Electronic Frontier Foundation

July 13, 2009

Mr. Robert Kasunic
Principal Legal Advisor
Office of the General Counsel
United States Copyright Office
101 Independence Ave SE
Washington, DC
20559-6000

***In re:* June 22, 2009 Questions Posed to Cell Phone Unlocking Panelists (Classes 5B-5D) in the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2008-08**

Dear Mr. Kasunic,

Thank you for the opportunity to respond to the Copyright Office's questions of June 22, 2009 regarding our application for renewal and modification of an exemption to 17 U.S.C. 1201(a)(1) to allow owners to unlock their cell phones in order to change wireless carriers. The issue of phone portability continues to be of timely concern to other regulatory authorities, including Congress and the Federal Communications Commission ("FCC"). For example, last week, the Wall Street Journal reported that the U.S. Department of Justice ("DOJ") is investigating whether telecommunications companies like Verizon and AT&T are abusing their market power.[1] One scrutinized area the article highlights is handset exclusivity deals, in which manufacturers and wireless companies agree that popular full-featured handsets will only be sold to large providers, just as the iPhone is only made available by AT&T. At a recent congressional hearing, smaller wireless providers complained that exclusivity deals were squeezing them out of the market, and the FCC said last month it will investigate these arrangements. Indeed, Senator Herb Kohl, Chairman of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, has sent a letter to the DOJ and FCC urging investigation into these arrangements.[2]

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[1] *See* "Telecoms Face Antitrust Threat --- Wireless Market, Generic Drugs Reviewed as Justice Department Steps Up Enforcement", Wall Street Journal, July 7, 2009, p. A1, *available at* http://online.wsj.com/article/SB124689740762401297.html.

[2] *See* Letter from Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Hon. Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice and Hon. Julius Genachowski, Chairman, Federal Communications Commission (Jul. 6, 2009), attached as Exhibit A.

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A ruling from the Copyright Office refusing to allow phone unlocking in many or all circumstances will adversely impact the ability of customers to take full-featured handsets to the provider of their choice. Such a ruling would also allow carriers with exclusive handset arrangements to perpetuate their dominant positions and interfere with commenter recyclers's ability to refurbish and reuse second-hand devices. Fortunately, the record before the Copyright Office fully supports the grant of this exemption. Wireless industry practices demonstrate that there is no connection between unlocking phones and copyright infringement, even for handsets using inexpensive chipsets, despite Virgin Mobile's contrary hearing testimony.

1. *[Part One:] Virgin Mobile USA testified that due to the inexpensive nature of the chip used on many of its subsidized handsets, there was no practical or cost-effective way to use separate technological measures to protect (1) the firmware and (2) the copyrighted works (such as ringtones, wallpaper or screensavers) contained on its handsets. Do any other manufacturers use the same or substantially similar chipsets but with separate protection measures on (2)?*

[PART ONE RESPONSE]: We believe that Virgin's testimony on this topic was incorrect or misleading. According to commenter's counsel Granick's interview with Carmi Levy, an independent technology analyst and journalist reporting on the handset market, almost every phone chipset sold today is hardware capable of implementing file-specific digital rights management (DRM) separately from the SPC or MSL carrier locks typically used to prevent an owner from switching carriers. Additionally, Virgin Mobile and other carriers using devices incorporating the very same chipset as Virgin's least-expensive handset implement separate DRM on ringtones or other "userland" content in addition to the SPC and/or MSL codes. Indeed, LG, Samsung and Kyocera have all manufactured handsets using the same chipset, Qualcomm's MSM-6050, while including DRM, as described below. Because other carriers implement DRM on the same inexpensive chip, we believe there are practical and cost effective ways to control access to ringtones, wallpaper and the like, while also permitting a DMCA exemption that does not interfere with carrier-switching.

The following information in response to Question 1 was developed by Attorney William Quirk of the law firm of Tuggey Rosenthal Pauerstein Sandoloski Agather LLP. Attorney Quirk has researched the chipset used on Virgin Mobile's least-expensive phone and the following information is the result of that research.

Background Regarding Controlling Access to Informational NAM Files: Unlocking the SPC and/or MSL allows the user to reprogram the CDMA handset's settings such as the Preferred Roaming List (PRL) and other Number Assignment Module (NAM) files – files that store a device's phone number and other firmware settings in non-volatile memory and that are used for switching carriers and adjusting network access features. These settings are designed by the handset manufacturers to be changed by the carrier on whose network the handset is used. When these settings are changed, the user can operate the phone on a different network, including running the

bootloader software, firmware, the operating system, and any other non-disabled applications or userland content.

Carriers in some instances implement the SPC and/or MSL not to prevent customers from switching carriers, but to ensure that customers do not inadvertently change these settings since, if these settings are changed, the handset may not work on the original carrier's network. This is why Verizon Wireless sets its SPC code to all zeros and advertises the code, rather than have no code at all. In this way, post-paid Verizon handsets are sold "unlocked," but customers are protected from accidentally modifying important network settings.

DRM Implementations With Same Chipset as Virgin Mobile's Least-Expensive Phone: Most if not all chipsets are designed to implement not only SPC and MSL locks but also file-specific technological protection measures (digital rights management or "DRM") to restrict access to userland content in specific application files or groups of files (both in firmware and elsewhere), such as ringtones, melodies, wallpaper, games, or the like.

Judging from a recent Internet search, Virgin Mobile's least-expensive phone is Kyocera's K-127 handset (marketed under the "Marbl" name),[3] which uses Qualcomm's MSM-6050 chipset.[4] Even though the MSM-6050 chipset itself does not come with preloaded DRM software as a standard feature, DRM can be implemented on such chipsets. Accordingly, we believe that Virgin Mobile could readily use DRM with the MSM-6050 chipset used in the Kyocera K-127.

Indeed, the same Qualcomm chipset has been used in dozens of other handset platforms,[5] some of which are currently or were marketed by carriers such as Sprint,

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[3] Virgin Mobile's advertisement at http://www.virginmobileusa.com/phones/phoneDetail.do?skuId=VMK127 states that new customers can get a free Marbl [K-127 handset shown] with purchase of $9.99 Marbl Airtime Package; see also http://www.kyocera-wireless.com/marbl-phone/index.htm for more description of the Kyocera "K127" "MARBL" Phone.

[4] Virgin Mobile states that the Marbl uses the MSM-6050. http://virginmobileusa.marketwire.com/easyir/mgmtdetails.do?easyirid=13135DE328B72AB2&version=live&mgmtsectionindex=4&src=y&tmplid=14_details. Additionally, Attorney Quirk opened and inspected a K-127 handset, and observed the Qualcomm chip inside labeled MSM-6050. See also www.phonescoop.com, stating that the MSM-6050 is used in the Kyocera K-127.

[5] Based principally on on-line research at www.phonescoop.com and other miscellaneous Internet sites, the same Qualcomm MSM-6050 chipset has been identified by Attorney Quirk to have been used in each of the following handset platform models: LG's CX-5450, LG-3280, LX-125, LX-140, LX-150, LX-225, LX-240, NX-225, PM-240, PM-325, VI-125 and VX-5200; AUDIOVOX 8610, 8612 & 8920; CASIO G'Zone S;

Alltel, TracFone, US Cellular, Cricket, and MetroPCS, as well as a number of smaller regional and rural carriers. Based on our information, we believe that virtually any of these models can be equipped with some form of DRM separate and apart from SPC, MSL or any universal access control that may be used to prevent switching of a handset from one carrier to another.

One example of a handset that uses DRM separate from its carrier lock is Virgin Mobile's Oystr (KX9D platform made by Kyocera), which also uses the Qualcomm 6050 chipset.[6] By connecting a computer to the phone and using a universal Phone Servicing Tool (PST) to view and manipulate its files (much like using a file explorer on a desktop computer) it is readily apparent that some of the files are protected by DRM. The images in Figures 1 and 2 are different screen-shots generated by using such a PST to show both accessible sound files (Figures 1 and 2) and inaccessible sound files (Figure 3) on the same Kyocera handset. As shown in the first and second screen-shots, files in the Default Ringer Folder of Virgin Mobile's Oyster handset are readily accessible to be copied. Figure 2, accordingly, shows how the particular file named "walk_the_bubble.pmd" can be readily copied.

KYOCERA K127, K325, KX9D & KX13; MOTOROLA V810 & W315; SAMSUNG A600, A620, A660, A760 & A920; SANYO 2300, 2400, 3100, 4920, 4930, 5400, 5500, 7300, 8200, & MVP; and UT Starcom's 120SP, 8915 and UT-7126.

[6] Virgin Mobile states that it uses the MSM-6050 chipset in the OYSTR platform: http://virginmobileusa.marketwire.com/easyir/mgmtdetails.do?easyirid=13135DE328B72AB2&version=live&mgmtsectionindex=5&src=y&tmplid=14_details. More information on the platform may be viewed at http://www.kyocera-wireless.com/oystr-phone/ and at http://www.phonescoop.com/phones/phone.php?p=1022.

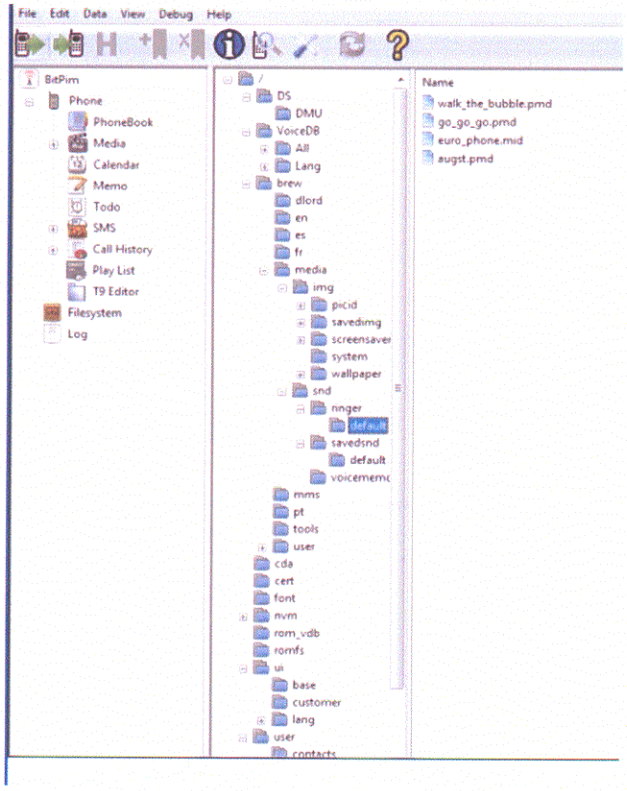

Figure 1 – Files in Default Ringer Folder are Not Protected by DRM

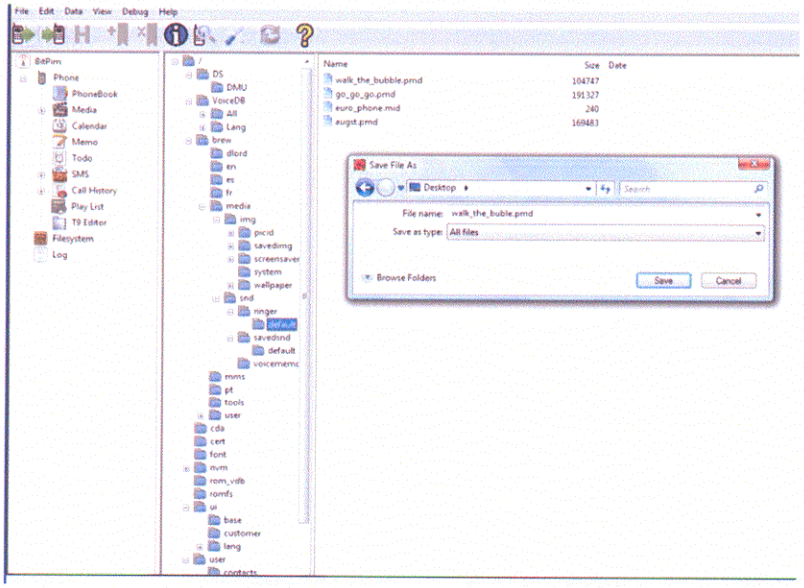

Figure 2 – Default Ringer Files Can Be Copied and Saved

In contrast with the folder shown in Figures 1 & 2, the same handset has a separate sound folder with twenty-four files that are protected by DRM. Such file-specific DRM is shown in the appearance of an "exception" error when the user attempts to copy any of the files in the selected folder. Figure 3 particularly shows the exception

error appearing on the right side in the screen when the user attempts to copy the "freeway.mid" sound file. Hence, the same handset that has unprotected files in the default ringer folder (as shown in Figures 1 & 2) also has DRM that effectively prevents copying of files in the predefined ("predef") user sound folder shown in Figure 3.

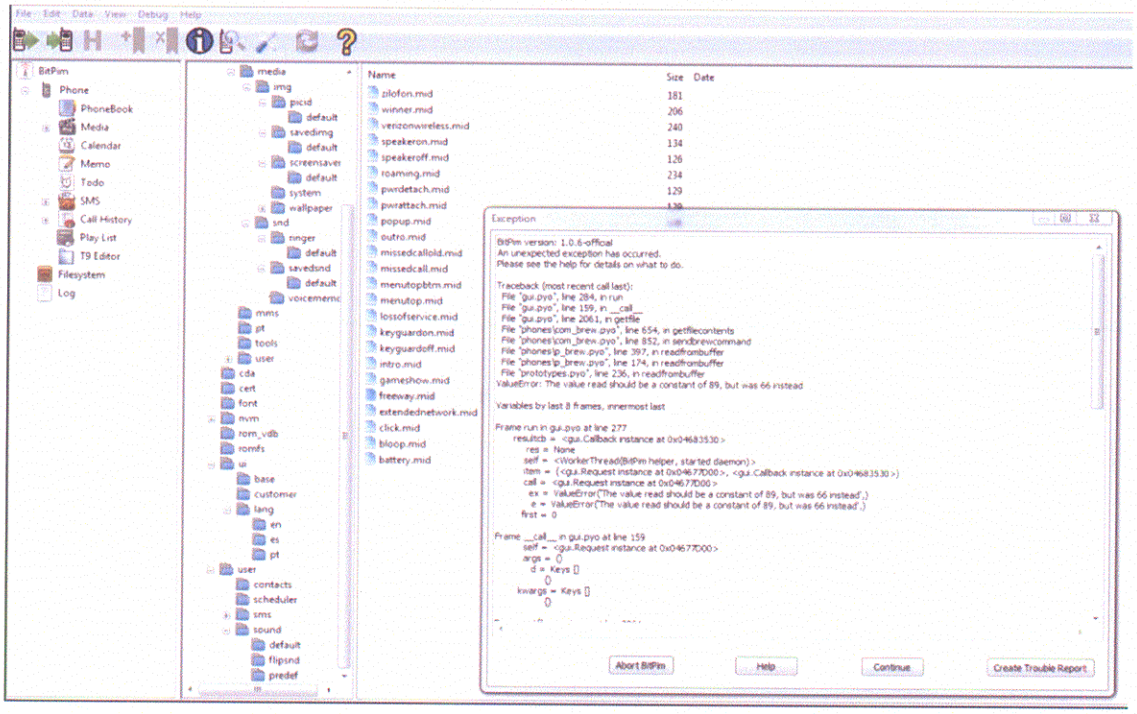

Figure 3 –DRM for Sound Files on a Qualcomm MSM-6050 Chip

The capacity of the Qualcomm MSM-6050 chip to be programmed with DRM is demonstrated by the fact that sound files in the default ringer folder can be copied while sound files in the predefined user sound folder cannot. Hence, we believe Virgin Mobile has already implemented DRM on a handset (Kyocera's Oystr) that uses the very same chip as in Virgin's least-expensive Marbl handset.

Moreover, the Kyocera Oystr handset is just one example of how DRM is implemented on the same chipset as Virgin Mobile's least-expensive handset. We have also confirmed that Sprint's VI-125 handset made by LG and Samsung's A645 platform have implemented file-specific DRM with the Qualcomm MSM-6050 chipset.[7]

Because Virgin Mobile has already been able to implement file specific DRM on the same Qualcomm MSM-6050 chipset as in Virgin's cheapest handset, and because

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[7] Confirmation on the VI-125 was by Attorney Quirk's independent testing. Confirmation on the A645 may be found at the following site: http://www.mobilemultimedia.be/en/uaprof/specification-uaprof-Samsung-SCHA645-3276.html (referring to the handset's DRM Class as Forward Lock and OMA download as Yes.)

LG, Samsung and Kyocera (which make the vast majority of handsets offered by Virgin Mobile) have all manufactured handsets with file-specific DRM using that same chipset, we believe inexpensive chipsets pose no technological barrier to separating carrier locks from DRM on content.

> *[Part Two:] Are equally or nearly-equally inexpensive chipsets available that can accommodate such separate technological measures? In other words, in order to control cost, is it necessary to protect different copyrighted works contained on such handsets with one technological protection measure that controls access?*

[PART TWO RESPONSE]: Based on Attorney Quirk's investigation and Attorney Granick's interview with Analyst Levy, we believe that DRM can be implemented on the vast majority, if not all chipsets sold today, including the chipsets used in Virgin Mobile's most inexpensive handsets. We also believe that in the future equally inexpensive chipsets will accommodate separate DRM. For instance, Qualcomm's next-generation chipset, the QSC-6055, also supports file-specific DRM. Given the numbering, we assume that the 6055 is meant to be comparable to the 6050.

2. *At the hearing in Palo Alto, representatives of Virgin Mobile USA stated that more information would be supplied to the Register in regard to the following question:*

   MR. CARSON: Which of your exclusive rights under Section 106 of Title 17 of the U.S. Code are being infringed when the customer takes that handset, switches to another service and uses the user interface, listens to the ring tones, whatever?
   MR. LURIE: I'd like to have this filed under written submission.

   Please respond to this question.

None of Virgin Mobile's exclusive rights are infringed when the customer uses her handset, including ringtones or user interface on another service. First, Virgin Mobile will only very rarely hold copyright in ringtones, which are almost always snippets of popular songs owned by the record labels and music publishers. Second, even for those few ringtones or for any user interface elements in which Virgin Mobile might own copyright, none of its exclusive rights are infringed when a user uses her phone on a different service.

Here, the userland content is not copied, but remains on the phone. The user creates no derivative work, as the content is not altered. There is no distribution. There is no public performance or display. There is no digital audio transmission. The ringtones merely play when the phone rings, and the user interface is merely viewed by the handset owner when she uses the phone. To the extent that any of Virgin Mobile's exclusive rights are implicated, 17 U.S.C. § 117 authorizes the owner of a copy of a computer program to make a new copy or adaptation as an essential step in the utilization of that program with a machine.

3. *Do carriers, other than Virgin Mobile USA, use separate technological protection measures to protect (1) the firmware, bootloader, or operating system and (2) other copyrighted works contained on, or capable of being added to the handset, e.g., ringtones, music, motion pictures, or software applications? If so, which carriers?*

Verizon Wireless, the nation's biggest CDMA carrier, uses file-specific DRM to control access to ringtones, but does not lock its phones. This vividly demonstrates that DRM on ringtones and other userland content is not tied to carrier locks for the vast majority of CDMA handsets sold.

Moreover, all GSM phones rely on different technological protection measures to lock the handset to a carrier than they do to control access to content on the handset. The SIM lock implemented in GSM handsets only controls whether the handset will accept a sim card from another carrier. DRM on ringtones and other content is entirely and always separate. Therefore any handset sold in the United States by AT&T or T-Mobile uses DRM separate from the carrier locks. The iPhone is but one example of such a GSM phone.

4. *Which carriers unlock handsets for the owners of the handset, so that handset owner can switch carriers? Under what circumstances or conditions are the handsets unlocked, if any?*

To answer this question, commenters' attorney Granick spoke with Attorney Scott Bursor who has been a plaintiffs' attorney in multiple class actions challenging the locking policies of large providers.[8] Attorney Bursor is very familiar with the unlocking practices of providers as a result of his involvement in these cases.

Verizon Wireless, the nation's largest CDMA carrier, sells all its post-paid phones with the SPC lock set to all zeros, and freely distributes that information. In this way, the handsets are basically unlocked. This practice is pursuant to a court settlement effective November 2007 in the matter of *Nguyen, et al., v. Verizon Wireless*, Alameda County Superior Court, Case No. RG 04137703. The settlement requires Verizon to disclose its phone lock code to consumers, assist customers with non-Verizon handsets to activate them on the carrier's network where possible, and notify retailers of these policies. Verizon's unlock policy conforms with United States communications policy.

As the Federal Communications Commission Chairman Kevin Martin said following the *Nguyen* settlement:

I was pleased to hear the announcement by Verizon Wireless of its plans to

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[8] See website for Law Offices of Scott Bursor, available at http://bursor.com/class_action.htm.

> introduce a new option for customers throughout the country–an option that will allow customers to use any device and to use any applications that they choose on the Verizon Wireless network. As I noted when we adopted open network rules for our upcoming spectrum auction, wireless customers should be able to use the wireless device of their choice and download whatever software they want onto it. I continue to believe that more openness—at the network, device, and application level—helps foster innovation and enhances consumers' freedom and choice in purchasing wireless service.[9]

Sprint is subject to a nearly identical 2007 settlement in the matter of *Zill v. Sprint Spectrum*, Alameda County Superior Court, Case No. RG03114147. However, that settlement has not yet gone into effect because all appeals are not yet resolved. Commentor's information is that Sprint currently will unlock a customer's phone at the end of their two year term, or if they pay the early termination fee.

T-Mobile provides unlock codes to customers if customers have 90 days of active service and meet a variety of other unspecified requirements. Analyst Levy and Attorney Bursor, both familiar with T-Mobile's practice, say that customers are not informed of the policy, it is not written in the contract, and that those seeking to unlock their phones basically have to cross their fingers when they call customer service.

Cingular and AT&T do not unlock their handsets. Class action challenges to these practices have been pending for approximately six years. See *Meoli v. VIVA Wireless*, No. RG03086113 (Cal. Super. Ct. Alameda County, filed March 12, 2003), *Mendoza v. Cingular Wireless LLC*, No. RG03114152 (Cal. Super. Ct. Alameda County, filed August 23, 2003.

5. *Which carriers will lock a handset in some way in the course of providing service for an unlocked phone or an unsubsidized phone, if any?*

According to Attorney Bursor, if a customer seeks to activate an unlocked phone on a new service, the new carrier will not lock the handset. However, every carrier treats subsidized and unsubsidized handsets identically. If a customer purchases a handset from a carrier, regardless of whether it is subsidized or unsubsidized, the carrier will treat the handset as it treats every other handset it sells. In other words, carriers that lock will lock every handset they sell regardless of subsidy. This practice makes clear that locking is a matter of business strategy, and not merely a matter of the carrier recouping subsidies on handsets it sells.

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[9] Chairman Martin's Statement On Verizon Wireless's Plans To Introduce An "Any Apps, Any Device" Option For Consumers In 2008, November 27, 2007, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-278410A1.pdf

We thank you for the opportunity to participate in the rulemaking and to respond to these questions.

Sincerely,

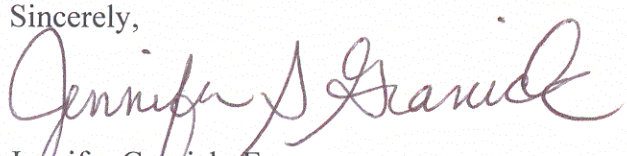

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EXHIBIT A

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

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