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AN EXAMINATION OF COMPETITION IN THE WIRELESS INDUSTRY

THURSDAY, MAY 7, 2009

House of Representatives,

Subcommittee on Communications, Technology,

and the Internet,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2123, Rayburn House Office Building, Hon. Rick Boucher [chairman of the subcommittee] presiding.

Present: Representatives Boucher, Markey, Rush, Eshoo, Doyle, Inslee, Christensen, Castor, Space, McNerney, Welch, Waxman (ex officio), Dingell, Stearns, Upton, Shimkus, Shadegg, Blunt, Buyer, Radanovich, Walden, Terry, and Barton (ex officio).

Staff Present: Roger Sherman, Chief Counsel; Pat Delgado, Chief of Staff for Representative Waxman; Tim Powderly, Counsel;

Shawn Chang, Counsel; Greg Guice, Counsel; Sarah Fisher, Special Assistant; Amy Levine, Counsel; Neil Fried, Minority Counsel; Amy Bender, Minority Counsel; and Sam Costello, Minority Assistant.

Mr. Boucher. The committee will come to order.

The movement of personal communications to mobile services is dramatic and accelerating. Just this week, it was announced that, for the first time, the number of homes having only a cell phone and no landline service now exceeds the number of homes having only a landline and no cellular service. Daily, new, attractive, and useful applications are coming to wireless services, and data rates continue to increase, ensuring that consumers can obtain faster access to mobile applications.

Today the subcommittee is beginning its examination of possible ways in which Federal telecommunications policy may be adjusted in light of these developments, with the goal of enhancing the consumer experience and facilitating the future growth of mobile services. Our goal is to develop on a bipartisan basis legislation that will make timely needed policy changes respecting mobile services, and as we construct the measure, we intend to consult with both consumer representatives and cellular telephone companies.

This morning, we begin this process by surveying possible areas in which policy changes may be needed. Today most Americans can choose among wireless service providers that offer a truly nationwide service. It is not uncommon for people to live in one State, work in another State, and travel to many other States, all while using their cellular telephones. These consumers expect and

deserve the same useful features and quality of service to be provided no matter where in our Nation they may be using mobile services.

Today, State governments have authority over consumer protection for wireless services, including such matters as customer billing information and practices. With a highly mobile Nation using an inherently mobile service with a truly national footprint, I think it is hard to argue that for millions of mobile users, one State's consumer protection standards are particularly relevant to that user to the exclusion of others.

The mobile industry presents a compelling example where a uniform national set of consumer protection standards would be more relevant to today's patterns of living, work and travel. In exchange for meaningful national standards, the States would be preempted from standard setting but, as a practical matter, should have enrolled in dispute resolution and standard enforcement.

Another clear need is for the identification of additional spectrum that can be made available in the future for commercial wireless services. As more people use wireless devices and as advanced applications require ever higher data rates over time, additional spectrum will be needed in order to accommodate projected growth. Our legislation should direct that NTIA undertake a survey of possible new spectrum that could be auctioned in the future for that future growth.

Other possible subjects of interest may include modifications

to the rules relating to cellular tower siting, particularly where the application is to place transmitters on existing structures that already have transmitters attached.

We should also examine whether the rules relating to roaming agreements should include data as well as voice services, which are covered by roaming agreement requirements presently.

We should examine whether policy adjustments are needed to assure the adequate availability of backhaul in order to accommodate the growing volume of cellular traffic, and whether any policy adjustment is appropriate to assure that the newest handsets are available to a wider group of cellular providers.

One relevant question would be whether a wider use of the requirements that the Commission imposed last year on the auction of the C-block could be a creative and perhaps helpful way of addressing that need.

The testimony of today's witnesses on these and other legislative avenues we may consider pursuing will be very welcomed.

And I want to say thank you to our witnesses for taking part in our discussion this morning.

Members will note the presence at the table of a variety of consumer representatives and also cellular telephone companies. Perhaps members have noted the absence of the two largest cellular telephone providers, AT&T and Verizon, from our conversation today. I want to note that invitations were extended to both of

those carriers. Both wanted to attend, but the witnesses who they wanted to testify were not available because of other previously scheduled company events that required those witnesses' attendance. Both companies have been invited to submit their comments for this record, and I do anticipate their being a part of the record of today's hearing accordingly and of also being a part of any future conversations that we have on the subject of structuring provisions for legislation addressing local services.

At this time, I am pleased to recognize the ranking Republican member of the subcommittee, the gentleman from Florida, Mr. Stearns, for his opening statement.

Mr. Stearns. Good morning, and thank you, Mr. Chairman, for holding this hearing.

As you pointed out, the wireless industry has become one of the fastest growing and most competitive sectors of the United States economy because Congress has allowed consumers to rule the market.

Now, the way in which consumers use wireless services varies widely from person to person, and thus, obviously, we should resist imposing a one-size-fits-all regulation that would likely reduce choice and innovation.

The industry has transformed from an all-analog duopoly to almost an all-digital, multi-carrier industry where consumers can choose from four national providers and over 100 regional or local providers with a variety of plans and devices at a range of prices

to meet the consumers' needs.

Indeed, more than 99 percent of the consumers have one or more wireless carriers to choose from, while 90 percent have four or more choices. So, obviously, consumers are the big winners here.

Between 1993 and 2008, the cost per minute has dropped to 4 cents from 44 cents, and the number of wireless subscribers increased from 11 million to 270 million, an increase of over 2,000 percent.

Wireless technology will, obviously, transform our lives from health and education to banking and transportation. Imagine if an EMT at an accident site can send images of the scene to the ER so that trauma teams can be preparing themselves instantaneously, or if teachers could stream live video from a zoo instead of reading about animals in an elementary school textbook?

Applications in mobile banking could eventually mean that our wireless devices will replace our wallets, and airlines are already experimenting with electronic boarding passes that are shipped directly to one's handheld wireless device, saving time and saving money. We are limited by our imagination and, of course, by our temptation to regulate.

The purpose of this hearing is to focus on a variety of issues, such as handset exclusivity, wireless net neutrality, special access, and maintaining a national regulatory framework.

On the issue of handset exclusivity, some say it is

anticompetitive and limits consumer choice. However, when the iPhone was introduced, consumers flocked to AT&T, challenging Verizon, T-Mobile and Sprint to offer their own improved devices, services, and rate plans to remain competitive.

On the other hand, I sometimes hear from constituents that they would like to use their iPhone on any network that they wish. I hope our witnesses can address both sides of this very complicated issue.

Wireless net neutrality is another important issue. I have already expressed concern that wireless net neutrality can jeopardize investments in innovation. This is especially true in the wireless context since capacity constraints make the need for flexibility and traffic management all that more critical.

Also, I hope our witnesses will address special access. In 1999, the FCC allowed limited deregulation of the special access market where providers could demonstrate evidence of competition. Some now argue that the market is no longer competitive, and we should consider re-regulating. Both sides assert that the evidence proves their position. If that is the case, then perhaps we need to get all the data and resolve the issue once and for all.

Innovation is occurring because carriers are looking for ways to drive usage on their networks in this competitive environment, not because of any government mandates. For example, without any government intervention, the application market is exploding.

iPhone users have the choice of more than 35,000 apps with more than 1 billion downloads in the 9 months that they have been live. It is important to point out that this occurred without a government mandate on AT&T. Therefore, instead of imposing new mandates, we should remove existing regulatory barriers, such as the disparate, costly State regulation of service plans and fees.

In 1993, we preempted State regulation of wireless rates and entry. That decision has fueled the tremendous growth. Since then, States have created a patchwork of regulations on service and billing practices that threaten their growth. So now is the time to create a national consumer protection framework.

Finally, I would also like to request that the committee start the process of identifying where the next allocation of spectrum for commercial use will come from. These inventory efforts generally have a long life between the start of the process and when the spectrum actually comes to market. Thus, the time to start is before America's carriers are spectrum constrained. Identifying spectrum will help ensure that the U.S. wireless market continues to be the world leader.

So, Mr. Chairman, I thank you for holding the hearing, and I welcome our witnesses, and I look forward to their testimony.

Mr. Boucher. Thank you very much, Mr. Stearns.

The gentleman from Michigan, Mr. Dingell, chairman emeritus of the full Energy and Commerce Committee, is recognized for 5 minutes.

Mr. Dingell. Thank you, Mr. Chairman, and I commend you for holding today's hearing on competition in the wireless industry, a very important subject.

Although the Organization for Economic Cooperation and Development, OECD, recognizes the United States as having one of the most competitive wireless industries in the industrialized world, the continued consolidation of that industry in this country behooves us to remain vigilant in ensuring robust wireless competition.

Indeed, the fact the two largest domestic carriers, AT&T and Verizon, control 60 percent of the market alone naturally leads one to question the veracity of several conclusions reached in the Wireless Telecommunications Bureau's January 16, 2009, report; most notably that consumers continue to reap significant benefits from competition in the Commercial Mobile Radio Services, CMRS, marketplace.

As you are all aware, I have long maintained that greater competition is beneficial to consumers. Today's debate on issues related to handset availability, voice and data roaming, and special access must not lose sight of their potential to increase competition in the marketplace. I welcome the opinions of witnesses assembled here today concerning these matters, but I would like to offer a few observations of my own before engaging in that discussion.

With regard to handset availability, I continue to question

why a consumer is constrained to using a single particular handset, for example, an iPhone on only one wireless provider's network. Although I understand this is due to contractual obligations, I wonder if a consumer would not benefit from greater choice in the networks available to his handset. I also wonder what it is that the Congress ought to do about this matter. Clearly, this is a matter into which the committee should go today and at other times.

Further, given the profusion of so-called smartphones in the marketplace, I feel it is imperative that we expand roaming requirements to include not only voice services but also data services.

Lastly, with regard to special access, I would reiterate my insistence from the 110th Congress that competitive carriers, CLECs, should make the same disclosure about their facilities as must incumbent local exchange carriers, the ILECs. I think this is a very important matter into which the committee should go.

I look forward to a lively discussion of these matters and others this morning, Mr. Chairman. I want to thank you not only for your courtesy but for your vigor in addressing these questions.

I yield back the balance of my time.

Mr. Boucher. Thank you very much, Chairman Dingell.

The gentleman from Illinois, Mr. Shimkus, is recognized for 2 minutes.

Mr. Shimkus. Sorry, Mr. Chairman. I am talking about energy up here. I got distracted.

Let me just highlight the issue on the competitive nature of the cell phone industry. It is highly competitive, and the simple example I would use is that my 2-year contract expired in December. So, in my local community, there is a development called Collinsville Crossing, new, and part of that development is part of a strip of buildings which are like 10 businesses. And as I researched, in 10 of those office sections, three are full-time national carriers who are selling their products, and a fourth one is in the Radio Shack.

So what I was able to do was to visit four competitive cell phone companies within less than a tenth of a mile, and not only visit them and figure out the deal and their products and the services, but I was able to walk back and forth, comparing prices, comparing models, comparing options, until I found the provider and the equipment that not only I wanted to do at my price but also that my 16-year-old son wanted. And nowhere else, in no other industry, in that short amount of space, not even in a big mall where you may have two wireless carriers or maybe three in the little subsections, but this is in Collinsville, Illinois.

So I reject the premise that there is not a highly competitive nature to the cell phone industry. It is what makes this committee great, and it is what makes this industry so exciting for conservative capitalist Republicans, because you move

too fast for us to regulate, and I am going to stand and make sure that we don't.

Mr. Boucher. Thank you very much, Mr. Shimkus.

The gentleman from Massachusetts, Mr. Markey, is recognized for 2 minutes.

Mr. Markey. Thank you, Mr. Chairman, and thank you for having this extremely important hearing today.

Last year, when I chaired the subcommittee, we held a legislative hearing on a draft consumer protection and broadband bill, with your support and with the support of many of our colleagues. That draft bill proposed a strong nationwide consumer protection policy for wireless subscribers. It had effective Federal and State enforcement, the promotion of community broadband deployment and a plan for Federal agencies to assess their spectrum inventory and to utilize frequencies using spectrum-efficient and cost-effective technologies. This last issue holds great promise for our future innovation and job creation.

I congratulate you, Mr. Chairman, for your leadership in this area.

The wireless industry has suggested that Congress should preempt States from regulating the terms and conditions of wireless service, as it did over a decade ago, with respect to the price for wireless services. Many States have initiated attempts to take action to provide consumer protection policies for their

residents, particularly with respect to regulation aimed at wireless contract terms, early termination fees, privacy issues, and others.

To the extent that wireless service is, by its nature, an interstate service, this hearing will provide an opportunity for us to explore whether further preemption is advisable, how consumer protection can be enhanced if regulatory treatment is nationalized, and how best to ensure rigorous enforcement of consumer protection.

Since the subcommittee's hearings last year, problems posed by the current marketplace and regulatory structure have persisted with roaming arrangements among carriers; with a lack of devices available to smaller regional carriers; with respect to the portability of devices to other carriers, remaining limited or nonexistent; with a lack of clarity and uniformity with respect to billing terms and conditions; and with an inability for consumers to effectively compare plans; and for many consumers to sometimes feel trapped after buying an expensive device or for getting locked into long-term contracts with significant penalties for switching.

This is a very important hearing. I thank you for your continuing leadership, Mr. Chairman.

I yield back the balance of my time.

Mr. Boucher. Well, thank you very much, Mr. Markey.

You did excellent work on this general subject during the

last Congress. We are using the legislative draft that you assembled as the foundation for our consideration this year, and I want to thank you and commend you for that outstanding work.

The gentleman from Indiana, Mr. Buyer, is recognized for 2 minutes.

Mr. Buyer. I reserve my time for questions.

Mr. Boucher. The gentleman reserves his time and will have his time added to his question time for this panel.

The gentleman from Illinois, Mr. Rush, is recognized for 2 minutes.

Mr. Rush. Thank you, Mr. Chairman, for holding this very important hearing.

In all of my years on this subcommittee, I have always been concerned with the lack of diversity and competition in the telecommunications market. I have found the lack of diversity in the wireless marketplace to be particularly disturbing because the spectrum used by wireless companies is a public asset, owned by all of the American people and not by just these companies. I continue to be dismayed over the fact that women and minority businesses have little, if any, presence in the wireless industry.

Given that the market for advanced wireless services is rapidly growing and will likely soon displace traditional wireline telecommunication services, it is vital that we ensure diversity in the market now and not kick the can down the road for another day.

As such, Mr. Chairman, I hope that these fine witnesses who are gathered here can comment on this longstanding interest of mine, and I further hope that, with the new administration, we will finally find some public commitment to ensure that all Americans can partake in the multimillion dollar wireless industry.

Mr. Chairman, with that, I yield back the balance of my time.

Mr. Boucher. Thank you very much, Mr. Rush.

The gentleman from California, Mr. Radanovich, is recognized for 2 minutes.

Mr. Radanovich. Thank you, Mr. Chairman, for holding this hearing and for examining the competition in the wireless industry. I appreciate the effort on this.

As cochair of the Wireless Caucus with Mr. Inslee, I appreciate the opportunity to explore the ways we can work together to ensure that the wireless customers will have the most innovative, best quality services at competitive prices.

One area I believe that is hindering effective competition is tower siting. The ability to deploy wireless systems and expand services, thereby increasing competition for customers, relies on the ability to construct and place towers and transmitters. Yet 3,300 wireless siting applications are pending before local jurisdictions awaiting a decision. Approximately 760 have been pending final action for more than a year, while 180 of those have been waiting for more than 3 years.

The problem is that the Communications Act is very ambiguous about the time in which a decision on these applications has to be made, requiring only that it be done within a reasonable time frame. This potential for delaying action discourages investment and prevents consumers from receiving the full benefits that come from increased service and competition.

I am sympathetic to the demands that zoning authorities must be given enough time to properly review these applications. However, this process must have an end to it so that carriers are not continuing to be left wondering whether they will get an answer at all.

I look forward to working with the interested parties and with the committee toward a resolution to this matter.

I am also aware that there is an effort to have the FCC reset price caps for special access, and I do not believe that this is possible or should be possible until the FCC has all the relevant data on the full scope of high-capacity services.

Nevertheless, I am thrilled that this hearing is taking place, and I look forward to the testimony from the witnesses.

Thank you, Mr. Chairman.

Mr. Boucher. Thank you, Mr. Radanovich.

The gentleman from Pennsylvania, Mr. Doyle, has just returned, and is recognized for 2 minutes.

Mr. Doyle. Thank you, Mr. Chairman. I apologize.

Thanks for holding this hearing.

Mr. Chairman, you know, some people who have my cell phone number are very interested in my car. I just want to say for the record that my car warranty is not about to expire. I am not really happy that they call my cell phone, and I am not happy that they keep calling me, even though I am on a "do not call" list and even though calling my cell phone is blatantly illegal. And even though I have tried to get on these companies' "do not call" lists, they still keep calling me, so I just want to say: Stop doing that.

I hope the FTC and the FCC hunt each and every one of you down and make a lesson out of you by interrupting every one of your meals that you eat for the rest of your lives with a telemarketing call. Okay. I feel better now.

Now on to more happy topics.

Since we last looked at the wireless industry, we have seen dramatically improved customer service. Consumers generally better understand the contracts they sign and the services that are available to them.

That is not to say it is all perfect. In fact, many of us up here have had problems with our bills, and I do agree with those who say that text messages are still priced way above cost. For example, if you were to send enough text messages to fill this 1.5-megabyte floppy diskette at 20 cents a message, you would have to pay over \$2,000. If you were to send enough text messages to equal the size of an MP3 song, that would cost almost \$6,000.

But I think most of the companies have improved. One example: Verizon Wireless has successfully sued several companies for illegal telemarketing and for text message spam. I am glad to see that the company, the FTC, and the FCC are working on this problem, and I am glad to see that most of the carriers have clearer bills and prorated contracts.

Mr. Chairman, if you decide to move a national framework bill, I look forward to seeing that. It will give consumers across America peace of mind with a baseline of reliable consumer protections. Thanks for your patience, and I yield back my time.

Mr. Boucher. Thank you very much, Mr. Doyle.

The gentleman from Oregon, Mr. Walden, is recognized for 2 minutes.

Mr. Walden. Thank you very much, Mr. Chairman. I appreciate this hearing as well.

A lot has already been said about the positive competitive nature of the wireless marketplace.

I would like to ask unanimous consent to put in the record a Consumer Reports story I found very interesting on this issue, dated January of 2009, which our colleagues may find of interest.

Mr. Boucher. Without objection.

[The information follows:]

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Mr. Walden. I am one of those people who, you know, has three cell phones, Mr. Chairman, one official, one personal, one campaign, so I get experience on a lot of them.

Fortunately, I have not been called about a car warranty yet. I suppose I should not admit that, but I am not going to give out the number either.

I know that this marketplace has changed dynamically and rapidly in a way that is very positive. As rates have come down, service has been expanded, and options have increased, and so I look forward to seeing where we can help this very mature industry move forward and keep the competition going that drives down prices and that makes these devices available.

With that, Mr. Chairman, I yield back.

Mr. Boucher. Thank you, Mr. Walden.

The gentlelady from the Virgin Islands, Mrs. Christensen, is recognized for 2 minutes.

Mrs. Christensen. Thank you, Mr. Chairman and Ranking Member Stearns, for holding this hearing to examine issues related to wireless competition in our country.

The wireless industry has a tremendous impact on the U.S. economy. It includes about 600 companies with a combined annual revenue of over \$110 billion. It is projected that, by 2016, this revenue will increase to \$427 billion annually.

However, some argue that the industry is highly concentrated

with four national wireless carriers earning about 85 percent of the industry revenue and two controlling 90 percent of special access. It is important to preserve competition within the wireless industry in order to ensure the consumers, especially in rural areas and in places like the U.S. Virgin Islands, that I represent, have access to reasonable rates and to the best of services.

Competitive local exchange carriers, such as the ones testifying today, rely heavily on the incumbents for services like special access. Yet they are limited in options for service providers. This inevitably raises prices for the CLECs and makes it difficult for them to remain competitive.

Mergers also can pose a significant threat to competition, especially if the conditions are not imposed and then implemented. The wireless industry is thriving and steadily growing at an enormous rate, but for some carriers, it is still difficult or virtually impossible to compete in this industry.

So I look forward to hearing from our witnesses on this issue and on the recommendations for keeping the industry competitive, and I thank them for being here.

Mr. Boucher. Thank you very much, Mrs. Christensen.

The gentleman from Nebraska, Mr. Terry, has waived his opening statement and will have additional question time added.

The gentleman from Michigan, Mr. Upton, is recognized for 2 minutes.

Mr. Upton. Well, thank you, Mr. Chairman.

I just want to say that I noticed today the same stats that you apparently cited in your opening statement that, for the first time, there are more American families with wireless phones than with hardline phones, and we know that all families are really struggling, that all American families are really struggling in these very tough economic times. They are looking for any savings that they can in their household budgets.

And thanks to more competition, providing more spectrum, something that this committee did in lifting many of the burdensome regulations, the cost to families has gone down, and we can congratulate many in this room for seeing that happen.

I would just say to Mr. Doyle, who has stepped away, maybe he is listening until the anteroom, there is a provision in most contracts, at least with mine. I have two teenagers. There is such a provision as an "unlimited text message" section, and I think it is about 4 bucks a month. I would suggest it, as it has saved me a lot of money after the first abuse of my son, Stephen.

Thank you. I yield back my time.

Mr. Boucher. Thank you very much, Mr. Upton.

The gentleman from California, Mr. McNerney, is recognized for 2 minutes.

Mr. McNerney. Thank you, Mr. Chairman, for holding this important hearing.

I am interested in today's hearing because of how dynamic the

industry is. We have seen a tremendous transformation in the last decade or so. I would like to see that competition continue, and I want to make sure that Federal regulation is not part of the problem and that it is part of the solution. So, right now, there does seem to be a consolidation going on in the industry, and I am looking forward to seeing what you have to say about what that is doing to the competition.

In particular, the handset exclusivity or tower siting, are those issues that are part of the problem or do we need to look at how those are being regulated right now?

So, with that, I yield back.

Mr. Boucher. Thank you, Mr. McNerney.

The ranking member of the full committee, the gentleman from Texas, Mr. Barton, is recognized for 5 minutes.

Mr. Barton. Well, Mr. Chairman, I will not take that time. I am going to submit my full statement for the record.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Mr. Barton. I am a three-cell-phone person if you count BlackBerrys. In my immediate family, there are seven. We contributed to that \$75 billion of revenue fairly substantially last year, and we enjoy it. I am told that there are about 280 million cell phone customers, which is almost one per person. This is obviously an industry that is thriving. There is consolidation going on. That is not necessarily a bad thing. We have two market participants that each have, I think between them, the top two have about 60 percent of the market.

The thing that I would bring to the committee's attention is this issue of States regulating terms and conditions. If you want to call it a loophole, we left that open several years ago. I think this subcommittee would be wise to take a look at that and to see if we do now need to set up a national regulatory framework for terms and conditions. That might help continue the growth of the industry that is thriving.

With that, I am glad we are having a hearing where we are not arguing over free allowances for CO<sub>2</sub>. So this is a good hearing, and I look forward to listening to our witnesses.

Mr. Boucher. Thank you very much, Mr. Barton. We will have a discussion later on that very subject.

Mr. Barton. Yes, I know. That is what I am afraid of, Mr. Chairman.

Mr. Boucher. The gentlelady from Florida, Ms. Castor, is

recognized for 2 minutes.

Ms. Castor. Thank you, Mr. Chairman. I will waive my opening.

Mr. Boucher. Thank you, Ms. Castor.

The gentlelady from California, Ms. Eshoo, is recognized for 2 minutes.

Ms. Eshoo. Thank you, Mr. Chairman.

And, welcome, to the panel of witnesses.

Compared to much of the telecommunications industry, the wireless sector might look like it is wildly competitive. Most consumers actually have some degree of choice for service, unlike the broadband sector, where 90 percent of Americans have two or fewer choices for service, or the wireline industry, where the choices are largely nonexistent.

Wireless technologies are bridging some of these gaps and are improving the competitive landscape, but there remain major choke points and anticompetitive practices that inhibit true competition and tilt the playing field steeply in favor of a pair of dominant carriers.

I think my colleagues are aware of whom I speak, and I am disappointed that Verizon and AT&T are not here today. I hope that they will decide to come in the future. After all, the top three wireless firms control nearly 80 percent of the wireless phone business in America. That is a real stronghold.

A particular concern I have in the wireless industry is the

market for special access services. Special access is the high-speed middle-mile between the Internet backbone for wireless phone and data towers, hospitals, banks, retailers, and other medium and large businesses. For wireless carriers, the cost of special access carriage is up to a third of the expense of running a wireless tower. Special access is a significant choke point in the telecommunications system since Verizon and AT&T control 80 to 90 percent of the special access market nationwide.

In 1999, the FCC moved to deregulate special access, and not surprisingly, with such limited competition, prices have skyrocketed. Recent data indicate that, for the three large, regional Bell companies, the rates of return on special access range from 15 to 38 percent.

In 2005, the FCC initiated a proceeding to review special access rates. Four years later, the Commission's review is still pending.

In November 2006, the GAO issued a report entitled, right here, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition and Dedicated Access Services." I think Chairman Martin must have missed that one.

So I am pleased that the Senate has finally scheduled hearings to confirm a new chairman of the FCC. I hope the Commission, and I would urge them, pursues this proceeding aggressively and determines where there is actual competition and fair pricing in this important market.

I also want to mention one other important competitive issue in the wireless industry, access to spectrum. In the most recent major auction of wireless spectrum, the 700 megahertz auction last year, 84 percent of the winning bids went to Verizon and AT&T. Again, it is difficult to see how the wireless sector can be competitive when two players dominate in so many respects. There are new entrants trying to break up this dominance, and some of them happily are on the panel today, and we look forward to hearing from you.

I think another avenue for a disruptive new entrant would be the auction of the AWS-3 spectrum now lying fallow. So, again, I hope the FCC proceeds on this matter. It has been pending for over 2 years, and I hope it will finally be taken up.

So, welcome, to all of you. I look forward to hearing your testimony.

Thank you, Mr. Chairman.

Mr. Boucher. Thank you very much, Ms. Eshoo.

The gentleman from Arizona, Mr. Shadegg, is recognized for 2 minutes.

Mr. Shadegg. Mr. Chairman, other than to thank you for holding this hearing and to thank our witnesses, I will waive my opening statement.

Mr. Boucher. Thank you very much, Mr. Shadegg.

The gentleman from Vermont, Mr. Welch, is recognized for 2 minutes.

Mr. Welch. Thank you, Mr. Chairman and Ranking Member Stearns.

Thank you to the witnesses.

Vermont is a very rural State, and it has had some experience in trying to deal with some of the issues that we are going to be dealing with as a committee, tower siting, roaming, a lack of competition. Most Vermonters are actually pretty pleased with the wireless service that they get, but it is incredibly critical to our economy to have wireless service everywhere.

The Vermont legislature has passed legislation calling on doing whatever it is we can do to extend wireless throughout the State, and our goal is to achieve 90 percent of coverage. Some of us think it ought to be 100 percent. We are in the process of installing tower sites and of using some of our barns and silos to actually help us along the way. We are working on streamlining the permitting process for new telecommunication towers and antennas that will facilitate our reaching our goals, but there are many issues remaining:

The cost of wireless backhaul is obviously a big one. Roaming rates are an enormous problem for many of our users. Vermont has not been able to attract the interest of some of these larger national carriers to serve some of our most rural areas. So they are kind of skimming the good economic opportunities and are ignoring where we need a lot of help.

The progress in my State has been largely as a result of

local efforts, so we would have some significant concern about this balance between a national plan and a freezing out of the ability of States to actually play a very aggressive role in trying to extend the benefits of wireless to their citizens.

Thank you, Mr. Chairman and Ranking Member, for convening this subcommittee hearing. I yield back the balance of my time.

Mr. Boucher. Thank you very much, Mr. Welch.

Mr. Inslee was here earlier. I do not see him now. Unless he is planning to appear momentarily, we are going to turn to our first panel of witnesses. We will turn to our first panel of witnesses.

STATEMENTS OF PAUL SCHIEBER, VICE PRESIDENT, ACCESS AND ROAMING, SPRING; ROBERT J. IRVING, JR., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, LEAP WIRELESS INTERNATIONAL, INC., CRICKET COMMUNICATIONS, INC.; VICTOR H. "HU" MEENA, PRESIDENT, CELLULAR SOUTH; RAVI POTHARLANKA, CHIEF OPERATING OFFICER, FIBER TOWER CORP; CHRIS MURRAY, SENIOR COUNSEL, CONSUMERS UNION; GEORGE S. FORD, CHIEF ECONOMIST, PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES.

Mr. Boucher. I want to welcome the attendance of each here this morning. I will say a brief word of introduction.

Mr. Paul Schieber is vice president for Access and Roaming for Sprint. Mr. Robert Irving is senior vice president and general counsel for Leap Wireless. Mr. Victor Meena is president of Cellular South. Mr. Ravi Potharlanka is chief operating officer for FiberTower. Mr. Chris Murray is senior counsel for Consumers Union. Dr. George Ford is chief economist of the Phoenix Center.

We welcome each of our witnesses this morning, and we thank you for sharing your views with us.

Without objection, your prepared written statements will be made a part of our record, and we would now welcome your oral summaries and would ask that you keep those summaries to

approximately 5 minutes so that we have ample time for questions.

Mr. Schieber, we will be happy to begin with you.

If you will turn your microphone on, we will hear you better.

**STATEMENT OF PAUL SCHIEBER**

Mr. Schieber. Thank you.

Good morning, Chairman Boucher, Congressman Stearns, and members of the subcommittee.

I am Paul Schieber, vice president of Access and Roaming at Sprint Nextel Corporation. Thank you for the opportunity to testify today about competition in the wireless industry in the United States.

For years, Sprint has been a leader in the development and deployment of data services, including a 3G mobile broadband platform throughout most of its network as well as the development of 4G technology. In recent years, Sprint has spent billions of dollars to deploy its 3G EVDO network, improve its performance capabilities, and increase the array of advanced services that are available to consumers through its mobile broadband platform.

Through our investment in Clearwire, we are also committed to maintaining our leadership role in making 4G broadband services widely available to U.S. consumers and businesses. These mobile broadband services will undoubtedly fuel significant economic development and job growth.

Unfortunately, there continue to be several impediments to Sprint and to other wireless and wireline provider efforts to make

broadband services ubiquitously accessible and reasonably priced for all Americans.

In Sprint's view, the biggest of these impediments is the failed special access market, but I want the members of the subcommittee to know that Sprint is also supportive of efforts to reform the Nation's cell-siting laws. We need laws which make it easier for wireless carriers to collocate facilities and to share the timely approval of cell site construction.

I focus my testimony on special access reform, however, because Sprint believes that should be a top priority of the FCC and this subcommittee.

Special access is the lifeblood of the telecommunications industry. It touches virtually every communications product and is a critical part of the services consumers use every day. When consumers make wireless calls, access the Internet, send e-mails, swipe their credit cards at stores, or use automated teller machines, they are using services that rely on special access.

The importance of middle-mile facilities to the wider deployment of broadband was underscored by Susan Crawford, a member of President Obama's National Economic Council, who recently stated, and I quote, "Investments in backhaul or middle-mile networks, particularly in rural communities, will likely be particularly useful."

When Sprint and other carriers provide mobile broadband services, we need other providers to link together into a seamless

network our facilities. In the simplest configuration, a broadband provider must interconnect three segments of an end-to-end service: A local network, middle-mile facilities and a backbone network.

In Sprint's case, its local wireless broadband facilities connect a caller or a laptop user to a nearby cell site. Sprint then needs middle-mile transmission circuits to transport the customer's traffic from a Sprint cell site, between a mobile telephone switching office and, from there, to Sprint's Internet backbone network.

As has been repeatedly demonstrated by Sprint and other wireless and wireline broadband service providers as well as by reports issued by the GAO and the National Regulatory Research Institute, we are overwhelmingly dependent on special access facilities provided by incumbent LECs.

Despite the central role of special access in mobile and fixed broadband deployment and the benefits that would come from robust competition, incumbents control 91.7 percent of the special access market, and two dominant carriers, AT&T and Verizon alone, receive 81 percent of all special access revenues nationwide, generating a rate of return of up to 138 percent on these revenues in the case of AT&T. This is obviously not a competitive market.

The monthly payments for middle-mile special access Sprint incurs in its wireless business represents about one-third of the cost of operating a cell site. In most cases, Sprint simply has

no competitive alternatives to the incumbent LEC for these facilities.

Today, Sprint buys access from vendors other than the LEC at only 4 percent of its cell sites. The excessive prices that incumbent LECs charge for these middle-mile connections harm consumers, cost us jobs and divert needed jobs from Sprint's broadband network and services.

Fortunately, the FCC has the legal authority and the evidentiary record to fix the problem and spur broadband deployment. Reform of special access will promote mobile and fixed broadband growth by freeing resources that can be used to invest in new facilities, create new jobs and contribute to the Nation's economic recovery.

I respectfully ask this subcommittee to urge the FCC to act now. The special access rulemaking, now pending for more than 6 years, must be completed now to rein in anticompetitive special access prices and practices by incumbent LECs, allowing Sprint and other competitive providers to accelerate the deployment of mobile and fixed broadband. Stimulating broadband deployment in this way will generate economic growth and will expand consumer access to broadband communications, and it will do so without spending a dime of taxpayers' money.

Thank you.

[The prepared statement of Mr. Schieber follows:]

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Mr. Boucher. Thank you very much, Mr. Schieber.

Mr. Irving.

**STATEMENT OF ROBERT J. IRVING, JR.**

Mr. Irving. Chairman Boucher, Ranking Member Stearns, and members of the subcommittee, thank you for allowing me to testify today on behalf of Leap Wireless and its subsidiary, Cricket Communications. I would also like to thank you and the Congress for your leadership in appropriating stimulus funds to expand broadband services and to improve access to broadband by public safety agencies.

While you are addressing many important issues today, I would like to offer Cricket's perspective on one of them, the importance of automatic voice and data roaming to ensure effective competition in the wireless industry.

First, I would like to note for you where Cricket fits in the industry and briefly explain why small- and mid-sized carriers like Cricket promote innovation and competition. Cricket and its joint venture partners have built digital networks covering almost 84 million individuals in 32 States, and we are continuing to grow steadily. In fact, we will launch service in Washington, D.C., and in Baltimore in the next several months.

Cricket's services are specifically tailored to bring

wireless communication to consumers who have been left behind by other providers. We offer consumers unlimited voice and data wireless services for a flat monthly rate with no fixed-term contracts, no credit check and no early termination fees. We also recently introduced an affordable wireless broadband product at \$35 to \$40 per month for unlimited service. Our customer base reflects our commitment to the underserved. A majority of our customers are Hispanics, African Americans and other minorities, and our customers tend to be younger and less affluent than our competitors' customers.

We recently partnered with the nonprofit group, One Economy, to provide very low-income families in Portland, Oregon, with computers, modems and free Cricket wireless broadband for 2 years. This pilot program has been tremendously successful in promoting broadband access and in increasing the Internet savvy of program participants. One participant reported to us that he is now enrolled in an online English class. Another said that she now uses e-mails to apply for jobs. Cricket hopes to expand this program to reach other very low-income families who can benefit from affordable broadband service.

Our growth and our commitment to a diverse customer base illustrate the type of competition that Congress and the FCC has tried to promote, and our success demonstrates those innovative, pro-consumer benefits that small- and mid-sized carriers bring to the wireless marketplace. We show that being pro-consumer can be

good for business. We discipline prices in every market that we enter, and our presence prompts other carriers to offer a wide range of choices, including flat rate and unlimited usage plans like the plans we pioneered.

In recent years, we have been concerned with the increasing consolidation of spectrum and market share into the hands of the Nation's largest carriers and of the consequence of this trend for small- and mid-sized carriers and, more importantly, for consumers.

Cricket and other small, rural and regional carriers increasingly face anticompetitive business practices, such as the largest carriers' refusal to provide wholesale roaming on reasonable, nondiscriminatory rates and terms. Automatic roaming agreements play a critical role in the wireless industry. They plug coverage holes that exist in every carrier's network.

Reliable service is not simply a marketing tool. Whether we are trying to get emergency text message alerts, seek help if we have car trouble, or contact family members in the wake of a hurricane or of a terrorist attack, consumers should not suffer dropped calls when they travel away from home.

Unfortunately, the Nation's largest carriers have institutionalized policies of charging very high wholesale rates or of denying roaming services all together to other carriers' customers in the areas where the requesting customer can theoretically provide service. These behaviors weaken emerging

competitors' service offerings, in spite of the fact that the largest carriers, themselves, have relied on roaming agreements for over 30 years to expand their own networks and to improve service.

These anticompetitive practices harm all consumers by reducing competition, but they disproportionately burden disadvantaged and rural populations, many of whom cannot afford or qualify for wireless service provided by the Nation's largest carriers.

In my written testimony, I have described several proceedings in which the FCC has an opportunity to improve its current policies with regard to automatic roaming. I urge Congress to monitor these proceedings closely, to encourage the FCC to adopt a pro-consumer, pro-competitive approach to roaming and, if necessary, to consider legislative solutions that ensure all consumers have access to affordable, nationwide wireless coverage.

Thank you very much.

[The prepared statement of Mr. Irving follows:]

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Mr. Boucher. Thank you, Mr. Irving.

Mr. Meena.

**STATEMENT OF VICTOR H. "HU" MEENA**

Mr. Meena. Good morning, Mr. Chairman and members of the subcommittee. Thank you for allowing me this opportunity to testify before you today.

I have been in the wireless industry for over 20 years with Cellular South, the Nation's largest, privately held wireless carrier, serving all of Mississippi and four other southeastern States.

In my years in the wireless industry, I have seen the duopolistic role of the early cellular licenses when there were two, and only two, carriers in each market. The rise in wireless competition is a result of the later spectrum options and of the growth and innovation throughout the industry as a result of the Telecommunications Act of 1996.

However, today I am convinced that, unless things change quickly, the industry is coming full circle and is progressing or is, rather, regressing into a duopoly once again.

Today, AT&T Wireless and Verizon Wireless have almost 65 percent of the national market. Over 90 percent of the wireless market is in the hands of those two, plus Sprint and T-Mobile.

This should come as no surprise after the parade of acquisitions over the past several years.

One of the effects of the market concentration, of this market concentration, is that the largest carriers now use their market power to demand and receive long-term, exclusive agreements with device manufacturers for the latest and greatest technological handsets. Exclusivity agreements prevent other carriers from acquiring these devices, and they are particularly harmful to wireless consumers. The practice has worked so well for the large carriers that they are now using the same formula for the emerging netbook market as well.

What would happen if merchants sold computers that only worked with one Internet service provider? For example, imagine a world in which Macintosh computers only worked on AT&T DSL. That, of course, is exactly the world we live in with iPhone and Apple's exclusivity agreement with AT&T Wireless. If a consumer wants that handheld computer, he or she must subscribe to that service through AT&T.

This battle among the industry titans has left consumers as collateral damage because device manufacturers are prohibited from offering cutting-edge devices to the smaller carriers who many times serve rural areas.

Even in the areas that are served by the largest carriers, consumers are not free to choose the latest devices without being forced into accepting services from a specific carrier. If you

live in New York City and want an iPhone, then you are obligated to be an AT&T Wireless customer. If you live in Washington, D.C., and want a BlackBerry Storm, then you will be a Verizon Wireless customer, whether you want to be or not.

The situation with exclusivity agreements is bad and is only getting worse. Cellular South and customers like us have tried to find solutions to this problem without resorting to help from policymakers. We have attempted several solutions within the industry, including direct talks with device manufacturers, industry association working groups, and consolidating purchasing power through buying grids, but all of these efforts have been fruitless. Without legislation from Congress or action from the FCC, there will be no solution to this issue.

On the topic of roaming, far and away the most important issue is that of automatic roaming for data services, specifically roaming for broadband. When I began in this industry, roaming agreements could be negotiated in a matter of an afternoon and usually finalized within a week. Today, the largest carriers use their market power to dictate unreasonable roaming terms or they refuse data roaming agreements all together; 700 megahertz licensees not named AT&T or Verizon cannot build out their next generation networks without high-speed data roaming agreements. This is increasingly important as carriers deploy new data technologies that provide services anywhere, any time, such as telemedicine applications and Voice services over Internet

Protocol, somewhat better known as VoIP.

I ask you, is VoIP voice roaming or is it data roaming?  
Better yet, why should it matter?

We are at a critical period in the wireless industry. Although the wireless industry may no longer be in its infancy, it is no more mature than an awkward adolescent. There is much innovating left to be done. There are many people of all socioeconomic backgrounds and of geographic locales who have yet to benefit fully from the wireless experience.

Before it is too late, Congress must step in and put an end to the largest carriers' anticompetitive stranglehold on devices as well as ensure full roaming access. The future of free markets in our industry and the delivery of wireless broadband services to rural America depends on it. A light regulatory touch today will prevent the reemerging duopoly in which two companies will control all of the customers, all of the best devices, all of the prime spectrum, and will become too big to fail.

Thank you.

[The prepared statement of Mr. Meena follows:]

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Mr. Boucher. Thank you very much, Mr. Meena.

Mr. Potharlanka.

#### **STATEMENT OF RAVI POTHARLANKA**

Mr. Potharlanka. Good morning, Chairman Boucher, Ranking Member Stearns and members of the subcommittee.

Thank you for the opportunity today to testify about the importance of middle and last mile backhaul services in the context of competition in the wireless industry.

My name is Ravi Potharlanka. I am the Chief Operating Officer of FiberTower Corporation.

Formed in 2000, FiberTower is the Nation's leading alternative carrier for middle and last mile backhaul. FiberTower operates hybrid fiber microwave networks in 13 U.S. markets. The top eight mobile carriers and the government are amongst our largest customers. We have a national scope of 24-gigahertz and 38-gigahertz spectrum licenses and access to over 100,000 towers. We also offer fixed wireless services across the Nation. We have been offering backhaul services for the last 6 years and are in a position to offer a unique perspective. Let me explain.

Backhaul connects last mile end users, including those who serve first responders, Homeland Security, municipal buildings, medical facilities, schools, and libraries to the Internet and to

other network-switching centers.

Absent backhaul infrastructure, broadband networks cannot operate. Also, backhaul and transport infrastructure must be built before end users can fully realize the benefits of broadband. In fact, backhaul is often considered the Achilles' heel to achieving broadband connectivity.

This lack of development in unserved and in underserved areas has inhibited the growth of broadband services. Our modular network is relatively inexpensive to deploy when compared to fiber and can often be up and running in a matter of days.

I want to applaud the subcommittee on its leadership in producing the broadband stimulus programs. This subcommittee and the committee have identified middle mile and last mile backhaul appropriately as a critical piece in achieving broadband expansion. We see the access to this capital as a unique opportunity to capitalize on the expansion.

For example, we could build in the western half of Virginia backhaul networks similar to those that have been built elsewhere. In just months, we could get people working throughout the unserved and underserved communities and make broadband accessible. This will create long-term jobs while permanently enhancing the economy. This model can most definitely be deployed in other areas of the Nation. I would now like to draw your attention to four important matters.

First, mapping of unserved and underserved areas must include

middle and last mile backhaul. The FCC, NTIA and RUS should consider an area with an adequate backhaul or transport coverage as underserved. Even if such an area has an end user broadband service provider, an area without backhaul is unable to support multiple broadband networks that drive the economy.

Second, ensure that multiple-use backhaul platforms, which are called MuniFrames, are accessible to all end users. Doing this truly brings broadband to the area while greatly reducing costs. It is important to ensure that all parties have the ability to access these platforms in a nondiscriminatory manner.

Third, reinforce the existing Federal preemptions or burdensome zoning and permitting restrictions for fixed wireless antenna placements. Restrictions that impair the installation of small antennas for fixed wireless are not permitted under a very specific FCC rule. Zoning and permitting requirements often add substantial delays in costs of deployments.

Fourth, make a limited number of the numerous, vacant TV white space channels available for point-to-point licensing. The recently completed FCC TV white space order is a first step in unleashing broadband deployments to unserved and underserved areas. The lack of backhaul and transport services is particularly problematic in rural areas when great costs and great distances slow or prevent connections to switch locations of the Internet.

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[11:10 a.m.]

Mr. Potharlanka. However, white space channels make long range promulgation possible, thereby reducing the number of required towers to reach the same distance. There is no Member of this Congress more committed than you, Mr. Chairman, to bringing high speed broadband to America. I submit to you today that should FCC grant point to point licensed use for limited number of TV white space channels, it could stimulate rural broadband. This proposal involves a small number of numerous vacant rural channels and only in a fashion that protects incumbents and promotes plentiful and healthy sustained growth for unlicensed devices.

100-mile connection using white spaces would typically cost less than \$200,000 to deploy, while the same connection using some proposed bands like in six or 3.65 gigahertz spectrum would likely cost more than \$3 million, almost 15 times as much. Similarly, a new transfiber build in the same distance would normally cost at least 20 or 30 times more expensive and be slow to deploy.

In conclusion, making a limited number of TV white space channels available before the initial stimulus grant filing deadline is very critical. Finally, we strongly recommend the following: Continued reinforcement of FCC rules that preempt burdensome zoning and permitting restrictions for small fixed wireless antennas, comprehensive mapping of middle mile and last

mile backhaul, and an express eligibility for backhaul and transport projects under the BTOP and RUS programs. This now concludes my oral testimony, and I thank you for the opportunity.

Mr. Boucher. Thank you very much, Mr. Potharlanka.

[The prepared statement of Mr. Potharlanka follows:]

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Mr. Boucher. Mr. Murray.

**STATEMENT OF CHRIS MURRAY**

Mr. Murray. Good morning, Mr. Chairman, Mr. Ranking Member and members of the committee. I appreciate the opportunity to appear before you once again on behalf of consumers and on behalf of Consumers Union, the publisher of Consumer Reports Magazine.

I am pleased to report that this year the satisfaction of consumers in the cell phone industry does seem to be headed upwards. You may remember last year it was bottom of the barrel. It was 18th out of 20 services that we rate. But this year it seems to be moving closer to average, and we are happy about that. Fewer consumers are complaining about automatic contract extension, and fewer consumers are complaining about early termination penalties as vociferously, although we still believe that, because these fees are starting from a very high level, we agree with State courts that are finding they may be illegal, so we think that scrutiny is warranted.

But we have a new top concern of consumers this year, and that is the high price of cell phone service. And you may recall the last time I was here I said that U.S. consumers pay more than consumers around the world for cell phone service. Now, on a per-minute basis, as the industry is quick to note, because U.S.

consumers talk an awful lot, we pay a little bit less. But if you look at just the dollars, the amount of money that people spend every year, U.S. consumers spend more on cell phone service than in any other industrialized nation.

We also see that SMS text revenues are up for the carriers over 150 percent per texting subscriber. That is not overall over the whole network, that is just for the people who text. It is up 150 percent over the last 4 years.

We see this year the rage is consumer overcharges for data plans. And we see one subscriber -- I had an account of somebody who bought a netbook and got a data plan from AT&T. Five gigabytes is what she got for \$60. She exceeded that plan by five gigabytes. And guess what the bill came back? \$5,000. It is astonishing to me that the first five gigabytes somehow cost \$60 and then the second five gigabytes cost about as much as a pretty decent used car.

So what is going on here?

I saw a McKenzie report that was fascinating, which basically said this industry is moving very quickly towards duopoly or towards a quasi-duopoly, and that concerns us. Basically, in sum, what I would like to say is that if we want competition to work better in this market, and I believe it can, is this market more competitive than some of the other rather monopolistic sectors of telecom? Well, yes. But that is sort of like saying a horse and buggy is a much better way to get around than a unicycle. We can

do better than that.

So if you want competition we need to reduce switching costs for consumers. That includes things like number portability, allowing consumers to take their phone numbers with them. We initially, when we first started talking about this 4 years ago, the cell phone industry said this is going to cost billions of dollars, and nobody wants it, and nobody will use it. Well, that wasn't the truth. The truth was people use this every day. They have been very happy with it, and it not only didn't cost so much, but it has actually allowed some carriers to really win in the marketplace.

So the FCC is considering a proposal to reduce the interval from 4 days to one. We obviously support that, and we hope that the agency will recognize the arguments of the carriers as relatively transparent protectionism.

The other thing, if we want competition, switching costs need to come down. And early termination fees are still a major concern for us. I will note that we are talking about a national model, but we do have a national model in the uniform commercial code, which is the law in 50 States. And what that says is that if you want subscribers for actual damages, that is okay. But if you are charging them a penalty that is designed to prevent them from switching, that is illegal, right? The law of contracts says you can't do that because we want competition to work as vigorously as possible.

So now the cell phone companies are up here saying we want a national model. Exempt us from the law of contracts in 50 States. I hope that the Congress will not go for that opportunity.

As we look at a national model, we have to look at what is the price of preemption. If we think that we can put in very strong national consumer standards, it is not totally anathema to consumers, but I do worry when I hear Members of Congress discussing how little this industry needs oversight and then, in the next breath, talking about a national consumer protection model. That seems to me to be code for we are going to eliminate some strong consumer protections in States.

The last thing I want to briefly touch on -- I apologize I don't have time to talk about roaming and data roaming and special access. But I am very concerned about anti-competitive behavior I see in the industry, and I really would beg this committee for more oversight.

Recently we saw AT&T saying they would not allow Skype to be used by users on the 3G radio. They will allow to use it on WiFi but you can't use it on the 3G radio. And the top public policy executive for AT&T says, we absolutely expect our vendors not to facilitate the services of our competitors.

This is the Internet. It is supposed to be different. This is what is supposed to bring us competition. And if what we are saying is we are just going to treat all these Internet companies as competitors and we are not going to let them use our Internet

connections, well, we have fundamentally broken the Internet.

So I am not stepping up today saying regulate the Internet. What I am saying is, let's get some oversight. When we have clear examples of anti-competitive behavior we need action.

The last thing I will say is on access to consumer devices handset exclusivities, I will note that Ranking Member Barton has a bill which aims to eliminate exclusives for automotive diagnostic software in an industry which is, arguably, more competitive than this one. And I think that is good, because you are breaking the stranglehold of automotive dealers, and allowing smaller repair shops to get in on a game that would otherwise be a complete monopoly for the dealerships.

Well, similarly, here we have some carriers who are absolutely too small to have the market power to get the devices that consumers are demanding. And if we want 3G to be built out in rural areas, I am telling you we have to look at this problem.

So I thank you again for the opportunity to appear before you today. And I hope that we can engage in further oversight. Thank you.

[The prepared statement of Mr. Murray follows:]

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Mr. Boucher. Thank you very much, Mr. Murray.

Dr. Ford.

#### STATEMENT OF GEORGE S. FORD

Mr. Ford. Mr. Chairman and Ranking Member Stearns and members of the subcommittee, good morning, and thank you for the invitation. My name is Dr. George Ford. I am the chief economist of the Phoenix Center, a nonprofit 501(c)(3) organization that focuses on the publishing of academic quality research on the law and economics of telecommunications and high tech industries.

Our research is consistently targeted at providing policymakers information about the important role that pro-entry policies must play in the communications industry. Our substantial research production has been published in academic journals, and several of our papers cover many of the topics discussed in this hearing today.

The Phoenix Center makes it a policy not to endorse or support any particular piece of Federal or State legislation or proposed regulation. Our mission is not to tell policymakers what to think, but more how to think about it.

By most accounts, the wireless industry today is workably competitive. The statistics have been cited here today by many members of the subcommittee and many of the panelists. But it is

not perfectly competitive. No industry is. Workably competitive means that competitiveness is effective enough at sustaining good performance, even if not matching the textbook concept of perfect competition.

Regulation is unlikely to improve market performance in a workably competitive market. Nor is the industry static, but it is constantly changing. The dynamic nature of the industry requires constant reformulation and testing of pricing plans, product offerings and network capabilities. Some changes are successful. Some not. That is the nature of the business.

You mentioned earlier, Mr. Chairman, that most Americans have access to four or so wireless carriers, and some feel that this makes it a concentrated market, and by some definitions it would. But the relatively concentrated nature of wireless communications is natural and to be expected, given the large amounts of capital expenditures required to participate in the industry. The industry incurs about \$20 billion in capital expenditures annually. Economics teaches us that in industry with such large capital costs relative to retail expenditures, only a relatively few number of firms will be able to survive and continue to offer service. The industry structure is, for the most part, pre-ordained by its cost and demand structure.

While it is often assumed that observing that there are only a few firms implies that there is little competition, there is no unambiguous theoretical support for this position. Duopoly is not

a dirty word.

In the 1992 Cable Act, rate regulation was abandoned with the presence of 1-1/2 firms, and that was in the statute. Okay. That is an HHI of 8,600, according to the rules.

I do not mean to imply that industry concentration is irrelevant, but it must be placed in the correct context. Recognizing that the industry is driven by its underlying cost and demand conditions is vital for good policymaking.

Let me give you a few examples. Take spectrum caps. Contrary to widely held beliefs, it is not possible to increase a sustainable number of firms in the wireless industry by increasing the amount of spectrum. Whether there are two or 10 firms the cost to deploy and upgrade a wireless network is roughly the same. Dividing the market into smaller pieces by divvying up spectrum into smaller pieces will not increase the number of carriers that can survive. What it will do is cause a nonsustainable industry structure and, inevitably, result in mergers, bankruptcies or both.

On the other hand, in a world of limited spectrum, having a few firms may actually be a very good thing for society. The more spectrum a firm has, the higher bandwidth services it can offer. If we cut the spectrum into little pieces to make more firms, we might get a little more price competition for low bandwidth services, but we lose the enormous value offered by higher bandwidth innovative services like mobile broadband. There is a

trade off between lots of guys with a little, and a few guys with a lot.

My research has also shown that, given the relatively concentrated nature of telecommunications markets, regulators must be very careful not to exacerbate the factors that generate that outcome. However well-intentioned, regulatory driven open access or wireless card phone proposals do exactly that. They both are likely to spark further industry concentration and increase prices for mobile handsets, without necessarily benefiting consumers.

There could be some benefits to such proposals, but all regulation comes at a cost. And my research leads me to believe that the costs are likely to outweigh the benefits.

In a recent paper using auction results show that Carterfone style open access obligations could reduce industry profitability by 32 percent and reduce industry investment by \$50 billion over the next 10 years. This large reduction in profitability could literally mean the difference between the survival or demise of weaker wireless providers. Open access regulations would, in fact, reduce the number of carriers in the industry and possibly result in significantly less competition and choice for consumers.

Moreover, regulations that control handset equipment, a common feature of wireless Carterfone policies invariably leads to higher handset prices but not necessarily lower service prices. And many of the people who propose those rules recognize this outcome, but ignore its implications. This would not be good for

the average American, not the high user American, but the average American, and would be particularly harmful to those with low incomes who are prolific users of mobile technology and are more likely to be cord cutters.

Another feature of the wireless industry that is typically forgotten, policy debates that is multi product industry. The typical wireless carrier offers local calling, national calling, international calling, e-mail, text messaging, picture messaging; they will even fix your flat tire. The economic implications of this are important.

The wireless firm doesn't offer a price and a service. It offers a set of prices and a set of services. All these services are interrelated. The price of one goes up. The price of the other goes down. The quantity of one goes up, the price of the other ones may change. You cannot take one thing, text messaging or phones, and focus on that one thing and say, oh, there is market power in this market because a high price in one service may sustain a low price in the other service. We are not in here talking about restaurants who mark up wine three or four times and give you water and bread. But it is the same kind of argument that people are making.

Finally, we have a paper here that we recently published on the national framework for wireless regulation. What is a little different about our approach is that we are not, we allow the state regulator to make efficient decisions for its people. It is

acting in the interest of its people. It is not acting incompetently or anything like that. But even still, it makes sense, if those decisions in one State spill over into another, whether it be cost or prices, that the regulation move up to the national level. So it is not a debate about the competence of regulation. It is a debate about how the industry and how a particular regulation in one location could impact another. And that is what I am driving at. Thank you for your time.

[The prepared statement of Mr. Ford follows:]

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Mr. Boucher. And we now have a recorded vote pending on the House floor. I am going to ask my questions, and then we will declare a brief recess, and we will ask our witnesses to stay with us pending the return of members. It shouldn't take very long. We just have one recorded vote to respond to.

Let me ask any of the witnesses who want to respond, because several of you mentioned this during the course of your testimony. Several of you have talked about your reliance on the major carriers, Verizon and AT&T, for the special access lines that connect facilities, and you depend upon those lines to connect your facilities. And you have talked about various ways that that problem might be addressed. One possible way to address it is to apply for stimulus funds under the Economic Recovery Act. And there is language in that Act that specifically makes middle mile services eligible as a target for grantmaking under the law.

So my question to those who have that concern is, are you planning to apply for stimulus funding for these middle mile links? Mr. Schieber, lets begin with you.

Mr. Schieber. Yes, thank you, Mr. Chairman. Sprint's position is, you know, we are closely monitoring that legislation as the terms in that legislation are defined and if, depending on how those terms are defined, unserved, underserved rural backhaul, etc., we may very well apply for those funds. It is unclear at this point until there is more clarification.

Mr. Boucher. Well, let's assume that the criteria make it possible for you to apply and, should you be awarded the grants, would enable those grants to be useful in addressing your middle mile needs. Would you then apply?

Mr. Schieber. We may very well. And I will tell you that our friends from FiberTower on the panel here are the experts in providing wireless backhaul services. In all honesty, we may look to someone like FiberTower.

Mr. Boucher. All right. Well, let's ask Mr. Potharlanka that same question.

Mr. Potharlanka. Thanks for the question, Mr. Chairman. Special access, or middle mile as we have called it, in terms of creating alternatives there, we have to build other types of facilities-based networks. We cannot resell the stuff. You have to actually invest capital to actually build networks so that various end users networks actually have options, much like, you know, we talked about options.

Mr. Boucher. Well, but Mr. Potharlanka, would you rely to some extent if it is available on stimulus funds in order to help you make that investment?

Mr. Potharlanka. Absolutely. Our technology and what we do is very well suited to actually building these types of networks, and we fully expect that, you know, depending on the rules, we would actually apply.

Mr. Boucher. Okay. That is good. One of the subjects that

interests me is possible barriers that might exist to the siting of additional transmitters by carriers on structures that are already in existence, to which transmitters are already attached. And within the general category of tower siting, where I understand there are a number of tensions between the local governments that have decisionmaking authority with regard to this and the carriers that want to site towers, it strikes me that that is one discrete area in which, if it truly is a problem, we might be able to offer some ready solutions.

And so let me just ask the question. Where you have got a circumstance where there is an effort and an application to attach an additional transmitter to a tower, to which other transmitters are already attached, is there resistance on the part of local governments today to rapidly processing those applications? Are you experiencing that problem? Mr. Potharlanka or others.

Mr. Potharlanka. Sure. I mean, we certainly experience, you know, zoning or permitting delays and cost associated with --

Mr. Boucher. That specific example, if you could answer that, please.

Mr. Potharlanka. With a specific example?

Mr. Boucher. Yes. That specific example.

Mr. Potharlanka. Sure. I mean, we have several instances in the northeastern States where our applications do take a long time.

Mr. Boucher. This is an example, and let me state it again,

where a tower already exists, transmitters are already attached to that tower. The application is to attach an additional transmitter to that tower already containing other transmitters. In that instance, do you know of instances where delays are being experienced and those applications are not being rapidly processed?

Mr. Potharlanka. Absolutely. We attach transmitters to existing sites, existing towers. We don't install new towers, and so that is exactly what we face.

Mr. Boucher. All right. Do others have examples? Mr. Schieber?

Mr. Schieber. Mr. Chairman, we experience the same thing at Sprint that, whether it is a new site or an existing site, there are often delays in getting zoning approvals from the local authorities.

Mr. Boucher. What is the appropriate remedy for that, in your mind?

Mr. Schieber. From our perspective, I think something like a shot clock that encourages local zoning authorities to make a decision quickly and not stretch the time frame out over many, many years, which is what we experience sometimes would be very, very helpful.

Mr. Boucher. All right. I have some additional questions, but I am going to interrupt those so that we can respond to our recorded vote on the floor. And this subcommittee will stand in

recess.

I would encourage Members to come back as quickly as they have voted so we can continue our questioning. And we will ask for the patience of our witnesses until we return.

[Recess.]

Mr. Boucher. The subcommittee will reconvene. I thank the witnesses for their patience. And we are missing Mr. Murray, but I suppose he will join us in due course.

I was interested in the testimony that was asked by -- that was provided by a number of the witnesses regarding the current roaming rules, and I would like to just ask each of you, if you want, to comment on this.

Given the importance of the growing use of mobile data, and the fact that so many people are now relying on their mobile devices as a major Internet access and e-mail application, in fact, I have got an iPhone. I guess I probably shouldn't advertise particular products, but I like it a lot. And I am probably using that for e-mail more now than anything that sits on a desk. And I am sure that there are millions of other people having similar experiences with that device or other similar kinds of portable devices.

And so, given the growing importance of mobile data uses, has the time come, in your opinion, for us to provide automatic roaming rights for data, similar to the automatic roaming rights that exist for voice services today?

Mr. Murray, you have joined us, and we will ask you first if you would like to comment.

Mr. Murray. I think absolutely the answer to that is yes. We value competition and we value rural consumers being served as robustly as urban. That is part of the promise of universal service. And unquestionably, these smaller carriers will tell you they can't get data roaming. It is not that it has been taken away, it has just never been there. So I think we have absolutely come to the point where this is essential. If we want to not hit a brick wall and see consolidation really accelerate, I think data roaming is essential.

Mr. Boucher. Others care to comment very briefly? My time really has expired. Mr. Meena.

Mr. Meena. Yes, sir. I wanted to comment on that because it is such an important issue. Yes, we, all carriers need access to automatic data roaming. The VOIP example I gave in my testimony is a perfect example. In the future with 4G, is VOIP voice or is it data? Why would it matter? And there are countless telemedicine and other applications that customers need to use in their home footprint, as well as their travel anywhere throughout the country, and that is a goal of ours, to provide the type of services that customers want, no matter where they go.

Mr. Boucher. All right. Anyone else want to offer a view?  
Mr. Irving.

Mr. Irving. I would agree that now is the time for data

roaming to also be included in carriers, common carrier obligations. We have begun entering into data roaming agreements generally with smaller and mid size carriers who tend to be more receptive to those roaming agreements.

I would add one clarification. You asked whether we should enter into data roaming agreements or data roaming obligations similar to the voice roaming obligations. We would like to see the voice roaming obligations and the data roaming obligations improved.

Mr. Boucher. I understand that. Mr. Schieber.

Mr. Schieber. Yes. Sprint spent billions of dollars on a DVDO network and as we have seen competition unfold, we are increasingly open to considering people who want to roam on our ABDO network. Whether we need automatic roaming, as we have with voice or not, is an open issue, I think. I will say though that, you know, if we have to have something like that, the in market exception really needs to be addressed so that we were all on the same level playing field. The in market exception precludes us from getting roaming from folks if we have spectrum in a particular market, so addressing that issue in that context would be very helpful.

Mr. Boucher. This would be spectrum you have in that market that you haven't built out in yet presumably.

Mr. Irving. That is correct.

Mr. Boucher. All right. Mr. Upton, you are recognized for

5 minutes.

Mr. Upton. Well, thank you, Mr. Chairman.

Dr. Ford, I have the results of the Consumer Reports most recent wireless survey which was published in January of this year. They concluded that, 1, overall cell phone service has become significantly better service. Two, contract terms for cell phone services are less onerous, and there were fewer problems with call quality in this year's survey, which obviously 2008. There was substantial improvement over the 2007 survey results, and that there has been a surge in satisfaction. Those are their words.

In your testimony you stated that the wireless industry is, in fact, workably competitive. And I know that as an economist and consumer satisfaction surveys may not be the tools of your trade. But would you agree that these positive consumer satisfaction surveys results are consistent with what we might expect from consumers enjoying the benefits of a competitive marketplace?

Mr. Ford. Oh, sure. I mean, I think, to some extent, that the progression of the industry is part of the dynamic competitive nature of it, and you would expect things to change and improve over time. And with the advent of new services and broadband and new telephones, people are going to get increasingly happy. And we are looking at nearly 20 percent of the people falling off the wire line network. Mobile service would have to get better for

that to happen. So sure, it is very consistent with that outcome.

Mr. Upton. Thank you. Mr. Schieber, AT&T and Verizon claim that see CLEX and other proponents of special access reform have not provided comprehensive data on the networks as the Bell companies have. Are you willing to provide the FCC with the same data that the Bell companies have given the FCC?

Mr. Schieber. Congressman, we respectfully disagree with AT&T and Verizon. We feel like the FCC has a strong record of evidence. The FCC has what they need to act on this. However, if there is additional information that we can provide that will help the FCC get better clarity in the State of competition and special access we will be more than happy to provide that. But we would like the FCC to act on that and act on it quickly though.

Mr. Upton. So the FCC, do they have any outstanding requests in for more information at this point or not?

Mr. Schieber. I am not aware of any outstanding requests at this point. I think that they are working on something at this point, a request for information.

Mr. Upton. Thank you. Mr. Potharlanka, in my view, we squandered an opportunity to make sure that backhaul capacity was available when we gave the white spaces away, rather than auction them off. Do we still have an opportunity to correct that mistake in the FCC's reconsideration of the white spaces order?

Mr. Potharlanka. Our general opinion about white spaces, the channels available in the white spaces, in rural areas is that we

could actually have multiple uses for it. I think several applications can coexist. And we are not sure that limiting options is the right way to do it, either through an auction process or --

Mr. Upton. But if they are valuable, wouldn't we all benefit if they had been auctioned off rather than parts of it given away?

Mr. Potharlanka. We are not disagreeing whether there would be enhanced value out of it. All we are saying is there are some parts of the spectrum, I think, which are best served by set asides for certain types of applications which, where you would be able to enable broadband over extended distances. And I think what we have proposed is we want to have multiple applications coexist at the same time. And I think different types of approaches could be used to putting that spectrum to work.

Mr. Upton. Well, do you think that they ought to be used for unlicensed parts? Should those white spaces be allowed to be unlicensed?

Mr. Potharlanka. Sure. Yeah. We believe that our proposal -- and let me touch on that specifically. Our proposal specifically States that we would like a few channels in the rural areas to be allocated for point-to-point licensing in a manner that they can coexist with income bands as well as allow for unlicensed devices to operate. And there is a way to do it. There are lots of rural areas where you have 15 sometimes, all the way up to 40, 45 channels. And I think the trick is to figure out

a mechanism where you can actually have a lot of these things coexist, and it is possible, given the amount of spectrum that is available.

Mr. Upton. Thank you. Yield back.

Mr. Boucher. Thank you very much, Mr. Upton.

The gentlelady from California, Ms. Eshoo, is recognized for 5 minutes.

Ms. Eshoo. Thank you, Mr. Chairman. And thank you to all of the witnesses. I think it has been a terrific panel, and I think that you have built a very strong case around the whole issue of whether we have real competition and what the outcomes are if we don't and the state of affairs that we are in.

Dr. Ford, I don't have a question for you. But there are two things that really take my breath away about what you said; and that is that a duopoly is natural. I just, I have to tell you, that just flies in the face of what I think America is about and what our whole system and belief in competition. I just don't buy into that. And so I needed to comment because I still can't get it out of my head.

But at any rate, I want to talk, I focused on special access in my opening comments. And while I think that, you know, much of the focus on special access has been the competitive issues that result from wireless companies who, due to a lack of competition and choice, have to pay largely whatever the incumbent Bell company decides. What I want to touch on is the broader impact of

this bottleneck in the middle mile.

Now, for years I worked very hard on HIT legislation, on getting the legislation passed here. We were successful in getting substantial funding, so we got the policy, then we got significant funding in the stimulus package. And that is going to create jobs. It is going to build an infrastructure to reduce health care costs. It is going to help reach people who don't have immediate access to hospitals.

But my question is, in listening to the panel and examining this issue, how are these hospitals and other providers who don't have immediate access to the network to transmit large amounts of health care data, health records, MRIs, x-rays and the rest, how are they going to get this to providers and to patients?

I mean, we use, you know, we kind of dive down into a whole alphabet soup of the telecom industry here, and yet members need to really understand that because of these bottlenecks, the work that we have already done and we are congratulating ourselves for, how is this going to work? So I pose that question to you. I mean, it is special access services. And now we are preparing ourselves for an energy bill. The smart grid has to be a part of it. The data transmission requirements to monitor, to send information, control the flow of energy access, energy across the grid, has to be in a very intelligent and efficient manner. And it will be substantial. And again, we bump up against special access fees.

So, and I just want to put my own personal example on the table and that is, last year, I explored the possibility of installing Cisco's telepresence technology in both my D.C. and Palo Alto office. And while it was fairly expensive, it was going to really do a lot for us and my constituents. But what we couldn't afford, what we couldn't afford out of our budget was the monthly cost of the special access lines that were needed. They were in the range of 2,000 bucks a month. So, you know, I mean, I just start with my own operation on that.

So I open it up to the entire panel on the special access fees and the exploration of these very key areas that we need, you not only need, but we need to operate to transmit information.

And we have the information technology. But in the 21st century, with these fees, I think that we are in real trouble. We are saying, on the one hand, congratulations Congress, we did all of this. But look what these special access fees are doing.

So whoever would like to comment. Dr. Ford's not going to agree with me, so the rest of you can chime in. But congratulations, Dr. Ford. There aren't too many people that leave a few words with me that will remain just about forever.

Mr. Meena. Yes, ma'am. I would like to try to answer that. Any time you have two carriers that that have a disproportionate power, then the prices that you experience are going to be prevalent. And the way to solve that is introduce, allow more competition, or maybe a light touch of regulation. That will

stimulate those duopolistic providers to do what they need to do. We had that same issue in the handset arena. The larger carriers are coalescing and bringing together market power to acquire the largest, a significant number of the most attractive handsets, and we are not able to provide those to our customers because of this market power that they exert. So that is why it is so important that Congress step in and require that companies like us can sell the handsets we want, that other companies can get into the special access business and do what they need to do to provide services at the rates that are competitive.

Ms. Eshoo. Now, the chairman said something earlier, which was a very good question, asking about the stimulus funds and making use of them in order to, if I heard it right, to accomplish the goal of what some of us would like to see in policy. I think, straightaway, we need a new policy. I want the companies to make good use of the stimulus funds. And I am proud that we did what we did for underserved and unserved areas, and it is a good place to start. But I don't that takes the place of a policy.

But anyway, I think others of you wanted to weigh in on what I raised.

Mr. Potharlanka. If I may add something to this. In terms of a specific example of a hospital needing access to bandwidth is a great one. The key is to create alternatives so that these costs go down. That is the key. Having, trying to regulate so much from the medium to long term actually serves the purpose, so

we need to create alternatives by, you know, enabling investment. And so our thought is, and this is what I think we, as a company, having been doing for some time is make sure that we invest capital where we create broadband hot spots, places across the nation where various entities can have equal access to bandwidth. It could be hospitals, it could be a government facility, frankly, it could be any of the wireless carriers which is who we focus on today. But frankly it could be anybody else.

And I think under the stimulus problem and the BTOP program, I think we have a unique opportunity to direct some of those funds to creating broadband hot spots so that we get the multiplier effect of opening broadband up to a larger community of users and not focused on just one segment of the marketplace.

And we also believe that, you know, approaches like this could be expanded on an ongoing basis, much beyond the stimulus program.

Mr. Murray. I will just add briefly that I think Mr. Potharlanka is right. We need alternatives. But at the same time, when we say data that show that in some places we have got profit margins exceeding 125 percent on these services, we have to acknowledge that there will be some places where there will not be alternatives, whether that is rural areas, whether that is just areas of the country that get left behind for whatever reason. And for those areas, the question is are we just going to orphan them?

Ms. Eshoo. Not a natural duopoly. It is hope for a lack of that somewhere.

Mr. Schieber. And I will tell you, 96 percent of our cell sites are served by the ILEC. 96 percent of the special access we buy on our wire --

Ms. Eshoo. 96 percent are?

Mr. Schieber. 96 percent of the wire line special access we pay for is paid to the ILEC.

In all honesty, in the interim and the short-term, I would be happy with a duopoly. It is not a duopoly, it is a monopoly today. We need to have more competition. And the broadband stimulus funding may be an option down the road. It may be an opportunity.

But, in all honesty, we have a short-term issue. And I don't think that we can predict that that will necessarily solve the special access problem. It is an operating expense problem we have. The broadband dollars are spent on capital. That is great. I support that. But we have an operating expense problem in this nation with respect to special access. And it is a monopoly right now. We have extremely difficult terms and conditions we have to put up with with the LECS, and I support that.

Ms. Eshoo. Thank you very much. I think you have been a terrific panel. Thank you, Mr. Chairman, for allowing them to answer the questions.

Mr. Boucher. Thank you very much, Ms. Eshoo.

The gentleman from Florida, Mr. Stearns, is recognized for 5 minutes.

Mr. Stearns. Thank you, Mr. Chairman. And I will probably take a little bit different approach than the gentlelady from California. She goes on to talk about the state of affairs that we are in and these bottlenecks. But if you look across the world and you see the concentration, the United States is more competitive than almost all the other countries. Isn't that true, Dr. Ford that, I think out of all the OEC countries, the United States has more, I mean, we have AT&T, Verizon, Sprint is in the mix and so is T Mobile.

So isn't it true that, contrary to what the gentlelady said, there is, the United States has more competition than almost any other country in the world? Is that true.

Mr. Ford. That is true.

Mr. Stearns. And Dr. Murray, I know you are talking about these 125 percent, and that is probably access, and Sprint is probably very aware of that. And I think Sprint makes a very good point. You know, the other side of the evidence shows that the market is competitive. You know, the real larger question is, can you have a large wireless market with 12 carriers, or is it going to come down to three or four? And I think there seems to be some quantitative law here that, when you get this kind of market, to have the capital to invest, and to have the innovations required, you probably can't have 12.

So Dr. Ford, you might want to just touch on that, because it appears to me that if we are the most competitive in the world, there is a quantitative rule that says you have got to have at least maybe just two or three that can carry the load.

Mr. Ford. Absolutely. I mean, we regulated the electricity business. We regulated the telephone, local telephone business for years because it was a natural monopoly. Only one firm could survive. And as technology has developed, we have created opportunities to get costs down and to have more firms. Markets grow, costs go down we can have more firms. So, yeah, I mean, our policy paper 21 sort of lays out the economics of what these industries are going to look like, using formulas. I mean, basically, there is formula to tell you what this industry is going to look like.

Mr. Stearns. Recently, the FCC came without a report and this is what they said. They are talking about the commercial and mobile radio services. They said, "the metrics indicate that there is an effective competition in the wireless market and demonstrate the increasingly significant role that the wireless services play in the lives of American consumers." So the FCC sort of agrees with you, Dr. Ford, and this is a recent report this year which indicates the competition.

Notwithstanding that fact, Mr. Schieber, Mr. Upton asked you the question about advocating increased special access regulation. You know that U.S. Telecom indicated, sent a letter to the FCC

outlining a lot of questions; and you have seen this report, have you?

Mr. Schieber. Yes, I have.

Mr. Stearns. Okay. So they are indicating that the evidence shows the market is competitive. You are indicating the market isn't. So they, the incumbent phone companies submitted this filing with the FCC listing the type of information that needs to be collected to answer this question, which is a fundamental question for this hearing today. Do you agree that these questions are relevant? You obviously have read them. Do you think they are pertinent and would provide us an answer whether the market is competitive or not?

Mr. Schieber. I think it is very relevant to determine whether the market is competitive. I can speak from personal experience in managing access on a day-to-day basis, Congressman, that it is, it is very difficult with, to find alternatives to the incumbent LECs. You have to look at the complete circuit that is being provided, the whole middle mile facility. There are certain portions of the middle mile facilities where there is more competition than the others. But for that very last mile in the middle market facilities there is very little competition.

Mr. Stearns. Okay. So we have these questions from the incumbents and others, and they submitted them. And you say these questions are pertinent. By and large you agree with these questions. And I guess a real question is, if the FCC answered

this question, could they make an objective decision whether there is enough competition in the market?

Mr. Schieber. We believe that the FCC --

Mr. Stearns. Just a yes or no on this. On these questions that are in here that you have read, would you say yes, these are sufficient to answer your concern about whether there's market competition or not?

Mr. Schieber. No, sir.

Mr. Stearns. Okay. And would you also, your group and others, provide another list of questions that you think are more pertinent so we can solve this question from the FCC's standpoint, because I think, as Members of Congress, this is so difficult for us to regulate. I think the gentlelady from California mentioned possibly we should step in. But I think many of us are sort of, you know, trying to sort this out. And maybe the FCC can do this instead of the government, the United States Congress coming in and mandating this thing. So we are trying to say, look, the U.S. Telecom has these list of questions. You don't think they are pertinent. Do you have your own set of questions that you and your group could submit so that the FCC could make an objective analysis?

Mr. Schieber. We would be happy to. Congressman, as I said earlier, we honestly believe that the FCC has all the information necessary to make this determination. But if there is additional information that we can provide, we would be happy to. If there

are additional question that we think they need to be asking, we will happy to provide those questions. With all due respect, what we would really like is for the FCC to act. This issue has been with them for six years.

Mr. Stearns. So the FCC, in your opinion, does not need these questions from the U.S. Telecom association to bring bearing and answer to this because they already have the information.

Mr. Schieber. I think there are questions that are relevant besides the ones that the ILECs have.

Mr. Stearns. Do you think these are self-serving then? Is that what you are saying?

Mr. Schieber. Without question, sir.

Mr. Stearns. Okay. Dr. Ford, what is your feeling? Can the FCC determine this, based upon the information they have without these questions?

Or you probably haven't seen these questions. But I think many of us would just like the FCC to act. And all respect to Sprint, they have got a good point. If the information is there, why isn't the FCC acting?

Or are you going back on your original statement is that there is sufficient competition that the FCC does not have to act.

Mr. Ford. I don't know how much competition there is in special access, and nobody knows how much competition there is in special access. They keep doing these huge studies. The NRI just did a study. The GAO has done studies. And every time they come

back with these studies, they say, well, the data is really bad and we need to do something else. The FCC needs to collect more data. The evidence, you know, I don't know, but the evidence for regulating special access is really pathetic. I mean, if there was a 138 percent rate of returning on special access I wouldn't be sitting here talking to you. I would be building a special access plant.

Mr. Stearns. Mr. Murray says it is 125 percent. Isn't that what you said, Mr. Murray?

Mr. Ford. I mean, it is just insane. These are regulatory books that the FCC has rejected as being relevant to this proceeding. The FCC, they collect the data and present it to people, and they said this is not relevant. I mean, a 138 percent rate of return? I mean, we would all be building plants. We would be nuts not to. It just doesn't make any sense. But that doesn't say that they don't have a point okay? The point is that somebody needs to get in there and do a really serious job and get data from everybody because if there is going to be two or three people providing service, okay, you can't miss one. If you don't have data from one guy, you have missed everything.

Mr. Stearns. Madam Chairman, I have asked my question. Is there anybody else on the panel that would like to tackle this, in addition to Dr. Ford and Mr. Schieber? Anybody else?

Mr. Murray. I guess I just want to challenge the economics for a brief second. I will humbly do so since I am not a tenth of

the economist that Dr. Ford is. But the classic monopoly behavior is not, hey, let's figure out how much output we can get out there. Let's produce the maximum amount. It is quite the opposite. Classic monopoly behavior is let's reduce output so we can raise price on the services that we have. And, you know, we are seeing, like, I mean, I guess would anybody deny that in more than 90 percent of U.S. markets there is only one choice for special access? Is anybody going to deny that fact? Because I don't think anybody will challenge that. And that looks like a really concentrated market to me.

Mr. Ford. Look, we have -- 95 percent of the people in this country have a telephone, and it was served by a monopoly. So restricting output is kind of silly in this business. Carriers are required to provide service to people. Okay? It is not a choice of restricting output. And if there is an output level that has been chosen, then the pricing is a little bit tricky, okay? Because you are not just going to put it out there and then not do anything with it. I mean, it is sunk. If he could make a marginal profit, a monopolist would make a marginal profit on it. So the argument is not correct.

Mr. Stearns. Thank you.

Ms. Eshoo. [Presiding.] Too bad Judge Black isn't still alive to come and testify.

Let's see. Just exercising the prerogative of the Chair, which I very, very seldom have ever had, I think that just to set

something down for the record, in terms of competition and the foreign markets have been referred to, they do regulate. They do regulate the top. They also insist that that there is regulation of the wholesale market. And there is a difference, Mr. Stearns. And I think that that needs to be taken into consideration.

I would like to recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. Doyle. Thank you very much. As I have said before, the debate over special access should really be called critical access because these special access lines are critical to broadband deployment and competition. These lines allow America's businesses to bring innovation and development to far-flung areas, and they allow us to stay connected to our data and the world around us. These are not small issues with funny names. They are our link to the broadband future, and we can't get this one wrong.

The FCC deregulated special access in 1999, anticipating new competition driving down prices. I probably would have supported deregulation then. But since then, competition has grown, then decimated with MCI and the old AT&T getting purchased by incumbents, then grown again a little bit, but it does not appear to have flourished.

The GAO in the Bush administration said that, where the FCC has completely deregulated special access prices, special access prices have gone up. NARUP commissioned a study that concluded, "overall, the market concentration data portray special access as

one firm such as the ILEC dominates, and other providers, both individually and collectively, have a small market share and little influence on price."

The report also said that the time is "certainly ripe for reform."

Now, the incumbents say that the markets are highly competitive, and that these reports aren't relying on the right data. I suppose I shouldn't be surprised, but these independent analysis are interesting.

I would like to ask Mr. Schieber, Mr. Meena and Mr. Irving, can you provide me any examples where a Bell company doesn't hold at least 90 percent of the market?

Mr. Schieber. Sir, I can't provide any such example. As I have already stated in my testimony, and then question and answers here, 96 percent of our special access circuits are with -- I can't think of a single market where they don't have more than 90 percent.

Your comments about this being critical access, as I said in my oral testimony, it is the lifeblood of the industry. And we, in fact, see access rates going up, as you discussed.

A specific example, we have a situation where we have had a 9-year contract with an ILEC. We had to renew that just last week, and I had two choices. I could renew under a new plan that was made available to me at a 28 percent increase for those circuits, or alternatively, I could elect not to renew under a

term, volume and term plan, and I would have to pay 108 percent more than I had been paying for the last 9 years.

Mr. Doyle. Mr. Irving.

Mr. Irving. We at Cricket have been following the debate carefully. Special access is, in fact, as has been discussed, going to become increasingly important as we move to greater capacity and greater data. We are, at Cricket, very interested in seeing increasing competition in this field. But I am not specifically aware of our own experience with middle access providers.

Mr. Doyle. Mr. Meena, are you aware of any Bell company that doesn't hold at least 90 percent of the market?

Mr. Meena. No, sir. I am not familiar with exactly what the percentages are, but I do know that a free market is defined by willing buyers --

Mr. Boucher. Pull the microphone up so everyone can hear you because I think everything you are saying is important, and especially so because I agree with you. So we want you right in the microphone.

Mr. Meena. Appreciate that. Yes. I don't know specifically what the percentages are. But I do know that a free market is defined by willing buyers and willing sellers, not seller. And that is what is seen to be a bottleneck for my cohorts here. Our big issue is related to devices and roaming, and special access doesn't matter if our customers can't get the devices they need,

can't get access to data roaming nationwide.

Mr. Doyle. Mr. Irving, in your testimony you mentioned several proceedings pending at the FCC that deal with roaming. Can you explain to the committee your understanding of the roaming conditions of the Verizon Wireless Alltel merger? And in your opinion, do you think those merger conditions have been violated?

Mr. Irving. I do. In connection with the merger, the wireless merger proceedings and, in fact, with all major wireless merger proceedings in the last several years, the issue of roaming has been raised to the FCC. And the reason it has been raised is because mergers of major companies eliminate one of few roaming partners that are available in the industry. The issues with respect to Alltel and Verizon merging, roaming came up. Verizon has a policy of carving out large geographic areas from competitors where they prohibit roaming, and there was concern that the elimination of an Alltel partner would further exacerbate that problem.

So, in connection with the roaming, with the merger proceeding, Congress, excuse me, the FCC imposed a condition that said that small and midsize carriers who dealt with Verizon and Alltel could choose either the Alltel agreement or the Verizon agreement to cover their roaming traffic. Verizon is known for having large geographic carve-outs in which they prohibit roaming. The Alltel agreements didn't have that. And so this merger condition insured that roaming would be available.

Although the condition has been in place, and although the merger has occurred, Verizon is taking the position that not only can they use geographic carve-outs for their own markets, but they are free to do that with Alltel markets also. So I believe that they are violating the condition that the FCC put in place. They are not violating it. They are making -- they are reserving the right to violate it. They are putting competitors like Lieb in a difficult position. We have asked the FCC to clarify and we hope the FCC will clarify rapidly.

Mr. Doyle. I see my time has expired. I thank the Chair.

Ms. Eshoo. Thank you. The gentleman from Illinois, Mr. Shimkus, is recognized for 5 minutes.

Mr. Shimkus. Thank you Madam Chairman.

Steve, do you want to go?

Okay. Thank you, Madam Chairman. Thank you for sitting in the Chair, and you all for waiting through the votes, and I am sorry about missing some of the testimony.

Let me just ask a simple question. Do you believe the auction of more spectrum with fewer conditions will benefit the consumer? Yes or no. And maybe why, if you have got a short answer. Mr. Schieber.

Mr. Schieber. Sir, I am not a spectrum expert. I am not sure that I am qualified to answer.

Mr. Shimkus. Okay. That is fine. Mr. Irving.

Mr. Irving. Absolutely. I think the answer is yes. I was

prepared to tell the committee that spectrum was the lifeblood of the wireless industry. Special access apparently is the lifeblood. And spectrum also. But we would like to see additional spectrum auctioned off with few conditions so that small and mid size carrier can continue to compete.

Mr. Shimkus. Great.

Mr. Meena. Yes. I don't think the name of the game in our industry is necessarily access to any kind of spectrum. Access to low band is particularly important. When I saw low band spectrum, I mean 800 megahertz, 700 megahertz. Last year we were able to acquire 700 megahertz spectrum that we are not able to actually build out because of the issue related to handsets and not having access to automatic roaming, auto data roaming.

RPTS SCOTT

DCMN NORMAN

[12:25 p.m.]

Mr. Shimkus. Let me ask because the question really is about if we place additional conditions on the spectrum that we are auctioning off, would that make it more difficult to you and to your decision to purchase or to bid on it.

Mr. Meena. It just depends on what those special conditions are.

Mr. Shimkus. So, if we added conditions without a definition, that does change your parameters a little bit?

Mr. Meena. Well, let me give you an example for specifically what you are asking.

We were hoping there would be special conditions tied into the 700 auction that would require automatic data roaming for those who bought, I believe it was, the C-Block spectrum last year. That did not occur. If that special condition had been in place -- and we would have been supportive of it -- we would have been very pleased if that would have come about.

Mr. Shimkus. Okay. Sir.

Mr. Potharlanka. We really were not qualified to talk about spectrum as it relates to middle mile. Our opinion is making more spectrum available for middle mile, I think, will create more options, and actually targeting --

Mr. Shimkus. Okay. I have limited time, so let me just go

to Mr. Murray and then to Dr. Ford.

Mr. Murray. So more spectrum would clearly benefit consumers, but the central tragedy of the last 10 years of policymaking, I would say, is the fact that we had the best opportunity of a swath of spectrum coming up. Who got it? The same two dominant carriers that were trying to create competition --

Mr. Shimkus. But the question is: If we put restrictions on spectrum, do you like that?

Mr. Murray. Well, you are referencing, I guess, the C-Block openness conditions, and I see --you know, if those conditions help the marketplace to move towards more openness and to get more devices and more applications out there for consumers, I think that is a net win for consumers, and I actually think --

Mr. Shimkus. But, obviously, the return on investment from the government on some of the auctions, because of restrictions, was less?

Mr. Murray. Well, let us remember that this is the public's spectrum; it is actually not the government's spectrum. What is the value of a public park, you know? Could we presumably earn a little bit more revenue if we sold that land for the public park? Well, sure.

Mr. Shimkus. But you also have to remember that people have to put in a lot of capital to make that spectrum worth anything. Otherwise, it is worth nothing.

Mr. Murray. Right. But some would actually argue the opposite -- that in some cases, by putting on certain kinds of conditions, you may actually increase the number of bidders who get into it.

Mr. Shimkus. Does anyone agree with that? Those of you who cannot debate this issue, I understand that.

Mr. Irving, do you agree that adding additional conditions will bring in more bidders or less bidders?

Mr. Irving. You know, there are conditions that could bring in more bidders. Right now, we have -- so it is hard to --

Mr. Shimkus. Does it restrict the ability of us to get a better return on the investment of spectrum, if we view it as a public asset, that we do so?

Mr. Irving. I am sorry. I apologize. I did not hear your question.

Mr. Shimkus. Well, I mean, if we put in conditions, does it inhibit our ability to raise the revenue from the bidders as we specify what goes on there? Let me just move on to another question because I am --

Mr. Meena. Could I take a shot at that, please?

Mr. Shimkus. No. Actually, I just need to go. I have got about four questions, and I have only dealt with one.

So let me just go to Mr. Schieber. How would Carterphone rules, requiring all wireless networks to support all devices, impact your ability to manage your network?

Mr. Schieber. It would have a significant impact. I am not a network engineer; but, you know, we are very cognizant of managing traffic to ensure that all of our customers have equal access to our network, and putting other devices --

Mr. Shimkus. And let me just, if I may, Madam Chair, finish with this: Would service quality be affected?

Mr. Schieber. It very well could be. Yes, sir.

Mr. Shimkus. Thank you, Madam Chair.

Ms. Eshoo. [Presiding.] Thank you, Mr. Shimkus.

The gentleman from California, Mr. McNerney, is recognized for 5 minutes.

Mr. McNerney. Thank you, Madam Chair.

I want to thank the panel for your testimony this morning. I have learned a lot, and I find it especially helpful, especially regarding special access and backhaul. I know it is not easy to testify, so I appreciate your coming up here.

I would like to see a competitive marketplace in which the little guy has a chance to become a big guy, and that is kind of what we are talking about here. I particularly liked your comments, Mr. Murray, that it is not necessarily about overregulating but that we need to use our oversight authority to haul noncompetitive players in here and to make them explain themselves in front of us. That is something that I hope the committee can follow up with.

My first question goes to you, Mr. Murray, and to you,

Dr. Ford. I definitely appreciate your economic perspective on this, but there are a few large telecom players that dominate the field, especially regarding the spectrum, while several smaller companies are clawing it out for the scraps, for the crumbs.

How do you propose to run the next auction so that it is more competitive for the little guys to get a part of it?

Mr. Murray, could you take that first?

Mr. Murray. I think, frankly, we just need to look at rules that perhaps have a filter which looks at dominant carriers. If you have already got a ton of spectrum, if you are already massively dominant in the industry, you know, it is possible that we should consider a spectrum block, which is a competitive spectrum block.

Mr. McNerney. So, by its very nature, that would get more people to bid if you were blocking?

Mr. Murray. Exactly.

Mr. McNerney. Dr. Ford.

Mr. Ford. You can hope for some things that you can never have, and this industry is very costly to be in, and you can try to force somebody in it, but that does not mean they are going to survive, okay? They are going to have to spend billions of dollars every year to keep that network running. If they cannot generate the business, then all you are doing is waiting for some bigger guy to gobble him up, and you have created a massive inefficiency, okay?

What we have to have in this industry is a dramatic rise in either the market size -- the expenditures, and maybe broadband will help with that -- or a significant reduction in the cost of the network. I have not seen either of those really happen.

I mean we are really at the point now where we are about to lose possibly another wireless carrier, and it is not because of some malfeasance or government incompetence in regulating the industry. It is just that it is too competitive for four or five people. It is just too competitive. It is just the nature of the business, man.

Mr. McNerney. Like Ms. Eshoo, I have trouble stomaching that geez, we need to let the bigger players get bigger so that they can spend the money they need to spend.

Mr. Ford. Well, you are going to have to subsidize them --

Mr. McNerney. From the market.

Mr. Ford. That is the only choice because they are going to lose money. If you have five of them beating their brains out, they are going to lose money. They have a debt to pay when they build that network. They have to have revenue to cover that cost. That is the only point, right? That is the only point. The costs are exceedingly high in this business.

Mr. McNerney. I have a technical question. I want to move on to a technical question.

Mr. Murray. California alone is the ninth largest economy in the world. Are we seriously suggesting that that cannot support

an independent, strong carrier? I think Leap is a testament to that is just not true. If it were so damned competitive, why is that its profit margins keep creeping up in the midst of a recession? We have got these guys making gangbuster profits in the midst of a time when the rest of the country is really struggling it out.

That, to me, says market power. We have got evidence of market power left to right in this industry. We have got anticompetitive behavior, blocking applications. You cannot get, you know, exclusive contracts on handsets. You know, you cannot get special access. What more evidence do we need that this market needs some oversight?

Mr. McNerney. Thank you. I would like to move on to a technical question, actually.

Mr. Schieber, you said you are not a technical person regarding the spectrum, but you are about to make massive investments in G4, I understand; is that correct?

Mr. Schieber. I am sorry. G4?

Mr. McNerney. Yes.

Mr. Schieber. Oh, 4G.

Mr. McNerney. Oh, 4G. Excuse me.

Mr. Schieber. I am sorry. Yes. Yes.

Mr. McNerney. I am a little dyslexic.

Mr. Schieber. Through a company, Clearwire, that we own a portion of, yes.

Mr. McNerney. So is there a problem with 4G in regard to the interference between neighboring portions of the spectrum?

Mr. Schieber. In all honesty, I believe anytime that you have spectrum that butts up against itself, that you always run the risk that there is some sort of interference. I know that it is something that our engineers deal with on a regular basis.

Mr. McNerney. Is that a particular problem? I mean 4G has a tremendous amount of bandwidth and content. There must be some spillover that exceeds that of prior generations of technology.

Mr. Schieber. I have not heard anything that indicates that the engineers cannot manage the spectrum appropriately to ensure that there is not interference.

Mr. McNerney. Does anyone else on the panel have a comment on that question?

Mr. Meena. I think Mr. Schieber is right.

You have that in any spectrum band. You could have bleed-over and interference if it is not managed properly. I do not know of any special situations with 4G other than incumbent broadcast TV stations at the 700-megahertz level that there might be some interference with when companies like ourselves offer 4G services at the 700-megahertz band.

Mr. McNerney. Okay. Thank you. My time has expired.

Ms. Eshoo. All right. Thank you, Mr. McNerney.

The Chair recognizes the gentleman from Oregon, Mr. Walden, for 5 minutes.

Mr. Walden. Thank you, Madam Chair. I appreciate that.

Mr. Schieber, my understanding is that more than half of all the backhaul in Europe and in Asia is wireless. If wireless backhaul is successful elsewhere, why doesn't Sprint use it more comprehensively in the U.S. given your partial ownership of Clearwire? What is the issue behind that?

Mr. Schieber. The majority of the cell sites where we do have an alternative vendor is, in fact, a wireless backhaul. It is technology that we are seeing an increasing amount of. I mentioned earlier that we work with FiberTower to bring wireless backhaul to our own cell sites.

One of the single biggest issues that we are faced with in migrating to wireless backhaul or to any other alternative access vendor is the fact that we are subject to very onerous terms and conditions associated with the special access and the middle mile facilities we buy from the ILEC today. We have situations where if we buy too much we are penalized; where if we buy too little, we are penalized. If we want to migrate a circuit from the ILEC to an alternative vendor, we have to pay in excess of \$900 in some cases. It is very, very difficult and very onerous to move, and so we have to be very cautious to avoid incurring termination liabilities.

Unfortunately, we were forced to sign up for those contracts because, without signing up for those contracts, we would have had to have paid even higher rates above and beyond what we are paying

today, which, as we heard today, we are already seeing exorbitant rates of return on special access and ILECs.

Mr. Walden. So it is not because T1 lines are so cheap?

Mr. Schieber. No, sir, T1 lines are not cheap. One-third of our operating costs associated with operating a cell site are for T1s and for the middle mile facilities.

Mr. Walden. Okay. Because your CTO, Barry West -- I guess in 2008 -- made some comment about that, that T lines are cheap and that that is part of the reason, so I was just wondering.

Mr. Schieber. In certain parts of the country -- in very dense, urban areas -- if there is a relatively short distance between a cell site and a LEC central office, you may very well see some less expensive T1s, but it is not a cheap technology for us to buy.

Mr. Walden. Okay. Dr. Ford, you were making some comments about just the extraordinary cost of whoever is building this out over time and about the need to get return on that. Mr. Murray, I think, had a little different perspective on that in terms of -- I think your line was "the gangbuster profits right now."

I am curious, Dr. Ford, if you want to respond to that.

Mr. Ford. Well, I mean I do not see any evidence of gangbuster profits. I mean, you know, you could say, well, there are gangbuster profits in special access. Well, I thought we were talking about the wireless industry. There are four or five wireless carriers in California. I mean there is enough market in

places for that to exist, and there are areas -- we heard earlier from members of the subcommittee -- where they do not have enough wireless, right? They are rural areas where the markets are very small but where the cost of deploying the network is not that much different or is even higher in rural areas. So the economics drives this thing. I mean you cannot just say, "I want more competition." The economics are going to tell you whether or not you can have what you want.

So, you know, firm profits are the only reasonable measure of how competitive the business is, because any given product may be above cost or any given product may be below cost. So it is across the whole scheme of the business venture from which you have to measure the competitiveness or the profitability of the business.

Mr. Walden. I will tell you that it seems like this Congress and administration certainly have an attitude of nationalizing everything, once it is broke. So I hope we do not create something else to go after.

I think I read in some testimony that 99 percent of America has access to cellular coverage right now. I must be the winner, then, of that 1 percent, because up until a year ago, at least two county seats -- well, at least one that I know of for sure -- in my district did not have cellphone coverage. U.S. Cellular came in there, and I know they are considering another town in my district. There are still lots of these rural areas where we do

not even have one carrier.

It would not be fair, Mr. Murray, if I did not let you respond now to what Dr. Ford said.

Mr. Murray. There is a lot to respond to there, sir.

One thing I would say is I do not see this at all as moving away from a market economy. In fact, this is quite the opposite. This is, how can we maintain free markets? How can we maintain competition? That is what I am saying.

My perspective has always been that I prefer competition to regulation, and in this market, while we do have some competition, there are really clear indicators that they are a market power. You know, the Department of Justice uses things like four firm concentration ratios, like HHI indices. The fact of the matter is those numbers have been creeping steadily up in this industry, and to complement that consolidation trend we see evidence of abuse.

So all I am saying is in order so that we can have a free market and have these companies stay strong and thrive, what we need to do is make sure that the dominant carriers are not abusing their market power. This has been the story of competition for more than a century.

Mr. Walden. Mr. Irving, do you want to respond?

Mr. Irving. Yes. Very quickly, I would just like to point out that, I think, small and medium carriers help make the industry vibrant, innovative and competitive.

What I would like to see is -- I would like to make sure, to

the extent that there are forces essentially tending toward elimination or toward the marginalization of small and medium carriers, that we act to address those forces so that we can continue to be innovative driving forces in the industry.

Mr. Walden. All right. Thank you.

Thank you, Madam Chair, for your indulgence on the time.

Ms. Eshoo. I thank the gentleman who is always so thoughtful and well-prepared.

Dr. Ford, you talked about California. You mentioned this. I want to set something down for the record here.

Now, according to the GAO report on special access, in Silicon Valley -- most specifically in San Jose, California, perhaps the most data-hungry area of the world -- competitors have access to only 6.2 percent of all buildings. To put it another way, the incumbent provider, AT&T, is the only provider of access in 93.8 percent of all buildings. So, if you think that is competitive, I will eat my hat. This is so worthwhile to drill down into this, but I just wanted to get that on the record.

Mr. Ford. Is that a question?

Ms. Eshoo. No.

I am going to recognize now the gentleman from Indiana, Mr. Buyer, for 7 minutes.

Mr. Buyer. Actually, I have to go back, Mr. Meena, and look at your testimony again.

Your word "duopoly" has sort of stuck in my mind, and so I

was trying to think of other industries in our country that have that type of system. I was thinking about the tire industry, perhaps. There are industries out there that have really dominant players. You might want to call them "duopolies," but they really are not. So you have got Coke and Pepsi, right? Then there are a whole bunch of others.

Mr. Meena. Right.

Mr. Buyer. That is exactly what you have here, too. I don't know, I don't want to be a lawyer and be nitpicking at your testimony here.

Mr. Meena. Well, I do not agree with that.

Mr. Buyer. You can't say "duopoly" and then can't count, okay? So whoever wrote that for you can't count. So don't call it a "duopoly." That is the only point I would like to make. It is an easy thing to --

Mr. Meena. I would like an opportunity to respond.

Mr. Buyer. Fine. It is an easy thing to throw out there. I am just being very cautious to you.

Sure, go ahead.

Mr. Meena. Yes. Well, what I am saying is that when I was in college, I walked out to play football at Ole Miss. There were two scholarship quarterbacks and five walk-ons. Were there really seven quarterbacks or two?

Mr. Buyer. Seven.

Mr. Meena. No. I tell you, there were two because there

were only two who got to go to the scrimmages and two who got to put the game jerseys on and those types of things. Yes, you could count one, two, three, four, five, six, and seven.

Mr. Buyer. Oh, I see. So the other five did not make the other two better players?

Mr. Meena. No, sir. Here is why. Here is the example.

Mr. Buyer. Where did you go to school?

Mr. Meena. I went to the University of Mississippi, but let me finish, please, sir.

The two who are duopolistic in our industry have built their companies on low-band spectrum -- 850 megahertz -- and they have put together licenses throughout the Nation on the most attractive beachfront property spectrum. When the auctions occurred last year and when more of that low-band spectrum was let, or was auctioned, they were able to acquire more and more of that. That allowed them to continue to build their businesses on the best spectrum possible in the wireless industry. That is the best advantage they have.

Mr. Buyer. Let me reclaim my time, then, because I am getting a sense that you would believe that all wireless carriers should have equal access to precisely the same type of wireless headset regardless of who made it.

Is that what you believe?

Mr. Meena. What is that?

Mr. Buyer. Is that what you believe?

Mr. Meena. I do believe that every wireless user should have

--

Mr. Buyer. I am trying to figure out what you believe.

Mr. Meena. Okay.

Mr. Buyer. Then, if that is the belief and if you are asking us to adopt that belief, where is the incentive to collaborate and to innovate and to create differentiating products?

Mr. Meena. I will tell you where the incentive is. It is in competition. These manufacturers want to sell every device they possibly can. For example, the iPhone. The iPhone today is limited to just selling to AT&T customers. Manufacturers desire to sell their products just like we desire to sell our products.

Mr. Buyer. Well, if in fact we had a paradigm -- actually, strike the word "paradigm."

If we had a predicate of your belief, where is the incentive for someone to adjoin and to put at-risk capital into the marketplace to create anew? That is the iPhone. So, when you have someone who actually wants to innovate and to do something new and different and to create something new and different, it excites the consumer, and then everybody goes chasing after the mark.

Mr. Meena. Sure. All smartphones --

Mr. Buyer. Would you agree with that?

Mr. Meena. I do agree with that, and I can even add onto that.

Mr. Buyer. Well then, if you agree to that, explain to me how that is congruent to your predicate?

Mr. Meena. Here is how it is congruent. All users want access to the latest and greatest devices, especially smartphones, this day. We are seeing a great migration from the plain old cellular phones to smartphones, including iPhones. BlackBerries are another example of that.

Our average revenue per user in smartphones is \$10 less than other companies' average revenue per user. If you have one company that has one device, they do not have that opportunity to take advantage of the price differential that we might offer and that others might offer.

Mr. Buyer. You know, I could use your same analogy in the pharmaceutical market. We deal with these exclusivity arrangements. When someone goes to the marketplace and they take the risk -- meaning they are willing to also accept the loss of the marketplace -- and when they have a blockbuster drug or when they have a blockbuster product, then everyone dives for the product. They want access to it, and they demand their access, and then they demand their subjective belief under an objective standard called "fairness," and they want us or the FCC to determine it.

Mr. Meena. Okay.

Mr. Buyer. The reality is that -- I suppose King Solomon, so long ago, said: When it comes to human vice -- in particular,

greed -- that there is nothing new under the sun.

Now, let us be pretty doggone honest with each other. That is what this is about. It is about money. It is about how we gain access to that dollar. We want to chase it. We want to benefit from somebody else's investment. So would we be just as equally willing to pay for their loss for products that do not make it on the market? The answer is no. That is the reality. The answer is no.

Mr. Meena. Let me tell you --

Mr. Buyer. So let me -- no. Time out. I understand your predicate. Respectfully, I disagree with your philosophy. I want to protect the marketplace is what I want to protect.

So as you look out there and you say, okay, not only does AT&T have an exclusivity with the iPhone, Sprint with the Palm Pre, Verizon with the BlackBerry Storm, T-Mobile now hooking up in an agreement with Google, but if these companies want to do this and if they are creating products which consumers like and they are new and innovative, I think it is pretty healthy, that is what I look at. I think of it as something that is very healthy.

I want to ask this question to -- let me turn to Dr. Ford. Help me here.

If Congress were to say that we would ban exclusivity -- do a prohibition of exclusivity agreements -- what would be the impact upon innovation and true competitiveness in the marketplace?

Mr. Ford. The wireless industry -- a lot of the competition

in the wireless industry occurs in the device. I mean most of the commercials you see on television are talking about the device. So the device is a very important component of competition in that industry. Plus, they are giving it to you a lot of times, and they are giving it to you for a very low price, so that is a very important piece. They want to be able to differentiate in that piece to attract business.

Necessity is the mother of invention. When AT&T came out with the iPhone, every single manufacturer was working exceedingly hard to try to match the quality of that product. And Apple drove this. It wasn't the wireless industry, okay? This was Apple's decision. Whether or not that was a wise decision for Apple, I don't know. You could go either way. AT&T had to upgrade its network significantly to handle that in terms that maybe they didn't put in as much investment as they needed to, given the enormous demands that that device puts on the network. I think, unquestionably in this industry, if you prohibit that kind of arrangement, you are going to reduce competition.

I think their points may be a little different in the sense that I am out here in this rural area, and I am not really competing in that space.

You know, I do not think that -- I mean, there is the issue also of whether or not a carrier would say, I am going to make a device for you, if you can't sell 5 million of them. It may not be efficient for the manufacturer to sell to very small firms, so

it might not necessarily be an issue with the big carriers in trying to keep other people from their goodies.

Mr. Murray. Congressman, if I may --

Mr. Buyer. I only have one comment. My time has expired. So if the Chair would indulge me, I would note that, out of the Organization of Economic Cooperation and Development, of all of the countries, the United States has the most minutes of use, the lowest revenue per minute and the least concentrated market of, and, what I would say, the most efficient use of spectrum of any of the countries.

Mr. Murray. And consumers pay more in this country than in any other country, right?

Mr. Buyer. Geez. If we use more, we pay more. Hello. Hello.

Mr. Ford. Thank you.

Mr. Murray. Sir, here is my question for you.

Mr. Buyer. If you want the best and if you get the most efficient use out of the spectrum and if you use it a lot, you are going to pay more. It is a free market enterprise system.

Mr. Murray. And that is why we are all moving towards unlimited --

Mr. Buyer. Wow.

Ms. Eshoo. Wow. This really did something for the volume. I have a bill on advertising volume --

Mr. Ford. I am all for that.

Ms. Eshoo. -- that blows people out of the room.

Thank you, Mr. Buyer.

I just want to make a comment about what is tied to what. We have many successful companies in the country that really are not tied to other services. TiVo? How many people in the room use TiVo? How about IMAX? Slingbox? Xbox?

So the notion that there has to be a nexus between the two is something I do not necessarily buy into, and we have got some very good examples of that.

Mr. Murray, you started to say something, and I would like to give you time to answer and anyone else who is on the panel. There is not any other member to call on, so we have got a few minutes here, and then we will adjourn.

Mr. Murray. Briefly, I wanted to address Mr. Buyer's point, which was that the network is not the innovator here. It is the handset company who is doing the innovation. I challenge the premise -- that is, a free market -- that we are going to maximize returns to that handset manufacturer by telling them to limit the universe of people with whom you can contract. That is just fundamentally wrong.

If we want to maximize the incentive for people to build sexy new devices, let them sell it to everybody. The only reason that manufacturers have not come out against these exclusive deals is because they are scared of the retribution that they will get back from the carriers. The carriers are not innovating here; it is

the handset manufacturers. It is just wrong if we say we are going to maximize their incentives by limiting the universe of people that they can sell to.

Mr. Buyer. Were they working together?

Ms. Eshoo. Well, the gentleman has not been recognized.

Mr. Meena. Most of the innovation is coming from the manufacturers. Most of it is coming from the manufacturers.

Ms. Eshoo. Does anyone else want to chime in on this?

Mr. Meena. Can I speak to the pharmaceutical issue?

Ms. Eshoo. Quickly.

Mr. Meena. In a rural area, what if there were just one -- let us just say there was a Walgreens and not a CVS, and that CVS had access to a lifesaving drug. Is it not fair for those who live in the rural area to have access to that lifesaving drug? That is what we are dealing with here. Is it not fair that those who live in rural areas do not have access to the latest and greatest devices?

Ms. Eshoo. Well, I think that today's hearing has been highly instructive and that there obviously are divergent views on the committee, but I think that we have not just skirted along the surface but that we have really dipped our wings into the important issues here. I think the area of special access is something that deserves a great deal of attention, not only by the Congress but by the FCC.

I hope again that the new composition of the FCC will come

together soon. There is an enormous amount of work to be done there and some very clear thinking about what the state of competition is in the United States of America. We are all for competition. I mean it is in the DNA of every American, but -- well, I will not editorialize that.

So I want to thank the audience. You have been a patient one. I do not know if we have so mesmerized you by the great content of the hearing or if you are employed by some of the interests here; but whatever, it is nice to see that the room remained full.

I want to ask for unanimous consent to keep the record open for 10 days for members to submit their opening statements and follow-up questions.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Ms. Eshoo. Also, not the Acting Chairwoman, but the Chairman has also included AT&T and Verizon to submit statements for the record, which I find very interesting, but that is what he would like to do. They did not testify today, but they are going to be allowed to submit statements for the record.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Ms. Eshoo. So that is the unanimous consent request. Not hearing any objections, so be the order. And the subcommittee will now adjourn. Thank you, everyone.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]