



**Rural Cellular Association**

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

**RM-11497**

**Summary of Comments**

**Prepared February 3, 2009  
Supplemented February 4, 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. Comments on the RCA petition, which were due on February 2, 2009, are summarized below.

**Ad Hoc Public Interest Spectrum Coalition (PISC)**

PISC, which includes the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, Public Knowledge, and U.S. PIRG, supports the rulemaking petition filed by RCA. (1)

Handset exclusivity arrangements impede the promotion of competition over quality and cost of service because the arrangements prevent would-be subscribers to rural and competitive wireless services from obtaining the most popular wireless devices. (1)

As shown by the FCC's eleventh annual report on wireless competition, the market for wireless services in 2009 "demonstrates ever lower levels of competition." AT&T and Verizon have a combined market share of over 60 percent. (2) Exclusive handset arrangements further reduce competition by eroding consumer choice. (3) If the FCC fails to prohibit handset exclusivity arrangements, more consumers will choose new devices over better service providers, and

this will harm meaningful competition in the wireless market, will impair the quality of wireless service, and will drive up the cost of wireless service. (3)

Prohibiting handset exclusivity arrangements, by allowing consumers to purchase new and popular devices from any wireless carrier, would result in increased innovation in wireless devices. (4) Using their control over the device market, wireless carriers resist possible innovations in devices “whenever the social benefits of those innovations cannot be internalized to the carriers.” (4)

The FCC should apply its Internet Policy Statement—including its principle of open devices—to wireless carriers, as Acting Chairman Copps suggested (while serving as a Commissioner). (5-6)

PISC agrees with RCA that the FCC has authority to prohibit exclusive handset arrangements as unreasonable practices in violation of Section 201(b) of the Communications Act of 1934 (Act), as incorporated through Section 332(c) of the Act. (6-7)

## **AT&T, Inc. (AT&T)**

AT&T opposes the RCA rulemaking petition.

AT&T argues that exclusive handset arrangements increase competition and benefit consumers. (7) AT&T explains that carriers that create advantages for themselves, such as exclusive marketing and distribution arrangements, will benefit with new customers and force its rivals to work harder to improve their own offerings. (7-8)

AT&T also contends that the FCC and the courts have found exclusive deals to be problematic only where such arrangements truly threatened to create or strengthen a monopoly—which conditions do not exist in the wireless marketplace. (9-10) AT&T references the FCC’s recent report on wireless competition in which the FCC concluded that consumers continue to reap the benefits of competition with low price, new technologies, improved service quality, and choice among providers. (10) Given the intense competitive conditions for wireless services and handsets, AT&T argues that no wireless carriers or handset manufacturer could use exclusive arrangements to foreclose competition and that there are numerous competing handsets offered by many competing wireless carriers in virtually every area and that the introduction of the iPhone has spurred many iPhone substitutes such as the HTC Touch, Blackberry Storm, Google G1, and several Samsung and LG models. (15)

AT&T also refutes RCA’s claim that exclusive deals have led to higher prices for handsets, claiming that the average price of a smart phone has dropped in the past year. (16)

AT&T argues that exclusivity arrangements enable all the manufacturers to bring new and better products to the market more quickly and permit the manufacturer to focus its resources on working with only one carrier to optimize, introduce, and promote a new handset and increase the carrier’s incentives to make network investments in support of new handsets and to promote such handsets. Thus, 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. (18)

AT&T argues that the exclusive arrangement to offer the iPhone was a critical component to realizing the public interest benefits to competition and to consumers and that it took a big risk in investing millions of dollars in the development, deployment, and promotion of the iPhone, and that success was not certain as Apple has never before made a mass market handset and also faced stiff competition from existing manufacturers. The exclusive arrangement also prevented rivals from getting a free-ride on AT&T's risky and substantial investment and from undermining AT&T's ability to recover through new subscriptions in the event that the iPhone was a success. (19-20)

AT&T argues that the FCC's public interest mandate does not extend to protecting competitors from competition and that the Act requires the FCC to focus on competition that benefits the public interest, not on equalizing competition among competitors. (22-23) AT&T claims that RCA has not shown that exclusive arrangements harm wireless competition (23).

AT&T claims that small carriers have access to highly desirable handsets at substantial discounts and favorable terms because small carriers have access to mega-wholesalers such as Brightpoint and AeroVoice and that these wholesalers carry handsets from all of the major manufacturers—the same that supply the largest U.S. carriers directly. (24-25) AT&T also argues that rural carriers, by banding together, have in the past been able to obtain exclusive rights to distribute handsets for some period of time. (26)

AT&T argues that there is no legal basis to regulate handset distribution. (27) Specifically, AT&T argues that wholesale distribution of wireless handsets is not a common carrier service and not subject to Sections 201 and 202 of the Act, which guards against unreasonable and discriminatory acts. (28) Even if applicable, AT&T claims that Section 202 prohibits unreasonable discrimination only against similarly situated customers and that persons outside its service area are not similarly situated to customers inside its service area. (29) AT&T also claims that Section 201 would not be impacted, even if applicable, because there is substantial competition and that such exclusive arrangements do not foreclose any other carrier from offering wireless service to anyone and they do not give any wireless carriers a monopoly, as the multiple dwelling unit access agreements did. (29-30) AT&T also argues that Section 254(b)(3), which directs the FCC to consider whether customers in rural and high-cost areas have access to various types of services that are reasonably comparable to the services available in urban areas, is not applicable because rural customers today have access to multiple competing carriers that offer handsets and plans with advanced touch screens and many other innovative features and capabilities in rural areas. AT&T also argues that RCA has not demonstrated that rural customers are denied access to services that are reasonably comparable to service available in other parts of the country. (30-31)

AT&T claims that, even if small, rural carriers had access to phones such as the iPhone, their networks would not be able to support such a phone because the iPhone is only fully functional on 3G networks and many features of the iPhone also require specific network capabilities, and that most small, rural carriers have not yet upgraded their networks to 3G. (33)

AT&T further argues that the RCA petition is merely a plea for an assertion of ancillary Title I regulation and that the FCC has no basis to assert Title I authority over handset distribution unless it could be shown that the practices in question threaten the vitality of competition in the wireless market, because the wireless marketplace is extremely competitive, and the FCC has no reason to intervene. (34-35)

Finally, AT&T argues that it would be unlawful for the FCC to abrogate existing exclusive agreements. (35-36)

### **Blooston Rural Carriers (BRC)**

Filed by the law firm of Blooston Mordkofsky Dickens Duffy & Prendergast, LLP, on behalf of 21 rural telephone clients.

BRC supports the RCA rulemaking petition. (1) Handset exclusivity threaten the ability of Tier II and Tier III wireless carriers to compete against nationwide carriers and to provide service in remote and sparsely populated areas that the nationwide carriers do not adequately serve. (1) Exclusivity arrangements also interfere with the ability of Tier II and Tier III carriers to obtain the devices they need to comply with FCC regulatory mandates, such as hearing aid compatibility (HAC) and E-911. (1-2, 5)

As RCA pointed out, there are several recent examples in which the most sought-after devices are not available to rural customers because the carrier with the exclusive arrangement does not provide service in the rural areas involved and also enforces roaming restrictions. The Apple iPhone is a noteworthy example. (3)

Handset exclusivity arrangements are inconsistent with the FCC's duty under the Act to make wire and radio communication service available to all the people of the United States on a non-discriminatory basis, and to ensure "a fair, efficient and equitable distribution of radio service" to all states. (4)

The quality of rural networks, and the availability of wireless services in the most remote areas, is jeopardized if rural wireless carriers cannot compete effectively with the four giant nationwide carriers. It will be impossible for rural carriers to survive if there is significant customer churn. If rural carriers are forced out of business, many of the most remote areas will lose access to any type of wireless service. (4)

Although the large carriers argue that exclusive handset arrangements enable them to "distinguish" themselves in the marketplace, this is actually accomplished by creating an artificial monopoly over a consumer device. This amounts to a tying arrangement that can be harmful to consumers and that must be evaluated for its potentially harmful anticompetitive effect. (6)

## **California RSA No. 3 Limited Partnership d/b/a Golden State Cellular (Golden State)**

Golden State agrees with RCA that the FCC must initiate a rulemaking proceeding to examine the anti-competitive effects of handset exclusivity arrangements between nationwide carriers and the handset manufacturers and, if necessary, use its authority to adopt rules to eliminate such arrangements when they harm competition. (1)

Golden State argues that these exclusive arrangements prevent small, rural carriers from being able to offer their customers the most advanced and desired handsets on the market, unfairly impeding competition between Golden State and the nation's largest wireless carriers. Golden State notes that, although consumers have a choice from about fifteen handset models that Golden State offers, none is among the top 10 most popular handsets in the country because most of these handsets are subject to exclusivity arrangements, making them available only to one of the nationwide carriers (*i.e.*, Verizon Wireless, AT&T, Sprint Nextel and T-Mobile). (2-3)

Golden State claims that when smaller carriers are able to secure a new handset offering, they generally do so several months after such handsets have been made available to the nationwide carriers, and this disparity was brought to the forefront in the context of the FCC's HAC requirements in which Tier III carriers were consistently having difficulty meeting the requirements because HAC-compatible phones were generally not available to them, but had already been made available to the nation's largest carriers. (3-4)

Golden State argues that the FCC has on numerous occasions taken action to ensure competition for the benefit of smaller carriers, citing the auction context in which, 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 FCC established auction rules to level the playing field, such as setting aside spectrum for small carriers and also establishing auction bidding credits which directly addressed the financing obstacles encountered by small carriers. (5)

## **Cellular 29 Plus and Lyrix Wireless (the "Companies")**

Cellular 29 Plus and Lyrix Wireless, carriers with a combined total of 14,000 subscribers that compete against U.S. Cellular in the Iowa RSA 1 and Iowa RSA 2 markets, urge the FCC to eliminate exclusive handset agreements. The Companies explain that the inability to purchase quality, competitive handsets in a timely manner "is by far the most difficult competitive hurdle" they face, largely because customers are increasingly choosing their wireless carriers based on the handsets offered by the competing carriers. "Handset exclusivity arrangements greatly benefit the larger carriers who have the purchasing power to enter into these arrangements much to the detriment of the smaller carriers who are left with whatever they can find to offer their customers." (1)

The markets served by the Companies are adjacent to the Omaha, Nebraska, and Des Moines, Iowa, markets (which are served by Verizon Wireless, AT&T, Sprint, U.S. Cellular, T-Mobile, and other carriers). Exclusivity deals are harming the Companies because they cannot offer handsets (such as the iPhone, Voyager, and Storm) that are available from competitors in

the Omaha and Des Moines markets. Even U.S. Cellular is not large enough to enter into exclusive deals with manufacturers for these phones. (1)

Exclusivity arrangements also have the effect of raising the cost of handsets to consumers. If manufacturers were able to offer handsets to multiple carriers, the reduced production costs and increased sales would lower the handset prices. (2)

### **Cincinnati Bell Wireless LLC (CBW)**

CBW supports the petition for rulemaking filed by RCA. (1) Only the largest national wireless carriers are able to leverage exclusivity arrangements with handset manufacturers, and this competitive disparity increases with each wireless carrier merger. These arrangements prevent the sale of the latest and most advanced handsets to these carriers' competitors either indefinitely or for varying lengths of time. This allows the largest providers to corner the market on the newest cutting-edge devices. (3) Introduction of new handsets pursuant to exclusivity arrangements also increases churn rates of competing carriers. (3-4)

Exclusivity arrangements are also harmful to subscribers, forcing them to switch providers, pay a premium for their desired handset, and enter into multi-year service agreements with the exclusive provider. (4-5)

Exclusivity arrangements have also made it difficult for CBW to acquire handsets for use on AWS spectrum purchased by AWS in 2006, severely hampering CBW's ability to deliver advanced broadband wireless services. (5) This causes CBW to suffer considerable economic harm because of lost revenues from customers and the incurrence of additional capital costs associated with supporting customers on CBW's GSM network. (6)

### **Corr Wireless Communications, LLC (Corr Wireless)**

Corr Wireless filed comments on December 2, 2008, supporting the RCA rulemaking petition, and urging the FCC to require handset manufacturers to make equipment available to large and small carriers on a non-discriminatory basis. (1)

The present distribution scheme, even without exclusivity deals, places smaller carriers at the end of the line. Corr Wireless often finds itself one or two years behind the major carriers in getting access to new handset models from manufacturers. Thus, even though Corr Wireless can compete against larger carriers on price, coverage, flexibility of service, and customer service, it is placed at a competitive disadvantage because it cannot match the handset offerings of the larger carriers. This deprives consumers of the benefit of effective competition. (1-2)

As efforts continue to open up wireless networks to provide access by devices not controlled by the carriers, the benefits of "open access" could be largely lost if manufacturers are permitted to enter into exclusive arrangements with carriers (such as the Apple iPhone deal). (2)

Although the FCC has adopted rules mandating diversity of choice for consumers with hearing issues, the ability of small carriers to meet these requirements is hampered by exclusivity

deals that restrict the availability of HAC-compliant handsets. Handset exclusivity arrangements also interfere with small carriers' ability to comply with E-911 requirements, because the arrangements restrict access to Assisted GPS handsets. (3) "The Commission cannot continue to impose obligations on carriers while denying them the tools needed to comply with those obligations at the most fundamental level." (4)

On February 2, 2009, Corr Wireless filed Further Comments, pointing out that France's Competition Council had recently provisionally suspended a handset exclusivity deal between Apple and France Telecom, enabling customers in France immediately to begin buying the iPhone from competing operators SFR and Bouygues Telecom. Corr Wireless urged the FCC to follow the Competition Council's example.

### **Jim Chen (Chen) (Retained by Cellular South, Inc.)**

Chen, Dean of the University of Louisville's Louis D. Brandeis School of Law, was retained by Cellular South, Inc., to file comments.

Chen supports the RCA rulemaking petition, and argues that the FCC should abrogate all existing exclusivity arrangements and prospectively ban all future exclusivity arrangements. (ii)

Chen's overall conclusion is that handset exclusivity arrangements have "a wide range of anticompetitive, discriminatory effects on consumer welfare and the national interest in competition and technological innovation in all facets of the wireless industry." (18)

Chen argues that there is no technological basis for the control that large wireless carriers exert over handset manufacture. The control is a product of convenience and profitability. The economic arrangements between handset manufacturers and large wireless carriers, which are all traceable to the carriers' stranglehold over handset sales, have had "a profoundly negative impact on competition, innovation, and consumer welfare." (5-6) One result of these arrangements has been to severely limit American consumers' use of the mobile Internet. (6) Another result is the way in which the large carriers have used SIM cards to "lock handsets into their own networks or even prevent handsets from being operated at all with any SIM card besides one provided by the carrier itself." (6-7)

Exclusivity arrangements currently dominate the market for advanced handsets. Eight of the ten most popular handsets in November 2008 "were handcuffed by an exclusivity arrangement to a single carrier." (9) These arrangements are the most recent example of how the large wireless carriers have leveraged their customer bases "into a clutch of oligopsonistic and highly undesirable practices." (9) The exclusivity arrangements force the retreat of competition, increase the large carriers' market power, and prevent rival carriers from disciplining rates and motivating innovation. For example, manufacturers making advanced phones for a single purchaser affirmatively disable features that consumers would value and instead include features that increase consumers' dependence on their carrier's network. (10)

Chen argues that the state of affairs that has resulted from handset exclusivity arrangements demands the FCC's attention. (11) Competing carriers have no effective recourse to com-

bat these exclusive arrangements. Because of the sheer gravity of the large carriers' customer bases, "even the combined purchasing power of industry consortiums such as the Associated Carrier Group, LLC, does not approach that of the nationwide carriers." (13) If the FCC does not take action against 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." (14)

Chen also contends that, even as mobile broadband is increasingly becoming a viable substitute for (or complement to) other means of browsing the Internet, exclusivity arrangements, especially in markets not served by the national carriers, are crippling or eliminating the broadband access mechanism that rural consumers would choose. (15-16)

The FCC has multiple bases of authority to prohibit handset exclusivity. (18) For example, Section 332(c)(1)(A) of the Act makes every wireless carrier subject to the common carrier and anti-discrimination provisions of Title II of the Act. (19) Section 201 of the Act gives the FCC ample authority to regulate the formation and enforcement of handset exclusivity arrangements. For example, the large carriers' practice of subsidizing handset sales through higher rates charged to the carriers' subscriber base as a whole is sufficient to bring the arrangements within the FCC's Section 201 authority to regulate carriers' "charges." (20)

Chen argues that exclusivity arrangements are subject to FCC regulation under Sections 1, 4, 202, and 254 (pursuant to the universal service principles articulated in that section), and pursuant to the FCC's authority to undertake public interest evaluations. (20-26) Chen also contends that, in addition to utilizing its express rulemaking powers, the FCC has authority to invoke its ancillary jurisdiction to regulate handset exclusivity arrangements, which the FCC has utilized in connection with the establishment of the universal service fund and the imposition of E911 obligations on VoIP providers. (27-29) The fact that handset exclusivity arrangements are created by contracts between private parties does not eclipse the power of the FCC to regulate these arrangements. (31-32)

Chen argues that the FCC should ban handset exclusivity arrangements for several reasons. The arrangements undermine competition in markets for wireless services, raise the prices for overall wireless services and for handsets, and interfere with the ability of rural carriers to compete against the national carriers "through the erection of artificial barriers that rural carriers simply cannot overcome through ordinary competitive channels." Collusion between device manufacturers and large wireless carriers also is undermining an industry that is otherwise faces few barriers to competition. (29-30)

The FCC's regulation of exclusivity clauses for telecommunications and video services in real estate developments is sufficient precedent and "a valuable blueprint" for action the FCC now should take against handset exclusivity arrangements. (32-40) The FCC should act because these arrangements "corrode the fundamental principles that have given rise to competition in the wireless industry: consumer choice, competitive and technological neutrality under law, even-handed regulation, and a culture of technological innovation that is productive to the very extent that it is unpredictable." (42) Moreover, there are no countervailing consumer benefits from handset exclusivity arrangements, and the large carriers are wrong in attacking the RCA petition

as a request for “generic” handsets that would be stripped of features unique to any carrier’s wireless network. (43)

### **MetroPCS Communications, Inc. (MetroPCS)**

MetroPCS supports the RCA rulemaking petition. It states that it supports government intervention only when free market forces are not operating properly to promote the public interest and that because of the recent consolidation in the wireless industry, the free market for handsets no longer operates properly. (1-2)

MetroPCS argues that exclusive handset arrangements force consumers to buy service and accessories from a particular wireless provider if they want the newest exclusive phone that is sold by only that provider, and such exclusivity arrangements stifle competition as regional, rural, and small carriers are forced to offer handsets to consumers that may not provide as much functionality as those offered by the largest wireless carriers. (2-3)

MetroPCS contends that exclusive arrangements will stifle adoption of new technologies and the expansion of wireless service since small, rural, and regional carriers will not invest in 4G technology if they cannot buy handsets which are able to access such technology. (3)

MetroPCS argues that consolidation has increased the disparity in purchasing power between the larger and smaller carriers, thereby enhancing the ability of larger carriers to enter into exclusive handset arrangements and this disparity will only continue to grow as large carriers acquire more customers, and it is apparent that customers purchase wireless service based on their desire for particular handsets (citing a Google study that more than one in two wireless consumers said handsets played a major role in their purchase decisions). (5-6)

MetroPCS contends that with the increasing concentration of subscribers in the four largest carriers, the desire of manufacturers to sell to as many carriers as possible is going down; specifically, handset manufacturers can provide handsets to well over 90 percent of subscribers without dealing with small, rural, and regional carriers, which will satisfy the desires of large carriers who prefer that handset manufacturers only sell to them. (7)

MetroPCS contends that exclusive handset arrangements will deter new competitors from entering the wireless marketplace because they do not have the scale or scope to overcome the exclusive arrangements negotiated by the large dominant carriers and that exclusive phones are critical for new entrants because it would make them competitive with the larger carriers; and the end result would be less participation in auctions and lower revenues for the U.S. Treasury which would lead to less customer choice. (8-9)

MetroPCS claims that lack of access to exclusive handsets may interfere with the efforts of small, rural, and regional carriers to provide or meet the FCC’s HAC or E911 accuracy requirements, which has occurred in the past due to these carriers’ inability to obtain handsets on the same timeframe as larger wireless carriers. (10)

MetroPCS is also concerned that exclusivity arrangements will limit the ability of small, rural, and regional carriers to deploy next generation handsets because the larger carriers, who are able to dictate the terms and types of phones they want to purchase, may steer handset manufacturers to support only the particular frequencies, air interfaces, and spectrum bandwidths held by the largest carriers, citing as an example AT&T and Verizon's intentions to deploy LTE infrastructure on their networks in the next few years. (11)

Finally, MetroPCS concludes that the FCC must examine whether exclusive arrangements by the dominant carriers are allowing them to extend their dominant market power into the market for handsets. (12)

### **Nex-Tech Wireless, LLC (Nex-Tech)**

Nex-Tech, a Tier III wireless carrier operating in Kansas, supports the RCA rulemaking petition and asks the FCC to prohibit or restrict exclusive handset arrangements. (1) The larger carriers are using exclusive handset arrangements to gain a competitive edge over small Tier III carriers. (1)

### **NTELOS Inc. (NTELOS)**

NTELOS, which holds PCS licenses in Virginia and West Virginia, supports the rulemaking petition filed by RCA. (1, 2)

In recent years the FCC has authorized significant consolidation in the wireless industry and also has pursued policies that favor large carriers over mid-tier carriers. This has lessened competition and squeezed smaller carriers. (1) The FCC must assure that rural and regional carriers, and new entrants, have reasonable access to spectrum, are able to purchase a range of handsets that meet customer needs, and have the ability to offer roaming services at just and reasonable rates. (2)

Even with competitive rate plans and services, NTELOS loses a significant number of sales opportunities because it is unable to offer exclusive handsets. (4) In addition, national carriers use software programming on their exclusive handsets that prevent consumers from "unlocking" the handsets for use on other networks. (4-5) The FCC should prohibit these "locking" practices. (5)

In addition, ongoing wireless industry consolidation threatens to lead CDMA handset manufacturers to stop programming their handsets with non-proprietary software that enables use of the handsets by all CDMA carriers. (These handsets also contain software that is proprietary for Verizon Wireless and Sprint.) (5)

**Rural Telecommunications Group, Inc. (RTG)**  
**Organization for the Promotion and Advancement of Small**  
**Telecommunications Companies (OPASTCO)**  
**National Telecommunications Cooperative Association (NTCA)**

RTG, OPASTCO, and NTCA (the “Joint Commenters”) support the rulemaking petition filed by RCA, and argue that the FCC should prohibit wireless licensees from entering into exclusive arrangements with handset manufacturers. (1-2)

Members of the Joint Commenters have encountered difficulties in obtaining handsets desired by their customers. Many of these carriers face competition in their markets from large national carriers who offer the desired handsets pursuant to exclusive deals. A direct result of this discriminatory access to handsets is the migration of customers from rural carriers to their larger in-market competitors. (2) Rural carriers cannot compete against the Apple iPhone by offering basic, low-end handsets that frequently are the only handsets made available by vendors to small rural carriers. (3)

Handset exclusivity arrangements drive up the price to consumers purchasing premium handsets, because the carriers selling them do not face any competition. Customers in rural areas are deprived of any access to these handsets with advanced features and functions. Exclusivity deals also interfere with the ability of small rural carriers to meet the FCC’s HAC requirements, because HAC-compliant phones that are locked up in exclusive arrangements are not available to the rural carriers. (3)

In addition to prohibiting exclusivity arrangements, the FCC “should prohibit handset manufacturers and distributors from setting volume discounts that effectively preclude smaller (i.e., Tier III) carriers from acquiring such handsets.” (4)

**South Dakota Telecommunications Association (SDTA)**

SDTA, an association representing 33 independent, cooperative, and municipal local exchange carriers in South Dakota, supports the RCA rulemaking petition and urges the FCC to initiate a rulemaking proceeding. (1)

With a few minor exceptions, these Comments are the same as the Comments filed by the Blooston Rural Carriers (see above).

**Sprint Nextel Corporation (Sprint)**

Sprint argues that the RCA rulemaking petition should be denied. (1) The petition is procedurally defective because it does not set out the text or substance of a proposed rule, nor does it indicate how RCA’s interests are affected. (2-3)

RCA does not support its claim that equipment exclusivity deals are both anti-competitive and contrary to the public interest. (4) RCA presents no evidence of any market failure that is harming either consumers or carriers. (4-5) Consumers who buy handsets from

carriers with exclusive arrangements are not harmed by higher prices, as RCA claims, because these consumers have many handsets to choose from, both from their carrier and from other vendors. Since no handset is a relevant product market in itself, consumers “have an incredible array of wireless devices to choose among.” (5) Consumers also realize that new product introductions often involve a premium price, and this is not unique to wireless handsets or exclusivity deals. (6)

RCA is wrong in claiming that consumers in rural areas are harmed because they cannot buy handsets that are exclusive to carriers who are not providing service in their areas. There are many other handsets available to these consumers from other sources, including wireless carriers and other vendors. RCA provides no evidence of insufficient consumer choice in any relevant geographic market. (7-8) Exclusivity arrangements are generally limited in duration, which means that consumers can obtain their desired handsets from an alternative provider at a later date. (8)

Sprint argues that rural carriers are not harmed by exclusive handset deals. The fact that large national carriers can get volume discounts because of their large customer base is not unfair or unique. (9) Because the handset business is highly competitive at the wholesale level, RCA does not prove its case that small rural carriers do not have access to handset options. (9-10) Further, small carriers can pool their resources and purchasing power (*e.g.*, through groups such as RSA or the Associated Carrier Group) to negotiate agreements with manufacturers for unique handsets. (10)

Handset exclusivity contracts produce important benefits to consumers. These arrangements have led to intensive development of innovative handsets. The Apple iPhone, which has spurred competition and furthered innovation, is a leading example. (11) Exclusivity deals also protect carriers’ investment in the development of unique, desirable handsets, and these deals enhance competition by enabling carriers to target particular users based on features and functions. The handsets enable operators to differentiate their offerings from those of other carriers. “Removing *any* basis on which operators can differentiate themselves diminishes competition and injures consumers.” (12, emphasis in original)

The FCC does not have any jurisdiction to regulate agreements between vendors and wireless carriers. (13) There is no jurisdiction under Title II of the Communications Act because Sections 201 and 202 only apply to communications services provided by common carriers. (13-14) Wireless handsets are “customer premises equipment” that is not subject to Title II. In addition, an exclusivity contract is not a practice “in connection with” a communications service, and therefore is not subject to Section 201. (14) There is no discrimination in violation of Section 202 because that section requires discrimination by a carrier between or among its customers in connection with its providing a communications service. This type of discrimination is not the subject of RCA’s petition. (14-15) “Even if Section 202(a) applied, a wireless operator is not discriminating among its customers when it enters into an exclusive contract for a handset. Its customers can all get the handset. Refusing to sell the handset to persons who live where the operator does not provide service is not discrimination among customers and is entirely reasonable.” (15)

RCA is wrong in claiming that exclusivity deals somehow endanger universal service by favoring urban areas over rural areas, thus violating Section 254(b)(3) of the Act. That section applies only to telecommunications services and information services. It does not apply to equipment. (15)

RCA fails in its attempt to rely on Sections 1 and 307 of the Act to create a geographic “service equity” requirement, and then to argue that handset exclusivity deals violate this requirement. Section 1 does not create a non-discrimination requirement based upon geographic location, and Section 307 clearly does not apply to handsets. (16-17) Sprint also argues that the FCC does not have ancillary jurisdiction to regulate handset contracts because the FCC does not have any general authority under Title I of the Act to regulate handsets. (18) RCA’s reliance on the FCC’s prohibition of exclusive contracts between telecommunications service providers and apartment owners is not applicable, because those contracts (unlike handset exclusivity agreements) give the carriers an actual monopoly in the provision of service to end user customers in apartment buildings. (19)

### **TCA, Inc. (TCA)**

TCA, a consulting firm that provides management services to small, rural carriers throughout the U.S., supports the RCA rulemaking petition.

TCA argues that the competitiveness in the wireless industry is limited only to large carriers, citing handsets powered by Google’s Android operating system in which consumers wishing to own a handset with this “open source” operating system can only do so by becoming a T-Mobile customer. (2)

TCA notes that the G-1 T-Mobile handset is being used on T-Mobile AWS spectrum and that many small wireless carriers that acquired AWS spectrum are not able to offer an Android-based handset due to the exclusive arrangement T-Mobile has. (2-3)

TCA argues that AT&T violates Section 254(b)(3) of the Act because AT&T, through its acquisition of Dobson, is getting almost \$3 million a month in federal universal service support and that rural Alaska customers do not have access to the iPhone but consumers in Anchorage do. (3-4)

### **Telecommunications Industry Association (TIA)**

TIA represents the global information and communications technology industry through standards development, advocacy, and other activities, and its members include companies that manufacture information and communications technology equipment, including wireless handsets. TIA argues that the FCC should address the issue of exclusivity contracts between wireless carriers and handset manufacturers by issuing a Notice of Inquiry (NOI). (3) TIA expresses concern that prohibition of exclusive contracts between wireless carriers and equipment manufacturers could lead to unintended consequences that would hinder provision of new wireless devices and services. (4)

TIA argues that an NOI would be an effective means for the FCC to investigate “a matter for which the need for regulation has not been established.” (5) The FCC, for example, has taken the NOI approach when addressing broadband practices, in order to learn more about the market and how consumers would be affected by the FCC’s policies. (5) The RCA petition does not adequately address the possible effects that exclusive contracts have on handset sales or prices or on rural broadband consumers, nor does the petition examine with specificity, or comprehensively itemize, the potential implications of regulating exclusive contracts. (6)

According to TIA, the RCA petition also fails to identify the public interest that is at stake, or how exclusive contracts are contrary to the public interest. For example, RCA fails to support its assertion that consumers are forced to pay “premium prices” for handsets with “desired” features. (6) In addition, the RCA petition is procedurally defective because it did not set forth the text or substance of a proposed rule, as required by the FCC’s rules. Before issuing a Notice of Proposed Rulemaking, the FCC should gather facts—not vague allegations—to decide whether a competitive issue exists at this time. An NOI is the proper vehicle for doing so. (7)

TIA lists a number of issues the FCC should examine in an NOI, as follows: (a) the competitive state of the wireless market; (b) RCA’s definition of contractual exclusivity; (c) how the FCC would define contractual exclusivity; (d) the nature of the public interest RCA seeks to protect; (e) the effect of contract prohibitions on competition in the wireless device market; (f) the impact of contract regulation on wireless device innovation, and on the overall price of handsets; (g) whether the prohibition sought by RCA would apply to the entire market, or only on a case-by-case basis; and (h) whether government intervention is necessary, or whether market forces can adequately address market concerns. (8)

TIA argues that “[w]ireless service providers and handset manufacturers have been able to enter contracts that allow service providers to differentiate themselves from competitors and provide incentives for handset manufacturers to innovate[,]” and that, as a result, the competitive market offers consumers a variety of devices, applications, service plans, and content with their mobile handsets. Exclusive handset contracts are part of the wireless business model in the U.S., and this is also true in Japan, China, and Canada. (9)

TIA contends that exclusive contracts serve a number of objectives. For example, they enable wireless carriers to differentiate themselves in a competitive market, they provide revenue sharing that funds manufacturers’ investment, and they minimize carriers’ financial risks in providing new devices. (9-10)

The FCC’s thirteenth report on competition in the wireless marketplace, according to TIA, shows that competition is strong, that wireless handset and service prices are declining, and that more than 95 percent of Americans live in areas with at least three mobile telephone competitors. (10-11)

TIA claims that the FCC has determined, contrary to RCA’s assertions, that certain consolidations in the wireless industry will benefit, rather than harm, consumers. For example, in approving the AT&T and Alltel merger, the FCC concluded that the merger would benefit competition and consumers, and pointed to the fact that former Alltel customers would be able to

choose from twice as many handsets after the merger. (13) TIA points out that the FCC made similar findings regarding competitive benefits in connection with its approval of the merger between Sprint Nextel and Clearwire. (13-14) The FCC “should allow consumers to reap the benefits of the recently approved mergers before implementing regulations.” (14)

TIA shares RCA’s goal of the ubiquitous availability of wireless services in rural areas, and TIA has consistently supported policies that promote the deployment of next-generation services throughout the country. (14-15) TIA points out that the FCC has recently launched numerous initiatives that will promote the provision of broadband, and facilitate competition, in rural areas, including the auction of 700 MHz spectrum, the Rural Health Care Pilot Program, approval of the Verizon-Alltel and the Sprint Nextel-Clearwire mergers, and waivers granted to broadband satellite service provider Globalstar, and its partner Open Range, to offer WiMax terrestrial services. (14-17)

### **Verizon Wireless (Verizon)**

Verizon opposes the RCA rulemaking petition and requests the FCC to dismiss or deny the petition, claiming that there are “many, many obstacles” to the FCC’s consideration of the petition. (1-2)

The FCC does not have any authority under the Act to regulate equipment vendors *per se*, or to regulate exclusive marketing agreements for handsets in supply contracts between vendors and wireless carriers. (4) For example, Section 1 of the Act only gives the FCC authority over communications services, and cannot reach exclusivity agreements for marketing specific handsets, since these agreements do not promote or impede the transmission of communications services. (5) Nor does Section 307(b) of the Act provide any authority for the regulation of handset agreements, since that section only authorizes the FCC to regulate the distribution of radio licenses. (6) Sections 201 and 202 of the Act are limited to the regulation of carriers’ provision of communications services to their customers, and do not reach equipment agreements. (7)

Verizon argues that, unlike agreements that restrict tenants in apartment buildings to one service agreement (which have been prohibited by the FCC), handset exclusivity agreements do not preclude the provision of communications services by any carrier authorized to provide them; the exclusivity involved is in an arrangement with an equipment vendor, not with a customer for communications services. (8)

The FCC cannot invoke its authority under Sections 4(i) and 303(r) of the Act to regulate handset exclusivity arrangements because these sections do not provide any stand-alone basis for authority. The FCC must have authority over a specific subject matter before it can invoke these sections, and the FCC does not have any subject matter authority over equipment vendors. (8) The FCC’s ancillary authority cannot provide jurisdiction over such vendors, because it is limited in scope, requiring that the service to be regulated must fall within the FCC’s general subject matter jurisdiction under Title I of the Act. Title I does not reach equipment vendors. (9-10)

Verizon argues that the wireless device market “is intensely competitive” and there is no market failure that would warrant FCC regulation. (11) There are hundreds of wireless phones

and devices available to consumers, from nearly three dozen vendors. (12) Wireless carriers do not manufacture handsets or own an equity interest in any major handset manufacturers. Wireless carriers and equipment vendors “enter into supply agreements based on their independent business judgments about how best to compete in the wireless market, and such competition in the wireless market benefits consumers . . . .” (12-13) Further, handset vendors typically distribute their devices broadly. RIM, for example, distributes its equipment through two dozen U.S. providers. (13)

Verizon contends that “[e]xclusivity arrangements may also be irrelevant to consumer handset sales because consumers do not have to obtain wireless equipment directly from service providers.” (13) Exclusive handset arrangements benefit manufacturers because their product sales get the benefit of marketing and promotional efforts by the carrier. Further, consumers benefit because they get lower prices for equipment (usually through a subsidy against the retail price). (14) Exclusivity arrangements do not impair technological innovation because technological advances that are attractive to carriers and their customers enable the manufacturers to “determine the terms under which service providers offer the latest handsets to consumers.” (15)

Verizon claims that RCA’s main argument is that some wireless carriers are blocking other wireless carriers (mainly rural carriers) from obtaining access to particular handsets by restricting access to certain manufacturers through exclusivity arrangements, and that this is hurting consumers. But this is economically impossible, because no U.S. wireless carrier has enough market power to block any handset manufacturer from entering the U.S. market “and working with various providers.” (16) Since carriers cannot keep manufacturers out of the market, “lesser restrictions, such as exclusivity agreements, have essentially no potential to cause anticompetitive harm.” (16) Limiting access to a manufacturer, for a specific device, does not prevent developing a similar device through another manufacturer. (16)

Verizon argues that the rule advocated by RCA, that would require distribution of the same handsets by multiple providers, would be a deterrent to innovation and competition (rather than a benefit) in a market where differentiation by provider and by manufacturer is a major factor in the development and production of handsets. (18) Verizon disputes RCA’s claim that the market power of larger carriers is a barrier to smaller carriers’ distribution of desirable handsets, pointing out that numerous smaller carriers (*e.g.*, Metro PCS, Leap Wireless, and Virgin Mobile) offer handsets that are exclusive to their customers. (19)

Exclusive supply agreements between equipment vendors and service providers in the competitive wireless market actually benefit both carriers and consumers. The arrangements promote innovation in wireless devices. Economists agree that innovation is one of the principal benefits of vertical arrangements in competitive markets. In the absence of exclusivity agreements, wireless carriers would have less incentive to develop and promote innovative handsets, because other providers would have immediate access to the handsets without having made any investment in research and design. (20) Exclusive arrangements make sense because the nature of wireless networks makes close collaboration between carriers and equipment manufacturers essential. (21)

Exclusive arrangements are important in differentiating one provider from other providers, because handsets have become increasingly important in selling a particular brand. As differences in price and coverage decrease, competing for innovative technologies, and offering exclusive access to those technologies, has become a key part of the wireless service market. (24)

Verizon points to Apple's iPhone as an example of how technological innovation can become widespread throughout the wireless industry, even though the iPhone itself is subject to an exclusivity arrangement. Other vendors are designing their own iPhone-like devices, enabling service providers to compete with the iPhone on price, brand loyalty, and network differences. This provides more choices to consumers. (27)

Verizon contends that the FCC should dismiss RCA's petition because RCA failed to make a concrete proposal to implement the relief that RCA was seeking. (28) For example, RCA does not define what it means by "exclusivity arrangements" and its proposal is not narrowly tailored to achieve its stated goal of expanding handset availability. (29) RCA also does not make clear whether it wants the FCC to regulate only the communications capability of handsets, or whether the "desired features" that must be available on a non-exclusive basis would include, *e.g.*, the phone's camera, the music store, and the search engine. (31)

RCA is seeking unprecedented regulation of the wireless industry, contrary to the FCC's deregulatory paradigm. This imposes a high burden on RCA to demonstrate that the regulation is clearly warranted. (31) RCA does not present any empirical data or economic analysis proving its claim that wireless carriers are using marketing practices that harm consumers. (33) Since no single wireless competitor has a dominant share of the market, regulation based on concentration is unwarranted and unnecessary. (33-34)