Case #4919 (08/28/08)
AT&T Mobility LLC
AT&T Wireless Service
Advertising Agency: Undisclosed
Challenger: Cellco Partnership d/b/a Verizon Wireless

- **NAD evaluates advertising claims in the context in which they appear**

Basis of Inquiry: Television advertising claims made by AT&T Mobility LLC ("the advertiser") for AT&T Wireless Services were challenged by Cellco Partnership d/b/a Verizon Wireless ("the challenger"), a provider of competing wireless services.

The challenged commercials each feature a protagonist, along with a character that represents the protagonist's wireless telephone. The telephone character explains that the protagonist cannot receive an important phone call or text message because he or she does not have AT&T, which means he or she has "zero bars" in the featured location. The unlucky protagonist is seen going about his or her business, missing an important opportunity because he or she is unable to receive a phone call or text message. A voiceover then says, "For the best coverage, switch to AT&T. More bars in more places." The phrase "Best Coverage" is shown on screen. During this voiceover, the phrase "Best Coverage" is seen in large text in the center of the screen. In much smaller text at the bottom of the screen appears a disclaimer that reads "Based on global coverage."

Challenger's Position:

I. Takeaway of "Best Coverage" and "More Bars in More Places" Claims

The challenger argued that the message conveyed by each challenged advertisement is that AT&T's network performance—beyond just geographical coverage—is qualitatively superior to AT&T's competitors. It contended that this message is unsupported.[1]

The challenger contended that NAD has already determined that the phrase "more bars in more places" constitutes a claim of network performance superiority. It noted a 2005 NAD case in which NAD found that the "more bars in more places" claim, when used by Cingular (now known as AT&T Mobility) falsely communicated that Cingular's wireless network "provides superior signal strength and reception in specific markets. . . and nationally."

[1] As background, the advertiser described the two most common types of digital networks: (i) Code Division Multiple Access ("CDMA") and Global System Mobile Communications ("GSM") networks. It explained that CDMA spreads data out over the channel after the channel is digitized. Multiple class can then be overlaid on top of one another across the entire channel, with each assigned its own "sequence code" to keep the signal distinct. GSM uses narrowband Time-Division Multiple Access ("TDMA") technology to enable digital transmissions between a mobile phone and a base station. A GSM network allows eight simultaneous calls on the same radio frequency by dividing the frequency into multiple time slots, with each caller taking turns transmitting and receiving over the channel only during their respective time slots.
The challenger contended that CDMA uses radio spectrum more efficiently than GSM because it can accommodate more callers per MHz of bandwidth than competing technologies. It went on to argue that because CDMA is more spectrally efficient than GSM, CDMA networks require fewer cell sites to operate effectively. Thus, it contended that AT&T's claimed higher number of cell sites is not relevant to network superiority.

The challenger also pointed to the plain language of the "more bars in more places" claim, noting that a breadth of coverage claim would simply be "coverage in more places" or perhaps "bars in more places." It argued that the phrase "*more* bars in more places," however, conveys a message regarding the quality of network performance. It argued that this phrase not only describes situations in which competitors have no bars and AT&T has some bars. Rather, "*more* bars in more places" suggests that there will be many places where consumers have some coverage ("bars"), but where AT&T has better performance ("more bars.") In addition, the challenger pointed to various public statements made by AT&T employees, which it argued confirm that the slogan is indeed intended to convey a message of superior performance quality.[2] It also noted a statement by an analyst who noted that "consumers equate bars with satisfaction and quality."

Moreover, the challenger argued that the addition of the "best coverage" language only reinforces the message of superior quality. The challenger contended that even standing alone, the "best coverage" claim would itself most properly be interpreted as relating to the quality of network performance, not simply the breadth of coverage. It argued the plain meaning of the word "best" relates to quality rather than quantity. It also noted various dictionary definitions of "best," such as: (i) 1. "Surpassing all others in excellence, achievement or quality. . . 3. Greatest; most." (ii) 1. Having good qualities in the highest degree. . . 3. Most; largest." (iii) "1. of the highest quality, excellence or standing;. . . 3. largest, most." (iv) "1. Excelling all others in quality. . . 3. Greatest in size or quantity; largest." The challenger disputed the advertiser's contention that by "best coverage," it actually meant "most coverage."

The challenger also disagreed with the advertiser's reliance on what the advertiser claims to be the telecommunications industry's usage of "coverage" as referring to the geographic area in which customers receive service. It argued that industry usage is not the critical factor in determining the messages conveyed to consumers by an advertisement. Additionally, the challenger noted NAD's 2006 *Cingular Wireless Corporation (Push to Talk Walkie-Talkie/Cellular Service)* decision, in which it was undisputed that Cingular had the largest number of subscribers in its walkie-talkie network. Cingular sought to defend the phrase "Largest Push to Talk Network Coverage in America" based on its having the largest geographical coverage area. The challenger noted that, despite the fact that this phrase used the word "largest" (which is clearly quantitative), NAD rejected the argument that it necessarily referred to geographic coverage area. NAD found that unless the word "area" was expressly included after the word "coverage," consumers could be misled. NAD stated: "[W]ith respect to the advertiser's claim, "Largest Push to Talk Coverage in America," given the substantial

[2] Such statements include:
(i) "More Coverage—We continue to expand our coverage throughout the country to ensure the highest levels of service availability and quality—more bars in more places…"; (ii) "Over the last three years, AT&T has invested more than $18 billion to expand and enhance the scope and capability of its wireless network to deliver 'more bars in more places.' This ongoing investment continues to increase coverage, ensure high levels of reliability and offer advanced wireless and data services to more parts of the country and more customers"; (iii) "Customers already are recognizing the benefits of integrating the two networks, which will be complete by year-end 2006, enjoying 'more bars in more places,' with better call quality and fewer dropped calls in many major markets."; (iv) "[t]he most tangible examples of how Cingular is 'Raising the Bar' is the newly combined network. . . People will quickly begin to see more bars in more places. . . Our 'Raising the Bar' tagline and 'Allover' network branding campaign allows us to clearly communicate a real improvement in network and service quality."

difference between Cingular's broad geographic coverage area and its very small network of Push To Talk users, to avoid the potential for any consumer confusion, NAD recommended that this claim similarly be modified to include "area" as a qualifier to the term "coverage." The challenger argued that if the term "coverage" were an unambiguously geographic term as argued by the advertiser, NAD would not have recommended adding the word "area."

The challenger also took issue with the advertiser's argument that depicting a failure to receive a call necessarily implies that an individual is outside his or her network's coverage area. The challenger argued that nothing in any of the commercials indicates that the individual is outside his or her network's coverage area. It noted that the commercials are set in places such as a bar and a pool hall, locations that hardly imply remoteness. The challenger disputed the advertiser's assumption that the "only" reason why a person would not receive a call is because he or she is outside his or her network's coverage area. It argued that there are many occasions where a person inside his network's coverage area does not receive a call or text message (e.g. if the person is in a basement, or a building with thick walls, or if the network circuits are busy.)

Finally, the challenger argued that the "based on global coverage" disclaimer fails to cure the unsupported message. First, it contended that the disclaimer is irrelevant to the body of the advertisements. It argued that the disclaimer addresses global breadth of coverage, while the commercials claim superior domestic network performance. Second, the challenger contended that the disclaimer improperly uses a quantitative attribute—breadth of global coverage—to qualify the qualitative claim of domestic network superiority. It argued that this confuses consumers. In any case, the challenger argued, disclaimers cannot contradict the claims they are meant to modify. Moreover, it contended that the super was not sufficiently clear and conspicuous.

In its second submission to NAD, the challenger provided a consumer perception survey conducted by Dr. Yoram Wind. The survey was an in-person, double-blind, mall-intercept survey of potential purchasers. The challenger reported that 48% of consumers perceived a message of superior network performance quality in response to open-ended questions concerning the major messages of the advertisements. It argued that a substantial segment of consumers perceived the advertisements as making a claim of superior network performance, not merely superior geographic coverage.

The advertiser contended that the survey shows that the advertisements communicate a message of superior network performance. The advertiser pointed to both (1) the total number of respondents who reported a message of superior network performance quality; and (2) the percentage of viewers who reported that message from the advertisements compared to the percentage reporting that message from a control advertisement without the phrases "more bars in more places" and "best coverage."

In particular, the challenger noted that 48% of respondents (as opposed to 26% who viewed the control advertisement) perceived a message of superior network performance quality in response to open-ended questions concerning the main messages. The challenger contended that this 22% net response rate is more then sufficient to establish that consumers perceive superior network

performance quality. Further, the challenger noted that the superior performance message conveyed by the advertisement is stronger than any quantitative "largest coverage area" message being conveyed by the advertisement. It noted that consumers responded at only 40% overall, and 5% net response rate with respect to broader coverage, compared to a 48% overall and 22% net response rate with respect to superior quality performance.

II. Substantiation for the Challenged Claims

The challenger argued that the advertiser cannot substantiate its message of superior network performance. First, the challenger pointed to "drive-tests" performed by Nielsen. These tests involve driving through various markets in the United States while attempting to initiate calls on each of the major wireless networks. Two important measures of network performance tested were: (i) ineffective call attempts, i.e. the call fails to connect to the network; and (ii) lost, or dropped, calls, i.e. the call connects but is subsequently unintentionally dropped.

The challenger noted testing conducted throughout 2007 and 2008 in the top 100 markets, accounting for about 60% of the entire U.S. population, which demonstrates that the Verizon Wireless network experienced fewer ineffective call attempts and fewer lost calls in many more of the top markets than did AT&T's network. Specifically, Verizon Wireless had the fewest ineffective call attempts in 90% of the top 100 markets, compared to a mere 11% for AT&T, and the fewest lost calls in 60% of the top 100 markets, compared to only 39% for AT&T. Further, AT&T had 1.9% ineffective call attempts in the top 100 markets compared to only 0.8% for Verizon Wireless, and AT&T had 0.9% lost calls in the top 100 markets compared to only 0.6% for Verizon Wireless.

The challenger argued that blocked and dropped calls are the most generally recognized measures of wireless network performance. It contended that AT&T's attempt to show superiority on these measures is flawed. First, the challenger objected to the advertiser's having apparently assigned a score of zero to providers in areas where they do not provide direct coverage. The challenger maintained that even where Verizon Wireless does not have direct coverage, it generally has a roaming arrangement. Consequently, a score of zero does not correspond to what a consumer would actually experience. Further, the challenger argued that it was not proper for AT&T to have averaged the results. It noted that AT&T does not claim to have the highest average score nationwide, but rather it claims superior network performance ("more bars") in more places. The challenger explained that if Verizon Wireless was given scores of zero in areas where it does not provide direct coverage, the averaged results would be unfairly skewed in favor of AT&T. It argued that the appropriate methodology would be to compare accessibility, retainability, and reliability either (i) only in geographic areas where the relevant carriers provide services through their own network, or (ii) throughout the entire United States, and including the carriers' roaming partners. Finally, the challenger argued that AT&T must substantiate a superior network performance claim with respect to its entire network, not simply its GSM network. Accordingly, the challenger contended that AT&T should not have separated its UMTS and GSM results. Particularly given the fact that AT&T's purported GSM reliability is only 0.83% higher than the reliability of its closest competitor (Verizon Wireless),

the advertiser argued that factoring in the UMTS results could render AT&T less reliable altogether than Verizon Wireless.

The challenger also pointed to a 2008 Wireless Call Quality Performance Study conducted by J.D. Power. This study provided a "report card" of wireless provider performance quality based on actual consumer experiences. Interviews were conducted with over 24,500 wireless users during September/October 2007 and January 2008. Respondents reported problems including: (i) dropped/discontinued calls; (ii) no connection on the first try; (iii) static/interference; (iv) voice distortion; (v) echoes; (vi) delayed voicemail notification; and (vii) delayed text message notification.

According to the study, Verizon Wireless ranked highest on a national basis in overall call quality. In none of the six geographic regions defined by J.D. Power did AT&T lead its competitors in overall call quality. Indeed, the challenger noted that Verizon Wireless outperformed AT&T in all six regions. Overall, the challenger added, AT&T performed worse than it did in the previous year's survey, and performed below average in all six regions. It scored "significantly worse than the industry average" in dropped calls, calls not connected, calls with static, and calls with distortion. Finally, the challenger noted that AT&T failed to significantly outperform the regional average in any type of major call quality problem in any region.

The challenger also pointed to a September 2007 *Consumer Reports* survey in which Verizon Wireless won or tied for first in the ratings for 17 of the 20 surveyed markets. In contrast, the challenger noted, AT&T lost by a "meaningful" margin in 16 of the 20 surveyed markets—and has not beaten Verizon Wireless in any market in any *Consumer Reports* survey since at least 2003. These rankings were based on consumers' real-life experiences regarding how many times they experienced problems related to no service, full circuits, dropped calls, static, or difficulty hearing in the previous seven days. *Consumer Reports* stated that AT&T "trails the better carriers in almost all respects," and that AT&T's "service and satisfaction were clearly second-tier, and connectivity was way below average, thanks to static and service failures" in many of the metropolitan areas surveyed. In summary, the challenger explained, the *Consumer Reports* survey showed AT&T to (i) be behind Verizon Wireless in all 20 of the markets; (ii) not place first in a single market; and (iii) place last or next to last in 19 of the 20 markets.

In addition, the challenger noted a consumer satisfaction survey conducted by the American Customer Satisfaction Index ("ACSI"). This survey shows Verizon Wireless scoring ahead of AT&T in consumer satisfaction rating (72 to 71), and showed T-Mobile as tied with AT&T.

Furthermore, the challenger argued that the evidence on which AT&T/Cingular relied in a 2006 NAD proceeding no longer supports the company's superior performance claim. The challenger contended that the situation now is far different than it was in 2006. It explained that this case involves a far superior challenger and very different facts.

Moreover, the challenger took issue with the advertiser's argument that AT&T has superior voice quality. It argued that the data provided by the advertiser on this point is incomplete and

not supported by any underlying evidence. It also noted that the data covers a time period ending in 2007, well before AT&T began running the advertisements. Finally, the challenger argued that no underlying data supports the advertiser's contention that CDMA suffers in sound quality compared to GSM as a general matter.

In addition, the challenger argued that AT&T's data regarding data transfer speed is highly misleading and has no bearing on the quality of its voice network. The challenger contended that the challenged commercials portray customers who are unable to receive voice calls or text messages. It noted that voice calls are transmitted over a voice network, and argued that text messages are not conveyed via high speed data connections.

The challenger also took issue with the advertiser's argument that AT&T's higher number of cell sites (among the four national carriers) correlates with its network performance. The challenger contended that the advertiser failed to cite any authority for this proposition. In any case, the challenger noted that according to the advertiser's own data, Sprint Nextel (a CDMA provider) would have superior performance to AT&T, because Sprint Nextel has 4,300 covered POPs per cell site (i.e. fewer people per cell site) compared to AT&T's 5,800 covered POPs per cell site. Likewise, T-Mobile would provide superior performance as compared to AT&T.

Advertiser's Position:

According to the advertiser, the challenged advertising touts only one attribute of AT&T's wireless network: superior geographic coverage. The advertiser asserted that AT&T has the largest voice and data network with the most coverage both domestically and internationally. The advertiser noted that its commercials do not show consumers receiving a call, and then losing the connection. Nor do they show consumers attempting to place an outbound call, and having the call blocked. Further, they do not show consumers struggling to hear a fuzzy connection. Finally, the advertiser noted that the commercials do not show or name Verizon. The commercials do, however, show consumers who cannot receive text messages or calls because their wireless network does not provide coverage in their particular location. The advertiser contended that none of the commercials make any reference to any feature of the AT&T wireless network other than its indisputably superior coverage.

I. AT&T's Superior Coverage

As background, the advertiser explained that the wireless market in the United States is covered by four national carriers: AT&T, Verizon, Sprint Nextel, and T-Mobile. The advertiser pointed to data showing that AT&T leads the market in all important respects: subscribers, revenues, geographic coverage, and "points of presence" ("POPs"), i.e., the number of people who live in geographic areas where coverage is available.

The fact that AT&T provides the broadest coverage means that AT&T customers can use their phones to send and receive both voice and data transmissions in more places.[3] The advertiser

[3] The advertiser noted that its "More Bars in More Places" was adopted in late 2004 when Cingular and AT&T Wireless ("ATTW") merged. As a result of the merger, all customers of both companies enjoyed the benefit of

argued that AT&T uses transmission technology that is superior in several respects for achieving the broadest coverage.[4]

The advertiser pointed to a statement made by an independent telecom analyst, made with respect to coverage: "Verizon doesn't have anything on [AT&T]." Further, the advertiser asserted that NAD has confirmed AT&T's coverage advantage in prior proceedings. The advertiser cited data released for the first quarter of 2008, showing that AT&T has 296 million covered POPS. This translates into 2,011,841.29 square miles covered, which represents 55.69% of the domestic area covered. No other carrier has as many covered POPS or has coverage that spans as many square miles as AT&T.

The advertiser further argued that AT&T, covering 204 countries, is also the leading wireless provider of international voice and data coverage. Additionally, it noted that within most countries, AT&T has agreements with two to five separate carriers. The advertiser stated that AT&T has entered into international roaming agreements with a total of 500 carriers—which is unparalleled by any other domestic or international wireless carrier.

II. Challenged Commercials

The advertiser disputed the challenger's interpretation of its advertisements. The advertiser maintained that its commercials convey the message that there are more places where non-AT&T customers have "zero bars," but where AT&T subscribers can receive coverage; hence, "More Bars in More Places."

The advertiser argued that every element of these commercials, including the visuals, the dialogue, the voiceover, and the graphics, communicates a message of coverage, not of performance quality. It noted that the commercials do not depict a single subscriber using or trying to use his cell phone. Thus, it argued, the scenarios are inherently *not* about the experience

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"More Bars in More Places" because Cingular and AT&T operated on the same platform. Since the merger, AT&T has increased its total number of cell towers and has by far the most in the industry, providing coverage benefits, as discussed below.

[4] The advertiser explained that there are two primary types of technology that wireless carriers use to transmit calls—GSM and CDMA. These two technologies are incompatible because, in simple terms, they share bandwidth differently. As such, a phone that works on one type of network will generally not work on the other type. AT&T and T-Mobile use GSM, while Sprint and Verizon primarily use CDMA. GSM, which stands for Global System for Mobil Communications, is the name of a type of network protocol referred to as Time Division Multiple Access (TDMA). This technology divides the bandwidth into slices, accommodating eight callers. In essence, each caller gets its own "slice" of the bandwidth. In contrast, CDMA, or Code Division Multiple Access, can be visualized as a horizontal signal, with calls overlaid on top of one another, but occupying the entire width of the frequency. Here, each call shares a portion of the frequency.

One coverage advantage for GSM stems from its status as the dominant technology for the global market. GSM is used in more than 74% of international markets. CDMA is primarily used *only* in the United States, Canada, and North and South Korea. Accordingly, GSM provides optimum coverage when traveling abroad. GSM phones also use SIM cards, which make it easier to switch a phone number and list of contacts between two handsets. GSM is more popular with consumers. The overwhelming customer base for GSM compared to CDMA attracts more investment, providing a coverage advantage.

of superior or inferior network service quality. Instead, a non-AT&T subscriber is depicted in a place or location outside his network's coverage, and he is thereby unaware of an important call, voicemail or text message. Unlike the situations depicted in Verizon's "Can You Hear Me Now" campaign, the advertiser argued, none of these characters are depicted as having difficulty hearing the person on the line or having poor reception.[5]

Second, the advertiser argued that the "More Bars in More Places" slogan is accompanied by express oral and visual statements that AT&T provides the "Best Coverage." Specifically, in each of the commercials, the voiceover states, "For the best coverage, switch to AT&T; More Bars in More Places," thereby linking the "More Bars in More Places" slogan to the express coverage claim. This statement is immediately followed by an art card that prominently features the words "Best Coverage" in the middle of the screen in large letters.

The advertiser noted the established meaning of the term "coverage" within the telecommunications industry. It argued that the term has been consistently used, and consumers have come to interpret it, to refer to the geographic area in which wireless customers can receive wireless service. CTIA, the international association of the wireless telecommunications industry, expressly defines coverage as geographic coverage—something that can be depicted on a map.

The advertiser contended that NAD has accepted the industry's interpretation of the term "coverage" as referring to geographic area.[6] Additionally, the advertiser argued that Verizon's suggestion that "coverage" can somehow be equated with performance is inconsistent with Verizon's own advertising campaign. The advertiser argued that the challenger, unable to support a superior "coverage" claim of its own, based its entire "Best Network" advertising campaign on the presumption that "Best Network" refers to performance and not to coverage.
The advertiser argued that the "Based on global coverage" disclosure further solidifies the geographic nature of the "Best Coverage" claim. It contended that this disclosure is fully consistent with the messages conveyed by the advertisement, and that is sufficiently clear and conspicuous.[7]

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[5] The advertiser noted a skit on the Jay Leno show in which he purportedly interprets AT&T's advertising as conveying a superior coverage message, not one of performance quality.

[6] It pointed to Cingular Wireless/Cingular Wireless Advertising, NAD Case Report #4241 (October 2004). It argued that NAD held that Cingular's determination of coverage area was consistent with industry practice, which determined coverage area based on a map of the United States. *See also* Cingular Wireless Corporation/More Bars In More Places, NAD Case Report #4508 (May 2006)

[7] Furthermore, the advertiser noted that its advertising campaign is not limited to depicting domestic (non-international) scenarios. It noted an AT&T commercial featuring a person in Hong Kong where his wireless carrier does not provide coverage.

The advertiser also disagreed with the challenger's assertion that NAD has already held that the "more bars in more places" slogan, standing along, conveys a message of superior network performance. The advertiser noted that in the Cingular case, NAD determined that the challenged claims "must be reviewed in the context of the advertising in which they appear." Additionally, the advertiser noted that the Cingular commercials involved depictions of consumers actually using their cell phones and thereby enjoying the quality of their service. It did not depict consumers with "zero bars" unable to receive calls or messages, it did not feature the "Best Coverage" claim, and it did not have the coverage-related disclaimer accompanying the slogan.

The advertiser also disagreed with the challenger's interpretation of the "best coverage" claim. Specifically, it disputed the contention that "best" is a qualitative term that can only refer to overall quality, rather than a specific attribute. By Verizon's reasoning, the advertiser argued, a "best gas mileage" claim refers not merely to the number of miles per gallon, but to superior performance while driving those miles. Similarly, a "best legroom" claim refers to the quality of the surrounding floor rather than to the amount of legroom available.

The advertiser argued that the word "best" must be viewed in conjunction with the noun that it modifies—in this case, "coverage." When applied to the term "coverage," which refers to geographic area, the word "best" can only logically be construed in a similarly quantitative fashion to mean "most" or "largest." The advertiser argued that in every definition of "best" cited by Verizon, the word is also defined as "most," "largest," and "greatest" in size or quantity.[8]

Finally, the advertiser took issue with Verizon's use of statements by a few AT&T employees. The advertiser contended that these statements are irrelevant, as they are unrelated to the challenged commercials, and in any case, NAD does not give weight to an advertiser's intentions. It contended that these statements reflect AT&T's aspirational goals of improving both its coverage and its performance.

III. Verizon's Consumer Perception Survey

The advertiser took issue with Verizon's consumer perception survey, which it argued is flawed in design, execution and analysis. As an initial matter, the advertiser argued that the timing and content of Verizon's survey suggest that the survey was improperly biased from the outset. The advertiser pointed to a May 2008 memorandum, from Errol Kaget of Data Development Worldwide, the survey subcontractor. The Kaget Memorandum describes new "Open End Probing and Clarifying Instructions" provided to survey interviewers "after the pretest." Dr.

[8] The advertiser also argued that the cases relied upon by Verizon on this point do not support Verizon's position. In DFS Services LLC/Discover Cash Rewards Program, NAD Case Report #4779 (January 2008), the word "best" was used to describe the advertiser's cash reward card generally and was not tied to a specific attribute of that card. As such, NAD determined that the claim "best . . . card" was an overall superiority claim. In contrast, in the challenged commercials, the word "best" is used to describe a specific attribute, "coverage," which is based on breadth, geographic area, and number of POPs. Accordingly, the word "best," as applied to coverage, necessarily means the most geographic area and the greatest number of POPs.

Wind's report explains that the first 137 respondents were included as part of this "pretest," and that the revised instructions were advised because "[e]xamination of these pretest questionnaires revealed that a number of the interviewers did not fully probe for the meaning of 'better service' or 'more bars.'" "To correct this situation, additional interviewer probing instructions were developed and all interviewers were re-trained prior to continuation of the interviewing." Interviewers were encouraged to devise their own probes, for example, "What do you mean?"; "What about . . . ?"; "Can you explain?"; "In what way?"; and "Anything else?"

After the results of the "pretest" were collected (the first 137 respondents), researchers instructed interviewers to conduct additional probing. This new probing was designed not simply to probe the meaning of "better service" and "more bars," but more generally to "clarify statements which are general or ambiguous." As part of their mid-point "retraining," interviewers were told to repeat back what respondents had said, and to probe respondents until respondents were "unproductive." Interviewers were told to write down the respondents' statements, and to "look over the statements to decide which need to be further explained." The advertiser argued that this significant shift in interview tactics suggests an effort to boost lackluster survey results.

Additionally, the advertiser argued that the Wind Survey failed to ask relevant questions, failed to appropriately measure and analyze results, and failed to include proper controls. In particular, the advertiser objected to what it considered the excessive probing, which it argued vested too much discretion in the interviewers and was designed to generate multiple different statements from respondents.[9]

Respondents were repeatedly probed in a manner that elicits rephrasing. For example, when probed to explain what he means by "coverage," the respondent may search his brain for some synonym, rather than repeat the term he (and the interviewer) just used. Because the average consumer has a limited vocabulary of wireless service terms, the advertiser argued, there is a high likelihood that the respondent will wind up using one of the phrases considered to be misleading by Dr. Wind. Moreover, the advertiser argued, none of the probes tied the question to the commercial itself. The advertiser argued that respondents were therefore likely to express pre-existing beliefs.

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[9] For example, Question 3 instructed interviewers to probe any references to "coverage," including any mentions of the words "Best or Better or More" in conjunction with "Coverage, Areas, Locations, Towers." Question 4 instructed interviewers to probe "Best or Better or More or Clearer or Stronger" in conjunction with "Quality, Reception, Signal, Connection, Bars, Bars Last Longer, More Strength." Question 5 probed mentions of "Being Better or the Best," for example "Better (Than Others), the Best (Compared to Others), Lasts Longer, Best Company, Better Company." Question 6 instructed interviewers, as a form of "catch all," as follows: "Ask Qs.6ab if respondent's answer to Qs.1ab mentioned references to any other response not asked about in Qs.2-5."

The advertiser contended that the number of potential statements that interviewers were instructed to look for and probe is exponential. Question 4 alone encompasses at least 40 potential probes (not including the "Anything else" questions). It argued that the probes were virtually guaranteed to generate the word "service" as a response, and then any reference to "service" was coded as a performance "quality" claim.

In addition, the advertiser argued that the Wind survey coded responses improperly, counting any comparative response as "superior performance." Despite Verizon's argument that the two key metrics of "superior network performance quality" are "fewer dropped calls" and "fewer blocked calls," Dr. Wind's survey does not even address these measures. The advertiser maintained that the Wind survey's conclusions were based on the assumption that any comparative statement relating to virtually any aspect of wireless service must be 'deceptive.'[10]

According to the advertiser, terms such as 'coverage,' 'signal,' 'service,' 'quality,' and 'reception' may all have been used to express a similar idea, simply because respondents may choose to talk about either antecedents or consequences of being able to receive calls in more places. It noted that there is nothing in these responses to demonstrate that consumers equate coverage with the number of blocked or dropped calls. The advertiser noted that the net percentage of respondents in the Wind Survey playing back these two messages (fewer dropped calls and fewer blocked calls) identified by Verizon is negligible. For example, the net impact of the challenged commercials on consumers' takeaway of a "fewer dropped calls" message was about 3%.

Finally, the advertiser took issue with the challenger's choice of control, which was a non-comparative commercial relating to AT&T's international coverage. The advertiser argued that the non-comparative control likely had the effect of lowering the degree of "comparative noise." Finally, the advertiser argued that the same flawed measures were used to assess consumer takeaway from the already discontinued print advertisement.[11]

IV. AT&T Consumer Perception Survey

The advertiser provided NAD with a double-blind mall-intercept consumer perception test, which was conducted by Dr. Itamar Simonson. It argued that this survey confirms that AT&T's advertising conveys a message of superior geographic coverage, not superior network performance quality. The survey objective was to determine how consumers interpret the slogan "More Bars in More Places," in conjunction with the "Best Coverage," claim and within the overall context of the commercials. The respondents were cell phone users, ages 18 and up, with an even distribution of males and females and appropriate age groups.[12] There were 815 respondents, selected from 24 markets in major geographically dispersed U.S. cities.

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[10] For example, the advertiser argued that if a respondent in the Wind Survey said that the AT&T commercial communicated that AT&T service offers "best coverage," Dr. Wind's coding scheme appears to have counted that answer as indicating "superior network performance quality" and, therefore as evidence of deception.

[11] Although the control advertisement was more similar to the test advertisement than the control used for the television commercials, the advertiser argued that the control print advertisement was modified in other respects that confound and complicate the comparison.

[12] The respondents were required to meet the following screening criteria: (1) they and members of their household did not work in advertising, public relations, or market research, and did not work for a company that provides cell phone service; (2) they used a cell phone; (3) they had not participated in any survey in the prior 3 months; (4) they

The survey consisted of four cells, with slightly over 200 respondents in each cell. The respondents in two of the cells viewed one of two actual AT&T commercials ("Not Returning Calls" and "Pumpkin's Dad"), while the respondents in the other two cells viewed these same commercials without the "More Bars in More Places" voiceover. Respondents were asked open-ended questions about the message communicated by the commercials. The results were validated by an independent research company that confirmed the interviews of 687 (or 84%) of the respondents, a rate that far exceeds industry standards.

The advertiser argued that its survey results show that consumers interpret the commercials as conveying a message of broader geographic coverage—not superior network performance quality. Using the criteria for measuring "network performance quality" identified by Verizon, there were no differences between the test and control commercials. Moreover, a comparison between the test and control groups shows virtually no differences regarding mentions of coverage, reception, service, signal, and quality. [13]

The advertiser noted that the message taken away by respondents more than any other message was one of "coverage"—33.15% of the respondents viewing the test commercials and 36.05% of the respondents viewing the control commercials. NAD has articulated a threshold of 20% or more to demonstrate consumer confusion.

Indeed, the data indicates that none of the respondents took away a message of blocked calls, and only an extremely small percentage of respondents took away a message relating to dropped calls. Notably, these percentages were slightly higher in the control than the test versions. [14]

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met the gender quota (approximately 50% male and female) and age quotas (approximately 50% between the ages of 18 and 39, and 50% ages 40 and older); and (5) those who usually wear glasses or contact lenses when watching television had their glasses or contact lenses with them. Itamar Simonson Survey, Exhibit 1, ¶ 22.

[13] For example:

- An average of only 3.2% of the respondents took away a "no dropped calls" message from the "Pool Hall" and "Pumpkin's Dad" commercials pooled, compared to 4.65% from the control commercials (**net -1.45%**).
- No respondents took away a "failure to connect"/blocked calls" message from the test or control commercials.
- An average of 10.35% of the respondents took away a "reception" message from both commercials, compared to 10.1% from the control commercials (**net 0.25%**).
- An average of 8.85% of the respondents took away a "signal" message from the test commercials, compared to 5.65% from the control commercials (**net 3.2%**).

An average of 11.1% took away a "missed calls" message from the test commercials, compared to 9.1% from the control commercials (**net 2.0%**).

[14] The net percentage of respondents (test minus control) taking away a "no dropped calls" message was -2% in the Pool Hall commercial and -0.9% in the Pumpkin's Dad commercial. Id. This is also seen in Verizon's survey results for "no/fewer dropped calls" responses. Wind Report, at 9 and 12.

Furthermore, it argued that a review of all of the test responses demonstrates unambiguously that the inclusion of the "More Bars in More Places" slogan does not affect the messages communicated by the AT&T commercials; there were no significant differences between the test and control groups.

V. Performance Data

Even if AT&T's advertising conveyed a message of superior performance quality, the advertiser argued that the challenger cannot establish that Verizon provides superior performance quality as compared to AT&T. First, the advertiser argued that the word "performance" can include numerous factors. The advertiser disputed the challenger's presumption that performance is defined merely by call accessibility (i.e., absence of blocks) and call retainability (i.e., absence of drops). The advertiser argued that many other factors contribute to overall performance, such as voice quality, data transmission speeds, and coverage. The advertiser maintained that based on several measures of network performance factors (other than blocks and drops), Verizon does not have superior network performance.

The advertiser argued that AT&T provides better voice quality. It contended that CDMA networks, like Verizon's, place more calls in the same amount of spectrum and consequently suffer in sound quality. The advertiser pointed to recent Nielsen/Telephia drive-test data regarding audio quality, which it argued shows AT&T as being superior in audio quality in all regions of the nation.

The advertiser argued that Verizon only discussed voice quality on a general level, relating to differences between GSM and CDMA networks. The more relevant issue, the advertiser contended, is the question of whether AT&T's voice quality is superior to that of Verizon. The advertiser also disputed Verizon's contention that data transfer speeds are irrelevant. It argued that the challenged commercials do not "unequivocally" refer to AT&T's voice network, as Verizon suggests.

With respect to AT&T's higher number of cell sites, the advertiser noted that: (i) AT&T has twice as many cell sites as Verizon; (ii) a customer's proximity to a cell site affects whether the customer will have a signal or be in a coverage shadow; and (iii) as previously acknowledged by NAD, the number of cell sites that a network operates is a factor that affects overall network performance quality.

The advertiser also argued that AT&T is superior with respect to data transmission speeds—a feature that it contended is very important to the modern wireless subscriber. The advertiser noted that transmission speed results from the data protocol used by a carrier. AT&T has three different types of data protocols (GPRS, EDGE, and HSPA), while Verizon only has two (1xRtt and EV-DO). In addition, the advertiser pointed to Nielsen data, which it argued shows that AT&T is the fastest network in 33 of the top 50 markets in the United States.

The advertiser also took issue with Verizon's data. It argued that Verizon's Telephia data is unrepresentative of the national wireless population, and that it may not have been tested for statistical significance. It contended that Accessibility x Reliability (AxR) is frequently used in

the wireless industry as a proxy for relative network performance in areas where competing carriers have coverage.[15] However, the advertiser contended that AxR is only a meaningful level of comparable performance in areas where the carriers being compared each have coverage. Other measures include voice quality, blocked calls, ability to use the Internet and send and receive email, and send and receive text messages and photos.

The advertiser argued that the 100 markets for which Verizon submitted Telephia/Neilsen data merely represent a *sample* from certain U.S. markets and only account for slightly more than half of the entire U.S. population. The advertiser argued that by excluding data from several rural and suburban markets, many of which AT&T has coverage in, but Verizon does not, the results are biased against AT&T. In the Cingular proceeding, the challenger presented Telephia data that covered only the top 43 markets, while Cingular provided Telephia data for all 304 markets that Telephia surveyed. The advertiser noted NAD's holding there that "the challenger could not 'cherry pick' specific markets from the report and arrange the data in such a way to contradict the overall finding of the survey."

The advertiser pointed to Telephia drive-test data based on 383 markets showing that AT&T is superior in terms of drops and blocks. The advertiser disagreed with Verizon's contention that AT&T should exclude from the analysis markets in which Verizon has no coverage. The advertiser maintained that such an approach would unjustly favor Verizon and lead to biased results.[16] The advertiser also disagreed with Verizon's suggestion that AT&T's analysis is flawed because it is based on averages. The advertiser noted the Cingular case, in which NAD approved of Cingular's reliance on Telephia data on a *nationwide* basis (based on averages.). Finally, contrary to Verizon's contentions, the advertiser noted that AT&T did not allocate zeros in markets where Verizon has roaming agreements. The zero scores were reserved for markets in which a carrier does not have coverage (i.e., direct coverage or coverage via roaming agreements). In addition, it is not necessary to combine the GSM and UMTS data in AT&T's analysis, as Verizon suggests. AT&T operates two different networks—GSM and UMTS, but consumers on the UMTS network have access to the GSM network.[17] Therefore, even if NAD determined that AT&T's advertising conveyed a message of superior performance in terms of

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[15] *Accessibility* (A), refers to the ability to place calls without being blocked; *retainability* (R), refers to the ability to keep the call for two minutes without being dropped; and *reliability* is a multiplier of accessibility and reliability (AxR). Telephia syndicates its data to the entire industry and generally provides the data on an "as is" basis. The carriers can use the data in the method that they choose. Accordingly, each carrier must test the data it uses for statistical significance.

[16] First, this approach would unfairly disadvantage the carriers that do have coverage in the excluded markets, because their overall reliability scores would not take into account their reliability scores from the excluded markets. Second, this method renders irrelevant the experience of the consumers who live in the excluded markets where Verizon does not have coverage but other carriers do. Finally, this analysis would be misleading because it does not reflect superior nationwide reliability—the results would not be truly national in scope.

[17] As a new technology, UMTS constitutes a very small percentage of AT&T's voice traffic (less than 10%).

blocks and drops, such a claim is fully substantiated, because all of AT&T's consumers (whether GSM or UMTS) have access to the superior GSM network.

AT&T's analysis of the data indicates that AT&T is superior to Verizon. AT&T's analysis is based on Telephia data for the year 2007 which covers all of the markets that Telephia drive tests—383 markets. This data consists of weighted averages, rather than straight averages, has been tested for statistical significance, and is representative of the entire market (85.9% of covered POPs).

The advertiser also took issue with the JD Power and Associates attitudes survey provided by Verizon. The advertiser noted that survey respondents were not able to make head-to-head comparisons of wireless carriers. Further, the advertiser argued that this survey reveals nothing more than subjective consumer opinions. Additionally, the JD Power survey does not statistically test the data for significance. The advertiser also noted that the study is not blinded, which means that respondents know that their participation will potentially help their carrier and affirm their choice in carriers. The advertiser also expressed concern about the survey's sample size. It also contended that the survey is long and complicated, with over 190 separate questions asked. In addition, it maintained that the sample over-represents price-sensitive people who use studies like this to brag about being smart shoppers. It argued that such customers give higher ratings to the "value" carriers. The advertiser also took issue with the question that was asked to respondents: "Please base your answer on what you have experienced or heard." The advertiser contended that this question invites hearsay. Finally, it argued that the JD Power reports do not reflect similar scores in other industry-accepted studies that have methodologies proven to be valid, such as Telephia.

The advertiser also took issue with the *Consumer Reports* data, arguing that it is nothing more than a summary. The advertiser further argued that the survey results are not likely representative of the entire country. Respondents were limited to subscribers of *Consumer Reports* online in just 20 markets. The article states that these consumer opinions may "not be representative of the general U.S. population." More generally, the advertiser criticized the fact that the *Consumer Reports* data was based on survey research rather than the more reliable and valid laboratory testing methodology. In addition, although Verizon asserted that AT&T was behind Verizon in all 20 of the surveyed markets, the differences between Verizon's ratings and AT&T's ratings in several of these markets were "not meaningful" according to the *Consumer Reports* article. Finally, the advertiser noted that the respondents were unable to perform any side-by-side comparisons of competing carriers.

Decision:

As an initial matter, NAD commented on the scope of the instant proceeding. Although the challenger expressed concern about various claims within the challenged advertising—the claims "more bars in more places" and "best coverage"—NAD noted that its task in any given proceeding is limited to evaluating the challenged claims in the context of the advertising in which they appear. Thus, NAD noted at the outset that its review of the "more bars in more

places" claim in the 2006 Cingular proceeding is of limited relevance to the present proceeding.[18]

I. *Takeaway of Challenged Commercials*

The challenged commercials each feature a protagonist—the would-be recipient of an important telephone call or text message—along with a character that represents the protagonist's wireless telephone. The telephone character explains that the protagonist cannot receive a crucial phone call or text message because he or she does not have AT&T, which means he or she has "zero bars" in the featured location. The unlucky protagonist is seen going about his or her business, missing an important opportunity because he or she is unable to receive the call or text message. A voiceover then says, "For the best coverage, switch to AT&T. More bars in more places."

The central issue in this proceeding is whether the challenged commercials convey a message of superior network performance, or one of superior geographic coverage. NAD first looked to the consumer perception surveys submitted by the parties.

(a) Challenger's Consumer Perception Survey

NAD first reviewed the challenger's survey, which, conducted by Dr. Yoram Wind, was offered to show that the commercials communicate a message of superior network performance. As a preliminary matter, NAD was satisfied that the survey was a double-blind, mall-intercept survey of potential cell phone purchasers. NAD appreciated that the survey tested all four of the challenged commercials. NAD further appreciated that the sample of respondents was carefully chosen to be geographically and otherwise representative, using a three-step sampling procedure.

However, NAD had several concerns about the challenger's survey methodology. First, NAD was troubled by the extent to which respondents were probed. Although NAD does not disapprove of probing as a general matter, NAD determined that the amount of probing involved in this survey was extensive and consequently increased the risk of producing unreliable answers. Thus, while responses containing certain vague terms (e.g. responses in which a respondent parrots back one of the claims at issue) might warrant one follow-up question to better gauge the respondent's takeaway, NAD determined that excessive probing risks yielding inaccurate data.

NAD was also troubled that interviewers were told to repeat back what respondents had said, and to probe respondents until respondents were "unproductive." NAD noted that the interviewers were told to write down the respondents' statements, and to "look over the statements to decide which need to be further explained."

[18] NAD noted its statement in the Cingular decision that the challenged claims "must be reviewed in the context of the advertising in which they appear." In that case, NAD reviewed the slogan's meaning in the context of the commercials there at issue, which showed "people in a variety of locations talking on their cell phones."

NAD shared the advertiser's concern that because the average consumer has a limited vocabulary of wireless service terms, there is a high likelihood that a respondent will wind up using one of the phrases considered to be misleading by the researcher. Moreover, NAD noted that none of the probes tied the question to the commercial itself.

Further, in many instances, respondents in the Wind survey were probed repeatedly, even after they made clear that they had taken away a message of geographical coverage, rather than qualitative network superiority.[19]

NAD was further troubled by the challenger's coding of its responses. Upon reviewing the verbatims, NAD noted many respondents whose answers (even after repeated probing) did not relate to network performance superiority, were nonetheless counted as such by the researcher. For example, Respondent # 13034 (who viewed the "Pumkin's Father" commercial) said that the "major message" of the commercial was "that AT&T has better coverage. Better signal coverage, I assume, over their competitors." When asked "anything else," the respondent replied "no." When probed about the term "coverage," the respondent answered "AT&T has better coverage. Better signal coverage." When asked "What do you mean by [above answer]," the respondent answered: *"Your cell phone will work in more places."* When asked "anything else?" the respondent added *"More remote places."* When probed about "quality," the respondent answered *"You get reception in more places."*[20] Despite the respondent's clear and repeated answers relating to geographic reach, this respondent was coded as having taken away a message of network performance superiority.

Respondent # 08014 (who viewed "Pumpkin's Father") said that the "major message" of the commercial was "Get AT&T for better coverage." When asked "Anything else?", the respondent replied "no." When probed about use of the term "coverage," the respondent answered "Get AT&T for better coverage." When asked "What do you mean by [above answer]," the respondent answered: "Dependable coverage in a non-urban environment." Despite the clearly geographical nature of this answer, this response was coded as indicating network performance superiority.

Respondent # 01022 (who viewed "The Professional") said that the "major message" of the commercial was "He's not getting service." When asked "Anything else?" she replied "Want you

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[19] For example, Respondent # 17028 (who viewed the "Pumkin's Father" commercial) said that the "major message" of the commercial was "AT&T has the best wireless coverage of any phone." When asked "What do you mean by [above answer]," the respondent replied ""You will be able to use your phone no matter where you are for emergency situations." NAD noted that this response (referring to the ability to use one's phone "no matter where you are") clearly indicates a geographical takeaway. When asked "Anything else?" the respondent answered "No." When probed as to the meaning of his use of the term "best," he answered "AT&T has the best wireless coverage of any phone." When asked "What do you mean by [above answer]," he responded, "The service is reliable and would excel where others may flounder." NAD disagreed with the researcher's decision to count this response as a takeaway regarding quality superiority rather than geographic coverage. NAD noted that in the context of all the answers given by Respondent # 17028, the reliability of the service clearly refers to its broad geographic reach.

[20] NAD was confused and troubled as to why this respondent was probed regarding the word "quality," when the verbatim answer sheet indicates that this respondent did not use the word "quality" in his answer.

to switch to AT&T." When probed about the term "service," she responded, "There is no reception in there," and when probed further about the term "better" or "best," she responded "He's not getting service. Want you to switch to AT&T."[21] When asked "What do you mean by [above answer]," she responded, "AT&T gets more service in more places." NAD determined that taken together, this respondent's answers suggest that she took away a message of geographical coverage rather than qualitative performance superiority.

Respondent # 03035 (who viewed "False Arrest") said that the "major message" of the commercial was "To switch to AT&T." When asked "Anything else?" she responded, "To try and get you to switch because they provide the best coverage." When probed as to the meaning of "coverage," she responded "coverage." When asked "What do you mean by [above answer]?" she answered "That in more places you'll have signal to be able to get them important calls." Despite the clear takeaway of geographic coverage ("in more places you'll have signal to be able to get them important calls"), NAD noted that this response too was coded as one of qualitative performance superiority.

Respondent # 13023 ("False Arrest") said that the "major message" of the commercial was, "It was trying to show that you can get more phone calls with AT&T service than any other cell phone in different places." When probed about the term "service," he responded "You can get more phone calls with AT&T service than any other cell phone in different places." When asked "What do you mean by [above answer]?" the respondent answered, "They're trying to tell you that with AT&T that you are going to have phone service everywhere including restricted areas and you won't miss a lot of calls." NAD determined that these answers clearly indicate a takeaway relating to geographic coverage.

Compounding NAD's concerns about the survey's probing and coding was the challenger's choice of control commercial. NAD noted that the control was a non-comparative commercial showcasing AT&T's international reach. NAD noted that a control commercial should ideally resemble the actual tested commercial as closely as possible, without the claims at issue. Although NAD appreciated that redacting claims from commercials is not always practical or desirable, NAD concluded that a commercial that was comparative in nature would have been a more appropriate control.

Due to NAD's concerns about the probing of respondents, the coding of their answers, and the choice of control commercial, NAD found the results of the Wind survey to be insufficiently reliable.

(b) Advertiser's Consumer Perception Survey

NAD next reviewed the advertiser's consumer perception survey, which, conducted by Dr. Itamar Simonson, was offered to show that AT&T's advertising conveys a message of superior geographic coverage, not superior network performance quality.

[21] Here again, NAD was not sure why the respondent was probed regarding the terms "better" or "best," given that the verbatim response indicates that she did not use these words to begin with.

NAD appreciated that the advertiser's survey was double-blinded, and that it was conducted among 815 cell phone users, ages 18 and over, with an even distribution of males and females and appropriate age groups. NAD further appreciated that the results were validated by an independent research company that confirmed the interviews of 84% of the respondents.

However, NAD was troubled by certain aspects of the advertiser's survey. First, NAD was troubled that respondents only viewed two of the four challenged commercials ("Not Returning Calls" and "Pumpkin's Dad.") As a general matter, an advertiser's evidence should mirror the claims it is offered to support.

Second, NAD noted that the advertiser's survey data—while emphasizing the distinction between takeaways of "network performance quality" and geographic coverage—does not address the distinction between the takeaway that AT&T provides coverage in more geographic regions, and the takeaway that AT&T provides coverage in more physical locations (e.g. basements, buildings with thick walls, etc.) within one's coverage area. NAD noted that many of the respondents' answers did not specify which type of coverage advantage they took away from the commercials. For example, responses such as "You will receive phone calls anywhere you are" (# 00207) and "AT&T has more coverage in all places" (# 00229) do not make clear whether the respondents believed that the characters' failure to receive calls is due to their being outside of their providers' coverage areas, or due to their being located in a building that inhibits cell phone connectivity. Other survey responses—for example, "Go anywhere or place and get calls. Bars, clubs" (# 00227); "[H]e didn't have any service in the pool hall" (#05003); and "It tells me that I would receive calls in places that others won't reach like indoors at a pool hall"—suggest that the respondents took away the latter message. NAD therefore found this survey to be of limited probative value.

(c) Reasonable Takeaway of the "More Bars in More Places" and "Best Coverage" Claims

Having determined that both parties' surveys are unreliable in various respects, NAD stepped into consumers' shoes to determine the reasonable takeaway of the "More Bars in More Places" and "Best Coverage" claims. In making this assessment, NAD considered the context in which the claim appears. As a preliminary matter, NAD noted that claims appear at the end of commercials that show a person who, because he or she does not have AT&T, gets "zero bars" in a particular location and therefore misses an important call or text message. Importantly, none of the challenged commercials depict a non-AT&T subscriber talking on the phone and struggling with a poor connection or losing the signal altogether. NAD therefore determined that these vignettes do not convey a message about AT&T's superiority with respect to various measures of network performance quality that become apparent after one has received a telephone call. Rather, NAD concluded that the commercials convey a message relating to the locations in which people can receive calls and text messages.[22]

[22] NAD noted the importance of context in evaluating the takeaway of advertising claims. Although the phrase "more bars in more places" could be subject to various reasonable interpretations if viewed as a standalone claim, the meaning of the claim is colored by the commercial in which it appears.

NAD noted that a person's physical location could prevent him or her from receiving phone calls and text messages in one of two ways. First, the person might be outside of his service's geographic coverage area (e.g. in a remote town in which the provider offers no coverage.) Second, he might be inside his service's geographical coverage area, but still miss the call because he is in a physical environment (e.g. a basement, an elevator, a building with thick walls, etc.) in which there is a coverage gap.

With this distinction in mind, NAD reviewed each commercial in turn beginning with "Pumpkin's Dad." NAD noted that this commercial features a man in a seemingly remote, non-urban area, high up on a ridge. The lights seen in the far distance underscore the remoteness of the location. The man explains that because he doesn't have AT&T, he "gets zero bars up here on this ridge." NAD determined that this vignette conveys the message that the man did not receive his daughter's calls or text messages because he is in a remote location that is outside of his provider's coverage area. In the context of this commercial, NAD concluded that the "More Bars in More Places" and "Best Coverage" claims relate to geographic coverage area.[23]

NAD came to the same conclusion with respect to the "Jeff" commercial, which features a man who is apparently out in the country at a friend's house, NAD noted that the man talks about "head[ing] down to county," thereby suggesting a remote and non-urban locale. NAD therefore determined that this vignette also conveys the message that he did not receive the [phone call] because he is in a remote location that is outside of his provider's coverage area. In the context of this commercial, NAD concluded that the "More Bars in More Places" and "Best Coverage" claims relate to geographic coverage area.[24]

NAD was more concerned, however, with the two commercials that take place indoors, in establishments that could have just as easily been located in major metropolitan areas where all major carriers provide coverage. In "Ronnie," a man is shown playing pool in the kind of pool hall that could be located anywhere in the country. His alter ego explains that he is missing a call because "he's basically got zero bars in this dump." NAD noted that nothing in this vignette signals that the reason for the missed call is the man's location outside of his provider's coverage area. Indeed, the statement that "he's basically got zero bars *in this dump*" links the lack of

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[23] NAD disagreed with the challenger's argument that because the word "best" is qualitative rather than quantitative, the phrase "best coverage" necessarily refers to a network performance quality. NAD determined that when the word "best" is used to describe a noun that is quantitative by nature, it clearly takes on a quantitative meaning. Thus, as noted by the advertiser, phrases such as "best gas mileage," "best legroom," and here, "best coverage," are understood as referring to a quantitative attribute. NAD was further unconvinced by the argument that

[24] NAD did not agree with the challenger's insistence that the first "more" in the "more bars in more places" means that the claim refers to performance quality, rather than geographic coverage. The challenger argued that this phrase suggests that there are many places where non-AT&T subscribers have coverage ("bars"), but where AT&T subscribers have better performance ("more bars.") NAD noted, however, that in certain geographic locations—such as the fictional ones depicted in the challenged commercials—where non-AT&T subscribers get "zero bars" but AT&T subscribers get *some* bars (whether it be one bar, two bars, or more), AT&T subscribers do indeed have "more bars" in those places.

Nor was NAD convinced by the challenger's reliance on particular public statements made by various AT&T employees. NAD noted that these statements were not made in relation to the challenged advertising, and that in any case, employee statements do not suffice as reliable evidence of consumer takeaway.

coverage to the building in which the pool hall is housed ("this dump"), rather than the broader geographic area. NAD therefore determined that this commercial could be reasonably understood as conveying the message that the call was missed due to the character's location in a basement-like "dump," rather than his being in a remote region, outside of his carrier's coverage area. In the context of this commercial, NAD determined that the "More Bars in More Places" and "Best Coverage" claims reasonably convey the message that aside from providing a greater number of coverage areas, AT&T is superior with respect to providing signals in various physical environments (e.g. pool halls, bars, underground locations, etc.) in which people commonly experience coverage gaps.

Similarly, NAD determined that the "Chuck" commercial, which features a man playing basketball inside a dark, windowless bar, does not indicate that the character's failure to receive calls is due to his being outside his carrier's coverage area. The voiceover explains that he is missing calls because "he's got zero bars in here," again linking the absence of bars more to his location inside the bar ("in here"), rather than his being outside the provider's coverage area. In the context of this commercial, NAD determined that the "More Bars in More Places" and "Best Coverage" claims reasonably convey the message that aside from providing a greater number of coverage areas, AT&T is superior with respect to providing signals in various physical environments (e.g. pool halls, bars, underground locations, etc.) in which people commonly experience coverage gaps.

II. AT&T's Substantiation For a Message of Geographical Coverage Area Superiority

Having determined that the "more bars in more places" claim, in the context of the "Pumpkin's Dad" and "Jeff" commercials, relates to AT&T's geographic coverage areas, NAD considered the advertiser's substantiation. NAD noted data released for the first quarter of 2008 showing that AT&T has 296 million covered POPS. This translates into 2,011,841.29 square miles covered, which represents 55.69% of the domestic area covered. NAD noted that according to this data, no other carrier has as many covered POPS or has coverage that spans as many square miles as AT&T.

NAD further noted that AT&T, covering 204 countries, is also the leading wireless provider of international voice and data coverage. Additionally, it noted that within most countries, AT&T has agreements with two to five separate carriers. AT&T has entered into international roaming agreements with a total of 500 carriers—which is unparalleled by any other domestic or international wireless carrier. Finally, NAD noted that the challenger did not dispute the advertiser's superiority with respect to geographic coverage areas.

NAD therefore concluded that the advertiser provided a reasonable basis for the "more bars in more places" and "Best Coverage" claims as they appear in the context of the "Pumpkin's Dad" and "Jeff" commercials, which make clear that the superiority is with respect to geographical coverage areas.

III. AT&T's Substantiation For a Message of Coverage Superiority For Reasons Unrelated to One's Location Outside of His Provider's Coverage Area

As noted above, NAD concluded that in the context of the "Ronnie" and "Chuck" commercials, which do not make clear that the characters are outside of their provider's coverage areas, the "more bars in more places" claim conveys the message that AT&T is superior with respect to its ability to provide a signal in certain physical locations (e.g. basement locations, etc.) which often experience coverage gaps. NAD noted that the evidence in the record does not support such a message. NAD therefore recommended that the advertiser either discontinue the "more bars in more places" claim as it appears in these commercials, or modify its advertising to make clear that the lack of signal is due to a character's being outside of his or her provider's coverage area.[25]

Conclusion:

NAD concluded that the advertiser provided a reasonable basis for the "more bars in more places" and "best coverage" claims as they appear in the context of the "Pumpkin's Dad" and "Jeff" commercials, which make clear that the superiority is with respect to geographical coverage areas. However, NAD concluded that in the context of the "Ronnie" and "Chuck" commercials, which do not make clear that the characters are outside of their provider's coverage areas, the "more bars in more places" and "best coverage" claims could be reasonably understood as conveying the message that AT&T is superior with respect to its ability to provide a signal in certain physical locations (e.g. basement locations, etc.) which often experience coverage gaps. NAD determined that the evidence in the record does not support such a message. NAD therefore recommended that the advertiser either discontinue the "more bars in more places" and "best coverage" claims as they appear in these commercials, or modify its advertising to make clear that the lack of signal is due to a character's being outside of his or her provider's coverage area.

Advertiser's Statement:

AT&T is pleased with NAD's decision that the claims "More Bars in More Places" and "Best Coverage" do not by themselves convey a message of superior network performance and that

[25] Having determined that the commercials did not convey a message of superior network performance quality (a message relating to various measures of quality that become apparent after a call is received), NAD did not have the occasion to evaluate the parties' evidence with respect to quality. However, NAD noted that the advertiser's Nielsen data relating to blocked (and dropped) calls is not sufficient to support the message conveyed by the "Ronnie" and "Chuck" commercials. NAD noted that commercials convey a message that relates specifically to not getting a signal in certain physical locations (e.g. basement locations, etc.), whereas the Nielsen data does not address the issue of building penetration. NAD also noted other evidence in the record that further suggests the message conveyed by these commercials is not supported. For example, the J.D. Power data cited by the challenger reports the incidence of, among other problems, achieving "no connection on the first try." While this lack of connection may or may not be due to building penetration issues, NAD noted that AT&T scored "significantly worse than the industry average" on the "calls not connected" measure. NAD also noted the data from *Consumer Reports*, which indicated that for AT&T, "connectivity was below average, thanks to. . . service failures in many of the metro areas we surveyed."

these claims, when viewed in the context of the "Pumpkin's Dad" and "Jeff" commercials convey a message of superior geographic coverage area.

AT&T is also pleased that NAD has recognized that "no other carrier has as many covered POPS or has coverage that spans as many square miles as AT&T" and that "AT&T, covering 204 countries, is also the leading wireless provider of international voice and data coverage."

Although we respectfully disagree with NAD's determination that the "Ronnie" and "Chuck" commercials should be discontinued or modified to make clear that the lack of signal is due to a character's being outside of his or her provider's coverage area, AT&T will take NAD's recommendations into account in future advertising.

AT&T thanks NAD for its thorough and thoughtful review of these complicated issues. **(#4919 JF, closed 8/28/2008)**