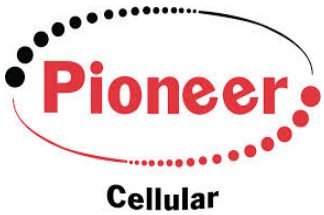

January 31, 2014

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Greg Walden
Chairman, Subcommittee on
Communications and Technology
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Anna G. Eshoo
Ranking Member, Subcommittee on
Communications and Technology
U.S. House of Representatives
Washington, D.C. 20510

Re: Comments in Response to White Paper
Released By the Committee on January 8, 2014

Chairman Upton, Ranking Member Waxman, Chairman Walden and Ranking Member Eshoo:

On behalf of Smith Bagley, Inc. d/b/a Cellular One ("Cellular One"), Cellular Network Partnership d/b/a Pioneer Cellular ("Pioneer Cellular") and East Kentucky Network, LLC d/b/a Appalachian Wireless ("Appalachian Wireless") (collectively, the "Rural Wireless Carriers"), we write in response to the Committee's White Paper, released January 8, 2014, seeking comment on an update to The Communications Act of 1934, as amended (the "Telecom Act").

Cellular One, Pioneer Cellular and Appalachian Wireless support the idea of updating the Telecom Act. As carriers collectively serving hundreds of thousands of citizens, we share common interests with many other regional and rural carriers across the country. We are willing to assist the Committee during this process, by providing information for the record, sharing comments on proposed legislation, and participating in hearings.

These comments are broken into three sections, a background on our companies, an overview commentary on some aspects of a Telecom Act rewrite that the Committee will hopefully find useful, and direct answers to the questions posed.

Background

Throughout the Four Corners region of the Southwest (Arizona, New Mexico, Colorado and Utah), Cellular One serves over 100,000 customers in a rural region where most of its service area has less than ten households per square mile. The company operates a 3G network and intends to deploy 4G at the earliest possible date.

Cellular One operates the most extensive commercial mobile wireless network serving the Navajo, Zuni, Hopi, White Mountain Apache, and Ramah Navajo in the Southwest United States, and area roughly the size of West Virginia. Much of the Cellular One network has been constructed and maintained with support from the federal universal service fund. The high-cost and low-income programs are largely responsible for the dramatic increase in telephone penetration in these areas between 2000 and the present.

Pioneer Cellular is a Partnership Group comprised of Pioneer Telephone Cooperative, Inc., KanOkla Telephone Association, South Central Communications of Kansas, and Hinton Cellular Company in Hinton, Oklahoma. Established in 1988, the group serves customers in 47 counties in western and southwestern Oklahoma and 14 counties in southern Kansas by using over 300 cell sites. Pioneer Cellular provides services to over 60,000 subscribers.

Appalachian Wireless is a provider of wireless service in the Appalachian Mountains of eastern Kentucky and southwestern Virginia, where it has been licensed for many years and has a longstanding record of serving small and rural communities. It serves over 120,000 customers in its service area. Larger national wireless carriers have largely ignored or offered minimal service in the small towns and rural areas that Appalachian Wireless serves. Without Appalachian Wireless' expenditure of resources to build out its wireless network, many of the areas it currently serves would most likely lack any reliable access to wireless voice and high-speed broadband services.

To put Cellular One, Pioneer Cellular and Appalachian Wireless in perspective, the three companies combined serve less than 300,000 subscribers. The nation's two largest facilities-based mobile wireless carriers each serve over 100 million subscribers. The next two each serve over 30 million subscribers, and the fifth largest carrier serves roughly five million customers.

General Comments on Telecom Act Reform

Most regional carriers, including the Rural Wireless Carriers, focus primarily in rural areas, while the big four carriers focus on areas best described as urban, suburban and major highways. In the Rural Wireless Carriers' experience, large carrier business plans focus on serving areas that preserve high margins and meeting shareholder expectations for earnings per share, share buybacks, and dividends. The high capital expenditures required in high-cost rural areas is inconsistent with these objectives.

In contrast, smaller and more rural focused carriers provide higher quality service in areas that would otherwise have been ignored or underserved. In the case of the Rural Wireless Carriers, this has translated into a successful business model that delivers superior coverage, excellent customer service, job creation, and a boost to the economy in rural areas. A Telecommunications Act update must ensure that rural citizens receive high-quality service that is reasonably comparable to those in urban areas.

Representatives Upton and Walden recently observed that, "[f]rom the earliest days of the telephone to today's wireless broadband Internet, the communications sector has been a driver of technological change and economic activity for more than a century." (Multichannel News Guest Blog, Jan. 9, 2014). However, by any measure, the market for wireless services is highly concentrated, and this concentration has increased significantly over the last decade as a result of merger and acquisition activity.

Today, four carriers—Verizon Wireless, AT&T, T-Mobile, and Sprint—hold the lion's share of all spectrum, measured on a MHz/POP basis, that is potentially usable for providing mobile wireless services, especially the most valuable spectrum below 1 GHz. The big four now divide up over 95% of the marketplace, with AT&T and Verizon Wireless accounting for nearly 70% of wireless industry revenue.[1] In contrast, the top two firms in the auto industry collectively hold less that 35 percent market share.[2]

The Department of Justice has similarly concluded that the wireless marketplace is highly concentrated. In 2011, the Department of Justice (DOJ) alleged that the proposed merger between AT&T and T-Mobile would result in a Herfindahl-Hirschman Index ("HHI"), of more than 3,100 for mobile wireless telecommunications services nationwide, an increase of nearly 700 points. DOJ stated, "These numbers substantially exceed the thresholds at which mergers are presumed to be likely to enhance market power."[3]

Excessive market concentration is harmful to rural consumers because it enables the largest carriers to exert tremendous leverage over small carriers on a host of competitive

[1] See http://venturebeat.com/2013/07/08/iphone-carrier-consolidation/

[2] See http://www.edmunds.com/industry-center/data/market-share-by-manufacturer.html

[3] *See USA v. AT&T, Inc., T-Mobile USA, Inc. and Deutsche Telekom, AG, Complaint, Case No. 1:11-cv-01560*, available at, http://www.justice.gov/atr/cases/f274600/274613.htm .

issues. This is especially true because our nation's mobile wireless technologies continue to be divided into two camps: Verizon/Sprint (CDMA) and AT&T/T-Mobile (GSM).[4] Among the competitive issues faced by smaller carriers are:

Interconnection. Small carriers must interconnect with one of these two camps (CDMA and GSM), so that customers' calls can be completed. The lack of choices confers enormous market power on large carriers, who are empowered to dictate the price of roaming and have the capability to deploy tools to prevent their customers from using a small carrier network in a rural area, even when it offers a strong signal.

Interoperability. The largest carriers have a lock on the handset marketplace, with power to dictate how handsets are designed, sometimes to the detriment of consumers and smaller regional/rural carriers. In the case of the 700 MHz band, the largest carriers used their leverage over handset design to jeopardize the significant spectrum investments of smaller carriers. Ultimately, the FCC had to step in to force 700 MHz interoperability, to ensure that when consumers buy popular handsets they will work throughout the country on all compatible bands. Congress should ensure that any future spectrum allocations include an interoperability mandate to protect consumers and to preserve competition in the wireless marketplace.

Size of Geographic Licenses. When the FCC allocates new spectrum for auction, the largest carriers favor large geographic license areas, despite specific language in Section 309(j) of the Act requiring the FCC to allocate spectrum so as to *increase* opportunities for small business, women, minority groups and rural telephone companies. In the upcoming incentive auction, the largest carriers seek license areas defined along 176 Basic Economic Areas, rather than 734 Cellular Market Areas.

Auctioning spectrum using smaller blocks increases opportunities for small business and raises more money for the U.S. Treasury, due to increased competition throughout the country. Specifying smaller blocks also increases the quantity of service in rural areas. A buyer of a large block can meet its build-out obligations by constructing network facilities in the urban/suburban parts of its licensed area, without ever having to build in the rural parts. By contrast, when a rural carrier purchases a rural block, it must meet its build requirement by constructing network in the rural areas. All of these factors should lead Congress to improve Section 309(j) of the Act to ensure that small geographic spectrum blocks are used at auction.

[4] As of this date, these two camps will continue for the foreseeable future, even in a 4G LTE world.

Specific Responses to Subcommittee Questions

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

The 1996 Telecom Act was bipartisan legislation, enacted to promote competition and reduce regulation. That should be the central organizing theme for an update. Congress should systematically identify all areas where the 1996 Telecom Act failed to increase competition, reduce regulation, and seek to draft corrective language. Yet, it is important to understand that simply referring injured parties to our nation's anti-trust laws is a recipe for a duopoly. Regulation that protects competition is critical, especially at a time when the market is so concentrated and the largest carriers wield tremendous power. We suggest the following general principles:

- The FCC's mandate to promote competitive communications markets must ensure that small business and rural consumers are not disadvantaged.

- Legislation should ensure that all service providers are subject to regulatory structures that are competitively neutral and designed to permit competition on a level playing field.

2. What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?

Congress should adopt the following core principles, for all service providers using any technology:

Public Safety: The FCC must ensure that 911, E-911, and next generation 911 services are rapidly deployed throughout the nation and that consumers have access to easily understood information that explains how modern emergency services can be accessed on any device that is capable of connecting to public communication networks. All providers must provide access to modern emergency services, when corresponding technology at our nation's PSAPs is updated.

Congress cannot place upon carriers the burden of developing modern and robust emergency services if PSAPs are not prepared to take advantage of them. Long after the FCC required wireless carriers to deliver Phase II E-911 capabilities, many PSAPs had not upgraded their facilities to make use of the new technology. At this week's FCC open meeting, Chairman Wheeler urged PSAPs to accelerate deployment of next generation capabilities so that our citizens can take advantage of them at the earliest possible date. Congress can appropriate funding for both carrier and PSAP upgrades, and require the FCC to coordinate such upgrades

so that carriers are not forced to invest in technology that is not useful. The quality of emergency services in rural areas would benefit greatly from funding mechanisms that assist both carriers and PSAPs in purchasing and installing necessary equipment. In short, the process for next generation 911 services must improve upon the former E-911 upgrade process.

Universal Access: A universal service fund must ensure that consumers living in rural high-cost areas have access to services and service quality that are reasonably comparable to those living in urban areas, including access to wireline and wireless networks. A competitively neutral system that promotes deployment of broadband networks in areas that would not otherwise have service is essential to our nation's economic future and is critically linked to public safety in rural areas.

Competition: Section 309(j) already requires the Commission to promote the dissemination of licenses.[5] This principle must be maintained and perhaps expanded to ensure that, to the greatest extent possible, consumers have choices in services and service providers. Legislation that requires the FCC to auction smaller blocks of spectrum will increase opportunities for small business, many of which are owned by women and members of minority groups.

Interconnection of Networks: One of the most powerful enablers of competition is a requirement that all consumers must be able to connect to all other consumers. When a carrier refuses to connect its network, either directly or indirectly, it reduces the utility of consumer devices. In the wireless industry, roaming is a form of interconnection, even in an all-IP world. Any action that prevents a carrier from efficiently interconnecting its network into the Internet, or roaming on another network, should be disfavored.

Competitive neutrality: Following the 1996 Act, the FCC adopted the core principle of competitive neutrality – that all universal service rules must not favor any particular class of carrier or technology.[6] That same principle should apply wherever possible throughout a revised statute, so that consumers, to the greatest extent possible, are able to choose the services that best suit their needs.

Consumer Access: The FCC should be empowered to adopt regulations to ensure that consumers are not denied access to any lawful content, or subject to unreasonable discrimination in service quality or pricing when accessing such content.

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[5] Under the Communications Act, in specifying eligibility for spectrum auctions, the Commission is directed to achieve the objective of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses *among a wide variety of applicants,* including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." *See* 47 U.S.C. § 309(j) (emphasis added).

[6] *See In the Matter of Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776 (1997).

Tribal Lands: Most tribal lands present a special case for the FCC, because they are remote, high-cost to serve, sparsely populated, have poor infrastructure, have poor economic demographics, or sometimes all of the above. In recent years, the FCC has worked very hard to improve inter-governmental relations and to ensure that low-income tribal members have access to basic telephone service through the federal Lifeline program.

That said, the FCC has not done enough to recognize many tribal areas as having special needs when it comes to infrastructure. For example, the FCC allowed the legacy universal service support mechanism to lapse on tribal lands, replacing it with an amount of support that, at present, appears to be insufficient. Infrastructure investment on remote tribal lands in Cellular One's service area is significantly behind where it would have been, but for the reduction in high-cost support.

Cellular One in particular asks Congress to look carefully at steps which can be taken to identify tribal lands with extraordinary needs, and direct universal service and other grant funds to such areas, so that all carriers can compete for such funds and ultimately deliver advanced telecommunications services to tribal lands that have for decades trailed the rest of the country.

3. Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?

The FCC's jurisdiction over our nation's telecommunications networks is currently imperiled. The current statute creates a common carrier regime under Title II, providing the agency with plenary authority to impose traditional common carrier regulations on telecommunications carriers, including for example, prohibitions against unreasonable discrimination, unreasonable business practices, and the entire universal service regime. When the FCC decided that information services should be free from Title II regulation, it freed Internet access providers from common carrier regulations.

This decision has created tremendous problems with the coming transition to all-IP networks. Once a carrier discontinues traditional circuit switched telephony, and is operating an all-IP system, it may properly claim to be free of the current Title II regime because it is no longer providing telecommunications services. So, for example, a carrier may decide that it is not going to interconnect its network with one or more carriers. It may decide that it no longer required to contribute to universal service mechanisms. It may engage in unreasonable business practices, free from FCC oversight.

To regulate such carriers, the FCC would probably have to resort to Section 706, a provision that Congress did not even put inside the Telecom Act, and which is intended to promote broadband investment. These are not good options for the agency, nor are they good options for consumers.

The better course would be for Congress to clarify the agency's jurisdiction. Congress must allow the FCC to require all carriers to act in ways that protect public safety, competition and consumers.

4. As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology-neutral?

The Rural Wireless Carriers favor codifying a principle of competitive and technological neutrality. All FCC rules should be drawn so as to not favor any class of carrier or particular technology. Giving any carrier a right of first refusal over shared benefits is not competitively neutral.

5. Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

The distinction between information and telecommunications services no longer serves a regulatory or practical purpose, and should be replaced with a single definition, broad enough to encompass all communications by wire (including fiber) or radio.

In 1996, the vast broadband capability of the current Internet was not fully envisioned. For example, IP telephony standards were not in place. Fixed and mobile video over the Internet did not exist. The "Internet of Things" was not yet conceived. As stated above, when traditional telephone carriers, both wireline and wireless, move to all-IP networks, it will be argued that neither the FCC nor state public utility commissions possess authority to regulate their businesses. At the state level, the argument will be that Internet service is interstate and therefore free from state jurisdiction. At the federal level, the argument will be that since the carrier is providing broadband service, it is free from Title II regulation. These fights will consume years in litigation.

Congress is confronted with the question of how best to ensure that modern broadband networks, and communication technologies of the future, will continue to be constructed, maintained and operated in a manner that fosters public safety and economic development, and that ensures universal access by all of our citizens.

We suggest that Congress review the Act to ensure the FCC has clear grants of regulatory authority over all communications technologies in the six subject areas listed in the response to question 2 above. Once general jurisdictional boundaries are clarified, work can begin on crafting legislation and corresponding FCC Rules that accomplish the Act's core mission of promoting public safety, competition, universal service, and consumer protection.

Cellular One, Pioneer Cellular and Appalachian Wireless stand ready to the assist the House Energy & Commerce Committee as it begins the process of updating the nation's telecommunications laws. A critical element of any rewrite must be that the nation's citizens living in rural and more remote areas of the country are not ignored or underserved, but are provided access to the same competitive telecommunications and broadband services that are being deployed throughout the country at a rapid pace. To do otherwise would create areas of the country that lack any reliable access to wireless voice and high-speed broadband services thereby impacting economic growth and community development.

We thank you for this opportunity.

Respectfully submitted,

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