Before the
Federal Communications Commission
Washington, D.C. 20554

Jacqueline Orloff,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-01-MD-009
	)	
Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless,	)	
	)	
and	)	
	)	
New Par,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 2002 **Released: May 16, 2002**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the formal complaint that Jacqueline Orloff ("Orloff") filed against Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, and its affiliate, New Par,[1] pursuant to a primary jurisdiction referral and section 208 of the Communications Act of 1934, as amended ("Act").[2] In short, Orloff's

[1] Vodafone AirTouch Licenses LLC has been renamed Verizon Wireless (VAW) LLC. Revised Joint Statement, File No. EB-01-MD-009 (filed July 3, 2001) ("Revised Joint Statement") at 3, ¶ 8. *See* Respondent's Answer, File No. EB-01-MD-009 (filed May 3, 2001) ("Answer") at 1 n.1. New Par formerly operated under the trade name "Airtouch Cellular," and now transacts business under the trade name "Verizon Wireless." Answer at 1 n.1. *See* Revised Joint Statement at 2, ¶ 2. Although much of the conduct at issue in this proceeding occurred before the above changes, this Order refers to the parties individually as "Verizon Wireless (VAW) LLC" and "New Par," respectively, and refers to these entities collectively as "Defendants."

[2] 47 U.S.C. § 208. The United States District Court for the Northern District of Ohio granted

complaint alleges that Defendants violated sections 201 and 202 of the Act by offering discounts and other inducements to certain customers taking service under Defendants' wireless calling plans that Defendants did not make available to Orloff.[3] We find that Orloff has not established that Defendants' challenged practices were unreasonably discriminatory, in violation of section 202(a) of the Act, or unjust and unreasonable, in violation of section 201(b) of the Act.

II. BACKGROUND

A. The Parties

2. Orloff is an individual consumer of cellular telephone service in the Cleveland, Ohio area.[4] At all relevant times, New Par was licensed and furnished service as a commercial mobile radio service ("CMRS") provider in the Cleveland, Ohio, market.[5] New Par is a general partnership in which Verizon Wireless (VAW) LLC is the majority partner.[6]

Defendants' request for a primary jurisdiction referral on May 30, 2000. *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) ("District Court Order"), attached as Exhibit A to Answer. Almost eight months later, on January 24, 2001, Orloff filed a formal complaint with the Commission implementing the primary jurisdiction referral. However, because that complaint failed in numerous and significant respects to comply with the Commission's rules governing formal complaints, *see* 47 C.F.R. §§ 1.720-1.736, Commission staff dismissed the complaint without prejudice on February 1, 2001. *See* Letter from Alexander P. Starr, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff (dated Feb. 1, 2001). Over two months later, Orloff filed a new complaint, which is the subject of this Order. *See* Complaint for Declaratory Judgment Arising out of Class Action Complaint for Damages, File No. EB-01-MD-009 (filed Apr. 12, 2001) ("Complaint").

[3] *See* 47 U.S.C. §§ 201(b), 202(a).

[4] Revised Joint Statement at 3, ¶¶ 11-12; Complaint at 2, ¶ 6; Answer, Tab 1 (Respondent's Legal Analysis) at 2.

[5] Revised Joint Statement at 2, ¶ 2; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 5, ¶ 9.

[6] Revised Joint Statement at 2, ¶¶ 4, 6; at 3, ¶ 8; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 6, ¶ 10. Defendants argue that, because Verizon Wireless (VAW) LLC is not a licensed CMRS provider or a common carrier, it is not properly a party defendant. Supplemental Answer, File No. EB-01-MD-009 (filed May 29, 2001) ("Supplemental Answer") at 2; Answer, Tab 1 (Respondent's Legal Analysis) at 1 n.1; Tab 2 (Respondent's Answer to Specific Allegations) at 95, ¶ 284. In light of our conclusion that the Complaint should be denied on the merits, we need not reach this issue. *Cf.* 47 U.S.C. § 411(a) (providing that interested non-carriers may be included as parties along with carrier defendants).

B. State of Competition in the Cleveland Ohio, CMRS Market

3. For purposes of adjudicating Orloff's complaint, the relevant period is January 1, 1999 through February 9, 2001, because it was during this period that Orloff negotiated, purchased, and received cellular service from Defendants.[7] Moreover, the relevant geographic market is the Cleveland, Ohio metropolitan statistical area ("MSA"),[8] because that is where Orloff resided and sought CMRS service from Defendants.[9]

4. During the relevant period, consumers seeking CMRS service in the Cleveland, Ohio MSA could choose between two cellular providers (New Par and GTE Mobilnet), two personal communications service ("PCS") providers (Ameritech and AT&T), and one enhanced specialized mobile radio ("SMR") provider (Nextel).[10] In addition to these five facilities-based providers, various resellers also served the market.[11]

5. These providers offered to consumers many different types of service packages, which combined 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.[12] In addition, these providers regularly designed new offerings to attract customers to their service, including plans with significant bundled minutes and less restrictive terms and conditions.[13] Moreover, the providers frequently presented special

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[7] *See* Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kathleen M. Trafford and Kenneth D. Patrich, counsel for Defendants, File No. EB-01-MD-009 (dated May 29, 2001) at 3 ("May 29, 2001 Staff Letter"); Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kenneth D. Patrich, L. Charles Keller, J. Wade Lindsey, Kathleen M. Trafford, and Daniel W. Costello, counsel for Defendants, File No. EB-01-MD-009 (dated June 8, 2001) at 1 ("June 8, 2001 Staff Letter"); Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kathleen M. Trafford and Kenneth D. Patrich, counsel for Defendants, File No. EB-01-MD-009 (dated July 16, 2001) at 2 ("July 16, 2001 Staff Letter").

[8] The Commission uses MSAs, which the Office of Management and Budget defines based on population statistics, to allocate cellular radio licenses.

[9] Revised Joint Statement at 2, ¶ 2; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 5, ¶ 9. *See also* May 29, 2001 Staff Letter at 3; June 8, 2001 Staff Letter at 1; July 16, 2001 Staff Letter at 2.

[10] Revised Joint Statement at 4, ¶ 18; Answer, Tab 1 (Respondent's Legal Analysis) at 3. Cellular service, PCS, and SMR service utilize different spectrum frequency to provide mobile telephony. The Commission regulates all three services as CMRS. *See* 47 C.F.R. § 20.9.

[11] Revised Joint Statement at 4, ¶ 19; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

[12] Revised Joint Statement at 4, ¶ 20; Answer, Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Affidavit of Corinne Milligan) ("Milligan Affidavit"), Exhibits 1-65.

[13] Revised Joint Statement at 4, ¶ 20; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 67, ¶ 156; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

promotions to consumers, including reduced activation fees and free or discounted phones and automobile battery chargers.[14] The providers extensively advertised these plans and promotions, highlighting rates, terms, conditions, and quality of service.[15]

C. Defendants' Service Offerings

6. In the Cleveland, Ohio CMRS market, Defendants provided to consumers various standard rate plans, as well as regular promotions, which included additional incentives to purchase their service.[16] Many of Defendants' rate plans and promotions included bundles of airtime minutes as part of monthly service or extra features at no additional charge.[17]

7. Defendants also authorized their personnel to depart from standard rate plans and promotions by offering added inducements to attract new customers or retain existing customers.[18] Defendants called these inducements "sales concessions" (for new customers) and "retention concessions" (for existing customers).[19] Examples of these concessions include a one-time monetary credit, minutes of air time added to a plan's or promotion's bundle of minutes, the free use of some feature (*e.g.*, voice mail or call forwarding) for a period of time, and equipment or an equipment discount or rebate.[20] Concessions resulted in the customer obtaining service at a price lower than that paid by another customer who received service under the same rate plan or promotion but who did not receive a concession.[21]

8. Defendants empowered their sales agents and customer care representatives to use their discretion in determining whether to offer a particular concession to a particular

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[14] Revised Joint Statement at 4, ¶ 20; Answer, Tab 1 (Respondent's Legal Analysis) at 21-22; Tab 2 (Respondent's Answer to Specific Allegations) at 51 and 67, ¶¶ 111, 158; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

[15] Revised Joint Statement at 5, ¶¶ 24, 26; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57 and 65, ¶¶ 133, 151; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

[16] Revised Joint Statement at 5, ¶ 25; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 60, ¶¶ 107, 142.

[17] Revised Joint Statement at 5, ¶ 25; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 60, ¶¶ 107, 142.

[18] Revised Joint Statement at 5-6, ¶ 28; Answer, Tab 1 (Respondent's Legal Analysis) at 4; Tab 2 (Respondent's Answer to Specific Allegations) at 70, ¶ 165.

[19] Revised Joint Statement at 5-6, ¶¶ 28-29; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

[20] Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 60, ¶ 142.

[21] Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 51, ¶ 116.

customer.[22] Thus, Defendants decided to grant a concession (as well as the amount of a concession) to any particular customer on an "individualized basis."[23] Defendants' personnel generally did not volunteer to consumers information about the potential for obtaining concessions.[24] Rather, a consumer generally could learn about and perhaps obtain a concession only as a result of negotiating (*i.e.*, haggling) with a representative of Defendants.[25] Defendants did not require their personnel to maintain records regarding the granting of concessions.[26]

9. Defendants also provided "Association" and "Government" rate plans in 1999, which were available to members of qualifying associations (*e.g.*, bar associations, chambers of commerce, boards of realtors) and governmental entities/employees, respectively.[27] On some occasions, Defendants allowed individuals who were not members of qualifying associations or governmental entities nonetheless to receive the Association or Government rates.[28]

10. On February 23, 1999, Orloff purchased cellular service from Defendants under an advertised rate plan.[29] Five months into her two-year contract, Orloff switched to another of Defendants' advertised rate plans, on which she remained until she terminated service on February 6, 2001.[30] Orloff received sales concessions at the time she took service

[22] Revised Joint Statement at 6, ¶ 30; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 46, ¶ 104.

[23] Revised Joint Statement at 7, ¶ 34; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 52, ¶ 119.

[24] Revised Joint Statement at 7, ¶ 34; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 52, ¶¶ 106, 118.

[25] Revised Joint Statement at 7, ¶ 35; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 52, ¶¶ 106, 118.

[26] Complainant's Initial Brief in Support of Declaratory Judgment that Defendants Have Violated 47 U.S.C. §§ 201 and 202 (filed Aug. 17, 2001) ("Orloff's Initial Brief") at 22, 29-31; Complainant's Reply Brief in Support of Declaratory Judgment that Defendants Have Violated 47 U.S.C. §§ 201 and 202 (filed Sept. 17, 2001) ("Orloff's Reply Brief") at 2-3.

[27] Revised Joint Statement at 5, ¶ 22; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57 and 77, ¶¶ 135, 179.

[28] Revised Joint Statement at 5, ¶ 22; Answer, Tab 1 (Respondent's Legal Analysis) at 18; Initial Brief of New Par and Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, File No. EB-01-MD-009 (filed Sept. 7, 2001) ("Respondent's Initial Brief") at 31. *See* Respondents' Answers to Complainant's July 9, 2001 Discovery Requests Propounded to Respondent New Par, File No. EB-01-MD-009 (filed July 27, 2001) ("Respondents' Answers to July 9, 2001 Discovery Requests"), Response to Request for Production of Documents No. 3 at NPV 170-173 (Ohio Association Program Packet); Response to Interrogatory No. 6.

[29] Revised Joint Statement at 3, ¶¶ 10-11, 15; Complaint, Exhibit B (Orloff Service Agreement); Answer, Tab 1 (Respondent's Legal Analysis) at 2.

[30] Revised Joint Statement at 4, ¶¶ 16, 17; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4, ¶ 6.

under the initial plan, and she received a retention concession at the time she switched to the subsequent plan.[31] Nevertheless, during the relevant period, customers in the Cleveland, Ohio market who were on the same rate plan as Orloff received certain sales and retention concessions that Orloff did not receive.[32]

D. The Federal District Court Litigation

11. On February 11, 2000, Orloff and three other individuals filed a putative class action lawsuit against Defendants in the United States District Court for the Northern District of Ohio.[33] The district court complaint alleges that Defendants violated section 202(a) of the Act by charging different prices to similarly-situated customers for the same service.[34] Pursuant to the referral to the Commission, granted at Defendants' request prior to the initiation of discovery, the District Court stayed the underlying lawsuit until the Commission determines whether Defendants' conduct violates the Act.[35]

E. The Instant Proceeding

12. In the Complaint filed with the Commission, Orloff alleges that Defendants' "policy and practice of secret, selective, and standardless discounts which are negotiated individually with preferred customers" violates sections 201 and 202 of the Act.[36] Specifically, the Complaint avers that Defendants acted in an unreasonable and discriminatory manner, because they failed to make available to Orloff (or to advise her of the existence of) more favorable rate plans and concessions that Defendants offered to

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[31] Revised Joint Statement at 3, ¶¶ 15-16; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95. The sales concessions consisted of 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. Revised Joint Statement at 3, ¶ 15; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95. The retention concession consisted of a billing credit. Revised Joint Statement at 4, ¶ 16; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95.

[32] Revised Joint Statement at 7, ¶ 40.

[33] The putative class consists of at least 50,000 Ohio residents who purchased cellular service from Defendants two years prior to the filing of the federal district court complaint and who did not receive concessions. Complaint, Exhibit A (*Jacqueline Orloff, et al. v. Vodafone AirTouch Licenses LLC, et al.*, Case No. 1: 00 CV 421, Class Action Complaint (N.D. Ohio Feb. 11, 2000)). We note that the Commission cannot adjudicate complaints under section 208 on a class action basis. *See Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22581, ¶ 29 (1998) ("class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act").

[34] *See* District Court Order at 1.

[35] District Court Order at 10. The District Court did not identify specific issues that it would like the Commission to resolve. *See id.*

[36] Complaint at v.

other similarly-situated customers.[37] The Complaint asks the Commission to declare Defendants' acts unlawful.[38] Assuming favorable rulings from the Commission, the Complaint further indicates that Orloff will pursue a claim for damages in the District Court, rather than at the Commission.[39]

13. In their Answer, Defendants assert that Orloff has not demonstrated that a "nondominant carrier in a competitive market [is] able to impose unreasonable or discriminatory pricing."[40] The Answer further argues that, even assuming Orloff's legal theory regarding discrimination by a non-dominant carrier is correct, Orloff has not demonstrated that, as a factual matter, she is entitled to relief, because she has not established that any particular customer was charged less than she was for like service and because she received concessions from Defendants.[41]

III. DISCUSSION

A. Defendants' Concessions Were a Reasonable Response to Competition in the Cleveland, Ohio CMRS Market.

1. Defendants' Concessions Were Not Unreasonably Discriminatory Under Section 202(a) of the Act.

a. Legal Standard

14. Section 202(a) of the Act makes it unlawful for any common carrier to discriminate unjustly or unreasonably among customers in its provision of "like communication service."[42] The Commission and the courts have held that a three-step inquiry is required 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.[43] When a complainant establishes the first two

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37 Complaint at 42-50, ¶¶ 225-280. *See* Orloff's Initial Brief at 17-34; Orloff's Reply Brief at 3-14.

38 *See* Complaint at 42-49, ¶¶ 225-272.

39 *See* Complaint at 49-50, ¶¶ 276, 280.

40 Answer, Tab 1 (Respondent's Legal Analysis) at 5. *See also* Answer, Tab 1 (Respondent's Legal Analysis) at 6-13.

41 Answer, Tab 1 (Respondent's Legal Analysis) at 5. *See also* Answer, Tab 1 (Respondent's Legal Analysis) at 14-22.

42 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . ."). Persons engaged in the provision of CMRS are treated as common carriers under the Act. *See* 47 U.S.C. § 332(c)(1)(A).

43 *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.*

components, the burden of persuasion shifts to the defendant carrier to justify the discrimination as reasonable.[44]

b. Likeness of Service and Difference in Treatment

15. We conclude that Orloff has satisfied the first two steps of the section 202(a) inquiry. First, the parties agree that, for purposes of this proceeding, the Commission may assume that the "like" communication service at issue is single-line cellular service purchased by a non-business user.[45] Second, we conclude that Defendants treated Orloff differently than they treated other customers purchasing like service, given the parties' stipulations that (1) a customer who received a concession obtained service at a lower price than that paid by a customer who received service under the same rate plan or promotion but who did not receive that concession;[46] and (2) some customers in the Cleveland, Ohio MSA on the same rate plan as Orloff received some types of sales and retention concessions that Orloff did not receive.[47] Accordingly, we turn to the question of whether Defendants have satisfied the third step of the section 202(a) inquiry – *i.e.*, whether their different treatment of Orloff was reasonable.

c. Reasonableness of the Different Treatment

16. Defendants contend that the existence of vigorous competition in the Cleveland, Ohio CMRS market rendered individualized concessions and haggling reasonable.[48] Defendants characterize their concessions practices as a means of enabling

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v. Bell Atlantic NYNEX Mobile Systems, Inc., et al., Memorandum Opinion and Order, FCC 01-368, ¶ 10 (rel. Dec. 19, 2001); *Beehive Telephone, Inc. v. Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10567, ¶ 27 (1995); *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5903, ¶ 132 (1991).

44 *See National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 129-30 (2nd Cir. 2001); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carrier*s, Report and Order, 12 FCC Rcd 22497, 22615, ¶ 291 & n.782 (1997), *recon. denied*, 16 FCC Rcd 5681 (2001); *PanAmSat Corp. v. Comsat Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 n.90 (1997).

45 *See* Orloff's Initial Brief at 18; Defendants' Initial Brief at 20. Defendants argue that, "while all wireless service involves the sale of airtime, such airtime comes in a wide variety of packages, with airtime bundled in different ways and coupled with many different types of features and services." Defendants' Initial Brief at 20. Nevertheless, Defendants state that they are willing to have the Commission assume in this proceeding that the CMRS service provided to Orloff was "like" the CMRS service provided to all other non-business customers. *Id.*

46 Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 44, ¶ 95.

47 Revised Joint Statement at 7, ¶ 40. Contrary to Defendants' assertion (*see* Answer, Tab 1 (Respondent's Legal Analysis) at 17; Defendants' Initial Brief at 21), the fact that Orloff received some sales and retention concessions is not dispositive of the issue of disparate treatment, because Orloff did not receive other concessions that were provided to customers obtaining like service.

48 Answer, Tab 1 (Respondent's Legal Analysis) at 6-13, 22; Defendants' Initial Brief at 8-10; Defendants' Reply Brief at 3.

a non-dominant carrier to keep existing customers and to obtain new customers by quickly meeting the offers of competitors.[49] According to Defendants, they made concessions in a nondiscriminatory manner, because no customers were guaranteed a concession, and any concessions that Defendants gave resulted from individual negotiation initiated by the customer (*i.e.*, haggling).[50] Thus, Defendants maintain that the determinative factor was whether a customer haggled: "[A]ll customers . . . could trigger a competitive response from [Defendants], and would be equally likely to be offered or not offered a concession."[51]

17. Orloff argues that the presence of competition does not justify Defendants' concessions practices,[52] and that competition is irrelevant when customers do not have access to sufficient information regarding alternative offerings.[53] Moreover, Orloff asserts that Defendants granted concessions for any reason or no reason at all, not because they carefully analyzed economic factors attendant to particular transactions.[54] Thus, Orloff highlights Defendants' failure to keep any records allowing a comparison of different customers and the reasons concessions were, or were not, given.[55]

18. Defendants have demonstrated that their disparate treatment of Orloff was reasonable. Although the Commission declined to forbear from applying sections 201(b) and 202(a) of the Act in the CMRS context,[56] it has considered the existence of robust competition in the CMRS market when determining whether a violation of those sections has occurred. For example, in *Kiefer v. PageNet*, the Commission held that a fee imposed by a paging carrier on past due balances for paging service was not unreasonable under section 201(b) of the Act.[57] The Commission rejected the complainant's assertion that the late fee must be cost-based, 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

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49 Answer, Tab 1 (Respondent's Legal Analysis) at 21-22; Defendants' Initial Brief at 2.

50 Defendants' Initial Brief at 22; Defendants' Reply Brief at 5.

51 Defendants' Reply Brief at 5. *See also* Defendants' Initial Brief at 22.

52 Complaint at 27-29, ¶¶ 146-153; Orloff's Initial Brief at 24-29; Orloff's Reply Brief at 3.

53 Complaint at 14-15, ¶¶ 60-65; Orloff's Initial Brief at 32; Orloff's Reply Brief at 7, 11, and 13.

54 Complaint at 43, ¶ 239; at 45, ¶ 249; at 49, ¶ 272; Orloff's Initial Brief at 22; Orloff's Reply Brief at 7-8.

55 Complaint at 24, ¶ 122; Orloff's Initial Brief at 22, 29-31; Orloff's Reply Brief at 2-3.

56 *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 (1998).

57 *Kiefer v. Paging Network, Inc., d/b/a PageNet*, Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001) ("*Kiefer v. PageNet*").

fee violate[d] section 201(b)."[58]

19. Orloff does not dispute that, at the time she took service from Defendants, consumers in the Cleveland, Ohio CMRS market had many choices.[59] In particular, consumers could obtain service from five facilities-based providers and from several resellers.[60] Carriers in that market regularly designed new service offerings to attract customers to their service and advertised the new packages and promotions to consumers.[61] Consequently, consumers had ample opportunity to compare various terms and conditions in order to identify the package best-suited to their needs.[62] In short, we conclude that vibrant competition characterized the Cleveland, Ohio CMRS market.[63]

20. Given the indisputable competition in the Cleveland CMRS market, we decline to find that Defendants' concessions practices violated section 202(a) of the Act, even if those practices allowed some consumers to negotiate better deals than other consumers. This is because we find that market forces protect Cleveland consumers from discrimination from these particular practices. We find that there is no evidence that any market failure prevented customers from switching carriers if they were dissatisfied. Accordingly, we find it unlikely that a carrier would have an incentive to engage in unreasonable discrimination where such conduct would result in a loss of customers.[64]

21. We are aware of case law holding that a carrier "will not be a common

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58 *Kiefer v. PageNet*, 16 FCC Rcd at 19131, ¶ 5; at 19132, ¶ 7.

59 *See* Orloff's Initial Brief at 24; Orloff's Reply Brief at 3.

60 Revised Joint Statement at 4, ¶¶ 18, 19; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

61 Revised Joint Statement at 4-5, ¶¶ 20, 24, 26. We have observed in the CMRS context that the continued rollout of differentiated pricing plans indicates a competitive marketplace. *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*, Sixth Report, 16 FCC Rcd 13350, 13377 (2001) *("Sixth Annual CMRS Competition Report*").

62 Revised Joint Statement at 5, ¶¶ 24, 26; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57 and 65, ¶¶ 133, 151; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer).

63 We note that statistics at a national level regarding cellular service indicate continued downward pricing trends, steady customer churn rates, and continued expansion of mobile networks into new and existing markets. These factors suggest a high level of competition for mobile telephony users generally. *See Sixth Annual CMRS Competition Report*, 16 FCC Rcd at 13370, 13376-8.

64 *See* Answer, Tab 1 (Respondent's Legal Analysis) at 22; Defendants' Initial Brief at 13. *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, ¶ 173 (1994) (noting that non-dominant carriers are unlikely to behave anti-competitively because they recognize that such behavior would result in the loss of customers); *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 31, ¶ 88 (1980) (firms lacking market power cannot rationally price their services in contravention of Sections 201(b) and 202(a) of the Act because they would lose market share).

carrier where its practice is to make individualized decisions, in particular cases, on whether and what terms to deal."[65] This statement, however, articulates the "quasi-public character implicit in the common carrier concept" – *i.e.*, that the carrier "undertakes to carry for all people indifferently."[66] Orloff does not allege that Defendants refused to deal with any segment of the public whose business is of the "type normally accepted."[67] For example, Orloff does not contend that Defendants declined to serve any particular demographic group (*e.g.*, customers who are of a certain race or income bracket). Indeed, Defendants' assertion that they are willing to engage in negotiations initiated by any customer is uncontroverted.[68]

22. In reaching our conclusion that a policy permitting all customers to haggle comports with section 202(a)'s reasonableness requirement, however, we emphasize two points. First, we are not forbearing from applying section 202(a) in this case. Section 202 continues to act as a powerful protection for CMRS consumers, even if it was not violated in this case. If a CMRS market were inadequately competitive, or if some other market failure limited consumers' abilities to use market forces to protect themselves, Section 202 could be implicated.[69] If, for example, a carrier unreasonably discriminated against rural consumers, who lacked adequate choice of providers, in favor of urban consumers, we could find a section 202 violation. It is also important to note that competition alone does not insulate a CMRS provider from section 202 liability. Even with adequate competition we will not hesitate to find that unreasonable discrimination violates section 202. Second, in a related vein, our holding of what is reasonable in this market does not necessarily translate to other markets marked by less competition.

23. We reject Orloff's contention that, in order to pass muster under section 202(a), a haggling policy must result in all customers who haggle being treated exactly the same.[70] By its very nature, a policy permitting customer negotiation will have

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65 *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"). *See also Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[i]f the carrier chooses its clients on an individualized basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service"); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (quoting *NARUC I*); Complaint at 7, ¶ 24 (citing *NARUC I*, 525 F.2d at 641); Orloff's Initial Brief at 16 (same); Orloff's Reply Brief at 5 (same).

66 *NARUC I*, 525 F.2d at 641 (citations omitted).

67 *NARUC I*, 525 F.2d at 641 (citations omitted).

68 *See* note 51, *supra*.

69 With respect to CMRS, the Commission generally has relied on market forces, rather than regulation, except when there is market failure. *See 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, ¶ 173 ("in a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power"); at 1478-79, ¶ 175 (forbearing from tariff requirements for CMRS carriers and noting that section 202 "will provide an important protection *in the event there is a market failure*") (emphasis added).

70 Orloff's Reply Brief at 9-10.

outcomes depending, in part, on the ability of customers to identify the elements of service they desire and to bargain effectively for those elements. Although such a policy may not result in identical deals for all consumers purchasing cellular service, we are confident that consumers, given the opportunity to purchase service from five facilities-based CMRS carriers and numerous CMRS resellers,[71] and given no evidence of other market failure, will "shop around," if they believe a particular carrier does not meet their needs. Moreover, although we agree with Orloff that the information available to customers about deals other customers received is not perfect,[72] she has not demonstrated that she was unaware of her ability to haggle or that Defendants somehow misled her in that regard. Indeed, it is undisputed that, during the relevant time period, CMRS providers in the Cleveland, Ohio, CMRS market actively advertised their plans and promotions in an effort to attract customers,[73] and that Orloff was aware that she had options beyond obtaining service from Defendants.[74] In fact, Orloff availed herself of the benefits of haggling, receiving numerous concessions from Defendants on two occasions.[75] We have not found in this case that information asymmetries rendered market forces in Cleveland unable to protect CMRS consumers.

24. We further disagree with Orloff's assertion that differences in treatment of consumers purchasing like service must be cost-justified on a transaction-by-transaction basis.[76] As noted above, the Commission has regulated CMRS though competitive market forces, declining to impose specific cost-based regulations on CMRS providers.[77] In any event, we find credible Defendants' assertion that their concessions practices stemmed generally from a rough profitability analysis, *i.e.*, to respond immediately to changes in the marketplace and to individual customer demand when existing plans and promotions were inadequate.[78] Furthermore, we believe that, as a practical matter, it would be extraordinarily burdensome to require CMRS carriers to do what Orloff asks (*i.e.*, to track and offer to every customer concessions attained through negotiation). In the absence of evidence of market failure in the Cleveland, Ohio CMRS market, we decline to impose such a burden.[79]

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71 *See* Revised Joint Statement at 4, ¶¶ 18, 19.

72 *See* Orloff's Initial Brief at 32; Orloff's Reply Brief at 7, 11.

73 Revised Joint Statement at 5, ¶¶ 24, 26.

74 Revised Joint Statement at 3, ¶ 14.

75 Revised Joint Statement at 3-4, ¶¶ 15-16.

76 Orloff's Initial Brief at 33-34; Orloff's Reply Brief at 14.

77 *See Kiefer v. PageNet*, 16 FCC Rcd at 19131, ¶ 5.

78 *See* Answer, Exhibit C (Affidavit of Seamus Hyland) ("Hyland Affidavit"), at ¶¶ 35-38; Exhibit L (Milligan Affidavit), Exhibits 1-65; Respondents' Answers to July 9, 2001 Discovery Requests, Response to Request for Production of Documents No. 2 at NPV 102-103; Defendants' Initial Brief at 18; Defendants' Reply Brief at 4.

79 Again, we emphasize that our ruling is confined to the facts of this case, which involve a highly-

2. Defendants' Concessions Practices Were Not Unreasonable Under Section 201(b) of the Act.

25. Section 201(b) of the Act requires a common carrier's charges and practices in connection with communication service to be "just and reasonable."[80] Orloff contends that Defendants' concessions practices constitute an unjust and unreasonable practice.[81] Defendants deny Orloff's allegations, offering the same defenses to the section 201(b) claim as they do to the section 202(a) claim.[82]

26. We reject Orloff's section 201(b) claim. As noted, section 201(b) declares unlawful only "unjust or unreasonable" common carrier practices. For the reasons discussed above, we find Defendants' concessions practices to be reasonable.[83]

B. Defendants' Occasional Departure from Association/Government Rate Plan Criteria is Tantamount to a Concession and, Therefore, is Reasonable.

27. Orloff argues that Defendants' occasional practice of allowing a person to obtain association/governmental entity rates, even though not a qualifying member, violates sections 201(b) and 202(a).[84] We disagree. First, the record contains no evidence that this conduct occurred in the Cleveland, Ohio MSA (as opposed to the Columbus, Ohio MSA). In any event, even if Orloff could show that Defendants engaged in this conduct in Cleveland, we would not find a violation of section 202(a) or

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competitive CMRS market occupied by a number of non-dominant carriers. Consequently, the cases cited by Orloff (*see* Orloff's Initial Brief at 27-28; Orloff's Reply Brief at 11) are distinguishable, because they all involved carriers with significant market power. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Cir. 1990); *Southwestern Bell Telephone Co.*, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 6964, 6967, ¶ 8 (1998); *AT&T Communications Tariff F.C.C. Nos. 1, 2, 9*, Memorandum Opinion and Order, 6 FCC Rcd 5675, 5675, ¶ 6 (1991).

[80] 47 U.S.C. § 201(b).

[81] Complaint at 49, ¶ 275; Orloff's Initial Brief at 23; Orloff's Reply Brief at 3.

[82] *See* Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 2, ¶ 2; Defendants' Initial Brief at 24, 31.

[83] Orloff asserts for the first time in her opening brief that Defendants' public position that they do not grant concessions is an intentional misrepresentation in violation of section 201(b). Orloff's Initial Brief at 32. We decline to address this misrepresentation claim, because Orloff did not raise it in her complaint. Thus, we find that the record provides an inadequate basis on which to properly assess the merits of the argument. *See, e.g.*, *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130, 16133 n.18 (2001) (declining to address an issue raised for the first time in the brief).

[84] *See* Complaint at 46-48, ¶¶ 258, 259, 263, and 267; Orloff's Initial Brief at 21. Orloff also argues that it is discriminatory for Defendants to bill customers participating in Association/Government rate plans directly for services, rather than billing the affiliated entity. Complaint at 46-47, ¶¶ 254-259. Because Orloff offers no legal support for this contention, we dismiss this aspect of her claim.

201(b). As Defendants observe,[85] allowing a non-member to obtain an association/governmental entity rate is merely another way of granting a concession, which we have already concluded was a reasonable practice in the competitive Cleveland, Ohio CMRS market.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 202(a), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202(a), and 208, that the Complaint filed by Jacqueline Orloff against Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, and New Par IS DENIED and that this proceeding IS TERMINATED as of the Release Date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[85] Answer, Tab 1 (Respondent's Legal Analysis) at 18; Defendants' Initial Brief at 32.