

**BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC**

In re: Certain Consumer Electronics and
Display Devices With Graphics Processing
and Graphics Processing Units Therein

Investigation No. 337-TA-932
80 Fed. Reg. 66039

COMMENTS OF PUBLIC KNOWLEDGE

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November 13, 2015

Public Knowledge respectfully submits the following comments in response to the Request for Comments on the Public Interest dated October 28, 2015. In this investigation contemplating exclusion and cease and desist orders on certain mobile phones and other devices, the Request for Comments solicits input on “any public health, safety, or welfare concerns in the United States” relating to such orders, as well as “how the limited exclusion order and cease and desist order would impact consumers in the United States.”

An exclusion order¹ on mobile phone devices could negatively impact United States consumers, and particularly their health, safety and welfare. This is because mobile Internet access is vitally important today—not merely for entertainment, but for healthcare, public participation, and essential communication. Traditionally underserved communities of consumers, such as rural areas that lack the broadband infrastructure taken for granted in large cities, rely on mobile phones for Internet access. An exclusion order would undercut mobile phone market competition, potentially raising prices to the point of inaccessibility especially to those who most rely on mobile phone service for Internet access.

These are serious concerns to public health, safety, and welfare, affecting an important constituency of United States consumers, and they require the Commission’s careful consideration before issuance of any exclusion order.

I. Interest of Commenter

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public’s access to knowledge, promoting creativity through balanced intellectual property rights, and upholding the rights of consumers to use innovative technology lawfully.

Public Knowledge has frequently commented on access to communications and mobile competition. It is currently an intervenor in the ongoing FCC Open Internet (net neutrality)

¹ For purposes of simplicity, these comments will use the phrase “exclusion order” to refer to both the proposed limited exclusion order and the proposed cease and desist order.

litigation. It also regularly comments and participates in antitrust investigations relating to telecommunications services, such as the now-failed merger between Comcast and Time Warner.

II. Many Traditionally Disadvantaged Communities Rely on Mobile Phone Service as Their Only Internet Connection, and Thus Have the Most to Lose from an Uncompetitive Mobile Phone Market

A strongly competitive market in mobile phones is essential to traditionally disadvantaged communities of United States consumers. Those consumers often depend on mobile service as their sole method of accessing the Internet, and so reducing consumer choice and raising the cost of mobile phone devices would most seriously impact those consumers.

Mobile service is the only on-ramp to the Internet for many rural, low-income, and traditionally marginalized communities.² Among adults living in poverty, 56% rely solely on wireless telephones.³ Similarly, the FCC finds that 53% of rural Americans and 63% of those on tribal lands lack adequate broadband service, compared to only 8% lacking such service in urban areas.⁴ Thus, the FCC has said that “[w]ireless services have taken on particular importance to low-income consumers, who are more likely to reside in wireless-only households than consumers at higher income levels.”⁵

Guaranteeing consumer choice in the mobile device market will promote competition, keep prices down, and protect important rights and interests of these American consumers. An exclusion order, which potentially does the opposite of these, potentially poses the greatest threat to many populations to whom the Internet has arguably been of the most benefit.

² Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 11-121, *Eighth Broadband Access Report*, FCC 12-90 (August 21, 2012).

³ Steven J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2013*, at 3, National Health Interview Survey (2014), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>.

⁴ See Fed. Commc’ns Comm’n, *Broadband Availability in America 3* (Jan. 30, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331734A1.pdf.

⁵ Report and Order and Further Notice of Proposed Rulemaking, *In re Lifeline and Link Up Reform and Modernization*, 27 F.C.C. Rcd. 6656, para. 21 (Feb. 6, 2012).

III. Internet Access is Essential to Public Health, Safety, and Welfare, and Exclusion of Mobile Phones Could Cut Off That Essential Access

The negative impact of an exclusion order on traditionally disadvantaged United States consumers is further underscored by the importance of Internet access to such consumers.

Basic services have shifted to the Internet as a primary medium. The Internet is one of “the dominant technological tools in American workplaces.”⁶ It opens the doors of knowledge to millions of students.⁷ It “allows people to give voice to their democratic aspirations.”⁸ And perhaps most importantly, it is becoming the platform for essential public services like voter registration, filing of taxes, health care records, and even 911 emergency services.⁹

It should thus come as no surprise that a multinational study found that “computer and internet technologies are increasingly crucial resources for functioning in today’s society.”¹⁰ Federal Circuit Judge O’Malley recently described the Internet as “arguably the most important innovation in communications in a generation” and “one of the most important aspects of modern-day life.”¹¹ President Obama more succinctly put it: “the Internet is not a luxury, it’s a necessity.”¹²

⁶ Kristen Purcell & Lee Rainie, Pew Research Ctr., *Technology’s Impact on Workers* 5 (2014), <http://www.pewinternet.org/2014/12/30/technologys-impact-on-workers/>.

⁷ Tamar Lewin, *College of Future Could Be Come One, Come All*, N.Y. Times, Nov. 19, 2012, at A1, available at <http://www.nytimes.com/2012/11/20/education/colleges-turn-to-crowd-sourcing-courses.html>.

⁸ *OECD Council Recommendation on Principles for Internet Policy Making* 5 (2011), available at <http://www.oecd.org/internet/ieconomy/49258588.pdf>.

⁹ See Pew Charitable Trusts, *Online Voter Registration: Trends in Development and Implementation* (2015), available at http://www.pewtrusts.org/~media/assets/2015/05/ovr_2015_brief.pdf; *More Taxpayers Filing from Home Computers in 2014, Many Taxpayers Eligible to Use Free File*, Internal Revenue Service (Mar. 13, 2014), <https://www.irs.gov/uac/Newsroom/More-Taxpayers-Filing-from-Home-Computers-in-2014--Many-Taxpayers-Eligible-to-Use-Free-File>; Susan S. Woods et al., *Patient Experiences With Full Electronic Access to Health Records and Clinical Notes Through the My HealtheVet Personal Health Record Pilot: Qualitative Study*, 15(3) J. Med. Internet Res. e65 (2013); *E911 Requirements for IP-Enabled Services*, 70 Fed. Reg. 37273 (FCC June 29, 2005) (implementing rules for 911 emergency service over Voice-over-IP services).

¹⁰ Araba Sey et al., *Connecting People for Development: Why Public Access ICTs Matter* 26, 28 (2013), <http://tascha.uw.edu/publications/connecting-people-for-development>.

¹¹ *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, No. 14-1527, slip op. at 2 (Nov. 10, 2015) (O’Malley, J., concurring) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir.

Furthermore, with respect to the traditionally disadvantaged communities discussed above, a World Bank report found “considerable evidence to suggest that the economic and social benefit of mobile telephony will be highest in rural areas.”¹³ Of particular relevance to public health, safety, and welfare: that report found that mobile phones in such areas can facilitate “aiding disaster relief; enabling the dissemination of . . . educational and health information, and promoting social capital and social cohesion.”¹⁴

It is against this backdrop that the Commission must evaluate the proposed exclusion and cease and desist orders, orders that have the potential consequence of pulling the essential service of Internet access out of reach from traditionally disadvantaged consumers.

IV. The Commission’s Previous Reasons for Rejecting These Public Interest Concerns Are Erroneous

The Commission has previously rejected similar arguments about these traditionally disadvantaged consumers on the theory that “the needs of such users can be met by noninfringing alternatives.”¹⁵ But this simply misses the mark.

The problem for such consumers is not whether alternatives are available, but whether alternatives will be affordable. Simple economics dictates that excluding some products from sale will drive up prices, potentially putting those products out of reach of the populations described above. Affordability, not availability, should be the benchmark for the Commission’s public interest analysis here.

2010)).

¹² Remarks During the ConnectHome Initiative at Durant High School in Durant, Oklahoma, 2015 Daily Comp. Pres. Doc. No. 497, at 2 (July 15, 2015), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201500497/pdf/DCPD-201500497.pdf>.

¹³ Asheeta Bhavnani et al., *The Role of Mobile Phones in Sustainable Rural Poverty Reduction* 20 (2008), *available at* <http://documents.worldbank.org/curated/en/2008/06/9665086/role-mobile-phones-sustainable-rural-poverty-reduction>.

¹⁴ *Id.* at 18 (internal numbering omitted).

¹⁵ *In re Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, slip op. at 114 (2013).

Furthermore, the Commission cannot analyze the effect of an exclusion order in a vacuum. Prior Commission investigations have assumed that the public harm resulting from exclusion of one manufacturer's device is tolerable because other manufacturers' devices are unaffected.¹⁶ But *every single major smartphone manufacturer* has now been involved in at least one ITC action.¹⁷ The price of every smartphone today includes a surcharge for the expected cost of an ITC investigation and possible exclusion;¹⁸ it blinks reality to believe otherwise. That surcharge could very well be the difference between a rural user buying or not buying a mobile phone. That difference is a public interest harm that the Commission cannot ignore.

V. Conclusion

The proposed limited exclusion and cease and desist orders would likely have negative effects on the health, safety, and welfare of United States consumers. Absent particular justification to the contrary, the Commission should decline to issue those orders.

Respectfully submitted,

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¹⁶ See *In re Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, slip op. at 75 (2011) (rejecting public interest arguments because “there is no evidence that HTC devices play a distinct role that Samsung, Motorola or LG Android smartphones (or Apple, Microsoft/Nokia, or RIM smartphones) do not”).

¹⁷ See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 4 & n.15 (2012) (citing investigations).

¹⁸ Cf. Ann Armstrong et al., *The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones 2* (May 29, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2443848>.