Testimony of
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Subcommittee on Antitrust, Competition Policy and Consumer Rights

regarding

"An Examination of Competition in the Wireless Market"

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INTRODUCTION

Chairwoman Klobuchar, Ranking Member Lee, and members of the Subcommittee, thank you for inviting me to testify before you today regarding the very poor state of competition in our nation's wireless industry.

Cellular South, the provider of C Spire Wireless service, has been in the wireless business for over twenty-five (25) years. We are the nation's largest privately owned wireless carrier and today, despite serving just under 1 million customers in all of Mississippi and portions of four other southeastern states, we are the sixth largest wireless operator in the U.S. Let me say that another way: in terms of subscribers, we are less than $1/100^{th}$ the size of either Verizon or AT&T yet, we are now the 6^{th} largest wireless operator in the U.S.

The acute lack of sustainable competition in the wireless industry has forced C Spire and many other smaller wireless operators to maintain an active role in Washington. Today, we do that through the Competitive Carriers Association or CCA. CCA's more than 100 wireless operator members include nearly every one of the nation's wireless operators, except for the wireless Twin Bells – Verizon and AT&T.

To fully appreciate the harm that a lack of competition has inflicted on the wireless industry, it is important to reflect on the industry's history. When C Spire (then offering service as Cellular South) entered the wireless business in the late-1980s, there was a local duopoly in every market. The FCC divided a total of 50 MHz of cellular spectrum in each local area between just two providers, one of which was the incumbent wireline telephone company. In that era of local-market duopolies, consumers had just two choices for wireless service. In a duopoly, the market can quickly reach equilibrium and, if both providers are reasonably happy with their position, innovation stagnates and prices rise. In the late-1980's carriers typically had little market incentive to innovate or improve service offerings. As a result, that period was marked by large, brick-sized phones and even larger wireless bills.

The industry changed for the better in the mid-1990s. In 1994, Congress broke-up the duopoly system by authorizing auction of PCS spectrum licenses for commercial wireless service. A substantial number of competitive carriers entered the market launching a new, healthy competitive era of wireless in the U.S.

For over a decade (from approximately 1995 to about 2009), the wireless industry was a shining example of robust competition. During that period, customers across much of the nation could choose from among multiple operators at the national and regional level competing to deliver the best services at the lowest price in highly competitive ecosystems. Once an operator chose an over-the-air technology (e.g., GSM or CDMA), devices were broadly available, reciprocal roaming agreements were easily and quickly negotiated with operators of compatible networks at economically sensible rates, and, network equipment could be deployed using common standards of compatibility. From 1995 to 2009, in the FCC's first 13 reports on the state of competition in the wireless industry, the agency concluded that the industry was characterized by either growing competition or "effective competition." Policymakers hailed the wireless industry at the time as "one of the great success stories" resulting from Congress's and the FCC's efforts to establish and maintain a regulatory framework in which competition could thrive.[1]

As the newer PCS licensees built networks and began acquiring customers, the incumbent cellular licensees were forced to respond to competitors with lower priced services and devices, new and larger coverage areas, better customer service, and more innovative offerings. C Spire had to do both – build new networks in some markets and respond to new competition in others.

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

In the markets where C Spire was an original cellular licensee, we had to develop creative strategies and new products to compete with the new PCS entrants. As a PCS licensee in other markets, we were the new carrier offering new products and services to take market share from the cellular incumbents. C Spire launched several offerings that were groundbreaking at the time, including "Free Nights and Weekends," "Free Incoming Calls," and, later, some of the nation's first "Unlimited" plans. During this period, carriers competed on a relatively level playing field and attracted and retained customers by offering some combination of superior coverage, pricing, or customer service. Consumers – and the nation's economy – were the primary beneficiaries.

But this all began to change in the middle of the last decade. Since at least 2006, Ma Bell has been rapidly reconstituting herself into the Twin Bells of the wireless industry: AT&T Mobility and Verizon Wireless. AT&T (with just one failed attempt out of dozens) and Verizon have gobbled up and continue to acquire numerous competitive carriers and potential new entrants, including ALLTEL, Dobson, Centennial, Rural Cellular Corporation, SpectrumCo, Leap and a long list of others.

Now, the Twin Bells have nearly succeeded in dragging the industry back to a complete duopoly with the same lack of competition that existed in the 80's. Today, we do not even have, as some have suggested, four national wireless operators. You only need to see the 4G LTE maps featured in a recent Verizon commercial to understand today's U.S. wireless industry is really composed of just two national operators (AT&T and Verizon), two metropolitan operators (Sprint

and T-Mobile), a few regional providers (such as C Spire, U.S. Cellular and nTelos) and dozens of smaller, typically rural, operators.[2]

HARMS OF TWIN BELLS' MARKET POWER

As the wireless Twin Bells have grown, the ability of others to compete effectively has been substantially reduced. The concentration of market power into the hands of the wireless Bells has led to fewer choices for consumers and the routine abuse of market power in an effort to prevent competition at every turn. Specifically, the Bells have leveraged their enormous market power to (1) restrict competitive carrier and consumer access to devices and operating system updates, (2) withhold or delay implementation of data roaming and backhaul agreements at economically reasonable rates, (3) concentrate valuable low-band spectrum nationwide, and (4) leverage their control over device and infrastructure vendors to Balkanize new spectrum and slow the deployment of new technology (e.g., 4G LTE) by competitors. In each case, the Bells have an incentive and ability to foreclose competition.

This consolidation has had harmful, concrete consequences that prevent the sort of healthy, open "wireless ecosystem" that can support competition and that thrived during the era of wireless growth. Just like a healthy biological ecosystem needs a combination of atmosphere, organisms, and nutrients functioning together to make for a sustainable, healthy, vibrant system, a wireless

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[2] *Verizon Commercial 2013 | Map Gallery |Verizon Wireless*, (Pub. Nov. 4, 2013) - http://www.youtube.com/watch?v=gFUUybc_M40

ecosystem needs three key inputs to function well. A healthy, sustainable wireless ecosystem provides operators with reasonable access to (1) spectrum, (2) devices and network equipment, and (3) other networks, including voice and data roaming on wireless networks and backhaul on wireline networks. To the extent access to any of these three key components is limited, or eliminated by consolidation of market power among just two enormously dominant players, the health of the ecosystem is diminished and competition is reduced or eliminated.

According to the FCC's latest competition report, the Twin Bells together account for an astounding 67 percent of industry revenue;[3] including 86% of the total industry EBITDA in 2013. This is a far greater share of industry revenue than the combined shares for the top two firms in other "consolidated" industries, like the automotive industry (top two firms hold only a 35% share of total revenue), the oil industry (top two firms hold only a 24% share of total revenue), or the banking industry (where the top two firms hold a 20% share of total revenue).[4] The last time the FCC was able to conclude that there is "effective competition" in the wireless industry was January 2009 – it has been unable to do so in any of its last three wireless competition reports.

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[3] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, Sixteenth Report, FCC 13-34, ¶ 52 (rel. Mar. 21, 2013) ("*16th Mobile Wireless Competition Report*").

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

Equally concerning is the risk of market stagnation that can result from intense concentration of market power among just two firms. When just two firms control or can exercise market power over nearly all of an industry's key inputs, competition and innovation suffer. And when one of those inputs is a taxpayer owned asset (spectrum), taxpayers suffer, too. Here, AT&T and Verizon have gained such large market share, that they nearly have become "the wireless market." They can now benefit from simply maintaining the status quo and encouraging policymakers to, essentially, "do nothing."

But, the status quo is harming consumers and the nation's economic growth. And, in the form of reduced spectrum auction revenues, it will harm taxpayers. Unless policymakers take steps now to reduce the Twin Bells' duopoly control over the wireless market, there will be little incentive for competitive operators to compete in future spectrum auctions and the revenue generated by those auctions – which could be used to fund important public safety initiatives and reduce federal budget deficits – will be at significant risk.

In summary, what remains of competition is increasingly in jeopardy in today's U.S. wireless industry. Even when competitive operators have made modest advances at the consumer retail level, these small successes have been short-lived and required devotion of disproportionate resources because of deep-rooted, structural defects to the competitive ecosystem wrought by the Twin Bells. For years, C Spire and other competitive operators have been telling policymakers about our concerns over the lack of competition – the lack of access to key inputs necessary for a competitive wireless ecosystem (of spectrum, devices, and networks). The industry, unfortunately,

remains on a glide path toward a *de facto* wireless duopoly of AT&T Mobility and Verizon Wireless – an outcome unchanged by temporary and unsustainable inroads at the consumer retail level that AT&T and Verizon point to as illustrating vibrant competition. In the meantime, the wireless Twin Bells have used the enormous scale they gained through acquisitions to control device and infrastructure vendors, limit or eliminate data roaming and backhaul, slow the deployment of new technologies in the U.S., and maintain artificially high price points for their services.

COMPETITIVE ECOSYSTEM VS. HEAVY-HANDED REGULATION

Policymakers now have a choice to make: they can either (1) allow the wireless industry to continue down a path toward a total duopoly made up of the behemoth wireless Twin Bells – a path that will eventually require intensive regulation of the wireless industry; or (2) reverse course with policies that promote sustainable competition in the wireless industry and encourage an environment in which competition is able to regulate the industry.

We think that choice is objectively simple: At a time when the American economy is struggling to get back on its feet, our priority should be on preventing the emergence of a duopoly that would require heavy regulation in one of the nation's largest and most critical industries. Instead, policymakers should act to preserve competitive, innovative markets that use private capital to create jobs while providing consumers with robust choices of products and services.

Policymakers must work to ensure that our nation has a wireless industry that encourages as much competition and access as possible.

Specifically, policymakers must promptly take three fundamental actions, each of which is a necessary element to a vibrant and open wireless ecosystem. First, they should adopt rules to safeguard competitive carriers' access to spectrum – both by updating the "spectrum screen" used to evaluate wireless acquisitions, and by structuring auction-related spectrum limits in a way that encourages and rewards participation by a broad range of operators, particularly for critical, limited low-band spectrum such as the 600 MHz band to be auctioned in 2015. Next, policymakers should promote access to devices by ensuring interoperability across future spectrum bands and by working with both operators and device manufacturers to ensure consumer devices are not contractually or technologically "locked" to any particular operator's network. Last, they must ensure that the FCC's rules preserve competitive operators' interconnection with the Twin Bells' networks, by enforcing economically reasonable data roaming requirements and ensuring reasonable access to backhaul or "special access" lines. These measures would help to ensure the sort of healthy ecosystem needed to foster sustainable competition in the nation's wireless industry.

ACCESS TO SPECTRUM

Policymakers must ensure spectrum is allocated and licensed efficiently and that it enables wireless competition. Time and again, the FCC has made clear that access to spectrum is a

"precondition to the provision of mobile wireless services" and is "critical for promoting the competition that drives innovation and investment."[5] The Department of Justice echoed this sentiment in a recent submission to the FCC, where it stated that soaring demand for mobile broadband in recent years has "made spectrum a critically scarce resource" for wireless carriers.[6] Both DOJ and the FCC also have recognized that access to low-frequency spectrum – which can provide "the same geographic coverage, at a lower cost, than higher-frequency bands"[7] – is especially important for new entrants and smaller carriers.

DOJ has urged the FCC to adopt rules ensuring that competitive carriers have the opportunity to acquire spectrum, particularly in low-frequency bands – a measure DOJ says would "improve the competitive dynamic" in the industry and "benefit consumers."[8] Today, the Twin Bells control around 75% of sub-1 GHz spectrum available for mobile broadband nationwide.[9] As the DOJ noted, the Bells have the incentive and the ability to acquire additional spectrum –

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

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

7 *16th Mobile Wireless Competition Report* ¶ 122.

8 *DOJ Ex Parte Submission* at 1.

9 Estimate based on Federal Communications Commission Universal Licensing System (ULS) data as of 12/31/2013.

particularly competitively important low-band spectrum – based not simply on its utility value but rather in part on the value of foreclosing competitors' access to it.[10]

The upcoming incentive auction for the 600 MHz spectrum presents an excellent opportunity to begin to restore sustainable wireless competition. The industry will be pushed further towards a duopoly if policymakers miss the opportunity to ensure that all carriers have a meaningful opportunity to participate in the auction for low-band spectrum. Similarly, the FCC's current review of its spectrum screen offers a valuable opportunity to ensure that future spectrum acquisitions by the Twin Bells do not do further harm to competition.

The FCC must structure the 600 MHz auction in a manner that promotes sustainable competition. All wireless operators, including smaller operators, must have an opportunity to bid, win, and integrate much needed low-band spectrum into their existing networks. In particular, and consistent with last year's Spectrum Act, the FCC should ensure that the two largest carriers have an opportunity to bid on spectrum where needed, but not in a way that allows them to "corner" the market for available 600 MHz spectrum and further concentrate the most valuable low-band spectrum in the hands of the Twin Bells.

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10 *DOJ Ex Parte Submission* at 14.

ACCESS TO DEVICES

Another critical component of a healthy, competitive wireless ecosystem is access to devices. The FCC has recognized that "devices are a central part of consumers' mobile wireless experience, and a key way by which providers differentiate their offerings."[11] For many years, the largest carriers have used exclusivity agreements with major device manufacturers to gain an edge over competitive carriers. AT&T was particularly successful at securing exclusive rights over popular handsets, most notably the iPhone which AT&T had exclusively for several years. With respect to CDMA devices, Verizon had numerous exclusivity agreements of its own for CDMA devices, and only after DOJ opened an investigation into handset exclusivity agreements – with the AT&T/iPhone arrangement reportedly "at the center" of the inquiry[12] – did Verizon begrudgingly agree to limit its period of exclusivity to allow smaller operators to offer these formerly exclusive handsets. While contractual device exclusivity seems to have lessened in recent years, the Twin Bells have pursued other strategies to frustrate competitive carriers' access to devices.

For example, for over four years, and until the FCC under interim Chairwoman Clyburn threatened regulatory intervention, AT&T utilized its market power over device and equipment

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11 *16th Wireless Competition Report* ¶ 2.

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

makers to implement and defend industry standards that prevented the development of interoperable devices in the Lower 700 MHz band. Device interoperability is a prerequisite to a well-functioning wireless marketplace; it encourages innovation, gives consumers more choices, and reduces costs to end users. Interoperability also makes roaming technologically possible; non-interoperable devices simply cannot function on other carriers' networks, even though those networks utilize the same technology and spectrum band.

Because of the lack of interoperable devices in the Lower 700 MHz spectrum, over $2 billion of the taxpayers' wireless spectrum remained stranded for years, unable to generate economic benefits for its licensees or consumers. Fortunately, and thanks in large part to the leadership of Commissioner Clyburn, that obstacle has been overcome and that spectrum, much of which is now in the hands of T-Mobile, can be used to increase the availability of 4G LTE in many markets across the country.

It is equally important for policymakers to ensure that both the Twin Bells and device manufacturers supply wireless devices that are not technologically "locked" to any particular operator's network. Wireless consumers must be able to move from one operator to another within a common ecosystem after satisfying all of their contractual obligations to their current carrier. Without both interoperability and unlocked devices, this critical component of competition will remain unachieved.

ACCESS TO NETWORKS

A competitive ecosystem also requires that operators have economically reasonable and reciprocal access to other, compatible wireless networks as well as reasonable access to wireline networks for backhaul in order to offer the level of service that consumers expect. Except for the Twin Bells, wireless operators lack a national coverage footprint, so their subscribers must roam on other compatible networks to receive service when outside their provider's service area.

AT&T and Verizon control (or are affiliated with) ubiquitous wireless and wireline networks, and play a dominant role in the market for roaming, as well as in the provision of "backhaul," which is the wire that connects an operator's tower, ultimately, to the public switched telephone network or the internet. Preserving economically reasonable access to these key network-related inputs is critical to competition. It enables competitive operators to provide a service that can compete with the vertically and horizontally consolidated scale of AT&T or Verizon.

With regard to roaming, the FCC's adoption (and the D.C. Circuit's affirmation[13]) of rules requiring wireless carriers to offer data roaming on commercially reasonable terms was a good first step toward economically reasonable access to reciprocal data roaming agreements. However, as the FCC notes in its most recent competition report, "the ability to negotiate data roaming

13 See, *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir 2012)

agreements on non-discriminatory terms and at reasonable rates remains a concern."[14] Competitive operators, like C Spire, will continue to find it difficult to negotiate with the Twin Bells for economically reasonable roaming rates utilizing the latest technology when those agreements cannot be measured by the FCC against the backdrop of all such agreements between the Twin Bells and other carriers. The FCC must continue to evaluate whether data roaming agreements offered in the market are fair and economically sustainable and encourage access to data roaming for consumers who expect to be able to use their devices anywhere there is an available, compatible network.

CONCLUSION

There is much innovation left to be done in the wireless space. Many people of all socioeconomic backgrounds and geographic locales have yet to benefit fully from the wireless experience. And that is why we face a critical decision point in the wireless industry.

Policymakers have to decide: Should we continue down the path toward a nationwide wireless duopoly, or should we take the steps necessary to restore a sustainable competitive ecosystem for our nation's wireless industry?

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14 *16th Wireless Competition Report* ¶ 210.

The question, I think, answers itself. American business is appropriately built on the notion that healthy competition breeds innovation that fosters economic growth and benefits consumers. That notion must certainly apply to the wireless industry, which cannot exist without the devices and networks that utilize the spectrum owned by and for the benefit of the American taxpayer.

Thank you again for the opportunity to be here today. I appreciate your time and your interest in these issues. I look forward to discussing them here this morning.