

WRITTEN STATEMENT

of

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on

“THE CONSUMER WIRELESS EXPERIENCE”

**Before the
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE**

June 17, 2009

INTRODUCTION

Mr. Chairman and members of the Committee, thank you for allowing this opportunity to testify before you today regarding a number of important issues related to competition in the wireless industry. I have been in the wireless industry for over twenty (20) years with Cellular South, the nation's largest privately-owned wireless carrier, serving all of Mississippi and portions of four other southeastern states.

In my years in the wireless industry, I have seen the duopolistic world of the early cellular licenses, the rise in wireless competition as a result of spectrum auctions in the personal communications service, and the growth and innovation throughout the industry as a result of the Telecommunications Act of 1996. However as I sit before you today, I am convinced that, unless things change quickly, the industry is coming full-circle and progressing – or, rather, regressing – into a duopoly once again.

The Justice Department broke up the AT&T monopoly in 1982. In 1993, the wheels were set in motion for spectrum auctions that would open the duopoly in wireless markets to competition. In 1996, Congress rewrote the Telecommunications Act to further promote competition in telecommunications services. Today, however, the industry is trending back towards consolidation and the days of Ma Bell. The largest carriers continue with acquisition after acquisition – Centennial Wireless, Alltel, Rural Cellular Corporation, Midwest Wireless, SunCom, Dobson Communications, just to name a few – with seemingly no interest from regulators in the effects that this consolidation has on the market.

Today over ninety percent (90%) of the wireless market is in the hands of AT&T Wireless, Verizon Wireless, Sprint Nextel and T-Mobile.¹ Combined, AT&T Wireless and

¹ According to a series of SEC filings and/or corporate press releases all of which are publicly available, customer totals of the four largest carriers as of 3/31/09 were: Verizon Wireless - 86.6 million customers, AT&T - 78.232

Verizon Wireless control over sixty percent (60%) of the market.² This should come as no surprise after the parade of acquisitions over the past several years.

One reason that this is a problem is that the largest carriers use their market power to prevent competitors from having access to devices and roaming. If this trend continues, and I believe it will without intervention from Congress, then there will once again be a duopoly in the wireless industry. Our country's banking and finance policy mistakenly believed that free reign in the marketplace with little oversight was the best course of action and that certain institutions were simply too big to fail. This reasoning will lead to the same market failures in the wireless industry. Congress must take action now to ensure that the wireless industry remains the competitive and innovative marketplace that Congress intended for consumers to have.

I. EXCLUSIVE AGREEMENTS FOR DEVICES

One effect of the market concentration described above is that the largest carriers now use their market power to demand (and receive) long-term exclusive agreements with device manufacturers for the latest and greatest handsets. Exclusivity agreements prevent other carriers from acquiring these devices and are particularly harmful to wireless consumers.

A. Exclusive Agreements for Devices are Anti-Competitive

Wireless service has evolved from a market where consumers were primarily concerned with attractive monthly plans and a provider's network, to a market where a carrier's wireless devices reign supreme. Cellular South and other regional and rural carriers have competed with the largest carriers for years based on network quality, network coverage and price. These are all

million customers, Sprint - 49.083 million customers, and T-Mobile - 33.2 million customers. Total customers served by "Big 4" - 247,115,000. According to CTIA – The Wireless Association, there were 270.3 million wireless customers as of 12/31/08. Even if one makes the unlikely assumption that wireless growth continued at the same rate in the first quarter of 2009 as it did in 2008, the total number of wireless subscribers rises to only 274,025,000. These numbers yield a combined market share of 90.179% for the Big Four. Of course, this does not include the addition of Centennial's customer figures to AT&T's customer count once that acquisition is approved by the FCC.

² See explanation in FN 1.

factors that are within our control. If we lose a customer because we don't offer the right plan or because we drop too many calls, that blame falls squarely on our shoulders – and I can and will fix that problem. However, our ability to compete is compromised because the largest carriers lock up devices in exclusivity agreements. Put simply, regional and rural carriers cannot gain access to the latest, cutting-edge devices which gives large carriers a key competitive advantage. Focus groups of customers who have left Cellular South for the largest carriers repeatedly say that they are buying the device, not the network, and certainly not the company.

Historically, exclusive agreements lasted three (3), maybe even six (6), months. Agreements of this length were certainly obstacles to competition, but they were not the anti-competitive weapons that today's long-term agreements have become. Today, handset manufacturers tell us that the largest carriers are demanding exclusivity on more devices, as well as longer exclusive periods for devices. The largest carriers are increasingly demanding "lifetime" exclusives on handsets. At least one large carrier is demanding that all of the devices it accepts from a particular manufacturer be provided under exclusive agreements. For years, Sprint has had exclusive agreements for all of Sanyo's devices.³ Manufacturers know that they must cater to the largest carriers in order to secure any kind of market share in the U.S. market.

B. Exclusive Agreements for Devices are Anti-Consumer

This battle among the industry titans has left consumers as collateral damage because device manufacturers are prohibited from providing the cutting-edge devices that consumers desire to the smaller carriers. Vast portions of America – including all or part of Alaska, Arizona, California, Idaho, Kansas, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Vermont, Washington, West Virginia and Wisconsin – are not served by any of the largest carriers, so Americans in these areas are prohibited from acquiring

³ This has continued even though Sanyo is now owned by Kyocera.

the newest and most innovative devices. Even in areas that are served by one of the largest carriers, consumers are not free to choose the latest devices without being forced into accepting service from a particular carrier. If you live in New York City and want a Blackberry Storm, then you will be a Verizon Wireless customer whether you want to pay confusing add on fees or not. If you live in Washington, D.C. and want an iPhone, then you are obligated to be an AT&T customer even though it will be years before you can reliably use your iPhone when traveling to and from work on the Metro. Because exclusive agreements prevent Cellular South from getting these devices, if you live in Laurel, Mississippi and want to subscribe to a third generation (“3G”) network, you will be limited to only those devices that Cellular South can provide.

Of course, the nation’s largest carriers aren’t limiting their use of exclusive arrangements to wireless handsets; these carriers have already begun using exclusive arrangements in the Netbook market. Netbooks are devices that fit somewhere between a Smartphone and a laptop computer. These devices offer Internet access and common laptop functionality, but are priced at a level at or near most Smartphones. These devices will offer the perfect solution for a number of wireless users who find Smartphones too small for extensive use, but find a laptop to be too cumbersome. Cellular South has been in touch with several Netbook manufacturers and, as you may have guessed, the largest carriers are already demanding exclusivity on many models of these wireless devices.

What would happen if merchants sold computers that only worked with one Internet service provider? Imagine a world in which Macintosh computers only worked on AT&T’s DSL. That’s exactly the world we live in with the iPhone and Apple’s exclusivity agreement

with AT&T. If you want that handheld computer, you must have service through a particular wireless voice and Internet provider.

As another example, what would happen if a pharmaceutical company developed a lifesaving drug that could be purchased exclusively from one pharmacy chain in the country, but you didn't have a branch of that chain in your city? That is similar to what consumers experience without access to some of the latest devices. Potentially lifesaving applications are being developed for devices that are exclusive to a single carrier. If that carrier does not serve your area, then you are simply out of luck.

I was asked about this at a recent hearing in the House of Representatives. Unfortunately, the question was presented as if we were seeking a free ride off of the investments of AT&T and Verizon. Holding aside that it is far from clear that those carriers take any real risk in developing handsets, we are simply seeking to buy the products that handset manufacturers produce and sell to others. Our conduct in seeking to limit or ban exclusivity arrangements is intended to broaden the market for handsets. We do not seek any special treatment or discounts, only an opportunity to buy the products they make.

C. Impact on Consumers, Economic Development, Public Safety & Health Care

If a regional or small carrier cannot get access to the latest devices, then it cannot roll out next-generation services. No carrier can justify the expense of deploying a new technology unless it can also deliver the devices necessary to make that technology work and deliver the products and services that consumers want. While this is bad for the carrier, it is ultimately the consumer who pays the price for not having access to the devices necessary to use mobile broadband services. Without access to the latest devices, consumers are ill-equipped to respond to natural disasters, they cannot access many benefits of telemedicine applications, and they

cannot adequately protect themselves in emergency situations. Today's advances in wireless technology will not be realized until the latest wireless handsets are available to all of rural America.

Collectively, a lack of access to the latest devices means that rural communities cannot maximize economic development. One of the first questions Toyota asked when it considered whether to build a plant in Mississippi was whether the rural town of Blue Springs had access to wireless 3G technology. Thankfully, for Blue Springs and the surrounding area that answer was "yes." However, without access to modern wireless devices, large portions of America will be left behind as the industry continues to deploy third generation or 3G technologies and eventually deploys 4G technology. Yesterday's economic development infrastructure meant rail, electrical, and road access. Today's global economy demands that rural areas have access to wireless broadband and the latest wireless devices.

D. The False Dilemma: Keep Exclusivity Agreements or Lose Innovation

The largest carriers claim that handset exclusivity agreements are good for consumers and the industry because they promote innovation. According to this argument, without exclusivity agreements, there would be no innovation in the wireless device market. The largest carriers offer a false dilemma between banning exclusivity agreements and innovation.

If this tactic sounds familiar, it is because the argument is simply today's version of the doomsday scenario that legacy companies ask us to believe whenever their control is threatened. Years ago, we were warned that using non-AT&T owned equipment could cause harm to the landline network. When the federal government finally permitted Americans to use non-AT&T equipment, the network miraculously survived. Had AT&T prevailed in those days, the people

that continue to have landline telephones may still be using rented, black, bulky boxes that are connected to the wall and useful only for voice connections.

Not only did the landline network survive when consumers were allowed to purchase and use non-AT&T equipment, incredible innovation sprang forth and the network became more than just a tool for voice communication. Today, the old landline network is used for high-speed data connections between computers (albeit they are limited to location-to-location connectivity). No one could argue that the computer industry has lacked innovation, yet the service providers do not have exclusive agreements for the customer equipment. Since today's wireless devices are far more akin to computers than merely voice telephones, how does the myth of exclusivity driving innovation continue to persist?

1. iPhone

While it is important to understand that the handset exclusivity issue is about far more than one device, the fact remains that Apple's iPhone crystallized the problem for consumers. Although AT&T touts this device as "creating enormous benefits for **all** consumers"⁴ the fact remains that millions of Americans **do not** benefit from the iPhone due to the limited scope of AT&T's network and its poor coverage in many areas.

According to AT&T, those customers who do benefit from the iPhone do so "in no small part" as a result of "[t]he exclusive arrangement between AT&T and Apple" that delivers "spectacular public interest benefits."⁵ Although AT&T claims "close collaboration and enormous investment,"⁶ the level and timing of AT&T's collaboration has never been disclosed

⁴ See the late-filed Written Statement of AT&T, Inc. before United States House of Representatives, Subcommittee on Communications, Technology and the Internet at 7 (no filing date given; May 7, 2009 hearing date) (emphasis added).

⁵ Id.

⁶ Id.

and it is widely assumed that much, if not all, of AT&T's investment was attributable to long-overdue network upgrades.⁷

With the release of the latest iPhone 3GS, AT&T continues to impede innovation by ensuring that Multimedia Messaging Service (MMS) will not be supported on AT&T's network until sometime this fall and that tethering⁸ will not be available until some undisclosed time in the future.⁹ This is hardly an example of a carrier driving innovation.

2. Netbooks

As discussed above, Netbooks are the next emerging wireless market segment with the opportunity to change the way people look at their wireless device. Netbooks combine the functionality of a personal computer with greater portability than a laptop, and they approach price points comparable to many Smartphones on the market today. Netbooks represent a solution for businesspeople, students, travelers, and anyone else that values full connectivity in a compact yet functional device. This product offers an economical entry point for demographics that have been left on the wrong side of the "digital divide."

Well-known computer manufacturers such as Dell are already in the Netbook market but, predictably, the largest carriers are now demanding exclusivity agreements simply because manufacturers of Netbooks have embedded wireless data cards – in addition to embedded Wi-Fi cards – to allow them to connect to the Internet. The largest carriers have not driven innovation

⁷ While early reviews of the iPhone were positive, the complaints about AT&T's slow network were too numerous to count. A quick Google search with the terms "AT&T slow network iPhone" returns 156,000 results.

⁸ "Tethering" is the capability to use the handset as a wireless modem by connecting it to a computer with a cord, so that the computer can access the Internet. This is especially useful in areas beyond the reach of wireline broadband connections and Wi-Fi networks.

⁹ "AT&T Lagging Behind in iPhone 3G Feature Deployment" available at: <http://www.neowin.net/news/main/09/06/09/att-lagging-behind-in-iphone-30-feature-deployment> (last visited June 14, 2009) ("Because of carrier exclusivity agreements it's the end user who gets harmed because they do not have the option of using a phone of their choosing on the network they prefer. All operators are guilty of exclusivity agreements, AT&T with the iPhone, Verizon with the Blackberry Storm, Sprint with the Pre and T-Mobile with the G1. Hopefully one day soon these contracts will be outlawed in favor of consumer choice, but until then, everyone must play the cards that have been dealt.").

in this market, yet they are able to extract exclusivity agreements – once again – because they have the market power to demand them. In the case of the most economical Netbooks on the market, Acer’s devices, we have been told by that manufacturer that all of their Netbooks are under exclusivity agreements. These agreements effectively deny Netbooks to any American who could meet an entry-level price point but who does not live in the proper service area, or who wishes to connect the device to their carrier of choice.

3. True Innovation

Our vision is to end big-carrier practices that prohibit every wireless consumer in the United States from being able to freely choose their own combination of attractive devices, relevant applications, quality coverage, and access to high-speed broadband networks, all with a rate plan that meets their budget. Now that’s true innovation! As long as handset exclusivity agreements are allowed to exist, this vision for innovation will never be reached.

E. Attempts at Non-Governmental Solutions

The situation with exclusivity agreements is bad and is only getting worse. Without action from Washington, there will be no solution. Cellular South and carriers like us have tried to find solutions to this problem without resorting to help from policymakers. We have attempted several solutions within the industry, but all have been fruitless insofar as resolving this problem.

1. Direct Contact with Large Carriers

Cellular South, in conjunction with another regional carrier, had discussions with Verizon Wireless regarding the possibility of Verizon lifting its exclusivity agreements for regional and rural carriers. There was an initial oral agreement that would allow Associated Carrier Group (ACG) members and certain other regional and rural carriers to offer a limited number of

Verizon's exclusive handsets from two manufacturers – LG and Samsung – six (6) months after Verizon launched the devices. It was understood and agreed to by Verizon and ACG that this would require access to the devices prior to Verizon's launch so that other carriers could begin optimizing and testing the devices, which is generally a nine (9) to twelve (12) month process. As a condition of this agreement, Verizon would determine which carriers would be allowed to be a part of the ACG buying group. ACG was willing to accept these terms because it represented a step in the right direction.

Prior to the hearing on May 7 before the House Subcommittee on Communications, Technology and the Internet, Verizon advised ACG that it would not, in fact, allow the smaller carriers to have access to the devices or to work with manufacturers prior to Verizon's launch. This change had the potential to double the exclusivity period and thus terminated the deal. Without access to the devices in advance of Verizon's launch, ACG members and the other smaller carriers could not offer these devices for approximately nine (9) to twelve (12) months after Verizon's introduction. By this point, the devices are at or nearing the end of their life cycle and certainly are no longer the cutting-edge devices that consumers demand.

Cellular South and other ACG members have been, and still remain, opposed to exclusivity agreements for any period of time. Verizon's actions clearly demonstrate the need for Congress to resolve this issue for consumers and competitors.

2. Device Manufacturers

Our efforts with the equipment manufacturers have produced information, but no solution to the problem of exclusive agreements for devices. Manufacturers tell us that they would like to open their portfolios to us, but that they cannot show us a number of their devices – much less sell them to us – because the largest carriers will not allow it.

3. Industry Groups

The Cellular Telecommunications and Internet Association (“CTIA”) convened a working group late last year in an effort to resolve the device exclusivity issue. CTIA brought large and small carriers to the table along with manufacturers, and the effort began with an early hope of promise. However, over the course of approximately three months, it became apparent that the largest carriers had no incentive to participate, the manufacturers remained virtually silent on the matter, and the effort proved futile.

4. Consolidation of Purchase Power

One frequent response from the four carriers that profit from exclusive handset arrangements is the suggestion that smaller carriers should consolidate purchasing power in order to gain access to cutting-edge devices. While that idea is good in theory, it does not work in practice.

The Associated Carrier Group was formed a number of years ago for just this purpose. ACG has almost 30 carriers who, at this time, are exclusively CDMA service providers. For the past two years, representatives of ACG have traveled to South Korea to plead for access to cutting-edge devices from LG and Samsung, but South Korean manufacturers have made it clear that exclusive arrangements insisted upon by the nation’s largest carriers prevent them from selling the most appealing handsets to ACG members.

It is commonly suggested that ACG should push for its own exclusive devices. Although ACG did have a device several years ago that was not sold by another carrier, the suggestion that small carriers join together for their own exclusive device ignores our belief that exclusives are not good for consumers or the industry. It is not our position that exclusives are bad because we

don't have them – it is that exclusive agreements negatively impact consumers by unfairly impeding competition.

Furthermore, it strains the limits of credibility to suggest that the smaller carriers can pool their purchasing power in order to acquire devices, because market power has been concentrated in the hands of the largest carriers over the past several years. As discussed previously, the largest four carriers have over ninety percent (90%) of the nation's wireless service market, with AT&T Wireless and Verizon Wireless combining for approximately sixty percent (60%) of the market. These carriers have grown through acquisition after acquisition with seemingly no regulatory consideration given to market concentration. As a result, all remaining carriers regardless of technology have less than ten percent (10%) of the market. If the largest carriers are allowed to continue using their market power to thwart competition, we will once again have a duopoly for wireless services.

A second flawed argument is that there are plenty of device manufacturers from whom the smaller carriers can acquire handsets that are not bound by exclusivity agreements. This argument essentially boils down the concept that smaller carriers should offer the devices that the largest carriers do not want. If the non-exclusive devices were the type of cutting-edge, game-changing devices that attracted customers, you can be assured that the mega-carriers would be locking those devices up with exclusive arrangements.

F. Efforts at the FCC

On May 20, 2008, Rural Cellular Association (“RCA”), of which Cellular South is a member, filed a Petition for Rulemaking (“Petition”) with the Federal Communications Commission (“Commission”), asking the Commission to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and

handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.

Only the four largest carriers and one manufacturer expressed opposition to the RCA Petition. In contrast, over two hundred (200) parties representing the rest of the wireless industry and the public interest community expressed their unconditional support for RCA's petition either individually or through their trade associations. The message of the majority was clear: free market competition and innovation has been strangled by large carrier demands for exclusive access to the latest advanced devices.

The market is distorted when a single carrier is allowed to have a monopoly on a device. Action is needed now to restore competition in the handset market and to ensure that consumers have the option to choose both the device and the service provider that they want.

II. ROAMING

On the topic of roaming, far and away the most important issue is that of automatic roaming for data services – specifically, roaming for high-speed data such as EV-DO, HSPA, and as we go forward, both WiMAX and LTE. An equally important aspect of roaming is the issue of interoperability which allows seamless transitions between networks.

A. High Speed Data Roaming

When I began in this industry, roaming agreements were standard practice. As networks expanded across the country, consumers came to expect their device to work, wherever they happened to be, regardless of who they chose as their service provider. Roaming agreements for voice service could be negotiated and finalized in hours or days. Recently, the FCC mandated that all carriers enter into roaming agreements for voice services, but did not extend that mandate to data services.

As technology has advanced in the industry, consumers now expect to be able to send and receive email and access the Internet over their devices, again wherever they happen to be. In order to accomplish this, a roaming agreement that covers data services must be entered into among carriers seeking access to distant networks. Instead of data roaming becoming routine, some of the largest carriers have been refusing to enter into data roaming agreements – as a means to restrict competition. Today’s wireless devices do so much more than just make phone calls, and new applications are being introduced every day. Consumers literally have access to the world at their fingertips with today’s wireless services. However, this world is often unavailable to many consumers because the largest carriers refuse roaming agreements for high-speed data.

Regional and rural carriers offer network access in areas that the largest carriers have not and, likely, will never build out on their own. These smaller carriers do not seek these roaming agreements as a means to actively market outside their footprint because, 1) that is not the goal in seeking roaming, and 2) even if that were the goal, roaming rates are too high to make an economic case for that type of growth. Our customers travel just like the customers of the big carriers and we believe that consumers should be able to use their devices wherever they may be. Besides, this is not a free ride for us – we pay for the service that our customers use on distant networks.

At the FCC, some Commissioners question whether they have authority to mandate data roaming. While we believe that the Commission has the power to resolve this issue, there is no doubt at all that Congress has the power to address high-speed data roaming obligations. By requiring carriers to provide automatic data roaming to requesting carriers that use a compatible technology, Congress can ensure that consumers never again find themselves unable to utilize

the indispensable data features of their wireless device when traveling outside of their home carrier's footprint.

B. Interoperability

A related matter in the roaming discussion is the issue of interoperability between wireless carriers. At its most basic, interoperability allows consumers to move seamlessly from one network to another. In other words, the networks are configured in such a manner that the consumer gets full access to the features on his or her device whether that consumer is at home, or traveling on the other side of the continent. The applications that are possible with interoperable networks are virtually limitless:

- Navigation – the ability to provide turn-by-turn directions to end users outside the home footprint.
- Tracking – the ability to track a device, package, or other shipment nationwide instead of just inside the home footprint
- Person finder – the ability to use a child's phone to find a lost child outside the home footprint, or to use a wearable device on a vulnerable adult to prevent them from becoming lost.
- Weather Applications – the ability to passively provide the current and forecasted weather conditions in the location where the end user is currently located. This would include severe weather alerts and warnings to move out of a storm's path.

Each day, consumers rely more and more on the data capabilities of their wireless devices. As wireless providers deploy 3G and 4G technologies, we are entering a world where even voice communications are treated like data transmissions. It is not acceptable in this era of wireless technology that there would be a roaming requirement for yesterday's voice traffic, but not for the data services of today and tomorrow. Consumers need a solution and Congress is in the clearest position to provide it.

CONCLUSION

As you can see, we are at a critical juncture in the wireless industry. Decisions made today will determine whether our industry becomes more consumer-friendly and innovative as a result of increased competition, or whether the trend towards a duopoly will continue and competition will be eliminated.

Although the wireless industry may no longer be in its infancy, it is no more mature than a gangly teenager. There is much innovation left to be done. There are more people of all socio-economic backgrounds and geographic locales who have yet to benefit fully from the wireless experience. Before it is too late, Congress must step in and put an end to the largest carriers' stranglehold on devices, as well as ensure full roaming access. A light regulatory touch today will prevent the re-emerging duopoly in which two companies control all the customers, all the devices, all the prime spectrum, and become "too big to fail."

Thank you again for the opportunity to be here today. I appreciate your time and your interest in these issues and look forward to discussing them here this morning. With that, I welcome any questions you may have.