"Competition at the Crossroads: Preventing Duopoly in Today's Wireless Marketplace"

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before the

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Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee, thank you for inviting me to testify about the state of competition in the wireless industry. I am here today on behalf of Competitive Carriers Association, the nation's leading association of competitive wireless carriers. Our association is made up of over 100 carrier members ranging from small, rural providers serving fewer than 5,000 customers to regional and national providers serving millions of customers. We also represent almost 200 Associate Members – small businesses, vendors and suppliers that serve carriers of all sizes and employ your constituents. The entire mobile ecosystem serving consumers is dependent on vibrant competition in the wireless industry at all levels. CCA's diverse membership is bound together by a shared goal for competitive policies and a shared concern over the growing market power of the "Twin Bells"—AT&T and Verizon. Through a steady stream of acquisitions, these two dominant carriers have turned what once was a robustly competitive wireless marketplace into an industry marching towards duopoly. I know several members of this Subcommittee, as well as the Federal Communications Commission ("FCC") and the Department of Justice ("DoJ"), have voiced the same concerns.

In my testimony today, I will provide a snapshot of today's wireless industry, elaborate on the challenges facing competitive carriers, and offer proposals for restoring wireless competition going forward. Indeed, policymakers have two distinct and different paths for the future of the wireless industry – allow continued market dominance by two carriers which will cement a duopoly in the industry, resulting ultimately in a heavy regulatory regime attempting to replicate the benefits of competition – or – establish a new competitive agenda for the next generation of wireless services which will fuel economic investment, job creation, innovation, and increased consumer access to all the benefits of mobile broadband. Our members are

prepared to invest, innovate, and create jobs, but they need access to critical inputs to expand and grow their businesses.

To fully appreciate where the industry stands, it is important to note how we got here. The wireless industry in the United States actually began as a duopoly in 1981, when the Federal Communications Commission divided a total of 50 MHz of cellular spectrum in each local area between just two providers, one of which was the incumbent wireline telephone company. Even with this duopoly, policies required the incumbent to support connectivity – interoperability and roaming – to prevent a monopoly. Congress broke-up this original duopoly in 1994, when it provided the FCC with auction authority that led to making available 120 MHz of PCS spectrum. That auction, along with later auctions in other spectrum bands, gave rise to a host of new wireless carriers and sparked increased competition. For many years, until the late 2000s, the wireless industry was a shining example of robust competition, with numerous carriers at the national and regional level competing to deliver steadily improving services at declining prices. From 1995 to 2009, in the FCC's first 13 reports on the state of competition in the wireless industry, the agency concluded that the industry was characterized by either growing competition or "effective competition." Policymakers hailed the wireless industry at the time as "one of the great success stories" resulting from Congress's and the FCC's efforts to establish and maintain a regulatory framework in which competition could thrive.[1]

Today, however, the gains in wireless competition over the past two decades are in danger, as the Twin Bells of AT&T and Verizon threaten to drag the industry back into a duopoly. The Twin Bells have gobbled up numerous competitive carriers in recent years, including ALLTEL, Dobson, Centennial, Rural Cellular Corporation, and a long list of others.

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[1] *See* CTIA, Interview with Kevin Martin, at 6, Wireless Wave (Fall 2005), *available at* http://www.ctia.org/advocacy/index.cfm/AID/10522.

And as AT&T and Verizon have grown, so too has the level of industry consolidation. According to the FCC's latest competition report, the wireless industry's Herfindhal-Hirschman Index (HHI) value—a common measure of consolidation—had grown to 2,873 by the end of 2011.[2] To put that in perspective, that figure is 373 points higher than the level considered "highly concentrated," and 722 points higher than the level measured in 2003, the first year the FCC calculated HHIs. The report also found that the Twin Bells together account for an astounding 67 percent of industry revenue.[3] That combined share is far higher than the combined shares for the top two firms in other "consolidated" industries. By comparison, the top two firms in the auto industry hold a 35 percent share of total revenue; the top two firms in the oil industry hold a 24 percent share; and the top two firms in the banking industry hold a 20 percent share.[4] Not surprisingly, in light of these figures, the FCC has been unable to find "effective competition" in the wireless industry in any of its last three annual competition reports.

The Twin Bells are not content merely holding a dominant position in the wireless marketplace; they have also abused their dominance by blocking competitors' access to key inputs that are necessary for a competitive market to exist. For instance, AT&T and Verizon each continue to aggregate massive amounts of wireless spectrum—which the FCC calls "the lifeblood of the wireless industry"—by using their vast resources to purchase large swaths of

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2 *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*, WT Docket No. 11-186, Sixteenth Report, FCC 13-34, ¶ 2 (rel. Mar. 21, 2013) ("*16th Mobile Wireless Competition Report*").

3 *Id.* ¶ 52.

4 *See* Free Press, *Why the AT&T-T-Mobile Deal Is Bad for America*, Mar. 22, 2011, at 1, *available at* http://www.freepress.net/sites/default/files/fp-legacy/ATT-TMobile.pdf.

spectrum. Since the start of 2012, these two carriers have attempted (and in most cases succeeded) to gain access to almost 800 licenses in bands used to offer mobile services, including nearly 300 licenses in bands below 1 GHz. Some of the most significant wireless deals in recent memory have been spectrum-only transactions, such as Verizon's 2012 acquisition of AWS-1 licenses from the four largest cable companies, AT&T's 2012 acquisition of NextWave Wireless and its substantial WCS and AWS spectrum holdings, and AT&T's 2011 acquisition of Qualcomm's nationwide licenses in the Lower 700 MHz band. The Twin Bells' spectrum holdings below 1 GHz—"beachfront" spectrum in bands ideally suited for new entrants and smaller carriers seeking to expand their coverage—are particularly extensive. The FCC estimates that Verizon holds 45 percent of the spectrum in the two major bands below 1 GHz, while AT&T holds 39 percent of the spectrum in those bands.[5] The more of this spectrum the Twin Bells stockpile for themselves, the less is available to competitive carriers. And as they continue to tighten their stranglehold on spectrum and other key inputs—like access to networks for roaming and interconnection, and access to cutting-edge, interoperable devices—the wireless industry today looks more like the duopoly of a generation ago.

The industry thus stands at a crossroads, with two possible paths forward. One option would be to do nothing, and allow AT&T and Verizon to continue swallowing their competitors, aggregating spectrum, and thwarting access to other critical inputs. Eventually, the Twin Bells' control over the marketplace would become so absolute, and competition would be so severely damaged, that a return to heavy-handed, utility-style regulation will be necessary to ensure reasonable prices and quality service. Most policymakers would not welcome this outcome, nor would CCA and its members. But the increasing dominance of a duopoly will compel a

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[5] *16th Mobile Wireless Competition Report* ¶ 129.

regulatory response if competition is not available to discipline prices, ensure responsive service, and deliver other benefits to consumers.

The other path—and in CCA's view, the far better option—would be to promote increased competition by preventing further consolidation by the Twin Bells and adopting rules to encourage a competitive framework and preserve access to key inputs. CCA has advanced concrete proposals for such reforms before the FCC and Congress. In particular, and as I will discuss in greater detail, the FCC should adopt rules to safeguard competitive carriers' access to spectrum—both by updating the "spectrum screen" used to evaluate wireless acquisitions, and by structuring spectrum auctions in a way that encourages and rewards participation by a range of competitive carriers. The FCC should also ensure that its rules preserve competitive carriers' access to networks, by enforcing roaming requirements and by reaffirming interconnection obligations. And the FCC should facilitate access to devices by restoring interoperability in the Lower 700 MHz band and by working with the Copyright Office to reinstate consumers' ability to unlock their handsets. Such measures, if adopted and implemented promptly, may well be what the industry needs to avert a true duopoly and to restore competition in this once vibrant marketplace.

Access to Spectrum

The FCC should start by ensuring spectrum is allocated efficiently, and in a way that enables wireless competition to flourish. Time and again, the FCC has made clear that access to spectrum is a "precondition to the provision of mobile wireless services" and is "critical for

promoting the competition that drives innovation and investment."[6] DOJ echoed this sentiment in a recent submission to the FCC, where it stated that soaring demand for mobile broadband in recent years has "made spectrum a critically scarce resource" for wireless carriers.[7] Both agencies also have recognized that access to low-frequency spectrum—which can provide "the same geographic coverage, at a lower cost, than higher-frequency bands"[8]—is especially important for new entrants and smaller carriers. In this vein, DOJ has urged the FCC to adopt rules ensuring that competitive carriers have the opportunity to acquire spectrum, particularly in low-frequency bands—a measure DOJ says would "improve the competitive dynamic" in the industry and "benefit consumers."[9] CCA agrees with the DOJ's assessment, and has proposed a slate of reforms to advance the procompetitive goals that I believe both agencies share.

In particular, CCA has urged the FCC to overhaul its "spectrum screen"—the tool the agency uses to identify spectrum acquisitions, in the secondary market or at auction, which may give an entity control over too much spectrum in a given area. For years, the screen has played a key role in the FCC's efforts to evaluate the effects of proposed transactions and auction design choices. But the decade-old screen, first adopted in 2003, is a poor fit for today's marketplace. Among other things, the screen fails to account for important differences between high and low frequency spectrum bands. And the screen largely ignores competitive effects at the national level, despite the FCC's recognition that those effects are vital in today's marketplace. The FCC

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6 *Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, 27 FCC Rcd 11710 ¶ 4 (2012).

7 Ex Parte Submission of the U.S. Dep't of Justice, WT Docket No. 12-269, at 9 (filed Apr. 11, 2013) ("*DOJ Ex Parte Submission*").

8 *16th Mobile Wireless Competition Report* ¶ 122.

9 *DOJ Ex Parte Submission* at 1.

must complete the Mobile Spectrum Holdings Rulemaking, currently in process, before the upcoming broadcast incentive auction rules can be established.

In light of these deficiencies, CCA has proposed targeted reforms – the FCC needs to adopt two additional screens. First, the FCC should adopt a separate screen for low-frequency spectrum as a supplement to the existing screen, which looks to all forms of spectrum held by an entity in a local area. Second, the FCC should apply a nationwide screen in addition to its analysis of local holdings. There should be a clear and predictable mechanism for adding or removing spectrum from the analysis. And finally, the FCC should apply a heightened level of scrutiny for transactions exceeding any applicable screen threshold. Such reforms not only would strengthen the screen as a tool for evaluating spectrum transactions, but also would provide the necessary certainty to entities contemplating spectrum acquisitions and increase regulatory predictability while protecting consumer welfare. The FCC should adopt these reforms as soon as possible—by the end of 2013 at the latest, and in all events before the incentive auction for repurposed broadcast spectrum is underway.

The upcoming incentive auction offers one of the few near-term opportunities to allocate low-frequency spectrum for mobile broadband, and so presents an excellent opportunity to stoke the embers of wireless competition. A missed opportunity to ensure that all carriers can have a meaningful opportunity to participate in an auction pushes the industry further towards a duopoly. As Chairman Pryor noted about the 700 MHz auction in 2008, "[h]istory will show that the way the FCC structured the auction basically helped the two big wireless companies to the detriment of competition in this country" by allowing the two largest carriers to outbid

opponents and "basically control the auction after that."[10] With the upcoming incentive auction, the FCC has the authority, as recently reaffirmed by Congress, to "adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition."[11]

Accordingly, CCA has urged the FCC to structure the upcoming incentive auction so that carriers of all sizes have a meaningful opportunity to acquire spectrum where needed. The FCC must adopt a spectrum auction process which ensures all carriers have a real opportunity to participate. All carriers, including smaller carriers, must have an opportunity to bid, win, and integrate much needed spectrum into their existing networks. In particular, and consistent with last year's Spectrum Act, the FCC should ensure that the two largest carriers have an opportunity to bid on spectrum where needed but cannot aggregate most of the spectrum made available, to the detriment of competitors.

CCA also supports the use of bidding credits and related mechanisms that would promote participation by rural, mid-size, and regional carriers. Importantly, the FCC must make spectrum available in small geographic areas, such as Cellular Market Areas (CMAs), that can be used by competitive carriers, and must not include blind and package or combinatorial bidding practices that may prevent smaller carriers from accessing spectrum even if licensed in small geographic sizes. These measures will be vital to the success of the auction, and by extension to the advancement of competition in the wireless industry. This will also increase potential revenue from the auction by encouraging participation from the maximum number of bidders, while also

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[10] John Eggerton, *Pryor: FCC 'Fouled Up' Spectrum Auction*, Broadcasting & Cable, Feb. 26, 2008, *available at* http://www.broadcastingcable.com/article/112604-Pryor_FCC_Fouled_Up_Spectrum_Auction.php.

[11] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6404, 126 Stat. 156, 230 (2012).

providing carriers with much needed spectrum to compete in a data hungry market. Indeed, looking back at the 700 MHz auction, blocks of spectrum made available in smaller geographic areas generated more revenue on a MHz-pop basis than larger geographic areas. The Upper C Block, auctioned in 12 partitions (REAGs), sold for only $0.76/MHz-pop. The Lower A Block, auctioned in smaller areas through 176 partitions (EAs), sold for $1.16/MHz-pop. Yet the highest grossing spectrum block was the Lower B Block, auctioned in 734 partitions (CMAs) for $2.68/MHz-pop. With smaller geographic areas, more carriers are able to bid for licenses, and the increased number of bidders leads to higher revenue.

Additionally, policymakers should consider new ways of encouraging full spectrum usage in rural areas. For example, the Rural Spectrum Accessibility Act introduced last Congress by Senators Snowe and Klobuchar would encourage carriers to partition or disaggregate spectrum not currently being used in areas to make it available for use by competitive carriers wishing to serve those rural markets. While additional spectrum is needed to allow the industry to keep up with consumers' demands, it is important for policymakers to consider all opportunities including on the secondary market to make full utilization of spectrum currently allocated for mobile broadband.

A close look at current spectrum utilization is not complete without careful consideration of the Federal Government's use of spectrum. I commend the work of those on this Committee, in Congress, and at the FCC and NTIA who continue to ensure efficient spectrum use by federal users. Congress should ensure the appropriate incentives are in place to encourage efficient federal use and to encourage reallocation of spectrum for mobile broadband use where necessary. Doing so allows taxpayers the maximum usage and return for a finite, taxpayer-owned resource. In particular, I commend the FCC's work to clear the 1695 MHz – 1710 MHz band and the 1755

MHz – 1780 MHz band to auction paired with the 2155 MHz – 2180 MHz band. This allocation would yield readily usable spectrum already in an LTE ecosystem which is internationally harmonized, encouraging investment in mobile broadband networks and maximizing revenue for the 2155 MHz – 2180 MHz band.

Access to Networks

Competitive carriers also need access to other providers' networks to offer a nationwide, interconnected service to consumers. The FCC should make it clear that the technology neutral interconnection requirements of the 1996 Telecommunications Act to provide wholesale connectivity to other facilities-based carriers remains intact. Most competitive carriers lack a national footprint, so their customers must roam on other compatible networks to receive service when outside their provider's service area. Moreover, in order to complete calls to the customers of other providers, carriers must be able to interconnect with those other providers' networks. AT&T and Verizon control (or are affiliated with) ubiquitous wireless and wireline networks, and naturally play a dominant role in the market for voice and data roaming, as well as in the provision of interconnection. Preserving access to these key network-related inputs is critical to competition, as it enables competitive carriers to provide a service of similar scale and functionality to the service offered by AT&T and Verizon, regardless of the type of technology used to transmit traffic.

On the roaming front, CCA and its members were pleased by the FCC's adoption of rules requiring wireless carriers to offer data roaming on commercially reasonable terms, and by the D.C. Circuit's decision to uphold those rules against a challenge by Verizon. But as the FCC's latest competition report acknowledges, "the ability to negotiate data roaming agreements on

non-discriminatory terms and at reasonable rates remains a concern."[12] Our members have found it particularly difficult to negotiate for roaming when they cannot discern whether the terms and conditions offered by the Twin Bells are in line with those offered to other carriers. The FCC must continue to address whether roaming agreements offered in the market are fair and economically sustainable and encourage access to roaming for competitive carriers and consumers who expect their calls to always connect.

The FCC also should protect the ability of competitive carriers to interconnect with the wireline networks of the large landline incumbents. As the FCC said in its National Broadband Plan, "[b]asic interconnection regulations . . . have been a central tenet of telecommunications regulatory policy for over a century," and "[f]or competition to thrive, the principle of interconnection . . . needs to be maintained."[13] AT&T, however, apparently does not share this view. Its wireline affiliate recently asked the FCC to waive statutory interconnection obligations in areas where it upgrades to Internet Protocol (or "IP") technology. But there is no basis to abandon these bedrock competitive protections just because of a change in technology. Quite the contrary—the interconnection mandates in Section 251 are technology-neutral, as the FCC has repeatedly stated. The FCC should reaffirm this broadly supported principle as the industry transitions to IP, and enable competitive carriers to interconnect with these next-generation telecommunications networks.

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[12] *16th Wireless Competition Report* ¶ 210.

[13] *Connecting America: The National Broadband Plan*, at 49 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

Access to Devices

Another critical input for competitive carriers is access to handsets and other devices. The FCC has recognized that "[h]andsets and devices are a central part of consumers' mobile wireless experience, and a key way by which providers differentiate their offerings."[14] For years, the largest carriers used exclusivity agreements with major device manufacturers to gain an edge over competitive carriers. AT&T was particularly successful at securing exclusive rights over popular handsets, most notably the iPhone. Only after DOJ opened an investigation into handset exclusivity agreements—with the AT&T/iPhone arrangement reportedly "at the center" of the inquiry[15]—did Verizon begrudgingly allow smaller carriers to offer these formerly exclusive handsets. So, more recently, the Twin Bells have pursued other strategies to frustrate competitive carriers' access to devices.

For example, AT&T has prevented the development of interoperable devices in the Lower 700 MHz band—that is, devices that operate in the B Block and C Block held by AT&T, as well as in the Lower A Block held by many CCA's members. Post auction, Verizon and AT&T created private band plans that were not contemplated or included in the band plan presented by the FCC leading up to the auction. Device interoperability is a prerequisite to a well-functioning wireless marketplace; it encourages innovation, gives consumers more choices, and reduces costs to end users. Interoperability also makes roaming technologically possible; non-interoperable devices simply cannot roam on other carriers' networks. But AT&T's efforts to bifurcate the Lower 700 MHz band—and to force manufacturers to develop devices that operate only on its portion of the band—have stymied device interoperability. Without a device

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[14] *16th Wireless Competition Report* ¶ 2.

[15] *See* Andrew Ross Sorkin, *Justice Department Said to Weigh Telecom Inquiry*, N.Y. TIMES, Jul. 7, 2009, *available at* http://dealbook.nytimes.com/2009/07/07/justice-deptartment-eyeing-telecom-probe-report-says/.

ecosystem for the Lower A Block, 12 MHz of broadband-capable spectrum has been orphaned, the nearly $2 billion investment made by CCA's members in that spectrum is in many respects stranded, and competitive carriers must wait on the sidelines while the two largest carriers have enjoyed a head start on deploying 4G LTE on 700 MHz spectrum throughout the country. CCA has urged the FCC to address these issues by restoring interoperability in the Lower 700 MHz band—just as has been the practice in every other spectrum band designated for wireless telecommunications services since the early 1980s. Thorough economic analysis demonstrates low costs and great rewards of interoperability, and real world technical tests have shown no impact on customer experience by moving to an interoperable Lower 700 MHz band. The FCC must take action on this matter in the near future to avoid further damage to wireless competition.

Not only will a clear pathway to 4G using 700 MHz spectrum expand mobile services, it will also provide critical partnership opportunities for the forthcoming First Responder Network Authority ("FirstNet") public safety broadband network. The rural and regional carriers that have struggled to gain access to the interoperable devices needed to deploy 4G LTE mobile broadband networks are the same carriers that currently provide service in rural and remote areas. Restoring interoperability and unlocking deployment in these areas creates new opportunities for FirstNet to leverage private investment and expand services for first responders throughout the nation – particularly in rural areas.

The largest carriers have also tried to frustrate device access by selling "locked" handsets that cannot be used once a subscriber has changed providers. While these handsets can be "unlocked," the Copyright Office recently permitted the unlocking exemption under the Digital Millennium Copyright Act to expire. This exemption allowed subscribers to unlock their

devices without fear of violating copyright law. The decision was hugely unpopular with consumers, including over 100,000 who petitioned the White House in an effort to reinstate the exemption. The White House responded with a sharp rebuke for the Copyright Office's decision, explaining that "consumers should be able to unlock their cell phones without risking criminal or other penalties," and that unlocking is "important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs."[16] Former FCC Chairman Genachowski likewise recognized that a ban on unlocking "raises serious competition and innovation concerns."[17] I commend Members of Congress, including Members of this Committee, who have led the charge for legislation to allow consumers to unlock devices, and urge you to swiftly advance and enact such legislation.

Universal Service Fund

It should also be noted that despite years of expansion of mobile services in rural America through access to the Universal Service Fund, as well as consumers' clear preference for mobility, the FCC, in its recent reform Order, dramatically reduced the amount of funding for mobile broadband. While wireless carriers' contributions make up a significant portion of the Fund, only a small portion is used to deploy mobile broadband networks in rural parts of the country. As a result of this short-sighted policy decision, your rural constituents may not have access to the latest mobile broadband networks they desire. Future oversight should truly

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16 White House, "It's Time to Legalize Cell Phone Unlocking," Mar. 4, 2013, *available at* https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7.

17 FCC, "Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Congress Position on DMCA and Unlocking New Cell Phones," Mar. 4, 2013, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0304/DOC-319250A1.pdf.

modernize the Fund by supporting consumer preferences and technologically-neutral and cost-efficient solutions. The FCC, through its administration of the Universal Service Fund, should not choose winners and losers among technologies and businesses.

Conclusion

Policymakers have a fundamental choice to make. You can either act now to create a competitive framework in the marketplace to restore competition and all its benefits to the wireless industry, or act later, once the Twin Bells have solidified their duopoly, attempting to replicate those benefits through utility-style regulation. I submit that the first approach is the far better one, not just for competitive carriers, but also for consumers, job creation, innovation, and economic growth. Prompt action to preserve access to key inputs like spectrum, networks, and devices will allow wireless competition to flourish, leading to more choices for consumers, lower retail prices, better service, and greater innovation.

Thank you again for the opportunity to testify today, and I welcome your questions.