

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

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

**COMMENTS OF
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

THE TELECOMMUNICATIONS
INDUSTRY ASSOCIATION

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INTRODUCTION.

The Telecommunications Industry Association (TIA) hereby submits comments to the Federal Communications Commission (Commission) in the above-captioned proceeding.¹ TIA, on behalf of its member companies, applauds the Commission for continuing its efforts to assess and facilitate the competitive wireless service, device, and applications industry. In evaluating the competitive state of these industries, past successful pro-market policies the Commission has adopted, and the need for continued market-based, deliberative regulation, the Commission has a unique opportunity to further expand competition in the wireless industry across all demographics and regions.

The Telecommunications Industry Association (TIA) represents the global information and communications technology (ICT) industry through standards development,

¹ See Inquiry Concerning Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Notice of Inquiry, WC Docket No. 09-66 (rel. Aug. 27, 2009) (Competition NOI).

advocacy, tradeshows, business opportunities, market intelligence and world-wide environmental regulatory analysis. Its 600 member companies manufacture or supply the products and services used in the provision of broadband and broadband-enabled applications. With roots dating back to 1924, TIA 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.

SUMMARY.

The Commission's comprehensive approach to evaluating the competitive environment of the wireless industry, as represented in the Competition NOI, provides an excellent opportunity for parties to accurately detail how the Commission has effectively fostered a competitive wireless industry market in America. As the Commission reviews parties' Comments, TIA urges the Commission to examine the path that it has taken to drive competition in the wireless industry and follow this path going forward.²

The Commission's approach in the recent past holds great promise for the future. As Commissioner Copps has noted, wireless technologies are increasingly reaching into

² See, e.g., First Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8966 ¶ 1 (1996) (allowing spectrum licensees to offer all types of fixed, mobile, and hybrid services). The Commission explained this policy was designed to ensure that wireless providers could effectively "respond to market demand...[and] increase competition in the provision of telecommunications services"); see also Report and Order, *Biennial Regulatory Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 13 FCC Rcd 21027, 21031 ¶ 4 (1998) (streamlining licensing rules for all wireless services to "introduce new entrants more quickly into this already competitive industry).

unserved and underserved areas and have the potential to most quickly bridge the broadband divide in the U.S.³ The Commission’s spectrum management policies over the last decade have driven wireless deployment and enabled widespread technology and service advancements for most Americans.⁴ As Chairman Genachowski leads the Commission with the goal of pursuing “policies that promote job creation, competition, innovation and investment,”⁵ TIA urges that the Commission continue its deliberate, yet light-handed, regulatory approach to enable the rapid deployment and adoption of wireless broadband services to unserved and underserved Americans in urban and rural areas alike.

TIA urges the Commission to carefully and methodically evaluate the impact of exclusive wireless handset agreements between wireless service providers and handset manufacturers and consider the likelihood that prohibiting such agreements would actually reduce competition among service providers and handset manufacturers. First, technical limitations of various wireless networks may make handsets currently sold under exclusive contracts non-adaptable to interested providers. Additionally, these agreements are entered into in the U.S. and many other nations in order to drive competition by differentiating service benefits – akin to differentiations service providers

³ Michael J. Copps, Acting Chairman, Federal Communications Commission, Bringing Broadband to Rural America, Report on a Rural Broadband Strategy, ¶ 10 (Rural Broadband Strategy Report) (rel. May 22, 2009) (detailing the benefits of expanding access to wireless broadband: “Wireless technologies are extending broadband into areas unreachable by cables and wires Many wireless [ISPs] have used [Wi-Fi] to offer fixed wireless broadband services in areas not reached by wireline technologies. . . . We expect to see further advancements on the wireless broadband front...”)

⁴ See Rural Broadband Strategy Report at ¶ 27 (estimating that mobile broadband networks cover 95.6 percent of the total U.S. population today).

⁵ Remarks of Chairman Julius Genachowski, Federal Communications Commission, To the Staff of the Federal Communications Commission at 4 (June 30, 2009) (“Remarks of Chairman Julius Genachowski to the Staff of the Federal Communications Commission”).

make in pricing plans, service range and speed, and other benefits. Further, handset exclusivity enables manufacturers to further invest in innovations that increase overall options for consumers. These pro-competitive factors should be evaluated as the commission reviews the public benefits of handset exclusivity.

Similarly, the Commission should recognize the competitive and public interest benefits reaped from its existing spectrum screen process. This process, which assesses potential anticompetitive wireless service areas on a case-by-case basis, has replaced a sweeping and arbitrary spectrum cap policy that ignored the strong competition existing in some markets while not addressing specific needs of non-competitive markets. Returning to such a spectrum cap policy simply cannot enhance competition in a deliberative and effective way.

Finally, TIA urges the Commission to recognize the inextricable link between wireless service and product competition and the adoption of wireless broadband services in areas where such adoption lags behind the rest of our nation. Wireless market competition cannot increase where potential consumers do not have the access to computing technologies and centers, adequate training, and an understanding of the importance of wireless broadband services to their lives. TIA urges the Commission to endorse funding for adoption programs, such as subsidies for low-cost laptop/broadband bundle programs, income-targeted vouchers for broadband-capable devices and services, and digital literacy programs. Additionally, the Commission should extend the Lifeline and Link-Up programs to subsidize broadband Internet access services for low-income Americans.

These policies provide the greatest likelihood that wireless broadband adoption – and as a result market competition – will increase.

DISCUSSION.

I. WIRELESS DEVICE COMPETITION WILL BE HARMED BY PROHIBITING EXCLUSIVE CONTRACTS.

The Commission seeks to develop a detailed understanding of wireless device market segments and how different wireless devices such as smartphones, netbooks, and modems/aircards should be examined and evaluated.⁶ In examining this issue, some parties may raise a recent Petition for Rulemaking suggesting that competition in the device market will be enhanced by prohibiting handset exclusivity contracts.⁷ TIA supports the Commission’s aim of promulgating regulations that will make the wireless device and service markets more competitive. However, TIA is not confident that a ban on handset exclusivity agreements would achieve this goal.

From a technical standpoint, limitations of handsets and networks can prohibit a handset that works on one network from working on another. For example, many rural carriers – those the RCA Petition seeks to support – have outdated or otherwise different networks that will not support some handsets desired by their customers. Thus, a handset exclusivity ban may not benefit the consumers targeted to benefit from such a ban.

⁶ See Competition NOI at ¶ 16.

⁷ See Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, filed May 20, 2008 (“RCA Petition”).

Additionally, there does not appear to be a clear record establishing a lack of competition in either the wireless services or handset market resulting from exclusive contracts. TIA urges the Commission to be cautious in its approach to this issue; it is important that it not hastily establish regulations prohibiting business conduct without a full record vetting all views on handset exclusivity agreements.

A Federally-mandated handset exclusivity ban may also thwart the Commission's regulatory framework that recognizes that competition thrives in a free-market environment. TIA agrees with this approach and commends the Commission for its foresight;⁸ its market-based policies have resulted in 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. To shift this policy and prohibit commercial entities from engaging in exclusivity agreements (which are commonplace in other industries) could chill the investment and competition that has resulted in a vast array of wireless handset options for consumers.

⁸ 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 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).

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 to increase competition.

Even in countries where exclusive contracts are not as common, such contracts are not explicitly banned by the government. 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 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, 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.

As is evident, the pro-competitive nature of handset exclusivity contracts has yielded greater choices for consumers, and innovation and competition could suffer should these contracts be banned. TIA urges the Commission to take these factors into consideration as it considers addressing the handset exclusivity issue.

II. SPECTRUM CAPS WILL NOT ENHANCE COMPETITION.

The Commission asks how it should assess the ways in which spectrum holdings affect market structure, conduct, and performance.⁹ Recently, some have argued that a spectrum cap on wireless carriers should be imposed to enhance competition.¹⁰

However, reinstating spectrum caps would constitute a step backward in the

⁹ See Competition NOI at ¶ 24.

¹⁰ See Public Notice, *WTB Seeks Comment on Petition for Rulemaking of RTG to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, RM No. 11498, DA 08-2279 (WTB, rel. Oct. 10, 2008) (seeking comment on the Rural Telecommunications Group, Inc.'s (RTG) proposal to implement a 110 MHz county-by-county spectrum cap on all commercial terrestrial wireless spectrum below 2.3 GHz) (RTG Petition).

Commission's spectrum policies and would negatively affect the mobile and wireless broadband product market's competitive nature. Such action would potentially limit carrier flexibility to respond to technical evolutions and to maximize the utility of existing allocations to increase competitive offerings.

Resurrecting a spectrum cap policy that was long ago discarded in favor of a more flexible spectrum screen method, which the Commission uses when reviewing competition in the mobile and now wireless broadband product market, would diminish competition.¹¹ Such a sweeping and arbitrary policy will ignore the strong competition existing in some markets while not addressing specific needs of non-competitive markets. The Commission stopped using spectrum caps in 2003, based on a 2001 determination that the imposition of spectrum caps was inflexible and failed to address consumer benefits or harms.¹²

A spectrum screen approach allows the Commission to implement a more dynamic, less arbitrarily-static spectrum policy. The current screen enables the Commission to look at the collective spectrum holdings in a given market, which reveals a more complete and discrete understanding of its competitiveness. Under the current screen approach, an operator can control between 95 MHz and 145 MHz of CMRS, SMR, PCS, and 700 MHz spectrum (as well as AWS-1 and BRS spectrum) depending upon whether, on a market-by-market basis, the spectrum has transitioned to commercial broadband use.¹³ If the

¹¹ RTG Petition at 20-22.

¹² See 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22668, 22693-94 ¶¶ 49-50 (2001).

screen is triggered, the Commission then undertakes a review of the market to determine if the aggregation of spectrum by a licensee would produce anti-consumer results. If the Commission has concerns regarding consumer benefits, it can compel divestitures on a market-by-market basis.¹⁴ Divestitures typically arise in the context of mergers and acquisitions but they have recently been extended to Commission consideration of auction awards.¹⁵ The Commission also periodically adds blocks of spectrum to the screen to take into account new allocations and auctions.¹⁶ Thus, the spectrum screen approach enables the Commission to analyze each market with sensitivity to its particular characteristics; an arbitrary spectrum cap would eliminate this valuable flexibility.

There is no basis for the Commission to conclude that its current approach to enhancing competition and protecting the public interest is in some way failing. RTG has not established why a reversal of this policy is either necessary to enhance competition, protect consumers, or be any more effective now than it was prior to its elimination in 2003. On the contrary, the issues raised by the RTG - relative concentration of the

¹³ See 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 and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, FCC 08-258 at ¶ 64 (rel. Nov. 10, 2008) (“*Verizon Wireless/Alltel Order*”); Sprint Nextel Corp. and Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, FCC 08-259 at ¶ 74 (rel. Nov. 7, 2008).

¹⁴ See, e.g., *Verizon Wireless/Alltel Order* at ¶¶ 100-113, 159 (requiring divestiture for five additional markets where the Commission finds upon further review after completing the initial screen that the transaction is “likely to cause significant competitive harm”).

¹⁵ See Union Telephone Company, Cellco Partnership d/b/a Verizon Wireless Applications for 700 MHz Band Licenses, Auction 73, *Memorandum Opinion and Order*, FCC 08-257 at ¶¶ 8, 26 (rel. Nov. 13, 2008).

¹⁶ Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20312-13 ¶ 30 (2007) (deciding to include 80 MHz of 700 MHz band spectrum to increase the initial spectrum aggregation screen to 95 MHz).

market and recent auction results - are irrelevant to the question of whether consumers are benefiting from competition spurred by existing Commission policy with respect to spectrum aggregation. The only indirect consumer harm RTG discusses involves roaming agreements that smaller carriers need to obtain from national carriers, a topic that has been under separate consideration in a different proceeding.¹⁷ Therefore, the RTG Petition makes an unpersuasive case for the Commission to consider resurrecting spectrum caps.

Should the Commission nevertheless choose to reevaluate the merit of its spectrum screen policy, TIA recommends that it first examine the effects of its current policy on consumers to determine whether this policy should be affirmed, modified, or discarded in favor of some other policy. The Commission should not conduct a narrow analysis of the marginal benefit of additional entry that might be achieved if the spectrum cap were reinstated. Instead, the Commission should take a broader view and consider that incumbent carriers are in various stages of moving to deployment of wireless broadband networks.

Unlike the voice networks of the past, the new networks will be built on blocks of spectrum ranging from 1.25 MHz to 20 MHz, or more. These building blocks will support the large networks needed to serve densely populated areas. In addition, these new broadband networks will require more contiguous spectrum than the voice networks that preceded them. A network that is constantly evolving to maximize the value of

¹⁷ See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007); Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Small Entity Compliance Guide, DA 08-1319 (CGB rel. June 6, 2008).

scarce spectrum resources and bring enhanced communications tools to consumers should not be managed with antiquated policies, like spectrum caps.

III. THE COMMISSION SHOULD EXPAND ITS EFFORTS TO HELP OVERCOME THE BARRIERS TO WIRELESS BROADBAND ADOPTION AMONG VULNERABLE POPULATIONS.

The Commission seeks comment on the forces that drive adoption and demand for mobile wireless broadband services.¹⁸ Empirical evaluations of broadband usage indicate that adoption rates are particularly low where users do not own a computer, have not been exposed to computer training, and/or do not understand the importance of broadband. Indeed, various studies demonstrate that the perceived lack of need for broadband and a lack of computer ownership are top barriers to broadband adoption. In rural areas – where most available broadband is wireless – one might expect a lack of broadband availability (in other words, the supply or access side of the problem) to be the top barrier to broadband adoption. However, the top barriers to widespread broadband adoption are actually lack of access to computers and the difficulty of using broadband technology.¹⁹ In these areas, only 19 percent of residents who do not subscribe to broadband service attribute this fact to a lack of available service. In contrast, 42 percent of rural residents who do not subscribe to broadband at home say they don't subscribe because they don't need it, and 34 percent of these residents report lack of a computer as the reason they don't subscribe to broadband at home.²⁰ Similarly, in urban areas, the major reasons

¹⁸ See Competition NOI at ¶¶ 13, 24.

¹⁹ See Cecilia Kang, Broadband's Cost Gives Non-Subscribers Pause, Poll Finds, Wash. Post, at D3 (Jan. 22, 2009).

²⁰ See Connected Nation, Consumer Insights to America's Broadband Challenge (Oct. 13, 2008), available at http://connectednation.com/research/publications/Consumer%20Insights%20Broadband%20Challenge_2008%2010%2013.pdf (last visited Sept. 27, 2009).

found for the relatively lower broadband adoption rates by low-income households are: (1) the cost of broadband service; (2) the lack of computer ownership; (3) the absence of computer literacy skills; and (4) a failure to perceive value in broadband adoption.²¹ The Commission's National Broadband Plan must address these barriers to adoption for first time home broadband users.

The Commission has an opportunity to help overcome these barriers to wireless broadband adoption. It is critical that the Commission expand its efforts to drive broadband adoption in vulnerable rural and urban communities and everywhere in between. Demand-side efforts should include, at a minimum, grants for programs that support adoption by low-income users such as subsidies or income targeted vouchers for laptops and other broadband-capable devices, computer and "digital literacy" projects, and funding for programs that bundle the purchase of a PC and broadband subscription at discounted rates for students and rural, low-income, and vulnerable populations.

Additionally, TIA supports the extension of the existing Lifeline and Link-Up programs to subsidize broadband Internet access services for low-income Americans. These Americans are among the most likely to not adopt broadband services. The Commission has before it two petitions seeking to extend the Lifeline and Link-Up programs (which now subsidize low-income users' voice service subscription and set-up costs) to

²¹ Comments of the City of New York, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, at 4, April 13, 2009.

broadband service.²² TIA supports these petitions, and urges the Commission to act quickly to bring the benefits of broadband to this underserved community. Such measures will drive wireless broadband adoption in many areas, thereby fostering wireless broadband competition in these markets.

CONCLUSION.

For the reasons set forth below, TIA urges the Commission to consider and endorse the pro-competitive nature of wireless handset exclusivity agreements, its existing spectrum screen policies, and policies that promote adoption of wireless broadband.

Respectfully submitted,

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²² See Petition of Computer and Communications Industry Association for Rulemaking to Enable Low-Income Consumers to Access Broadband Through the Universal Service Lifeline and Link-Up Program (filed Oct. 7, 2008); Petition of TracFone Wireless, Inc. for Waiver, CC Docket No. 96-45 (filed May 4, 2009).