ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

02-1189

JACQUELINE ORLOFF,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
Br.	Petitioner's brief
CMRS	Commercial mobile radio service
FCC or Commission	Respondent Federal Communications Commission
J.A.	Joint Appendix
Order	*Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless and New Par*, Memorandum Opinion and Order, 17 FCC Rcd 8987 (2002)
Orloff	Petitioner Jacqueline Orloff
PCS	Personal communications service
SMR	Specialized mobile radio
Title II	Title II of the Communications Act of 1934, as amended, 47 U.S.C. 201 et. seq.
1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

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STATEMENT OF ISSUE PRESENTED

Petitioner Jacqueline Orloff subscribed to cellular telephone service from Verizon Wireless in the Cleveland, Ohio, area and twice negotiated certain "concessions" from the company that departed from the standard terms of the rate plan she contracted to purchase. Upon learning that other Verizon Wireless customers had negotiated concessions that differed from those she had bargained for, Orloff filed a putative class action lawsuit against the company in federal district court seeking damages. Following a primary jurisdiction referral from the court, the Federal Communications Commission in the order on review denied Orloff's administrative complaint against Verizon Wireless. The FCC held that, in the vibrantly competitive Cleveland

market, Verizon Wireless's practice of responding to competition by negotiating concessions with individual consumers to secure or retain their business was neither unreasonably discriminatory within the meaning of 47 U.S.C. § 202(a) nor an unreasonable practice within the meaning of 47 U.S.C. § 201(b). *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless and New Par*, Memorandum Opinion and Order, 17 FCC Rcd 8987 (2002) ("*Order*") (J.A.).

This case presents the following central question for review:

Whether the Commission reasonably construed ambiguous provisions of the Communications Act (*i.e.*, sections 201(b) and 202(a)) to permit a wireless common carrier to negotiate specific deals with individual customers to secure or retain their business in an indisputably competitive market?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in an appendix to this brief.

JURISDICTION

This Court has jurisdiction to review the FCC's *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(l).

COUNTERSTATEMENT

I. Statutory and Regulatory Framework

A. Classifying Communications Carriers as "Common Carriers"

A communications carrier that is classified as a "common carrier" is subject to specific duties prescribed by Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 201 *et. seq*. The Communications Act defines "common carrier" as "any person engaged as a common carrier" for hire in interstate or foreign communications by wire or radio. 47 U.S.C. §

153(10). Finding this definition "indefinite" and circular, this Court has announced its own definition of the term for purposes of determining whether a particular entity or service is subject to statutory duties prescribed by Title II. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"). Under this Court's two-pronged test, "common carrier status turns on:

> (1) whether the carrier 'holds [itself] out to serve indifferently all potential users'; and (2) whether the carrier allows 'customers to transmit intelligence of their own design and choosing.'"

U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (footnote and citations omitted). There is no dispute in this case that Verizon Wireless is a common carrier subject to various Title II duties.

B. Traditional Regulation of Communications Common Carriers

(1) Title II Statutory Duties

Classification of an entity as a common carrier is not an end unto itself. The primary purpose of the classification is to determine whether Title II applies. When it does apply, Title II specifies that a common carrier's rates and practices must be just and reasonable, 47 U.S.C. § 201(b), and free of unjust and unreasonable discrimination, 47 U.S.C. § 202(a). Absent regulatory forbearance, *see* 47 U.S.C. §§ 160, 332(c)(1)(A), a common carrier must file tariffs with the Commission specifying its rates, terms, and conditions of service. 47 U.S.C. § 203. In addition, a common carrier is subject to administrative complaints filed with the FCC alleging a violation of the Communications Act. 47 U.S.C. § 208. The statute directs the FCC to adjudicate such complaints "in such manner and by such means as it shall deem proper," 47 U.S.C. § 208(a), and authorizes the agency to award damages. 47 U.S.C. § 209.

(2) Modulation of Common Carrier Duties to Accommodate Competitive Market Conditions

For many years under this statutory framework, the Commission classified those common carriers with market power as dominant and therefore subject to full Title II regulation. Carriers without market power were classified as non-dominant. Because non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably because such behavior could result in loss of customers, the Commission did not subject non-dominant carriers to the full range of Title II requirements. *See Competitive Carrier Notice*, 77 FCC 2d 308, 334-38 (1979); *Competitive Carrier First Report*, 85 FCC 2d 1, 31 (1980). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994) ("*CMRS Second Report and Order*") (describing FCC's historical approach). Thus, the Commission's basic approach was to modulate regulatory duties for non-dominant common carriers to accommodate competitive market realities.

C. Section 332: A New and Distinct Regulatory Paradigm for Commercial Mobile Radio Service

Recognizing the increasingly-competitive nature of wireless services generally, Congress in 1993 amended section 332 of the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry, of which cellular telephone service is a part." *Cellnet Communications, Inc. v.* FCC, 149 F.3d 429, 433 (6th Cir. 1998).[1] The statutory amendments sought to enhance competition and reduce regulation by, among other things, establishing a comprehensive and consistent regulatory framework for the various types of

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[1] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

wireless providers and by giving the Commission flexibility to modulate the levels of regulation for commercial mobile radio service ("CMRS") providers in light of competitive market conditions.[2] New section 332(c) of the Act was premised on Congress's recognition that the marketplace rather than extensive regulation would better promote continued investment in wireless infrastructure, while at the same time ensuring that consumers enjoy reasonable rates and high quality services.

The new wireless regulatory paradigm established by Congress departed from the traditional wireline model in two significant respects. First, Congress generally preempted state and local rate and entry regulation of CMRS. 47 U.S.C. § 332(c)(3). The statute allows a state to seek permission from the FCC to regulate CMRS rates, but that state must demonstrate that "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A)(i). *See also* 47 C.F.R. § 20.13 (2001).

The Commission denied petitions from several states seeking to regulate CMRS rates and entry when the record did not satisfy this stringent statutory standard. *See*, *e.g.*, *Connecticut Dep't of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996) (affirming FCC's denial of Connecticut's petition). In 1995, the Commission denied Ohio's petition to regulate CMRS rates and entry on the basis of a finding that the State had failed to demonstrate that market forces were inadequate to protect Ohio consumers. *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd 7842

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[2] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1).

(1995) ("*Ohio CMRS Order*"), *recon. denied*, 10 FCC Rcd 12427 (1995). No party sought judicial review of the Commission's decision denying Ohio's petition.

The second marked departure from the wireline regulatory model involved an express grant of statutory forbearance authority to the FCC. Continuing its focus on competitive market conditions and reduced regulation, Congress specified that a person providing CMRS will be treated as a common carrier subject to Title II, but authorized the Commission to forbear from applying the provisions of Title II to CMRS providers, except for sections 201, 202, and 208, if certain criteria are satisfied. 47 U.S.C. § 332(c)(1)(A). In deciding whether to forbear, Congress directed the FCC to consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service." 47 U.S.C. § 332(c)(1)(C).[3]

The Commission exercised this forbearance power to ensure that CMRS providers need not file tariffs specifying the rates, terms, and conditions of their service offerings. "In a competitive market," the FCC explained, "market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power." *CMRS Second Report and Order*, 9 FCC Rcd at 1478, para. 173. Finding

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[3] In 1996, Congress added section 10 to the Communications Act to extend the Commission's forbearance authority beyond the more limited forbearance power contained in section 332(c). Section 10 provides that "[n]otwithstanding section 332(c)(1)(A) of this Act," the Commission shall forbear from applying "any regulation or any provision of this Act" to a telecommunications carrier or telecommunications service if the specified criteria are satisfied. 47 U.S.C. § 160(a). The Commission has observed that section 10 "now gives the Commission the authority to forbear from enforcing sections 201 and 202" to CMRS providers although it has not exercised that authority. *See Personal Communications Industry Association's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865 (1998) ("*PCIA Forbearance Order*"), *recon. denied*, 14 FCC Rcd 16340 (1999).

that tariffs are "not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates," the Commission decided to forbear from imposing section 203 tariff filing obligations on CMRS providers. *Id.*, 9 FCC Rcd at 1479, para. 177; *see also* 47 C.F.R. § 20.15(c) (2001).

The FCC determined that tariffs can harm consumers in certain circumstances. Requiring tariff filings in a competitive environment, the Commission explained, can:

> (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.

CMRS Second Report and Order, 9 FCC Rcd at 1479, para. 177. Detariffing "will foster competition which will expand the consumer benefits of a competitive marketplace" by "enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages." *Id.* The FCC emphasized that sections 201 and 202 still applied to CMRS providers, ensuring the availability of powerful regulatory protections for consumers if there was evidence of market failure. *See id.*, 9 FCC Rcd at 1479, para. 176.

By preempting state entry and rate regulation of CMRS and authorizing forbearance, "Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace." *Id.,* 9 FCC Rcd at 1418, para. 14. These two actions – congressional preemption of intrastate rate regulation and the Commission's CMRS detariffing decision – are critical features shaping the competitive landscape for CMRS today. The result is that CMRS providers do not file tariffs at either the

federal or state level to establish the legally effective rates, terms, and conditions for their offerings. Rather, the CMRS provider-customer relationship is governed "by the mechanisms of a competitive marketplace" and CMRS carriers enter into service contracts with their customers. *Wireless Consumers Alliance, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17032-33, paras. 20-21 (2000). Under this substantially deregulated regime, the FCC "do[es] not set CMRS rates or require that carriers only charge rates as filed," but rather "rel[ies] on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination." *Id.*, 15 FCC Rcd at 17033, para. 21.

D. The Telecommunications Act of 1996: An Enhanced Focus on Increasing Competition and Reducing Regulation.

Congress built upon its successful competitive blueprint for CMRS with its passage of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("1996 Act"). This "unusually important" legislative enactment, *Reno v. ACLU*, 521 U.S. 844, 857 (1997), extensively amended the Communications Act "to provide for a pro-competitive, de-regulatory national policy framework" with the primary objective of "opening all telecommunications markets to competition." H.R. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) ("*1996 Conference Report*"). "In response to the 1996 Act, the FCC has sought to move toward greater competition for, and less regulation of, telecommunications services." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 454 (D.C. Cir. 2001).

In addition to directing the Commission to promote competition through various affirmative steps, *see*, *e.g.*, 47 U.S.C. §§ 251, 252, Congress included several important deregulatory initiatives linked to competitive market conditions. These include a directive that

the Commission every two years review its regulations that apply to the operations or activities of any provider of telecommunications service to determine whether any such regulation "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. § 161(a). This provision directs the FCC to repeal or modify any regulation it determines is no longer in the public interest. 47 U.S.C. § 161(b). The Commission recently executed this congressional directive in the CMRS context by, for example, "sunsetting" its spectrum cap and eliminating its cellular cross-interest rule in Metropolitan Statistical Areas on the basis of a finding that these rules are no longer in the public interest as a result of increased competition in the CMRS market. *See 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668 (2001).

Congress also added section 10 to the Communications Act, an additional and broader grant of forbearance authority. The criteria triggering forbearance pursuant to section 10 are virtually identical to the forbearance criteria specified in section 332(c), including the requirement that the FCC consider whether forbearance "will promote competitive market conditions" and "enhance competition among providers of telecommunications services" when evaluating the public interest. 47 U.S.C. §§ 160(a), (b).

Consistent with its detariffing policy for CMRS, the Commission moved to forbear from applying the section 203 tariff filing requirements to the interstate domestic interexchange services of non-dominant interexchange carriers. The FCC explained that eliminating tariff filings by nondominant interexchange carriers "will prevent such carriers from refusing to negotiate with customers based on the Commission's tariff filing and review processes. As a result, carriers may become more responsive to customer demands, and offer a greater variety of

price and service packages that meet their customers' needs." *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20761, para. 54 (1996). This Court affirmed, holding that the Commission "was entitled to value the free market, the benefits of which are rather well established." *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000).

E. The Benefits of Competition and Deregulation For CMRS Consumers

By virtually any measure, the pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has allowed competition to flourish and thereby bring substantial benefits to consumers. Subscribership is up.[4] Rates are down.[5] Consumers continue to significantly increase the amount of time they communicate using their wireless phones, most likely as a result of decreasing prices and the wider acceptance of and reliance upon wireless services. *Seventh Annual CMRS Competition Report*, 17 FCC Rcd at 13006. Consumer choice has expanded dramatically; wireless customers may choose among

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[4] In the twelve months ending December 2001, the mobile telephony sector increased subscribership from 109.5 million to 128.5 million, producing a nationwide penetration rate of roughly 45 percent. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Rcd 12985, 13004-5 (2002) ("*Seventh Annual CMRS Competition Report*").

[5] *Id.*, 17 FCC Rcd at 13012-13. According to the U.S. Department of Labor's Bureau of Labor Statistics, for example, the price of residential mobile telephone service declined by 5.5 percent during 2001 while the overall consumer price index increased by 1.6 percent. *Id.*, 17 FCC Rcd at 13013.

multiple providers and a wide array of service and equipment options.[6] "Churn" rates are high; more than 30 percent of subscribers change service providers each year, often to "take advantage of a sale or promotion." *Id.*, 17 FCC Rcd at 13007. Taken as a whole, these measures "generally demonstrate a high level of competition for most consumers." *Id.*, 17 FCC Rcd at 13003.

Ohio CMRS consumers have benefited from this vibrant competition. One million new consumers subscribed to CMRS in Ohio during the period June 2000 – June 2001, an increase of 30 percent. *Id.*, 17 FCC Rcd at 13088, App. C, Table 2. Ohio CMRS subscribers are served by at least 12 mobile carriers. *Id.* Cleveland-area residents have shared in these benefits, as well: Two million consumers subscribe to CMRS in the Cleveland-Akron area, a penetration rate of 43 percent. *Id.*, 17 FCC Rcd at 13090, App. C, Table 3.

II. Stipulated Facts Concerning the State of Competition in the Cleveland, Ohio, CMRS Market

At all times relevant to this dispute, consumers in the Cleveland, Ohio, CMRS market were able to choose among five facilities-based providers of CMRS, including Verizon Wireless.[7] These vendors offered different technologies, different features, and different prices. Consumers also could choose among various resellers of CMRS service. These facilities-based and reseller competitors offered many different types of service packages to consumers. Such

[6] To date, 268 million people, or 94 percent of the total U.S. population, live in counties with access to three or more different operators (cellular, broadband personal communications service ("PCS"), and/or digital specialized mobile radio ("SMR") providers) offering mobile telephone service. More than 229 million people, or 80 percent of the total U.S. population, live in counties with five or more mobile telephone operators competing to offer service. And 151 million people, or 53 percent of the population, live in counties in which six different mobile telephone operators are providing service. *Id.*, 17 FCC Rcd at 13095, App. C, Table 5.

[7] New Par, an affiliate of Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, was the actual licensee. New Par now transacts business under the trade name "Verizon Wireless." For the sake of simplicity, this brief refers to Verizon Wireless throughout.

offerings included a variety of features such as unlimited weekend calling, free long distance, voice mail, text messaging, no activation fees, extended geographic coverage, and discounted additional lines. These competitors also regularly designed new service offerings to attract customers to their service, including offering plans with significant bundled minutes, many features, and less restrictive terms and conditions. CMRS providers regularly offered promotions to consumers, many of which included equipment offers as well as service offers. During the relevant time period, CMRS providers in the Cleveland market extensively advertised new service packages and promotions to consumers highlighting rates, terms, conditions, and quality of service. *See* Revised Joint Statement, File No. EB-01-MD-009 (filed July 3, 2001) (listing stipulated facts from the parties to the administrative complaint proceeding) ("*Revised Joint Statement*") at 4-5, paras. 18-20, 24, 26 (J.A.).

III. Stipulated Facts Concerning Verizon Wireless's Service Offerings

Verizon Wireless offered cellular telephone service pursuant to various standard rate plans as well as regular promotions, and designed these offerings to be attractive to different types of consumers – for example, single-line low-volume consumers as well as multi-line high-volume business customers. Many of these plans and promotions included bundles of airtime minutes as part of monthly service or extra features at no additional charge. *Id.*, at 5, para. 25 (J.A.).

During the relevant time period, Verizon Wireless sometimes gave individual customers some inducements not included in any rate plan or promotion "so that the particular customer would keep its business with [the company] or take service from [the company]." *Id.*, at 5-6 para. 28 (J.A.). These customer "concessions," as they were called, might include, for example,

a one-time monetary credit, a recurring credit, some minutes of airtime added to the bundle of minutes included in a rate plan or promotion, the use of some feature (voice-mail, call forwarding, weekend calling) at no charge for some period of time, or equipment or an equipment discount or rebate. Inducements offered to attract new customers were called "sales concessions"; inducements offered to retain existing customers were termed "retention concessions." Verizon Wireless sometimes offered a customer a single concession or sometimes offered a combination of different concessions. Concessions resulted in the customer obtaining service at a price lower than that paid by a customer who received service under the same rate plan or promotion but who did not receive a concession. *Id.*, at 5-6, paras. 27-29 (J.A.).

Verizon Wireless authorized its sale agents and customer care representatives to use their discretion in determining whether to offer a customer a concession. No customer was guaranteed a concession. The company granted concessions to single-line, low-volume consumers and to its large business accounts. The decision to grant a concession (as well as the amount of the concession) was made on an "individualized basis." *Id.* at 7, para. 34 (J.A.). Representatives of Verizon Wireless generally did not inform customers of the existence of its concession policy and did not communicate to customers the factors that would be considered by the company in determining whether to grant a customer a retention and/or sales concession. A concession occurred as a result of negotiations between the Verizon Wireless sales representative and the prospective customer. *Id.*, at 6-7, paras. 30-35 (J.A.).

The company also provided "association" and "government" rate plans in 1999, which were available to members of qualifying associations (*e.g.*, chambers of commerce, boards of realtors, bar associations) and governmental entities/employees, respectively. On occasion,

Verizon Wireless allowed individuals who were not members of qualifying entities to receive the association or government rates. *Id*., at 5, para. 22 (J.A.).

IV. Stipulated Facts Concerning Orloff's Relationship to Verizon Wireless

Orloff knew she could contract for CMRS from multiple providers in the Cleveland area. On February 23, 1999, she elected to purchase cellular telephone service from Verizon Wireless pursuant to a standard advertised rate plan. She executed a two-year contract. Orloff received "sales concessions" from Verizon Wireless that departed from the advertised rate plan. She received a reduced rate on a new cellular telephone, waiver of the standard activation charge, one-half credit on the amount of the monthly access fee for a period of six months, and free weekend calling for three months. *Id*., at 3, paras. 10-11, 14-15 (J.A.).

Five months into her two-year contract, Verizon Wireless allowed Orloff to switch to a different advertised rate plan. In addition to the benefits of the new rate plan, she received a "retention concession" consisting of a billing credit. Orloff terminated her contractual relationship with Verizon Wireless on February 6, 2001. She subscribed to Verizon Wireless's service for roughly two years. *Id*., at 4, paras. 16-17 (J.A.). During the first quarter of 1999, some Verizon Wireless customers in the Cleveland area on the same rate plan as Orloff received some types of sales and retention concessions that she did not receive. *Id*., at 7, para. 40 (J.A.).

V. The Federal District Court Litigation

On February 11, 2000, approximately one year after she negotiated the original contract with Verizon Wireless, Orloff and three other individuals filed a putative class action lawsuit against Verizon Wireless in the United States District Court for the Northern District of Ohio. The putative class was to include Ohio residents who purchased cellular telephone service from

Verizon Wireless two years prior to the filing of the federal district court complaint and who allegedly did not receive concessions that some other subscribers received. The district court complaint alleges that Verizon Wireless violated section 202(a) of the Communications Act by charging different prices to similarly-situated customers for the same service. On May 30, 2000, the District Court granted Verizon Wireless's request for a primary jurisdiction referral to the FCC and stayed the underlying lawsuit. The District Court did not identify specific issues for the Commission to resolve. *See Jacqueline Orloff, et al. v. Vodafone AirTouch Licenses LLC, et al.*, Case No. 1: 00 CV 421, slip op. (N.D. Ohio May 30, 2000).

VI. The Order On Review

After some delay, Orloff moved to implement the primary jurisdiction referral by filing an administrative complaint with the FCC pursuant to section 208.[8] In her complaint, Orloff alleged that Verizon Wireless's practice of negotiating concessions with individual consumers constituted unreasonable discrimination in violation of section 202(a) and an unreasonable practice in violation of section 201(b). She asked the FCC to declare Verizon Wireless's marketing practices unlawful, and indicated that she subsequently would pursue a claim for damages in the district court if she prevailed on the liability issue at the Commission. *Orde*r, 17 FCC Rcd at 8992-93, para. 12 (J.A.).

The Commission relied heavily on the parties' stipulations concerning key facts. *See Revised Joint Statement* at 2-7, paras. 1-40 (J.A.). There was no dispute – and the FCC found – that the Cleveland CMRS market was vibrantly competitive and that Orloff was aware that she

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[8] Orloff filed her initial complaint on January 24, 2001, almost eight months after the District Court issued its opinion. The staff dismissed that complaint without prejudice on February 1, 2001, for failure to comply with the FCC's rules governing section 208 complaints. Orloff refiled the complaint in compliance with the rules on April 12, 2001. *See Order*, 17 FCC Rcd at 8999, n.2 (J.A.).

could contract with various CMRS providers offering a changing array of service packages and promotions. *See Order,* 17 FCC Rcd at 8989-90, 8996-97, 8998, paras. 4-5, 19-20, 23 (J.A.); *Revised Joint Statement* at 3, 4-5, paras. 14, 18-20, 24, 26 (J.A.). There was no dispute – and the FCC found – that Verizon Wireless negotiated with individual customers and offered them sales and retention concessions to secure and/or retain their business, and that this practice resulted in consumers obtaining prices that departed from standard rate plans and promotions and that sometimes differed among individual customers taking service under the same rate plan or promotion. *See Order*, 17 FCC Rcd at 8990-91, 8994, paras. 7-8, 15 (JA - ,); *Revised Joint Statement* at 5-7, 27-35, 40 (J.A. - , -). There was no dispute – and the FCC found – that Orloff on two separate occasions negotiated concessions from Verizon Wireless that departed from the terms of the standard rate plan under which she took service. *See Order*, 17 FCC Rcd at 8991-92, 8998, paras. 10, 24 (J.A. ,); *Revised Joint Statement* at 3-4, paras. 15-16 (J.A. -).

Nothing in the record indicated that Verizon Wireless's practice of negotiating with individual consumers such as Orloff over the rates, terms, and conditions of service was unique among Cleveland-area CMRS providers. The FCC found "no evidence in the record that any market failure prevented consumers from switching carriers if they were dissatisfied," *Order*, 17 FCC Rcd at 8996, para. 20 (J.A.), nor was there any record evidence that Orloff could not obtain the features she desired from other Cleveland CMRS providers.

Against this undisputed factual backdrop, the Commission examined Orloff's section 202(a) claim first. On the basis of the parties' stipulations, the FCC found that Orloff had

satisfied the first two prongs of the established three-part test for unreasonable discrimination.[9] The agency held that the services (*i.e.*, single-line cellular service purchased by a non-business user) were "like" and that Verizon Wireless treated Orloff differently from other customers purchasing like service who received different concessions from the ones she had obtained. *Id.*, 17 FCC Rcd at 8994, para. 15 (J.A.).

The Commission then considered whether Verizon Wireless had demonstrated that the discrimination was reasonable within the meaning of section 202(a). Verizon Wireless contended that the existence of vigorous competition in the Cleveland market rendered its negotiation and concession practices reasonable. The company characterized its concession practices as a means of enabling a non-dominant carrier to keep existing customers and to obtain new customers "by quickly meeting the offers of competitors." *Id.*, 17 FCC Rcd at 8994-95, para.16 (quoting Answer, Tab 1 (Respondents' Legal Analysis) at 21-22 (J.A); Defendants' Initial Brief at 2) (J.A.).

The Commission concluded that Verizon Wireless's concessions were a reasonable response to competition in the Cleveland CMRS market and thus were consistent with section

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[9] The Commission and the courts have applied a three-step inquiry to determine whether a violation of section 202(a) has occurred: (1) whether the services at issue are "like"; (2) if they are, whether there are differences in the terms and conditions pursuant to which the services are provided; and (3) if so, whether the differences are reasonable. *See*, *e.g.*, *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *MCI Telecommunications Corp. v. FCC,* 842 F.2d 1296, 1303 (D.C. Cir. 1988); *Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc., et al.,* Memorandum Opinion and Order, 16 FCC Rcd 22887, 22891, para. 10 (2001). When a complainant establishes the first two components, the burden of persuasion shifts to the defendant carrier to justify the discrimination as reasonable. *See National Communications Ass'n, Inc. v. AT&T Corp.,* 238 F.3d 124, 129-30 (2d Cir. 2001); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers,* Report and Order, 12 FCC Rcd 22497, 22615, para. 291 & n.782 (1997), *recon. denied,* 16 FCC Rcd 5681 (2001).

202(a). *Id.*, 17 FCC Rcd at 8995-99, paras. 16-24 (J.A. -). As a threshold matter, the agency rejected Orloff's contention that the presence of competition was irrelevant to the statutory reasonableness inquiry. Citing *Kiefer v. Paging Network, Inc. d/b/a Pagenet,* Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001), the FCC noted that it previously had considered the existence of robust competition in the CMRS market when adjudicating the reasonableness of a carrier's practices under section 201(b). *Id.*, 17 FCC Rcd at 8995-96, para. 18 (J.A.). The FCC explained that in *Kiefer* it rejected an unreasonableness challenge to a late fee charged by a paging carrier, "noting, among other things, that the Commission has regulated CMRS 'through competitive market forces,' and that the existence of a competitive market in that case 'did not warrant a finding that the late fee violate[d] section 201(b).'" *Id.* (quoting *Kiefer*, 16 FCC Rcd at 19131, 19132, paras. 5, 7) (J.A.).

The FCC then examined the reasonableness of Verizon Wireless' concession practices in light of the indisputably "vibrant" competition that characterized the Cleveland CMRS market. The Commission noted that consumers in the Cleveland area could choose among many service providers, and that those competitors regularly designed new service offerings to attract customers and extensively advertised the new packages and promotions. "Consequently," the agency found, "consumers had ample opportunity to compare various terms and conditions in order to identify the package best-suited to their needs." *Id.*, 17 FCC Rcd at 8996, para. 19 (J.A.). Given the intense competition in the Cleveland market and the absence of any evidence of any market failure that prevented customers from switching carriers, the FCC found that market forces adequately protect Cleveland consumers from unreasonably discriminatory practices and charges. The agency observed that CMRS carriers in Cleveland, like non-dominant carriers in other competitive markets, would be unlikely to engage in unreasonable discrimination when

such conduct would result in the loss of customers. *Id.* (citing prior FCC decisions making similar findings concerning non-dominant carriers) (J.A.).

The FCC rejected Orloff's insistence that a negotiation policy must result in all customers who negotiate being treated exactly the same. Potentially disparate outcomes resulting from negotiation, the agency concluded, were to be expected and were not unreasonable given consumers' undisputed ability to "shop around" and the lack of evidence regarding any market failure. Orloff herself, the Commission found, was fully aware of her options and availed herself of the benefits of negotiation, obtaining concessions from Verizon Wireless on two separate occasions. Thus, the Commission found no evidence that information asymmetries rendered market forces in Cleveland unable to protect consumers. *Id.*, 17 FCC Rcd at 8998, para. 23 (J.A.).

The Commission also rejected Orloff's blanket assertion that disparate treatment of consumers purchasing like service must be cost-justified "on a transaction-by-transaction basis," in light of the agency's longstanding history of regulating CMRS providers through competitive market forces rather than specific cost-based regulations. In any event, the agency found persuasive Verizon Wireless's assertion that its concession practices stemmed generally from a rough profitability analysis. *Id.*, 17 FCC Rcd at 8998-99, para. 24 (J.A.).

Moreover, the FCC noted that Orloff's proposed requirement would result in extraordinary burdens on CMRS carriers, requiring them to track and offer to every customer all concessions obtained through negotiation. Even if it were administratively possible to implement Orloff's proposal, in the absence of market failure the agency found no warrant to impose such burdens on CMRS providers. *Id.*, 17 FCC Rcd at 8998-99, para. 24 (J.A.).

Although the Commission thus found that Verizon Wireless's concessions did not violate section 202(a) in the highly competitive Cleveland market, the FCC cautioned that its holding was confined to the specific factual circumstances of the complaint and "does not necessarily translate to other markets marked by less competition." *Id.*, 17 FCC Rcd at 8998, para. 22 (J.A.). The Commission also emphasized that it was "not forbearing from applying section 202(a)" and that section 202 "continues to act as a powerful protection for CMRS consumers, even if it was not violated in this case." *Id.*, 17 FCC Rcd at 8997, para. 22 (J.A.). Section 202 could require a different result, the FCC explained, if a CMRS market was inadequately competitive or if some other "market failure" limited consumers' abilities to use market forces to protect themselves. *Id.* (J.A.).

The FCC acknowledged "case law holding that a carrier 'will not be a common carrier where its practice is to make individualized decisions, in particular cases, on whether and what terms to deal,'" and explained that this language "articulates the 'quasi-public character implicit in the common carrier concept' -- that the carrier 'undertakes to carry for all people indifferently.'" *Id.*, 17 FCC Rcd at 8997, para. 21 (quoting *NARUC I,* 525 F.2d at 641) (J.A.). Orloff, the agency noted, did not allege that Verizon Wireless refused to deal with any segment of the public, nor did she contest Verizon Wireless's assertion that it stood willing to engage in negotiations initiated by any customer. *Id.* (J.A.).

The Commission also determined that Verizon Wireless's concessions did not constitute an unreasonable practice within the meaning of section 201(b), for the same reasons that they were not unreasonably discriminatory under section 202(a). *Id.*, 17 FCC Rcd at 8999, paras. 25-26 (J.A.). Finally, the FCC rejected Orloff's claim that Verizon Wireless violated sections 202(a) and 201(b) by occasionally allowing a person to obtain association/governmental entity

rates, even though not a qualifying member. The Commission found no evidence in the record that this practice had even occurred in the Cleveland market. *Id.*, 17 FCC Rcd at 9000, para. 27 (J.A.). In any event, allowing a non-member to obtain an association/governmental entity rate, the FCC observed, "is merely another way of granting a concession," which the agency previously had found to be reasonable in the specific context of the highly competitive Cleveland market. *Id.* (J.A.).

Orloff then filed its petition for review in this Court.

SUMMARY OF ARGUMENT

As a wireless common carrier, Verizon Wireless is subject to certain duties prescribed by Title II of the Communications Act. These include the requirement that its rates and practices be just and reasonable and free of unreasonable discrimination pursuant to sections 201(b) and 202(a). In this case, the FCC construed the statute's prohibitions against unreasonable discrimination and unreasonable practices and properly concluded that they did not bar Verizon Wireless's practice of negotiating with individual customers to secure or retain their business in the indisputably competitive Cleveland CMRS market. The Commission's construction of the statute is reasonable and entitled to deference.

Title II of the Communications Act prescribes the substantive duties that apply to entities deemed communications common carriers. The judicially-announced definition of "common carrier" is employed by the FCC and courts to classify particular entities or services that are subject to Title II. The definition itself, however, does not independently prescribe substantive duties. Orloff's heavy reliance on language from cases describing the definition of a common carrier is therefore misplaced.

Over the past ten years, Congress consistently and repeatedly has directed the FCC to consider competitive market conditions when construing and applying Title II duties to common carriers such as Verizon Wireless. Congress's enactment of section 332 hailed a fundamental shift in regulation of CMRS providers away from traditional, monopoly era regulation in favor of increased reliance on competitive market forces and substantially reduced regulation. The 1996 Act confirmed and expanded this pro-competitive, deregulatory approach to regulation of communications common carriers. The direction from Congress is loud and clear: competitive market conditions matter.

The prohibitions in sections 201(b) and 202(a) are not absolute, and bar only *unreasonable* practices and discrimination. By employing broad, general language, Congress conferred discretion on the Commission to determine whether specific practices and discrimination are unreasonable and therefore unlawful. The Commission previously has stated its belief that flexible pricing practices that respond to CMRS marketplace demand do not violate sections 201 and 202. Consistent with this position, and especially in light of the powerful and consistent congressional signals over the past decade, it was appropriate for the FCC to view the reasonableness of Verizon Wireless's marketing practices through the lens of competitive market conditions in Cleveland.

Competition in the Cleveland CMRS market undeniably is robust. Customers have many choices of services and providers and can protect their interests by "shopping around" to find the service package that best suits their individual needs. Orloff herself enjoyed the benefits of this competition by negotiating certain concessions from Verizon Wireless. Moreover, there is no evidence in the record of market failure or any suggestion that subscribers could not switch carriers if they were dissatisfied with their service provider. In these circumstances, the FCC

reasonably found that Verizon Wireless's marketing practices did not violate the prohibition against unreasonable discrimination and unreasonable practices in the statutes.

In contrast, Orloff's construction of sections 201(b) and 202(a) is patently unreasonable. She advocates a *per se* prohibition on discrimination that reads the key modifier – "unreasonable" – out of the statute. Her view ignores a decade of congressional commands to the FCC to consider competitive market conditions when construing and applying Title II to common carriers. And she would deprive consumers of the benefits of competition by subjecting this vibrantly-competitive industry, in effect, to monopoly-era style regulation.

Finally, the FCC did not exercise its authority to forbear from enforcing sections 201(b) and 202(a) in this case, and thus did not fail to follow the prescribed procedures for forbearance. Rather, the Commission explicitly applied those provisions and properly gave meaning to the reasonable standard in the statutes, in light of the specific facts presented.

STANDARD OF REVIEW

This case involves a challenge to the Commission's interpretations of 47 U.S.C. §§ 201 and 202. The standard articulated in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs judicial review of the Commission's interpretations of the Communications Act of 1934, as amended. *See*, *e.g.*, *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002).

Under *Chevron*, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843 n.9, 842. If the intent of Congress is clear – that is, if the statute conveys "a plain meaning that *requires* a certain interpretation," *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d

1044, 1049 (D.C. Cir. 1997) (emphasis in original) – then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, 467 U.S. at 843. Under those circumstances, "the task that confronts [the Court] is to decide, not whether the [agency's approach] represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue*, 523 U.S. 382, 389 (1998). If the agency's reading "fills a gap or defines a term in a reasonable way in light of the Legislature's design," the Court must give that reading "controlling weight," even if that interpretation "is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 843, n.11). This Court has conferred *Chevron* deference to the FCC's interpretation of the Communications Act when the definition of "common carrier" was implicated. *See, e.g., U.S. Telecom Ass'n*, 295 F.3d at 1332; *Iowa v. FCC*, 218 F.3d 756, 757 (D.C. Cir. 2000).

Insofar as the petitioner attacks the Commission's exercise of its statutory authority, the court's review is limited to determining whether the agency's decisions were arbitrary and capricious within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). This deferential standard "presumes the validity of agency actions" and leaves open to review only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *MCI WorldCom Network Services, Inc. v. FCC*, 274 F.3d 542, 546-47 (D.C. Cir. 2001) (citing *Global NAPs, Inc. v. FCC*, 247 F.3d 252,

257 (D.C. Cir. 2001), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

ARGUMENT

There is no dispute that Verizon Wireless, as a provider of cellular telephone service, is a common carrier subject to certain Title II obligations.[10] These include the requirements that its rates and practices be just and reasonable and free of unreasonable discrimination pursuant to sections 201(b) and 202(a).[11]

I. The FCC Reasonably Construed Sections 201(b) and 202(a) In Light of Competitive Market Conditions

A. The Communications Act – Not the Judicially-Announced Definition of "Common Carrier" – Prescribes the Substantive Duties That Apply to a Communications Common Carrier

Title II obligations hinge on whether a particular entity is classified as a common carrier. The judicially-announced definition of "common carrier" assists the classification process by describing the characteristics of an entity or service that shall be subject to the substantive duties

[10] *See* 47 U.S.C. § 332(c)(1) (person providing CMRS shall be treated as common carrier); 47 C.F.R. § 20.9(a)(7) (2001) (cellular service shall be treated as common carrier service and regulated as CMRS).

[11] S*ee* 47 C.F.R. § 20.15(a) (2001) (CMRS providers must comply with sections 201 and 202).

of Title II – but the definition does not independently prescribe substantive duties.[12] Once a particular entity is deemed a common carrier, one must look to the statute – specifically, to Title II – to determine the substantive obligations that apply to that entity. Thus, Orloff's single-minded focus on language from cases such as *NARUC I* and *FCC v. Midwest Video Corp.*[13] misses the point: It is the statute – not the common law definition – that prescribes the substantive duties that apply to communications common carriers. When Congress said that CMRS providers should be treated as common carriers, it pointed the FCC in the direction of Title II. *See* 47 U.S.C. § 332(c)(1)(A).

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[12] This Court's decisions confirm that the definition of "common carrier" is employed by the FCC and reviewing courts for classification purposes to determine whether a particular entity or service shall be deemed subject to Title II substantive duties (or eligible for Title II benefits). *See*, *e.g.*, *NARUC I*, 525 F.2d 630 (upholding FCC's classification of SMR providers as non-common carriers free of Title II duties); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (rejecting as inadequately explained FCC's classification of "dark fiber" as common carrier service subject to Title II duties); *Virgin Islands Telephone Co. v. FCC,* 198 F.3d 921 (D.C. Cir. 1999) (upholding FCC's classification of entity selling submarine cable system capacity as non-common carrier free of Title II duties); *Iowa*, 218 F.3d 756 (rejecting as inadequately explained FCC's classification of state high-speed telecommunications provider as non-common carrier ineligible for Title II universal service subsidies); *U.S. Telecom Ass'n*, 295 F.3d 1326 (upholding FCC's remand classification of state high-speed telecommunications provider as common carrier eligible for Title II universal service subsidies).

[13] In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Supreme Court found FCC rules governing cable television operators to be the functional equivalent of traditional common carrier-type regulation, and overturned those rules as beyond the agency's authority because the Court found them inconsistent with a statutory directive not to compel broadcasters to act as common carriers. The Court focused on the nature of the FCC's action and evaluated that action in light of jurisdictional limits imposed on the agency by Congress. Although *Midwest Video* referred to the definition of "common carrier" announced by this Court in *NARUC I*, it does not stand for the proposition that the definition imposes substantive obligations independent of the Communications Act, any more than *NARUC I* does.

B. Congress Has Directed the FCC to Consider Competitive Market Conditions When Construing and Applying Title II of the Communications Act

The Commission has a long history of construing and applying the Communications Act in light of competitive market conditions, as evidenced by its longstanding practice of lessening Title II regulation for nondominant carriers that lack market power. Congress has ratified this general approach, first as to CMRS through section 332, and then more broadly through the 1996 Act. Indeed, consideration of competitive market conditions permeates Congress's approach to regulation of communications common carriers over the past decade. Against this backdrop, this Court generally has credited the FCC's reliance on competitive market forces to protect consumers: "Competition for telephone services, where it exists, serves the FCC's statutory goal of ensuring fair and reasonable prices for telecommunications services." *WorldCom, Inc. v. FCC*, 238 F.3d at 452 (affirming FCC's grant of pricing flexibility to incumbent local exchange carriers). *See also MCI WorldCom, Inc.*, 209 F.3d at 766 ("We think, however, the Commission was entitled to value the free market, the benefits of which are rather well established.").

Section 332 vividly illustrates Congress's policy preference for competitive market forces over regulation in the CMRS market.[14] Congress generally eliminated state and local regulation of rates and entry in order to prevent such regulation from stunting the growth of CMRS; a state may engage in such regulation only in the event it can demonstrate to the FCC that market conditions fail to protect consumers. 47 U.S.C. § 332(c)(3); 47 C.F.R. § 20.13 (2001). Congress in section 332 also gave the FCC broad flexibility to establish appropriate levels of regulation for

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[14] *See Southwestern Bell Mobile Systems, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19902, para. 9 (1999) (declaring "Congressional and Commission" policy preference in favor of competitive forces over regulation in CMRS industry); *Kiefer*, 16 FCC Rcd at 19132, para. 7 ("market forces should generally govern the rates and charges assessed by CMRS providers").

CMRS providers through forbearance from the enforcement of specific Title II provisions, and the statutory forbearance standard equates the public interest with promotion of competitive market conditions. 47 U.S.C. § 332(c)(1)(C). Through these actions, "Congress [has] acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace." *CMRS Second Report and Order*, 9 FCC Rcd at 1418, para. 14.

Consistent with the twin themes of competition and deregulation that animate congressional policy in the wireless context, Congress and the FCC have eliminated tariff regulation to promote price and service competition in the CMRS market. *See* 47 U.S.C. § 332(c)(3); *CMRS Second Report and Order*, 9 FCC Rcd at 1478-79, paras. 173-77; 47 C.F.R. § 20.15(c) (2001). A substantially deregulated, detariffed environment "foster[s] competition which will expand the consumer benefits of a competitive marketplace" by "enabling CMRS providers to respond quickly to competitors' price changes." *CMRS Second Report and Order*, 9 FCC Rcd at 1479. Accordingly, privately negotiated contracts -- rather than tariffs -- govern the relationship between consumers and CMRS providers, and competitive market forces "ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination." *Wireless Consumers Alliance, Inc.*, 15 FCC Rcd at 17033, para. 21.

The 1996 Act is a clarion call for promoting competition and reducing regulation in all markets when competitive conditions exist. *See 1996 Conference Report* at 1 (1996 Act intended "to provide for a pro-competitive, de-regulatory national policy framework"). For example, the 1996 Act requires the FCC, for the first time, to take affirmative steps to promote

competition in previously-monopolistic local telephone markets. *See* 47 U.S.C. §§ 251, 252. *See generally AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); *Verizon Communications, Inc.*, 122 S.Ct. 1646.

As it did in section 332, Congress in the 1996 Act linked deregulation with increased competition. Congress directed the Commission every two years to review its regulations that apply to any provider of telecommunications services and to repeal or modify any such regulation that is "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. § 161. Likewise, Congress commanded the FCC to forbear from applying any provision of the Communications Act (except 47 U.S.C. §§ 251(c), 271) to telecommunications carriers when certain criteria are satisfied. Here again, Congress equated the public interest with promotion of competitive market conditions. *See* 47 U.S.C. § 160.

The message from Congress is inescapable: Competitive market conditions matter. To ignore the state of competition in Cleveland – as Orloff insists the FCC must do (Br. at 15-16) – would fundamentally contradict Congress's primary objectives for national communications policy.

C. Title II Bars Only *Unreasonable* Discrimination and Practices

As the FCC has noted previously in the CMRS context, Section 202(a) "does not prohibit all different treatment of consumers, only *unreasonable* discrimination among consumers." *PCIA Forbearance Order,* 13 FCC Rcd at 16871, para. 29 (emphasis in original).[15] Likewise,

[15] *See*, *e.g.*, *Competitive Telecommunications Ass'n*, 998 F.2d at 1061 (third step of section 202(a) inquiry involves determining whether price difference between "like" services is reasonable).

section 201(b) bans only unjust and unreasonable practices. And Congress delegated to the FCC the task of evaluating specific discrimination and practices to determine whether they are unreasonable and therefore unlawful. The Commission often makes these judgments, as in this case, when adjudicating an administrative complaint filed against a common carrier pursuant to 47 U.S.C. § 208.

The concept of reasonableness may vary depending on the specific factual context presented. As this Court has held, "[t]he generality of these terms" – unjust, unreasonable – "opens a rather large area for the free play of agency discretion" to determine whether specific discrimination or practices violate Title II, subject to familiar APA "arbitrary and capricious" limits. *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

Indeed, in the CMRS context, the FCC has stated its belief that flexible pricing practices that respond to marketplace demands do not violate sections 201 and 202. Specifically, the Commission has observed that the reasonableness standards in sections 201 and 202 "give wireless carriers ample discretion to adopt flexible pricing to meet customer needs and marketplace demands." *PCIA Forbearance Order*, 13 FCC Rcd at 16871, para. 29. The FCC made this observation in response to concerns raised by wireless carriers that sections 201 and 202 might be used to constrain them "from offering imaginative and customized terms and conditions" or "make it difficult for competitive providers to negotiate freely and to tailor terms and conditions of service to the specific needs of particular customers." *Id.,* 13 FCC Rcd at 16871 n.78. Consistent with its prior position, and especially in light of the clear and powerful directives from Congress over the past decade, it was appropriate for the Commission to view the

reasonableness of Verizon Wireless's marketing practices under sections 201 and 202 through the prism of competitive realities in the Cleveland CMRS market.[16]

Undaunted by Congress's determination to limit the prohibitions in sections 201 and 202 to specific discrimination and practices deemed “unreasonable” by the expert agency, Orloff advocates a rigid interpretation of sections 201 and 202 both driven and constrained by the common law definition of "common carrier." Negotiation with an individual customer, in Orloff’s inflexible view, can never be reasonable within the meaning of sections 201 and 202. This interpretation vitiates the critical statutory term “unreasonable” and places a straightjacket on the FCC's "free play of agency discretion." *Bell Atlantic Telephone Cos.*, 79 F.3d at 1202. By effectively reading Congress’s limiting concept – “unreasonableness” – out of the statute, Orloff violates the principle that the Communications Act should be construed “to make sense of the whole.” *Bell Atlantic Telephone Cos*., 131 F.3d at 1047. *See also Walters v. Metropolitan Educational Enterprise, Inc,* 519 U.S. 202, 209 (1997) (“Statutes must be interpreted, if possible, to give each word some operative effect.”).

Moreover, even if the judicially-announced definition of "common carrier" somehow sheds some light on the substantive duties of Title II – and it does not – there is no basis on this record to conclude that Verizon Wireless's conduct was unlawful in these circumstances. First, even under the judicial definition -- created because the courts have found the statutory definition wanting -- the meaning of "common carrier" has remained somewhat elusive and open to novel

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[16] The Commission has looked to competitive market conditions to test the reasonableness of specific practices under Title II in prior cases. See, e.g., *Kiefer*, 16 FCC Rcd at 19132, para. 7 (fee imposed by paging carrier on past due balances held not unreasonable under section 201(a) on the basis, in part, of "existence of a competitive market"); *Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE Class Action Complaint*, 16 FCC Rcd 11558 (2001) (finding certain CMRS billing practices not per se unreasonable under 201(b) on the basis, in part, of consideration of competitive market conditions).

disputes, as evidenced by recent cases. *See*, *e.g.*, *Virgin Islands Telephone Co.*, 198 F.3d 921 (deferring to FCC's interpretation of "ambiguous" new term "telecommunications carrier" in 1996 Act to mean essentially same thing as "common carrier"); *U.S. Telecom Ass'n*, 295 F.3d 1326 (deferring to FCC's remand determination that entity with restricted user base may be classified as common carrier if it offers service to all users it is authorized by law to serve). These cases demonstrate that ambiguities continue to plague this area of the law, triggering judicial deference to Commission choices "reasonably within the pale of statutory possibility." *Verizon Communications, Inc.*, 122 S.Ct. at 1667.

Second, the statement emanating from *NARUC I* that a carrier "will not be a common carrier where its practice is to make individualized decisions, in particular cases, on whether and what terms to deal" does nothing more than "articulate[] the 'quasi-public character implicit in the common carrier concept' -- i.e., that the carrier 'undertakes to carry for all people indifferently.'" *Order*, 17 FCC Rcd at 8997, para. 21 (quoting *NARUC I*) (J.A.). Orloff did not allege that Verizon Wireless "refused to deal with any segment of the public whose business is of the 'type normally accepted.'" *Id.* (J.A.). There was no suggestion in the record, for example, that Verizon Wireless declined to serve any particular demographic group or geographic area, nor did Orloff challenge Verizon Wireless's assertion that it stood ready to engage in negotiations initiated by any customer. *Id.* (J.A.). All customers are entitled to take service from Verizon Wireless according to the rates, terms, and conditions of its standard rate plans and promotions. All customers also are entitled to bargain with the sales agent and to make a case for a concession, using the availability of competition and the option of taking business elsewhere as a bargaining tool. Thus, to the extent that this statement from the two-part judicial definition of "common carrier" sheds the slightest light on substantive Title II duties, the

Commission reasonably determined that the record failed to demonstrate any failure on the part of Verizon Wireless to carry out those duties. That determination merits deference by this Court.

D. Verizon Wireless's Concessions to Secure and Retain Customers Are a Reasonable Response to Vibrant Competition in the Cleveland CMRS Market

The vibrant nature of competition in the Cleveland CMRS market is not in doubt. Indeed, as early as 1995 the Commission determined that market forces adequately protected CMRS consumers in Ohio when it denied that State's request to regulate rates and entry. *Ohio CMRS Order,* 10 FCC Rcd 7842 (1995). Competition for CMRS in Ohio generally, and more specifically in Cleveland, has accelerated since that time. *See generally Seventh Annual CMRS Competition Report*, 17 FCC Rcd at 13088, 13090, App. C, Tables 2, 3. And competition of the degree present in Cleveland "serves the FCC's statutory goal of ensuring fair and reasonable prices for telecommunications services." *WorldCom, Inc. v. FCC,* 238 F.3d at 452.

During the relevant time period, the record revealed that service providers advertised widely and competed vigorously for customers' business. Consumers could choose among a plethora of plans, promotions, and prices. CMRS providers routinely designed and offered new packages of service with features designed to attract and retain customers. The Commission found -- and Orloff does not dispute -- that consumers could protect their interests by "shopping around" to find packages of services and features that best suit their individual needs. The Commission found -- and Orloff does not dispute -- that the record contained no evidence of market failure in Cleveland that prevented customers from switching carriers if they became dissatisfied with their existing service. Given this undisputed evidence, the FCC quite

reasonably concluded that market forces protect Cleveland consumers from unreasonable discrimination and practices.[17]

Nor is there any evidence that market forces failed Orloff. To the contrary, Orloff herself reaped the benefits of Cleveland's highly competitive market environment – even as she now assails the negotiating practices that she successfully employed. Orloff cannot dispute that she negotiated concessions from Verizon Wireless that departed from the standard terms of her rate plan. Orloff offered no evidence to indicate that she could not obtain the features she desired from other CMRS providers in the Cleveland market or that she was unable to switch providers. Indeed, the record suggests otherwise; in order to retain her business, Verizon Wireless allowed her to escape her original two-year contract, immediately offered her the benefits of a new rate plan, and gave her a billing credit to boot. That is the antithesis of market failure. Viewed in this light, Orloff's complaint rings hollow. The FCC properly determined that Verizon Wireless's practice of negotiating concessions with individual customers to secure and retain their business (as it did with Orloff) was a reasonable response to competition in the Cleveland CMRS market.

Orloff complains (Br. at 19-21) that Verizon Wireless has not shown any reason specific to her for the disparate treatment among negotiating consumers. We have previously found that sections 201 and 202 "give wireless carriers ample discretion to adopt flexible pricing to meet customer needs and marketplace demand." *PCIA Forbearance Order*, 13 FCC Rcd at 16871, para. 29. Verizon Wireless's practice of granting concessions to negotiating consumers is the

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[17] Orloff (Br. 5-6) quotes selectively from scattered statements in a deposition from a Verizon Wireless executive in an unsuccessful effort to paint the company's marketing practices as unreasonable. Properly read in context, the executive's statements concerning the discretion of sales personnel to offer sales and retention concessions are consistent with the FCC's finding that concessions are designed to respond to competitors' offerings in the highly competitive Cleveland market. *See generally* Deposition of Seamus Hyland (J.A.).

type of flexible pricing responsive to consumer demand that typically emerges in competitive markets. As the Commission observed, "by its very nature," negotiation over rates, terms, and conditions of service (in contrast to simply taking service pursuant to a filed tariff) "will have outcomes depending, in part, on the ability of customers to identify the elements of service they desire and to bargain effectively for those elements." *Order*, 17 FCC Rcd at 8998, para. 23 (J.A.). There is nothing unusual in the fact that Orloff's negotiations with Verizon Wireless – which presumably were shaped by elements of service and other factors of importance to her – produced results that differed from negotiated outcomes between the company and other consumers with varying priorities.

The courts have observed that a "neutral, rational basis" may justify a disparity in charges for "like" services. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Cir. 1990); *see also Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 844-45 (9th Cir. 2002) (upholding disparate treatment by common carrier). Although the Commission may not rely upon a "terse," conclusory comment that a difference in a particular case is reasonable, *MCI Telecommunications Corp.*, 917 F.2d at 41, its extensive articulation of a competitive justification in this case and in the orders on which this case relies easily satisfies the requirement of a "neutral, rational basis." Indeed, the articulation of a competition-based rationale for evaluating rate disparities that arise in negotiations over service contracts has the

virtue of informing carriers and customers alike of their obligations and rights under section 202(a).[18]

E. Orloff's Interpretation of Sections 201 and 202 is Unreasonable

Although Orloff purports to present six separate issues, her argument collapses to a three-sentence syllogism: The judicially-announced definition of "common carrier" states that a common carrier does not make individual decisions, in particular cases, whether and on what terms to deal. Verizon Wireless is a common carrier. Therefore, Orloff claims, Verizon Wireless may not negotiate the terms on which it deals with individual consumers.

Orloff's simplistic syllogism fails on many levels. By asserting that a common carrier may never lawfully negotiate with its customers (Br. at 14-16), Orloff in effect invites the judicial creation of a *per se* ban on discrimination under section 202(a). This runs headlong into the statute -- Congress prohibited only *unreasonable* discrimination in section 202(a). Likewise,

[18] Orloff (Br. at 18) cites *MCI Telecommunications Corp*. v. FCC, 842 F.2d 1296, 1303 (D.C. Cir. 1988), for the proposition that the FCC and courts apply a three-prong test for evaluating section 202(a) claims. The FCC agrees with Orloff on this point. To the extent, however, that *MCI Telecommunications Corp*. may be read to suggest that the FCC in certain instances must examine the underlying cost differences in like services – and Orloff's brief does not suggest that it does – we believe the case is distinguishable from this one. The dispute in *MCI Telecommunications Corp*. arose under a tariff regime in the wake of divestiture by AT&T of its monopoly local telephone affiliates, the Bell Operating Companies ("BOCs"). The case involved a comparison of the BOCs' special access tariff offerings to AT&T's competitors with contracts executed between the BOCs and AT&T for the use of shared network facilities, and the Court found that the FCC erred by not carrying through with the three-step process for unreasonable discrimination claims. In *MCI Telecommunications Corp*., one of the two services subject to comparison was governed by tariffs, the providers of both services (the BOCs) indisputably had market power, and the non-favored parties (AT&T's competitors) had no access to the second offering at issue (the contracts between the BOCs and AT&T). Here, in contrast, no tariffs are involved, the provider (Verizon Wireless) lacks market power and operates in a highly competitive environment, and Orloff had ample opportunity to negotiate with Verizon Wireless over the rates, terms, and conditions of service.

Congress prohibited only *unreasonable* practices in section 201(b). And Congress assigned interpretation of these limited bans, couched in general terms, to the sound discretion of an expert administrative agency. Because Orloff's interpretation would vitiate the "reasonableness" standard Congress established in sections 201 and 202, it is contrary to law. *See Bell Atlantic Telephone Cos*., 131 F.3d at 1047 (Communications Act should be construed to "make sense of the whole").

More flaws are readily apparent. Orloff would have the Commission disregard a decade of commands from Congress to consider competitive market conditions in the CMRS context when construing and applying the Communications Act. Orloff's proffered interpretation ignores and contradicts the context of the statute. The Court should therefore reject it. *See generally id*., 131 F.3d at 1047-50 (emphasizing importance of construing Communications Act in context, consistent with its history and purpose).

The deficiencies continue. Orloff, in effect, insists that any negotiation policy must result in all customers who negotiate being treated exactly the same; if another customer negotiates more favorable terms than she did, she apparently believes Verizon Wireless has an obligation to make those terms available to her. *See Order*, 17 FCC Rcd at 8998, para. 23 (J.A.). This assertion conflicts with her broader arguments: (1) no customer may negotiate with a common carrier; and (2) the nondiscrimination requirement is absolute, and permits no different treatment for negotiators as compared to non-negotiators. The point is that Orloff does not have a principled position; she simply wants the best deal that anyone else gets.

In essence, Orloff would "turn back the clock" to the regulatory-laden days when non-dominant carriers were required to file tariffs at the FCC and could not depart from the rates, terms, and conditions specified in those filed tariffs. And she would do so contrary to the FCC's

congressionally authorized, judicially approved determination that, in competitive markets, a substantially deregulated and detariffed environment characterized by private contract formation best promotes competition and protects consumers. Orloff thus apparently disagrees with this Court's holding that the Commission is "entitled to value the free market, the benefits of which are rather well established." *MCI WorldCom, Inc.*, 209 F.3d at 766.

II. The Commission Did Not Forbear From Applying Sections 201 and 202 to Verizon Wireless

Finally, at the tail end of her brief (pp. 24-26), Orloff half-heartedly contends that the Commission's decision unlawfully forbears from applying sections 201 and 202 to Verizon Wireless. To the contrary, the FCC explicitly applied these statutory provisions -- properly construed to give meaning to the word "unreasonable" -- and determined that Verizon's conduct in these circumstances did not violate sections 201 and 202. Indeed, the Commission emphasized that it was "*not* forbearing from applying section 202(a)" and announced that section 202 "continues to act as a powerful protection for CMRS consumers, even if it was not violated in this case." *Order*, 17 FCC Rcd at 8997, para. 22. (J.A.   ) (emphasis supplied). The Commission stated that it might find a violation of section 202 if "a CMRS market was inadequately competitive, or if some other market failure limited consumers' abilities to use market forces to protect themselves." *Id.* (J.A.) The Commission explained that unreasonable discrimination might be found, for example, if a CMRS provider discriminated against rural customers who lacked adequate choice of providers in favor of urban consumers. The Commission also noted that the existence of competition in the abstract is not sufficient to insulate a CMRS provider from section 202 liability, emphasizing that "we will not hesitate to

find that unreasonable discrimination violates section 202" even when competition is present. *Id.* (J.A.).

The Commission previously has described various types of market failure and carrier conduct that could harm consumers and potentially be deemed unreasonable under the statute. When the FCC in 1998 declined to forbear from applying sections 201 and 202 to broadband PCS providers, for example, it observed that carriers' use of different technologies, the high cost of handsets, and the lack of number portability combine to create conditions that potentially could harm consumers. In addition, the FCC noted that carriers could harm consumers by unreasonably failing to offer roaming, or by prohibiting or unreasonably restricting resale of their services. *PCIA Forbearance Order*, 13 FCC Rcd at 16869, para. 26. Gross disparities in rates, terms, and conditions of service might also implicate sections 201 and 202, as might certain tying arrangements or economic "redlining."

No such market failure or carrier conduct is alleged in this case. There is thus no merit to Orloff's contention (Br. at 25) that the Commission "effectively deregulated Verizon Wireless from the Congressional mandates of Section 202."[19]

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[19] Orloff's brief argument with respect to forbearance – that the Commission lacks authority to forbear from enforcing these two provisions or failed to follow proper procedures under the forbearance statute – is beside the point. The Commission applied sections 201 and 202 here, and did not forbear from enforcing them. We note, however, that Orloff misconstrues the scope of the agency's forbearance power, which Congress expanded in 1996 well beyond the limits it previously established in section 332: "Notwithstanding section 332(c)(1)(A) of this Act," the Commission "shall" forbear from applying "any regulation or provision of this Act" to a telecommunications carrier or service. 47 U.S.C. § 160(a) (emphasis added). This provision places no limits on the agency's mandate to forbear from enforcing Title II requirements (with the exception of sections 251(c) and 271, see 47 U.S.C. § 160(d)) and "now gives the Commission the authority to forbear from enforcing sections 201 and 202" in the CMRS context if the requisite criteria are satisfied. *PCIA Forbearance Order*, 13 FCC Rcd at 16865, para. 15. The Commission to date has not exercised its clear statutory authority to forbear from applying sections 201 and 202 to CMRS providers. See 47 C.F.R. § 20.15(a) (2001).

The Commission's explicit application of sections 201 and 202 to Verizon Wireless fully distinguishes the circumstances here from *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) -- as underscored by Orloff's failure to cite the case in her brief. In *Ass'n of Communications Enterprises*, this Court vacated a Commission ruling that allowed two merged incumbent local exchange carriers to avoid section 251(c) resale obligations on certain advanced services by providing those services through a separate subsidiary.[20] The Commission's holding in that case was that section 251(c)'s resale obligation *did not apply*; here, in contrast, the Commission properly found that sections 201 and 202 applied to Verizon Wireless but had not been violated in the specific circumstances.

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[20] The Court found the Commission's interpretation unreasonable in light of "the Act's structure," 235 F.3d at 296, emphasizing that Congress not only had prohibited section 251(c) forbearance but also had not prescribed an affiliate structure in section 272 for the provision of advanced services, in contrast to other specified activities such as long distance service. *Id.*, 235 F.3d at 294-96.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's order should be affirmed.

Respectfully submitted,

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November 27, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUELINE ORLOFF, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	))))))))))))	02-1189

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11984 words.

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