
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Rural Cellular Association) RM-11497
)
Petition for Rulemaking Regarding Exclusivity)
Arrangements Between Commercial Wireless)
Carriers and Handset Manufacturers)

To: The Commission

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association (“TIA”) hereby submits its comments in response to the Commission’s public notice requesting comments on a petition for rulemaking in the above-captioned proceeding (“RCA Petition”).¹ For the reasons outlined below, TIA urges the Commission to address the issue of exclusivity contracts between wireless carriers and handset manufacturers by issuing a Notice of Inquiry (NOI).

INTRODUCTION

The Telecommunications Industry Association (TIA) represents the global information and communications technology (ICT) industry through standards development, advocacy, tradeshow, business opportunities, market intelligence and world-wide environmental regulatory analysis. With roots dating back to 1924, TIA

¹ See Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, filed May 20, 2008 (“RCA Petition”).

enhances the business environment for broadband, mobile wireless, information technology, networks, cable, satellite and unified communications. Members' products and services empower communications in every industry and market, including healthcare, education, security, public safety, transportation, government, the military, the environment and entertainment.

As companies that manufacture innovative information and communications technology equipment, including wireless handsets, TIA members would be greatly impacted by regulation of private contracts in the wireless services market. TIA is concerned that the prohibition of exclusive contracts between wireless carriers and handset manufacturers will lead to unintended consequences that will hamper provision of new wireless devices and services.

RCA has not established competitive harm or the guarantee that the requested Commission regulation will result in either more available wireless broadband devices for its members or more wireless services for U.S. consumers. Accordingly, TIA requests that the Commission address this issue through an NOI, which will provide the Commission data necessary to make a reasoned ruling on the RCA Petition. Further, the Commission should act cautiously before regulating private contracts, particularly in a market that is competitive and is currently producing a wide variety of innovative devices available to consumers throughout the U.S. Finally, the Commission has launched numerous initiatives that will spur the provision of broadband and facilitate competition in rural areas without the need to regulate private contracts.

DISCUSSION

I. THE ISSUES RAISED IN THE RURAL CELLULAR ASSOCIATION'S PETITION FOR RULEMAKING SHOULD FIRST BE ADDRESSED IN A NOTICE OF INQUIRY N (NOI).

a. A Notice of Inquiry is a more appropriate mechanism to investigate an area in which there is no established harm.

An Notice of Inquiry (NOI) is an effective method for the Commission to investigate a matter for which the need for regulation has not been established. Through an NOI, the FCC can investigate all aspects of a policy issue through an established factual record without limitation. The NOI process empowers the Commission to gather information and enhance the Commission's understanding of an issue to determine if rules are necessary. Acting cautiously before promulgating rules is consistent with the Commission's preference for an environment that fosters swift broadband deployment and a competitive wireless device and service marketplace that has increased broadband availability and competition among device manufacturers and providers.

The Commission often uses an NOI to fully evaluate complex issues that have comprehensive effects on industry and consumers.² When addressing broadband industry practices, the Commission issued an NOI in order to enhance its understanding of the nature of the market and how consumers are affected by such policies to ensure they ultimately benefit the consumer.³ This NOI requested comment on dozens of questions so that the Commission would have a complete record before issuing rules that would affect an entire industry and millions of consumers.

² See e.g., Petition for a Notice of Inquiry Regarding 911 Call-Forwarding Requirements and Carriers' Blocking Options for Non-Initialized Phones, WC Docket No. 08-51, FCC-08-95; Petition for Notice of Inquiry Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customer's Caused by Anticompetitive Conduct, WT Docket No. 05-254, FCC 05-152, Rel.: Aug. 15, 2005; Notice of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, CC Docket No. 00-185, FCC-00-355, Rel.: Sept. 28, 2000.

³ *In the Matter of Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, Adopted: March 22, 2007, Rel.: April 16, 2007, FCC-07-31.

The issues raised in the Rural Cellular Association (RCA) Petition for Rulemaking (the “RCA Petition”) are similarly complex, and any resulting action taken by the FCC has the potential to impact all consumers of wireless services and future wireless broadband services. While the RCA Petition vaguely addresses possible effects of exclusive contracts on terms and conditions of service, handset prices, and rural broadband consumers, it neither examines these issues with great specificity nor comprehensively itemizes potential implications of regulating these contracts. To ensure that these issues are fully vetted, the first logical step -- based on Commission precedent -- for the FCC is to compile data to establish a record regarding the alleged concern through an NOI.

b. The RCA Petition neither establishes a lack of competition in either the wireless services or handset market resulting directly from exclusive contracts nor proposes a specific remedy for the alleged problem.

The RCA Petition asks the FCC to investigate the use of exclusivity arrangements between commercial wireless carriers and handset manufacturers and adopt rules that prohibit such arrangements when contrary to the public interest. However, the Petition neither identifies the “public interest” at stake nor does it describe with specificity how these contracts are contrary to the public interest. For example, RCA claims that, as a result of exclusivity arrangements, consumers are forced to pay premium prices for their desired handsets.⁴ However, RCA does not provide a specific example of this scenario or define “premium prices” and “desired handsets,” two subjective terms which vary based on consumer expectation.

⁴ RCA Petition at 5.

Further, FCC practice and procedure requires a petition for rulemaking to “set forth the text or substance of the proposed rule, amendment, or rule to repealed, together with all facts, views, arguments and data deemed to support the action requested.”⁵ The RCA Petition fails to meet this requirement and instead generally requests that the FCC adopt rules when necessary. To follow proper FCC practice and procedure, as well as precedent, the FCC should gather “all facts, views, arguments and data,” as set forth in FCC regulations. Further in these comments, TIA provides a list of critical, but not comprehensive, issues the Commission should consider before deciding whether to initiate a rulemaking proceeding.

Prior to launching a full NPRM, the FCC should investigate this issue, as requested by the RCA Petition, to determine if a competitive issue contrary to the public interest actually exists at this time. To do so, facts -- not vague allegations -- must be the foundation for future Commission consideration. The proper venue for compiling these facts is an NOI. Only after receiving information from all the interested parties and determining whether there is any harm to the consumer should the FCC consider an NPRM.

c. There are numerous questions the Commission should ask on record before determining if a Notice of Proposed Rulemaking is warranted.

As set forth in the preceding sections, the RCA Petition utterly fails to address the numerous and broad implications of its proposal to regulate contracts. TIA urges the Commission to initiate an NOI and request information on, among others, the following questions:

⁵ 47 C.F.R. 1.401(c).

1. What is the competitive state of the wireless market?
2. How does RCA define the contractual exclusivity alleged in its petition?
3. How will the Commission define contractual exclusivity?
4. What is the public interest RCA seeks to protect? Is this a valid public interest, and will it be served by contract regulation?
5. Will contract prohibition in this area increase competition in the wireless device market, or could it decrease competition by resulting in more generic device offerings and delaying introduction of wireless device innovations to consumers?
6. If contracts are regulated, as RCA proposes, how would such regulation affect the ability for manufacturers to produce innovative devices in the future?
7. How would contract regulation affect the overall price of handsets in the market?
8. Would the prohibition sought by RCA apply to the entire market, or be imposed on a case-by-case basis after determination that a contract is anti-competitive?
9. Is government intervention necessary or can any competitive concerns be addressed through market forces? (*e.g.*, Although the iPhone was not available in Alaska when it was originally released, it is now.)

Not only should the Commission consider these and other important questions but it should give all interested parties the opportunity to provide substantiated input and raise other potentially important issues.

II. TIA URGES THE COMMISSION TO ACT WITH CAUTION BEFORE REGULATING PRIVATE CONTRACTS IN THE WIRELESS MARKET.

- a. The FCC has consistently emphasized the importance of maintaining a market structure allowed to operate with minimal constraints that result in innovation and consumer choice.**

The Commission has created a regulatory framework recognizing that competition thrives in a free-market environment. TIA agrees with this approach and commends the Commission for its foresight;⁶ its market-based policies have resulted in

⁶ See *e.g.*, *In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Reply Comments of the Telecommunications Industry Association, CC Docket No. 96-45 (filed Sept. 22, 2008); *In the Matter of Broadband Industry Practices*, Comments of the Telecommunications Industry Association, WC Docket No. 07-52 (filed Feb. 13, 2008); *In the Matter of*

making a variety of technologies, platforms, service, applications, and devices available to American consumers. Wireless 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. As a result, the United States has a competitive wireless services market that offers consumers a variety of devices, applications, service plans, and content associated with their mobile handsets.

Exclusive contracts are part of a business model for the U.S. wireless services industry. The United States is not the only country to utilize such a business model; wireless services providers in Japan, a country lauded for its broadband deployment and highly ranked in global surveys of broadband penetration, relies heavily on the subsidization of handsets. Moreover, wireless providers in China and Canada also use exclusive contracts.

Even in countries where exclusive contracts are not as common, such contracts are not explicitly banned. Some operators may, and, in fact, do, allow their customers to unlock handsets that may be subject to exclusivity contracts to allow those devices to run on alternative networks. However, this is a business choice made in a competitive market and should not be subject to regulation.

Exclusive contracts may be used by wireless services providers and handset manufacturers for a number of other reasons. First, as participants in a competitive marketplace, wireless carriers seek to differentiate themselves in a variety of ways. These may include price, network coverage, quality of service, mobile data services,

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Comments of the Telecommunications Industry Association, GN Docket No. 07-45 (filed May 16, 2007).

applications, and speed. Providing consumers a choice in handset offerings is simply another competitive option in a carrier's business model used to make their service package more attractive to potential customers.

Exclusive contracts may be used by wireless services providers and handset manufacturers for a number of other reasons. The revenue-sharing derived from exclusivity allows manufacturers to fund expensive investment in the development of new products and in the marketing of that product. This investment reduces the enormous financial risks associated with development and results in innovative devices designed to work properly on the provider's network.

Carriers also use exclusive contracts to minimize financial risks associated with providing a new device to customers and to differentiate themselves in the marketplace. Operators take a financial risk when introducing a new device to be offered over their systems, particularly if the device runs on a new operating system. Exclusive contracts help guarantee a return on investment, and, in turn, speed the development time for new devices and features. Further, exclusive contracts allow the carrier to subsidize the price of the handset. This business model has resulted in a wide variety of innovative devices that are available at an affordable price to consumers.

b. The Commission has noted that not only does competition exist in the current wireless market but has recently taken action that will increase the service and devices available to consumers.

i. The Commission's most recent report to Congress on the state of competition in the mobile services market concluded that significant competition exists.

In its most recent report to Congress on the state of competition in

the commercial mobile services industry, the FCC concluded that U.S. consumers continue to experience significant benefits from competition in the mobile marketplace.⁷ The Report established that approximately 99.6% percent of all Americans have at least one mobile operator per census block, and more than 95% live in an area with at least three mobile telephone operators competing for service.⁸ The Report also demonstrates that wireless handset and service prices continue to decline. On average, U.S. mobile subscribers paid about \$0.06 per minute for mobile voice calls in December 2007 – a one cent decline from \$0.07 in 2006.⁹ The Report also notes new and innovative devices and services launched in the year preceding the release of the Report. These include a live mobile TV service launched by Verizon, using Qualcomm’s MediaFLO network, the Apple 3G iPhone, CMDA operator’s upgrades of EV-DO networks to EV-DO Revision (“Rev. A”), and Google and T-Mobile’s T-Mobile G1, an Android-based phone.¹⁰

The Report recognizes that service providers in the mobile telecommunications market compete on many dimensions other than price, supporting TIA’s assertion that choice of handset is one of many factors used by providers to compete.¹¹ Not only do these options allow service providers to differentiate themselves in the marketplace, they put pressure on other providers and manufacturers to improve quality of services and devices. For example, the Apple iPhone, which is exclusively available through one provider, allows consumers browse websites and use applications freely and to access

⁷ See *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54, Adopted: Jan. 15, 2009, Rel.: Jan. 16, 2009 at ¶1 (Thirteenth Report’)

⁸ *Id.* at ¶2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at ¶125.

sites that previously did not display properly on cell phones.¹² As noted by the Commission, this has the potential to put increased pressure on rival providers to loosen restrictions customer access to third-party mobile content and software.¹³ The iPhone also demonstrates the effect that consumers can have on business decisions. Based on evidence from surveys from people who had not purchased iPhones that revealed that the biggest barrier to purchase for those consumers was its high upfront price, Apple aggressively lowered the price of the new 3G models.¹⁴

The Commission itself has recognized that competition currently exists in the wireless services industry, and that this competition is a direct result of the regulatory environment created by the FCC allowing carriers to freely compete by offering consumers a wide variety of service and device options. There is no evidence -- in the RCA petition or generally -- that exclusivity contracts harms consumers. Therefore, TIA urges the Commission to carefully consider the likely harms of contractual regulation prior to addressing RCA's petition.

ii. The Commission has recently approved two mergers in the wireless service industry, noting the existence of competition and benefits to consumers.

Refuting RCA's claims, the Commission has recently made clear that some forms of market consolidation will increase wireless consumer choice and service. As the Commission has made clear, in approving an application for a merger of two CMRS providers, the Commission must determine that granting the application will serve the

¹² *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, WT Docket No. 07-71, FCC 08-28, Adopted: Jan. 28, 2008 at ¶177.

¹³ *Id.*

¹⁴ *Thirteenth Report* at ¶165.

public.¹⁵ The Commission thus evaluates the markets affected by the potential merger and identifies areas where competitive harm may exist.¹⁶ After applying an initial screen to identify the markets where there clearly is no competitive harm, the Commission will provide a market-by-market analysis of the remaining markets. If the Commission identifies a possible competitive harm in the remaining markets, the merger applicants and/or the Commission will take appropriate action to ameliorate such possible harms.¹⁷

The FCC recently approved two wireless service providers' mergers upon completing this transaction review process. On November 10, 2008 the FCC approved a merger between Verizon Wireless and Alltel, noting the competitive effects resulting from the merger that will benefit consumers. The Commission established that Alltel customers will be able to choose among more than twice as many models of mobile phones (thirty rather than fifteen) post-merger, dramatically increasing consumer product choice. The Merger Order also noted that Verizon Wireless' Open Development Initiative (ODI) will allow the use of any device on Verizon Wireless' network that meets the company's published standards.¹⁸ As a result of the ODI, consumers will have more freedom to pair handsets of their choosing with their preferred service provider.

The Commission also recently approved the merger between Sprint Nextel and Clearwire.¹⁹ The Commission completed its competition analysis and concluded that,

¹⁵ 47 U.S.C. §§214(a), 310(b)(4), and 310(d).

¹⁶ *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum and Opinion and Order and Declaratory Ruling, WT Docket No. 08-95, FCC 08-258, Adopted: Nov. 4, 2008, Rel.: Nov. 10, 2008 (the "Verizon Wireless/Alltel Merger").

¹⁷ *Verizon Wireless/Alltel Merger* at ¶3.

¹⁸ *Id.* at ¶13.

¹⁹ *In the Matter of Spring Nextel Corporation and Clearwire Corporation*, Memorandum Opinion and Order, WT Docket No. 08-94, FCC 08-259, Adopted: Nov. 4, 2008, Rel.: Nov. 7, 2008 (the "Sprint/Clearwire Merger").

subject to conditions, the merger would result in major public interest benefits by expediting deployment of nationwide WiMAX-based network.²⁰ This network will speed the arrival of a broadband pipe that will increase competition and consumer choice. Further, under the terms of the merger, the New Clearwire will permit customers to use any lawful device so long as it is compatible with and not harmful to the WiMAX network.²¹ This should again generate competition among software applications providers, content providers, device manufacturers, and resellers.

Commission precedent clearly demonstrates that its competition analysis can, in some circumstances, identify that market consolidation will not stifle competition but rather increase it. TIA urges the Commission to act cautiously before regulating contracts in an industry in which the Commission itself has already concluded is sufficiently competitive. Further, the Commission should allow consumers to reap the benefits of the recently approved mergers before implementing regulations.

III. THE COMMISSION HAS LAUNCHED NUMEROUS INITIATIVES THAT WILL SPUR THE PROVISION OF BROADBAND AND FACILITATE COMPETITION IN RURAL AREAS.

In its petition, RCA expresses apprehension about the availability of wireless services to consumers in rural areas.²² TIA shares RCA's goal of ubiquitous availability of service and has consistently promoted policies that promote deployment of next-

²⁰ *Sprint/Clearwire Merger* at ¶3.

²¹ *Id.* at 96.

²² *RCA Petition* at 5.

generation services to all areas of the country.²³ The Commission has recently launched numerous initiatives that will spur the provision of broadband and facilitate competition in rural areas. These include, but are not limited to, the auction of the 700 MHz spectrum, the Rural Health Care Pilot Program, the approvals of mergers between Verizon/Alltel and Sprint-Nextel/Clearwire, and waivers granted to Globalstar and Open Range.

The 700 MHz auction, which closed March 18, 2008, resulted in the granting of 1,090 licenses in a spectrum block noted for its value to both industry and public safety since it is particularly compatible with the use of wireless broadband. As a result of the auction, there is a potential for an additional wireless “third-pipe” in every market across the nation.²⁴ This will bring competition to the broadband sector and spur proliferation of devices in rural areas. Further, the pending auction for the D-Block of the 700 MHz Band will provide additional opportunity for rural broadband deployment.

The Advanced Wireless Services (AWS) auctions have also acted as a rural broadband stimulant. Several rural providers have acquired spectrum through these auctions and will deploy advanced technologies to provide broadband in unserved and underserved areas. For example, Stelera, using licenses acquired in the AWS-1 Auction²⁵ and a \$35 million Rural Utilities Service (RUS) loan²⁶, is delivering data-only broadband services for rural communities over a dedicated HSPA network. Stelera’s network was piloted between March and October in two small cities, Floresville and Poth, in south

²³ E.g., TIA Letter to the Commission, *In the Matter of Rural Health Care Support*, WC Docket No. 02-60, Submitted: Jan. 27, 2009; Comments of the Telecommunications Industry Association, *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Submitted: April 17, 2008.

²⁴ Statement by Chairman Martin on 700 MHz Auction Winners, Rel.: March 20, 2008.

²⁵ See *Auction of Advanced Wireless Services Licenses Closes*, Public Notice, DA 06-1882, Rel.: Sept. 20, 2006.

²⁶ See Press Release, Stelera Wireless, Stelera Wireless Receives \$35 Million to Deploy Broadband Services in Rural America (March 12, 2008) (on file with author at www.stelera.com).

Texas. Following the successful pilot, Stelera is now rolling out its network, using Nokia Siemens technology, in two phases, which will cover 55 cities by June 2009 and 110 cities by 2010. The network currently provides speeds of 14.4 Mbps and will be upgraded to 28.8 Mbps by November 2009.

The Commission recently launched its Rural Health Care Pilot Program (“RHCPP”), a plan designed to facilitate the creation of a nationwide broadband network dedicated to health care.²⁷ The funding mechanism created in this program is intended to bring the benefits of telehealth and telemedicine to areas of the country where the need is most acute, primarily rural areas.²⁸ In addition to modernizing our country’s healthcare system, the RHCPP spurs rural broadband deployment by bolstering investment in communications networks in such areas. This is evidenced by the 69 projects already funded by this program, including a network in West Virginia that will connect 450 facilities to improve connectivity for rural health centers; deployments in Michigan that will link approximately 390 primarily rural facilities to Internet2 at speeds of up to 100 Mbps.; and existing networks in South Dakota, North Dakota, Iowa, Minnesota, Nebraska, and Wyoming that will be enhanced to connect about 180 facilities to Internet2.²⁹

Finally, in October 2008 the FCC granted broadband satellite service provider Globalstar temporary permission to offer some WiMax terrestrial services through a

²⁷*In the Matter of Rural Health Care Support Mechanism*, Order, WC Docket No. 02-60, FCC 06-144, Adopted: Sept. 26, 2006, Rel.: 2006 (the “Rural Health Care Support”).

²⁸ *Rural Health Care Support* at ¶1.

²⁹The Commission’s original description of all selected projects is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278260A2.pdf

partner.³⁰ The waiver will let Globalstar and its partner, Open Range Communications Inc., to use a \$267 million loan from the Agriculture Department’s Rural Development Utilities Program to deploy mobile services to 546 rural communities by 2013.³¹ The Commission granted the waiver for “good cause shown,” despite the fact that the service offering fails to meet certain FCC technical requirements.³² In this case the “good cause shown” is the potential to facilitate provision of broadband services to rural areas of America.³³

IV. CONCLUSION

For the reasons set forth above, the Commission should issue a Notice of Inquiry on the subject of exclusive contracts between wireless handset manufacturers and wireless service providers ruling on the Rural Cellular Association’s Petition for Rulemaking. There are numerous crucial questions stemming from this request that should be answered on record by all interested parties. The Commission should also take into account the thriving competitive state of the mobile service and device market, as well as the numerous existing rural broadband initiatives, before taking the step of regulating private contracts.

³⁰*In the Matter of Globalstar Licensee LLC Application for Modification of License for Operation of Ancillary Terrestrial Component Facilities*, Order and Authorization, File No. SAT-MOD-20080516-00106 Call Sign: S2115, FCC 08-254, Adopted: Oct. 31, 2008, Rel.: Oct. 31, 2008.

³¹ *Id.*

³² *Id.* at ¶20.

³³ *Id.* at ¶21.

Respectfully submitted,

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