

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

July 6, 2009

Hon. Christine Varney
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Washington, D.C.

Hon. Julius Genachowski
Chairman
Federal Communications Commission
Washington, D.C.

Dear Assistant Attorney General Varney and Chairman Genachowski:

I am writing regarding competition in the cell phone market. Wireless telephones have become a vital means of communications for the vast majority of Americans, with over 270 million subscribers nationwide. Recently, we on the Antitrust Subcommittee have become concerned with emerging barriers to competition in an already highly concentrated market. Four carriers control over 90% of the cell phone market, and two of them collectively have a market share of 60%. I therefore believe it is vitally important that the FCC and Justice Department take action to enhance competition in this market and to remove barriers to competition preventing the emergence of new competitors.

On June 16, the Antitrust Subcommittee held hearings on rising text message prices and the state of competition in the cell phone industry generally. Our hearing came after a doubling of text message prices charged by the four largest carriers on a per message basis from 2006 to 2008. In the span of two years, the four leading carriers raised text messaging prices charged on per message basis from 10 to 20 cents per message. These lockstep price increases occurred despite the fact that it did not appear to be justified in any respect by rising costs in delivering text messages, which an expert at our hearing testified cost about 0.3 cents per message to transmit.

The cell phone companies testified that they did not coordinate their price increases in any way, and we received no evidence to contradict this testimony. Nonetheless, these identical price increases are hardly consistent with the vigorous price competition we hope to see in a competitive marketplace. Indeed, these price increases may represent a warning sign for the state of competition in the cell phone market. I am concerned that the concentrated nature of the cell phone marketplace could lead to future price increases for this and other cell phone services relied upon by millions of Americans.

I therefore urge that the Justice Department and FCC take action to ensure that the wireless telephone market is open to competition, and to remove undue barriers to entry and expansion by new competitors. With respect to the FCC, these actions include:

(i) **Strengthening Roaming Requirements** – It is essential that competitive cell phone carriers have reasonable access to interconnect with the networks of the established carriers (generally referred to as “roaming”) in order to have a fair chance to compete. In 2007, the FCC clarified that automatic roaming is a common carrier service that must be provided on just, reasonable, and nondiscriminatory terms. See Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007). But the FCC limited its decision in two critical respects, both of which are the subject of additional pending proceedings.

First, the FCC implemented the so-called “in-market exception” that permits carriers to refuse roaming agreements where the requesting carrier holds an overlapping spectrum license or lease. Because a number of licenses purchased by small and regional carriers in recent auctions are quite large, they will take years to build out -- meaning that the in-market exception in many cases results in a severe limitation or outright denial of roaming service to consumers (particularly underserved consumers whose primary access to wireless service is through small and mid-sized carrier flat-rate offerings). Several carriers have filed petitions for reconsideration in WT Docket No. 05-265 that are primarily focused on eliminating the in-market exception, and those petitions are still pending. Except for AT&T and Verizon, the entire wireless industry (including Sprint, T-Mobile, Cricket, MetroPCS, US Cellular, and hundreds of rural carriers) supports repeal of the in-market exception. I urge the FCC to repeal this exemption

Second is the issue of “data roaming,” the ability of carriers to gain roaming for data – such things as internet connections and email. These applications are essential to building a competitive cell phone service, given the millions of consumers who use “smart phones” for these applications. To date, the FCC has declined to impose any obligation for data roaming for wireless broadband. The FCC has instead sought further comment on whether automatic roaming should apply to data, but so far it has not taken any action on that score. An automatic data roaming obligation is critical to the continued growth of competitive wireless service offerings that will discipline the pricing and services of the large incumbent wireless operators. I urge the FCC to require carriers to provide data, as well as voice roaming, on just, reasonable and nondiscriminatory terms.

(ii) **Spectrum Constraints** In the 1990s, the FCC allocated a considerable amount of new spectrum for wireless services and adopted regulations to ensure that the spectrum was allocated among a range of wireless providers. Since 2001, however, the FCC has taken a more “hands-off” approach, and consequently, the nation's largest carriers have systematically absorbed smaller providers and acquired the lion's share of spectrum made available at auction. Most recently, AT&T and Verizon dominated the 700 MHz auction, paying approximately \$16 billion for new licenses -- or 84 percent of auction revenues. Small and mid-sized carriers have urged the FCC (i) to identify and

allocate additional spectrum to meet the growing demand for wireless voice, broadband and other advanced data services, and (ii) to adopt auction eligibility regulations to ensure that licenses are assigned to a range of different providers to promote competition and prevent the nation's largest providers from stockpiling even more spectrum. I urge the FCC to adopt pro-competitive spectrum policies so that new and emerging cell phone carriers can compete with established carriers.

(iii) **Handset exclusivity.** The practice of the large cell phone companies gaining exclusive deals to the most in-demand cell phones is a serious barrier to competition. Consumers are unlikely to obtain cell phone service from companies if they cannot obtain desired handsets. In 2008, the Rural Cellular Association petitioned the FCC to begin a rulemaking to evaluate exclusivity arrangements between wireless carriers and handset manufacturers. *See* Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (May 20, 2008). Earlier this month, then Acting Commissioner Copps stated in a speech that he "agree[s] that [the FCC] should open a proceeding to closely examine handset exclusivity arrangements that have reportedly become more prevalent in recent years," and instructed the Wireless Bureau "to begin crafting such an item." Remarks of FCC Acting Chairman Michael J. Copps, Pike & Fischer's Broadband Policy Summit V (June 18, 2009). I concur with this view and urge the FCC to examine this issue closely, and take action to prevent the dominant cell phone providers from gaining exclusive access to the most in-demand cell phones.

(iv) **Early termination fees.** With many consumers signing two year contracts, expensive early termination fees can constitute a substantial barrier to competition. Early termination fees should be prorated, so that consumers do not face substantial penalties for switching to a different cell phone providers. At our June 16 hearing, for example, AT&T testified that in a two year contract the \$ 175 early termination fee was reduced by \$ 5 per month, leaving a \$ 60 balance owed if the consumer terminated the contract with one month remaining. Early termination fees that are not pro-rated in proportion to the time remaining on the contract are effectively a penalty to consumers who wish to switch cell phone providers.

(v) **Special Access.** It is essential that the FCC take action to ensure with respect to reform of special access regulations. Wireless competitors depend on reasonable special access rates to the incumbent phone companies' networks in order to connect their calls. A GAO Report issued on November 26, 2006 found that little competition existed for special access connections in much of the country. In 2005, the FCC released a Notice of Proposed Rulemaking to examine the regulatory framework to apply a price cap on interstate special access services. *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005). In 2007, the Commission asked the parties to refresh the record with additional information. *See* FCC Public Notice, *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, 22 FCC Rcd 13352 (2007). The

Commission has not yet acted on that issue. I urge the FCC to take action so that special access rates do not constitute an additional barrier to competition.

(vi) Commercial Mobile Radio Service Competition Report. The FCC is currently conducting its annual review of the wireless market. In preparing the Fourteenth Annual report, we strongly urge the FCC to consider a broader range of factors within its current standard framework for evaluating competition. Specifically, in considering the market structure, the FCC should conform to traditional antitrust conclusions regarding appropriate HHI levels for determining the existence of competition. The choices that matter most to consumers are the plans and providers available to them in their area. The FCC should also examine the impact of HHIs at the regional level.

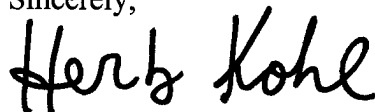
In considering the conduct of cell phone companies, the FCC should examine parallel pricing and parallel conduct from providers. In evaluating consumer behavior and choice, the FCC should consider the impact of early termination fees, lengthy contracts, and handset exclusivity arrangements. Finally, it is critical that the Commission take a close look at substantial barriers to entry and growth in the wireless markets, including limited access to spectrum, excessive costs for special access services, and loopholes in the existing roaming regulations.

FCC action on these items can remove unnecessary barriers to competitive and ensure a competitive cell phone market for the benefit of consumers. I look forward to working with the FCC on these issues.

With respect to the Justice Department, we urge that the Antitrust Division closely examine the cell phone industry to insure that dominant carriers do not take action to stifle competition or engage in conduct contrary injurious to competition in violation of antitrust law. I urge the Department to take all actions necessary to ensure that the market remain open to competition. I also urge that the Department closely scrutinize any future mergers or acquisitions proposed in this industry to ensure that they are not likely to cause any substantial injury to competition.

Thank you both for your attention to this matter.

Sincerely,



HERB KOHL

Chairman, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights