2007.¹⁷

These numbers tell a very different tale from the change in revenue in the *Thirteenth Report*. According to CTIA's own numbers, total service revenue from wireless increased 10% from 2005 to 2006¹⁸ and another 10% from 2006 to 2007.¹⁹ Outside of an appendix, these numbers are not discussed in the *Thirteenth Report*, which instead focuses its “market performance” determination on increased minutes of use and decreased average revenue per minute. Nowhere does the Commission acknowledge that from 2005 to 2007, investment decreased substantially even as revenue increased.

These extra revenues appear to be going directly into carrier profit margins. AT&T's wireless division reported a Q1 2009 profit margin of 40.9 percent, well above the already inflated 39.2 percent profit forecast;²⁰ Verizon's margin for the same time period was 46%.²¹

¹⁶ See *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*, 23 FCC Rcd 2241 at paras. 126-54 (2008) (“*Thirteenth Report*”).

¹⁷ See *Thirteenth Report* at para. 155.

¹⁸ See *Thirteenth Report* at Appendix A-1 (reporting 2005 service revenues as \$113,538,221 and 2006 service revenues as \$125,456,825).

¹⁹ *Id.* (reporting 2007 service revenues as \$138,869,304).

²⁰ Sinead Carew, “AT&T profit boosted by iPhone, video, Internet,” *Reuters* (Apr. 22, 2009), available at <http://www.reuters.com/article/technologyNews/idUSTRE53L29L20090422>.

²¹ “Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009,” Verizon (Apr. 27, 2009) available at <http://investor.verizon.com/news/view.aspx?NewsID=983>.

And, these are far from isolated incidents of good fortune.²² In a truly competitive market, more of these profits would be invested into the network to continue to improve service quality and lower service cost.²³

Certainly, the Commission's upcoming *Fourteenth Report* should be based on the most recent capital expenditure data available, and that data may tell a different tale. But, if the trend has continued, the Commission must recognize that investment in wireless networks is going down despite increased revenue, and that the increased revenue is going directly into profits – a clear sign of insufficient competition.

2. Growth in the CMRS market is limited and does not reflect aggressive investment.

As with investment, on growth, the carriers' rhetoric does not match the reality. As stated above, some growth is natural even in a concentrated market – the few participants have incentives to grow the total pool of consumers, to grow the total revenue, and to grow the total profits. Therefore, the best test should be whether the market demonstrates any artificial limitations on growth, or whether there is evidence to indicate that growth in the market is less than it would be in a competitive market.

Although it is difficult to tell whether growth is less than it could have been, some indications may be gleaned from the performance of other countries. Viewed through this lens, growth of wireless services in the U.S. market is nowhere near as rosy a picture as industry

²² See generally “Wireless growth boosts Verizon’s profit,” *Associated Press* (Apr. 28, 2008), available at <http://www.msnbc.msn.com/id/24351412/>; Marguerite Reardon, “Verizon counts on wireless for profits,” *CNET News* (July 28, 2008), available at http://news.cnet.com/8301-1035_3-10000507-94.html; Marguerite Reardon, “Verizon’s profits soar on wireless,” *CNET News* (Oct. 27, 2008), available at http://news.cnet.com/8301-1035_3-10075870-94.html.

²³ Regardless of whether accounting profit margins are fairly considered economic profits and a fair subject for competition analysis, to argue over the best metric to represent profits when the metrics we do have paint such a clear picture is to miss the forest for the trees.

claims. As of 2007, the U.S. ranks 63rd in cellular subscriptions per 100 people; over the five year window from 2002-2007, the U.S. ranks 79th in growth of subscriptions per 100 people.²⁴ To be clear, growth does not directly correlate with competition – the nations with more growth than the United States do not necessarily have more competition. However, compared to countries with similar penetration rates, growth of subscriptions in the U.S. wireless market in recent years has been below average.²⁵ At a minimum, this evidence should cast doubt on arguments that the U.S. market is experiencing rapid growth and is therefore competitive.

Based on the limited information available in the record and in other sources to evaluate the market's growth, all signs should indicate weak performance of the wireless market. Limited growth – particularly when coupled with rising profits and decreased investment – is a clear sign of insufficient competition.

C. The Record Indicates Delays and Limits to Innovation Resulting from Insufficient Competition.

To have effective competition, a market should not contain artificial limitations on innovation.²⁶ However, the CMRS market demonstrates substantial delays and limitations.

1. Exclusive handset deals generate delays and limits for innovation.

Contrary to the arguments of major carriers, the impact of exclusive deals for handsets is to reduce and delay innovation. Allowing wireless carriers to control the development and release of new features on devices – the inevitable concomitant of exclusive deals – results in the delay of new functionality until the carrier can maximize its individual financial return on the

²⁴ See “Measuring the Information Society,” International Telecommunications Union, at Annex 4 (2009), at http://www.itu.int/ITU-D/ict/publications/idi/2009/material/IDI2009_w5.pdf.

²⁵ See *id.* (examining growth in wireless markets from 2002 to 2007).

²⁶ See p. 29, *infra*. See generally F. M SCHERER AND DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1990) (hereafter SCHERER AND ROSS).

feature, and the elimination of any features or functionality that might benefit both the device manufacturer and the consumer but might harm the financial interest of the wireless carrier.

The large national carriers contend that the wireless market demonstrates remarkable innovation as a result of handset exclusivity, and that this innovation somehow both demonstrates and generates substantial competition in the CMRS market. For example, AT&T claims “[t]he popularity of the iPhone and its innovative features and applications has provoked an unprecedented competitive frenzy.”²⁷ The contention is that other device manufacturers and carriers work together to “innovate” by competing to develop clones of popular devices, and that without exclusive deals, carriers would lack this incentive.

Such arguments fail to acknowledge two important, basic observations. First, the reproduction of clone devices that mimic the functionality of other devices does not constitute innovation. The objective of competition and innovation is not to recreate the iPhone with Motorola, Nokia, and Samsung branding – the objective is to go one step further and to create the next generation of wireless device. Second, device manufacturers have independent incentive to create new and better devices, regardless of the presence or absence of exclusive deals. In fact, in a market with exclusive deals, device manufacturers have incentives to create clones, as other carriers will pay (and in fact overpay, knowing the popularity of such devices and the minimal risk) to offer such clones. However, in a market without exclusivity, device manufacturers have a stronger incentive to create better, more innovative devices – not to reinvent the wheel.

In particular, although the Apple iPhone is certainly an innovative and groundbreaking device, AT&T’s allegation that their exclusive deal is responsible for the innovation and social

²⁷ AT&T Comments at 36.

benefits of the iPhone is unwarranted.²⁸ Consider Apple's recent announcement of the iPhone 3GS, featuring the new capabilities of tethering and MMS functionality.²⁹ AT&T has chosen not to offer these capabilities with its service.³⁰ Users of the iPhone in other countries and with other services can use these features, but, since AT&T is the sole carrier permitted to offer the iPhone in the United States, American consumers have no way to use them – a real, and substantial, limit on innovation, actively imposed by the wireless carrier.³¹ And, as stated in our initial comments, AT&T has impeded other iPhone-related innovations as well. Notably, the popular Skype iPhone application is not allowed to be operated on AT&T's 3G network,³² nor is Sling Media's SlingPlayer Mobile application,³³ even though programs which impose equivalent or even more substantial burdens on the network are permitted.³⁴

2. Innovation is measured by features, not clones – and features remain artificially limited.

Some initial comments in this proceeding contend that the market for devices is functional and competitive because a large number of different mobile devices are available on the U.S. market. According to CTIA, there are over 630 wireless devices currently being sold in

²⁸ CFA et al. Comments at 12-13.

²⁹ See, e.g., Brad Stone, "AT&T: Tethering and MMS Coming to the iPhone," *New York Times* (June 8, 2009), at

<http://bits.blogs.nytimes.com/2009/06/08/att-tethering-and-mms-coming-to-the-iphone-in-us/>.

³⁰ *Id.*

³¹ AT&T has said it will include these features, but has said only that it would provide both services "soon." See *id.*

³² See Leslie Cauley, "Skype's iPhone limits irk some consumer advocates," *USA Today* (February 2, 2009), at http://www.usatoday.com/tech/news/2009-04-01-att-skype-iphone_N.htm.

³³ See Chris Riley, "AT&T's Not-So-Secret Veto over 3G SlingPlayer Mobile,"

SavetheInternet.com Blog (May 13, 2009), at

<http://www.savetheinternet.com/blog/09/05/13/att's-not-so-secret-veto-over-3g-slingplayer-mobile>.

³⁴ See Ryan Singel, "Group Calls Foul on AT&T Blocking Some iPhone Video Apps," *Wired.com* (June 18, 2009), at <http://www.wired.com/epicenter/2009/06/group-calls-foul-on-att-blocking-some-iphone-video-apps/>.

this country, a number CTIA deems “nothing short of amazing.”³⁵ This statistic – which still falls well short of the 1080 devices being sold in Japan, according to the Japanese phone design company ReUdo³⁶ – fails to indicate the level of innovation in the wireless market. CTIA fails to indicate what number of these devices are smartphones or other innovative devices, and what number merely replicate the same basic functionality, a question of particular importance in a market that rewards the creation of clone devices because of the dynamic produced by exclusive deals for popular handsets.

Innovation is best measured by features and functionality, and not by clones. A large number of nearly identical devices with the same limited set of features does not indicate an innovative market. Contrary to the arguments of carriers,³⁷ the sheer number of available handset models and the number of handsets that offer specific features does not indicate in any way the level of innovation or competition in the market. Rather, innovation remains actively and artificially limited by the policies and terms of service of wireless carriers, given life and authority through the power they hold over device manufacturers.

II. DESPITE CARRIERS’ ROSY OUTLOOK, GOVERNMENT BODIES, CONSUMERS, AND COMPETITORS HAVE EXPRESSED NUMEROUS COMPETITIVE CONCERNS.

Although AT&T and Verizon claim repeatedly that the wireless market is very competitive, other smaller competitors point to numerous artificial restrictions on their ability to compete and grow, including exclusive deals for devices, limitations on roaming abilities, and excessive prices for special access services. Increasingly, other branches of the federal

³⁵ CTIA Comments at 31-32.

³⁶ See ReUdo (June 16, 2009), at http://www.reudo.co.jp/keitai_list/index.html.

³⁷ See Verizon Comments at 14; CTIA Comments at 31.

government are also investigating signs that the wireless market is not sufficiently competitive. In recent months, both the House and Senate have conducted hearings focused the state of the wireless market; additionally, the Department of Justice is reportedly conducting a preliminary investigation of some behaviors. Also, despite misleading assertions from the wireless industry, consumers continue to face excessive prices and punitive early termination fees. Finally, comments in the initial round of this proceeding demonstrate a wide range of concern over limits to competition and consumer choice in the wireless market, limits that the Commission should recognize in its *Fourteenth Report*, and should strive to address in subsequent proceedings.³⁸ All of the problems and inquiries at play here reflect the same central dynamic – dominant carriers leveraging their influence over the market in ways that harm the public interest and competition, creating the appearance (or, rather, the reality) of market failures that merit policy responses.

A. The House, Senate, and Department of Justice Are Investigating the State of Competition in the Wireless Market.

1. The House is actively examining wireless competition and barriers to entry.

The House subcommittee with jurisdiction over telecommunications has held two hearings on the wireless market, both of which touched on problems with competition. In the summer of 2007, shortly after release of the first Apple iPhone, the House Subcommittee on Telecommunications and the Internet held a hearing titled, “Wireless Innovation and Consumer Protection.”³⁹ The hearing examined high early termination fees and portability of devices, and

³⁸ Some of the relevant proceedings are already open. For example, the Commission has an open docket on a petition by RCA concerning handset exclusivity arrangements. *See, e.g.*, Reply Comments of the Ad Hoc Public Interest Spectrum Coalition, RM-11497 (Feb. 20, 2009) (PISC RCA Reply Comments).

³⁹ Hearing, Wireless Innovation and Consumer Protection, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce (July 11, 2007),

many participants raised ongoing harms to the market that stem from insufficient competition.⁴⁰

In his opening statement, Subcommittee Chairman Markey addressed these issues, raised in importance by AT&T's exclusive deal for the new iPhone:

[The iPhone] highlights problems with the current marketplace structure, where devices are provided by carriers, portability of devices to other carriers is limited or non-existent, and many consumers feel trapped having bought an expensive device or having been locked into a long-term contract with significant penalties for switching.⁴¹

Although the major national carriers continued to insist that all was well, many panelists demonstrated substantial limits on competition in the wireless market, and some members of Congress appeared sympathetic.⁴²

In 2009, the House Subcommittee on Communications, Technology, and the Internet held a hearing titled, "An Examination of Competition in the Wireless Industry."⁴³ As in 2007, the public interest community and smaller wireless competitors raised concerns over the power of a

http://archives.energycommerce.house.gov/cmte_mtgs/110-ti-hrg.071107.ConsumerProtection.shtml.

⁴⁰ See Hearing Transcript, Serial No. 110-61, Wireless Innovation and Consumer Protection (July 11, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:43548.wais; see generally Susan Crawford, "The iPhone hearing," at http://scrawford.blogware.com/blog/_archives/2007/7/11/3085640.html.

⁴¹ Statement of Chairman Edward J. Markey, House Subcommittee on Telecommunications and the Internet, Hearing on Wireless Innovation and Consumer Protection (July 11, 2007), available at http://markey.house.gov/index.php?option=com_content&task=view&id=2954.

⁴² See, e.g., Crawford, *supra* note 40 (describing Rep. Markey's comments on carrier control over wireless devices).

⁴³ Hearing, An Examination of Competition in the Wireless Industry, Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce (May 7, 2009), http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1611:energy-and-commerce-subcommittee-hearing-on-an-examination-of-competition-in-the-wireless-industry&catid=134:subcommittee-on-communications-technology-and-the-internet&Itemid=74.

few carriers in an increasingly concentrated market.⁴⁴ Focusing on exclusive deals for handsets, Cellular South compared the arrangements to the wired world, and a hypothetical future in which Macintosh computers would only be able to connect to the Internet through an AT&T DSL line.⁴⁵ Even other major wireless carriers targeted the behavior of AT&T and Verizon – Sprint Nextel characterized the special access market as a monopoly, with the Bell incumbents holding a dominating position and leveraging their power over their wireless competitors.⁴⁶ And, as with the 2007 hearing, some members of the subcommittee appeared sympathetic to these concerns.⁴⁷

2. The Senate is actively examining wireless competition and barriers to entry.

Two Senate committees have held hearings to examine the state of competition in the wireless market. First, on June 16, 2009, the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Committee on the Judiciary held a hearing on rising prices for individual text messages in wireless services.⁴⁸ Senator Kohl asked AT&T and Verizon representatives to explain why the price of individual text messages outside of a plan or above the limits of a plan had risen by a factor of two between 2006 and 2008 for all four major national carriers within weeks or days of each other, first from 10 cents per message to 15 cents, and then from 15 cents to 20 cents.⁴⁹ As the hearing revealed, these prices stand in stark contrast to the cost to the carrier, which a panel witness calculated to be nearly two orders of magnitude

⁴⁴ See, e.g., Kenneth Corbin, “House Panel Mulls Wireless Regulation,” *InternetNews.com* (May 7, 2009), at <http://www.internetnews.com/government/article.php/3819306>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Rep. Eshoo raised the high price of special access among other issues. See, e.g., Project VoteSmart, at http://www.votesmart.org/speech_detail.php?sc_id=464387&. Rep. McNerney stated that “there are a few large telecom players that dominate the field... while several smaller companies are clawing it out for the scraps.” *Id.*

⁴⁸ See, e.g., Press release, “Kohl Examines Causes of Rising Text Message Pricing,” available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2870.

⁴⁹ *Id.*

lower at around 0.3 cents per message.⁵⁰ To defend against this, AT&T and Verizon argued that a majority of their subscribers purchase bulk texting plans at lower rates.⁵¹

Apparently unconvinced following the Senate's hearings on text message prices, on July 6, 2009, Subcommittee Chairman Herb Kohl sent a letter to the Department of Justice and the Federal Communications Commission to raise concerns over the state of competition in the CMRS market.⁵² Chairman Kohl stated that parallel price increases for text messages are "a warning sign for the state of competition in the cell phone market."⁵³ Chairman Kohl also expressed concern over other aspects of the wireless market, including data roaming and handset exclusivity.⁵⁴

Additionally, on June 17, 2009, the Senate Committee on Commerce, Science and Transportation held a full committee hearing on "The Consumer Wireless Experience."⁵⁵ The hearing emphasized coverage and competition in the wireless industry, including among other

⁵⁰ Scott Bland, "Senate Investigates Rising Text Message Prices," *Kansas City infoZine News* (June 18, 2009), available at <http://www.infozine.com/news/stories/op/storiesView/sid/36325/>. Both the sender and receiver of the text are charged, resulting in a total revenue of 40 cents if neither has a bulk plan, more than 100 times the estimated transmission cost of 0.3 cents.

⁵¹ *Id.* Upon being asked directly, the carriers stated that approximately 17 percent of their service subscribers send and receive text messages without purchasing a bulk plan. *Id.*

⁵² Cecilia Kang, "Key Senator Backs Telecom Probe," *Washington Post* (July 7, 2009), at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/06/AR2009070603526.html>; Jim Puzzanghera, "Antitrust review of wireless carriers is urged," *Los Angeles Times* (July 7, 2009), at <http://www.latimes.com/business/la-fi-telecom-justice7-2009jul07,0,607246.story>.

⁵³ Kang, *supra* note 52.

⁵⁴ *Id.* While serving as Acting Chairman, Commissioner Copps stated that the Commission should open a proceeding on handset exclusivity arrangements. Matthew Lasar, "Genachowski: FCC will probe handset exclusivity deals," *Ars Technica* (June 21, 2009), at <http://arstechnica.com/tech-policy/news/2009/06/genachowski-tells-kerry-hell-probe-wireless-handsets-and-lots-more.ars>. During his confirmation hearing, Chairman Genachowski promised to "ensure that the full record on the RCA [handset exclusivity] petition is reviewed, and act accordingly to promote competition and consumer choice." *Id.*

⁵⁵ Hearing, The Consumer Wireless Experience, Senate Committee on Commerce, Science and Transportation, at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=03b81ffd-ba9f-42e6-8331-7c28f6d112b0.

factors the impact of exclusive deals for handsets on consumers and competition.⁵⁶ Chairman Rockefeller expressed numerous concerns with the wireless marketplace, including confusing contracts, mysterious charges, consumer complaints, and problems with coverage in rural areas.⁵⁷ Similarly, Senator Kerry praised the FCC's landmark *Carterfone* action separating the control of devices from service on the wireline network, and asked whether it was best for consumers to have carrier control over devices on the wireless network.⁵⁸ Senator Klobuchar also asked the FCC to examine handset deals, saying, "Consumers should be free to choose the plan and phone that best fits their needs."⁵⁹

3. The Department of Justice has opened a preliminary investigation of wireless carriers and practices.

The day after Chairman Kohl's letter reached the Commission and the Department of Justice, news reports indicated the Department of Justice had opened a "preliminary investigation" of telecom companies,⁶⁰ including consideration of exclusive handset deals among other wireless practices.⁶¹ The DOJ has not yet begun an official investigation, but public

⁵⁶ See, e.g., Martin H. Bosworth, "Senate Committee Investigates Cell Phone Contracts," *ConsumerAffairs.com* (June 18, 2009), available at http://www.consumeraffairs.com/news04/2009/06/congress_mobile02.html.

⁵⁷ Statement of John D. Rockefeller (June 17, 2009), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=6449b0b8-ff99-4445-9913-56c7135df3d9.

⁵⁸ Statement of John F. Kerry (June 17, 2009), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=c1ebbe6e-b617-424d-bf04-26ceb25bc394.

⁵⁹ News release, "Klobuchar: Protect Consumer Rights in Cell Phone Market," (June 17, 2009), available at http://klobuchar.senate.gov/newsreleases_detail.cfm?id=314651.

⁶⁰ Amol Sharma, "Telecoms Face Antitrust Threat," *Wall Street Journal* (July 7, 2009), at <http://online.wsj.com/article/SB124689740762401297.html>.

⁶¹ Howard Buskirk, "DoJ Said to Investigate Anti-Competitive Wireless Practices," *Communications Daily*, vol. 29 no. 128 (July 7, 2009).

interest groups and members of Congress have praised the initial efforts.⁶² Furthermore, the investigation is consistent with widespread statements that the current administration will increase antitrust oversight more broadly.⁶³ Clearly, increased scrutiny of the status of competition and of practices such as exclusive deals for devices is part of this agenda.

B. Consumers Continue to Face Excessive Prices and Punitive Early Termination Fees.

1. Prices remain excessive.

Significant consolidation and lack of effective federal oversight of the wireless industry have greatly diminished price competition in the wireless market. As stated in our initial comments, U.S. consumers pay more for wireless service than consumers in almost any other country in the world.⁶⁴ Industry strives to obscure this by contending that the relevant metric for voice services is price per minute,⁶⁵ and that bulk text message plans outweigh the rising price of individual text messages for consumers without plans or consumers who go over their plans. But price per minute for voice and bulk text message prices are not the only metrics that should be considered. The Commission must also consider total cost to consumers, and the price paid by consumers for individual voice minutes and text messages that exceed plan limits.

⁶² See, e.g., Nancy Gohring, “Report: DOJ Reviewing US Telecom Deals with Handset Makers,” *IDG News Service, PC World* (July 6, 2009), available at http://www.pcworld.com/article/167905/report_doj_reviewing_us_telecom_deals_with_handset_makers.html (quoting supporting statements from Public Knowledge and Senator John Kerry).

⁶³ See, e.g., Rik Myslewski, “DOJ probes reviews US telecom powers,” *The Register* (July 6, 2009), at http://www.theregister.co.uk/2009/07/06/doj_begins_telecom_review/ (“Citing “inadequate antitrust oversight” as a contributing factor to the global economic Meltdown, Varney said that “As antitrust enforcers, we cannot sit on the sidelines any longer.””).

⁶⁴ CFA et al. Comments at 8.

⁶⁵ See, e.g., CTIA Comments at 2.

U.S. consumers pay more in total for wireless service than most other developed nations—an average of \$506 each year, higher than the OECD average of \$439, and much more than consumers in countries such as Sweden (\$246), Spain (\$293), and Germany (\$371).⁶⁶ Carriers in the U.S. are able to extract some of the highest average returns per user (ARPU) by pricing consumers into tiered service plans with high monthly rates.⁶⁷ Industry comments contend that these numbers are outweighed by U.S. consumers' higher usage, and that price per minute is the better metric. However, meaningful comparisons of per-minute rates are difficult – U.S. consumers are charged for the minutes to both send and receive calls, unlike consumers in many other countries, who pay only for the minutes they use to make calls. The same dynamic exists in text message plans. U.S. consumers are charged for both sending and receiving text messages – at substantially higher rates for individual messages. And, as stated in our initial comments, wireless carriers have adopted parallel, increasing, pricing structures for individual text messages, prices that do not obviously relate to the costs of providing the service.⁶⁸

The true impact – and, perhaps, the true purpose – of high prices for individual text messages and voice minutes is to drive consumers towards purchasing more expensive voice plans and text plans than they will use, to avoid extortionate overage charges for voice minutes and text messages that go beyond their plan's limits. Additional usage of service in a market with high fixed costs and low marginal costs typically results in greater profits. Risk aversion results in the purchase of minutes and messages that are not in fact used, which become pure profit for wireless carriers.

⁶⁶ See Organization for Economic Co-Operation and Development, *OECD Communications Outlook 2007* (2007).

⁶⁷ Rob Frieden, "The Way Forward on Wireless," in ...AND COMMUNICATIONS FOR ALL 153-167 (Amit Schejter, ed.) (2009).

⁶⁸ CFA et al. Comments at 10-12.

2. *Early termination fees remain punitive.*

Citing “competitive forces,” CTIA notes in its initial comments that all four major national wireless carriers have begun pro-rating early termination fees, or ETFs.⁶⁹ Although this is a welcome development, it does not alleviate the problems for consumers, nor does it demonstrate effective competition. For consumers, ETFs start and remain too high, regardless of pro-rating – the average subsidy of a wireless handset is \$14.33, as Consumers Union calculated in 2008.⁷⁰ An ETF that begins at \$175, for a consumer who exits the contract immediately, constitutes a penalty of over \$150.

In a supposedly competitive wireless market, CTIA also fails to explain why ETFs were not pro-rated for many years, or why they start out at such a high rate. The simple explanation is that the ETF is not recompense for initial subsidy offered on the handset, but rather is a tool designed solely to reduce subscriber churn. The amount set by carriers for the ETF has no empirical or economical rationale, but rather is psychological.⁷¹ However, the impact of the ETF is more substantial than its design – a punitively high ETF increases switching costs, reducing mobility and competition. Absent political pressure or regulatory intervention, in an insufficiently competitive market, ETFs will remain artificially high, and will keep consumers trapped in long term contracts. This spiraling cycle – limited competition leading to artificial subscriber lock-in, further reducing competition – cannot be papered over with empty rationales.

⁶⁹ CTIA Comments at 29-30.

⁷⁰ Testimony of Chris Murray, Senior Counsel, Consumers Union, before the Federal Communications Commission (June 12, 2008), *available at* <http://www.fcc.gov/realaudio/presentations/2008/061208/murray.pdf>.

⁷¹ *See id.*

C. Market Competitors Have Filed in this Proceeding to Demonstrate a Lack of Competition.

1. Exclusive handset deals limit competition.

The Commission should acknowledge in the *Fourteenth Report* that exclusive deals for handsets represent a substantial barrier to competition, without any substantial offsetting contributions to innovation or to competition. By giving wireless carriers control over the development of the devices, exclusive deals limit innovation by limiting the freedom of device manufacturers to innovate and develop features that consumers want,⁷² and limit meaningful competition over wireless devices by encouraging the development of clones.⁷³ Furthermore, they limit competition over aspects of the wireless service, such as price and quality, which are more properly the goals of promoting CMRS competition.⁷⁴

Industry comments contend that exclusive deals promote competition and do not constitute a barrier to entry. For example, AT&T argues that exclusive deals “increase a carrier’s incentives to make purchase commitments” and “encourage other carriers to do better, by improving their own handset portfolios.”⁷⁵ Similarly, Verizon states that exclusive deals for devices allow carriers to “differentiate themselves.”⁷⁶ Verizon also argues that competition among providers to offer handsets produces greater innovation in devices.⁷⁷

These arguments are without merit. First, even without exclusive deals, device manufacturers can still secure purchase commitments from wireless carriers prior to deploying

⁷² See PISC RCA Reply Comments at 3-4.

⁷³ *Id.* at 7-8.

⁷⁴ See, e.g., *id.* at 8-9.

⁷⁵ AT&T Comments at 36.

⁷⁶ Verizon Comments at 15.

⁷⁷ *Id.*

their devices, in exchange for the right to offer the device.⁷⁸ In fact, without exclusivity, device manufacturers can distribute the risks of development and secure even larger total commitments by distributing purchase commitments across multiple carriers. Such distribution would allow smaller carriers to group together and negotiate for rights to offer the device through shared bulk purchase commitments – while in the current market structure, the same group of carriers may collectively lack sufficient market power to secure an exclusive deal. A market without exclusive deals can spread both the risks and rewards of innovation more broadly.

Second, competition over providers to secure exclusive handset deals reduces incentives to compete to offer better, cheaper wireless service to consumers. Growth of wireless service in recent years has disproportionately come from carriers with exclusive deals for the most popular smartphones.⁷⁹ National carriers with exclusive deals bear less risk of losing customers to smaller competitors with better and cheaper services, and therefore have less incentive to develop a better network.

Competitors to the major national carriers raise these issues before the Commission in this proceeding. Cellular South cites a recent study indicating that 50 percent of wireless consumers report that handsets play a “major” role in their choice of service, and 24 percent of consumers “based their decision *exclusively* on the wireless handset.”⁸⁰ Although Cellular South can compete effectively over features of the wireless service itself – including coverage, price, quality, and even brand loyalty – customers departing the carrier consistently cite the device as

⁷⁸ Wireless carriers will still have incentives to make purchase commitments to unproven devices, if they believe the device will become popular. After a device becomes popular, the device manufacturer has the advantage in negotiating a contract for carriage, and the terms of carriage would then be less favorable (albeit less risky) to the carrier. A carrier willing to make a purchase commitment to an unproven device has a relative advantage to a latecomer.

⁷⁹ See, e.g., PISC RCA Reply Comments at 9.

⁸⁰ Cellular South Comments at 12.

the primary reason.⁸¹ MetroPCS contends, “The lack of availability of particular handsets to all consumers has the practical effect of limiting competition.”⁸²

Effective competition in the market for CMRS services – as distinct from the market for CMRS handsets – should emphasize quality of service, price of service, profitability, and other features of the service itself, and should examine the effect of exclusive deals for handsets as a barrier to entry and an impediment to competition.

2. Special access rates, roaming, and other market features limit competition.

As discussed in our opening comments, and as raised in numerous other initial comments, the Commission should similarly recognize in the *Fourteenth Report* the negative impact that other market “features” pose for competition, including limited spectrum, high special access rates, and loopholes in roaming regulations. These barriers to entry and growth create additional hurdles for new entrants and for regional and rural carriers – and special access rates impact all, including larger national carriers that, unlike AT&T and Verizon, are not integrated with a wireline network operator.

Comments in the record of this proceeding indicate widespread concern over these barriers to entry and growth in the CMRS market. Both would-be entrants and smaller network operators address limits on available spectrum and concentrated holdings by incumbent operators who also tend to acquire majority portions of new spectrum.⁸³ Multiple providers express concern over the failure of the Commission’s roaming obligations to include data services, and the limitation of the roaming obligations whenever a carrier holds spectrum licenses in a given

⁸¹ *Id.* at 13.

⁸² MetroPCS Comments at 9.

⁸³ *See, e.g.*, NTCA Comments at 2; Cricket Comments at 9-10.

area, regardless of whether or not the carrier can offer service in any portion of the area.⁸⁴

Additionally, recent relaxation of regulations on special access services have produced greatly increased prices,⁸⁵ resulting in substantially higher costs for competing carriers and placing them at a competitive disadvantage.⁸⁶

Effective competition in the market for CMRS services should consider fully the impact on entry and growth of competing carriers posed by limited spectrum resources and consolidated spectrum holdings, high special access rates, and the absence of automatic roaming for data services and the in-market exception.

All of these problems – high and parallel pricing, punitive early termination penalties, exclusive deals for handsets, barriers to roaming, and limitations on spectrum and special access – reflect the same underlying dynamic: dominant carriers leveraging their influence over the market in ways that harm the public interest and competition. These problems will not be remedied by an insufficiently competitive market, and their impact on consumers (as well as to competition) merits Commission action.

III. TO PROPERLY EVALUATE THE MARKET, THE COMMISSION SHOULD APPLY A COMPREHENSIVE MODEL TO THE BEST POSSIBLE DATA.

A. The Commission Should Gather Its Own Data, Not Rely on Third Party Data.

⁸⁴ See, e.g., Bright House Comments at 3-9; Cricket Comments at 11-12; RTG Comments at 10-11; Cellular South Comments at 17-22.

⁸⁵ See Derek Turner, “Dismantling Digital Deregulation,” Free Press, at 57-58 (2009), available at http://freepress.net/files/Dismantling_Digital_Deregulation.pdf.

⁸⁶ See, e.g., Sprint Nextel Comments at 3-9.

The Commission should gather its own data, and should not rely on third party data for substantive reports. Reliance on third party sources for data on the CMRS market poses a substantial risk to the efficacy of future policymaking activity based on the data. This risk has been demonstrated by similar reports compiled by the Commission on the status of competition in the market for the delivery of video programming.⁸⁷ The Commission's most recent such report produced substantial controversy, resulting in large part from debates over the accuracy and proper interpretation of third-party data used in the report.⁸⁸ After a delay of nearly fourteen months between adoption of the report and its release, the Commission's final conclusion was that an accurate determination of the status of the market would only be possible if the industry provided data directly.⁸⁹ This conclusion required the postponement of consideration of a substantial policy issue.

A substantial portion of the data underlying past CMRS reports comes from a single third party source, American Roamer. In the *Thirteenth Report*, conclusions concerning the penetration of CMRS services and on the number of competitors available to consumers in a region derive from interpretations of data from American Roamer.⁹⁰ We acknowledge that the data from American Roamer is available at a higher level of granularity than current Commission data, but the Commission should strive to collect better data and not rely indefinitely on third party sources. We encourage the Commission to collect granular information on service availability and subscriptions directly from providers of CMRS services, and to rely on original data in its reports whenever possible, to ensure that its conclusions are based on the most reliable data.

⁸⁷ Comments of Free Press, MB 07-269 (Feb. 17, 2009), at 2-3.

⁸⁸ *Id.* at 3-4.

⁸⁹ *Id.* at 4.

⁹⁰ *Thirteenth Report* at paras. 37-43.

B. The Commission Should Establish a Multifactor Standard, Including Natural and Artificial Limits to Competition.

1. The Foreign Carrier standard is insufficient.

Some parties have suggested that the Commission's 1995 *Foreign Carrier Entry Order* provides an appropriate framework for defining effective competition.⁹¹ Although the basic principles of this framework are not invalid, they do not go nearly far enough to illustrate the presence or absence of effective competition in the wireless market. Adopting the so-called "standard" of the *Foreign Carrier Entry Order* would be tantamount to assuming that the market is competitive by ignoring numerous signs of competitive failure and many varied and ongoing limits on competition.

In the *Foreign Carrier Entry Order*, the Commission stated that "[e]ffective competition means competition among service providers in a market that benefits consumers by expanding service offerings, promoting development of innovative technology, and lowering prices."⁹² Even under this simple analysis, based on the available evidence of price increases, deliberate limits on technological innovation, and other clear signs of market failure, a neutral observer must conclude that the CMRS market is not effectively competitive.

Above and beyond this single statement, in the *Foreign Carrier Entry Order*, the Commission considered numerous factors beyond these as part of an overall public interest analysis, including adopting an "effective competitive opportunities analysis."⁹³ Therefore, any attempts to interpret the *Order* as defining effective competition through "expanded service offerings," "development of innovative technology," and "lowered prices" is inaccurate.

⁹¹ See AT&T Comments at 11; CTIA Comments at 9.

⁹² Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Rcd 3873 (1995).

⁹³ *Id.* at para 3.

Moreover, the purported standard represented by the *Order* fails to consider the many specific behavioral and structural impediments that are essential to the determination of effective competition. Any accurate evaluation of the state of competition in the wireless market must take into account all of the relevant aspects of market structure, provider conduct, and market performance, along with any and all barriers to entry and growth.

2. The Commission's standard should include a broad range of factors within the categories of structure, conduct, and performance.

As requested in our initial comments, the Commission should construct and apply a standard for evaluating effective competition that includes numerous factors within the broader categories of market structure, provider conduct, consumer behavior, and market performance.⁹⁴ Consistent application by the Commission of a broad framework of factors, year after year, is needed to develop an accurate and ongoing evaluation of the markets for wireless services. At a minimum, the Commission should consider the following additional factors from standard literature on the criteria relevant for a determination of workable competition.⁹⁵ According to these factors, the market for wireless services is far from effectively competitive.

Structural criteria:

1. The number of competitors should be at least as large as scale economies permit.

Regardless of how the national HHI rates stack up against foreign countries – and setting aside for the moment the greater importance of evaluating HHIs at the regional level⁹⁶ – the Commission should expect effective competition to produce a “target” average HHI of 1800. Until this level is reached, the Commission should not declare that the CMRS market is

⁹⁴ CFA et al. Comments at 3-4.

⁹⁵ See SCHERER AND ROSS, *supra* note 26, at p. 53-54.

⁹⁶ CFA et al. Comments at 5.

effectively competitive, and should continue to examine whether any regulatory changes are needed to improve the state of competition.

2. There should be no artificial inhibitions on mobility and entry.

As noted in detail in this proceeding, high early termination fees, high rates for special access services, and exclusive deals for handsets continue to serve as substantial and artificial inhibitions on mobility and entry in the wireless market. Additionally, limited spectrum availability, coupled with the Commission's ongoing relaxation of spectrum cap and spectrum screen policies and compounded by major gaps in the Commission's roaming regulations, continues to serve as a substantial barrier on entry and growth.

3. There should be moderate and price-sensitive quality differentials in products offered.

Among other factors, near uniform limitations in the terms of service of the major national carriers, along with increasingly parallel pricing, indicate an absence of substantial quality differentials in wireless services.

Conduct criteria:

4. Some uncertainty should exist in the minds of rivals as to whether price initiatives will be followed.

Increased prices in individual text messages by one carrier were twice quickly followed by others. These moves, along with other parallel pricing initiatives with similarly substantial impacts on consumers, paint a clear picture of a concentrated industry operating in lock-step.

5. There should be no unfair, exclusionary, predatory, or coercive tactics.

At a minimum, as discussed above, early termination fees are punitive, and high prices for individual text messages and voice overage minutes force consumers into purchasing plans that exceed their requirements.

6. There should be no persistent, harmful price discrimination.

Among other practices, excessive roaming charges common in the wireless market – permitted by insufficient competition and compounded by loopholes in the Commission’s roaming regulations – may well constitute persistent and harmful price discrimination.

Performance criteria:

7. Output levels and product quality should be responsive to consumer demands.

As addressed in detail in these comments, growth, investment, and innovation are being deliberately and artificially restricted and delayed – telltale signs of insufficient competition.

8. Profits should be at levels just sufficient to reward investment, efficiency, and innovation.

In an economy where many sectors are struggling, profit margins of 40% or more on wireless services seem somewhat more than “just sufficient.”

9. Success should accrue to sellers who best serve consumer wants.

In recent years, it appears as if success accrues instead to major carriers with large spectrum holdings and with integrated wireline affiliates, to allow them to avoid excessive costs for roaming and special access.

These factors are far from an exclusive list, and the analysis of them is far from exhaustive. But even a cursory examination indicates major, unresolved problems with the wireless market, including many that will not go away without regulatory intervention.

CONCLUSION

Industry comments tell a simple story – the wireless market is growing, price per minute is going down, and wireless carriers continue to invest. But this story is incomplete. Both total and marginal consumer prices are rising, consumer choice is limited, and valuable innovations are being delayed or kept from the market altogether; and smaller competitors cannot get the spectrum, the backhaul, the roaming, or the handsets they need. And the carriers' strongest argument – that growth, investment, and innovation indicate effective competition – comes up short on both the theory and the facts. Even as revenues and profits rise, investment declines, growth disappoints, and wireless carriers persist in constructing artificial and anti-consumer obstacles to innovation – all telltale signs of insufficient competition.

The major incumbent wireless operators, enjoying immense profits, seek to have the Commission maintain its limited analysis, to ensure that the carriers continue to enjoy the regulatory environment that has allowed them to amass spectrum and market share without reprisal. As with our initial comments, we ask the Commission to follow the examples of Congress and the Department of Justice and to look more deeply, to examine all of the evidence and all of the barriers impeding growth and competition in the wireless market. In a world in which only AT&T and Verizon believe there is adequate competition, the Commission's public interest duties demand a closer examination.

Respectfully submitted,

/s/

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