

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
<b>RURAL CELLULAR ASSOCIATION</b>	)	RM-11497
	)	
Petition for Rulemaking Regarding Exclusivity	)	
Arrangements Between Commercial Wireless	)	
Carriers and Handset Manufacturers	)	

**REPLY COMMENTS  
of the  
*Ad Hoc* PUBLIC INTEREST SPECTRUM COALITION**

Handset exclusivity arrangements are harmful to consumers. These anticompetitive practices limit consumer choice, raise consumer prices, and limit innovation in the device market. The arrangements tie together the markets for devices and services, allowing the market power of wireless carriers to invade a competitive market for devices and to use successful devices as hooks to reduce competition in the wireless services market – they function as artificial restrictions on competition in both the wireless service and wireless device markets. This proceeding raises the question of whether the Commission should remove these restrictions and open up the device and service markets, by preventing wireless carriers from interfering with innovation and adoption of wireless devices, with the intent of limiting competition over quality and price in wireless services. The Commission has the authority to enact regulations prohibiting exclusivity arrangements between carriers and device manufacturers, and to abrogate existing arrangements. The Commission should issue a Notice of Proposed Rulemaking suggesting language for rules to immediately prohibit such arrangements.

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## I. EXCLUSIVITY ARRANGEMENTS DO NOT BENEFIT CONSUMERS

### A. *Eliminating handset exclusivity will increase, not limit, innovation in the device market.*

Despite allegations by wireless carriers, handset exclusivity arrangements do not promote innovation in the device market.<sup>1</sup> Initial comments in this proceeding reveal the major carriers' hubris, as they claim for themselves primary responsibility for driving innovation in the device market.<sup>2</sup> But device manufacturers have more than sufficient incentive to innovate without the "guidance" of carriers, and will innovate as much or more when given complete creative control over device design.<sup>3</sup>

Rather, carrier control over the design of wireless devices serves only to eliminate innovations that run counter to the interests of the carriers – even if those innovations are beneficial to consumers and to device manufacturers. One example of such an innovation is the inclusion of Wi-Fi radio connectivity in devices, valuable to consumers but forcefully resisted by carriers, who fear the use of VoIP calls to avoid using cellular minutes.<sup>4</sup> Breaking handset exclusivity arrangements would put the device market into the hands of the device makers, and would encourage the development of such consumer-friendly but carrier-opposed innovations.

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<sup>1</sup> Comments of AT&T Inc. at 17-18 ("AT&T"); Comments of Verizon Wireless at 17, 22, 24, 26-27 ("VZW").

<sup>2</sup> See, e.g., VZW at 17 ("The LG Voyager is a Verizon Wireless handset model, just as the Prius is a Toyota model car.").

<sup>3</sup> Comments of the Ad Hoc Public Interest Spectrum Coalition at 5 ("PISC").

<sup>4</sup> Comments of Jim Chen at 10-11 ("Chen"). Although a few devices allow Wi-Fi connectivity, carriers long resisted its inclusion, as Chen notes. *Id.*

***B. Eliminating handset exclusivity will not result in “generic” handsets, but instead will open the market to diverse innovations from multiple handset manufacturers.***

Initial comments allege that device manufacturers will be forced to produce only “generic” handsets that work on all networks.<sup>5</sup> These comments completely misinterpret the scope of policies sought by opponents of handset exclusivity.<sup>6</sup> Eliminating handset exclusivity arrangements would have no impact other than to prevent carriers from entering into exclusive deals. Device manufacturers would not be “forced” to do anything – this argument, like many others in this proceeding, is a red herring.<sup>7</sup> Contrary to the claims of carriers, device manufacturers would not be forced to sell generic phones that work with any network, and they would not be forced to work with every carrier to make sure that they offer a version of each phone for that carrier.<sup>8</sup> Instead, device manufacturers would have strong incentives to design devices that meet the needs and expectations of consumers, regardless of the branding or preferences of the wireless carrier. Banning exclusivity arrangements would put control of the device market back into the hands of the device manufacturers – they may choose to offer devices through any or all carriers, on terms they find valuable to them, so long as those terms do not include an exclusivity provision preventing the device manufacturer from separately offering the device through another carrier.

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<sup>5</sup> VZW at 25.

<sup>6</sup> Chen at 43.

<sup>7</sup> Worthy of note, not a single device manufacturer filed initial comments in this docket to oppose the petition.

<sup>8</sup> VZW at 30. For example, if Motorola chooses to produce a new “Q-2” smartphone and, for reasons of its own, chooses only to offer the Q-2 through Verizon, Motorola would face no obstacles.

***C. Eliminating handset exclusivity will allow consumers of rural carriers to use more devices.***

Verizon strangely claims that prohibiting exclusivity arrangements would have no impact on rural carrier access to wireless devices.<sup>9</sup> Verizon is correct that such a prohibition would not compel any device manufacturer to work with a rural carrier.<sup>10</sup> However, basic market economics indicates that if the device manufacturer stands to make more money from an arrangement with a rural carrier than the transaction costs of entering into the arrangement, the carrier and the manufacturer will come to agreement and the carrier will be able to offer the device. Therefore, if a single device manufacturer could profit by offering a single device (that would otherwise be subject to an exclusivity arrangement) with a rural carrier on terms that are also profitable to the carrier, prohibiting exclusivity arrangements would increase the number of devices available to consumers of rural carriers.

***D. Handset exclusivity arrangements restrict consumer choice.***

Simply put, “consumer choice” in the wireless market means that consumers should be able to choose devices and services independently, as with every other type of communications service. Having the ability to “choose” a different handset in order to get service from a different carrier may mean that a consumer is not locked into a single carrier in perpetuity, but it is nevertheless a restriction on consumer choice.<sup>11</sup> Imagine if consumers could only use a Macbook Air on the Internet when connecting through Verizon’s FiOS network, thanks to an agreement between Verizon and Apple. Or, imagine if Sony Bravia televisions could only display cable television programming when the channels are delivered over Time Warner’s cable

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<sup>9</sup> VZW at 3, 15.

<sup>10</sup> VZW at 30. Though this runs counter to Verizon’s alternative argument that handset manufacturers would be forced to release devices that work on any network. VZW at 29-30.

<sup>11</sup> Comments of Sprint Nextel Corporation at 7 (“Sprint”); AT&T at 15.

television system. The circumstances are no different here – with the exception that such arrangements on wireline Internet or cable television would provoke substantial outrage from consumers and (possibly) antitrust suit.

There can be no guarantees that prohibiting exclusivity arrangements would serve as a panacea to enable consumers to truly choose any device and any carrier. For example, Apple might choose not to offer the iPhone through any rural carriers.<sup>12</sup> However, handset exclusivity arrangements are an artificial, anti-consumer hindrance to any carrier seeking to establish an arrangement with Apple or any other device manufacturer. Consumer choice is not a one-device issue, and as argued above, the elimination of handset exclusivity would inevitably increase consumer choice.

***E. Eliminating handset exclusivity will not increase subsidized handset prices.***

Commenters further misunderstand the nature of the relief sought and the market for wireless devices to the extent they contend that eliminating arrangements will somehow prohibit handset price subsidies.<sup>13</sup> This argument is another red herring, designed to indicate that prohibiting handset exclusivity arrangements will somehow doom the entire wireless market. Although many individuals and organizations are concerned with the duration of user contracts for wireless services and with the amounts of fixed, non-negotiable early termination fees,<sup>14</sup> these issues are irrelevant to this proceeding. Carriers would still be permitted to recoup subsidies on handsets by signing consumers to one- and two-year deals, backed by early termination fees. In fact, as multiple carriers will likely be able to offer the same devices, it

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<sup>12</sup> Though Apple would not benefit by excluding the iPhone from would-be consumers in those parts of the seventeen states not fully covered by AT&T service. RCA Petition at 6-7.

<sup>13</sup> Comments of the Telecommunications Industry Association at 9 (“TIA”); VZW at 14.

<sup>14</sup> Consider the more than 14,000 consumers who sent letters to the Commission in the summer of 2008. See <http://www.consumersunion.org/pub/2008/07/005858print.html>.

seems likely that the carriers will compete over amounts of subsidization, and handset prices to consumers will fall.

## **II. EXCLUSIVITY ARRANGEMENTS DO NOT BENEFIT COMPETITION**

### ***A. Exclusivity arrangements do not generate meaningful competition in the wireless device market.***

Multiple carriers assert that handset exclusivity arrangements are beneficial for competition and for consumers because they provide incentives for other device manufacturers to create competing devices.<sup>15</sup> This argument is misguided, and again indicates hubris on the part of wireless carriers. Manufacturers have independent incentives to create competing devices – even better devices – in order to remain successful in the device market; they do not need or benefit from market segmentation by carriers. Exclusivity arrangements function as artificial restrictions on competition in the market for wireless devices by preventing device manufacturers from offering their products through any wireless carrier.

Furthermore, carrier and manufacturer efforts to recreate a clone of a device, such as the iPhone, for the sole reason that the device is only available through one carrier, are inefficient and wasteful, even when they are legally possible.<sup>16</sup> Meaningful and beneficial competition for consumers arises when device manufacturers compete to develop new and better devices, not to

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<sup>15</sup> AT&T at 7-8; Sprint at 6-7; VZW at 3, 22.

<sup>16</sup> AT&T at 15-16. One of the most attractive features of the Apple iPhone is the multi-touch functionality. However, the open-source Android mobile operating system avoided the feature at the behest of Apple. See Erin Barker, “Why Google Android Doesn’t Use Multi-Touch,” *Contentinople*, Feb. 10, 2009, available at [http://www.contentinople.com/author.asp?section\\_id=655&doc\\_id=171908&f\\_src=contentinople\\_sitedefault](http://www.contentinople.com/author.asp?section_id=655&doc_id=171908&f_src=contentinople_sitedefault). Another phone being heralded as a competitor to the iPhone has run into trouble with Apple for emulating the device. See Brian X. Chen, “Will Apple Sue Palm for Ripping Off iPhone?” *Wired Gadget Lab*, Jan. 23, 2009, available at <http://blog.wired.com/gadgets/2009/01/apple-vs-palm.html>.

clone existing ones. Open competition in the market for wireless devices – not artificial segmentation by wireless carriers for their own benefits – will most effectively promote new innovation, improve device quality, and lower prices.

***B. Exclusivity arrangements do not generate meaningful competition, over quality and price, in the wireless services market.***

Carriers contend that limited availability of handsets serves as a market differentiation factor and thus improves competition in the market for wireless services.<sup>17</sup> This form of “competition” is unnecessary and artificial. Meaningful consumer choice in the market for wireless services is choice over price and quality of service, including reliability, availability, and terms of service, without being clouded by outside “market differentiation” factors.<sup>18</sup> Providing consumers with a limited-availability handset reduces the need to improve service quality or reduce service price to compete by providing artificial value to consumers (access to a handset that might otherwise be available through any carrier), and thus cannot possibly be considered to be a beneficial or meaningful form of competition. In other words, as in the market for wireless devices, exclusivity arrangements act as artificial restrictions on meaningful competition in the wireless services market. Prohibiting exclusivity arrangements would increase the availability of handsets through alternative carriers, and would render a single

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<sup>17</sup> TIA at 9-10, AT&T at 2, Sprint at 11-13, VZW at 24.

<sup>18</sup> Verizon recognizes that meaningful competition lies in the network and the service provider and not the device, but claims that the ability of other carriers to provide “iPhone-like devices” is sufficient to keep the exclusivity of the iPhone from interfering with the wireless market. VZW at 27 (“[E]quipment vendors are designing their own iPhone-like devices... As a result, service providers can compete with the iPhone in the areas of pricing, brand loyalty and network differences.”). No rural carrier yet has access to an “iPhone-like device” as Verizon uses the term. Furthermore, any differences in quality or functionality between the devices – of which there are many – will be weighed against differences in quality or price of the wireless service, and will thus interfere with meaningful competition in the market for wireless services.

carrier unable to compete on handset availability alone, requiring all carriers to invest in their networks to compete over quality and price of service, rather than negotiating leverage.

### III. THE WIRELESS MARKET IS NOT COMPETITIVE

#### *A. Access to some devices is no substitute for access to the most popular devices.*

Commenters argue that handset exclusivity arrangements do not hinder competition because all carriers can offer many different devices with their services.<sup>19</sup> However, access to some devices is not a substitute for access to the most popular devices. Popular phones, particularly innovative smartphones, drive growth in the market for wireless services, and offer the best (if not only) chance for wireless carriers to flourish in a weak economy.<sup>20</sup> The most popular devices are locked into a single carrier through an exclusivity arrangement.<sup>21</sup> As a result, smaller carriers – already less able to secure an exclusivity arrangement – lose even more market share, as a result of artificial restrictions on their ability to compete.

#### *B. Vertical relationships are harmful because of market concentration in wireless services.*

Verizon argues that there can be no economic harm because no carrier has sufficient market power to foreclose a manufacturer from entering the wireless market.<sup>22</sup> The factual basis of this argument may or may not be correct – although a manufacturer can enter the market, true success requires the cooperation of each of the major carriers. Consider Nokia, a “proud and

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<sup>19</sup> VZW at 13; AT&T

<sup>20</sup> PISC at 3; *see also* Marguerite Reardon, “Smartphones offer hope in declining cell phone biz,” *CNET News*, Feb. 4, 2009, *available at* [http://news.cnet.com/8301-1035\\_3-10156897-94.html](http://news.cnet.com/8301-1035_3-10156897-94.html), Richard Wray, “Mobile phone firms bank on smartphones to bail out the industry,” *The Guardian*, Feb. 14, 2009, *available at* <http://www.guardian.co.uk/business/2009/feb/15/mobile-world-congress-report-fewer-delegates>.

<sup>21</sup> Chen at 9.

<sup>22</sup> VZW at 16.

innovative” device manufacturer with a long history of success outside the United States.<sup>23</sup> Nokia “has long been unwilling” to cede control over device innovation, like other manufacturers – and, for a long time, paid the price for such resistance with much less success in the US market.<sup>24</sup> The reduced success is not a failure of Nokia’s or of ordinary market operations – it is economic harm produced because “the major U.S. wireless carriers, AT&T (T) and Verizon Wireless, dominate the market to such an extent that phonemakers must work through them to succeed.”<sup>25</sup> Simply put, if Nokia retained control over its devices, consumers would be better off.<sup>26</sup>

Furthermore, even if the factual basis is assumed to be true, Verizon’s argument is based on a misinterpretation of the embedded quote from Hahn-Litan-Singer.<sup>27</sup> Even if no carrier has sufficient market power to prevent a manufacturer from entering the wireless device market, the only proper conclusion is that vertical arrangements between a carrier and a device manufacturer do not generate harm in the market for wireless *devices* – it does not eliminate the possibility of harm in the market for wireless services. Thanks to excessive and increasing concentration,<sup>28</sup> the

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<sup>23</sup> David Kiley, “Nokia Starts Listening,” *Business Week*, Apr. 24, 2008, available at [http://www.businessweek.com/magazine/content/08\\_18/b4082030947029.htm](http://www.businessweek.com/magazine/content/08_18/b4082030947029.htm).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* (“The very qualities that have made Nokia a success in other markets—the intense focus on innovation, design, and engineering—may get diluted if the company caters too much to the desires of executives at U.S. wireless carriers.”).

<sup>27</sup> VZW at 16 (“[C]omplete foreclosure by a single wireless operator would not likely prevent a handset maker from achieving the requisite economies of scale (that is, the cost of making the handset would be no higher). Because the targeted handset maker could supply at a minimum the other U.S. wireless operators, there would be no foreclosure. And, without foreclosure, there is no prospect of higher prices for consumers, as higher prices require higher costs of rival handset makers. Thus, without foreclosure, there can be no anticompetitive harm.”).

<sup>28</sup> PISC at 2; *see also* Kevin Fitchard, “For AT&T and Verizon Wireless, the subscriptions just keep on coming,” *Telephony Online*, July 24, 2008, available at <http://telephonyonline.com/wireless/news/att-verizon-increase-subscriptions-0724/index.html>;

major wireless carriers possess sufficient market power and negotiating leverage to outbid smaller carriers for the exclusive right to distribute all of the most popular current and new wireless devices, relegating minor carriers to the leftovers in the device market. This is a clear harm to the market for wireless services. The impossibility of foreclosure for device manufacturers simply has no relevance.

#### **IV. THE COMMISSION HAS DIRECT JURISDICTION TO ACT**

##### ***A. Sections 201 and 202 provide the Commission with sufficient jurisdiction.***

Commenters contend that sections 201 and 202 of the Communications Act do not provide jurisdiction to prohibit exclusivity arrangements. In particular, Verizon contends that these sections “contain no language that would permit the Commission to regulate equipment vendors, the sales practices of equipment vendors, or the wholesale supply agreements that equipment vendors reach with wireless service providers.”<sup>29</sup> Verizon’s framing is deliberately deceptive, arguing that because an action would impact device manufacturers, the Commission lacks jurisdiction.<sup>30</sup> Here, jurisdiction lies under, at a minimum, section 201(b), to allow the Commission to prohibit unreasonable terms in agreements, entered into by wireless carriers, when those agreements create an artificial restriction on the market for communications services

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Kevin Fitchard, “AT&T, VZW fuel growth through dueling acquisitions,” *Telephony Online*, Nov. 10, 2008, available at <http://telephonyonline.com/home/news/att-vzw-acquisitions-1110/>. In the most recent CMRS Report, Table A-4 illustrates the increasing subscriber dominance of the top 5 (now 4) mobile telephone operators who now account for more than 92% of subscribers for the top 20 operators. *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, DA 09-54, at para. 46 (rel. Jan. 16, 2009).

<sup>29</sup> VZW at 7.

<sup>30</sup> VZW at 2. (“The Commission does not have jurisdiction over equipment vendors generally and their contracts for sale of equipment to wireless providers; therefore, the Commission cannot regulate the terms and conditions in supply agreements between wireless providers and equipment manufacturers that are the subject of RCA’s Petition.”).

by preventing other carriers from entering into negotiations with device manufacturers to offer the same handsets. Verizon's conclusion that the Commission lacks jurisdiction to involve itself in the behaviors of wireless carriers, when those behaviors have a direct and substantial impact not just on the wireless consumer experience but also on the markets for wireless services and wireless devices, thus fails on multiple levels.

Similarly, AT&T argues that exclusivity arrangements are distinct from exclusive deals between providers and managers of apartment buildings, because consumers are not foreclosed from acquiring service from a different carrier.<sup>31</sup> However, these arrangements can nevertheless be interpreted by the Commission to impose an unreasonable burden on consumers because choosing a different carrier requires the consumer to choose a different device – solely because of a practice of the wireless carrier. Section 201(b) grants jurisdiction to the Commission to regulate unreasonable practices by wireless carriers – plain and simple. Thus, there is no real question of jurisdiction here, as AT&T alleges, but only a question of policy.

AT&T similarly conflates arguments of policy with arguments of jurisdiction in attempting to create an artificial distinction with the MDU order over the issue of abrogating existing arrangements.<sup>32</sup> Again, AT&T offers a policy argument as to why the Commission should treat the circumstances differently, but somehow believes this to render such an action by the Commission unlawful. The Commission is well within its legal authority to choose to abrogate existing handset exclusivity agreements, as it did in the MDU order.

Sprint notes, correctly, that the provision of consumer premises equipment is not a common carrier service governed by Title II/III and section 201(b).<sup>33</sup> However, Sprint

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<sup>31</sup> AT&T at 30.

<sup>32</sup> AT&T at 35-36.

<sup>33</sup> Sprint at 14.

exaggerates greatly the legal import of that observation. True, the Commission would not possess jurisdiction under Title II/III to regulate terms and conditions of sales of CPE between device manufacturers and consumers – but this is a complete misstatement of the jurisdictional hook of the proposed regulation. The terms and conditions being regulated here are terms between the wireless carrier and the device manufacturer, in an agreement with a direct and substantial impact on consumer wireless service usage, and on the market for wireless services. An agreement for the offering of wireless devices with wireless services that contains a provision forbidding a device manufacturer from entering into a contract with another wireless carrier to provide a device along with that carrier’s service is twice attached to wireless carriers and offerings of wireless services (undeniably Title III services).

## **V. THE COMMISSION SHOULD PROHIBIT EXCLUSIVITY ARRANGEMENTS**

### ***A. The Commission can and should immediately issue a Notice of Proposed Rulemaking.***

Contrary to the arguments of TIA, the proper next step in this proceeding is for the Commission to issue a Notice of Proposed Rulemaking.<sup>34</sup> The Commission has full discretion to choose whether to issue a Notice of Inquiry or a Notice of Proposed Rulemaking in this docket, and a review of the current record in response to the RCA Petition indicates that a Notice of Proposed Rulemaking is a more appropriate next step for the Commission.

The purpose of a Notice of Inquiry is to seek comment from a broad range of parties on a broad range of options, and to identify whether and to what extent Commission rules would serve the public interest. This objective is easily met by the record in response to the Petition. Having determined that Commission action would be beneficial, and having arrived at specific

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<sup>34</sup> TIA at 5-7.

rules which the Commission might include in an Order, the proper next step is a NPRM presenting to the public the candidate rules, to receive comment on which of the approaches is preferable and on whether slight modifications to the rules as presented would allow them to better serve the public interest and the Commission's purpose in enacting the rules.

TIA suggests nine separate reasons why the Commission should put forward a NOI instead of a NPRM, and none of the reasons are credible.<sup>35</sup> In fact, each of TIA's questions is either resolved in the current comment cycle of this proceeding, answered in other FCC proceedings, or is more appropriate for resolution in a NPRM:

1. The "competitive state of the wireless market" is evaluated in the Commission's annual CMRS reports, which have demonstrated increasing HHI in recent years.<sup>36</sup>
2. RCA's definitions of contractual exclusivity in its initial petition have been refined and clarified by this record. As a reminder, the Commission is not procedurally limited in a NPRM to proposing only rules suggested by RCA's initial petition.
3. The Commission's definitions of contractual exclusivity are appropriate for presentation and consideration in a NPRM. These comments, along with others, offer specific suggested definitions, which the Commission could adopt; or, the Commission has more than enough information in this record to construct its own.
4. The public interest goals of this proceeding are well addressed by the current record, including these comments. The policy interests of promoting consumer choice and competition are clearly presented in this record, as are the merits and disadvantages of adopting a regulatory solution to the current market deficiencies.

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<sup>35</sup> *Id.* at 8.

<sup>36</sup> PISC at 2.

5. The general question of the impact of contract prohibition on competition, lying at the heart of the policy question at issue in this proceeding, is addressed more comprehensively in the record than any other. Further information on this question can *only* be gathered through a NPRM, as specific rules are needed for providers and public interest groups to evaluate the competitive impact at a more precise level.
6. The current comment cycle presents both competing arguments of the impact of a prohibition on exclusivity arrangements on innovation in devices – and it is likely that the reply cycle will present oppositions to both arguments as well.<sup>37</sup>
7. As with number 6, the question of the impact of a prohibition on device prices has been well addressed in this record. No additional meaningful or objective information could be gleaned from a NOI. A study by the Commission’s Office of Strategic Planning could provide guidance, but collecting further rhetoric from industry through a NOI would serve no purpose other than to delay a rulemaking.
8. The question of whether case-by-case prohibitions could be an alternative solution is outside the scope of this record, as RCA and all supporters ask for an industry-wide solution. Should the Commission determine, following a NPRM, that industry-wide solutions are not appropriate, then a Further Notice of Proposed Rulemaking seeking comment on case-by-case rules might be warranted.
9. The broad question of whether regulation is or is not warranted in response to the market and consumer harms of exclusivity is central to the debate in this comment cycle; no further information can be gleaned through a NOI other than a repetition and elaboration on the same arguments.

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<sup>37</sup> See *supra* at p. 3-4.

***B. The NPRM should propose to prohibit future exclusivity clauses in agreements, and to prohibit the enforcement of existing agreements.***

The Commission should follow its example from the MDU Order, by proposing in a Notice of Proposed Rulemaking a rule to prohibit carriers from including or enforcing in their arrangements with device manufacturers any terms that prohibit the device manufacturer from offering the device through other wireless carriers.<sup>38</sup> The Commission should propose to abrogate such terms in existing contracts, by immediately permitting all device manufacturers to enter into negotiations with all carriers (should the device manufacturer so desire) to offer their devices. Such a rule would be clear and not subject to the ambiguities raised as objections by Verizon.<sup>39</sup> Additionally, such a rule would not be easily evaded as Verizon contends.<sup>40</sup> Even if a carrier were to invest the costs necessary to overhaul their entire nationwide network to make it slightly technologically different, this would have negative repercussions for the carrier by forcing all handset manufacturers to tune their existing devices to work on the new network. Additionally, nothing would prevent the manufacturer from making multiple versions of the device with the same features but tuned to different networks, as device manufacturers routinely do for devices not subject to handset exclusivity arrangements.

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<sup>38</sup> Although the question of “colors” of device seems somewhat trivial for policy purposes, we do not propose that all colors of all devices be protected. If a carrier wants to have an exclusive on one color of device, we would not oppose. However, if certain functionalities of a device are only available to some carriers, we would consider the different levels of functionality to comprise different devices, and would therefore consider that an illegal exclusivity under the rules as proposed.

<sup>39</sup> VZW at 3, 29.

<sup>40</sup> *Id.* at 30.

Respectfully submitted,

*Ad Hoc* Public Interest Spectrum Coalition

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February 20, 2009