

Rural Cellular Association

**Petition for Rulemaking Regarding Exclusivity
Arrangements Between Commercial Wireless
Carriers and Handset Manufacturers**

RM-11497

Summary of Reply Comments

Prepared February 25, 2009

[Numbers in (parentheses) are citations to page numbers in the comments.]

The Rural Cellular Association (RCA) filed a petition for rulemaking on May 20, 2008, asking the Federal Communications Commission (FCC) to initiate a rulemaking proceeding to examine exclusivity arrangements between commercial wireless carriers and handset manufacturers. Most comments on the RCA petition were filed on February 2, 2009. Most reply comments on the RCA petition were filed on February 20, 2009, and are summarized below.

Ad Hoc Public Interest Spectrum Coalition (“PISC”)

Exclusive deals do not promote innovation in the handset device market. Device manufacturers have more than enough incentive to innovate without any “guidance” from the national carriers. Carrier control over the design of wireless devices eliminates innovation. An example is the inclusion of Wi-Fi connectivity in handsets, which is valuable to consumers “but forcefully resisted by carriers . . .” (3) Breaking handset deals would put the device market in the hands of the device makers, thus promoting customer-friendly innovation. (3)

Commenters opposing the RCA Petition are incorrect in arguing that a ban on exclusive deals would result in only “generic” handsets being produced. Handset manufacturers would not be “forced” to make only generic phones, but instead would have strong incentives to design phones in response to consumer demand (regardless of the branding or preferences of wireless carriers). Banning exclusive deals would put control back in the hands of the manufacturers. (4) Verizon is wrong in arguing that banning handset deals would have no impact on rural carriers’ access to particular handsets. While the FCC cannot require manufacturers to deal with rural carriers, they will do so if they determine the deals to be profitable, whereas exclusive deals prohibit the manufacturers from pursuing profitable arrangements with rural carriers. (5)

Consumers should be able to choose service and wireless devices independently. Exclusive deals undercut this consumer choice. Handset exclusivity is an artificial, anti-consumer hindrance to any carrier seeking to set up an arrangement with Apple or any other device manufacturer. (6)

Some commenters maintain that eliminating exclusivity would prohibit handset pricing subsidies. If handset exclusivity deals are banned, carriers would still be able to recoup subsidies on handsets through multiple-year contracts “backed by early termination fees.” (6) (Although many individuals and organizations are concerned about multiple-year contracts and early termination fees, “these issues are irrelevant to this proceeding.”) (6)

Open competition in the market for wireless devices will effectively promote innovation, service quality, and lower prices. Artificial segmentation by wireless carriers for their own advantage undermines these benefits. (8) Opponents of the RCA Petition contend that exclusive deals serve as a market differentiation factor, which improves competition. This “market differentiation,” as a form of “competition,” is artificial and unnecessary. Limited-availability handsets minimize the carrier’s incentives to improve service quality or lower prices, neither of which is beneficial to consumers. (8) “Prohibiting exclusivity arrangements would increase the availability of handsets through alternative carriers, and would render a single carrier unable to compete on handset availability alone, requiring all carriers to invest in their networks to compete over quality and price of service, rather than negotiating leverage.” (8-9)

It is wrong to argue that exclusive agreements do not hinder competition because all carriers are able to offer many different devices with their services. The problem with this argument is that access to some devices is not a substitute for access to the most popular devices. Popular phones drive growth in the market for wireless services. Exclusive deals force smaller carriers to lose even more market share, thus handicapping their ability to compete. (9)

It is incorrect to argue that exclusive deals do not cause any economic harm because no carrier has enough market power to foreclose a manufacturer from entering the wireless market. Citing Nokia’s relative lack of success in the U.S. market because of its unwillingness to cede control over device innovation, PISC argues that the fact is that the large carriers dominate the U.S. wireless market, forcing phone manufacturers to work through them in order to succeed. (9-10). Further, even if no wireless carrier has sufficient market power to prevent a manufacturer from entering the wireless device market, vertical arrangements between large carriers and handset manufacturers create the possibility of harm in the market for wireless services. (10) This harm has materialized, because the market concentration of the large carriers enables them to “relegate[e] minor carriers to the leftovers in the device market.” (11) This causes a clear harm to the market for wireless services. (11)

Verizon is wrong in implying that, because an FCC action to ban or regulate exclusive handset arrangements would impact handset manufacturers, the FCC lacks jurisdiction. (11) Section 201(b) of the Communications Act of 1934 (“Act”) gives the FCC jurisdiction to bar unreasonable terms in agreements entered into by wireless carriers, if those agreements create an artificial restriction on the market for communications services by barring other carriers from negotiating with the manufacturer to offer the same handsets. (11-12). Also, the FCC’s decisions in the multi-tenant environment (MTE) and multi-tenant dwelling unit (MDU) context are relevant because, although consumers are not foreclosed from obtaining service from another carrier, the exclusive handset deals place an unreasonable burden on consumers by forcing them to choose a different device if they choose a different carrier, solely because of the practice of the wireless carrier in entering into an exclusive handset deal. (12) While Sprint is correct that the FCC would lack Title II or Title III jurisdiction to regulate sales of customer premises equipment between device manufacturers and consumers, what RCA is suggesting is the regulation of the terms of agreements between wireless carriers and handset manufacturers, when these agreements have a direct and substantial impact on consumers’ wireless service usage and the market for wireless services. (12-13)

The proper next step in this proceeding is for the FCC to issue a Notice of Proposed Rulemaking (“NPRM”). TIA is wrong in suggesting that the FCC should instead issue a Notice of Inquiry (“NOI”). The purpose of an NOI has already been served by the record in this proceeding. (13) TIA advanced nine reasons for pursuing an NOI instead of an NPRM, but these reasons are not credible because each of the questions raised by TIA has been sufficiently addressed in the record of this proceeding, has been answered already in other FCC proceedings, or is more appropriately addressed in an NPRM. (13-14)

The FCC should do here what it did in the MDU proceeding, by proposing in an NPRM to prohibit future exclusivity clauses and to prohibit the enforcement of existing agreements. (16)

Associated Carrier Group (“ACG”)

ACG does not ordinarily participate in advocacy activities; however, the organization finds it necessary to file in this proceeding to correct several mischaracterizations – including representations as to ACG’s purpose and role in device acquisition – made by the few parties opposed to the RCA Petition. ACG believes strongly that the Commission should heed the recommendations made by RCA and take action to prohibit exclusive handset distribution agreements that harm the public and threaten competition in the wireless marketplace. (1)

At least one major manufacturer has informed ACG that it would prefer to have fewer exclusive handsets in order to achieve cost savings from greater efficiency and scale that could be passed onto the consumer. When manufacturers are required to

manufacture multiple devices for various carriers because one or more Tier I carriers insist on exclusivity, the Original Equipment Manufacturer (OEM) incurs additional variable costs which are inevitably passed through to consumers. (1-2)

AT&T claims that a ban on exclusivity would mean that some phones would not be developed at all or that some phones would be introduced with fewer features or less optimal performance. ACG believes that the opposite is true. That is, if OEMs focus on fewer handsets (which would be possible if exclusive agreements were eliminated), then the resulting efficiencies and economies of scale would permit the inclusion of additional features and more optimal performance. (2)

While AeroVoice and Brightpoint offer valuable services to their customers, ACG would hardly characterize either of these companies as “mega-wholesalers.” AeroVoice is quite small, and ACG does not have a purchasing relationship with them. Brightpoint aggregates orders from smaller carriers. It serves as a channel through which devices are routed from the device manufacturers to ACG members. For example, ACG’s recent ability to acquire certain non-exclusive Samsung and LG handsets is a result of ACG’s own efforts. Brightpoint did not play any role in gaining access to these devices. It is, therefore, incorrect for AT&T to assert that these wholesalers offer a solution for the device exclusivity problem. (2-3)

ACG does not seek exclusive devices. ACG views exclusivity agreements as “choice-limiting” arrangements that harm the consumer by restricting competition, reducing innovation, and ultimately raising the cost of devices and/or wireless services to consumers. AT&T’s insinuation that ACG has been successful in securing exclusive handset arrangements for its membership is also alarmingly inaccurate. ACG has had one exclusive handset in its existence – Kyocera’s KX5 Slider Remix – and the exclusive arrangement lasted for 60 days. That arrangement expired more than three years ago. (3)

Even in combination, rural carriers have only a miniscule percentage of the market power that is wielded by the four largest nationwide carriers. These carriers have been so successful in concentrating market power in recent years that they now have more than 90% of the wireless market in the United States. (3)

Manufacturers frequently tell ACG that large carriers are now demanding that they be given an exclusive agreement for all devices that the carrier purchases from the manufacturer.

ACG understands that there may be exclusive devices offered by carriers that are not among the four largest carriers. However, by any objective measure, these devices are not the innovative devices that subscribers demand, nor or any of these devices typically included on any list of best-selling handsets. (4)

AT&T, Inc. (“AT&T”)

AT&T renews its criticisms of the RCA Petition, claiming that it sought radical government intervention to abrogate and regulate private contracts, while failing to provide any evidence of harm or any legal justification for a regulatory solution to the nonexistent harm. (1) Now, AT&T claims, the record makes clear that RCA is seeking protection from competition, and that this protection would harm wireless consumers. (1-2) The comments confirm that prohibiting exclusive deals would actually hamper provision of new wireless devices and services, and that actual market performance refutes any argument that such contracts must be banned. (2)

Supporters of RCA ask for the curtailment of competitive activity based on unsupported assertions of competitive harm. In making these arguments, they ignore the benefits that flow from exclusive handset arrangements, which “have spawned a golden age of innovation” (2) Carriers supporting the RCA Petition concede that the wireless marketplace is vigorously competitive, with carriers competing on a variety of fronts, and they admit that their real concern is the competitive pressure and customer “churn” that result from the handset agreements. (3)

Although RCA’s supporters seem to favor a European model for regulating the wireless industry, the fact is that America’s wireless marketplace is more competitive and innovative than its European counterpart. (3-4) If the Commission were to move in the direction sought by RCA and its supporters, the development of innovative wireless devices that break new ground would be threatened, free-riding would be encouraged, and the introduction of new revolutionary devices would be discouraged or altogether prevented. (4-5). In short, AT&T argues, “[o]ne of the last things the country needs right now is for the Commission to hobble innovation and investment with rules that serve no purpose except to insulate certain carriers from competition.” (5)

Exclusive distribution arrangements provide several important competitive benefits. In an attached Reply Declaration, Professor Michael Katz argues that innovation by one manufacturer and carrier (teamed together), creates pressures for other manufacturers and carriers to meet or beat that innovation. (Katz Reply Decl. at ¶¶ 3, 7) AT&T argues that exclusive deals increase carriers’ incentives to make network innovations. (6-7). This is done by decreasing the risks associated with developing innovative offerings. (7) AT&T’s exclusive arrangement to distribute the Apple iPhone, for example, “sparked unprecedented competitive responses[,]” a fact that was acknowledged even by Professor Chen (in his statement for Cellular South). (7-8)

There is no basis for claims made by supporters of the RCA Petition that a ban on exclusive deals would produce more innovation and investment. (9) For example, innovative phones such as the iPhone, the RAZR, and many others were distributed first in the U.S., and the Amazon Kindle is available in the U.S., but not in Europe. Virtually every significant wireless innovation reaches U.S. consumers first. (9) There is no reason for the FCC “to attempt to make our wireless marketplace more like the comparatively ossified markets of Europe, particularly now when the nation’s economic recovery critically depends on increased investment from wireless and those other sectors of the

economy that remain relatively healthy.” (9-10) AT&T also argues that regulating exclusive deals would stifle not only smartphone innovation, but also the development of products like Kindle and computers with wireless connectivity. (10)

The comments confirm that exclusive deals do not cause any competitive or other cognizable harm. (10) This conclusion is supported by marketplace evidence and economic theory. (10-11, citing the FCC’s Thirteenth Report on Wireless Competition) It is absurd to suggest that any single wireless carrier could use exclusive contracts with one of the handset manufacturers to foreclose competition. (11) Professor Katz supports this view, arguing that there are many competing carriers, there is no market data supporting the view that exclusive deals have harmed competition, the handset industry is highly competitive, there are many available handsets, RCA members currently offer a wide range of handsets (including smartphones), and small buyers can band together if scale is needed to purchase handsets. (Katz Reply Decl. at ¶ 20) Professor Katz also points out that no wireless carrier is a monopolist, no wireless handset manufacturer is a monopolist, and no wireless handset model is a monopoly product. (Katz Reply Decl. at ¶ 16)

RCA and its supports have no coherent theory of harm. For example, their claim that wireless carriers have monopsony power is absurd on its face. The handset market is a global market, and no carrier “has the remotest ability to dictate price or terms to any handset manufacturer.” (11) Rural carriers offer more than two hundred unique handsets, including many with the newest features. (12) Many commenters supporting the RCA Petition nonetheless acknowledge that the wireless and handset markets are competitive, that small and rural carriers are able to obtain handsets with functionality that is comparable to that of “exclusive” handsets, that handsets are only one aspect on which carriers compete, and that small carriers are performing well in the current market. (12-13)

There is no basis for the claim that exclusive contracts force consumers to pay more for handsets or wireless service, or both. U.S. wireless prices have been falling steadily for years. Most exclusive handsets are available under the same voice and data plans as a carrier’s other handset offerings. (13-14) Professor Katz argues that there are many economic flaws with the claim that exclusive deals result in higher prices. (Katz Reply Decl. at ¶¶ 24-26) The fact is that intense competition and customer choice prevent any carrier from charging supra-competitive prices. (14) In addition, RCA’s supporters fail to back up their claims that exclusive arrangements slow innovation and new product introduction. (15) Further, there is no evidence (contrary to the assertions of RCA’s supporters) that exclusive handset agreements will trigger harms in the future. (15) For example, there is no single wireless phone that attracts even a double digit percentage of wireless customers. Thus, claims that exclusive deals “are suddenly going to stop these competitive forces tomorrow is complete fantasy.” (16)

Rural carriers’ claims that exclusive deals interfere with their ability to comply with hearing aid compatibility (“HAC”) requirements is not plausible, given the fact that

rural carriers reported to the FCC in January that they have already complied with HAC mandates. Further, AT&T alone offers 20 different non-exclusive HAC-compliant handsets. (16) Rural carriers' claims about exclusive deals threatening wireless E-911 compliance are also unpersuasive, because most rural carriers use CDMA technology, and Assisted GPS technology has been incorporated in CDMA handsets for years. (16-17)

Carriers supporting the RCA Petition actually have confirmed that they want restrictions on exclusive handset arrangements to protect them *from* competition. (17) They admit that they want access to specific phones, so that they can free-ride on the national advertising of other carriers. (18) Some carriers supporting RCA complain about increased churn rates when new handsets are introduced pursuant to exclusive deals. But churn rates actually are evidence of intensified competition. (18) RCA's supporters also misguidedly argue that exclusive agreements should be prohibited or regulated so that these carriers can obtain and sell exclusive phones, because they could then do better in areas where they compete against larger carriers, and they then could use the increased profits to build out wireless infrastructure in underserved areas. (19) But this would actually make markets less competitive, for the sole purpose of aiding some market participants. In any event, the FCC could not direct handset manufacturers to sell phones to rural carriers. (19-20) The RCA Petition and its supporting comments are nothing more than "unabashed pleas for a narrow protectionism that would interfere with functioning markets merely to provide highly dubious short-term benefits to a few carriers." (20)

The comments overwhelmingly confirm that RCA has failed to identify any legal basis for regulation of exclusive handset arrangements. (21) Professor Chen's statement (prepared for Cellular South) is the only attempt to make a case for FCC authority, but he ignores the fact that the FCC has expressly authorized exclusive deals that do not prevent competition among carriers. (21) Professor Chen's reliance on the FCC's MTE and MDU decisions is not persuasive because exclusive handset deals, unlike exclusive arrangements in the MTE-MDU context, do not prevent any consumers from obtaining any service from any alternative supplier. (21-22) AT&T argues that this explains why the FCC rejected a request to ban exclusive wireless handset agreements in 1992, a time when wireless service was a duopoly. (23)

The claim that the FCC's authority to ban exclusive handset deals finds support from the action taken by the Competition Council of France is not persuasive. It would be a mistake for the FCC to seek to emulate the French wireless market, which is not nearly as competitive as the U.S. market. (23-24) Compared to the U.S. market, French customers have access to fewer services and they pay much higher prices for services they can purchase. Further, the only thing that the French Council's decision has done for French consumers is to make the iPhone available from other distributors for more than a thousand dollars. (24) It would be better for the FCC to follow Germany's lead—there, the government upheld an exclusive iPhone distribution contract against challenge. (24)

For all these reasons, Professor Chen's arguments based on Section 201(b) of the Act are beside the point. FCC precedent has established that it is not an "unreasonable practice" for carriers to enter into exclusive handset arrangements with manufacturers. (24) Further, there is no basis for Professor Chen's claim that the FCC can find exclusive deals to be "unreasonable" without making any finding of "market power." (25) It is "nonsense" for Professor Chen to maintain that carriers bundle discounted handset prices and then recoup the discounts through higher prices charged to their entire subscriber base. Intense competition prevents carriers from doing so. (26) Nor does Section 202 or Section 254 provide a basis for any FCC action to ban exclusive deals. Section 202, contrary to Professor Chen's claims, does not prohibit all forms of discrimination, but only discrimination in the provision of service by a carrier among its customers. (27-28) Further, the fact that each and every customer in the U.S. does not have access to each and every handset made by each and every manufacturer does not implicate the protections of Section 254(b)(3) of the Act, which requires only that consumers in rural and high-cost areas must have access to services that are reasonably comparable to services that are available in urban areas. (29)

Professor Chen's invocation of Section 1 of the Act (mandating nationwide telecommunications service) is not persuasive, because wireless services *are* broadly available nationwide and the wireless market is competitive. (30) The public interest argument made by Professor Chen, based on Sections 4(i) and 303(r) of the Act, is also unavailing because the D.C. Circuit Court of Appeals has held that the FCC, in order to invoke its public interest authority, must first establish subject matter jurisdiction, and the Act provides no independent basis for regulating exclusive handset agreements. (30-31) In addition, the FCC cannot use its ancillary jurisdiction to regulate exclusive deals, because regulating such deals does not involve the direct regulation of *communications*. (32) AT&T also attacks claims by Ad Hoc PISC that the FCC's Internet Policy Statement, and the FCC's *Comcast Order* (FCC 08-183, Aug. 20, 2008) provide a basis for regulating handset deals, (33) and challenges Professor Chen's argument that the FCC has authority to abrogate existing exclusive deals pursuant to the *Mobile-Sierra* doctrine, because the FCC has no direct authority over handset manufacturers or the contracts they enter into with carriers.

Carolina West Wireless ("Carolina West")

Carolina West would prefer to see these exclusive arrangements end as quickly as possible. Carolina West believes that the FCC has the legal authority to and should launch an investigation into the growing use of exclusive handset arrangements and adopt rules that prohibit their use so that handsets are offered on a non-discriminatory basis. (1)

Carolina West is in the same position as most small carriers in that in order to win or retain a customer, it must overcome a customer's or potential customer's desire to purchase a specific exclusive handset that it is prohibited from selling to customers. This issue is exacerbated by the over-saturated marketing of these exclusive handsets. (2)

Many rural consumers, like those served by Carolina West, do not have available to them handsets that have as much functionality as the exclusive handsets. Consumers who are, in fact, able to access these exclusive arrangements are then forced to switch providers, pay a premium for their desired handset, and enter into multi-year service agreements with the exclusive provider. (3)

Carolina West believes that wireless carriers must have access to the same handsets as the largest carriers in order to compete with them on a level playing field. Otherwise, the ability of these carriers to compete effectively with nation's largest carriers is significantly harmed. Carolina West agrees with Jim Chen that competing carriers have no effective recourse to combat these exclusive arrangements, and if the Commission does not take action to end the growing prevalence of exclusivity arrangements, these arrangements will push the industry toward a less competitive marketplace with "no more than four carriers in total, with few if any competitive choices in rural and high-cost communities." (3-4)

A direct result of this discriminatory access to handsets is the migration of customers from rural carriers to their larger in-market competitors. Carolina West attributes most of its customer churn directly to its inability to access the most popular handsets. (4)

The Commission must ensure that customers are choosing wireless carriers based on factors such as price, service offerings, and quality of service – factors that are clearly within every carrier's control – not because of a significantly smaller carrier's inability, due to unfair market conditions created by exclusive handset agreements, to get access to the most popular handsets. The Commission should be concerned that the quality of rural networks and the availability of wireless services in the most remote areas will be jeopardized if rural wireless carriers cannot compete effectively with the four giant nationwide carriers. (4)

The Commission has taken analogous corrective action on numerous occasions, particularly in the auction context where, upon the realization that small carriers were at a financial disadvantage if they were forced to compete head-to-head with larger carriers for spectrum, the Commission established auction rules to level the playing field, such as setting aside spectrum for small carriers and establishing auction bidding credits which directly addressed the financing obstacles encountered by small carriers. The Commission should take similar measures in this proceeding to correct an unfair competitive imbalance, consistent with its obligations under the Act. (5)

Cellular South, Inc. ("Cellular South")

The Big Four national wireless carriers—AT&T, Sprint-Nextel, T-Mobile, and Verizon Wireless—have tremendous purchasing power as buyers of handsets, and they are using this power to extract marketing agreements from handset manufacturers. (2)

The restrictive agreements deny smaller carriers access to many of the most popular handsets. This, in turn, impedes the ability of smaller carriers to compete with the large national carriers. (2-3)

This proceeding thus concerns the effects of exclusive agreement on wireless service competition and wireless consumers, and the issue of whether exclusive agreements adversely affect handset manufacturers is beside the point. (3) Arguments made by opponents of the RCA Petition, that exclusionary agreements are not problematic because of substantial competition among handset manufacturers, are irrelevant. In fact, the number of handset manufacturers and lack of concentration make it easier for the large carriers to demand and receive exclusive deals. (3) It is very important for the FCC to focus its attention on the effect of exclusive arrangements on wireless carrier competition, and not on the impact on handset manufacturers. (3-4)

The anticompetitive effects of exclusive deals are making it increasingly difficult for smaller carriers to compete in Cellular Market Areas against the Big Four carriers. This problem is being made worse by growing consumer demand for the latest and best models of 3G handsets. Further, the large national carriers are able to drive demand for particular handsets through advertising. (4) Verizon acknowledges that handsets have become an important factor in selling a particular brand, and in consumers' purchasing decisions, and this means that exclusivity agreements have become even more beneficial to the large carriers and more harmful to smaller carriers. (5)

Claims by the large carriers that exclusive arrangements offer only pro-competitive benefits, including increased efficiencies and innovation, are not persuasive. AT&T cites Apple's iPhone to support this argument, but there is no basis for AT&T's claim that its own exclusive marketing agreement with Apple was the linchpin for the iPhone's success. Apple's descriptions of its development of the iPhone do not suggest that the GSM technology used in the iPhone is unique, or that Apple needed or desired AT&T's involvement regarding the design or functionality of the iPhone. (6-7) Cellular South acknowledges that Apple has benefited from the exclusive deals in the U.S. and other countries, since it received payments from the carriers as part of the exclusive deals, but Cellular South contends that Apple's receipt of these payments in return for exclusive marketing rights demonstrates that the carriers themselves were able to garner additional profits attributable to the exclusive agreements. (7) Further, wireless consumers have benefited from competition among carriers for the sale of the RAZR wireless phone, since, when the phone was introduced as an exclusive offering it sold for \$499, but is now available for under \$100 or even for free from some carriers. (7-8)

The large carriers seek to justify exclusive deals based on their claim that they need to participate in handset development and the exclusive deals protect the investments they make for this purpose, but Cellular South argues that the large carriers present no credible evidence "that the handset manufacturers could not bring innovative devices to market without their assistance and investment." (8) Cellular South concludes that the alleged increased efficiencies and innovation produced by exclusive agreements

do not outweigh the competitive harms caused by the agreements. (8) AT&T's claims that exclusive handset deals are not anti-competitive are unpersuasive, because courts have long recognized that exclusive deals create adverse bottleneck effects. (8-9)

While AT&T and Sprint suggest that smaller carriers simply need to pool their resources in order to obtain their own exclusive deals with handset manufacturers, Cellular South explains that, based upon its own experience as a member of the Associated Carrier Group ("ACG"), this suggestion is not realistic. (10) One reason for this, according to Cellular South, is that over 90 percent of all wireless subscribers in the U.S. are customers of the Big Four carriers. Therefore, if *all* the remaining carriers somehow banded together, they would represent, in combination, less than 10 percent of the market. ACG's members account for less than 1 percent of the total number of wireless subscribers. (10) Further, ACG's diverse membership does not generally have the same handset requirements. (11) In addition, "middleman" distributors such as Brightpoint do not have sufficient bargaining power to obtain exclusive agreements on behalf of the smaller carriers. (11) Cellular South also points out that a significant portion of Brightpoint's business involves servicing AT&T, Verizon, and a Sprint affiliate, and. In addition, Brightpoint cannot achieve economies of scale for its smaller carrier customers because these customers generally have individual specifications for the handsets they order. (11)

If competition in the wireless marketplace is reduced or eliminated, then wireless consumers suffer. (12) This is particularly problematic for customers served by rural or smaller carriers in areas that are not of interest to the large carriers. Consumers are also harmed by their inability to access certain applications as a result of exclusive contracts. Cellular South points to the fact that Apple now has more than 15,000 applications for use with its iPhone. One example is the iChart™ application that can be used by doctors to access their patients' medical records via the iPhone. (12) Another problem with exclusive deals, Cellular South argues, is that they "discourage innovation by manufacturers with regard to features that do not increase consumers' dependence on the exclusive carrier's network, such as 802.11 WiFi capacity." (13)

With respect to the FCC's jurisdiction, Cellular South adopts and incorporates by reference the arguments made in RCA's Reply Comments.

MetroPCS Communications, Inc. ("MetroPCS")

If a market is dominated by a few major players, then exclusive arrangements raise competitive concerns. Contrary to AT&T's assertions, the market for wireless services is in fact dominated by two major carriers. The industry is split into two sets of carriers providing service over either a CDMA or GSM air interface. (2) Verizon Wireless has a dominant position with respect to the CDMA air interface (about 55 percent of all subscribers), and AT&T holds a dominant position regarding the GSM air interface (about 70 percent of all subscribers). (2-3)

Even taken as a whole (without separating the industry into CDMA and GSM markets), the wireless industry is highly concentrated, according to the Horizontal Merger Guidelines applied by the Department of Justice and the Federal Trade Commission. (3) In addition, according to the FCC's Thirteenth Report on CMRS Competition, the Big Four wireless carriers account for 92.4 percent of all wireless subscribers, demonstrating that these carriers clearly dominate the competitive landscape. It is disingenuous and factually incorrect for the Big Four carriers to claim that the wireless market is not highly concentrated, or that the large carriers are not "in a position to exercise improper market power." (4) Given the high degree of concentration in the wireless market, the FCC should regulate exclusive deals, even based upon the arguments that the large carriers have made in this proceeding. For example, AT&T has acknowledged that exclusive agreements may be anti-competitive if parties are dominant and have substantial market power. (4)

AT&T is incorrect in relying on the FCC's 1992 decision regarding bundling of cellular CPE and cellular service, which AT&T claims constituted a rejection of proposals to regulate large carriers' exclusive handset offerings. (5) The wireless market has changed since the time of that decision. At that time, the FCC found that the wireless industry was largely composed of smaller carriers operating in local markets, and that no single carrier or group of carriers had sufficient market power to impact the numerous CPE manufacturers operating on a national basis. (5) Now, however, industry consolidation has led to "large, nationwide carriers with the ability to exercise market power over wireless handset manufacturers." (5-6) To take one example, in 1992 customers were free to independently purchase wireless handsets because they all operated on the same analog interface. Today, most advanced wireless handsets are exclusively tied to a single air interface, "rob[bing] customers of the ability to travel freely among wireless carriers" (6)

The analysis advanced by AT&T and Verizon Wireless is flawed because it improperly conflates the market for handset manufacture with the market for handset distribution. The correct analysis must focus on the fact that the Big Four carriers have used their dominance in the wireless services market to exert control over the market for handset distribution. (7) MetroPCS contests AT&T's claim that the market for handset manufacture will remain fully competitive, but MetroPCS argues that, even accepting AT&T's assumption, "the simple fact is that competition among handset manufacturers does not reach consumers." (8) The large carriers control the distribution channels for most handsets; most customers cannot purchase handsets except through arrangements with carriers. (8) MetroPCS points to a recent study showing that 54 percent of new wireless customers purchase their handsets at carriers' brand name retail stores, while 16 percent make their purchases at retail electronics stores, and 0.6 percent purchase their phones over the Internet. (9) Handset manufacturers are dependent on carriers to sell their handsets to consumers, and this enables the carriers to dictate terms to the manufacturers. (9)

MetroPCS compares this situation to the control that the pre-divestiture AT&T exerted over the long distance market because of its bottleneck control over the local loop. AT&T used its market dominance to control the terms under which competing long distance carriers could gain access to the local loop. Now, wireless carriers are using their market dominance to control access to the distribution system for wireless handsets, enabling them to coerce handset manufacturers to enter into exclusive deals. In this regard, MetroPCS argues that it is noteworthy that no handset manufacturer (including Apple) has filed comments in this proceeding. (10 & n. 30)

The damage caused by exclusive arrangements is made even worse by the large carriers' use of handset locking and long-term contracts. (11) Long-term contracts and large early termination fees make wireless customers "very similar to the tenant farmer who buys all its products from the landlord and never ceases to get out of debt, or the employee of a company living in a company town." (12) The fact is that the large national carriers dominate their customers. Even if customers fulfill their contracts or pay early termination fees, handset locking prevents them from using their phone on a different network and thus getting the benefit of their investment. This imposes further artificial limits on the market for handsets. (12)

The FCC has a mandate to promote diversity of ownership in the telecommunications marketplace, and it is required to take steps to eliminate market barriers faced by entrepreneurs and other small businesses. (12-13) Section 332 of the Act directs the FCC to encourage competition in the wireless industry specifically. By allowing handset exclusivity arrangements, the FCC is failing to promote these mandates. (13) The FCC must be engaged in pursuing the widest distribution of new technology to all citizens. By allowing exclusive agreements, the FCC "is condoning a system that prevents rural Americans from accessing cutting-edge technology, exacerbating the urban-rural digital divide." (13)

Regional and rural carriers do not have timely access to the most popular and advanced handsets. This harms competitive carriers, and their customers, because they cannot compete on a level playing field. Rural customers living in areas not served by any of the Big Four carriers are utterly unable to obtain advanced wireless technology, which is a particular problem with regard to next-generation wireless broadband. (13-14)

New handsets "are tremendous drivers of growth," as demonstrated by the relationship between AT&T's recent new subscriber numbers and the activation of the new iPhone 3G. (14-15) There is a similar relationship between Verizon Wireless's customer additions and sales of the BlackBerry Storm, and T-Mobile's recent net customer additions and sales of the Google G1 handset. (15) MetroPCS argues that these numbers disprove AT&T's contention that carriers would be reluctant to invest in new handset technology in the absence of exclusive arrangements. It is more likely that, even without exclusive deals, carriers would invest in handsets to spur new buying by customers. In contrast, the exclusive deals clearly disadvantage those carriers that cannot obtain any access to new handsets. (16)

The large carriers are incorrect in suggesting that exclusive deals promote competition in the handset market. (16) For example, it is difficult to maintain that RIM developed the BlackBerry Storm because of its exclusive deal with Verizon Wireless, rather than because of its effort to sustain its position in the wireless handset marketplace and compete with the iPhone. The iPhone forced RIM to “innovate or perish” and this dynamic was not related to RIM’s exclusive deal with Verizon Wireless. (17) The handset manufacturers—and not the large wireless carriers—develop the intellectual property and technology that drive wireless innovation. Because of this, handset exclusivity deals “do nothing to promote innovation in wireless devices” (17) The problem faced by handset manufacturers is that, because of the monopsony held by AT&T and Verizon Wireless, they are frozen out of the current distribution model, leaving them no choice but to enter into exclusive deals. (17)

MetroPCS rejects AT&T’s argument that exclusive deals preserve and promote handset manufacturers’ brand image because the manufacturers may design handsets with features and capabilities that do not work properly on all carriers’ networks. No CDMA carrier would sell GSM iPhones to its customers recognizing that these phones would not function on the carrier’s network, so the claim that manufacturers’ brand image would be at risk without exclusive deals is not persuasive. (17-18)

New entrants and rural carriers cannot compete effectively against the national carriers (who already have greater resources, greater spectrum, and larger roaming footprints) because they do not have access to handsets that are subject to exclusive agreements. (18) Further, these exclusive deals can hinder broadband deployment if the large carriers also dictate exclusive deals on a new generation of handsets. (19)

MetroPCS encourages the FCC to initiate a rulemaking to investigate the anti-competitive effects of exclusive deals and to create a forum for these issues to be explored based on a full and complete record. (19)

National Association of State Utility Consumer Advocates (NASUCA)

The National Association of State Utility Consumer Advocates (“NASUCA”)⁷ hereby files reply comments in support of the RCA Petition. (2)

NASUCA notes that fundamental to the oppositions is the proposition stated by AT&T that “[t]he U.S. wireless business is universally recognized as one of the most intensely competitive industries of any kind anywhere.” This hyperbole serves little purpose, especially given the facts as shown by many of the comments: The U.S. wireless business is concentrated and growing more so. (3)

The comments provide ample evidence of market failure for handsets, especially for the newer feature-laden handsets that are increasingly the focus of consumer interest. The RCA Petition contained an exhibit listing exclusivity arrangements for the larger

carriers.²⁴ RCA also noted smaller carriers' difficulties in obtaining "the most popular handsets," even where there is ostensibly no exclusivity arrangement. Notably, neither AT&T, nor Sprint Nextel, nor Verizon Wireless, all of which are identified on the RCA Appendix, challenged these claims of exclusivity. (5)

The big carriers' attempts to inflate the benefits of exclusivity arrangements are also belied by their limitation to the U.S. market. (7) NASUCA states that consumers definitely are harmed by exclusivity arrangements. Exclusivity arrangements raise the specter of "tying," often seen as a source of consumer harm. (8)

NASUCA notes that it is the newest, most advanced handsets that customers want; those are the handsets that the rural carriers have difficulty with. AT&T touts the existence of handset wholesalers such as Brightpoint, which "handled nearly 80 million handsets in 2007 (many more than any U.S. wireless carrier), and expects to handle up to 90 million handsets in 2008." AT&T fails to mention, however, that this is a worldwide number. Stateside, however, "even the combined purchasing power of industry consortiums, such as the Associated Carrier Group, LLC, does not approach that of the nationwide carriers. (9-10)

The negative impact on smaller wireless carriers also translates into negative impacts on consumers: Handset exclusivity arrangements threaten the ability of Tier II and Tier III wireless carriers to compete effectively with nationwide carriers and their ability to provide service in remote and sparsely populated areas that are not adequately served by the nationwide carriers. (10)

It appears that the lack of access to these handsets caused by exclusivity also impairs the smaller carriers' ability to comply with various FCC mandates. This also harms the consumers whom the FCC requirements were designed to benefit and protect. (10-11)

The big carriers all extol the benefits of their exclusivity arrangements with handset manufacturers. Their presumption is that the "whiz-bang" handsets would not have been developed or produced without such arrangements. Yet it should be clear that such was not the case. It should also be clear that none of these purported benefits are exclusive to exclusivity arrangements. The arrangements are a business decision; they are not fundamental to improvements from the consumers' perspective. (11-12)

Clearly, the FCC's authority over the manufacturers is limited, but the authority over the carriers extends to the types of devices that the manufacturers can supply to the carriers (at least if the carriers want customers to be able to buy them). For example, although manufacturers are free to produce handsets that do not have 9-1-1 capability that is effective even when service has been terminated, wireless carriers are not free to sell those handsets to their customers. NASUCA notes that Professor Jim Chen provides a detailed and expansive review of the Commission's authority to regulate the arrangements between wireless carriers and handset manufacturers, and specifically to

prohibit exclusivity arrangements and shows why such regulation is in the public interest. (12-13)

Northeast Communications of Wisconsin, Inc. dba Cellcom

Cellcom provides wireless service in rural Northeast Wisconsin since 1987 using a CDMA network. Cellcom would like to see these exclusive arrangements end as quickly as possible and believes that the FCC has the legal authority to and should launch an investigation into the growing use of exclusive handset arrangements and adopt rules that prohibit their use. (1)

Cellcom believes that consumers are harmed by exclusive handset agreements. Cellcom finds that the biggest hurdle in competing with the nationwide carriers is overcoming a customer's or potential customer's desire to purchase a specific exclusive handset that the smaller carrier or new entrant is unfairly prohibited from selling to customers. Under the present distribution scheme, smaller carriers like Cellcom are at the end of the distribution line when it comes to getting access to new handset models from manufacturers. Even though Cellcom can compete against larger carriers on price, coverage, flexibility of service, and customer service, it is placed at a competitive disadvantage because it cannot come close to matching the handset offerings of the larger carriers, creating an unfair competitive marketplace for the provision of wireless service. Moreover, permitting exclusive handset arrangements to continue is simply bad policy. Exclusivity arrangements force consumers to switch providers, pay a premium for their desired handset, and enter into multi-year service agreements with the exclusive provider. (2-3)

Cellcom agrees that smaller carriers must have access to the same handsets as the largest carriers in order to compete with them on a level playing field. ⁸ If not, then the ability of these carriers to effectively compete with nation's largest carriers is significantly harmed. (3)

Cellcom attributes most of its customer chum directly to its inability to access the most popular handsets. The Commission must ensure that customers are choosing wireless carriers based on factors such as price, service offerings, and quality of service - factors that are clearly within every carrier's control and not because of a carrier's inability, due to unfair market conditions created by exclusive handset agreements, to get access to the most popular handsets. (4)

Cellcom states that the Commission has taken analogous corrective action on numerous occasions, particularly in the auction context where, upon the realization that small carriers were at a financial disadvantage if they were forced to compete head-to-head with larger carriers for spectrum, the Commission established auction rules to level the playing field, such as setting aside spectrum for small carriers and establishing auction bidding credits which directly addressed the financing obstacles encountered by small carriers. The Commission should take similar measures to correct a competitive imbalance in this proceeding, consistent with its obligations under the Communications Act of 1934, as amended. (4-5)

Research in Motion Corp.

RIM believes the Commission should deny the RCA Petition. RCA has not set out a clear proposed rule or remedy in its petition, rendering a rulemaking proceeding exceedingly premature. Furthermore, it has not demonstrated that market conditions warrant additional regulation of the contracts negotiated between manufacturers and carriers. To the contrary, the latest data indicate significant competition in the mobile marketplace among both service providers and handset manufacturers. (2)

The wireless handset market has grown far more competitive than it was in 1992, when the Commission had already deemed that market “extremely competitive.” There are at least 35 companies designing and manufacturing handsets today. As of March 20, 2008, there were more than 620 unique models of wireless devices available to American consumers. New manufacturers continue to enter the U.S. market, and individual providers’ market shares are subject to significant fluctuations. Likewise, there are many avenues through which consumers may purchase wireless devices, including carriers, electronics retailers, department stores, manufacturers’ retail stores and websites, and online merchants. Accordingly, RCA has not made a sufficient showing that service providers and manufacturers should be barred or limited from negotiating their commercial agreements freely in a competitive marketplace. (4-5)

Freedom over contract terms, including the freedom to enter into exclusivity arrangements, allows for higher volume and term commitments, permitting providers to overcome economies of scale and pass savings on to consumers. Exclusivity arrangements can permit a commitment to research, innovation and experimentation that might otherwise be impossible. Such arrangements can help guarantee substantial sales volume over a given term, helping to insure some portion of the provider’s investment. Absent the freedom to enter into such agreements, manufacturers might well invest much more conservatively, focusing exclusively on incremental advances that are much less costly to engineer, and therefore present less risk, but fail to maximize consumer benefit. (5, 7)

The benefits associated with exclusivity arrangements are not limited to the research and development phase. By helping to ensure significant demand, these arrangements can also permit manufacturers to produce their new devices in substantial volumes, spreading relatively high “fixed” (non-volume-sensitive) costs over a broad production run. Exclusivity deals can therefore help manufacturers to overcome economies of scale and sell at competitive prices advanced devices that might otherwise have required higher per-unit recovery. (7)

For evidence of the way in which freedom to negotiate commercial arrangements facilitates the development of game-changing devices, one needs to look no further than RIM’s own experience. In 2008, RIM and AT&T introduced the Blackberry Bold to the U.S., RIM also introduced with Verizon Wireless the Blackberry Storm to the U.S. Since their introduction, both devices have been available in the U.S. only from these respective

carriers. RIM's ability to negotiate its commercial arrangements freely with AT&T and Verizon Wireless facilitated the deployment of these innovative new devices, which otherwise might have taken longer to develop or might not have been developed at all. (8)

The benefits associated with exclusivity arrangements extend well beyond the customers of the carriers enjoying exclusive access. Ultimately, the certainty afforded by exclusive arrangements ensures that advanced, low-cost technologies that otherwise might not have been developed at all can be made widely available to customers of multiple carriers over time. Here, again, RIM's experience is instructive: Both its BlackBerry Curve and its Blackberry Pearl were introduced exclusively via specific providers (in the United States, AT&T for the Curve and T-Mobile USA for the Pearl). Over time, however, both devices were also made available to other carriers and distributors, and they remain popular offerings available from several carriers and distributors in the U.S. today. (8-9)

The Commission should deny RCA's petition because there is no statutory authority to support a bar or limitation on manufacturers' commercial freedom to negotiate exclusive arrangements. Congress has afforded the Commission no power over the contractual practices of handset manufacturers. The Communications Act accords the Commission only specifically enumerated powers over equipment manufacturers, none of which apply here. Moreover, the circumstances presented here do not satisfy the well-established legal test for exercise of the Commission's ancillary jurisdiction. RCA has not cited, and *cannot* cite, any statutory provision authorizing the FCC to bar handset manufacturers from entering into exclusive contracts. The Commission has no more authority to limit the contractual dealings of handset manufacturers than it had to mandate the inclusion of broadcast flag technologies on television devices; in neither case is the regulated activity closely enough tied to the communication itself. (9-11)

Rural Cellular Association

Not surprisingly, the comments filed in this proceeding make clear that the nation's largest wireless carriers would prefer to keep their monopolistic handset arrangements in place. (1) The nation's largest carriers have made clear that they are currently unwilling to discontinue or modify their use of exclusive handset arrangements. (3)

RCA, its member carriers, every other small and mid-sized carrier and trade association, and seven consumer groups would prefer to see these exclusive arrangements end as quickly as possible and believe that the FCC has the legal authority to and should launch an investigation into the growing use of exclusive handset arrangements and adopt rules that prohibit their use so that handsets are offered on a non-discriminatory basis. Even the Telecommunications Industry Association (TIA) – whose members include handset manufacturers – supports FCC action to investigate the use of exclusive handset arrangements. (2)

Handset accessibility has become a primary concern for nearly every wireless carrier in the country, other than the nation's four largest carriers. The market power of the dominant nationwide wireless carriers has been allowed to grow to the point where these nationwide carriers can, in nearly every case, dictate exclusivity terms to handset manufacturers. Many of RCA's member carriers simply do not have access to handsets that are less than two years old – an eternity in the wireless industry. If the nation's small and mid-size wireless carriers are unable to get access to handsets that consumers have an interest in purchasing, the ability of these carriers to effectively compete with the nation's largest carriers is significantly harmed. In addition, customers served by smaller carriers and new entrants are prevented from accessing the most popular handsets and benefiting from the advances in wireless handset technology until years after their urban counterparts. (2-3)

It is also important to note that in an attempt to reach agreement among interested parties on the issues raised in the RCA petition or, at the very least, narrow the issues for Commission consideration, CTIA recently hosted a series of conference calls with its member carriers and manufacturers. A significant number of carrier and manufacturer representatives, as well as representatives of CTIA and RCA, participated in these calls. Ultimately, the issue that remained irresolvable was the willingness of the four largest wireless carriers to discontinue or modify their use of exclusive handset arrangements. Once it became clear that these carriers were unwilling to modify their use of exclusive handset arrangements, the conference calls ended. (3-4)

The "Big 4" nationwide carriers – AT&T, Verizon Wireless, Sprint and T-Mobile – account for more than 90% of all wireless telephone subscribers in the U.S. The time has come for the Commission to look closely at the use of handset exclusivity arrangements and determine whether the growing use of these arrangements by the dominant carriers in the wireless industry harms the public interest. If, after a prompt and thorough investigation, the Commission decides that exclusive arrangements do, in fact, harm the public interest and are allowing the "Big 4" carriers to extend their dominant market power into the market for handsets, RCA recommends that the Commission adopt rules that would prohibit such arrangements, consistent with its obligations under the Act. (4-5)

The proper procedural course is for the Commission to immediately investigate whether exclusive handset agreements are harming consumers and competition and then, if necessary, adopt rules that prohibit such arrangements. If the Commission comes to the same conclusion as RCA – exclusive handset arrangements are harming the public interest – then the Commission should grant RCA's petition and proceed directly to a Notice of Proposed Rulemaking. (6)

To the extent that there are procedural concerns by any party or the Commission concerning RCA's petition because it does not contain a proposed rule for Commission consideration, RCA will include it in these reply comments. Specifically, RCA proposes

that the Commission adopt a rule that could be codified in Part 20 of the Commission's Rules that states:

No commercial mobile service provider, and no agent or representative thereof, shall enter into any exclusivity arrangement with any handset manufacturer or handset vendor, or any agency or representative thereof.
(8)

The majority of commenters state that consumers are harmed by exclusive handset agreements. The absence of competition for a particular exclusive handset results in customers not only having to switch service providers, but also having to pay a premium for their desired handset. Often times, customers also must enter into multi-year service agreements with exclusive providers, presumably to offset handset subsidies, and end up paying a premium for the associated wireless services as well. (9-10)

The vibrant competition that these parties claim exists in the U.S. wireless handset market is limited almost exclusively to the nation's four largest national carriers. In reality, only a small fraction of these devices are available to smaller carriers and, typically, the devices that are made available to smaller carriers have already been available to consumers from one of the "Big 4" national carriers – in many cases for more than 12 months – as part of an exclusive arrangement. (10)

AT&T's claim that "[a]ll wireless consumers, even those that do not have an iPhone and have not subscribed to AT&T's mobile service, have [somehow] reaped enormous benefits from the handset" is ludicrous. In making this egocentric proclamation, AT&T glosses over the fact that many rural consumers – in significant portions of more than 15 states – still cannot activate and "legally" use the iPhone, nor can many of these same consumers get access to any of the other handsets cited by AT&T claims "are expressly marketed as iPhone substitutes." The exclusive handset arrangements insisted upon by the "Big 4" carriers that prohibit smaller carriers from offering desired handsets to the communities they serve are, in many circumstances, relegating rural consumers to "second class citizens" in the wireless marketplace. (11-12)

The Conseil de la Concurrence ("Competition Council") in France temporarily suspended an exclusive handset agreement between France Telecom and Apple which gave French operator Orange the exclusive right to sell the Apple iPhone for a five-year period. According to press reports, the Council determined that "France Telecom's five-year deal with Apple . . . adds another obstacle for consumers in a market already suffering from a lack of competition." The Competition Council's action is interim pending an investigation of the agreement between Apple and France Telecom which is not expected to be completed until 2010. To prevent other abusive arrangements in the interim, the Council ruled that any future exclusivity deals would be limited to three months duration. (12)

The biggest obstacle for small carriers and new entrants in competing with the “Big 4” carriers is overcoming a customer’s or potential customer’s desire to purchase a specific exclusive handset that the smaller carrier or new entrant is unfairly prohibited from selling to customers. Handset exclusivity arrangements threaten the ability of Tier II and Tier III wireless carriers and new entrants to compete effectively with nationwide carriers, thereby jeopardizing their ability to continue providing service in remote areas not adequately served by the nationwide carriers. (12)

Many of RCA’s member carriers simply do not have access to handsets that are less than two years old. The harmful competitive impact that a two-year delay can have on a carrier was never made more clear than following Sprint’s decision to delay rollout of the Motorola RAZR handset. Many have claimed that Sprint’s delay in offering the RAZR was a significant miscalculation by the company and is, in part, responsible for the company’s declining market position. Of course, Sprint’s decision to delay introduction of the RAZR was by choice. In contrast, the delays experienced by RCA member carriers desperately wanting to introduce the latest and most advanced handsets to their communities are not by choice. Unfortunately, delays of two years from a handset’s introduction until the same handset makes its way to RCA member carriers are, though unfair, a part of business that RCA member carriers simply must currently find a way to overcome. (14-15)

With regard to the point advanced by parties opposed to RCA’s petition that exclusive handset arrangements are necessary to furthering the technological development of handsets, these commenters fail to provide evidence that substantiates their position. While claims that the iPhone influenced the development of competitive models from multiple vendors, such as the Samsung Instinct (offered by Sprint) and the Blackberry Storm (offered by Verizon Wireless), are likely accurate, no party claims that *but for* the iPhone, other innovative handsets would not have been developed. Similarly, TIA provides absolutely no support for its claim that a revenue-sharing model between manufacturers and carriers is somehow necessary to create and speed development time for innovative devices and features is without support. (15-16)

In reality, handset manufacturers have been forced to accept such exclusive arrangements in the U.S. due to the dominant market power exerted by the nation’s largest wireless carriers. Manufacturers have told RCA members that they would actually prefer to be able to sell their handsets to as many carriers as possible so as to increase sales, but are prohibited from doing so by the exclusive arrangements that they are forced into by the largest wireless carriers. (16)

RCA is not blind to the fact that large carriers like Verizon Wireless, AT&T, Sprint and T-Mobile and handset manufacturers spend considerable economic and administrative resources developing their exclusive handsets. However, RCA member carriers, through consortiums like the Associated Carrier Group, are also prepared to spend millions of dollars to develop handsets with multiple manufacturers and have been turned away because, according to manufacturer representatives, they are precluded from

working with smaller carriers due to the expansive exclusive restrictions placed on them by the nation's largest carriers. As a result, RCA member carriers are now routinely faced with an inability to get access to certain popular handsets for more than 12 months after the handset's initial introduction and, in a minority of cases, for the lifetime of a particular handset. (17)

RCA has not asked the Commission to assume jurisdiction to regulate equipment vendors generally or handset manufacturers specifically. Rather, it is asking the Commission to exercise its existing Title II jurisdiction over commercial mobile service ("CMRS") providers, and the contracts of CMRS carriers, particularly their "[e]xclusive dealing contracts." The Commission has been explicitly given regulatory authority over the exclusive dealing contracts of wireless carriers. (18)

Cellular carriers obviously are CMRS providers. CMRS providers in turn are common carriers subject to Title II. Therefore, cellular carriers must comply with thirteen Title II sections, specifically including §§ 201 and 202. Accordingly, all practices of cellular carriers "for and in connection with" their communications services are subject to the Commission's Title II jurisdiction. Because Title II of the Act clearly applies to carrier contracts, the Commission's rulemaking authority extends to carrier practices in connection with their cellular services, including their contract practices. (19)

Section 211(a) of the Act requires that every subject carrier file with the Commission its contracts with other carriers, whether subject to the Act or not, concerning any traffic affected by the provisions of the Act. Section 211(b), however, gives the Commission the "authority to require the filing of *any other contracts* of any carrier." The Commission's authority to require the filing of a carrier contract under § 211 gives it authority to modify the terms of the contract under the *Sierra-Mobile* doctrine. For all contracts filed with the Commission, "it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public.'" Thus, the Commission's authority to require wireless carriers to file exclusive dealing contracts with handset manufacturers provides it with ample authority to regulate the terms of such contracts. (20-21)

One of the powers retained by the Commission was its authority under § 215(c) to regulate "[e]xclusive dealing contracts." Under § 215(c), the Commission is empowered to "examine all contracts of common carriers subject to [the Act] which prevent the other party thereto from dealing with another common carrier subject to [the Act]." Although § 215(c) provides that the Commission must report its findings as to exclusive dealing contracts to Congress with its recommendation for legislation, the provision does not preclude the Commission from exercising its rulemaking authority under §§ 154(i), 201(b) and 303(r). (21-22)

Agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers are clearly "exclusive dealing

contracts” within the meaning of § 215(c) since they prevent vendors from supplying handsets to other carriers, such as RCA’s members, that are subject to the Act. Thus, §§ 211(b) and 215(c) of the Act constitute a congressional delegation of authority to the Commission to examine exclusive dealing contracts between wireless equipment vendors and handset manufacturers to determine whether they have a substantial adverse effect on the provision of wireless telecommunications services or result in an impairment of competition. Because the Commission has specific statutory authority to regulate exclusive dealing contracts, we need not address whether the Commission as Title I ancillary jurisdiction to regulate such contracts. (23)

Contrary to Sprint’s contention, an “equipment supply contract” between a wireless carrier and a handset manufacturer can be evidence of a practice in connection with the carrier’s service that is cognizable under § 201(b). Entering into an exclusive dealing contract obviously can be an unreasonable carrier “practice” that violates § 201(b). The Commission has twice held that exclusive contracts for telecommunications service in a multiple tenant environment (“MTE”) “impedes the pro-competitive purposes of the 1996 Act,” and thus “a carrier’s agreement to such a contract is an unreasonable practice” under § 201(b). (24-25)

The Commission’s rulemaking authority under §§ 4(i), 303(r), and particularly 201(b) gives it the power to promulgate rules to carry out any of the provisions of the Act. Congress delegated a breadth of authority to the Commission sufficient to allow it to engage in a rulemaking simply to determine whether regulatory actions need be taken to ensure that the practice of entering into such exclusive dealing contracts do not violate the nondiscriminatory policies of §§ 1, 254(b), and 307(b), as well as the nondiscriminatory provisions of § 202(a). (25, 29)

The Commission has already decided that it has the statutory power to regulate exclusive dealing contracts between cellular carriers and handset manufacturers. Now that RCA has produced evidence that the exclusive dealing contracts between wireless carriers and handset manufacturers are impeding the pro-competitive policies of the 1996 Act, the Commission should exercise its jurisdiction to revisit the issue in a rulemaking. (29-31)

The availability of handsets that are able to operate on LTE technology in the future will be critical to all smaller carriers who attempt to compete with the national wireless carriers and offer 4G services. RCA is concerned that the nation’s largest carriers, who are able to dictate the terms and types of phones they want to purchase, may decide to steer handset manufacturers to support only the particular frequencies, air interfaces and spectrum bandwidths held by the largest carriers. This could in turn limit the ability of smaller carriers to deploy these handsets. This anticompetitive environment is toxic to smaller carriers planning to provide advanced wireless services to the communities they serve. (31-32)

If small, rural and regional carriers are unable to buy handsets with 4G technology, such as LTE, they will be severely harmed in the future as they will not be able to compete against the largest carriers who already have access to more capital and, in some cases, better resources. Advanced wireless services – 3G and beyond – will only flourish if the Commission takes action now that prohibits such exclusive arrangements. (33)

Based upon the information provided to the Commission in this proceeding by those in support of *and opposed* to the RCA petition, the Commission should initiate a rulemaking to investigate the anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers. RCA believes strongly that following its investigation, the Commission will conclude that the public interest is, in fact, being harmed by these arrangements. Given the gravity of the harms allegedly caused by these agreements, if that determination is made, the Commission must then promptly adopt rules that prohibit such arrangements consistent with the Commission's obligations under the Act. (34)

SouthernLINC Wireless (SouthernLINC)

SouthernLINC suggests that, aside from the arguments already presented during the initial round of comments, there may be additional grounds for Commission action regarding handset exclusivity arrangements. (3)

SouthernLINC notes while the nationwide carriers argue that the Commission has the authority to regulate the technical specifications of handsets and the use of handsets while they are transmitting, it does not have the authority to regulate handsets or handset manufacturers with respect to distribution, the Commission recently did exactly that when it adopted new rules on hearing aid compatibility that not only established the technical specifications that handsets must meet to be deemed HAC-compliant, but also imposed requirements directly on handset manufacturers regarding the composition of the overall handset portfolios that they offer to wireless carriers. (3)

These requirements, adopted pursuant to the Commission's authority under Sections 4(i), 303(r), and 710 of the Communications Act, as amended, effectively regulate manufacturers' business decisions with respect to the types of handsets that they offer to service providers and, thus, effectively regulate the provision of equipment to wireless carriers. Because the purpose of these rules is to "further 'ensure reasonable access to telephone service by persons with impaired hearing' as required by the Communications Act" and to "ensure that consumers with hearing loss have a variety of handsets available to them, *including handsets with innovative features,*" the Commission should consider the extent to which these important public interest goals - and the Commission's statutory responsibilities are affected by handset exclusivity arrangements. Moreover, the clear statutory and policy goals established by these provisions further support the Commission's exercise of its broad Title I ancillary jurisdiction in this matter. (4-5)

The Commission could also take action regarding handset exclusivity arrangements

pursuant to its mandate to "promot[e] safety of life and property through the use of wire and radio communication," such as through wireless E911 and the Commercial Mobile Alert System ("CMAS"). As the Commission considers what measures should be taken with respect to exclusivity agreements between wireless carriers and handset manufacturers, the Commission should consider the extent to which such agreements affect the public interest in improved E911 location accuracy and CMAS deployment, as well as the Commission's statutory and policy duties to advance these important public interests. (5, 7)

Thumb Cellular

Thumb is a Tier III rural cellular carrier serving fewer than 500,000 subscribers in the lower peninsula in Michigan. (1)

The Commission plainly has jurisdiction over wireless carriers even if the Commission did not have jurisdiction over handset vendors/manufacturers. The Commission's authority to regulate contractual relationships of Commission regulated entities cannot seriously be disputed. Regulation of supplier/purchaser contracts is not something new at the Commission, it is a Commission power of long standing and, unlike the Commission's regulation of broadcaster/network contacts, the relationship between Verizon and the other large carriers and their tied up equipment manufacturers do not implicate any First Amendment concerns. Verizon's notion that there is an area of the equipment manufacture and supplier/purchaser relationship upon which the Commission may not intrude does not present even the veneer of a substantial legal prohibition which precludes ameliorative action by the Commission, that is, Verizon's jurisdictional argument is less than thin. (2-3)

The Commission's rule making authority is extremely broad and it is not cabined in the manner that Verizon argues. Verizon's argument that the Commission has not provided adequate rule making notice is belied by Verizon's own extensive discussion of the subject matter. (4)

Thumb fully supports the effort to prohibit exclusive arrangements between the large carriers and handset manufacturers. These exclusive arrangements provide the larger carriers with a competitive advantage based solely upon their size which allows them to tie up equipment manufacturers with long term exclusive production/distribution agreements. The effect of these exclusive arrangements is to preclude small carriers from obtaining cutting edge technology and service opportunities until such time as the technology is no longer cutting edge and long after rural consumers have been denied service choices.

The issue is not whether a particular market or group of markets is affected by or can affect handset distribution, nor whether a particular market or carrier can influence a particular manufacturer, but rather, whether the nationwide distribution of handsets, and the public interest, is adversely affected by the combined exclusive dealing arrangements which exist between the large Tier I and Tier II carriers and the handset manufacturers. The public interest is not served by large carrier/vendor/manufacture exclusive supply

contracts which limits both technology and service access to rural markets. It is difficult to conceive of a situation which presents a clearer restraint of trade issue -- consumers are denied technology and services and rural carriers are denied a fair opportunity to compete against large carriers. (5-7)

T-Mobile USA, Inc.

T-Mobile asks the Commission to deny RCA's petition on the ground that regulatory intervention in the handset market is unauthorized and unnecessary and would inhibit innovation at a critical time to the detriment of the consumer. (1)

T-Mobile claims that restricting wireless carriers' ability to offer unique handsets to their customers would prohibit or restrict an important mechanism that handset manufacturers and wireless carriers employ to bring innovative choices to consumers quickly and at low prices, and to do so at a time when this marketplace is fast evolving (1). This is not the environment to step into and impose inflexible regulatory mandates. RCA's request could backfire – ultimately disserving not only consumers but the carriers themselves, including RCA's own members. (1-2)

There is no problem that requires government intervention. The wireless market is robustly competitive, as is the market for wireless handsets. A recent snapshot of today's market shows there are now over *40 handset manufacturers* offering over *600 handset models* in the United States and new players and new models are introduced frequently. (2)

Time-limited exclusive handset agreements are a reasonable means by which carriers seek to compete and distinguish their service offerings in a highly competitive market. Such agreements permit the company to undertake the significant research and development investments necessary to cultivate new features and functionalities designed to improve the experience of its wireless customers. A limited exclusive arrangement can mitigate the risk of such investment to at least some degree – and can provide the initial reassurance and return carriers need to provide the substantial subsidies that typically support wireless handset offerings.

T-Mobile's limited exclusive agreements also protect its investment in highly customized, "branded" handsets that are developed to reflect the "look and feel" of its service. Exclusivity agreements do not distort competition or unfairly harm small and rural carriers as RCA suggests. To the contrary, exclusivity agreements in most cases remain in place for only a short period of time. Longer exclusive arrangements like those involving the iPhone are few and far between. (2)

T-Mobile and other wireless carriers and manufacturers actively work with smaller carriers to ensure that their customers will have access to the new generation of 3G phones. T-Mobile's exclusive arrangements generally impact only Tier 1 and 2

competitors, purposefully *excluding* from their scope the Tier 3 carriers that are the focus of RCA's requested relief. (2-3)

The overwhelming evidence shows that rural carriers currently offer a wide array of handsets, including the most advanced features, without any need for regulatory intervention. These carriers benefit from the innovation that larger carriers fund since, in the vast majority of cases, they obtain access to new handsets either immediately, or, at worst, after a relatively short period of just a few months. Beyond this, the record shows that many small and rural carriers provide exclusive handset offerings of their own. In short, the explosion of innovation that exclusive handset contracts foster benefits consumers – and carriers – everywhere. (3)

Finally, the comments raise serious questions about the Commission's jurisdiction to take the steps RCA advocates. The Communications Act grants the Commission no authority to regulate the handset market. (3)

Exclusive handset arrangements are an intrinsic component of this competitive marketplace. These agreements create opportunities and incentives for product and service differentiation and innovation. Not only do consumers benefit directly – but competitors that might not be able to command a major innovative effort on their own quickly benefit from the fruits of larger carriers' research and development. These agreements should be encouraged, not prohibited or subjected to inflexible regulatory limitations. (4)

The key purpose of exclusive agreements is to provide carriers and manufacturers with the necessary economic incentives to make the substantial investments required in developing a new handset – especially on a fast track. The type of innovation that typically underlies an exclusive agreement involves an effort to devise unique features, consumer-friendly processes, and notable differentiators over pre-existing phones. That process may take years, involving many hours, much carrier-manufacturer collaboration, and a significant expenditure of resources. In some cases, a carrier may even need to make changes in its own network to support the new handset capabilities: T-Mobile had to do precisely this to optimally support some features of the new T-Mobile G1™ with Google™, and AT&T reports that it likewise had to make changes to support some of the capabilities of the iPhone. (4-5)

Entering into at least a limited exclusive arrangement allows a carrier to enjoy a unique, if short-lived, “bump” in connection with the introduction of the new device. The market attention this garners helps the carrier recoup its costs – and also helps the carrier justify and afford the significant device subsidization that consumers have come to expect. (5)

But the key point is not simply that exclusive arrangements are a perfectly legitimate means to recoup the cost of investment. It is that, *without* this assurance, neither carriers nor manufacturers would make those investments – and the result would

be a significant drop-off in innovation, and a slow-down in the introduction of new handsets and new features and applications. Manufacturers – most of whom are struggling significantly in the marketplace and have been for several years – cannot make these investments, without an understanding that carriers stand ready to purchase the resulting devices. Exclusive agreements employed by T-Mobile allow innovation to flourish by providing at least some assurance to both parties that experimentation will be worth their while. The result is the explosion in specialized handsets that has been witnessed in recent years. (5)

Exclusive agreements tend to extend only a number of *months*, not years. Indeed, the lengthy exclusivity term of the iPhone in the United States is an anomaly. Most of T-Mobile’s exclusive agreements last less than a year and some are as short as 90 days. (6)

Exclusive arrangements tend to be longer where a carrier has spent substantial time and resources to develop and design a customized handset to fit specifically with the look and feel of its brand and service. For example, T-Mobile has invested heavily in developing proprietary handsets like the Sidekick™ and Shadow™ to provide users with a completely customized experience that is specific to and reflective of T-Mobile’s brand. These flagship phones are designed to leverage T-Mobile’s network and provide users with an optimal experience with services like MyFaves®, text, instant messaging, MySpace Mobile™, and unique features like customizable skins and limited edition designer shells created in collaboration with celebrities such as skateboarder Tony Hawk. In these cases, exclusivity periods protect not only the investment but the unique branding and customized features of the phone, which is important in a highly competitive marketplace in which carriers must differentiate themselves. Notably, however, T-Mobile does *not* subject the basic, underlying phone model to any exclusivity restrictions; it simply seeks to protect the customized, carrier specific model, which has become an intrinsic component of the T-Mobile “brand.” (7)

RCA’s request suffers from another fundamental misconception: exclusive agreements often do not even apply to the Tier 3 carriers that are at the heart of its petition. (8) Most of T-Mobile’s exclusive agreements in the U.S. extend only to Tier 1 and Tier 2 carriers, which are T-Mobile’s primary competitors. Thus, T-Mobile’s agreements typically leave manufacturers free to sell the subject handsets to smaller carriers even right after launch. And T-Mobile typically does not object where the agreement is unclear and where manufacturers have sought T-Mobile’s consent for such sales. Contrary to the implication underlying RCA’s requested relief, its members stand to benefit substantially from the significant investment T-Mobile makes in new handsets that usually are immediately made available to smaller carriers. (8-9)

For example, T-Mobile partnered with Nokia, Samsung, and Sony Ericsson to develop the first handsets to operate on Advanced Wireless Services (“AWS”) spectrum. But many of these handsets, including the Nokia 6263 and the Sony Ericsson TM506 already have been released for purchase by smaller carriers and the general public. Thus, contrary to claims by Cincinnati Bell Wireless that T-Mobile and others are tying up the

3G marketplace and restricting access to phones, the fact is that T-Mobile's development efforts are *seeding* the market with phones that other carriers then stand to enjoy. (9)

Exclusive arrangements are not merely the province of the carriers that RCA chooses to identify as "the Big 5." Many smaller carriers employ exclusive arrangements in order to support innovative service offerings or appeal to a specialized niche market. Firefly Mobile markets an exclusive handset designed specifically for children, which is paired with services that allow parents to control incoming and outgoing calls. Jitterbug Wireless caters to older wireless users, featuring handsets with oversized keypads and displays and a dial tone whenever the handset is opened. In addition, a group of small and rural Tier II and Tier III carriers – known as the Associated Carrier Group ("ACG") – pooled their resources to attract a handset manufacturer partner to bring one of the first music phones to the wireless market in 2005 (10)

No evidence has been presented that *consumers* are harmed in any way by protecting handset innovation through exclusive agreements. The record shows that rural carriers tend to carry a variety of handsets including smartphones and other advanced devices with QWERTY keyboards and touchscreens; and, as noted above, some rural carriers even have exclusive devices. And simply making all the larger carriers' devices available would be of dubious value, since in many cases the rural carriers have not made the unique network upgrades to support the newest devices. (11)

The relief RCA seeks runs counter to Commission precedent. In its 1992 *Cellular Bundling Order*, the Commission found no cause for concern about the purported anticompetitive effects of exclusivity arrangements because the market for wireless handsets – even in 1992 – was "extremely competitive," and the market for wireless services was growing ever more competitive. Moreover, the Commission found that this competition created opportunities for CPE manufacturers to reach deals with a variety of carriers, and precluded carriers from imposing terms on the manufacturers that were unattractive or unfair. While the Commission is free to reconsider its prior orders, it may do so only where the record clearly supports that about-face. The record here does not provide such support. Competition has only increased in the seventeen years since that Order was issued. (12)

Individual wireless carriers do not have the market power to adversely affect or exert anti-competitive influence over the numerous wireless handset manufacturers operating on a national and international basis. No individual handset has captured more than 5 percent of the consumer market at any given time. And new popular devices are immediately countered with development efforts by competitors seeking to develop the "next great thing." This type of differentiation among carriers is not a skewing of competition – it is evidence of healthy competition, which leads to innovation and promotes consumer welfare. (13-14)

No provision of the Communications Act authorizes the Commission to regulate the terms of handset exclusivity agreements designed to protect innovation and the

development of new technology. There is also no support for any assertion of ancillary jurisdiction in this case. (16-17) Even if the FCC had the legal jurisdiction to regulate exclusive handset arrangements – which it does not – prior Commission findings and both the FCC’s and the Act’s clear policies preclude a sudden dive into regulatory intervention absent a showing of significant market failure and consumer harm. Neither is present here. (17)

United States Cellular Corporation (“U.S. Cellular”)

Exclusive handset contracts divide wireless customers into “have’s” and “have not’s,” with many customers in rural areas having no option to subscribe to the services of the large, national carriers, thus denying these customers access to the most desirable and advanced handsets that are only available through exclusive arrangements with the national carriers. (3) The Apple iPhone, distributed exclusively by AT&T, is a case in point. Professor William Rogerson (submitting a Statement attached to the U.S. Cellular Reply Comments) challenges claims by the large carriers that the exclusive iPhone deal is not harmful to consumers because consumers can obtain similar handsets from other carriers. Professor Rogerson argues that these similar handsets are also locked up by exclusive deals and consequently are not available in many rural areas. (Rogerson at 9)

U.S. Cellular argues that exclusive handset contracts are becoming increasingly harmful to rural consumers because they make it difficult for these consumers to take advantage of Internet access provided by mobile broadband that is available only through smartphones tied up by exclusive deals. (4) Turning rural consumers into second class customers by blocking their access to smartphones and other innovative handsets is not consistent with the purposes and policies of the Act. (5)

Restricting exclusive arrangements, and enabling customers to purchase new and advanced handsets with any carrier, would advance the universal service, broadband deployment, pro-consumer, and pro-competition policies of the Act and the Telecommunications Act of 1996. (5) On the other hand, permitting the national carriers (who are increasingly dominant in wireless markets due to spectrum purchases, mergers, and acquisitions) to shut out access by rural consumers to the most advanced handsets “clearly short circuits the statutory policy of ensuring that communications service is available to all consumers throughout the country.” (6)

U.S. Cellular argues that exclusivity arrangements give the national carriers an unfair competitive advantage in markets in which they compete against regional and rural carriers, and points to the fact that, when AT&T began distributing both the 2G and 3G iPhones, “U.S. Cellular experienced a significant and sustained increase in port-outs to AT&T that can only be attributed to the fact that customers could only obtain the iPhone by switching from U.S. Cellular to AT&T.” (6)

The record demonstrates that exclusive handset deals dominate the wireless handset market, and that these arrangements result in the migration of customers from

rural carriers to their larger in-market competitors. (7) Although regional and wireless carriers are fully capable of competing against the Big Four carriers based upon service quality, service packages, and price, their ability to compete is hampered by the fact that existing and potential customers place a premium on obtaining handsets that are locked up in exclusive deals. (8) Professor Rogerson argues that fair competition suffers because the large carriers deny their competitors access to handsets and prohibit their customers from migrating their handsets to competing carriers. (Rogerson at 9)

Exclusive deals force regional and rural carriers to offer handsets with less functionality and desirable features than those offered by the national carriers, and this has the effect of stifling competition and restricting competitive entry. This problem is made even more severe as the wireless industry transitions to Long Term Evolution standards, protocols, and air interfaces. (9; Rogerson at 11) Rural carriers cannot overcome, through ordinary competitive channels, the market barriers that result from exclusive contracts. There is no “market solution” to this problem, and this presents a compelling case for the FCC to initiate a rulemaking to examine the risks to competition and consumer welfare that are posed by handset exclusivity arrangements. (10)

U.S. Cellular argues that there is ample precedent for FCC action, citing the agency’s recent decision to impose automatic roaming requirements on the national carriers. In that proceeding, the FCC found that automatic roaming is subject to protections under the Act, that customers expect to be able to roam automatically on other carriers’ networks, and that automatic roaming provides benefits to subscribers. (11) U.S. Cellular argues that these same considerations support the initiation of a rulemaking to examine the reasonableness of exclusive handset deals. (11-12)

U.S. Cellular argues that another adverse effect of exclusive handset agreements is that consumers who are able to purchase handsets subject to exclusive deals are forced to pay higher prices for these handsets. (12) U.S. Cellular contends that Sprint has acknowledged this point by noting that when the Motorola RAZR phone was first offered, on an exclusive basis, it was priced at \$499 but was later sold by both large and smaller carriers at much lower prices. Exclusive deals also narrow consumer choice, and force consumers to make trade-offs (involving service quality and price, for example) in order to obtain desired handsets. (12-13)

Another victim of exclusive handset contracts is innovation in the design and development of handsets. To the extent consumers cannot make independent handset selections, manufacturers have less incentive to compete for customers by emphasizing research and innovation as a means of differentiating their products. (13) This problem is made worse by the fact that exclusive handset deals often result in handsets that are not optimized for use across wireless networks, but instead are designed to increase customers’ dependence on their carriers’ networks. (14, citing Professor Chen, in his statement for Cellular South)

U.S. Cellular also contends that exclusive handset contracts undermine the benefits of “open networks” that have been promoted by the FCC. Open access to 700 MHz C Block spectrum, for example, would be threatened if handsets designed for use on this spectrum are subject to exclusive contracts. (14) Even AT&T Mobility has recently promoted the advantages of open wireless architectures, device interoperability, and commonality among applications for handsets such as the iPhone. U.S. Cellular argues that handset exclusivity deals undercut these goals articulated by AT&T Mobility, and detract from the benefits that customers could receive from interoperable applications and from integrated devices, applications, and services. (14-15)

Because of the fact that the FCC is charged with protecting consumer welfare, a rulemaking is necessary to focus on the issue of the extent to which exclusive handset deals are harming consumer welfare. U.S. Cellular argues that the current record shows that exclusive deals are harming consumers in several different ways, and that this record presents a compelling case for a rulemaking. (15)

The Big Four carriers are able to lock in customers and thus leverage their exclusive handset deals to fend off competition from regional and rural carriers. The large carriers are in effect tying their wireless services to their exclusively available handsets, and U.S. Cellular argues that an FCC rulemaking should examine the issue of whether exclusive handset deals should be treated as tying arrangements and should be prohibited or regulated to control their harmful effects upon competition and consumers. (16) U.S. Cellular cites concerns previously expressed by the FCC regarding tying arrangements, and also points out that the FCC has acted to protect wireless consumers from the adverse effects of bundling arrangements. (17-18) U.S. Cellular argues that the market dominance of the Big Four carriers strongly suggests that they are able to use tying arrangements to lock in customers, thus harming both competition and consumer welfare. (18-20) U.S. Cellular, citing figures developed by Professor Rogerson, argues that AT&T and Verizon Wireless each serve about 30 percent of all wireless subscribers, and that the Big Four carriers have a combined share of about 86 percent of all wireless subscribers. (19, Rogerson at 18, Table 1)

U.S. Cellular also argues that a rulemaking should be initiated to examine whether exclusive handset contracts operate as restrictive covenants, raising serious anti-competitive concerns, especially in light of the FCC’s interest in preventing anti-competitive behavior and removing impediments to consumer choice. (20) The FCC should examine whether exclusive deals are too broad in scope, and therefore are contrary to the public interest, because they block other carriers from selling handsets which are subject to the exclusive deals in markets in which the national wireless carrier involved is not even competing. These public interest concerns are similar to those reflected by Congress when it established the Universal Service Fund for the purpose of protecting rural consumers from becoming economically isolated from the benefits of telecommunications technology. (20-21)

U.S. Cellular argues that there may be theoretical pro-competitive arguments that would permit a national carrier to enter into a “quasi-exclusive” handset deal barring the handset manufacturer from entering into sale arrangements with other *national* carriers, there is no public policy justification for the national carriers’ using exclusive deals to bar handset manufacturers from entering into arrangements with regional and rural carriers. (21) Rogerson proposes that the FCC should continue to allow the Big Four carriers to enter into exclusive arrangements with handset manufacturers, but that these arrangements should be allowed to apply only to other members of the Big Four. (Rogerson at 14-16)

In addition to examining whether exclusive deals are too broad in scope, the FCC should also review in a rulemaking whether they are too long in duration. U.S. Cellular argues that, by the time exclusivity agreements expire, the handsets involved are obsolete, replaced by more modern and desirable handsets which themselves are subject to exclusivity deals. (22) U.S. Cellular cites to a recent decision by the Competition Council of France that criticized the five-year exclusive contract between France Telecom and Apple, for distribution of the iPhone, and provided that future exclusivity deals would be limited to three months at a time. (22)

There is no basis for the claims made by opponents of the RCA Petition that exclusive handset deals, by encouraging carriers to invest in the development of new handsets and by preventing competing carriers from supplying the same handsets, enhance the development and deployment of new technologies. (22-23) Professor Rogerson uses the iPhone as an example, arguing that AT&T essentially played almost no role at all in developing the handset, and pointing out that this is typical because handset manufacturers operate in a global market and U.S. carriers are not likely to play a significant role in funding research and development costs associated with handsets deployed throughout the global market. (Rogerson at 13-14)

With respect to the FCC’s jurisdiction to regulate exclusive handset arrangements, U.S. Cellular presents arguments that are the same in all materials respects to those presented in the RCA Reply Comments.