

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of ) Docket No. 05-194  
)  
Petition for a Declaratory Ruling that Early )  
Termination Fees Are “Rates Charged for )  
Wireless Service” )  
)

In the Matter of ) Docket No. 05-193  
)  
Clarification That Early Termination Fees )  
Charged to Cellular Telephone Customers )  
Are “Rates Charged” Within the Meaning of )  
47 U.S.C. § 332(c)(3)(A) )

**COMMENTS OF WIRELESS CONSUMERS ALLIANCE, PORSHA MEOLI, LESLIE  
ARMSTRONG, SRIDHAR KRISHNAN, ASTRID MENDOZA, CHRISTINA NGUYEN,  
DELORES JOHNSON, BRUCE GATTON, KATHERINE ZILL, MARK LYONS,  
RICHARD SAMKO AND AMANDA SELBY**

LAW OFFICES OF CARL B. HILLIARD  
CARL B. HILLIARD  
1246 Stratford Court  
Del Mar, Ca. 92014  
Telephone: (858) 509-2938

MILLER & VAN EATON, PLLC  
JAMES R. HOBSON  
1155 Connecticut Avenue N.W. · Suite 1000  
Washington, DC 20036  
Telephone: (202) 785-0600

BRAMSON, PLUTZIK, MAHLER &  
BIRKHAEUSER, LLP  
ALAN R. PLUTZIK  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598  
Telephone: (925) 945-0200

FRANKLIN & FRANKLIN, P. C.  
J. DAVID FRANKLIN  
550 West “C” Street, Suite 950  
San Diego, CA 92101  
Telephone: (619) 239-6300

Counsel of Record for Respondents Wireless  
Consumers Alliance *et al.*

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Wireless Consumers Alliance, Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Astrid Mendoza, Christina Nguyen, Bruce Gattton, Margaret Schwarz, Kathryn Zill, Mark Lyons, Richard Samko and Amanda Selby (hereinafter collectively referred to as “WCA”) submit these Comments in response to the Petitions for Declaratory Relief filed by Triton PCS Operating Company, L.L.C. d/b/a SunCom (“SunCom”), in Docket No. 05-193, and the Cellular Telecommunications & Internet Association (“CTIA”), in Docket No. 05-194 (collectively, “Petitioners”).<sup>1</sup>

## **I. EXECUTIVE SUMMARY**

Petitioners have asked the Commission to rule that 47 U.S.C. § 332(c)(3)(A), as a matter of law, preempts all state-law challenges, of any kind or character, to termination fees that wireless carriers impose when a subscriber’s service is terminated before its expiration date (“early termination fees” or “ETFs”). The Commission should deny that relief.

According to Petitioners, ETFs are part of a business strategy adopted by many wireless carriers that features fixed term contracts, handset subsidies and “discounted” monthly rates. Petitioners argue that ETFs help carriers recover costs incurred when subscribers cancel their service or are terminated by the carrier for nonpayment before the expiration of the one-year or two-year term of the contract. If carriers were unable to charge ETFs, they contend, they would have to adopt a different business strategy. Monthly rates, they assert, would go up and some handset subsidies might be reduced. This effect on rates, Petitioners argue, makes carriers’ ETFs part of their “rate structure,” and causes any claim challenging them to be preempted by § 332. Furthermore, Petitioners assert that if a court were to award damages or other monetary relief in a case challenging ETFs, this relief would amount to a determination that the ETFs previously

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<sup>1</sup> Wireless Consumers Alliance (“WCA”) is a consumer organization devoted to advancing the interests of wireless telephone consumers. Meoli, Armstrong, Krishnan, Mendoza, Nguyen, Gattton, Zill, Johnson, Samko and Selby are current or former wireless subscribers who have filed state-law claims against wireless carriers in California state court arising from their payment of early termination fees.

charged were not reasonable, and therefore would constitute retroactive ratemaking prohibited by § 332.

As we will demonstrate below and in a subsequent filing,<sup>2</sup> the factual assumptions upon which Petitioners base their arguments are, at best, dubious. ETFs are “liquidated damages” provisions, not “rates charged.” They are designed primarily to prevent “churn” – or, in other words, to prevent or impede subscribers from switching carriers. Moreover, there is no evidence to support Petitioners’ contention that if ETFs were modified or eliminated pursuant to court order, or if damages were awarded in a lawsuit challenging ETFs, it would cause any changes to wireless carriers’ rates. But even if all of Petitioners’ characterizations, assumptions and predictions about the future were completely accurate, it would not matter. The issue before the Commission is not whether ETFs are good or bad, or whether monthly rates would go up or handset subsidies would vanish without them. Rather, it is whether, as a matter of law, § 332 preempts state-law actions that challenge ETFs. In other words, the question is not whether the existence or absence of ETFs has some effect on rates. Rather, the question is whether ETFs are rates within the meaning of the statute. And they are not.

Both the language of § 332 and the statute’s legislative history are flatly inconsistent with Petitioners’ preemption theory. The statutory clause on which Petitioners rely preempts only state and local “regulation” of “rates charged.” However, ETFs are not “rates charged” – they are “other terms and conditions” imposed by contract, which are explicitly left to state regulation. The major carriers’ subscriber contracts confirm that. They don’t describe or label ETFs as rates. Instead, they place the clause imposing ETFs in the section of the contract headed “Terms and Conditions.” Moreover, ETFs are completely dissimilar from rates both in form and function: Rates are charges for service, measured by time or unit of service. ETFs, on the other hand, are contractual remedies for breach of contract. Indeed, they are liquidated damages

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<sup>2</sup> Respondents intend to submit separately internal documents produced by wireless carriers in litigation, pursuant to a Protective Order, that will shed significant light on the genesis, rationale, purpose and effect of ETFs. Court approval to submit these documents to the Commission was obtained too late to file them with these Comments.

clauses – in the event of a breach of contract by the subscriber, they provide that the carrier may recover a sum certain, usually (but not always) a flat fee of \$150, \$175 or \$200. Thus, unlike rates, ETFs are not charges for service; instead, they are charges imposed only upon the termination of service. They are charges for not receiving service.

Not only are ETFs not rates, but state-law contract, tort or consumer fraud actions arising from ETFs do not constitute the “regulation” of “rates.” Indeed, while Petitioners seek to characterize the state-court class actions that they are trying to evade through their petitions herein as surreptitious rate-making, there is no truth to that characterization. Those cases are brought under longstanding state contract laws of general applicability that, among other things, protect contracting parties, especially consumers subject to contracts of adhesion, from unfair and deceptive business practices generally, and from liquidated damages clauses that amount to contractual penalties in particular. Every state has a statute prohibiting unfair and deceptive business practices, and every state has a statute or a common-law rule that specifies what standards liquidated damages clauses must meet and which prohibits abusive and oppressive contractual penalties.<sup>3</sup> These limitations on liquidated damages protect consumers from overreaching by all businesses – not just wireless carriers.

As both the language of § 332 and its legislative history confirm, the statute was never intended to preempt state contract, tort or consumer protection laws of general applicability. Indeed, the statute itself expressly permits state regulation of “other terms and conditions” – that is, contractual “terms and conditions” other than rates. Moreover, the general savings clause of 47 U.S.C. § 414 preserves state-law remedies that are not specifically preempted.

In addressing preemption under § 332, the Commission is not writing on a blank slate. Indeed, a large number of courts have already spoken on the issue of whether ETF claims are preempted as a matter of law. With immaterial exception, they have all held the same way – that

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<sup>3</sup> Indeed, the Uniform Commercial Code, provisions of which have been adopted in some form by all fifty states, contains a provision limiting liquidated damages and prohibiting contractual penalties. U.C.C. § 2-718. *See, e.g.*, California Uniform Commercial Code § 2718.

ETFs are not rates and that there is no preemption.<sup>4</sup> In contrast, not a single case has endorsed the proposition advocated by Petitioners – that all ETFs are “rates” and that any and all state-law actions challenging any ETF are preempted. Only a tiny handful of cases have held, in an individual case, that a particular carrier’s ETF was a “rate” or that a particular claim challenging it was preempted; and those cases are so procedurally and substantively flawed that they are simply bad law. In *Wireless Consumers Alliance*, 15 FCC Rcd 17021 (2000), the Commission stated that “the determination of whether any claim or remedy is consistent with § 332 must be determined in the first instance by a state trial court based on the specific claims before it.” *Id.* at ¶ 28. The Commission should defer to and follow the repeated rulings by state and federal trial courts that ETFs are not rates and that claims challenging them are not preempted.

The Commission’s own prior rulings interpreting § 332 also do not support the relief that Petitioners seek. The Commission has held that while § 332 preempts state regulation of rates, it does not prohibit actions brought under state-law contract, tort or consumer protection laws that merely affect a wireless carrier’s revenues or costs of doing business. *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19901, ¶ 7 (1999); *Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1737, 1745 ¶ 20 (1997). Nor does the statute preempt

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<sup>4</sup> *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 at \*36 (S.D. Iowa 2004); *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004), attached hereto as Exhibit A; *Gatton v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 25922 (C.D. Cal. April 18, 2003); *Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002), Exhibit G to CTIA Petition; *State of Iowa v. United States Cellular Corporation* 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000); *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996); *Hall v. Sprint*, *supra*, attached hereto as Exhibit B; *Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, 2004 Cal. PUC LEXIS 577 (December 16, 2004), attached as Exhibit C hereto; see also *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7<sup>th</sup> Cir. 2004) (suit alleging improper billing not preempted by § 332); *Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000) (case challenging wireless company’s late fees not preempted under § 332); *Mountain Solutions v. State Corporation Commission of Kansas*, 966 F. Supp. 1043 (D. Kan. 1997) (holding state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by § 332); *Dakota Systems, Inc. v. Viken*, 694 N.W.2d 23, 40, 2005 S.D. LEXIS 28 (So. Dakota Supr. Ct. Feb. 23, 2005) (state licensing and tax statutes not preempted by § 332).

efforts to recover damages. *Wireless Consumers Alliance, Inc.*, *supra*, 15 FCC Rcd 17021 at ¶ 19. The award of monetary relief does not amount to retroactive ratemaking under § 332. *Id.* at ¶¶ 23-24; *In re Wireless Consumers Alliance, Inc., Order on Reconsideration*, 16 FCC Rcd 5618, 5620 (2001). To now hold that all state-law challenges to ETFs are preempted as a matter of law would require the Commission to abandon its own carefully considered and longstanding precedents

Boiled down to its essence, Petitioners' argument is based not on law but on its own policy preferences – they contend that if state-law litigation were to force changes in carriers' ETF practices, that would affect rates structures in a way that they characterize as undesirable. But the preemptive scope of § 332 is not a question of policy – it is a question of statutory interpretation. Both the statutory language and the judicial decisions interpreting it are clear: Challenges to ETFs based on state contract, tort or consumer protection provisions are not preempted.

Furthermore, even if the Commission were to consider the policy arguments advanced by Petitioners, it should reject them. Petitioners argue that their current business strategy, which involves subsidized handsets and “discounted” monthly rates, is good for consumers and the industry and must be preserved at all costs; and they assert that allowing state-law challenges to ETFs to go forward would destroy that business strategy. Nobody knows whether any of the ETF cases now pending in state or federal court will be successful, or if they are successful, whether that would change or destroy handset subsidies or any other aspects of the way carriers do business. Certainly, the Petitioners' speculation to that effect is unproven. But the point is that the Commission should not be invested in a particular market or pricing structure for the industry. It is an important premise of § 332 that markets, not regulators, are supposed to determine what business and pricing strategies carriers should adopt. State-law provisions and remedies are an important aspect of markets.<sup>5</sup>

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<sup>5</sup> Thus, in *Wireless Consumers Alliance, supra*, 15 FCC Rcd 17021 at ¶ 24, the Commission stated:

But even if the Commission believes that the state-court litigation, if successful, may change the business landscape for some wireless carriers, such changes are as likely to have salutary effects as negative ones. ETFs are, in their essential nature, anticompetitive. They are designed, first and foremost, to control churn – or, in other words, to impair subscribers’ freedom to switch carriers to obtain lower prices and better service. The Commission has recognized that allowing subscribers greater freedom to switch carriers is pro-competitive. *See In the Matter of Telephone Number Portability*, 18 FCC Recd 20971, 20976 (2003).

Petitioners also argue that the conflicting demands of state laws interfere with the desirable goal of nationwide uniformity in service offerings. But that is false. Carriers’ offerings are not necessarily uniform now and there is no reason why they should be. The savings clauses embedded in 47 U.S.C. §§ 332 and 414 explicitly contemplate that wireless carriers will have to cope with the shifting demands of state law. Exposure to litigation under state laws of general applicability such as those relating to liquidated damages and unfair business practices is part of the price the carriers pay for the greater freedom from regulation that § 332 gave them. In sum, Petitioners’ request for relief is indefensible not only as a matter of law but also as a matter of policy.

## II. ARGUMENT

### A. **The Language of the Statute Provides No Support for the Petitioners’ Claim that All ETFs Are “Rates Charged” or that State-Law Causes of Action Challenging them Are Preempted**

47 U.S.C. § 332(c)(3)(A) provides:

[N]o State or local government shall have any authority to regulate ... rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

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It follows that if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort claims should generally be enforced in state courts. We also agree with commentators who assert that enforcement of such laws through a monetary remedy is compatible with a free market.

The determination of whether or not a federal statute preempts state-law claims turns on the intent of Congress:

The purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal citations and quotations omitted).

Whether court claims challenging a wireless carrier's ETFs under provisions of state law are preempted under § 332(c)(3)(A) therefore depends on an analysis of the intent of Congress, which is revealed primarily in the words of the statute itself, and secondarily in "the structure and purpose of the statute as a whole." The principal inquiries in making that determination in a particular case would seem to be whether the ETF in question is a "rate charged" within the meaning of § 332 and whether the claims asserted under state law are properly characterized as attempts to "regulate" rates.

However, the breadth of relief that Petitioners are seeking requires an even more sweeping showing. Petitioners are asking the Commission to hold that ETFs, no matter who imposes them, where and in what type of contract they appear, how they are triggered, how much they are, whether they are ever collected or not, how they may relate to other aspects of a wireless carrier's business or what each carrier's subscriber contract says about them, are always and everywhere "rates charged" as a matter of law, and that claims based on state law that challenge anything at all about an ETF are, *ipso facto*, preempted. Thus, Petitioners must show that all ETFs, in their essential nature, are necessarily "rates charged," and that there is no kind or type of ETF that could conceivably be characterized as anything other than a "rate charged." They must also show that no claim that could possibly be brought under state law challenging such an ETF could possibly be anything other than an effort to "regulate rates." Petitioners have

not made and cannot even begin to make such a showing. The language of the statute, its legislative history, the overwhelming weight of judicial and regulatory authority and the facts applicable to ETFs all demonstrate that ETFs are not “rates charged” and, accordingly, that claims seeking relief from ETFs under state law are not preempted.

Two aspects of the statutory language require particular attention in this regard. First, what the statute prohibits is state “regulation” of “rates charged.” Both “regulation” and “rates charged” have readily ascertainable meanings. First, the word “rate” has a clear meaning – it is a charge:

- (1) for service,
- (2) imposed by unit of service or time.

Thus, Black’s Law Dictionary, 1261 (6th ed. 1990) defines a “rate” as follows:

In connection with public utilities, as a charge to the public for a service open to all and upon the same terms. The unit cost of a service supplied to the public by a utility. When used in connection with public utilities, such as a telephone company, generally means price stated or fixed for some commodity or service of general need or utility supplied to the public measured by specific unit or standard.

The American Heritage Dictionary defines a “rate” as “the cost per unit of a commodity or service.” *American Heritage Dict.* 1027 (2d ed. 1982), quoted in *Ball v. GTE Mobilnet of California*, 81 Cal.App.4<sup>th</sup> 529, 538 (2000) (emphasis in original court opinion).

Consistent with this guidance, the Commission, held, in *Wireless Consumers Alliance*, that a “rate,” as used in § 332, is a “charge for services.” 15 FCC Rcd 17021 at ¶ 39, n.44.

ETFs are not charges for service. A customer does not get any services by paying an early termination fee. Instead of being a charge for service, an ETF is a charge for the discontinuation of service that is only assessed when no more service is to be provided. Moreover, it is significant that ETFs are imposed not only when a subscriber terminates a fixed-period service contract early but also when the carrier terminates a subscriber’s service before the expiration of his service contract – for example, when the subscriber fails to pay his bill on time. Under these circumstances, an ETF is a charge imposed on the subscriber in connection with being cut off from service by the carrier. Indeed, each subscriber’s monthly bill contains all

of the charges for services provided by the carrier, and no ETF ever gets charged as long as the contract runs through its term. Thus, it is a charge that most subscribers never become obligated to pay.

Petitioners contend that ETFs qualify as rates, in part, because they constitute contingent, delayed partial payment for handsets and accessories previously provided by the carrier at the beginning of the subscriber's contract and service provided by the carrier during the term of the contract. CTIA Petition at 11. That is an unsupportable assertion. ETFs are rarely charged, and even more rarely paid. An ETF cannot, therefore, provide for any recoupment or compensation for handsets or accessories. Moreover, no carrier's service contract specifies that the ETF is to pay for equipment or service.<sup>6</sup>

ETFs serve a variety of purposes for wireless carriers – recovering “liquidated damages” in the event a contract terminates before its expiration date, impeding or preventing subscribers from switching carriers, controlling “churn,” intimidating subscribers to sign up for additional years or additional services and raising revenue. None of these purposes is in any way connected with the straightforward meaning of the word “rate” or the phrase, “rate charged” – a charge for a unit of service.

Indeed, all of the major carriers include their ETFs in the section of their subscriber contract entitled “TERMS AND CONDITIONS,” a document entirely separate from the “rate plan,” which supports the conclusion that they are “other terms and conditions” within the meaning of § 332, rather than “rates charged.”<sup>7</sup>

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<sup>6</sup> At p. 13 of its petition, CTIA argues that ETFs are analogous to other contingent charges, not paid by all subscribers, that are nevertheless regarded as “rates,” such as charges for exceeding the monthly allotment of minutes and pay-per-use charges. However, this comparison is flawed. These charges are only contingent in the sense that if the service is never rendered to a particular subscriber, he does not incur an obligation to pay. The same is not true under Petitioners' view of ETFs. The products and services for which Petitioners claim ETFs form part of the contingent payment are provided to everyone, but only the subscriber whose contract is terminated early is charged an ETF. Thus, the theory that ETFs are rates because they are “contingent part payment” is meritless.

<sup>7</sup> See T-Mobile contract, attached hereto as Exhibit D; AT&T Wireless contract, attached hereto as Exhibit E.

Petitioners attempt to compare ETFs to such practices as billing for calls “rounded up to the next full minute,” or timing calls from “Send” to “End” rather than only for the time the call is connected. However, the comparison is inapposite. Practices such as rounding up or billing from “Send” to “End” affect every charge for every call. ETFs, on the other hand, do not arise unless and until the carrier claims that the contract has been breached.

Also of significance in the statute is the word “regulate.” Although Petitioners attempt to read language into § 332 that is not there, nothing in the statute prohibits the assertion of garden variety state-law claims arising from contract, tort or statutory causes of action that might somehow arguably influence or affect rates or “rate structures.” Moreover, there is no language in the statute that would forbid a court from granting monetary or injunctive relief that might somehow relate to or implicate rates. What the statute says is that state and local governments may not “regulate” rates. A court’s award of damages or other monetary relief based on a state-law claim arising from contract, tort or consumer protection laws generally does not constitute “rate regulation.” *Wireless Consumers Alliance, supra*, 15 FCC Rcd 17021 at ¶¶ 38-39. Similarly, a court’s award of equitable relief with respect to a charge that is not a “rate” under the statute does not constitute rate regulation.

Finally, there are not one but two savings clauses that expressly exempt particular categories of claims from the preemption provisions of § 332.

As a general matter, federal statutory provisions preempting state law must be read narrowly as a general rule. *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230 (1947). Preemption will not be found unless the statute evinces a “clear and manifest” Congressional intention to displace state law with federal regulation in a particular arena. *Id. Accord Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 93 (1983). Indeed, the Supreme Court has admonished that where it is possible to interpret a statute as not preempting a particular claim, the statute must be interpreted in that way. *Bates v. Dow Agrosciences LLC*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1788, 161 L.Ed. 2d 687 (2005).

In *Bates*, the Supreme Court rejected Dow’s contention that the preemption provision of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136v(b), preempted claims for damages under state-law consumer protection statutes:

Even if Dow had offered us a plausible alternative reading of § 136vb – indeed, even if its alternative were just as plausible as our reading of that text – we would nevertheless have a duty to accept the reading that disfavors pre-emption. Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest.

125 S.Ct. at 1800 (internal citations and quotation marks omitted).

Thus, even if there were no savings clauses applicable to § 332, Petitioners would have to bear a heavy burden to establish preemption. The two savings clauses, read together, make the burden insurmountable.

The first of these savings clauses is included in the very same sentence as the preemption for the “regulat[ion of] rates charged.” The statute provides:

[N]o State or local government shall have any authority to regulate ... rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332 (emphasis added).

Accordingly, to determine whether claims challenging ETFs are preempted, it is necessary to interpret the phrase “terms and conditions.” And this phrase, like the words “rates” and “regulate,” has a clear and discernable meaning. Thus, “term” clearly refers to a term of a contract. Indeed, Black’s Law Dictionary (8<sup>th</sup> ed. 2004 at 1509) defines “term” as “a contractual stipulation.” “Condition” is defined as “A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation. Black’s 6<sup>th</sup> ed. at 293. The ETF is clearly intended to “suspend, rescind or modify” the contract pursuant to which the carrier provides service and the customer pays. In addition, as we demonstrate below, ETFs are found in the carriers’ subscriber contracts – an entirely separate document from the “rate plan.” Exhs

D-E. Moreover, numerous courts have determined that ETFs are not “rates” but, rather, are “other terms and conditions” of wireless service. *E.g., Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 at \*36 (S.D. Iowa 2004). *See* discussion at Section D below. Accordingly, the savings clause that Congress inserted into the text of § 332 militates strongly against a finding that state-law claims challenging ETFs are preempted.

In addition to the savings clause that appears in § 332 itself, another savings provision is also applicable to § 332 – the general savings provision of 47 U.S.C. § 414. That provision states:

Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

As the Eleventh Circuit Court of Appeals held, interpreting § 414:

...[T]he existence of this type of "savings" clause which contemplates the application of state-law and the exercise of state-court jurisdiction to some degree counsels against a conclusion that the purpose behind the Act was to replicate the 'unique preemptive force' of the LMRA and ERISA.

*Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11<sup>th</sup> Cir. 2001); *see also Weinberg v. Sprint*, 165 F.R.D. 431, 439 (D.N.J. 1996) (§ 414 “indicates Congress’s intent that independent state causes of action ... not be subsumed by the Act but remain separate causes of action...”); *In re Operator Services of America*, 6 FCC Rcd 4475, 4477 at ¶ 11 (§ 414 “...preserves the availability...of such preexisting remedies as tort, breach of contract, negligence, fraud and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers.”); *Lewis v. Nextel Communications*, 281 F.Supp.2d 1302, 1306 (S.D. Ala. 2003) (“The FCA’s savings clause makes it clear that the causes of action in the federal statute are cumulative to available state law actions.”); *Union Ink Company, Inc. v. AT&T Corp.*, 801 A.2d 361, 370 (N.J. Sup. 2002) (“The Communications Act does not displace, but rather supplements state law claims against cellular telephone service providers for consumer fraud, misrepresentation, breach of contract and unfair billing practices.”).

**B. The Legislative History of § 332(c)(3)(A) Strongly Suggests that ETFs Are Not “Rates Charged”**

The legislative history of the statute also militates against the reading of § 332 advocated by Petitioners. As part of the Omnibus Budget Reconciliation Act of 1993, Congress amended the Federal Communications Act of 1934 to substantially deregulate the wireless telecommunications industry. *See Connecticut Dept. of Public Utility Control v. FCC* 78 F.3d 842, 845 (2d Cir. 1996). Prior to the amendment, commercial wireless carriers were required to file tariffs publishing their intrastate rates with state regulatory commissions. *Spielholz v. Superior Court*, 86 Cal.App.4<sup>th</sup> 1366, 1373 (2001). The amendment removed the authority for state governments to regulate the rates charged by wireless carriers. *See* 47 U.S.C. § 332(c)(3)(A). However, as the amendment’s legislative history makes clear, state governments retained their authority to regulate the “other terms and conditions” of wireless service:

It is the intent of the Committee that the states still be able to regulate the terms and conditions of these services. By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other customer protection matters; facilities, citing issues (*e.g.*, zoning), transfers of control, the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”

H.R.Rep. No. 103-111, 103d Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

Congress’s intent was to exclude from federal preemption consumer claims like this one. ETFs fall within the “other terms and conditions” provision in § 332(c)(3)(A). By their very nature, ETFs are a remedy for breach of contract that derives from the terms of subscriber contracts not “rates.” State-law provisions regarding contracts, liquidated damages and consumer fraud – the types of provisions that are at issues in the cases pending in California, Illinois, Florida and South Carolina that Petitioners are asking the Commission to preclude – are clearly “matters [that] fall within a state’s lawful authority.” *See e.g. Union Ink Co. v. AT&T*, 801 A. 2d 361, 374-75 (N.J. Sup. App. Div. 2002) (“Those rules of law that, generally, govern

the relationships between parties to consumer transactions are signaled out for particular preservation.”)

Hence, as the *Phillips* court held, ETFs fall within “other terms and conditions” and challenges thereto ““are brought under consumer protection laws and go to the substance of consumer protection – e.g., fraud, misrepresentation, false advertising, billing practices – not to rates....”” *Phillips, supra*, 2004 U.S. Dist. LEXIS 14544 at \*32 (quoting *U.S. Cellular*, 2000 U.S. Dist. LEXIS 21656 at \*18). Any broader interpretation of “rates” would contradict the express language of the statute that Congress intended to permit states to regulate consumer protection. *Id.* at \*36.

### **C. ETFs Are Liquidated Damages, Not “Rates Charged”**

Petitioners egregiously mischaracterize ETFs in claiming that they are “rates charged” for wireless service. Rather, they are remedies for breach of the subscriber agreement. More specifically, they are liquidated damages provisions. The term “liquidated damages” is defined in Black’s Law Dictionary as:

An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.

Black’s Law Dictionary (7<sup>th</sup> ed.) at 395. Wireless carriers’ ETFs clearly fall within this definition. To establish a valid liquidated damages provision in a contract, state statutes focus on whether: (1) the liquidated damages clause was agreed to by the parties, (2) damages are extremely difficult to determine, and (3) the contractual liquidated damages amount accurately measures the anticipated loss that the non-breaching party would suffer in the event of a breach by the other party. *See, e.g.*, Cal. Civ. Code § 1671(d). The purpose of these provisions is to protect consumers from liquidated damages provisions that in fact are punitive in nature and amount, *i.e.* a penalty. *Donald v. The Golden 1 Credit Union*, 839 F.Supp. 1394 (E.D. Cal. 1993).

A number of wireless carriers’ contracts are deliberately and explicitly worded not only to acknowledge their ETFs as a liquidated damages provision, but to attempt to

satisfy statutory standards, trying to ensure that the liquidated damages clause is upheld as valid under state law. Thus, for example, the T-Mobile contract effective as of December, 2004, states:

But if you cancel service or breach the agreement before your term ends, you agree that the resulting harm to us is impracticable or extremely difficult to measure and you agree to pay us in addition to amounts owed, as a reasonable estimate of our harm, a \$200 cancellation fee...

T-Mobile Agreement, Exhibit D hereto (emphasis added).

Similarly, a recent AT&T Wireless Welcome Guide, under the heading “Terms and Conditions,” states:

If you terminate service more than 30 days after your activation date, but before the end of your fixed term, or we terminate following your default, you will be in material breach of this agreement. You agree our damages will be difficult or impossible to determine and agree to pay us, as a reasonable estimate of our damages and in addition to all other amounts owing, a cancellation fee for each number (the actual amount of which is reflected in the sales information), and you may not be eligible for new customer promotions in the future.

AT&T Wireless Agreement, Exhibit E hereto (emphasis added).

The language of termination, breach, harm and damages, and the formulation that damages are difficult or impossible to determine are the hallmarks of a classic liquidated damages clause. Although not all carriers use the same language in their contracts, the contractual function performed by ETFs is the same for every carrier. The charge is not imposed unless the subscriber breaches the contract and the agreement is terminated before its expiration date, and it is explicitly designed to pay the carrier for harm or losses suffered upon early termination. CTIA itself, in its Petition, admits that ETFs are designed to recover revenue lost as a result of a customer’s breach of contract resulting in the early termination of the contract. CTIA Petition at 2, 18. If there were any doubt that ETFs are liquidated damages, it is dispelled by the industry’s admission that if ETFs were absent or unenforceable, carriers would file a breach of contract claim against subscribers

who terminate their contracts early and attempt to recover their “actual damages.” *Id.* at 25.<sup>8</sup> In other words, ETFs are the substitute for a determination of the carrier’s damages through a breach of contract lawsuit against the subscriber.<sup>9</sup>

By characterizing their ETFs as liquidated damages, and/or admitting that the ETFs are liquidated damages clauses, the carriers are relying upon state contract law to recover damages when a subscriber commits a breach of contract. Accordingly, Petitioners’ position is anomalous and unfair: They take the position that the industry can rely on state contract law to collect damages from subscribers who terminate early. However, they contend that any attempt by the subscriber to defend himself from such a suit by invoking state-law restrictions on liquidated damages is preempted as state regulation of “rates charged.”

CTIA argues that it is “immaterial for purposes of the analysis of the ETF ... whether, as a matter of contract law, [it] is viewed as a conditional payment for the handset or services, as a reasonable approximation of lost profits, as reliance damages of the carrier, or some other proper measure of contract damages....” CTIA Petition at 12, fn. 41. Thus, Petitioners seem to suggest that ETFs can be, at one and the same time, both liquidated damages and rates. That contention is illogical and legally baseless. If ETFs are contract remedies, they cannot be “rates charged.” And they are clearly contract remedies.

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<sup>8</sup> CTIA Petition, at 25. And, in fact, Verizon has done precisely that. In the ETF case pending against Verizon in Alameda County, California, Verizon has filed conditional counterclaims against certain plaintiffs, alleging that if Verizon’s ETFs are held to be void or unenforceable, Verizon seeks a recovery of “actual damages” attributable to the early termination of their contracts. *See* Exhibit F hereto at 5 (“...[C]ross-defendant Morton damaged Verizon Wireless by terminating her contract early. Damages incurred by Verizon Wireless include but are not limited to the excess of remaining monthly payments due under the subscription agreement over the cost of serving Morton for the remainder of the agreed-upon term.”)

<sup>9</sup> Significantly, however, the existence of an ETF does not relieve a carrier that may wish to obtain compensation from a subscriber for the early termination of his contract from the necessity of filing suit. It only affects the amount of damages that the carrier could recover if it did file suit (assuming the ETF is found to be valid and enforceable).

**D. The Weight of Judicial Opinion Supports the View that ETFs Are Not “Rates Charged” and that Claims Challenging ETFs Are Not Preempted**

Petitioners represent that the weight of judicial authority supports their contention that ETFs are “rates charged” and that state-law claims challenging them are preempted – or, at least, that there is a split of authority on the question, and that only a few rogue courts in isolated jurisdictions have ruled against the industry on this issue. Nothing could be further from the truth. The scope of § 332’s preemption provision has been addressed repeatedly and squarely by federal and state courts throughout the country, and virtually every court that has decided the issue has flatly rejected the expansive interpretation of § 332 that Petitioners advocate. The industry has been losing this issue in the courts for years – that is why it has now come to the Commission to ask the agency to pull its chestnuts from the fire. And there is not a single case in which a court has endorsed the sweeping interpretation of § 332’s preemption clause that Petitioners are advocating.

**1. Courts Have Repeatedly Rejected Petitioner’s Expansive View of § 332 Preemption**

Numerous cases from federal and state courts throughout the country have rejected Petitioners’ expansive view of § 332 preemption, both in cases challenging some aspect of ETFs and in other related contexts. The recent case of *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004), is particularly instructive. In *Phillips*, a former AT&T Wireless subscriber alleged that he had been illegally charged early termination fees under AT&T’s cellular service contracts, in violation of the Iowa Consumer Credit Code and the Iowa Unfair Debt Collection Statute. AT&T removed the case to federal court, claiming that plaintiff’s state law claims were completely preempted by § 332(c)(3)(A). The plaintiff moved to remand. AT&T argued that § 332(c)(3)(A) completely preempts all challenges to “rates charged” and “market entry,” creating federal removal jurisdiction over such challenges. The court agreed. However, the court held that ETFs are not “rates charged” within the meaning of § 332(c)(3)(A) and remanded the case to state court. The court observed:

[T]he entire spectrum of telecommunications regulation is not being preempted [by § 332]. Only those claims that would regulate “rates” or “market entry” fall within the bounds of complete preemption under the FCA. Thus, the real inquiry in this case becomes whether Phillips’ claims constitute a challenge to either the rates or market entry of AT & T, the cellular service provider.

*Id.* at \*21.

AT&T argued in *Phillips*, as Petitioners do here, that the ETF was a critical component of its “rate structure,” because the effect of granting the relief requested would result in increased rates for its service. *Id.* at \*26. Specifically, AT&T contended that

...it would be required to increase its rates to recover costs and make a reasonable profit on a more expedited basis if it were determined that it could not charge an early termination fee for the early termination of term service agreements.

*Id.* at \*28. AT&T relied on the Affidavit of Michael Attiyeh, its Director of Consumer Product Management, in support of the proposition that its ETFs correlated to, and were an integral part of, the rates charged by AT&T for its services. *Id.* (A copy of the Attiyeh Affidavit that AT&T submitted in *Phillips* is attached as Exhibit G hereto.) However, the court rejected that argument.

The court acknowledged and agreed with Commission authority that § 332 preempts claims challenging both “rate levels” and “rate structures.” However, the court held that ETFs were not “rates,” but, rather, “other terms and conditions [that] Congress demonstrated a specific intent to exclude ... from preemption under section 332.” *Id.* at \*36. At most, the court held, AT&T had shown that ETFs affected rates, and that was not enough to establish that they were rates or that the plaintiff’s claims were an effort to regulate rates. Accordingly, the court concluded that the plaintiff’s claims did not constitute a direct challenge to the carrier’s rates, and were therefore not preempted by § 332. The Court explained:

[T]he Court finds the AT&T early termination fee is not a ‘rate’...[S]uch a broad interpretation of “rates” is contrary to the intent of Congress. This Court agrees that “rate” must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment.

*Id.*

AT&T sought reconsideration of the court's ruling in *Phillips*. However, the court denied reconsideration and refused AT&T's request to certify the issue of whether ETFs are "rates charged" to the Eighth Circuit Court of Appeals. The court was unequivocal:

...[R]econsideration is not warranted in the present case. The parties fully briefed the relevant issues on the motion to remand. The Court then had the added benefit of the oral arguments presented by the parties. The Court fully understood the issues and the arguments made by the parties. The Court then conducted its own research on the relevant issues before reaching the conclusions contained in the July 29, 2004 [ruling]. Defendant's arguments do not convince the Court that any of its findings were made in error. Thus, Defendant has provided the Court with no reason to revisit its prior determination....

*Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 17326 at \*6 (S.D. Iowa 2004).

*Phillips* is directly on point. The arguments made by AT&T in *Phillips* in support of the preemption defense are identical to the arguments Petitioners are making here. Indeed, the Attiyeh Affidavit on which AT&T relied in the *Phillips* case echoes the arguments in the CTIA and SunCom petitions and in the Declaration of Charles Kallenbach that accompanies the SunCom Petition.

AT&T contended in *Phillips*, as Petitioners do here, that state-law claims challenging ETFs are preempted because ETFs: (1) are part of the carrier's "rate structure"; (2) produce revenues that help to recover the carrier's costs of doing business, including the costs of customer acquisitions; and (3) influence and impact the carrier's rates for service. *Id.* at \*26. Nonetheless, the *Phillips* court made short shrift of these arguments, holding that ETFs are not the "rates charged" for service envisioned by the statute.

Moreover, *Phillips* cited two additional cases that had addressed the same question and reached the same conclusion – that ETFs are not "rates charged" and that § 332 does not preempt state-law claims challenging them. In *State of Iowa v. United States Cellular Corporation*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000) ("*U.S. Cellular*"), the trial court refused to accept the defendants' proposed overbroad definitions of "rates charged" – definitions remarkably similar to those that are being advanced by Petitioners herein:

U.S. Cellular would have this Court construe “rates” so broadly as to incorporate anything that might touch upon U.S. Cellular’s business. U.S. Cellular’s interpretation requires numerous degrees of separation in order for a state claim to escape preemption by the Communications Act. This is problematic. Inherently, any interference with U.S. Cellular’s business practices will increase its business expenses. These increased business expenses would likely be passed on to customers as rate increases. If “rate” included any action that indirectly induced rate increases, the exception would be swallowed by the rule. This could not have been Congress’ intent. U.S. Cellular’s interpretation would destroy the Act’s savings clause, making all actions affecting the company federal in nature.

*Id.* at \*20. (Emphasis added.).

In *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D.

Iowa 2000) (“*Cedar Rapids Cellular*”), the Court stated:

This Court declines to read “rates” in § 332 so broadly as to necessarily preclude a state’s judicial challenge based on a statute designed to protect consumers against fraudulent or deceptive business practices. Under such a reading, any challenge to defendant’s conduct could be couched in terms of its effect on rates, and, as the Court has already concluded, the language of the statute makes it apparent that Congress did not intend such a result.

*Id.* at \*20-\*21.

Similarly, in *Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002), which CTIA has attached to its Petition as Exhibit G, the court held Cingular’s ETFs not to be part of Cingular’s “rate structure,” and accordingly ruled that § 332 did not provide “federal question” jurisdiction over a state-law claim that the ETFs were improper penalties under Illinois contract law.

In *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S. D. Fla. Sept. 23, 2004), attached hereto as Exhibit A, plaintiffs filed claims alleging that Nextel Corp.’s ETFs were improper contractual penalties under Florida law and that, in imposing them, Nextel had violated Florida consumer statutes. Nextel removed the action on three separate and independent grounds. Nextel asserted that (1) § 332(c)(3)(A) “completely preempted” plaintiffs’ claims; (2) the complaint raised substantial federal questions; and (3) removal was justified under the “artful pleading” doctrine. Exhibit H hereto. In its brief opposing plaintiffs’ motion for remand, Nextel argued, on the same grounds that Petitioners are asserting in this litigation, that its ETFs were “rates charged” within the meaning of § 332. After concluding that plaintiffs’

claims were not subject to “complete preemption” under Eleventh Circuit law, the *Carver Ranches* court then rejected Nextel’s “substantial federal question” and “artful pleading” arguments, holding: “The court does not find that an early termination fee is a rate.” Exhibit A at p. 4, ¶ 6 (emphasis added).

Similarly, in *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996), the plaintiff alleged that the wireless carrier’s \$200 early termination fee was not enforceable under Texas law. As Petitioners do here, the defendant in *Esquivel* argued that the fee was a “rate” because it enabled it to recover costs incurred to acquire new customers and allowed customers to avoid payment of “up-front” acquisition costs by amortizing them over the life of the agreement. *Id.* at 715. Nonetheless, the trial court held that the ETF was a liquidated damages provision included within the “terms and conditions” of service:

The Court is persuaded that the liquidated damages provision here is a ‘term and condition’ of the agreement rather than a rate...The actual language calling for liquidated damages is located in a section of the agreement styled ‘terms and conditions’.....The congressional history indicates that the phrase “terms and conditions” was meant to include such matters as customer billing information and practices and billing disputes, and other consumer protection matters. Plaintiffs’ suit is invoking the common law of Texas designed to protect consumers from excessive liquidated damages provisions that are tantamount to penalties....

*Id.* at 715-716. Plaintiffs’ claims, therefore, were not preempted.

Yet another recent case that holds that ETFs are not “rates” and that claims challenging them are not preempted is *Hall v. Sprint*, State of Illinois, Third Judicial Circuit, Case No. 04L113 (Aug. 10, 2004), attached hereto as Exhibit B. Moreover, the decision in *Hall* was made on the merits and *not* in the context of a petition for removal or a motion to remand.

The California Public Utilities Commission (CPUC) recently endorsed the same view. In the *Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, the CPUC determined that an ETF provision “...raises the kind of consumer protection matters that federal law permits the states to adjudicate and does not expressly or impliedly seek to regulate wireless rates or terms of entry.” 2004 Cal. PUC LEXIS 577 (December 16, 2004), attached as Exhibit C hereto.

The scope of § 332's preemption provision has also been considered and ruled on in numerous cases that do not involve ETFs but are closely analogous and persuasive. Thus, in *Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000), wireless subscribers sought to recover allegedly unlawful late fee charges. *Id.* at 422. At issue was whether the "late fees" constituted "rates charged" or "other terms and conditions" under the statute. Defendants in *Brown* argued that the late fee charges were subject to complete preemption because a reduction in the late fee charge would result in an increase in rates. Rejecting that argument, the court reasoned that any legal claim that resulted in an increased obligation for defendants could theoretically increase rates. It held that Congress had not preempted all claims that would influence rates, but only those that directly challenged the rates themselves. *Id.* at 423. Notably, the court also held that the late fees were not a rate, but rather a penalty for failing to submit timely payment after receipt of billing. Accordingly, the court found that late fees are "other terms and conditions" under § 332.<sup>10</sup>

In *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004), plaintiff contracted for a wireless telephone service plan that provided a fixed rate for a certain number of airtime minutes each month, while billing additional amounts for any minutes used in excess of the amount allotted by the plan. Plaintiff alleged that defendant had delayed billing calls for the current billing period to later billing periods, thereby charging customers more for airtime than had properly been incurred. *Id.* at 1074. Cingular removed the case to federal court, arguing that the plaintiff's claims were preempted, *id.* at 1070, and that the plaintiff's challenges to the timing of billing and amounts billed were prohibited attacks on "rates." *Id.* at 1072. The district court held that the plaintiffs' claims were preempted. *Id.* at 1071. The Court of Appeals disagreed and remanded the action, stating:

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<sup>10</sup> See also *Commonwealth of Kentucky ex rel. Gorman v. Comcast Cable*, 881 F. Supp. 285 (W.D. Ky. 1995) (finding practice of billing customers for certain services unless they specifically renounced them was subject to state regulation); *Mountain Solutions v. State Corporation Commission of Kansas*, 966 F. Supp. 1043 (D. Kan. 1997) (holding state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by §332).

Fedor asserts that Cingular agreed to provide him with a certain number of minutes of call-time each month, and that calls within that month that exceeded the allotted time would be subject to an additional fee. Fedor does not challenge the reasonableness of those charges, nor does he ask the Court to determine whether the services provided were sufficient to justify the charges. Fedor merely argues that Cingular inappropriately attributed calls made in one month to the call-time for a different month, thus assessing charges that were different from the contract terms. A state court analyzing this claim would need to refer to the rates in assessing damages, but would never examine the reasonableness of those rates.... In other words, these claims address not the rates themselves, but the conduct of Cingular in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the “terms and conditions” of commercial mobile services.

*Id.* at 1074 (emphasis added).

In *Gatton v. T-Mobile USA, Inc.*, 2003 WL 21530185 (C.D. Cal. April 18, 2003), the plaintiff alleged that certain provisions of the “terms and conditions” of service in the agreement customers purportedly sign when purchasing a T-Mobile service, including the \$200 contract cancellation fee, were unlawful or unconscionable business practices. Defendants made the same argument they have advanced in all of these cases. The U.S. District Court for the Central District was not persuaded by the defendant’s shopworn argument:

Plaintiffs’ claims concerning the arbitration provision, cancellation policies, and advertising practices do not raise a federal question and are thus appropriate claims under state law. These claims do not concern T-Mobile’s rates, but rather attack certain aspects of the agreement between subscriber and service provider.

*Id.* at \*9.

Thus, the great weight of legal authority establishes (1) that ETFs are not “rates charged” within the meaning of § 332(c)(3)(A); (2) that state-law challenges to ETFs based on state contract, tort and consumer protection laws are not preempted by § 332(c)(3)(A); and (3) that the statute must be given a narrow interpretation consistent with its limited language and purpose.

**2. The Authorities Cited by Petitioners in Support of Preemption Are Insubstantial, Procedurally Flawed, Unpersuasive and Inapposite**

In contrast to the weight of judicial authority that supports the view that ETFs are not “rates” and that claims challenging ETFs are not preempted, the authority that Petitioners muster in support of the proposition that ETF claims are preempted is pitifully insubstantial. In only a

tiny handful of cases has a court held that an ETF is a “rate” or that a claim challenging it is preempted by § 332. Even these few cases are so fraught with substantive and procedural defects that they have no precedential value at all. Indeed, almost without exception, the only cases in which any court has decided this issue in the industry’s favor are cases in which the subscriber who was challenging the ETFs either failed to show up in court or didn’t file any papers in opposition to preemption. Moreover, even if these cases had some persuasive force – which they do not – they still would not help Petitioners, because none of these cases extends the scope of preemption under § 332 as far as Petitioners are urging the Commission to do: The cases, at most, hold only that a particular ETF of a particular carrier is a “rate,” based on a particular factual record, and that a particular claim challenging that ETF is preempted. But Petitioners urge the Commission to hold that every ETF, of whatsoever kind or character, is a “rate,” and that every state-law case that challenges an ETF in any way is preempted as a matter of law. No case has so held.

a. *The Consumer Justice Case*

Petitioners cite to a brief, unpublished order of a Court Commissioner in the Los Angeles County Superior Court in the case of *Consumer Justice Foundation v. Pacific Bell Telephone Co.* (Los Angeles County Super. No. BC214554, July 29, 2002), granting Cingular’s motion for summary judgment on the issue of preemption.<sup>11</sup> However, the precedential value of *Consumer Justice* case could not possibly be weaker:

- First, Cingular’s motion for summary judgment on the preemption issue in *Consumer Justice* was unopposed. As the *Consumer Justice* decision itself makes clear, the plaintiff and its counsel in that action elected not to present a factual record to the court in opposing Cingular’s motion for summary judgment. Rather, plaintiff rested upon the declaration of its attorney that Cingular had stipulated to the inapplicability of the affirmative defense of federal preemption. Accordingly, the plaintiff submitted nothing in response to Cingular’s

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<sup>11</sup> A copy of the *Consumer Justice* opinion is attached hereto as Exhibit I.

motion for summary judgment – no briefs, no evidence and no argument. Thus, the court in that case was never made aware of any of the authorities cited above that hold that ETF claims are not preempted. Nor did the Court see even a speck of evidence to rebut the self-serving declaration that Cingular submitted in support of its preemption argument.

- Second, the case was decided by a *court commissioner*, a court employee hired to perform “subordinate judicial duties” in the California courts (Cal. Constitution, Article VI, § 22); and

-Third, because the decisions of trial courts – even those made by judges instead of commissioners – cannot be cited under California law,<sup>12</sup> *Consumer Justice* is not even citable precedent.

Accordingly, in citing *Consumer Justice* and suggesting that it represents substantive and favorable authority in support of their preemption argument, Petitioners are being less than candid with the Commission. They should not have cited that case and the Commission should give it no weight.

*b.      The Redfern and Chandler Cases*

The other court cases that Petitioners cite are equally threadbare. Exactly two federal cases have found that state law claims attacking ETFs are preempted by § 332(c)(3)(A) – *Redfern v AT&T Wireless*, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. 2003) and *Chandler v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill., July 21, 2004). Both decisions were issued by the same district court judge in the Southern District of Illinois. In both cases, as in *Consumer Justice*, the preemption issue was decided in a questionable procedural posture. Both rulings are perfunctory and largely devoid of analysis. Both egregiously misinterpret § 332. But even apart from these deficiencies, neither *Redfern* nor *Chandler* can even be cited for the proposition that ETF claims are preempted as a matter of law, because both cases conflict with another decision

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<sup>12</sup> *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1669 (2003); *Santa Ana Hospital v. Superior Court*, 56 Cal.App.4th 819, 831 (1997); B. Witkin, *Cal. Procedure* (3d ed.), “Appeal,” §922, 2003 Supp. at 260.

made by the same judge, on a different record with respect to a different defendant, holding that claims challenging that defendant's ETFs were not preempted.

In *Redfern*, the plaintiff's counsel failed to show up for the hearing, a circumstance that the Court pointedly mentioned in its one-paragraph opinion. *Redfern, supra*, 2003 U.S. Dist. LEXIS 25745 at \*1-\*2. Defendant AT&T presented the declaration of Michael Attiyeh, its Director of Product Marketing (the same person who provided a declaration in the *Phillips* case), stating that its ETF directly correlated with, and was an integral part of, the rates charged by defendant for its services. The declaration represented that rates offered on contracts for a specified term were lower than rates on contracts with no term because the ETFs "secure[d] a projected earning." The declaration noted that prepaid contracts did not include an ETF and that, consequently, rates for prepaid service were higher per minute than rates under a contract for a specified term.

The court found that the ETF "affected" the rates charged for wireless services. The Court interpreted the phrase "rates charged" under § 332 to mean anything that affected rates. The Court concluded that because ETFs affected rates, the plaintiff's challenge to AT&T's ETF was completely preempted by federal law. *Id.* at \*2-\*3.

In reaching the conclusion that ETFs are rates because they affect rates, the *Redfern* court relied on the Seventh Circuit's decision in *Bastien v. AT&T Wireless Services* (7th Cir. 2000) 205 F.3d 983, 986. *Bastien* is not authority for this proposition – it did not concern ETFs at all.<sup>13</sup> But if *Bastien* was ever authority on this point, it has been superseded, or at least severely limited, by the Seventh Circuit's subsequent decision in *Fedor, supra*. See *Murray v. Motorola, Inc.* 327 F.Supp.2d 554, 565 (D. Md. 2004). Under *Fedor*, garden variety contract and tort claims, even when they relate to the imposition of rates, are not preempted – only direct state

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<sup>13</sup> In *Bastien*, the plaintiff complained that AWS had entered the Chicago market before it had built an adequate network to provide quality service in that market. 205 F.3d at 989. The court held *Bastien*'s claims preempted because "These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T may begin offering service in the Chicago market." *Id.*

regulation of rates is precluded. Significantly, the allegedly illicit charges challenged in *Fedor* affected costs and revenues in the same way as ETFs do. Yet, the Seventh Circuit allowed the plaintiff's claim that they had been unlawfully charged to go forward. Accordingly, any vitality that *Redfern* – or *Bastien* -- may have had with respect to whether ETFs are “rates” under § 332 has been blunted by the subsequent appellate decision in *Fedor*.

*Chandler v. AT&T*, like *Redfern*, is a frail reed. In *Chandler*, as in *Redfern*, plaintiff challenged AT&T Wireless's ETF as an invalid liquidated damages provision. The case was assigned to District Judge G. Patrick Murphy, the same judge that had decided *Redfern*, who once again rendered a perfunctory opinion. In his brief order refusing to remand the case, Judge Murphy noted that AT&T had made “the same arguments ... as it did in *Redfern*.” 2004 U.S. Dist. LEXIS 14884 at \*3. Not surprisingly, the judge endorsed the same conclusion that he had reached in *Redfern*. He cited to AT&T's showing that the prepaid service plans that AT&T offered charged higher rates than AT&T's term plans, because those plans did not have ETF provisions, and, in reliance thereon, held that AT&T's ETF was “directly connected to” the rates charged for mobile services. *Id.* at \*4-\*5. Judge Murphy held that § 332(c)(3)(A) completely preempted any state law claims affecting a cellular provider's rates or market entry. Because Judge Murphy found that ETFs “affected” AT&T's rates, it held that § 332 preempted the plaintiff's legal challenge to AT&T's ETFs.

However, neither *Redfern* nor *Chandler* can be cited for the proposition that the ETFs of every carrier under all circumstances are “rates charged” as a matter of law – the proposition that Petitioners are now urging the Commission to endorse – because those decisions were based on the particular facts and factual record that was before the Court on plaintiffs' motions for remand. Indeed, Judge Murphy also decided a third case arising from claims challenging ETFs, *Kinkel v. Cingular Wireless*, Case No. 02-999-GPM (S.D. Ill. 2002).<sup>14</sup> In *Kinkel*, Judge Murphy determined that Cingular's ETFs were not “rates charged” under § 332, and that the claims

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<sup>14</sup> CTIA has attached a copy of the Slip Opinion in *Kinkel* to its Petition as Exhibit G thereto.

challenging them were not preempted. *Id.* at 4. Thus, *Redfern* and *Chandler*, at most, stand for the proposition that some ETFs are “rates charged” under § 332, and that some claims challenging ETFs are preempted by the statute. Whether or not a particular ETF is a “rate” under the statute, these cases suggest, depends on the facts relating to the particular ETF and the wireless company that imposed it. The marshaling and evaluation of facts of this sort and the rendering of judgment thereon is a role for the court to perform on a case-by-case basis. It is not a matter that can be determined by the Commission in formulating a blanket rule for the entire industry.

### **3. Other Cases Cited by Petitioners**

In *Consumer Justice*, *Redfern* and *Chandler*, despite the questionable circumstances surrounding the decisions in those cases, the courts at least directly addressed whether ETFs are “rates charged” under § 332. However, in the other cases cited by Petitioners, *Aubrey v. Ameritech Mobile Comm., Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 17, 2002), *Gilmore v. Southwestern Bell*, 156 F. Supp. 2d 916 (N.D. Ill. 2001), and the unreported case of *Simons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. April 11, 1996), the courts did not decide this question. In *Aubrey*, a case focused largely on whether the defendant’s decision to change its technology from CDMA to TDMA was immune from attack under state law, the Court assumed without discussion that the defendant’s termination charge was a “rate.”<sup>15</sup>

In *Simons*, a 1996 decision, Texas plaintiffs in a nationwide class action, alleged that the ETF liquidated damages provision was void because it was a penalty, and therefore punitive under 47 U.S.C. § 206 and unreasonable under 47 U.S.C. § 201(b). The Court held that all state law claims related to the field of rate regulation are completely preempted by Section 332(c)(3)(a) and Texas law as a standard for unreasonable practices under Section 201(b) is irrelevant. The Court further stated that if federal law completely preempts a state law claim, any complaint that comes within the scope of the federal cause of action necessarily arises under

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<sup>15</sup> Apparently, the plaintiff also made that assumption. *Aubrey*, at \*4.

federal law. The Court found that the efforts of plaintiffs to “nationalize” the Texas common law of liquidated damages into the Federal Communications Act was improper. *Simons* has no application because the plaintiffs filed their claim under federal law, not state law, and the Court wrongly found “complete preemption,” which precluded the applications of state contract law, a position in the Commission has rejected in its *Southwestern Bell Mobile and Wireless Consumer Alliance* decisions.

Finally, the claim in *Gilmore* had nothing to do with ETFs. The charge in question in *Gilmore* was the commencement in 1995 of a Corporate Account Administration Fee that was imposed on every subscriber every month in connection with the provision of service – a far cry from ETFs, which wireless companies impose only when service terminates. Thus, *Gilmore* is distinguishable on its facts.

There, the plaintiff complained that he did not agree in the contract to pay higher rates for cellular service or to pay additional fees for which no significant additional goods or services were rendered. The Court found that plaintiff’s contract allegations explicitly raised the issue of whether plaintiffs received sufficient services in return for the added fee. The Court found that this presented a “rate issue,” citing *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), a filed rate doctrine case, and *Bastien*. The Commission has acknowledged in *Wireless Consumers Alliance* that the “rationale” of “filed rate doctrine” cases should not apply in CMRS cases. 15 FCC Rcd 17021 at ¶¶ 15-22. The Court further stated that the claim that the plaintiff should not pay this fee because he did not agree to pay the fee is a challenge to the appropriateness of the fee, and therefore, a rate challenge that falls within the purview of Section 201(b).

*Gilmore* was effectively overruled by the subsequent opinion of the Seventh Circuit in *Fedor*, recognizing that state law contract and tort claims “are preserved for the states under § 332 as the ‘terms and conditions’ of commercial mobile services.” *Fedor, supra*, 355 F.3d at

1074.<sup>16</sup> The Court in fact held that the plaintiff's claims addressed not the rates themselves, but the conduct of Cingular in breaching the contract by failing to adhere to agreed upon rates.

*Id.* This is precisely what happened in *Gilmore*. The carrier added a fee which the plaintiff had not agreed contractually to pay.

In sum, none of the cases cited by Petitioners support the proposition that all ETFs are “rates charged,” or that claims challenging ETFs are preempted as a matter of law. Indeed, there is not a single case that so holds. But, as we have shown above, there are many, many cases that hold that ETFs, as a matter of law, never qualify as “rates charged” under § 332. Accordingly, in advocating that the Commission adopt a blanket rule that ETFs are immunized from attack under § 332, Petitioners are, to put it mildly, swimming against a strong tide of adverse judicial authority.

**E. The Commission's Decisions Strongly Support the Conclusion that ETFs Are Not “Rates Charged” and that § 332(c)(3)(A) Does Not Preempt Claims Challenging Them**

Petitioners mischaracterize the prior decisions rendered by the Commission in arguing that those decisions support their expansive vision of the preemptive power of § 332. Contrary to Petitioners' contention, the Commission has interpreted the preemption provision of § 332 with appropriate caution. The Commission has never held that ETFs are “rates charged” under § 332 or that state-law contract or tort claims challenging ETFs are preempted.

As the Commission observed in its Order implementing the 1993 amendments to § 332, Congress amended § 332 to promote competition in the wireless telecommunications marketplace. *In re Implementation of Sections 3(n) and 332 of the Communications Act* (1994) 9 FCC Rcd 1411 at ¶15. The amendment was designed to serve the interests of consumers while benefiting the U.S. economy. *Id.* At the same time, the Commission recognized that states have

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<sup>16</sup> Moreover, *Gilmore* was based on the premise that the preemptive force of § 332 was so strong as to supply federal jurisdiction under the doctrine of “complete preemption,” even where the only claims asserted are state-law claims. This conclusion has been rejected by a majority of courts. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp. 2d 838, 850 (W.D. Mo. 2004), *aff'd* 396 F.3d 922 (8<sup>th</sup> Cir. 2005).

a legitimate interest in protecting the interests of telecommunications users residing within their jurisdiction. *Id.* at ¶23.

As discussed above, the Petitioners' argument is essentially that because ETFs affect wireless carriers' costs and revenues, they affect rates, and that because they affect rates, they are rates for purposes of the statute. In decisions interpreting § 332, the Commission has repeatedly rejected this reasoning. In *Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1737, 1745 (1997), the Commission held that the "rates charged" language in § 332 only prohibits states from prescribing, setting or fixing rates of wireless telephone providers. The Commission stated:

The Commission has found the 'rates charged by' language to prohibit states from prescribing, setting, or fixing rates of CMRS providers. We have not found, however, that it preempts state authority over matters which may have an impact on the costs of doing business for a CMRS operator."

*Id.* at ¶ 20 (emphasis added).

In affirming the FCC's decision in *Pittencrieff*, the D.C. Circuit agreed. *CTIA v. FCC* 168 F.3d 1332 (D.C. Cir. 1999). The parties appealing from the *Pittencrieff* decision argued that a Texas law requiring wireless carriers to contribute money to a "universal service" fund was impermissible rate regulation because it increased the wireless service providers' cost of doing business in the state. However, the Court concluded that equating state action that may increase the cost of business with rate regulation would forbid nearly all forms of state regulation, a result at odds with the "other terms and conditions" specifically excluded from preemption by the statute. *Id.* at 1336.

Although petitioners cite *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19901 at ¶ 7 (1999) as support for their expansive vision of the preemption provisions of § 332(c)(3)(A), their reliance on that case is misplaced. In *Southwestern Bell*, the Commission expressly recognized and reinforced the statutory provision explicitly recognizing that state-law claims challenging "terms and conditions" are not preempted:

Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness per se of the rates or rate structures of CMRS providers. On the other hand, Section 332(c)(3)(A) provides an exception for state regulation of "the other terms and conditions of commercial mobile service." The House Report on the Omnibus Budget Reconciliation Act of 1993, in which the amended language in Section 332 was enacted, states that, "[by] 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . ." Courts considering the issue so far have held that Section 332(c)(3)(A) does not preempt complaints that do not allege that billing practices of CMRS providers are unlawful per se, but challenge the implementation of these practices on grounds of breach of contract, consumer fraud, or false advertising.

*Id.* at ¶ 7 (internal footnotes omitted).

In *Southwestern Bell*, the Commission responded to a wireless carrier's request that it acknowledge that there is a Congressional and Commission preference that the wireless industry be governed by competitive forces rather than governmental regulation, and, based thereon, that it announce a general rule exempting carriers from the operation of state contractual and consumer laws. The Commission agreed with the general pro-competition principle but held that § 332 did not exempt wireless carriers from state contract and consumer laws governing their operation:

We agree that, as a matter of Congressional and Commission policy, there is a "general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation," and we grant Southwestern's petition in this respect.

We condition our ruling, however, in the context of an evolving CMRS market. In the same Commission order quoted by petitioner in support of the principle that there is a general preference for competitive forces over regulation, the Commission also emphasized that:

. . . [W]e do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied.

As discussed in paragraphs 6 and 7 above, Congress has explicitly permitted regulation of "the other terms and conditions of commercial mobile service" by the states. We therefore do not agree with the arguments of Southwestern or

CMRS provider commenters to the extent that they imply that such preference for competition over regulation results in a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws

*Id.* at ¶¶ 9-10 (emphasis added; internal citations and footnotes omitted).

The Commission struck another blow against the industry’s attempt to expand § 332(c)(3)(A) beyond its proper bounds in *Wireless Consumers Alliance, Inc., supra*. In *Wireless Consumers Alliance*, the FCC held that § 332 does not generally preempt the award of monetary relief by state courts based on state tort, contract or consumer protection claims. The industry argued, as it does here, that the award of monetary relief by a court should be preempted because it could affect rates and could amount to retroactive ratemaking, relying on authorities decided in under the “filed rate doctrine.” However, the Commission emphatically rejected that view. The Commission held that since there are no longer filed rates for wireless service, the analysis and logic of “filed-rate” cases is inapplicable in cases dealing with § 332. *Id.* at ¶ 19. Accordingly, the Commission held that the mere award of monetary relief does not amount to either retroactive or prospective ratemaking, even where rates are involved. Thus, the Commission stated:

...[W]e agree with commenters that there is no necessary correspondence between the indirect effect that monetary liability may have on a company’s behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior. For example, if a company is found monetarily liable for false advertising, it will presumably alter its advertising. The impact on its prices and other behavior, however, is uncertain. The indirect and uncertain effects of monetary damage awards based on tort and contract law do not correspond to the mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities.

In addition, ... tort and contract law have the additional and separate function of compensating victims, which sets them apart from direct forms of regulation.... We agree with those commenters who contend that § 332 was designed to promote the CMRS industry’s reliance on competitive markets in which private agreements and other contract principles can be enforced. It follows that, if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts. We also agree with commenters who assert that enforcement of such laws through a monetary remedy is compatible with a free market....[T]hese duties fall no more heavily on CMRS providers than on any other business.

*Wireless Consumers Alliance, supra*, 15 FCC Rcd 17021 at ¶¶ 23-24 (emphasis added).

The relief that Petitioners seek is inconsistent with the principles announced in these decisions:

- Petitioners ask the Commission, in effect, to overrule *Pittencrieff*'s holding that the rate-related preemption of § 332 extends beyond the prohibition of state actions prescribing, setting, or fixing rates and preempts even state laws which only “have an impact on the costs of doing business for a CMRS operator.”

- They request the Commission to abrogate the limitations in *Southwestern Bell* and extend an immunity to wireless carriers from state laws governing the validity and enforceability of contracts and contractual provisions and liquidated damages provisions.

- Moreover, they ask the Commission to abandon its holding in *Wireless Consumers Alliance* and instead to adopt a rule that § 332 preempts the award of damages or other monetary relief pursuant to state contract and consumer fraud laws.

Petitioners focus on statements in ¶ 25 of *Wireless Consumers Alliance*, to the effect that § 332 would preempt any effort by a court to determine whether a “price charged for a CMRS service” is reasonable or to set a “prospective price for CMRS service.” They argue that ETFs are part of the “prices” they charge and that any legal analysis performed by a court to determine whether an ETF is an appropriate liquidated damages clause will necessarily involve an analysis of the reasonableness of the ETF. Accordingly, they argue, any liquidated damages analysis would be preempted, as would any order granting injunctive relief regarding ETFs. However, this argument is without merit.

First, from the context of the Commission’s comments in ¶ 25 of *Wireless Consumers Alliance*, it is apparent that the Commission used the phrase “price charged for CMRS service” as a synonym for “rate.” Indeed, under § 332, if the Commission meant that phrase to mean anything other than “rate,” the statements made in ¶ 25 would make no sense, and certainly would not be consistent with or authorized by § 332. The statute doesn’t mention “prices” – it refers only to “rates.” Therefore, what the Commission said in ¶ 25 is that a court injunction

forbidding a wireless carrier to charge “rates” would run afoul of § 332, and that a claim requiring the analysis of the reasonableness of “rates” would be preempted. But ETFs are not “rates,” and they are not “prices charged for CMRS service.” Instead, they are charges imposed upon the termination of service as liquidated damages for an alleged breach of contract. Accordingly, ¶ 25 of *Wireless Consumers Alliance* does not support Petitioners’ request for relief.

Furthermore, the assumption that a liquidated damages claim will automatically devolve into a determination of the “reasonableness” of “rates” is not accurate. Thus, under the relevant California statute, a liquidated damages clause in a consumer contract is void unless all of the following are true: (1) the parties to the contract have agreed on the amount, (2) from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage; *and* (3) the amount set as liquidated damages represents the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. Cal. Civil Code § 1671(d); *Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal. 4th 970 (1998). The first two prongs of the statutory test do not involve any determination of the reasonableness of anything. Accordingly, because a liquidated damages case could be decided on either of these two tests, there is no preemption even under Petitioners’ analysis.

Moreover, although the word “reasonable” appears in the third prong of the liquidated damages test, that word has nothing to do with the reasonableness of any rate. Rather, it requires that a liquidated damages amount, to be valid under California law, represent a reasonable endeavor to estimate the non-breaching party’s damages. In other words, reasonableness is only considered in relation to anticipated damages. The type of reasonableness inquiry that would be a part of any regulatory ratemaking is completely absent from the analysis. There is a profound difference between a regulatory effort to determine the reasonableness of rates and a court’s inquiry into whether a liquidated damages provision represents a reasonable effort by the contracting parties to fix compensation for the non-breaching party’s losses. Thus, CTIA completely mischaracterizes the nature of the liquidated damages analysis that a court would

conduct when it represents that “[the] courts must, in essence, conduct the equivalent of a regulatory rate investigation into wireless carriers’ rate structures” (CTIA Petition at 7) to evaluate whether the ETFs pass muster under state liquidated damages and consumer protection laws. The courts are not required to, and they are not going to, conduct the equivalent of a regulatory rate investigation into wireless carriers’ rate structures to rule on the state court claims.

CTIA is correct in asserting that pending ETF lawsuits seek to abolish the use of ETFs as an unlawful penalty under state laws that are nearly identical throughout the 50 states. The ETF is a liquidated damages clause, as admitted by most wireless carriers. However, a liquidated damages clause is lawful only when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages.

The ETF cases contend that the ETF, as a liquidated damages clause, is an unlawful penalty because actual damages can be ascertained without great difficulty for a breach of contract claim for early termination. In *Hall, supra*, the Court’s order granting plaintiff’s motion for class certification acknowledged that Sprint was capable of calculating with remarkable specificity the actual damages sustained in the event of early termination. *See Hall v. Sprint Spectrum, L.P.*, State of Illinois, Third Judicial Circuit, Case No. 04L113 (May 20, 2005), attached hereto as Exhibit J. In the Verizon cross-complaint filed in the California ETF cases, Verizon has acknowledged that it can determine its actual damages sustained as a result of early termination. *See* Exhibit F hereto.

CTIA frivolously argues that the loss of ETFs would cause the rates of wireless carriers to increase. This argument ignores that statement made at page 25 of CTIA’s petition: “Even if the service change is a void liquidated damage, [the non-breaching party] is still entitled to recover its actual damages.” In fact, Verizon’s cross-complaint in the California ETF cases is an effort to do just that – recover actual damages for early termination in a breach of contract action.

Historically, wireless carriers have collected less than 50% of the ETFs assessed against their customers by way of voluntary payments by the customers. To collect the remainder of the

ETFs, the wireless carriers are relegated to a breach of contract action against their customers for early termination. Wireless carriers can easily replace the ETF approach to a customer's breach of contract by billing the offending customer for the amount of actual damages caused by early termination. Just like the ETF approach, to the extent its offending customer refused to pay the billing voluntarily, the wireless carrier could then sue for breach of contract. Thus, it is readily apparent that wireless carriers will lose little or no revenue if they are forced to abandon their ETF approach to breach of contract claims.

**F. Petitioners' Policy Arguments Are Neither Relevant Nor Persuasive**

In advocating that § 332 should be interpreted to preempt any and all claims challenging ETFs, Petitioners appear to rely principally on arguments based not on law but on considerations of "policy." Thus, they assert that certain of the industry's current business practices, involving term contracts, handset subsidies and "discounted" monthly service charges, are good for the industry and the public. They argue that if a court were to uphold any state-law challenge to an ETF of any kind or character whatsoever, that would necessarily destroy these supposedly beneficial business practices. Furthermore, they contend that the industry's ability to operate in a uniform manner in all states is critical to consumer welfare. Any state-law judgment requiring changes to carriers' practices with respect to ETFs, they urge, would eliminate any possibility of uniformity and create a regulatory patchwork that would harm the public.

These policy arguments are improper in the context of this proceeding. The Commission's task herein is to interpret an Act of Congress. The resolution of this proceeding turns on law, not policy. The Commission is simply not free to superimpose its own policy determinations on § 332. Congress has already weighed all of the relevant policy considerations, and Congress has made all of the policy choices. They are reflected in the language of § 332, as that statute has been interpreted by courts throughout the United States. Petitioners' policy arguments about whether handset subsidies or "discounted monthly rates" are good for the public or whether it is a desirable goal to foster national uniformity of wireless terms and conditions are

irrelevant. Petitioners are in the wrong forum – they should be before Congress, trying to change § 332, not before this Commission, asking the agency to adopt an interpretation of the statute that the statute clearly will not bear.

But even if the Commission were to consider Petitioners’ policy arguments, those arguments have no validity. Congress enacted § 332, among other things, to eliminate state tariff-based regulation of intrastate rates for wireless service (*Spielholz v. Superior Court, supra*, 86 Cal.App.4<sup>th</sup> at 1373), and to implement a preference that competition rather than regulation govern the marketplace for wireless service. *In re Southwestern Bell Mobile Systems, Inc., supra*, 14 FCC Rcd 19898 at ¶¶ 9-10. A ruling preempting all challenges to ETFs would be at odds with the pro-competitive, pro-marketplace rationale of the statute because the carriers’ ETFs are anti-competitive in motivation and effect. Their avowed and explicit purpose is to deter “churn” – that is, to prevent customers from switching carriers.<sup>17</sup> As the Commission observed in *In the Matter of Telephone Number Portability*, 18 FCC Recd 20971, 20976 (2003),

Preventing carriers from imposing restrictions on porting will benefit consumers by preventing carriers from establishing barriers to competitive switching. With customers able to switch more freely among carriers, competitive pressure will encourage carriers to compete for customers by offering lower prices and new services.

The same thing is true of ETFs. In the absence of preemption, federal and state courts would be free to require carriers to implement changes to bring their termination practices into compliance with state laws regarding unfair and deceptive business practices and liquidated damages by abolishing ETFs or making them less onerous. Any changes of that nature would likely enable customers to “switch more freely among carriers,” and the resulting competitive

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<sup>17</sup> That consumers resent the restrictions that ETFs impose on their freedom is clear from Commission statistics, which reveal that ETFs are wildly unpopular. Each year, the Commission receives a substantial number of complaints about them, and the number is growing exponentially. Thus, in 2002, the agency received 1,610 complaints from members of the public about ETFs. By 2004, the number of such complaints had more than doubled, to 3,958. *See Summaries of Top Consumer Complaint Subjects Processed by the FCC’s Consumer and Governmental Affairs Bureau*, attached hereto as Exhibit K.

pressure will tend to drive prices down and encourage the development of new and better services.

Petitioners also argue that in the absence of preemption, the carriers might be subjected to the dictates of conflicting state laws, which would defeat the policy goal of nationwide uniformity in service offerings, terms of service and pricing. But that argument is fatuous. Indeed, the savings clauses – both the one included in § 332 and the general savings provision of 47 U.S.C. § 414 – explicitly contemplate that wireless carriers, just like General Motors, Wal-Mart and all other companies that do business nationally, are going to have to contend with requirements imposed by state law, and that these may differ somewhat from one state to the next. Indeed, the carriers are already coping with regional and local variations – pricing differs from market to market, and the selection of handsets and calling plans is not uniform throughout the country for each carrier.

Last year, three wireless carriers, Sprint, Cingular and Verizon, entered into a settlement with the attorneys general of 32 states that required those carriers' ETFs to be modified to allow termination within the first two weeks of service without any ETF penalty. See "Cell Phone Firms Agree to Consumer Rights," The Associated Press, July 21, 2004, attached hereto as Exhibit L. Thus the practices of those carriers may vary as between the 32 states covered by that settlement and the other 18 states that are not. Moreover, at least one company, Cingular, imposes different ETFs in different states – it employs flat-fee ETFs of \$150 in 39 states, but in nine states and parts of two others its ETFs are pro-rated, so that a subscriber pays \$20 for each month remaining on his contract at the time of early termination.<sup>18</sup> It is far from clear that enforcing uniformity is good for consumers, the industry or the public. As the settlement between the three carriers and the 32 state attorneys general demonstrates, allowing states to enforce their consumer laws can have beneficial effects.

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<sup>18</sup> See Cingular Plan Terms (attached hereto as Exhibit M), at 1 ("Early termination fee of \$240 prorated over the length of the service agreement applies to subscriptions in the following states: FL, GA, SC, NC, AL, KY, TN, LA, NY and parts of IN and NJ. A non-prorated \$150 early termination fee applies in all other Cingular areas.").

However, assuming *arguendo* that uniformity is a desirable goal, preemption of ETF claims won't achieve it, because, ironically, the law regarding liquidated damages – which underlies most of the pending class action suits challenging wireless carriers' ETFs – does not vary significantly from state to state. See U.C.C. § 2-718; see also California Uniform Commercial Code § 2718.

Finally, preempting suits brought under state contract and consumer protection laws would be counter-productive for the very simple reason that it would abrogate important and long-standing protections that state law affords to consumers and would potentially expose consumers to significant risk of harm. Individual state legislatures made the judgment long ago that their residents require protection from unfair and deceptive business practices and from improper liquidated damages clauses.<sup>19</sup> Absent statutory limitations, a business might be free to impose liquidated damages of \$1 million for breach of a \$100 contract – and if the contract were a contract of adhesion for the sale of a product or service that many customers found to be a necessity, the business might well be able to secure the agreement of many customers to a contract containing such a provision. The state legislatures determined that their citizens should be protected from those risks by declaring liquidated damages clauses in consumer contracts void unless they comply with statutory requirements. Assuming *arguendo* that the Commission can take into account considerations of “policy,” we submit that the legislative judgments that led to the enactment of these laws in all 50 states reflect pre-existing policy determinations to which the Commission must defer.

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<sup>19</sup> Thus, the California statute governing liquidated damages clauses, Civil Code § 1671, was first enacted in 1872.

### III. CONCLUSION

For the foregoing reasons, the relief requested by Petitioners should be denied.

Dated: August 5, 2005

Respectfully Submitted,

LAW OFFICES OF CARL B. HILLIARD  
CARL B. HILLIARD  
1246 Stratford Court  
Del Mar, Ca. 92014  
Telephone: (858) 509-2938  
Facsimile: (858) 509-2937

MILLER & VAN EATON, PLLC  
JAMES R. HOBSON  
1155 Connecticut Avenue N.W. · Suite 1000  
Washington, DC 20036  
Telephone: (202) 785-0600  
Fax: (202) 785-1234

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James R. Hobson

BRAMSON, PLUTZIK, MAHLER &  
BIRKHAUSER, LLP  
ALAN R. PLUTZIK  
L. TIMOTHY FISHER  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598  
Telephone: (925) 945-0200

FRANKLIN & FRANKLIN, P. C.  
J. DAVID FRANKLIN  
550 West "C" Street, Suite 950  
San Diego, CA 92101  
Telephone: (619) 239-6300

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor  
500 Seventh Avenue, 10th Floor  
New York, NY 10018  
Telephone: (212) 989-9113

FARUQI & FARUQI, LLP  
Adam Gonnelli  
320 East 39th Street  
New York, NY 10016  
Telephone: (212) 983-9330

GILMAN AND PASTOR, LLP  
David Pastor  
Stonehill Corporate Center  
999 Broadway, Suite 500  
Saugus, MA 01906  
Telephone: (781) 231-7850

LAW OFFICES OF ANTHONY A. FERRIGNO  
Anthony A. Ferrigno  
P.O. Box 5799  
San Clemente, CA 92674  
Telephone: (949) 366-9700

Counsel of Record for Respondents

# EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CARVER RANCHES WASHINGTON  
PARK, INC., on behalf of itself and all  
others similarly situated,

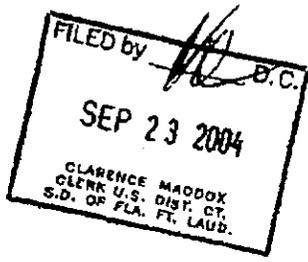
CASE NO. 04-80607-CIV-DIMITROULEAS

Plaintiffs,

vs.

NEXTEL SOUTH CORPORATION, d/b/a  
NEXTEL COMMUNICATIONS,

Defendant.



**FINAL JUDGMENT AND ORDER OF REMAND**

THIS CAUSE is before the Court on Plaintiff Carver Ranches' August 19, 2004 Motion to Remand [DE-9], and the Court having considered Defendant Nextel's August 30, 2004 Opposition [DE-12] Defendant Nextel's July 26, 2004 Supplemental Authority [DE-6] Plaintiff's September 10, 2004 Reply [DE-14] and Defendant's Request for Oral Argument herein filed September 22, 2004, finds as follows:

1. On May 17, 2004 Plaintiff filed a Class Action Complaint in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, alleging a violation of Florida's Deceptive and Unfair Trades Practices Act, Fla. Stat. § 501.201 et. seq. (FDUTPA). Plaintiff complains that agreements which require the possible payment of an early termination fee constitute a violation of FDUTPA.

2. On June 30, 2004 Nextel removed this case to federal court contending that the early termination fee is not a penalty but a rate and is therefore subject to complete federal preemption. See Bastien v. AT & T Wireless Services, Inc., 205 F. 3d 983, 990 (7th Cir. 2000).

3. Plaintiff has moved to remand this action to state court citing Smith v. GTE Corporation, 236 F. 3d 1292, 1312 (11th Cir. 2001) for the proposition that there is no indication that Congress intended to completely preempt state law in this federal act. See also Sapp v. AT & T Corp., 215 F. Supp. 1273, 1278 (M.D. Ala. 2002)(extending the rationale of Smith to cellular phones). The burden of establishing federal jurisdiction falls on the party seeking removal. Kokkonen v. Guardian Life Insurance Co. of America, 114 S. Ct. 1673 (1994).

4. Generally, a defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" City of Chicago v. International College of Surgeons, 118 S. Ct. 523, 529 (1997)(quoting 28 U.S.C. § 1441(a)). In determining whether removal is correct, thus, "propriety .... depends on whether the case originally could have been filed in federal court." Caterpillar Inc. v. Williams, 107 S. Ct. 2425, 2429-30 (1987). The Court is duty-bound to inquire into and resolve questions of its jurisdictional power, and the Court must remand any case in which it determines it lacks subject matter jurisdiction. See 28 U.S.C. § 1447. Typically, under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987)(citing Gully v. First National Bank, 57 S. Ct. 96 (1936)). A case is usually not removable "if the complaint does not affirmatively allege a federal claim." Beneficial National Bank v. Anderson, 123 S. Ct. 2058, 2062 (2003). Here, Plaintiff's complaint relies exclusively on state law and does not affirmatively allege any federal claim.

5. The doctrine of complete preemption is a narrow exception to the well-pleaded complaint rule. See Stern v. International Business Machine Corp., 326 F. 3d 1367, 1370-71

(11th Cir. 2003)(“the doctrine of complete preemption is extremely limited and has been found by the Supreme Court to exist in only two substantive contexts”)<sup>1</sup>. Complete preemption exists only when “the preemptive force of a statute is so ‘extraordinary’ that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.” Metropolitan Life Insurance Co. v. Taylor, 107 S. Ct. 1542, 1547.

Defendants assert that Plaintiff’s state law claims are completely preempted by the Federal Communications Act (“FCA”), 47 U.S.C. § 151 et seq. and its provisions that govern rates and suits based thereon. The Supreme Court has established that the central issue in determining if federal law completely preempts a state law claim is congressional intent. See Beneficial, 123 S. Ct. at 2064. Section 332 of the FCA prohibits states from regulating rates charged by commercial mobile service carriers. However, it is plain from the language of the FCA and has been determined by the Eleventh Circuit that state law is not completely preempted by the FCA. Congress provided in the FCA that “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 47 U.S.C. § 414. Citing this language, the Eleventh Circuit stated that “the existence of this type of ‘savings’ clause which contemplate[s] the application of state-law and the exercise of state-court jurisdiction to some degree ... counsels against conclusion that a purpose behind the ... Act was to replicate the unique preemptive force of the LMRA and ERISA.” Smith, 236 F. 3d at 1313 (quoting Blab T.V. of Mobile, Inc. v.

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<sup>1</sup>ERISA, Pilot Life Insurance Company v. Dedeaux, 107 S. Ct. 1549 (1987); and LMRA, Ayco Corporation v. Aero Lodge, 88 S. Ct. 1235 (1968), but also see Price-Anderson Act, El Paso Natural Gas Co. v. Neztasic, 119 S. Ct. 1430 (1999) and National Bank Act, Beneficial National Bank v. Anderson, 123 S. Ct. 2058 (2003).

Comcast Cable Communications, Inc., 182 F. 3d 851, 857-58 (11th Cir. 1999)). Numerous other district court decisions in cases asserting similar or identical claims have reached the same conclusion that the FCA does not completely preempt state law claims. Esquivel v. Southwestern Bell Mobile Systems, 920 F. Supp. 713, 715 (S.D. Tex. 1996); Lewis v. Nextel Communications, Inc., 281 F. Supp. 2d 1302 (N.D. Ala. 2003); Moriconi v. AT&T Wireless PCS, LLC, 280 F. Supp. 2d 867, 872-73 (E.D. Ark. 2003) but see Phillips v. AT&T Wireless, 2004 WL 1737385 (S.D. Ia. July 29, 2004) reconsideration denied 2004 WL 1968676 (S.D. Ia. Aug. 30, 2004).

6. Moreover, the court does not find that an early termination fee is a rate.

7. However, the law in this removal area is not so settled so as to warrant this court imposing costs and attorneys fees on Nextel.

According, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Removal [DE-9] is hereby **GRANTED**. This case is remanded to the Fifteenth Judicial Circuit of Florida.

2. Defendant's Motion for Oral Argument herein filed September 22, 2004 is hereby **DENIED**.

3. Plaintiff's request for attorneys fees and costs [DE-9-2] is hereby **DENIED**.

3. The Clerk shall take all necessary steps to effectuate this removal and close this

federal case.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida,  
this 22 day of September, 2004.

  
WILLIAM P. DIMITROULEAS  
United States District Judge

Copies furnished to:

Jayne A. Goldstein, Esquire  
Scott A. Bursor, Esquire  
Adam Gonnelli, Esquire  
David Poster, Esquire  
Alan R. Platzik, Esquire  
Clinton Richard Lasego, Esquire  
Michael R. Tien, Esquire  
Seamus C. Duffy, Esquire  
David Paul Ackerman, Esquire  
Janet T. Munn, Esquire

# EXHIBIT B

0223  
PL

**THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS**

Hall

Plaintiff

No. 04

vs.

Sprint

Defendant

Div. L

113

**ORDER**

Case called for hearing on Defendants' Motion to Dismiss. Parties present by counsel. Arguments heard. The court concludes that the ETFs are "other terms and conditions" related to the provision of Defendants' cellular service, and not a "rate." Accordingly, Defendants' Motion is denied.

Defendants shall answer the Complaint within 30 days. The parties shall submit an agreed to proposed scheduling order.

Timothy Sullivan  
for P

**FILED**

AUG 10 2004

CLERK OF CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

Hebert for Ds

Date 8/10/04

Nicholas M. [Signature]

Judge



# EXHIBIT C

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers

Decision 04-12-058; Investigation 02-06-003

California Public Utilities Commission

*2004 Cal. PUC LEXIS 577*

December 16, 2004, Dated; June 6, 2002, Filed

**PANEL:** [\*1] CARL W. WOOD, Commissioner; LORETTA M. LYNCH, Commissioner; GEOFFREY F. BROWN, Commissioner; SUSAN P. KENNEDY, Commissioner; MICHAEL R. PEEVEY, President

**OPINION: ORDER MODIFYING AND DENYING REHEARING OF DECISION (D.) 04-09-062**

## I. INTRODUCTION

Cingular Wireless ("Cingular") seeks rehearing of D.04-09-062 ("the Decision"), in which we determined that Cingular violated *Public Utilities Code sections 451, 702 and 2896*, n1 as well as D.95-04-028, and ordered Cingular to pay customer reparations and a penalty of \$ 12,140,000. These violations resulted from Cingular's practice of charging customers Early Termination Fees ("ETFs") without permitting a grace period to determine whether Cingular's service met the customer's needs, particularly during a period of time when Cingular conceded it experienced significant network capacity problems, and yet failed to disclose these capacity problems to potential customers. Cingular filed a timely application for rehearing of D.04-09-062 on October 29, 2004. Intervenor Utility Consumers' Action Network ("UCAN") filed a response [\*2] to Cingular's rehearing application on November 12, 2004. n2

n1 Unless otherwise noted, all statutory references are to the Public Utilities Code. n2 For a detailed discussion of the underlying factual background and procedural history of this investigation, see D.04-09-062, pp. 2-8.

We have reviewed all of the allegations raised in the rehearing application, and determine that cause does not exist for granting the application. However, we will modify D.04-09-062 to clarify that, upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents.

## II. DISCUSSION

In its rehearing application, Cingular challenges D.04-09-062 on the following grounds: 1) the Commission acted outside of its authority and jurisdiction; 2) the Decision is not supported by substantial evidence; 3) the Decision violates Cingular's due process rights and is unconstitutionally vague; 4) the Commission has selectively [\*3] prosecuted Cingular for violating prospective standards; 5) the penalty assessed against Cingular cannot be justified under controlling legal standards; 6) the Decision's conclusion that Cingular owes refunds to customers who paid an ETF is legally wrong; and 7) the Commission failed to bring an action under section 2104 to recover penalties. Cingular also requests oral argument on its rehearing application.

### A. Commission Authority and Jurisdiction

Cingular asserts that the Decision unlawfully regulates areas that are both expressly and impliedly preempted by federal law. (Rehearing App., pp. 5-15.) According to Cingular, our determination that Cingular's lack of a return policy violates section 451 amounts to rate regulation and is preempted (Rehearing App., pp. 10-13), and our findings on the sufficiency of Cingular's wireless network and the quality of service amount to entry regulation, which Cingular alleges is also preempted (Rehearing App., pp. 13-15). Cingular also asserts that the Decision's use of section 451 is unprecedented and unlawful, and that the Decision lacks precedent to support its use of section 451 to retroactively declare Cingular's ETF policy unjust and [\*4] unreasonable and impose fines and reparation obligations. (Rehearing App., pp. 15-23). Finally, Cingular claims that the Decision's application of section 2896(a) is unlawful. (Rehearing App., pp. 23-27.) These allegations of error lack merit.

Cingular first asserts that federal law preempts the actions taken by the Commission in D.04-09-062. (Rehearing App., pp. 5-10.) According to Cingular, "section 332(c)(3)(A) of the Communications Act [47 U.S.C. § 332 (c)(3)(A)] generally preempts state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." (Rehearing App., p. 8 (fn. omitted).) However, as noted in D.02-10-061, in which we denied Cingular's motion to dismiss the Order Instituting Investigation ("OII") in this proceeding, "the OII raises the kind of consumer protection matters that federal law permits the states to adjudicate. The OII neither expressly or impliedly seeks to regulate wireless rates or terms of entry." (D.02-10-061, p. 14.)

In D.04-10-013, n3 we recently rejected [\*5] arguments similar to Cingular's, in which wireless carriers argued that we exceeded our jurisdiction by intruding upon carrier decisions about the imposition of rates and by improperly restricting carriers' flexibility to establish rate structures and to choose when to impose fees on customers. (D.04-10-013, p. 4.) As to these arguments, we stated: "Section 332 is not so broadly construed. . . . States retain jurisdiction to regulate other terms and conditions' of wireless service. 47 U.S.C. § 332(c)(3)(A). This phrase has been broadly defined to include consumer protection matters and customer billing information." (*Id.*) We further noted that "several courts have limited section 332's reach to regulations that *directly and explicitly* control rates or prevent market entry." (*Id.* (emphasis in original), citing *Communications Telesystems Intern. v. CPUC* (9th Cir. 1999) 196 F.3d 1011, 1017; *Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366.) The Federal Communications Commission ("FCC") has also rejected carrier arguments that non-disclosure and consumer fraud claims [\*6] are in fact disguised attacks on the reasonableness of the rate charged for service, and the FCC rejected carrier claims that regulations that require an increase in operating costs had an impact on the rates charged, and thus were preempted. (See, e.g., D.04-10-013, p. 5; *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021 (Aug. 14, 2000) P 27 ("a carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service"); *In re Pittencrieff Communications, Inc.* 13 F.C.C.R. 1735 (Oct. 2, 1997), PP 15-18,20, 22.)

n3 D.04-10-013 modified and subsequently denied rehearing of D.04-05-057. D.04-05-057 adopted General Order 168, Rules Governing Telecommunications Consumer Protection, which are applicable to all Commission-regulated telecommunications utilities.

As to entry regulation, Cingular argues that "the Decision strays into areas reserved for [\*7] the exclusive jurisdiction of the FCC by seeking to regulate Cingular's entry into the California CMRS [Commercial Mobile Radio Services] market." (Rehearing App., p. 13.) However, as we noted in D.04-10-013, this argument misrepresents the scope of federal preemption of state regulation. (D.04-10-013, p. 6.) Cingular cites the United States Court of Appeals for the Seventh Circuit's decision in *Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983, for the proposition that states may not impose civil liability on wireless carriers for alleged network deficiencies because this would force carriers to do more than required by the FCC, thereby regulating carrier entry into the relevant state market. (Rehearing App., p. 14.) However, while referencing *Bastien* repeatedly in its rehearing application, Cingular fails to mention the Seventh Circuit's more recent decision in *Fedor v. Cingular Wireless* (7th Cir. 2004) 355 F.3d 1069, in which the Court determined that Cingular's claims regarding impermissible entry regulation lacked merit. (*Id.* at p. 1074.) The Court in *Fedor* [\*8] found that Cingular's argument "stretches the allegations of the complaint beyond recognition" and that, at most, Cingular would be required to either adjust its billing system or alter its contract. (*Id.*) The Court stated: "In other words, Cingular would have to conform its billing practices to the representation made in its contract." (*Id.*) The Court held that this does not constitute improper entry regulation.

In the present case, nothing in D.04-09-062 attempts to regulate either Cingular's rates or its entry into the California wireless service market. n4 The Decision does not prohibit Cingular from imposing ETFs; rather, the Decision determined that the "conditions under which Cingular imposed the ETF" resulted in an unjust rule and constituted unreasonable service. (D.04-09-062, p. 51.) We did not order Cingular to expand or improve its network infrastructure, and did not in any way bar Cingular's participation in the California wireless service market. Therefore, Cingular's assertions to the contrary lack merit.

n4 Cingular also suggests that the Decision imposes a "duty of self-disparagement in the marketplace," whereby Cingular is required to pronounce its own network "unreliable" or "poor" in order to comply with the Decision. (D.04-09-062, p. 15.) To the contrary, in accordance with California law, the Decision merely requires Cingular to provide honest, intelligible information to its customers regarding its service and network capabilities.

[\*9]

Cingular next asserts that the Commission improperly applied section 451 to its conduct, and that it had no notice that the Commission objected to ETFs or that the Commission considered the lack of a grace period to be an unreasonable practice. (Rehearing App., pp. 15-18.) Again, Cingular misunderstands the nature of our concerns about Cingular's conduct. In D.04-09-062, we made no finding that ETFs are unreasonable per se, or that the failure to offer customers a grace period is unreasonable per se. Rather, we determined that, given the totality of the circumstances, Cingular's practice of charging ETFs without permitting a grace period to determine whether Cingular's service met the customer's needs, particularly during a period of time when Cingular conceded it experienced significant network capacity problems, and yet failed to disclose these capacity problems to potential customers, was unreasonable. As the Decision notes, section 451's "reasonable service" requirement by necessity involves a fact-specific analysis, and "it is impossible to list or otherwise identify every utility action or omission that might fall afoul of § 451 and the law does not require the Commission to [\*10] do so." (D.04-09-062, pp. 74-75.)

Cingular next asserts that the Decision lacks precedent to support its use of section 451 to retroactively declare Cingular's ETF policy unjust and unreasonable and impose fines and reparation obligations. (Rehearing App., pp. 18-21.) However, as the Decision notes, the Commission has interpreted and applied section 451's reasonable service mandate in a variety of factual situations spanning several decades. (D.04-09-062, p. 49.) For example, utilizing section 451, we have required "that utilities provide accurate consumer information by a readily accessible means, refrain from misleading or potentially misleading marketing practices, and ensure their representatives assist customers by providing meaningful information about products and services." (See D.04-09-062, p. 49-50, fn. 31, and Commission decisions cited therein.) As noted above, because of the fact-specific nature of this inquiry, it is impossible to produce an exhaustive list of all conduct prohibited under section 451. However, given the relevant Commission precedent with respect to section 451, Cingular should not be surprised that its practice of imposing ETFs with no grace period, [\*11] particularly during a time of significant network capacity problems, and without informing potential customers of these network capacity problems, could run afoul of section 451.

Finally, Cingular claims that the Decision's application of section 2896(a) is unlawful because it retroactively imposes a disclosure requirement based on unstated standards for an imperfect technology. (Rehearing App., pp. 23-27.) Cingular asserts that the Decision punishes Cingular "under section 2896 because all wireless calls do not go through at all places." (*Id.* at p. 24.) This allegation of error lacks merit because the Decision in no way attempts to impose a standard of "perfection" in wireless service upon Cingular. Indeed, the Decision acknowledges that "wireless service cannot be guaranteed, given the physics of radio energy." (D.04-09-062, p. 81, Finding of Fact 16.) However, we also determined that Cingular, like all wireless carriers, "has detailed engineering information that can predict the likelihood of outdoor, in-vehicle and in-building coverage, typically with 95% accuracy." (*Id.*) We reasonably found that Cingular's failure to disclose known information about its network capacity [\*12] and coverage capabilities violated section 2896's requirement that consumers be provided sufficient information upon which to make informed choices among telecommunications services and providers.

Thus, Cingular's allegations of error regarding Commission jurisdiction, federal preemption, and the application of sections 451 and 2896 lack merit.

#### **B. Substantial Evidence**

Cingular next argues that the Decision is not supported by substantial evidence and that the record does not support a finding that Cingular violated section 451. (Rehearing App., pp. 27-37.) According to Cingular, the Decision lacks adequate findings to support a conclusion that Cingular's lack of a grace period was unjust and unreasonable (Rehearing App., pp. 29-31), and the Decision improperly relies on alleged complaints to conclude that a small number of complaints represented the general dissatisfaction of Cingular's customers (Rehearing App., pp. 31-37). Cingular further asserts that the record does not support a finding that Cingular violated section 2896 (Rehearing App., pp. 37-47), and the Decision's conclusion that Cingular experienced significant network problems throughout 2001 is not supported by substantial [\*13] evidence in light of the whole record (Rehearing App., pp. 37-43). Finally, Cingular claims that the Decision's conclusion that Cingular failed to disclose known network problems is not supported by substantial evidence. (Rehearing App., pp. 43-47.) These allegations of error lack merit.

In this proceeding, we weighed all of the evidence submitted by all parties, including Cingular, UCAN and the Commission's Consumer Protection and Safety Division ("CPSD"), in reaching our conclusion that Cingular's ETF policy, and in particular the imposition of ETFs with no grace period during a period of time when Cingular conceded it experienced significant network capacity problems, violated *Public Utilities Code sections 451, 702 and 2896*, as well as D.95-04-028. Over the course of more than two years, the Commission received and considered voluminous evidence and exhibits from all parties, held nine days of evidentiary hearings in April 2003, extended the deadline for resolving this proceeding in order to consider appeals by Cingular, CPSD and UCAN, and held oral argument [\*14] on these appeals on December 8, 2003. (D.04-09-062, p. 7.) In addition to considering the factual and legal arguments raised by the parties, the Commission also considered amicus curiae briefs filed by various utilities, wireless industry groups and consumer groups. (D.04-09-062, pp. 7-8.)

After considering all of the arguments and evidence submitted by the parties, we determined that Cingular's conduct and corporate operating practice with respect to the imposition of ETFs "objectively resulted in unjust and unreasonable customer service." (D.04-09-062, p. 75.) We found, and Cingular did not dispute, that Cingular and its agents imposed ETFs for early termination of contracts, without allowing a trial or grace period, despite the fact that Cingular acknowledged that using the phone was the most effective means of determining whether Cingular's service would meet a particular customer's needs. (D.04-09-062, pp. 75, 79, Finding of Fact 2.) Cingular also admitted during hearings that the "maps and brochures provided to customers who asked about coverage were actually rate area maps, not coverage maps, and did not accurately depict coverage." (D.04-09-062, p. 75.) Cingular's witnesses [\*15] further acknowledged that Cingular experienced problems with respect to the sufficiency of its network, particularly during 2001, and Cingular internal e-mail correspondence demonstrated that Cingular was aware that it had "NO excess capacity" and that "increasing sales would simply make an existing problem worse." (D.04-09-062, pp. 14-16.) We found that there was "no evidence that Cingular's sales representatives and agents were instructed to advise customers about known, major network problems," and customers complained that they were misled about local, as well as out-of-state, coverage and that Cingular sales personnel represented that certain "cities, towns, or even specific streets had coverage, when they did not." (D.04-09-062, pp. 22-23 & fn. 17; p. 79, Finding of Fact 4.) Finally, we found that CPSD investigators and customer witnesses provided "firsthand, verified statements and sworn testimony about problems with Cingular's service," and that these witnesses and their testimony were largely credible. (D.04-09-062, p. 80, Finding of Fact 11.)

Based upon all of the evidence received by the Commission over the course of more than two years, including the evidence and testimony [\*16] described above, we properly determined that Cingular's conduct violated sections 451 and 2896. As to section 451, we concluded that "from January 1, 2000 to April 30, 2002, Cingular's official no return/no refund/ETF policy constituted an unfair rule resulting in a corporate pattern and practice that failed to provide adequate, just, and reasonable service to customers, in violation of § 451 and D.95-04-028." (D.04-09-062, p. 82, Conclusion of Law 2.) We further found that "during 2001, Cingular's corporate pattern and practice of failing to disclose known network problems to customers resulted in a failure to provide adequate, just and reasonable service, in violation of § 451, 702, 2896 and D.95-04-028." (D.04-09-062, p. 82, Conclusion of Law 3.) These determinations are supported by substantial evidence in light of the entire record, and, accordingly, Cingular's allegations of error lack merit.

### **C. Due Process and Vagueness**

Cingular asserts that the Decision cannot withstand constitutional scrutiny because the Commission violated Cingular's due process rights by shifting the burden of proof to Cingular and because the Decision's imposition of standards (sections 2896 and 451) [\*17] are unconstitutionally vague. (Rehearing App., pp. 47-50.) These allegations of error lack merit.

Cingular first alleges that CPSD did not meet its burden of proof as to several key issues, and that the Commission improperly shifted to Cingular "the burden of disproving allegations and unfounded accusations." (Rehearing App., p. 48.) According to Cingular, the Commission erred in finding that "the limited complaint allegations lodged against Cingular" were "broadly symptomatic" of Cingular's practices and network quality. (*Id.*) Cingular further alleges that "the Decision tries to bridge an evidentiary gap by merely observing that the record is silent" as to certain issues, including whether the complaint allegations against Cingular were representative of the satisfaction level of Cingular's customers, how Cingular's network compared to other wireless carriers, and whether Cingular's network problems were "isolated and local." (*Id.*) Cingular claims that these various evidentiary issues amount to a denial of due process.

Cingular cites no case law in support of its allegation that it was denied due process by the Commission. n5 Cingular does cite to *Evidence Code section 500* [\*18] for the basic proposition that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." n6 (Rehearing App., p. 48.) Cingular also relies upon our decision in *Re Accutel Communications, Inc.*, D.02-07-034, which Cingular characterizes as standing for the proposition that allegations of widespread slamming cannot be inferred from a few customer complaints or from a carrier's inability to produce customer authorizations for changes in service. (Rehearing App., p. 48.)

n5 As the party seeking rehearing, Cingular has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See *Pub. Util. Code § 1732*; see also Rule 86.1; *Cal. Code Regs., Tit. 20, Sec. 86.1*.) n6 Rule 64 of the Commission's Rules of Practice and Procedure states: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." Section 1701 further provides that "all hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

[\*19]

The fundamental problem with Cingular's argument is that it consistently downplays both the volume and character of the evidence presented against Cingular during the course of the Commission's investigation. Over the course of more than two years, Cingular was given ample opportunity to present affirmative evidence related to its conduct and practices, and to cross-examine and rebut evidence submitted against it by both CPSD and UCAN. As noted above, the Commission received and considered extensive evidence from all parties, held nine days of evidentiary hearings, extended the deadline for resolving this proceeding in order to consider appeals by Cingular, CPSD and UCAN, and held oral argument on these appeals. (D.04-09-062, p. 7.) Customer complaints presented against Cingular came from numerous sources, including: 1) 49 verified customer complaints against Cingular; 2) over 1,000 informal complaints by letter or e-mail to the Commission's Consumer Affairs Bureau between January 1998 and October 2002; 3) UCAN's database of 22 verified and 52 unverified customer complaints; and 4) twelve customer complaints to the California Attorney General's Office. n7 (See D.04-09-062, pp. 35-44.) [\*20] We found that these customer complaints were "largely credible," and that in many instances Cingular's own evidence documented customer dissatisfaction with Cingular's network and service. n8 (D.04-09-062, pp. 80-81, Findings of Fact 11, 12.) We concluded that the record established by a preponderance of the evidence that Cingular's conduct violated sections 451, 702 and 2896, as well as D.95-04-028. (D.04-09-062, p. 82, Conclusions of Law 1-3.) We did not agree with Cingular's characterization of the complaint allegations as "limited." (Rehearing App., p. 48.) It is well-established that the Commission's factual findings will be upheld as long as they are reasonably supported by substantial evidence. (See, e.g., *Strumsky v. San Diego Co. Emp. Retirement Assn.* (1974) 11 Cal.3d 28, 35; *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187; *People v. Lane* (1956) 144 Cal.App.2d 87, 89.)

n7 The Decision assigns varying degrees of weight to different types of evidence. For example, the Decision notes that informal complaints should not be given the same weight as declarations or affidavits, and that unverified complaints are not afforded the same weight as sworn testimony. (D.04-09-062, pp. 42-44.) [\*21]

n8 The evaluation of witness credibility is a matter particularly for the trier of fact, and findings as to witness credibility will not be disturbed unless the testimony is incredible or inherently improbable. (See, e.g., *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 220; *Vessey & Co. v. Agricultural Labor Relations Bd.* (1989) 210 Cal.App.3d 629, 642.)

Cingular next alleges that the standards articulated in the Decision with respect to compliance with sections 2896 and 451 are unconstitutionally vague because "the standards fail to sufficiently state what conduct is either prohibited or required." (Rehearing App., p. 49.) This assertion lacks merit because the Commission properly interpreted and applied sections 2896 and 451 to Cingular's conduct, and this interpretation and application is not unconstitutionally vague.

Cingular cites several cases in support of its argument that the standards articulated in the Decision are unconstitutionally vague. (See, e.g., *In re Newbern* (1960) 53 Cal.2d 786, 792; [\*22] *A.B. Small Company v. American Sugar Refining Co.* (1925) 267 U.S. 233; *People v. Lopez* (1998) 66 Cal.App.4th 615, 630; *Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1032.) These cases stand for the general, and uncontroversial, proposition that statutes must be definite and specific enough to provide an intelligible standard of conduct for activities that are required or proscribed by law. In *Valiyee, supra*, the court found that the statute in question "easily" passed constitutional muster. The court noted that "reasonable certainty is all that is required," and stated that a statute is not vague if "any reasonable and practical construction can be given to its language." (*Valiyee, supra*, 74 Cal.App.4th at 1032 (citations omitted).) And in *Newbern, supra*, the court noted that the requirement of a reasonable degree of certainty in legislation is especially critical in the arena of criminal law. (*Newbern, supra*, 53 Cal.2d at 792.)

In the present case, the Commission was amply [\*23] justified in determining that Cingular's conduct violated sections 451 and 2896, and its interpretation of these statutes in D.04-09-062 was not impermissibly vague. It is well-settled that there is a strong presumption of the validity of Commission decisions, and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes. (*Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410.) As to section 451, we noted that this section requires that all public utilities not only charge just and reasonable rates, but also furnish and maintain adequate, efficient, just, and reasonable service necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. (D.04-09-062, p. 49.) Section 451 also requires the rules pertaining to service to the public to be just and reasonable. (*Id.*) We noted that, in decisions spanning several decades, the Commission has interpreted section 451's reasonable service mandate to require, for example, "that utilities provide accurate consumer information by a readily accessible [\*24] means, refrain from misleading or potentially misleading marketing practices, and ensure their representatives assist customers by providing meaningful information about products and services." (*Id.* (fn. omitted).) We expressly found that "the record in this proceeding establishes a corporate pattern and practice that resulted in unreasonable customer service in violation of § 451. . . ." (D.04-09-062, p. 50.)

As to section 2896, we stated that this section "requires all telephone corporations (including wireless carriers and resellers) to provide customers with sufficient information upon which to make informed choices among telecommunications services and providers." (D.04-09-062, p. 54, quoting section 2896(a).) We found that "the record on disclosure establishes that Cingular provided very little information to potential customers in its advertising or marketing materials, or via its sales agents, that could assist such customers in assessing Cingular's coverage and capacity capabilities." (D.04-09-062, p. 55.) In weighing the evidence against Cingular, including Cingular's inability to meet its own internal network measurement standards at times, we found that "Cingular's [\*25] coverage disclosures were insufficient to permit customers to make informed choices about whether to contract for its service." (D.04-09-062, p. 56, (fn. omitted).) We concluded that Cingular's conduct failed to meet "an objective interpretation of the duty owed to customers under § 2896(a)." (D.04-09-062, p. 56.)

It should be noted that Cingular does *not* allege that the plain language of sections 451 and 2896 is vague or ambiguous. Rather, according to Cingular, it is our interpretation of these sections that is impermissibly vague. However, given the unambiguous language of sections 451 and 2896, we properly determined that Cingular's conduct and practices resulted in unreasonable customer service and failed to provide sufficient information for customers to make informed choices about Cingular's service and network capabilities. Thus, Cingular's allegations regarding denial of due process and unconstitutional vagueness lack merit.

#### D. Selective Prosecution for Prospective Standards

Cingular next alleges that the Commission has selectively prosecuted Cingular for violating prospective standards. (Rehearing App., pp. 50-52.) According to Cingular, it is being singled out for [\*26] punishment by the Commission for conduct that was not significantly different from that of its competitors. This allegation of error lacks merit.

As a constitutional agency of the State of California, the Commission has broad discretion with respect to the exercise of its enforcement authority. (See California Constitution, Article XII; see also *Pub. Util. Code* § 701.) It is a general rule that state agencies have discretion to establish priorities in the use of limited agency resources, and that these agencies are better equipped than the courts to engage in the proper ordering of agency enforcement priorities. (See, e.g., *People v. Cimarusti* (1978) 81 Cal.App.3d 314, 323 (executive branch agencies and officials have discretion with respect to enforcement and disposition of charges in civil action involving imposition of civil penalties); *People v. Smith* (1975) 53 Cal.App.3d 655, 658.) Cingular cites no relevant authority for the proposition that we are required to convene an industry-wide proceeding involving all California wireless providers in order to address Cingular's improper [\*27] practices and conduct, and we are aware of no such authority.

In addition, Cingular's assertion that it was improperly targeted for Commission prosecution among similarly-situated California wireless providers is belied by record testimony demonstrating that Cingular was alone among its California competitors in its formal, written "no refund/no return" policy. (April 4, 2003 Hearing Transcript, 700:20-25.) Indeed, not only was Cingular's practice uncommon within the California wireless market, it was uncommon even as compared to Cingular's other service territories. (See D.04-09-062, p. 38 (noting that Cingular's other regions had more customer-friendly policies, with return periods varying from three days to 30); see also March 14, 2003 Reply Testimony of CPSD witness Maricarmen Caceres at p. 3, and Attachment 3 thereto (noting that Cingular's Western Region had by far the strictest return policy, permitting "no returns or refunds").)

As to the issue of whether D.04-09-062 creates "wholly new standards" and "retroactively" enforces them against Cingular, this allegation similarly lacks merit. (Rehearing App., p. 51.) As a telecommunications carrier licensed to provide wireless service [\*28] in California, Cingular is charged with notice of what conduct is prohibited under applicable statutes, regulations and Commission decisions. In addition, Cingular received actual notice from the Commission in the form of a September 2001 cease and desist letter, as well as the June 2002 issuance of the OII in this proceeding, that the Commission was receiving consumer complaints about its ETF policy, and that these complaints put at issue the legality of this practice. (D.04-09-062, p. 76.) Finally, the Commission, in numerous decisions dating back several decades, has made clear that section 451's reasonable service mandate requires utilities to provide accurate and meaningful product information to customers by a readily accessible means, and to refrain from misleading or potentially misleading marketing practices. (See D.04-09-062, pp. 49-50 & fn. 31.) As the Decision notes, Cingular's ETF policy was unjust, and therefore unreasonable, "because customers were unable to determine whether they would be able to use Cingular's wireless service in the ways they desired until they attempted to make or receive calls -- and no customer could do this without first signing a contract for [\*29] service" that included an ETF for cancellation of service before the expiration of the contract period. (D.04-09-062, p. 50.) Such application of section 451 is consistent with existing Commission precedent, as noted above, and we properly concluded that no utility "should expect to be insulated from the obligation to treat its customers fairly." (D.04-09-062, p. 76.)

Thus, Cingular's assertion that the Commission has selectively prosecuted Cingular for violating prospective standards lacks merit.

#### **E. Justification for \$ 12.14 Million Penalty**

Cingular claims that the \$ 12.14 million penalty cannot be justified under the controlling legal standards. (Rehearing App., pp. 52-59.) According to Cingular, we improperly applied the criteria articulated in D.98-12-075 in arriving at a penalty of \$ 12.14 million against Cingular. This allegation of error lacks merit.

In D.98-12-075, we outlined several factors to be considered in assessing fines against a public utility. These factors include the following: 1) the severity of the offense; 2) the conduct of the utility, including the utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the [\*30] violation; 3) the financial resources of the utility; 4) the totality of the circumstances in furtherance of the public interest; and 5) the role of precedent. (See D.98-12-075 (1998) 84 Cal.P.U.C.2d 155, 182-84.) We noted in D.98-12-075 that "it is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules," and that "the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance." (*Id.* at 168.)

Section 2107 authorizes the Commission to impose a penalty of \$ 500 to \$ 20,000 per offense for violations of state statutes and orders and decisions of the Commission. (D.04-09-062, pp. 61-62.) Section 2108 further provides that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense." (D.04-09-062, p. 62.)

In the present case, we properly considered all of the factors listed above in assessing \$ 12.14 million in fines against Cingular. (See D.04-09-062, pp. 61-66.) In terms of the severity of the offense, the Decision notes that the [\*31] "violations are extremely serious" and represent "an ongoing corporate practice that failed to provide adequate, just and reasonable service to customers. . . ." (D.04-09-062, p. 63.) We further found that "this corporate practice harmed a large number of customers, inconveniencing them all, causing monetary loss for many and obliging some to deal with collection and credit rating agencies." (*Id.*)

In terms of assessing the utility's conduct, including preventing, detecting, disclosing and rectifying the violations, we found that Cingular refused to acknowledge any wrongdoing and continued to insist "that it has done nothing wrong and that its network problems since 2000 constitute normal growing pains." (D.04-09-062, p. 64.) However, we also found that the evidence demonstrated that Cingular's drive to build market share in California "overshadowed its fundamental statutory duty to operate by just and reasonable rules in order to provide adequate, just and reasonable service." (*Id.*) Further, we were not persuaded by Cingular's argument that the fact that it would sometimes waive all or part of its ETF or offer service charge credits to dissatisfied customers adequately redressed [\*32] the harm its official ETF policy caused. (*Id.*) Thus, we concluded that Cingular failed to take affirmative steps to prevent, detect, disclose and rectify its numerous and repeated violations.

Regarding Cingular's revenues and financial resources, we found that there was no means to estimate what portion of Cingular's revenues during the relevant time period was attributable to its official ETF policy. (D.04-09-062, p. 64.) We were able to determine that some customers paid all or a portion of an ETF and that some customers "decided it would cost them less to pay monthly service charges until the contract term expired" than to pay the ETF. (*Id.* at pp. 64-65.) The record in this proceeding also reflected that Cingular reported corporate revenues of \$ 14.746 billion for year-end 2002, that Cingular had approximately 22 million customers at that time, and that Cingular's three million California customers constituted 14% of Cingular's customer base, and likely 14% of Cingular's revenues as well. (*Id.* at p. 65.)

Finally, we properly considered the totality of the circumstances and the role of precedent in assessing fines against Cingular. We considered several recent precedents [\*33] involving fines assessed against major telecommunications utilities, including *In re Qwest Communications*, D.02-10-059 (fine of \$ 20.34 million for slamming and cramming offenses), *In re Pacific Bell*, D.02-10-073 (fine of \$ 27 million for DSL billing and reporting errors), and *UCAN v. Pacific Bell*, D.01-09-058, limited rehearing D.02-02-027 (fine of \$ 15.225 million for misleading marketing tactics calculated at \$ 17,500 per day for each offense). In particular, we found that *UCAN v. Pacific Bell* provided a very useful precedent for establishing an appropriate fine for Cingular in this proceeding. (D.04-09-062, p. 66.) Pacific Bell's conduct in *UCAN v. Pacific Bell* was considered particularly egregious because it concerned the marketing of basic telephone services to captive residential customers, including immigrant and low income customers, and because Pacific Bell had been fined \$ 16.5 million by the Commission in 1986 for similar conduct. (*Id.*) Given that Cingular did not have a history of prior violations, we determined that a lower daily penalty was appropriate in this proceeding, and ordered Cingular to pay \$ 10,000 per day for the period from January [\*34] 1, 2000 to April 30, 2002 (849 days) due to Cingular's no return/no refund/ETF policy, and \$ 10,000 per day for the period from January 1, 2001 to December 31, 2001 (365 days) due to Cingular's failure to disclose known network problems to customers. (*Id.*; see also D.04-09-062, p. 82, Conclusions of Law 2-5.) Thus, a penalty of \$ 12.14 million was assessed against Cingular based on the totality of the circumstances. n9

n9 Both CPSD and Intervenor UCAN argued that the underlying record would support an increase in the \$ 12.14 million fine assessed against Cingular. (D.04-09-062, p. 72.)

Cingular clearly disagrees with our interpretation and assessment of the evidence presented against it as a justification for the imposition of fines. However, review of Commission decisions is generally limited to a determination of whether the agency's decision is supported under the substantial evidence test. (See *Strumsky, supra*, 11 Cal.3d at 35.) If the Commission's findings are based on inferences [\*35] reasonably drawn from the record, a

Commission decision is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed. (See, e.g., *Lorimore, supra*, 232 Cal.App.2d at 187; *Lane, supra*, 144 Cal.App.2d at 89.)

Given the weight of the evidence presented against Cingular, and considering all of the factors outlined in D.98-12-075 regarding the imposition of fines, we properly exercised our judgment and discretion in assessing \$ 12.14 million in fines against Cingular. Thus, Cingular's argument to the contrary lacks merit.

#### F. Refunds to Customers Who Paid ETFs

Cingular next asserts that the Decision's conclusion that Cingular owes refunds to customers who paid an ETF is legally wrong. (Rehearing App., pp. 59-63.) According to Cingular, the Decision's refund requirements amount to preempted rate regulation, are grossly excessive and overbroad, and are arbitrary and capricious due to a lack of evidentiary support. (Rehearing App., 60-63.) These allegations of error lack merit.

In D.04-09-062, we ordered reparations to be paid to Cingular customers in order "to limit Cingular's [\*36] unjust enrichment from the partial or full ETF payments it received from contract cancellations prior to May 1, 2002, the effective date of its present policy." (D.04-09-062, p. 67.) We ordered Cingular to "return, with interest, any sums received for early cancellation of contracts entered into between January 1, 2000 and April 30, 2002, to the customers who paid those sums." (D.04-09-062, pp. 67, 84-85, Ordering Paragraphs 2-3.) We further ordered Cingular to reimburse, with interest, any sums paid by customers after May 1, 2002, for contract cancellations during the first fifteen days of the contract period. (*Id.*) Cingular was also ordered to reimburse customers for ETF payments made to Cingular's agents prior to May 1, 2002, and for any improper ETF collections after May 1, 2002. (*Id.*) We ordered Cingular to file a refund plan with the Commission's Telecommunications Division no later than 75 days from the date of mailing of D.04-09-062. (*Id.*)

The Commission's authority to order customer reparations is well-established. (See, e.g., *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914-15.) As noted in *Wise v. Pacific Gas and Electric Co.* (1999) 77 Cal.App.4th 287, [\*37] "pursuant to its constitutional authority to award reparation, the PUC may order public utilities to make reparation to aggrieved ratepayers for rates that are unreasonable, excessive or discriminatory." (See *Wise, supra*, 77 Cal.App.4th at 299; see also *Pub. Util. Code* § 734; *Cal. Constitution*, Article XII, § 4; *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 907.)

The gist of Cingular's argument seems to be that the Commission cannot order refunds of ETFs because such refunds would amount to rate regulation by the Commission in violation of 47 U.S.C. section 332(c)(3)(A). n10 (Rehearing App., p. 60.) Cingular claims that the Commission has no authority to prohibit Cingular from charging an ETF. (*Id.*) Other than citing to section 332 itself, Cingular identifies no case law or other authority in support of its argument that the reparations ordered by the Commission constitute impermissible rate regulation in violation of section 332. As noted above, Cingular has the burden to demonstrate the specific grounds [\*38] upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See *Pub. Util. Code* § 1732; see also *Rule* 86.1; *Cal. Code Regs., Tit. 20, Sec. 86.1.*)

n10 47 U.S.C. section 332(c)(3)(A) provides that states have no authority to regulate the rates charged by commercial mobile services. However, section 332(c)(3)(A) also states that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services," and that providers of commercial mobile services are not exempt "from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

Cingular's argument that the reparations ordered by the Commission violate section 332 misunderstands both [\*39] the nature of, and the reasons for, the reparations remedy ordered by the Commission. Contrary to Cingular's assertion, the Decision did not prohibit Cingular, or any other California wireless provider, from charging an ETF. Indeed, the Decision expressly states:

Our investigation does not seek, either directly or indirectly, to regulate Cingular's rates. We make no findings on whether imposition of an ETF is unreasonable per se. Neither do we make any findings about what amount, if any, constitutes a reasonable or unreasonable ETF.

(D.04-09-062, p. 51.) The Decision instead focused on the specific circumstances surrounding Cingular's imposition of ETFs, including the fact that "Cingular knowingly created and pursued advertising, marketing and sales strategies that sought to secure market share by building Cingular's subscriber base and encouraging increases in minutes of use per customer regardless of the ability of Cingular's GSM [Global System for Mobile Communications] to deliver service." (D.04-09-062, p. 52.) We properly determined that the "conditions under which Cingular imposed the ETF" resulted in an unjust rule and constituted unreasonable service. (D.04-09-062, p. [\*40] 51.) This does not amount to regulation of Cingular's rates.

Cingular also asserts that our reparations order is grossly excessive and overbroad, and suggests that the reparations ordered in the Decision are akin to penalties and punitive damages. (Rehearing App., p. 60.) Cingular further claims that, by ordering both fines and reparations, the Commission is punishing Cingular multiple times for the same action. (*Id.*) This argument lacks merit and fundamentally misses the point of consumer reparations. The only cases cited by Cingular in support of this argument deal solely with punitive damages. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) However, the reparations ordered by the Commission are not in the nature of punitive damages; rather, they are specifically designed to compensate consumers who were charged ETFs under the unreasonable circumstances outlined above. (See D.04-09-062, pp. 66-67, 83, Conclusion of Law 7 (reparations are designed to make customers whole and to avoid unjust enrichment to Cingular).) Cingular cites no authority for the proposition [\*41] that it should be permitted to retain the profits from its unreasonable ETF policy, and the Commission is aware of no such authority.

Finally, Cingular asserts that the reparations ordered in the Decision are arbitrary and capricious due to a lack of evidentiary support. (Rehearing App., p. 63.) However, in reviewing Commission decisions, courts generally limit their review to a determination of whether the Commission's decision is supported under the substantial evidence test. (See *Strumsky, supra*, 11 Cal.3d at 35.) As long as the Commission's findings are reasonably supported and are based on inferences reasonably drawn from the record, Commission decisions will be found to be supported by substantial evidence in light of the whole record and will not be reversed. (See *Molina, supra*, 145 Cal.App.2d at 604; *Lorimore, supra*, 232 Cal.App.2d at 187; *Lane, supra*, 144 Cal.App.2d at 89.) As discussed above, we received ample evidence demonstrating that the circumstances surrounding Cingular's imposition of ETFs were unreasonable, resulting in customers being "trapped" [\*42] into "contracts for service regardless of whether Cingular could provide the coverage or capacity these customers sought." (D.04-09-062, p. 51.) Under these circumstances, our reparations order is properly supported by substantial evidence.

Thus, Cingular's allegation that we erred in ordering customer reparations lacks merit. However, we will modify D.04-09-062 to clarify that, upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents.

#### **G. Action to Recover Penalties Under Section 2104**

Cingular alleges that we cannot directly impose fines upon Cingular for its violations of the Public Utilities Code and previous Commission decisions without filing suit in superior court. (Rehearing App., pp. 63-64.) This allegation lacks merit, as there is ample authority for the proposition that the Commission is authorized to assess fines against Cingular pursuant to section 2107 without proceeding to superior court. Cingular relies on section 2104, which provides, in part: "Actions to recover penalties under this part shall be brought in the name of the people of the [\*43] state of California in the superior court. . . ." According to Cingular, we can only impose penalties by bringing an action in superior court.

Contrary to Cingular's argument, the Commission has the authority directly to levy fines and penalties pursuant to sections 2107 and 701. Section 2107 provides:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$ 500), nor more than twenty thousand dollars (\$ 20,000) for each offense." (*Pub. Util. Code* § 2107.)

Section 701 further provides:

The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (*Pub. Util. Code* § 701 [\*44] .)

The plain language of section 2104 refers to "actions to recover penalties." (*Pub. Util. Code* § 2104 (emphasis added).) Thus, we have interpreted section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin Strawberry Water Co.*, D.00-03-023, (2000) 2000 Cal. PUC Lexis 127, \*6-\*7, and cases cited therein.)

In 1993, the Legislature enacted Senate Bill ("SB") 485, which amended section 2107 to increase the amount of fines that may be imposed on public utilities. (See Stats. 1993, ch. 221, § 12, p. 1462.) The legislative history for SB 485 expressly acknowledges that the Commission "has broad authority to levy appropriate fines in the course of its business," and cites section 701 as the basis of this authority. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).) The legislative history notes that this broad authority has been "supplemented by additional specific fine authority" of a specified dollar amount, as set forth in section 2107. (Senate [\*45] Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1.) Further, a bill analysis explicitly states that SB 485 "would increase the fines the Public Utilities Commission can levy against public utilities. . . ." (Senate Committee on Energy and Public Utilities, Analysis of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as heard on April 20, 1993, p. 1 (emphasis added).)

Moreover, that legislative history also supports our interpretation of section 2104 that the Commission is only required to go to court to collect, rather than to impose, a fine; that is, to collect an unpaid fine. As stated in the legislative history, "the [Commission] must go to the Superior Court to collect any fines which are levied." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).)

At one time, we interpreted section 2104 as requiring a court action to impose penalties, rather than the Commission possessing the authority independently to assess fines. (See, e.g., *DiMaggio v. Pacific Bell*, D.92-03-031 (1992) 43 Cal.P.U.C.2d 392, 395.)<sup>n11</sup> However, "an administrative [\*46] agency may change its interpretation of a statute, rejecting an old construction and adopting a new." (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1326, quoting *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.) Moreover, "even when an agency adopts a new interpretation of a statute and rejects an old, a court must continue to apply a deferential standard of review." (*Hudson v. Board of Administration*, *supra*, at p. 1326, quoting *Henning v. Industrial Welfare Com.*, *supra*, at p. 1270; see also *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.)

<sup>n11</sup> The Commission's decision in *DiMaggio*, *supra*, was issued prior to the 1993 amendments to section 2107.

As early as 1990, we interpreted section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. [\*47] Thus, we have the authority to impose penalties for violations of the Public Utilities Code or Commission decisions, but must recover or collect unpaid penalties through a superior court action. (See *Vortel Communications, Inc. v. Advanced Communications Technology, Inc., et al.* (1990) 1990 Cal.P.U.C. LEXIS 673 at p. \*17; see also *Re Southern California Water Company*, D.91-04-022 (1991) 39 Cal.P.U.C.2d 507, 516.)

No California court has ever accepted Cingular's interpretation of the Public Utilities Code with respect to our ability directly to impose fines. In the past five years, there have been at least six Commission decisions imposing penalties that have been appealed, in whole or in part, on the basis of the Commission's authority directly to impose fines. In each of these cases, a petition for writ of review has been summarily denied by the Court of Appeal. (See, e.g., *Futurenet, Inc. v. Public Utilities Commission*, petition denied June 7, 2000, Case No. B137208; *Conlin-Strawberry Water Co., Inc. v. Public Utilities Commission*, petition denied July 26, 2001, Case No. F035333 [Commission's authority to impose [\*48] penalties was the sole issue presented to the court]; *Southern California Edison Co. v. Public Utilities Commission*, petition denied Feb. 28, 2002, Case No. B156189; *Vista Group International, Inc. v. Public Utilities Commission*, petition denied April 30, 2003, Case No. A100218; *Qwest Communications v. Public Utilities Commission*, petition denied Oct. 2, 2003, Case No. A102483; *USP&C v. Public Utilities Commission*, petition denied Jan. 7, 2004, Case No. A102657; petition for review denied by Cal. Supreme Court on March 30, 2004, Case No. S122022.) Although a summary denial does not have precedential effect, it is considered to be a "decision on the merits" for res judicata purposes. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630-631; *Consumers*

*Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905.) And, in light of the decision in *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 272, that a court must grant a petition for writ of review if it finds that the Commission erred, given the number of writs denied [\*49] on petitions raising this issue, it can be presumed that not all of these petitions were procedurally defective. Therefore, the fact that all such petitions have been summarily denied indicates that the reviewing courts found no legal error.

For all of the foregoing reasons, the Commission has the authority to impose fines directly on Cingular for its unlawful conduct.

#### H. Oral Argument

Cingular also requests oral argument on the issues raised in its application for rehearing. (Rehearing App., pp. 64-67.) Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (*Cal. Code of Regs., Tit. 20, § 86.3.*) In the present case, there is ample evidence in the record regarding Cingular's conduct and practices. In addition, we already held oral argument in this proceeding on December 8, 2003 regarding the parties' appeals of the Presiding Officer's Decision. (See D.04-09-062, p. 7.) We have a full understanding of [\*50] the record, and there are no legal issues requiring further briefing, whether orally or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, Cingular's request for oral argument should be denied.

#### III. CONCLUSION

D.04-09-062 is modified as described below. Rehearing of D.04-09-062, as modified, is denied because no legal error has been demonstrated.

#### IT IS THEREFORE ORDERED THAT:

1. D.04-09-062 is modified by inserting the following sentence as item (d) at the end of Ordering Paragraph 3: "(d) Upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents."

2. Rehearing of D.04-09-062, as modified, is denied.

3. Cingular is ordered to file a reparations plan as directed by D.04-09-062, Ordering Paragraphs 2-4.

This order is effective today.

Dated December 16, 2004, at San Francisco, California.

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners

I dissent

MICHAEL R. PEEVEY

President

Comr. Kennedy reserves the right to file a dissent.

[\*51]

SUSAN P. KENNEDY

Commissioner

**DISSENTBY: KENNEDY****Dissent of Commissioner Susan P. Kennedy Item 71 Cingular Wireless Application for Rehearing  
December 16, 2004**

I dissent.

Cingular's petition for rehearing raised meritorious issues including lack of an adequate record on which to base the fine we imposed, impermissible vagueness in the standards that we found Cingular had violated, and selective enforcement of our rules.

As I said in my dissent in the original case, the decision punished Cingular for providing inadequate service. Although we do not regulate wireless telephone service quality and the decision is couched in terms of failure to disclose problems with service, it is clear that the real issue was not disclosure per se but service quality.

Even if the record showed, which I do not believe it does, that Cingular's service quality was poor, we lack jurisdiction to fine the company based on poor service quality.

What the record does show is a spotty pattern of complaints about service, which is inadequate to support the fine. Cingular's claim that we violated its due process rights by basing a huge fine on a small number of clearly unrepresentative customer accounts [\*52] has merit, in my opinion.

Furthermore, we punished behavior that was not against any Commission rule at the time. The Commission decided that a vague standard of conduct would be retroactively applied to impose a fine. This comes perilously close to a due process violation as well.

Finally, as I wrote in my dissent, I am bothered by the fact that the record fails to disclose that Cingular's behavior was significantly different from that of any of its competitors. I realize that a claim of selective enforcement is generally not a defense. For example, it is no defense to a charge of speeding to say that "the other guys were going just as fast." However, I am troubled that we chose to single out one company for punishment before adopting rules of general application to the industry as a whole.

SUSAN P. KENNEDY

December 16, 2004

San Francisco, California

# EXHIBIT D

**PLEASE NOTE:** WHEN YOU BREAK THE SEAL ON THE MANUFACTURER'S BOX AND USE THE WIRELESS PHONE(S) WITH T-MOBILE'S SERVICE, YOU HAVE AGREED TO THE FOLLOWING TERMS AND CONDITIONS OF THE CUSTOMER SERVICE AGREEMENT. THIS AGREEMENT REQUIRES THAT YOU MAINTAIN SERVICE WITH T-MOBILE ON THE PREPROGRAMMED PHONE NUMBER(S) FOR THE MINIMUM CONTRACT PERIOD REQUIRED FROM THE ACTIVATION DATE. FAILURE TO MAINTAIN SERVICE FOR THE MINIMUM CONTRACT PERIOD REQUIRED MAY RESULT IN AN EARLY TERMINATION FEE IMPOSED BY YOUR SERVICE PROVIDER (READ THE SERVICE PROVIDER TERMS AND CONDITIONS BELOW FOR DETAILS).

**Equipment Discount Information:** An equipment purchase discount of \$250 has been provided to the customer in exchange for activating and maintaining a new, non-substitute Wireless mobile number on any commercially published rate plan for a minimum of 181 consecutive days. Should this number disconnect (permanently or temporarily, except based on the fault of the carrier), or if the customer's wireless service rate plan is changed to one of a lower service rate plan, within the same time period (181 consecutive days), this discount will be null and void and the customer must reimburse this Authorized Wireless Representative \$250. The customer herein provides authorization for the \$250 to be charged to the customer's credit card without need for further approval; provided, however, the \$250 will only be charged if the monthly service rate is changed to one of a lower monthly service rate or if the wireless phone bill is not paid for 181 consecutive days.

## **T-MOBILE TERMS AND CONDITIONS**

Effective 12/04 until amended

Welcome to T-Mobile. **BY ACTIVATING OR USING OUR SERVICE, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS ("T&C's"). PLEASE READ THESE T&C's CAREFULLY.** They affect your legal rights by, among other things, requiring **MANDATORY ARBITRATION OF DISPUTES** and charging an **EARLY CANCELLATION FEE**. **IF YOU DO NOT AGREE TO THESE T&C's, DO NOT ACTIVATE OR USE THE SERVICE OR YOUR WIRELESS PHONE, DEVICE, SMART CARD, OR OTHER EQUIPMENT ("PHONE") AND FOLLOW THE DIRECTIONS IN SEC. 5 BELOW.**

These T & C's and your Service Agreement (if any) constitute your agreement with T-Mobile USA, Inc. and its affiliates (together, "T-Mobile," "we," or "us") for any wireless services and other telecommunications services that we provide you ("T-Mobile Services"), any applications, Phones, or products that you purchase or obtain from us or use with the Service ("Products"), and any applications or services that you purchase, obtain, or use that are provided through or with the Service, or billed to your T-Mobile account ("Third-Party Services") (T-Mobile Services and Third-Party Service together, the "Service"). These T&C's supercede all earlier versions. To the extent these T&C's conflict with the T-Mobile Terms and Conditions you receive with your Phone, these T&C's apply. Rate plan and feature information for the Services you select or use are available to you when you purchase the Service at retail locations and on our website, and are a part of our agreement and are incorporated by reference into these T&C's (the T&C's, your Service Agreement and the rate plan information together are referred to as the "Agreement"). You acknowledge that no employee, dealer or other agent is authorized to make any representation or warranty (other than as described in the Agreement or our current materials) with respect to the Agreement, Service, Products or rate plans and offerings, or to waive or modify any terms or provisions of the Agreement.

**1. Acceptance of Agreement:** You accept this Agreement by: (i) activating or using the Service; (ii) signing, orally or electronically accepting the Agreement; or (iii) are deemed to accept the Agreement, whichever occurs first. You must activate Service within 30 days after purchase of your Phone (unless returned as provided in Sec. 5). If you don't activate Service within 30 days, you are deemed to accept the Agreement, and you agree to pay monthly Service charges for the Term according to your rate plan.

**2. MANDATORY ARBITRATION TO RESOLVE DISPUTES/ CLASS ACTION WAIVER/JURY TRIAL WAIVER: ARBITRATION. PLEASE READ THIS PROVISION CAREFULLY. IT MEANS THAT, EXCEPT AS NOTED BELOW, YOU AND WE WILL ARBITRATE OUR DISPUTES. ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR THE PROVISION OF SERVICES OR PRODUCTS TO YOU, INCLUDING ANY BILLING DISPUTES ("CLAIM"), SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA").** This

agreement to arbitrate also requires you to arbitrate claims against other parties relating to Services or Products provided or billed to you, including suppliers of Services and Products and our retail dealers, if you also assert Claims against us in the same proceeding. You and we acknowledge that the Agreement affects interstate commerce and that the Federal Arbitration Act and federal arbitration law apply to arbitrations under the Agreement (despite the choice of law provision in Sec. 23).

**BEFORE INSTITUTING ARBITRATION, YOU AGREE TO PROVIDE US WITH AN OPPORTUNITY TO RESOLVE YOUR CLAIM BY SENDING A WRITTEN DESCRIPTION OF YOUR CLAIM TO US AT T-MOBILE CUSTOMER RELATIONS, P.O. BOX 37380, ALBUQUERQUE, NM 87176-7380 AND NEGOTIATING WITH US IN GOOD FAITH REGARDING YOUR CLAIM. IF WE ARE NOT ABLE TO RESOLVE YOUR CLAIM WITHIN 30 DAYS OF RECEIPT OF YOUR NOTICE, THEN YOU OR WE, INSTEAD OF SUING IN COURT, MAY INITIATE ARBITRATION PROCEEDINGS WITH THE AAA. YOU MUST SERVE OUR REGISTERED AGENT (SEE SEC. 20) IN ORDER TO BEGIN AN ARBITRATION. ARBITRATION WILL BE CONDUCTED UNDER THE AAA'S PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES AND SUPPLEMENTAL PROCEDURES FOR CONSUMER-RELATED DISPUTES, WHICH ARE AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT [www.adr.org](http://www.adr.org).** The AAA has a fee schedule for arbitrations. You will pay your share of the arbitrator's fees and administrative expenses ("Fees and Expenses") except that: (a) for Claims less than \$25, we will pay all Fees and Expenses; and (b) for Claims between \$25 and \$1,000, you will pay only \$25 in Fees and Expenses, or any lesser amount as provided under AAA's Supplemental Procedures for Consumer-Related Disputes. **You and we agree to pay our own other fees, costs, and expenses, including those for any attorneys, experts, and witnesses. An arbitrator may only award as much and the type of relief as a court with jurisdiction in the place of arbitration that is consistent with law and this Agreement. An arbitrator may issue injunctive or declaratory relief but only applying to you and us and not to any other customer or third party. As a limited exception to the agreement to arbitrate, you and we agree that: (a) you may take Claims to small claims court, if your Claims qualify for hearing by such court; and (b) if you fail to timely pay amounts due, we may assign your account for collection, and the collection agency may pursue in court claims limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.**

**CLASS ACTION WAIVER. WHETHER IN COURT, SMALL CLAIMS COURT, OR ARBITRATION YOU AND WE MAY ONLY BRING CLAIMS AGAINST EACH OTHER IN AN INDIVIDUAL CAPACITY AND NOT AS A CLASS REPRESENTATIVE OR A CLASS MEMBER IN A CLASS OR REPRESENTATIVE ACTION. NOTWITHSTANDING SEC. 22, IF A COURT OR ARBITRATOR DETERMINES IN A CLAIM BETWEEN YOU**

AND US THAT YOUR WAIVER OF ANY ABILITY TO PARTICIPATE IN CLASS OR REPRESENTATIVE ACTIONS IS UNENFORCEABLE UNDER APPLICABLE LAW, THE ARBITRATION AGREEMENT WILL NOT APPLY, AND YOU AND WE AGREE THAT SUCH CLAIMS WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT.

**JURY TRIAL WAIVER.** WHETHER ANY CLAIM IS IN ARBITRATION OR IN COURT (AS PROVIDED IN THIS SEC. 2) YOU AND WE WAIVE ANY RIGHT TO JURY TRIAL INVOLVING ANY CLAIMS OR DISPUTES BETWEEN YOU AND US.

**3. Changes to the Agreement or Charges.** EXCEPT TO THE EXTENT PROHIBITED BY LAW, IF WE: (A) INCREASE THE CHARGES INCLUDED IN YOUR MONTHLY RECURRING ACCESS RATE PLAN, OR (B) MODIFY A MATERIAL TERM OF OUR AGREEMENT WITH YOU AND THE MODIFICATION WOULD BE MATERIALLY ADVERSE TO YOU, WE WILL NOTIFY YOU OF THE INCREASE OR MODIFICATION AND YOU CAN CANCEL THAT SERVICE WITHOUT PAYING A CANCELLATION FEE (WHICH IS YOUR ONLY REMEDY) BY FOLLOWING THE CANCELLATION INSTRUCTIONS IN THE NOTICE. IF YOU DO NOT CANCEL YOUR SERVICE BY FOLLOWING THOSE INSTRUCTIONS, OR YOU OTHERWISE ACCEPT THE CHANGE, THEN YOU AGREE TO THE INCREASE OR MODIFICATION, EVEN IF YOU PAID FOR SERVICE IN ADVANCE. IF THE NOTICE DOES NOT SAY HOW LONG YOU HAVE TO CANCEL, THEN IT IS WITHIN 14 DAYS AFTER THE DATE OF THE NOTICE, UNLESS A LONGER PERIOD IS REQUIRED BY LAW. EXCEPT TO THE EXTENT PROHIBITED BY LAW, CHARGES FOR PRODUCTS, SERVICES, OPTIONAL SERVICES, OR ANY OTHER CHARGES THAT ARE NOT INCLUDED IN YOUR MONTHLY RECURRING ACCESS RATE PLAN (SUCH AS DIRECTORY ASSISTANCE, ROAMING, DOWNLOADS AND THIRD-PARTY CONTENT) ARE SUBJECT TO CHANGE AT ANY TIME WITHOUT NOTICE, AND IF YOU CONTINUE TO USE THOSE SERVICES, OR YOU OTHERWISE AGREE TO THE CHANGES, THEN YOU AGREE TO THE NEW CHARGES. VISIT OUR WEBSITE, RETAIL LOCATIONS, OR CALL CUSTOMER CARE FOR CURRENT CHARGES.

**4. Term; Cancellation of Service.** If you select a rate plan with a fixed term longer than 1 month, then this Agreement will continue for the full number of months selected ("Term"). You may cancel Service for any reason by providing us with notice (we may require up to 30 days), which cancellation will take effect on or before the beginning of the next billing cycle after the notice period, BUT IF YOU CANCEL SERVICE OR BREACH THE AGREEMENT BEFORE YOUR TERM ENDS, YOU AGREE THAT THE RESULTING HARM TO US IS IMPRACTICABLE OR EXTREMELY DIFFICULT TO MEASURE AND YOU AGREE TO PAY US IN ADDITION TO AMOUNTS OWED, AS A REASONABLE ESTIMATE OF OUR HARM, A \$200 CANCELLATION FEE PER NUMBER (which may be deducted from your deposit or any amounts prepaid by you, charged to your card or billed to your account). Our cost of providing your Service and Phone is not incurred evenly over the Term. Our monthly charges and other rates are based on the assumption that you will remain a customer for the whole Term. You and we agree that it is reasonable for your rates to include the amount of the cancellation fee. We may suspend or terminate your Service for any reason or no reason upon 3 days notice (unless a longer period is required by law). If you breach the Agreement, we may suspend or terminate your Service immediately without prior notice (except to the extent prohibited by law) and do the same for any other service you receive under any other agreement with us. **You breach the Agreement by:** (a) failing to pay any sum when due; (b) failing to comply with any provision in this Agreement or any other agreement between us; (c) becoming the subject of any proceedings under the Bankruptcy Code; (d) becoming insolvent; or (e) your financial institution dishonoring or returning for insufficient funds your check or credit card. In the event of cancellation, you are responsible for payment of all charges (including any cancellation fee) due to us under the

Agreement, which charges will be immediately due and payable. If we reinstate Service to you after discontinuing Service, you may be subject to a credit check and agree to pay reactivation charges or deposits. After the Term expires, you become a month-to-month customer but are still subject to the Agreement, as modified.

**5. Cancellation and Return Policy.** There is a Return Period during which you can cancel a newly activated line of Service without paying a cancellation fee. The Return Period is 14 calendar days from the date of Service activation or 30 days from the Phone's purchase date if you have not activated Service (the Return Period may be longer in some states, such as CA - visit [www.t-mobile.com](http://www.t-mobile.com), or ask a sales or customer care representative). Even if you cancel Service, you must pay all Service and other charges incurred prior to cancellation. In order to receive a refund of the purchase price (minus shipping and rebates) of your Phone, you must return it in "like-new" condition with proof of purchase to the place of purchase during the Return Period along with its original packaging and contents. You may be required to pay a restocking fee. The purchase price of your Phone may have been subsidized to facilitate your subscription to the Service. If you cancel service and do not return the Phone in "like-new" condition within the Return Period, you will be charged for the difference between the full retail price of the Phone without activation (which may be more than the price with Service activation) and the price you paid for the Phone (minus rebate). This Sec. 5 does not apply to Phone upgrade, replacement, exchange or other similar programs; see those program materials for details.

**6. Service Availability and Limits.** Your Phone operates as a radio and Service is only available when your Phone is within range of an antenna providing Service. Coverage maps only approximate our wireless coverage area outdoors; actual service area, coverage and quality may vary and change without notice. There may be gaps in Service within the estimated coverage areas shown on coverage maps. Even within a coverage area, factors, such as: network changes, emergencies, traffic volume, transmission limits, service outages, technical limitations, signal strength, your equipment, interconnecting carriers, terrain, structures, weather and other conditions (without limit) may interfere with actual service, quality and availability. Calls may be interrupted, dropped, refused, or limited. Coverage maps may depict coverage in areas where networks are operated by our affiliates and roaming partners; such coverage may change without notice. We are not responsible for those networks and some Services are not available on third-party networks or while roaming. We may impose credit, usage or other limits to Service, cancel or suspend Service, or block certain types of calls, messages or sessions (such as international, 900 or 976 calls) at our discretion. We may suspend Service without notice if you exceed any credit limit. Service may not be transferred to another market except at our discretion, and we may charge transfer fees. **WE ARE NOT LIABLE FOR ANY SERVICE LIMITS, FAILURES OR OUTAGES, INCLUDING WITHOUT LIMIT, THE FAILURE OF ALERTS, 9-1-1 EMERGENCY, PRIORITY ACCESS OR SECURE SERVICE CALLS TO BE CONNECTED OR COMPLETED, OR THE FAILURE TO PROVIDE ALERTS OR ACCURATELY LOCATE ANY 9-1-1 CALL (SEE SEC. 14).** Location services, including 9-1-1 location services, emergency or other alert systems, priority access and secure service calls may not be available in your area and are subject to the Service limitations in this Sec. 6.

**7. Use of Service.** You may not use, or attempt to use, the Service, the network, or your Phone for any fraudulent, unlawful, improper, harassing, excessive, harmful or abusive purpose ("Improper Uses"), or so as to adversely or negatively impact our customers, employees, business, ability to provide quality service, reputation, or network, or any other person. We may determine on a case-by-case basis what constitutes Improper Uses. Improper Uses include, without limit: (a) using an automatic dialer or program; (b) sending unsolicited messages or calls;

(c) attempting to interfere with the access of any user, host, or network; (d) identity theft; (e) attempting to decipher, decompile, or reverse engineer any software; (f) posting or transmitting unlawful, infringing, or objectionable content as determined by us; (g) probing, or attempting to tamper with or harm our systems, network or customers; or (h) reselling or attempting to resell any aspect of the Service, whether for profit or otherwise. If we suspect a violation of this provision, we may: (i) begin legal action; (ii) suspend or terminate Service immediately and without prior notice; (iii) suspend or terminate service provided to you under any other agreement with us; and (iv) cooperate with law enforcement in prosecuting offenders. You agree to cooperate with us in investigating suspected violations. We may terminate your Service or change your rate plan at any time, with notice, if we determine, in our sole discretion, that your use of the Service is excessive, unusually burdensome, or unprofitable to us. You have no proprietary or ownership rights to a specific wireless telephone number ("Number"), IP address, or e-mail address assigned to you or your Phone; we may change them at any time. You may not program any other Number into your Phone. We may charge you to change your Number.

**8. Use of Phone with Other Providers/Phone Purchases.** Wireless devices and networks do not all use the same technologies. Your Phone may not be compatible with the network and services provided by another wireless service provider and, therefore, may not work with that provider's wireless service. You may buy a Phone from us, or from someone else, but it must be GSM/GPRS equipment that is compatible and approved for use with our network and Services and we do not guarantee that all T-Mobile features will be available with such equipment. A T-Mobile Phone may be programmed to accept only a T-Mobile SIM card.

**9. Changes to Your Account.** If you give your personal account validation information to someone, they can access and make changes to your account just as you can. You may request to switch to another rate plan, and if we authorize the change, a transfer fee may apply and the new rates will become effective by the start of your next billing cycle. Changes may require your agreement to a new Term (if you select a promotional rate plan or special Phone pricing) or new T&C's. If we allow you to temporarily suspend your account, you may continue to pay monthly charges and we may extend the Term for the length of that suspension.

**10. Deposits.** At any time, we may require a deposit from you (in which you grant us a security interest) or increase the amount of your deposit. If we notify you of an increase not associated with a change in rate plan, you may either (a) provide us with the increased deposit or (b) cancel Service within 7 days following the date of the notice (any cancellation fee will be waived). Except to the extent prohibited by law, your deposit may be commingled with other funds and will not earn interest. You may not use your deposit to pay your bills or delay payment, but we can apply your deposit to any charges that you owe us. If Service is cancelled for any reason, any deposit will be applied toward amounts you owe us at or after cancellation. Any remaining deposit will be returned to you at your billing address. Except to the extent prohibited by law, we will not refund any balances of \$5 or less unless you contact us to request it. We will hold such money for you for up to 1 year (without accruing interest for your benefit), but you forfeit to us any portion of the money left after 1 year. You also forfeit any money that the U.S. Mail cannot deliver and returns to us.

**11. Billing, Charges and Late Fees.** You authorize us to verify your creditworthiness with a credit-reporting agency at any time. You will be charged for Service and other features on a monthly billing cycle basis and we may change your billing cycle at any time. You agree to timely pay in full each month all charges and fees associated with the Service, including without limit, monthly recurring Service charges, charges described in Sec. 12, airtime, roaming, long distance, toll, landline access, messages (whether read or unread, solicited or unsolicited), images, sounds, data, features (such as web access, text messages

and voicemail), calling services (such as operator or directory assistance and calling card use), additional or optional services that you use or are processed through your Phone (or Number, IP address or email address assigned to or authorized by you), and you remain liable for payment even if a third party agrees to pay your charges. You will be charged for more than one call when you use certain features resulting in multiple inbound or outbound calls (such as call forwarding, call waiting, voicemail retrieval, and conference calling). All lines use and share the airtime and features included in Family or other pooling plans. Mobile to mobile minutes are those used between T-Mobile Phones while on the T-Mobile USA network (and not roaming or affiliate networks). Except to the extent prohibited by law, billing of roaming charges and minutes or Services used may be delayed or applied against included minutes or Services in subsequent billing cycles, which may cause you to exceed your included minutes or Services in a particular billing cycle. Roaming and other call rating (such as time of call) depend on the location of the network equipment providing Service for a particular call and not the location of the Phone. For billing purposes, you agree not to rely on indicators on your Phone (such as roaming and call time), which may be inaccurate. **UNUSED MINUTES OR OTHER ALLOTMENTS FROM YOUR RATE PLAN EXPIRE AT THE END OF YOUR BILLING CYCLE AND DO NOT CARRY OVER TO SUBSEQUENT BILLING CYCLES. PARTIAL MINUTES OF AIRTIME USAGE ARE ROUNDED UP AND CHARGED, OR DEDUCTED FROM ANY INCLUDED MINUTES, AS FULL MINUTES; AIRTIME USAGE IS MEASURED FROM THE TIME THE NETWORK BEGINS TO PROCESS THE CALL (BEFORE THE PHONE RINGS OR THE CALL IS ANSWERED) THROUGH ITS TERMINATION OF THE CALL (AFTER YOU HANG UP). FOR BILLING PURPOSES, THE TIME OR DAY (SUCH AS NIGHTS AND WEEKENDS) OF AN ENTIRE CALL IS DETERMINED BY THE TIME THE CALL STARTS. UNLESS OTHERWISE SPECIFIED IN YOUR RATE PLAN MATERIALS, WEEKENDS ARE MIDNIGHT FRIDAY TO MIDNIGHT SUNDAY. NIGHTS ARE 9:00 PM TO 6:59 AM.**

**Incorrect Charges.** If you believe your bill contains an incorrect charge, you have 60 days from the date of the first bill that contains the charge to notify us or you waive any right to dispute the charge. To notify us, please contact Customer Care at [www.t-mobile.com](http://www.t-mobile.com), (800) 937-8997, or 611 from your Phone. We may require you to describe the dispute in writing. Any written communications concerning charges must be sent to the T-Mobile Customer Relations address in Sec. 2. If you accept a credit to resolve an issue, you agree the issue is fully resolved. If Customer Care does not resolve your dispute and you still wish to pursue the matter, follow the dispute resolution process described in Sec. 2. **California customers:** our Utility number is U-3056-C; if you file a billing related claim with the Consumer Affairs Branch ("CAB") of the CPUC you must, within 24 hours of filing, inform us by writing to the Customer Relations address in Sec. 2 with sufficient information to identify you and your account. If we resolve your dispute, your CAB claim will be deemed resolved at that time, and you agree to promptly withdraw your claim with the CAB.

**Payments.** We may require payment before your due date if we are concerned about your ability to pay us (such as when you have an unusually high balance). For your payment to be deemed received by us and your account to be timely credited, you must provide with your payment information sufficient to identify you and your account (your account number). If we accept late or partial payments or payments with limiting notations, it will not waive any of our rights to collect all amounts that you owe us and it will not be an accord and satisfaction. If we agree to an alternate payment plan, we may confirm it in any manner, including by electronic means. If your financial institution dishonors or returns for insufficient funds your check or credit card, it is a breach of this Agreement and we may a) charge you a fee of \$20 or such amount as may be permitted by law, b) stop accepting checks, credit card or other similar payment methods from you and c) immediately suspend or

cancel your Service. We may use a collection agency and charge you for their fees billed to us for trying to collect what you owe us. Late Fees. You agree to pay 1.5% or \$5 per month (or portion of a month), whichever is greater, on any past due balances until paid, subject to the highest amount permitted by law. Except to the extent prohibited by law, this late fee may be charged regardless of any disputes you may have raised regarding your invoiced charges.

**12. Taxes & Fees/Regulatory and Administrative Fees.** We bill you for taxes, fees, and other charges (such as sales, use, excise, public utility and other taxes) levied by or remitted to domestic or foreign governments or authorities and imposed on you or us as a result of providing the Service or your Phone ("Taxes & Fees"). Any tax exemption only applies after the date we receive from you acceptable documentation. We will determine, in our discretion, the type and amount of the Taxes & Fees to be billed. These Taxes & Fees may change at any time without notice. We may also bill you for regulatory and administrative fees (\$.86 per line per month as of 12/04) to recover our costs of complying with certain regulatory mandates (in our discretion) and Universal Service Fees ("USF") or similarly imposed charges (the amount or method of calculation of these fees may change at any time without notice to you) except to the extent prohibited by law. Regulatory and administrative fees and USF are not taxes or government required charges. We may impose regulatory and administrative fees whether or not all or some services are used, or available to you, or in your location. We are required to use the residential or business street address you provided us to determine certain Taxes & Fees. If you give us an address (such as a PO box) that is not a recognized street address, does not identify the taxing jurisdictions applicable to the address or does not reflect the service area associated with your Number, you may be assigned a default location for Taxes & Fees calculation, which may result in a higher or lower charge for certain Taxes & Fees and you have 60 days from the date of the first bill that contains disputed Taxes & Fees to notify us or you waive your right to dispute those Taxes & Fees.

**13. Disclaimer of Warranties.** EXCEPT FOR ANY OTHER WRITTEN WARRANTY THAT MAY BE PROVIDED, AND TO THE EXTENT PERMITTED BY LAW, ALL SERVICES, PRODUCTS AND THIRD PARTY PRODUCTS ARE PROVIDED "AS IS," "WITH ALL FAULTS" AND WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMIT, WARRANTIES OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE, ALL OF WHICH ARE EXPRESSLY DISCLAIMED. YOU ASSUME ALL RESPONSIBILITY AND RISK FOR USE OF THE SERVICE OR PRODUCTS. WE DO NOT AUTHORIZE ANYONE TO MAKE A WARRANTY OF ANY KIND ON OUR BEHALF, AND YOU SHOULD NOT RELY ON ANY SUCH STATEMENT. ANY STATEMENTS MADE IN PACKAGING, MANUALS OR OTHER DOCUMENTS, OR BY ANY OF OUR DEALERS (EXCEPT FOR ANY WRITTEN LIMITED WARRANTY THAT MAY BE PROVIDED), ARE FOR INFORMATIONAL PURPOSES ONLY AND ARE NOT WARRANTIES BY US OF ANY KIND. WE AND OUR OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, DEALERS, SUPPLIERS, PARENTS, SUBSIDIARIES OR AFFILIATES ("T-MOBILE AFFILIATES") DO NOT WARRANT THAT THE INFORMATION, SOFTWARE, PRODUCTS, PROCESSES, OR SERVICES WILL BE UNINTERRUPTED, ACCURATE, COMPLETE, USEFUL, FUNCTIONAL, BUG OR ERROR FREE. IF YOU RECEIVED A WRITTEN "T-MOBILE LIMITED WARRANTY" WITH YOUR PHONE, IT IS THE ONLY WARRANTY MADE BY US WITH RESPECT TO THE PHONE. IF APPLICABLE STATE LAW DOES NOT ALLOW THE DISCLAIMER OF CERTAIN IMPLIED WARRANTIES, THE RELEVANT PORTIONS OF THE ABOVE EXCLUSION MAY NOT APPLY TO YOU.

**14. Limitation of Liability.** We are not liable to you, other users of your Phone or third parties for any deficiency in performance or quality,

caused in whole or in part by an act or omission of an underlying carrier or service provider, website, messaging community, dealer, equipment or facility failure, Phone failure or unavailability, discontinuation of Service, or Phones, network problems, lack of coverage or network capacity, equipment or facility upgrade or modification, delay or failure of number portability, acts of God, strikes, fire, terrorism, war, riot, emergency, government actions, equipment or facility shortage or relocation, the failure of an incoming or outgoing call, including 9-1-1 emergency, priority access, or secured service call, to be connected or completed or for the functionality of location services, including 9-1-1 location services, priority access, or secured call or alert service, or causes beyond our reasonable control. EVEN IF T-MOBILE HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGES, T-MOBILE AND T-MOBILE AFFILIATES WILL NOT BE LIABLE TO YOU OR ANY OF YOUR EMPLOYEES, AGENTS, CUSTOMERS OR ANY THIRD PARTIES FOR ANY DAMAGES ARISING FROM USE OF THE SERVICE OR ANY PHONE, INCLUDING WITHOUT LIMITATION: PUNITIVE, EXEMPLARY, INCIDENTAL, TREBLE, SPECIAL OR CONSEQUENTIAL DAMAGES; LOSS OF PRIVACY OR SECURITY DAMAGES; PERSONAL INJURY OR PROPERTY DAMAGES; COPYRIGHT, TRADEMARK, PATENT, TRADE SECRET OR OTHER INTELLECTUAL PROPERTY DAMAGES; OR ANY DAMAGES WHATSOEVER ARISING FROM INTERRUPTION OR FAILURE OF SERVICE, LISTING ERRORS, LOST PROFITS, LOSS OF BUSINESS, LOSS OF DATA, LOSS DUE TO UNAUTHORIZED ACCESS OR DUE TO VIRUSES OR OTHER HARMFUL COMPONENTS, COST OF REPLACEMENT PRODUCTS AND SERVICES, SUSPENSION, TERMINATION, OR THE INABILITY TO USE THE SERVICE OR ANY PRODUCT, THE CONTENT OF ANY DATA TRANSMISSION, COMMUNICATION OR MESSAGE TRANSMITTED TO OR RECEIVED BY YOUR PHONE (WHETHER READ OR UNREAD, SOLICITED OR UNSOLICITED), OR LOSSES RESULTING FROM ANY PRODUCTS, GOODS OR SERVICE PURCHASED, MESSAGES RECEIVED OR TRANSACTIONS ENTERED INTO THROUGH THE SERVICE. IF THE STATE LAW APPLICABLE TO YOUR CLAIMS DOES NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR OTHER MODIFICATIONS OF OR LIMITATIONS TO CERTAIN REMEDIES, THE RELEVANT PORTIONS OF THE ABOVE EXCLUSION OR LIMITATION WILL NOT APPLY TO YOU. THE MAXIMUM AGGREGATE LIABILITY OF T-MOBILE AND T-MOBILE AFFILIATES TO YOU, AND THE EXCLUSIVE REMEDY AVAILABLE IN CONNECTION WITH THE AGREEMENT FOR ANY AND ALL DAMAGES, INJURY OR LOSSES ARISING FROM ANY AND ALL CLAIMS OR CAUSES OF ACTION RELATED TO SERVICES OR PHONES, SHALL BE A REFUND OR REBATE OF THE PRORATED MONTHLY OR OTHER CHARGES YOU PAID OR OWE US FOR THE APPLICABLE SERVICE OR PHONE. THE EXISTENCE OF MULTIPLE CLAIMS OR SUITS UNDER OR RELATED TO THIS AGREEMENT WILL NOT ENLARGE OR EXTEND THE LIMITATION OF MONEY DAMAGES. EXCEPT TO THE EXTENT PROHIBITED BY LAW, ALL CLAIMS MUST BE BROUGHT WITHIN 2 YEARS OF THE DATE THE CLAIM ARISES.

**15. Indemnification.** You agree to defend, indemnify and hold us, T-Mobile Affiliates and any roaming or network partner harmless from any and all claims, demands, actions, liabilities, costs or damages arising out of your use of the Service or Products, any legal disclosures we make relating to your Service or Product, or your breach of this Agreement. You further agree to pay our reasonable attorneys' and expert witnesses' fees and costs arising from any actions or claims by third parties and those incurred in establishing whether this Sec. 15 applies.

**16. Privacy.** Wireless systems use radios to transmit communications over a complex network. We do not guarantee that your communications using the Service or Products will be private or secure, and we are not liable to you for any lack of privacy or security you may experience. You are responsible for taking precautions and providing security measures best suited for your

situation and intended use of the Service. We may (but are not required to) monitor, intercept, and disclose your transmissions, location or communications and may disclose your billing, account, calling records, or other information, in good faith reliance on legal process, if required by law or to protect our rights, business, network or customers. We may locate you through our network. Your caller identification (such as your name and Number) even if unlisted may be displayed to others (for example, on the equipment or bill of the person receiving your call or any Internet site you visit.) We may list your name, address, and Number in a published directory with your consent. For more information on our privacy policies, please see our privacy notice at [www.t-mobile.com/privacy](http://www.t-mobile.com/privacy). The way third parties handle and use your personal information is governed by their policies and we are not responsible for their policies, or their compliance with them.

**17. Lost or Stolen Phone.** If your Phone is lost or stolen ("Lost Phone") you will not be liable for unauthorized airtime charges incurred on the Lost Phone if you: (a) notify us immediately; (b) ask us to deactivate the Lost Phone; and (c) provide within 14 days any documentation we request, including a police report. You must fulfill the remainder of your Term by activating a replacement Phone (which may be full price) or the cancellation fee will apply.

**18. Number Portability.** You may be able to transfer your Number to another wireless carrier or to bring your number to us. For information about Number Portability, please visit [www.t-mobile.com](http://www.t-mobile.com) or contact Customer Care at (800) 937-8997 or 611 from your Phone. You may not transfer your Number if your account has been cancelled or suspended, or prepaid account expired. You remain liable for charges incurred resulting from your Service with us or service with your former carrier, including cancellation fees. If you call 911 after you request a transfer, but before you receive confirmation of completion, the 911 operator may not have accurate information on your identity and location. You must inform the 911 operator of your identity and location immediately upon placing the call.

**19. Assignment.** We may assign all or part of our rights or duties under the Agreement without such assignment being considered a change to the Agreement, and without notice to you, except to the extent provided by law. We are then released from all liability. You may not assign the Agreement without our prior written consent. Subject to these restrictions, the Agreement will bind the heirs, successors, subcontractors, and assigns of the respective parties, who will receive its benefits.

**20. Notices/Customer Communications.** We may send you written notice, which may be on or included with your bill, which is considered given and received by you on the third day after the date deposited in the U.S. Mail to your address in our billing records. You agree we may also notify and communicate with you, or respond to your inquiries electronically through your Phone or otherwise, such as by e-mail, voicemail or text messaging, which is considered given and received immediately upon transmission. Written notice to us is considered given when received by our registered agent, Corporation Services Company ("CSC") 1010 Union Ave. SE, Olympia, WA 98501.

**21. Digital Millennium Copyright Act ("DMCA") Notice.** To the extent in providing Service we may act as a "services provider" (as defined by DMCA) and offer services as online provider of materials and links to third-party sites. As a result, third-party materials that we do not own or control may be transmitted, stored, accessed or made available using the Service. If you believe material available via the Service infringes a copyright, notify us using the notice procedure under the DMCA. We will respond expeditiously to remove or disable access to such material and will follow the procedures specified in the DMCA to resolve the claim. Our designated agent to whom you must address infringement notices under the DMCA is CSC (see Sec. 20).

**22. Severability and Survivability.** Except to the extent expressly set forth in Sec. 2, all terms and conditions of these T&C's are independent of each

other and if any provision of these T&C's is held to be inapplicable or unenforceable, then (a) that term or provision shall be construed, as nearly as possible, to reflect the intentions of the parties with the other terms or provisions remaining in full force and effect, (b) the T&C's will not fail their essential purpose and (c) the balance of the T&C's remain unaffected and in full force and effect, unless our obligations are materially impaired, in which event we have the right to terminate the Agreement. You and we will continue to be bound by the following Secs. (and any other provisions or rights and obligations that may reasonably be construed as surviving) of these T&C's after the Agreement ends, regardless of reason: 2-6, 10-15, 18, 19, 20, 22, 23, 25 and 26.

**23. Entire Agreement/Applicable Law/Venue/Miscellaneous.** This Agreement represents the final and entire agreement between you and us regarding the Service and Products. Electronic images of the Agreement will be considered originals. You acknowledge that you have not relied on any other representations not specifically included in this Agreement. If we don't enforce our rights under any of the provisions of the Agreement, we may still require strict compliance in the future. You represent that you are of legal age and have the legal capacity to enter into this Agreement. If you are contracting on behalf of a company, you represent that you are authorized to enter into this Agreement and agree to be personally liable for all accounts if you are not so authorized. This Agreement is governed by the Federal Arbitration Agreement, applicable federal law, and the laws of the state in which your billing address in our records is located. Foreign laws do not apply. Arbitration proceedings or any actions to enforce an arbitration award must be in the state where your Service is principally provided, but not outside the U.S.

**24. Additional Terms for Prepaid Customers.** You are responsible for prepaying all charges for using the Service. The airtime balance in your prepaid account is reduced by the charges attributable to your use of the Service. Service lasts as long as the earlier of a) the time period on a prepaid card or coupon or b) when the airtime balance goes to zero, then Service will be interrupted. You may continue to use Service by purchasing additional prepaid Service. If your account expires, you may lose your Number. You will not receive a monthly bill or activity record. Prepaid Service is non-refundable (even if returned during the return period), and no refunds or other compensation will be given for unused airtime balances, lost or stolen prepaid cards or coupons. Applicable Taxes & Fees will be included in your prepaid charges.

**25. Additional Terms for SmartAccess Customers.** SmartAccess is subject to credit eligibility, determined in our discretion. We may suspend Service to any Number without prior notice if your account balance exceeds your spending limit or you are late with a payment (whether or not you exceed your spending limit). If we suspend Service because your balance exceeds your spending limit, we may, in our sole discretion, reinstate Service after you make a payment that reduces your account balance and your account is not in arrears. If we suspend Service because you are late with payment, we may, in our sole discretion, reinstate Service if you pay the entire balance owing on your account. Regardless of suspension, you will be liable for all charges for Service under the Agreement, including monthly Service and usage charges, and other charges or purchases billed to your account, whether or not you reinstate Service. SmartAccess customers are only eligible for select rate plans. Smart Access activation fees are non-refundable unless you: (a) purchased the Phone and Service directly from a T-Mobile store, [www.t-mobile.com](http://www.t-mobile.com) or (800) TMOBILE; and (b) cancel Service and return the Phone to the place of purchase in accordance with Sec. 5.

**26. Other Agreements or Warranties.** Other Services (such as T-Mobile HotSpot or Equipment Protection) or Products may come with separate written terms or conditions, and warranties that govern their use or purchase. Please see those other agreements or warranties for your rights and duties regarding their use.

# EXHIBIT E

**explanation of rates and charges****Explanation of Rates and Charges**

Activation subject to credit approval; deposit may be required. Compatible device, activation fee and minimum one-year contract required. Your device has been manufactured to operate exclusively on our network and cannot be activated with any other wireless carrier. Next Generation Multi-band phones cannot be used with another customer's SIM card. After the first 30 days of service, an early cancellation fee of \$175 applies.

On the AT&T Wireless Next Generation network, usage is measured during the time you are connected to our system, which is approximately from the time you press the button that initiates or answers the call until approximately the time the first party terminates the call. On any other AT&T Wireless network, usage is measured during the time you are connected to our system, which is approximately from the time you press the button that initiates or answers the call until approximately the time you press the button that terminates the call. Voice usage for each call is billed in full minute increments with partial minutes rounded up to the next full minute. While on the AT&T Wireless network, there is no charge for busy or unanswered calls if you end the call within 30 seconds. Unused monthly included minutes, megabytes and text messages are lost. Availability, timeliness and reliability of service are subject to radio transmission limitations caused by system capacity, system repairs and modifications, your equipment, terrain, signal strength, weather and other conditions.

For Next Generation multi-band phones, roaming not available on other carriers' domestic GSM/GPRS networks.

Different rates apply for calling card or credit card calls, international calls or operator assistance. Long distance charges for calls received while roaming are calculated from your home area code to the location where you received the call. Due to delayed reporting between carriers, voice usage may be billed in a subsequent month and will be charged as if used in the month billed.

Not all features, service options or offers are available on all devices, on all rate plans or available for purchase or use in all areas. #121 VoiceInfo, Call Waiting and Three-Way Calling will incur airtime or roaming plus applicable long distance charges. You will incur airtime or roaming plus applicable long distance charges when accessing voice mail from your wireless phone. Call forwarding usage is charged at the same rate per minute as additional airtime for your calling plan, plus applicable long distance charges and will not apply towards your Included Minutes. You will be billed for each text message sent from your device, whether the message is delivered or not. mMode Pix only available on limited devices.

With Next Generation service, you will automatically receive limited access to AT&T Wireless data service for \$0.03 per kilobyte on any domestic GPRS network.

The end user's principal residence must be within an eligible AT&T Wireless area. For business or corporate responsibility customers, the end user's principal residence or principal business office must be within an eligible AT&T Wireless area.

Eligibility requirements, pricing, features and calling areas are subject to change without notice. Service is subject to the applicable map and features brochure and Terms and Conditions available in the AT&T Wireless Welcome Guide.

Fees: Activation - \$36 per line; Reconnection - \$25 per line; Returned Check Charge - will not exceed \$20; AT&T Wireless Connect(SM)-411 - \$1.25 per use, plus airtime, roaming and applicable long distance, while on the AT&T Wireless network. Regulatory Programs Fee-\$1.75. Other charges, surcharges, assessments to defray costs for government programs, universal connectivity charge, and federal, state and local taxes apply.

We have a commitment to privacy and encourage you to learn about our practices by reading our Privacy Policy at [www.attwireless.com/privacy](http://www.attwireless.com/privacy). For complete information on mMode and other features see the AT&T Wireless Service Areas and Features brochure.

Close Window

## TERMS AND CONDITIONS FOR WIRELESS SERVICE

Get the most out of your wireless service by knowing the terms of your Agreement with us. PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY. They govern the relationship between you and AT&T Wireless and explain our respective legal rights concerning all aspects of our relationship, including without limitation:

- Billing and charges
- Starting and ending service
- Account information
- Early cancellation fees
- Limitations of liability and warranty
- Changes to this Agreement
- Resolution of past or future disputes by arbitration instead of court trials and class actions.

IF YOU 1) USE THE SERVICE OR THE WIRELESS DEVICE, OR 2) ACCEPT ANY BENEFIT IN EXCHANGE FOR COMMITTING TO NEW TERMS AND CONDITIONS AND/OR A NEW CONTRACT TERM, OR 3) PAY US ANY AMOUNT FOR THE SERVICE, YOU CONSENT TO THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT. IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS OR NEW CONTRACT TERM, DO NOT USE THE SERVICE OR DEVICE AND NOTIFY US IMMEDIATELY TO CANCEL SERVICE AND/OR RETURN THE EQUIPMENT OR OTHER BENEFIT RECEIVED.

This is an agreement ("Agreement") for wireless radio telecommunications services and related services and/or features ("Service") between you and the entity licensed by the Federal Communications Commission to provide Service in the area associated with your assigned telephone, data and/or messaging number(s) ("Number") that is doing business as AT&T Wireless and/or AT&T Wireless Services ("us" or "we"). The term "Device" means the SIM (Subscriber Identity Module) Card and/or wireless receiving and transmitting equipment that we have authorized to be programmed with the Number and any accessories.

### I. SERVICE.

3. **Term; Early Cancellation Fee.** The term of this Agreement for each Number depends on the calling, data or mobile Internet plan, feature or promotion you select and is described in a separate AT&T Wireless Calling Plan, Service Plan or Rate Plan Brochure ("Rate Plan"), in feature or promotional materials, at attwireless.com and/or in an AT&T Wireless Welcome Guide (collectively, "Sales Information"), all of which are a part of this Agreement and were provided when you activated Service. To receive copies of Sales Information contact Customer Care. The term of this Agreement for each Number begins on the date we activate Service for that Number or the date you accept a benefit that extends or renews the term and ends when Service for that Number is terminated. IF YOU SELECT A RATE PLAN, FEATURE OR PROMOTION WHICH REQUIRES A FIXED TERM OF MORE THAN ONE MONTH (SUCH AS A ONE-YEAR RATE PLAN), YOU AGREE TO PURCHASE SERVICE FOR THE FULL TERM. After the fixed term expires, or if you are not on a fixed term (such as a "monthly" Rate Plan), this Agreement will continue until terminated by either party with advance notice, if required in your Rate Plan. IF YOU SELECT A RATE PLAN, FEATURE OR PROMOTION WITH A FIXED TERM, YOU MAY TERMINATE THIS AGREEMENT WITH RESPECT TO ANY NUMBER WITHIN 30 DAYS AFTER YOUR ORIGINAL ACTIVATION DATE OF THAT NUMBER. IF YOU TERMINATE SERVICE MORE THAN 30 DAYS AFTER YOUR ACTIVATION DATE, BUT BEFORE THE END OF YOUR FIXED TERM, OR WE TERMINATE FOLLOWING YOUR DEFAULT, YOU WILL BE IN MATERIAL BREACH OF THIS AGREEMENT. YOU AGREE OUR DAMAGES WILL BE DIFFICULT OR IMPOSSIBLE TO DETERMINE AND AGREE TO PAY US, AS A REASONABLE ESTIMATE OF OUR DAMAGES AND IN ADDITION TO ALL OTHER AMOUNTS OWING, A CANCELLATION FEE FOR EACH NUMBER (THE ACTUAL AMOUNT OF WHICH IS REFLECTED IN THE SALES INFORMATION), AND YOU MAY NOT BE ELIGIBLE FOR NEW CUSTOMER PROMOTIONS IN THE FUTURE.
4. **Rates.** Your Service rates and other charges and conditions for each Number or Device are described in your Sales Information. If you lose your eligibility for a particular Rate Plan, we may change your Rate Plan upon prior notice to you. If you misrepresent your eligibility for any Rate Plan, you agree to pay us the additional amount you would have been charged under the most favorable Rate Plan for which you are eligible. If you activate Service on behalf of an entity but were unauthorized to do so, you will be personally responsible for all charges to the account and will be fully bound by this Agreement as though you had activated Service on your own behalf. If you select a Rate Plan that includes a predetermined allotment of Services (for example, a predetermined amount of airtime, megabytes or text messages), unused allotment of Services from one billing cycle will not carry over to any other billing cycle.
5. **Availability/Interruption.** Service is normally available to your Device when it is within the operating range of our system and may be available outside of that area in other participating carrier service areas. Service functionality may vary when outside our system. Service is subject to transmission limitation, reduction in transmission speed, or interruption caused by weather, your equipment, terrain, obstructions such as trees or buildings, or other conditions. Service may be limited in some areas where coverage is not available or may be temporarily limited or interrupted due to system capacity limitations, system repairs or modifications, or in response to suspected fraud, abuse, misuse of the network, hacking or malicious viruses. Interruption may also result from nonpayment of charges by you. We may block access to certain categories of numbers (e.g. 976, 900 and certain international destinations) or certain web sites if, in our sole discretion, we are experiencing excessive billing, collection, fraud problems or other misuse of our network. We may, but do not have an obligation to, refuse to transmit any information through the Service and may screen and delete information prior to delivery to you or the Device as permitted by law. Some aspects of the Service may be temporarily unavailable if personal information is provided by a child under the age of 13. Without parental consent, children under the age of 13 will not be able to use certain aspects of the Service. Devices may be incompatible with TTY, so TTY users may be unable to make emergency calls.
6. **Use of Service/Device/Number.** Reproduction, retransmission, dissemination or resale of Service is prohibited without prior written contractual arrangements with us and any required regulatory approvals. You are responsible for ensuring that your Device is compatible with our Service and meets federal standards. You are responsible for the purchase and maintenance of any additional hardware, software and/or Internet access from your PC required to use the Service. You consent to receiving advertising, alerts and other broadcast messages from us or our authorized agents. IP addresses for services provided on the AT&T Wireless GSM/GPRS network will be assigned dynamically per session from a private pool and not all protocols will be supported. Other IP addressing options are available for additional cost. You have no ownership rights to the Number, any IP address, any e-mail address or any other identifier provisioned by us, our agents or the manufacturer of your Device to be used with the Service, and you agree we may change any such Number, IP address, e-mail address or any other identifier at any time with or without prior notice to you. Your Device has been manufactured to operate exclusively with Service provided by us. The Device cannot be activated with any other wireless carrier and if your Device utilizes a SIM card it will only accept a SIM card provided by us. By using Service, you agree to abide by the terms and conditions of any applicable software license. You can only activate a limited number of promotions on each Number.
7. **Unauthorized Usage.** You agree not to use the Device or Service for any unlawful, unauthorized or abusive purpose or in any way that damages our property or others' property, or interferes with, harms or disrupts our system or other operators' systems or other users. You will comply with all laws while using the Service and you will not transmit any communication or data that would violate any laws, court order, or regulation, or would likely be offensive to the recipient. You are responsible for all content you transmit using the Service. You may not install any amplifiers, enhancers, repeaters or other devices that modify, disrupt or interfere in any way with the radio frequency licensed to us to provide Service. If your Device, user name or password is stolen or Service is fraudulently used, you must immediately notify us and provide us with such documentation and information as we may request.

(including affidavits and police reports). Until you notify us, you will remain responsible for all charges. You agree to cooperate with us in any fraud investigation and to use any fraud prevention measures we prescribe. Failure to provide reasonable cooperation may result in your liability for all fraudulent usage.

- f. **Release of Information.** You consent to our release of information about you when we believe release is appropriate to comply with the law (e.g. a lawful subpoena, E911 information); to enforce or apply our customer agreements; to initiate, render, bill and collect for Services; to protect our rights or property, or to protect users of those Services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such Services, or if we reasonably believe that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of communications or justifies disclosure of records without delay.

## 2. CHARGES/PAYMENTS/DEFAULT.

- a. **Generally.** You are responsible for paying all charges, including but not limited to: airtime, access, features, voice mail access, voice mail delivery, data usage, text messages, downloadables, alerts, roaming, long distance, directory and operator assistance charges, the price of Devices and accessories, charges for other goods and services that you authorize to be charged through your wireless bill, and shipping/handling fees. You will be billed at domestic airtime or roaming rates for 800, 866, 877, 888, and other "toll free" calls. AT&T Wireless will be your wireless long distance provider. When using the AT&T Wireless GSM/GPRS network, for all incoming and outgoing voice Service, the length of the call will be measured during the time that the call is connected to our system, which is approximately from the time you press the button which initiates or answers a call until approximately the time the first party terminates the call. When using any other AT&T Wireless network, for all incoming and outgoing voice Service, the length of the call will be measured during the time that the call is connected to our system, which is approximately from the time you press the button which initiates an outgoing call or approximately when the Device starts ringing for incoming calls until approximately the time you press the button which terminates the call. On all AT&T Wireless networks, voice Service on each call is billed in full minute increments, with partial minutes of use rounded up to the next full minute. When you place a call on the AT&T Wireless network in your local area and it is dropped by our system, if you replace the call within a reasonable period of time, we will automatically credit your account for one minute of airtime. When using the TDMA or analog networks you will only be provided a credit if your included minutes have been depleted. For any other dropped calls, contact Customer Care. If an incoming call has been forwarded to another phone number, you will be charged for the entire time that our switch handles the call. While on the AT&T Wireless network, there is no charge for busy or unanswered calls if you end the call within 30 seconds. You are responsible for all data usage sent through our network and associated with the Device, regardless of whether the Device actually receives the information. In some cases our network will re-send certain packets to ensure complete delivery. In these cases you will be responsible for paying for the re-sent packets. Utilizing compression solutions may or may not impact the amount of kilobytes for which you are billed. Mobile Internet service will be calculated and billed in kilobytes. One megabyte equals 1024 kilobytes. One kilobyte equals 1024 bytes. For the AT&T Wireless GSM/GPRS network, once every 24 hours we will compile all data usage. Our system will then create a billing record representing the combined data usage for each network used during that period. The usage for each billing record will be rounded up to the next kilobyte and a cost will be associated with that billing record and rounded to the nearest cent.
- b. **Taxes, Surcharges and Other Fees.** Various taxes, surcharges, fees, and other assessments are imposed relating to the Service we provide to you, goods or services you purchase, and the wireless network and equipment used in providing the Service. We will determine, in our reasonable discretion, the taxes and other assessments that you are responsible to pay and the amounts of such charges. These may include federal, state or local taxes, surcharges or fees, as well as assessments to defray costs for federally mandated programs such as enhanced 911 service, local number portability and number pooling. You are responsible for paying these taxes and other assessments, regardless of whether they are assessed on you or us. To determine which jurisdictions' taxes and other assessments to collect, federal law requires us to obtain your Place of Primary Use ("PPU"), which must be your residential or business street address and must be within our licensed service area. You agree to provide us your PPU and to notify us of any changes in your PPU. If you do not provide us with an appropriate PPU, we may reasonably designate one for you. On certain Rate Plans, your PPU must be your residential address.
- c. **Billing and Payment.** We will provide your bill in a format we choose, which may change from time to time. Payment of all charges is due upon receipt of invoice. A fee may be charged for additional copies of bills. You will receive one bill for all Service associated with each Device. Billing cycle end dates may change from time to time. When a billing cycle covers less than or more than a full month, we may make reasonable adjustments and prorations. Service may be billed in a subsequent month due to delayed reporting between carriers; this service will be charged as if used in the month billed. You agree to notify us promptly if your credit card is terminated, lost or stolen or when the authorized date changes.
- d. **Late Payments/Disputes.** Time is of the essence for payment. Therefore, you agree to pay us a late fee for amounts unpaid 20 days after the date of the invoice of 1.5% (AK 0.875%, AR 0.5%, NE 1.33%, WI 1.0%) per month. Acceptance of late or partial payments (even if marked "Paid in Full") shall not waive any of our rights to collect the full amount due under this Agreement. For any check or electronic payment returned for nonpayment, we will assess an additional fee not to exceed \$20 and we may, without notice to you, suspend Service and/or terminate this Agreement, in addition to all other remedies. All amounts due, including disputed amounts, must be paid by the due date regardless of the status of any objection. All communications concerning disputed amounts owed, including any instrument tendered as full satisfaction of the amounts owed, or stipulating any other conditional action, agreement or proposed resolution of any dispute must be (i) in writing, (ii) marked "Billing Dispute" on the outside of the envelope, (iii) sent to our address contained on the invoice, and (iv) received by us within 60 days after receipt of the invoice.
- e. **Default/Termination.** If you fail to pay any amount owed to us or an affiliate of ours or any amount appearing on your invoice within 20 days after the date of the invoice, or if you have amounts still owing to us or an affiliate of ours from a prior account, or if you breach any representation to us or fail to perform any of the promises you made in this Agreement, or if you are subject to any proceeding under the Bankruptcy Code or similar laws, you will be in default and we may, without notice to you, withhold equipment or other refunds or suspend Service and/or terminate this Agreement, in addition to all other remedies available to us. We may require reactivation charges to renew Service after termination or suspension. Upon termination and/or porting the Number to another carrier, you are responsible for paying all amounts and charges owing under this Agreement, including any applicable cancellation fee. Third Party promotions and/or discounts may terminate upon termination of this Agreement. You agree to pay all costs including reasonable attorneys fees, collection fees, and court costs we incur in enforcing this Agreement through any appeal.
- f. **Deposits/Service Limits/Credit Reports/Return of Balances.** You authorize us to ask consumer reporting agencies or trade references to furnish us with employment and credit information, and you consent to our rechecking and reporting personal and/or business payment and credit history. If you believe that we have reported inaccurate information about your account to a consumer reporting agency, you may send a written notice describing the specific inaccuracy to the following address: AT&T Wireless, Attn: Credit Investigation Team, P.O. Box 8758, Portland, OR 97207-8758. We may require a deposit or set a service limit to establish or maintain Service. The deposit will be held as a partial guarantee of payment. It cannot be used by you to pay your bill or delay payment. Unless otherwise required by law, deposits may be mixed with other funds and will not earn interest. We reserve the right to increase your deposit in our sole discretion if we deem appropriate. You may request that we reevaluate your deposit on an annual basis, which may result in a partial or total refund of the deposit to you or credit to your account. If you default on this Agreement or this Agreement is terminated, we may, without notice to you, apply any deposit towards payment of charges due. After approximately 90 days following termination of this Agreement, any remaining deposit or other credit balance in excess of \$10 will be returned without interest to you at your last known address. You agree any amounts under \$10 will not be refunded to cover our costs of closing your account.
- g. **Account Information.** Any person able to provide your name, the last four digits of your social security number (or for business customers other information we deem sufficient), and the Number is authorized by you to receive information about and make changes to your account, including adding new Service. If you are receiving Service on a business Rate Plan through your employer, you authorize us to share your account information with your employer. You consent to disclosure of any information about you to any person as permitted by law if any device programmed with your Number calls an emergency service number such as 911 or, if we reasonably believe that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of communications or justifies disclosure of records without delay.

- h. **CPNI Consent.** Under federal law, you have a right, and we have a duty, to protect the confidentiality of information about the amount, type, and destination of your wireless service usage and the location of your device on our network (CPNI). You consent to us sharing your CPNI or other personal information with AT&T Wireless and their affiliates, agents and contractors, to develop or bring to your attention any products and services, or in the event of any merger, sale of some or all of the company assets or acquisition as well as in any insolvency, bankruptcy or receivership proceeding in which CPNI or other personal information would be transferred as one of the business assets of the company. This consent survives the termination of your Service and is valid until you revoke it. To remove this consent at any time, notify us in writing at AT&T Wireless, Attn: CPNI, P.O. Box 97061, Redmond, WA 98073-9761, providing your (1) name, (2) Service billing address, (3) Number including area code, and (4) Service account number. Removing consent will not affect your current Service or the provisions of paragraphs 1.f and 2.g, above.

### 3. CHANGES TO THIS AGREEMENT.

We may amend the terms of this Agreement, including the Sales Information, upon advance notice. If you do not agree to the amendment, you may terminate the Agreement by giving us notice within 20 days of the date we notify you, and you will not be charged any early cancellation fee. If you use the Service more than 20 days after we notify you of a change, you agree to that change. You have the option to change your Service at any time by notifying us, and you may take advantage of those of our Services for which you qualify, provided that you comply with any requirements of the Service, including, where applicable, extending the term of this Agreement. Any change will take effect by your next billing cycle. If you transfer to a Rate Plan having a term that is shorter than your previous Rate Plan, you may remain obligated for the term of the previous Rate Plan. If we allow you to suspend your account for a temporary period, we may extend the term of your Agreement by the length of the temporary suspension.

### 4. LIMITATIONS.

The parties intend that the limitations on liability, warranty and damage awards provided for in this Agreement will apply to the fullest extent allowed by law. Some jurisdictions do not allow the exclusion of certain warranties or the waiver, limitation or exclusion of liability for punitive, incidental or consequential damages, or for intentional or willful conduct in some circumstances. To the extent that any of these limitations are not permitted by applicable law, they will not apply to you.

- a. **Limitation of Liability.** WE ARE NOT LIABLE FOR ACTS OR OMISSIONS OF ANOTHER SERVICE PROVIDER OR ANY THIRD PARTY PROVIDERS OF SERVICES RELATED TO USE OF THE DEVICE OR SERVICE, FOR INFORMATION PROVIDED THROUGH YOUR DEVICE, LACK OF PRIVACY OR SECURITY EXPERIENCED WHEN USING THE DEVICE, EQUIPMENT FAILURE OR MODIFICATION, OR OTHER CAUSES BEYOND OUR REASONABLE CONTROL, INCLUDING WITHOUT LIMITATION ANY REPRESENTATIONS THAT THE SERVICES WILL BE ERROR-FREE, UNINTERRUPTED, OR FREE FROM UNAUTHORIZED ACCESS (INCLUDING THIRD PARTY HACKERS OR DENIAL OF SERVICE ATTACKS). WE ARE NOT LIABLE FOR SERVICE OUTAGES OF 24 CONTINUOUS HOURS OR LESS NOR FOR SERVICE LIMITATIONS OR INTERRUPTIONS, AS DESCRIBED IN PARAGRAPH 1.C ABOVE. OUR LIABILITY AND THE LIABILITY OF ANY UNDERLYING CARRIER FOR ANY FAILURE OR MISTAKE SHALL IN NO EVENT EXCEED OUR SERVICE CHARGES DURING THE AFFECTED PERIOD. WE AND ANY UNDERLYING CARRIER ARE NOT LIABLE FOR ANY INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES SUCH AS LOST PROFITS. YOU AND WE BOTH WAIVE TO THE FULLEST EXTENT ALLOWED BY LAW, ANY CLAIMS TO RECOVER INCIDENTAL, PUNITIVE AND CONSEQUENTIAL DAMAGES. WE AND ANY UNDERLYING CARRIER ARE NOT LIABLE FOR (i) ECONOMIC LOSS OR INJURIES TO PERSONS OR PROPERTY ARISING FROM USE OF THE SERVICE, THE DEVICE OR ANY EQUIPMENT USED IN CONNECTION WITH THE DEVICE UNLESS CAUSED BY OUR SOLE AND GROSS NEGLIGENCE, OR (ii) THE INSTALLATION OR REPAIR OF THE DEVICE BY ANY PARTIES WHO ARE NOT OUR EMPLOYEES. THIS PARAGRAPH SHALL SURVIVE TERMINATION OF THIS AGREEMENT.
- b. **Indemnification.** YOU AGREE TO DEFEND, INDEMNIFY, AND HOLD US, OUR AFFILIATES AND AGENTS AND ANY OTHER SERVICE PROVIDER, HARMLESS FROM CLAIMS OR DAMAGES RELATING TO THIS AGREEMENT OR YOUR PROMISES OR STATEMENTS MADE IN IT AND USE OF THE DEVICE OR SERVICE UNLESS DUE TO OUR SOLE AND GROSS NEGLIGENCE. YOU ALSO AGREE TO PAY OUR REASONABLE ATTORNEYS' AND EXPERT WITNESS FEES AND COSTS INCURRED IN ENFORCING THIS AGREEMENT THROUGH APPEAL EXCEPT AS PROVIDED IN PARAGRAPH 5, BELOW. USE OF YOUR DEVICE WHILE OPERATING A MOTOR VEHICLE OR IN ANOTHER DISTRACTED OR NEGLIGENT MANNER MAY BE PROHIBITED OR RESTRICTED BY LAW IN SOME AREAS. IT IS YOUR RESPONSIBILITY TO CONFORM TO ALL SUCH LAWS OR REGULATIONS AND YOU SHALL INDEMNIFY US FROM CLAIMS ARISING FROM ANY SUCH UNLAWFUL USE. THIS PARAGRAPH SHALL SURVIVE TERMINATION OF THIS AGREEMENT.
- c. **No Warranties.** WE MAKE NO EXPRESS WARRANTY REGARDING THE SERVICE OR THE DEVICE OR ANY SERVICES PROVIDED BY ANY THIRD PARTIES, AND DISCLAIM ANY IMPLIED WARRANTY, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WE DO NOT AUTHORIZE ANYONE TO MAKE ANY WARRANTY ON OUR BEHALF AND YOU SHOULD NOT RELY ON ANY SUCH STATEMENT. WE ARE NOT THE MANUFACTURER OF THE DEVICE AND ANY STATEMENT REGARDING IT SHOULD NOT BE INTERPRETED AS A WARRANTY. THIS PARAGRAPH SHALL SURVIVE TERMINATION OF THIS AGREEMENT.

### 5. RESOLUTION OF DISPUTES.

PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS RIGHTS THAT YOU MAY OTHERWISE HAVE. IT PROVIDES FOR RESOLUTION OF MOST DISPUTES THROUGH ARBITRATION INSTEAD OF COURT TRIALS AND CLASS ACTIONS. ARBITRATION IS FINAL AND BINDING AND SUBJECT TO ONLY VERY LIMITED REVIEW BY A COURT. THIS ARBITRATION CLAUSE SHALL SURVIVE TERMINATION OF THIS AGREEMENT.

1. **Binding Arbitration.** This provision is intended to be interpreted broadly to encompass all disputes or claims arising out of our relationship. Any dispute or claim, including those against any of our subsidiary, parent or affiliate companies, arising out of or relating to this Agreement, our Privacy Policy or the Service or any equipment used in connection with the Service (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such a court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us.
2. **Arbitration Procedures.** You must first present any claim or dispute to us by contacting Customer Care to allow us an opportunity to resolve the dispute (see also paragraphs 2.d above and 5.e below). You may request arbitration if your claim or dispute cannot be resolved within 60 days. The arbitration of any dispute or claim shall be conducted in accordance with the American Arbitration Association ("AAA") under the Wireless Industry Arbitration Rules ("WIA Rules"), as modified by this Agreement. The WIA Rules and information about arbitration and fees are available upon request from the AAA online at [www.adr.org](http://www.adr.org). You and we agree that this Agreement evidences a transaction in interstate commerce and this arbitration provision will be interpreted and enforced in accordance with the Federal Arbitration Act and federal arbitration law. Unless you and we agree otherwise, any arbitration will take place in the county seat for the county in which your billing address is located. At either party's election, the arbitration shall be held telephonically. An arbitrator may award any relief or damages (including injunctive or declaratory relief) that a court could award, except an arbitrator may not award relief in excess of or contrary to what this Agreement provides and may not order relief on a consolidated, class wide or representative basis. In any arbitration applying the WIA Rules applicable to large/complex cases, the Arbitrators must also apply the Federal Rules of Evidence, and the losing party may have the award reviewed in accordance with the review procedures set forth in the WIA Rules. Judgment on any arbitration award may be entered in any court having proper jurisdiction. If any portion of this arbitration clause is determined by a court to be inapplicable or invalid, then the remainder shall still be given full force and effect.

- c. **Costs of Arbitration.** For claims of less than \$1,000, you will be obligated to pay \$25 and we will pay all other administrative costs and fees. For claims over \$1,000 but under \$75,000, you will be obligated to pay your share of the arbitration fees, but no more than the equivalent court filing fee for a court action filed in the jurisdiction where your billing address is located. For arbitrations in excess of \$75,000, all administrative fees and expenses of arbitration will be divided equally between you and us. In all arbitrations, each party will bear the expense of its own counsel, experts, witnesses and preparation and presentation of evidence at the arbitration.
- d. **Waiver of Class Actions.** By this Agreement, both you and we are waiving certain rights to litigate disputes in court. You and we both agree that any arbitration will be conducted on an individual basis and not on a consolidated, class wide or representative basis. If for any reason this arbitration clause is deemed inapplicable or invalid, or to the extent this arbitration clause allows for litigation of disputes in court, you and we both waive, to the fullest extent allowed by law, any right to pursue any claims on a class or consolidated basis or in a representative capacity.
- e. **Limitations Period.** Any arbitration or legal action with respect to any and all claims or causes of action related to or arising out of this Agreement must be brought within two years after the cause of action arises, or within the applicable statutory period of time, whichever is shorter. This limitations period does not apply to any given cause of action when the statutory limitations period for that cause of action cannot be waived, restricted or otherwise limited by you.

#### 6. MISCELLANEOUS.

- a. **Privacy.** We encourage you to learn more about our general privacy practices by reading our Privacy Policy at [www.attwireless.com/privacy](http://www.attwireless.com/privacy). In addition to the practices described in this Agreement and our Privacy Policy, you authorize our monitoring and recording of your conversations concerning your account or the Service and consent to our use of automatic dialing equipment to contact you on any phone number you provide us.
- b. **Assignment.** We may assign all or part of this Agreement without such assignment being considered a change to the Agreement, and without notice to you. We are then released from all liability. You may not assign this Agreement without our prior written consent.
- c. **Notices.** We may send you notices by mail or electronic means, in our sole discretion. Notices to you shall be effective 1) 3 days following the date deposited in the U.S. Mail or delivered to a nationally recognized courier or delivery service to your address as kept in our files and/or 2) immediately upon our transmission using an electronic means such as e-mail or text messaging service. You are responsible for notifying us of any changes in your mailing or e-mail address. Written notice to us shall be effective when directed to our Customer Care Department and received by us. Your notice must contain specific information adequate to identify you and your Service. Oral and electronic notices shall be deemed effective on the date reflected in our records.
- d. **Entire Agreement.** These Terms and Conditions, together with the Sales Information, represent the entire agreement between you and us, which may only be amended as described in this Agreement. This Agreement supersedes any inconsistent or additional representations made to you by any of our representatives, agents or dealers. If any part of this Agreement is found invalid, the balance of the Agreement remains enforceable. If, at any time, we do not enforce any right or remedy available under this Agreement, that failure is not a waiver of our right to enforce the right or remedy at a later time. Copied, microfiched, scanned or other duplicate or electronic images of this Agreement are admissible for all purposes.
- e. **Governing Laws.** This Agreement is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the Number. Where our Service terms and conditions are regulated by a state agency or the FCC, the regulations are available for your inspection; if there is any inconsistency between this Agreement and those regulations, this Agreement shall be deemed amended as necessary to conform to such regulations.
- f. **Capacity.** You represent that you are legally competent to enter into this Agreement, that you are over 18 years old, a citizen or resident of the United States and that you are not aware of any disability that would prevent you from entering into this Agreement.

# EXHIBIT F

1 JEROME C. ROTH (SBN 159483)  
2 KRISTIN LINSLEY MYLES (SBN 154148)  
3 JOHN P. HUNT (SBN 208941)  
4 JONATHAN H. BLAVIN (SBN 230269)  
5 MUNGER, TOLLES & OLSON LLP  
6 33 New Montgomery Street, 19th Floor  
7 San Francisco, CA 94105-9781  
8 Telephone: (415) 512-4000  
9 Facsimile: (415) 512-4077

10 Attorneys for Defendant  
11 CELLCO PARTNERSHIP d/b/a VERIZON  
12 WIRELESS

13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 IN AND FOR THE CITY AND COUNTY OF ALAMEDA

15 Coordination Proceeding  
16 Special Title (Rule 1550(b))

17 In Re:

18 **CELLPHONE TERMINATION FEE  
19 CASES**

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4332

**FIRST AMENDED CROSS-COMPLAINT  
OF VERIZON WIRELESS**

**The Honorable Ronald M. Sabraw**

Complaint Filed: June 24, 2005

20 This document relates to:

21 CELLCO PARTNERSHIP d/b/a  
22 VERIZON WIRELESS,

23 Cross-Complainant,

24 vs.

25 CHRISTINE MORTON, DELORES  
26 JOHNSON, and MOLLY WHITE,

27 Cross-Defendants.  
28

1 Cross-Complainant Cellco Partnership d/b/a Verizon Wireless ("Verizon  
2 Wireless"), by and through its undersigned attorneys, hereby cross-complains against cross-  
3 defendants Christine Morton, Delores Johnson, and Molly White ("Cross-Defendants").  
4 Verizon Wireless makes the following allegations based upon information and belief.

5 **NATURE OF THE ACTION**

6 1. Each Cross-Defendant alleges that she entered into a Wireless Services  
7 Customer Agreement ("Customer Agreement") with Verizon Wireless for the provision of  
8 wireless services. To the extent this is true, each Cross-Defendant agreed to remain a Verizon  
9 Wireless customer for two years from the date she entered into her contract, but retained the  
10 option of terminating early in exchange for payment of an early termination fee ("ETF").

11 2. Each Cross-Defendant alleges that she paid an ETF. To the extent any  
12 Cross-Defendant paid an ETF, she did so as a result of the exercise of an option to terminate a  
13 Customer Agreement prior to its two-year anniversary date.

14 3. Cross-Defendants have filed suit against Verizon Wireless, on behalf of  
15 themselves and a putative class of California consumers, in the Superior Court for the State of  
16 California, County of Alameda, Judicial Council Coordination Proceeding No. 4332, alleging  
17 Verizon Wireless violated Cal. Civ. Code § 1671(d); Cal. Civ. Code § 1750, *et seq.*; and Cal.  
18 Bus. and Prof. Code § 17200, *et seq.* They also assert claims for unjust enrichment/common law  
19 restitution and a common count for money had and received. Cross-Defendants' claims are  
20 based on the ETFs they allege that they paid to Verizon Wireless.

21 4. According to Cross-Defendants, the Verizon Wireless ETF provision is  
22 unenforceable because it is a liquidated damages provision that violates California law. Cross-  
23 Defendants seek, among other things, to have the Court declare that the Verizon Wireless ETF is  
24 void and to order Verizon Wireless to return any ETFs it collected from Cross-Defendants.

25 5. Verizon Wireless is filing an Answer in which Verizon Wireless denies  
26 that the ETF is a liquidated damages provision and contends instead that the ETF is an  
27 alternative performance option, under which a subscriber may terminate service before the end  
28 of the two-year term in exchange for payment of an ETF. Thus, it is the position of Verizon

1 Wireless that to the extent each Plaintiff paid an ETF, that payment reflects Plaintiff's choice of  
2 an alternative method of performing her contract obligations, rather than the assessment of  
3 liquidated damages for Plaintiff's breach of the Service Agreement. Verizon Wireless contends  
4 that its ETF is not subject to California law governing liquidated damages provisions and that  
5 the ETF is otherwise valid and enforceable.

6 6. Verizon Wireless also contends that any state law that would invalidate  
7 the ETF provisions in Verizon Wireless's Service Agreements is preempted by federal law.

8 7. In the event, and only in the event, that the Court disagrees with Verizon  
9 Wireless and determines that: (i) Cross-Defendants in fact breached their Service Agreements  
10 by terminating early; (ii) that the ETF clause is not a valid alternative performance option, but  
11 instead, is a liquidated damages provision that violates California law; and (iii) that such  
12 California law claims are not federally preempted, then Verizon Wireless brings this Cross-  
13 Complaint to recover the actual damages sustained by Verizon Wireless as a result of Cross-  
14 Defendants' early termination of their Customer Agreements.

#### 15 PARTIES

16 8. Cross-Complainant Celco Partnership d/b/a Verizon Wireless is a  
17 Delaware Corporation with its primary place of business in Bedminster, New Jersey. Verizon  
18 Wireless provides wireless services in California.

19 9. Cross-Defendant Christine Morton is a resident of San Pablo, California.

20 10. Cross-Defendant Delores Johnson is a resident of Orange County,  
21 California

22 11. Cross-Defendant Molly White is a resident of Oregon.

#### 23 OPERATIVE FACTS

24 12. Verizon Wireless and each Cross-Defendant entered into a Customer  
25 Agreement. Pursuant to its Customer Agreements, Verizon Wireless agreed to provide wireless  
26 services to Cross-Defendants in exchange for monthly payments to be made by Cross-  
27 Defendants. Under the Customer Agreements, Cross-Defendants Morton, Johnson, and White  
28 agreed to maintain their service for 24 months. Because a Verizon Wireless customer has the

1 ability to change calling plans, Morton, Johnson, and White were not obligated to remain on  
2 their original plans for the duration of their minimum terms.

3 13. Cross-Defendant Johnson terminated her service prior to the end of her  
4 24-month Customer Agreement period.

5 14. Cross-Defendant White terminated her service prior to the end of her 24-  
6 month Customer Agreement period.

7 15. To the extent Cross-Defendant Morton paid an ETF to Verizon Wireless,  
8 she did so as a result of the termination of service prior to the end of a 24-month Customer  
9 Agreement period.

10 16. Verizon Wireless provided wireless services as required by any Customer  
11 Agreement into which any Cross-Defendant entered.

12 17. It is the position of Verizon Wireless that any ETF payment remitted by  
13 any Cross-Defendant was made in exchange for the exercise of a right to terminate a Customer  
14 Agreement prior to the end of the contract term. It also is the position of Verizon Wireless that  
15 Cross-Defendants did not breach any of the agreements to which they claim to be parties by  
16 terminating service early, because under the express provisions of the Agreements, Cross-  
17 Defendants retained the option of terminating early in exchange for payment of a \$175 ETF.  
18 However, in the event the Court determines that the ETF provision in any Customer Agreement  
19 to which any Cross-Defendant claims to be a party is void and unenforceable, and that Cross-  
20 Defendants have breached their Customer Agreements by terminating early, then Cross-  
21 Defendants owe Verizon Wireless compensation for the damage caused by their breach of the  
22 Customer Agreements.

23 18. As of the date of the filing of this Cross-Complaint, Cross-Defendants'  
24 claims have not been certified as a class action. Verizon Wireless expressly reserves its right to  
25 assert the claims set forth herein against the members of the plaintiff class on an individual or a  
26 class-wide basis in the event this case is certified as a class action.

1 **FIRST ALTERNATIVE CAUSE OF ACTION**

2 (Breach of Contract Against Morton)

3 19. Verizon Wireless realleges and incorporates by reference the allegations  
4 contained in Paragraphs 1 through 18 of this Cross-Complaint as if fully set forth herein.

5 20. The Customer Agreement Cross-Defendant Morton executed was  
6 binding and enforceable.

7 21. In the event the Court determines that the ETF provision set forth in the  
8 Cross-Defendant Morton's Customer Agreement is an invalid liquidated damages clause, and  
9 that the Customer Agreement did not allow Cross-Defendant Morton to terminate prior to the  
10 24-month anniversary of its execution, then Cross-Defendant Morton damaged Verizon  
11 Wireless by terminating her contract early. Damages incurred by Verizon Wireless include but  
12 are not limited to the excess of remaining monthly payments due under the Subscription  
13 Agreement over the cost of serving Morton for the remainder of the agreed-upon term.

14 22. Verizon Wireless performed all of its duties and obligations under  
15 Morton's Customer Agreement, except those excused by Morton's breach in the event the  
16 Court determines that Morton breached her Customer Agreement.

17 23. Verizon Wireless seeks its damages, including prejudgment interest and  
18 consequential damages.

19 **SECOND ALTERNATIVE CAUSE OF ACTION**

20 (Breach of Contract Against Johnson)

21 24. Verizon Wireless realleges and incorporates by reference the allegations  
22 contained in Paragraphs 1 through 18 of this Cross-Complaint as if fully set forth herein.

23 25. The Customer Agreement Cross-Defendant Johnson executed was  
24 binding and enforceable.

25 26. In the event the Court determines that the ETF provision set forth in the  
26 Cross-Defendant Johnson's Customer Agreement is an invalid liquidated damages clause, and  
27 that the Customer Agreement did not allow Cross-Defendant Johnson to terminate prior to the  
28 24-month anniversary of its execution, then Cross-Defendant Johnson damaged Verizon

1 Wireless by terminating her contract early. Damages incurred by Verizon Wireless include but  
2 are not limited to the excess of remaining monthly payments due under the Subscription  
3 Agreement over the cost of serving Morton for the remainder of the agreed-upon term.

4 27. Verizon Wireless performed all of its duties and obligations under  
5 Johnson's Customer Agreement, except those excused by Johnson's breach in the event the  
6 Court determines that Morton breached her Customer Agreement.

7 28. Verizon Wireless seeks its damages, including prejudgment interest and  
8 consequential damages.

9 **THIRD ALTERNATIVE CAUSE OF ACTION**

10 (Breach of Contract Against White)

11 29. Verizon Wireless realleges and incorporates by reference the allegations  
12 contained in Paragraphs 1 through 18 of this Cross-Complaint as if fully set forth herein.

13 30. The Customer Agreement Cross-Defendant White executed was binding  
14 and enforceable.

15 31. In the event the Court determines that the ETF provision set forth in the  
16 Cross-Defendant White's Customer Agreement is an invalid liquidated damages clause, and  
17 that the Customer Agreement did not allow Cross-Defendant White to terminate prior to the  
18 24-month anniversary of its execution, then Cross-Defendant White damaged Verizon  
19 Wireless by terminating her contract early. Damages incurred by Verizon Wireless include but  
20 are not limited to the excess of remaining monthly payments due under the Subscription  
21 Agreement over the cost of serving White for the remainder of the agreed-upon term.

22 32. Verizon Wireless performed all of its duties and obligations under  
23 White's Customer Agreement, except those excused by White's breach in the event the Court  
24 determines that White breached her Customer Agreement.

25 33. Verizon Wireless seeks its damages, including prejudgment interest and  
26 consequential damages.



1 that any portion of Johnson's Customer Agreement was void, then Cross-Defendant Johnson is  
2 liable to Verizon Wireless for the benefits she received under the contract.

3 42. Johnson received certain benefits as consideration for which Johnson  
4 agreed not to cancel Verizon Wireless service without either (1) completing a certain period of  
5 service with Verizon Wireless or (2) paying an "early termination fee."

6 43. Johnson canceled Verizon Wireless service without completing the  
7 agreed-upon period of service with Verizon Wireless.

8 44. If Johnson is relieved of the obligation to pay the ETF, she should not in  
9 justice be permitted to retain the benefits she received from Verizon Wireless.

10 45. Accordingly, if Johnson is relieved of the obligation to pay the ETF, she  
11 will be unjustly enriched and the amount of the benefits she received should be restored to  
12 Verizon Wireless as restitution.

13 **SIXTH ALTERNATIVE CAUSE OF ACTION**

14 (Unjust Enrichment Against White)

15 46. Verizon Wireless realleges and reincorporates by reference the  
16 allegations contained in Paragraphs 1 through 18 of this Cross-Complaint as if fully set forth  
17 herein.

18 47. It is the position of Verizon Wireless that the Customer Agreement to  
19 which White asserts she was a party was valid and enforceable. In the event the Court finds  
20 that White's Customer Agreement was void, then Cross-Defendant White is liable to Verizon  
21 Wireless for the benefits she received under the contract.

22 48. White received certain benefits as consideration for which White agreed  
23 not to cancel Verizon Wireless service without either (1) completing a certain period of service  
24 with Verizon Wireless or (2) paying an "early termination fee."

25 49. White canceled Verizon Wireless service without completing the  
26 agreed-upon period of service with Verizon Wireless.

27 50. If White is relieved of the obligation to pay the ETF, she should not in  
28 justice be permitted to retain the benefits she received from Verizon Wireless.



# EXHIBIT G

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

KENNETH PHILLIPS,

Plaintiff,

v.

AT&T WIRELESS,

Defendant.

Civil Action No. 4:04cv40240

AFFIDAVIT OF MICHAEL ATTIYEH

STATE OF WASHINGTON

COUNTY OF KING

Comes now Michael Attiyeh, being of lawful age and duly sworn upon his oath,  
and states:

1. My name is Michael Attiyeh and I am employed by AT&T Wireless Services ("AWS") as Director of Consumer Product Management. In that position and other positions I have held, I have been involved with determining the policy for early termination fees and the establishment of rate plans for AWS. I have personal knowledge of the facts stated herein and I am otherwise competent to testify. I submit this affidavit in support of AWS' Response to Plaintiff's Motion to Remand.

2. The early termination fee imposed for cancellation of a customer's wireless service agreement prior to the expiration of its term directly correlates to and is an integral part of the rates charged by AWS for its services under such agreements. The early termination fee is a specific factor considered in setting the overall rates charged to

customers. AWS' rates are based, in part, on the early termination fee, and the fee is a component of its rate plans. Specifically, the early termination fee provides recovery of lost revenue when a customer cancels service before expiration of the service agreement, and is thus directly related to the rates charged for the underlying service.

3. In setting rates for services, AWS considers several factors, including the costs associated with acquiring a new customer and AWS' ability to recover such costs if a person terminates their service early. The rates must be set at a level that will result, on average, in AWS recouping its costs and making a reasonable profit.

4. With regard to the early termination fee, AWS differentiates between term contracts and rate plans that do not require a term of service. For rate plans involving term contracts, AWS is able to charge lower effective rates because of the assurance that the subscriber will provide an income stream of sufficient duration to cover costs and provide a profit. In exchange for the lower rates for service, the customer agrees to the early termination fee as a means of making up the lost revenues in an early termination situation. This fee takes the place of the lost service revenues in covering the costs associated with the cancelled subscriber.

5. For rate plans that do not require a term of service, and thus have no early termination fee, the rates are typically higher to insure coverage of costs and a profit on a more expedited basis. For example, AWS has prepaid rate plans that do not require term contracts (and thus have no early termination fee). While the costs associated with prepaid activations are typically lower than the costs associated with term contract activations, the rates for prepaid service are typically higher than for term contract service. Higher rates for prepaid plans are necessary to insure early recovery of

acquisition costs and a reasonable profit since there is no assurance that a prepaid subscriber will stay on the service for any length of time.

6. Because AWS is able to charge an early termination fee in connection with the early cancellation of term service agreements, it is able to charge lower rates under those agreements. If it were determined that AWS could not charge an early termination fee for early cancellation of term service agreements, AWS would be required to increase its rates to recover costs and make a reasonable profit on a more expedited basis -- similar to the higher rates for prepaid service. Thus, the early termination fee imposed for cancellation of a customer's wireless service agreement prior to the expiration of its term directly affects the rates charged by AWS for its service under such agreements, and is an integral part of its fixed term rate plans.

Further, affiant sayeth not.

Michael Attiyeh  
MICHAEL ATTIYEH

Before me, on this 1 day of June, 2004, personally appeared Michael Attiyeh, known to me to be the individual described in and who executed the foregoing affidavit, and acknowledged that he fully understood its contents and meaning and executed the same as his free act and deed.

Carol N. Levin  
Notary Public, State of Washington  
CAROL N. LEVIN

My commission expires:

12-9-05



# EXHIBIT H

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.:50 2004 CA 005062 XXXX MB

CARVER RANCHES WASHINGTON PARK,  
INC., On Behalf of Itself and All Others  
Similarly Situated,

Plaintiff,

v.

NEXTEL SOUTH CORPORATION d/b/a  
NEXTEL COMMUNICATIONS,

Defendant.

**DEFENDANT'S NOTICE OF FILING NOTICE OF REMOVAL**

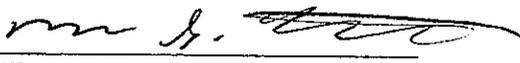
Defendant Nextel South Corp., d/b/a Nextel Communications ("Nextel"), by and through its undersigned counsel, hereby gives notice to this Court that it has this day filed a Notice of Removal in the United States District Court for the Southern District of Florida. A copy of the Notice of Removal is attached hereto as "Exhibit A." Accordingly, pursuant to 28 U.S.C. § 1446, removal of this proceeding from this Court to the United States District Court for the Southern District of Florida has been effected.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy hereof was furnished by U.S. Mail to:  
**Jayne A. Goldstein, Esquire**, Mager, White & Goldstein, LLP, 2825 University Drive, Suite 350, Coral Springs, Florida 33065 (fax 954 341-0855); **Ann D. White, Esquire**, **Michael J. Kane, Esquire** and **Lee Albert, Esquire**, Mager, White & Goldstein, LLP, One Pitcairn Place, Suite 2400, 165 Township Line Road, Jenkintown, Pennsylvania 19046 (fax 215 481-

0271); **Scott A. Bursor, Esquire**, Law Offices of Scott A. Bursor, 500 Seventh Avenue, 10<sup>th</sup> Floor, New York, New York 10018 (fax 212 989-9163); **Adam Gonnelli, Esquire**, Faruqi & Faruqi, LLP, 320 East 39<sup>th</sup> Street, New York, New York 10016 (fax 212 983-9331); **David Pastor, Esquire**, Gilman & Pastor, LLP, Stonehill Corporate Center, 999 Broadway, Suite 500, Sangus, Massachusetts 01906 (fax 781 231-7840); and **Alan R. Plutzik, Esquire and L. Timothy Fisher, Esquire**, Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598 (fax 925-945-8792), this 30<sup>th</sup> day of June, 2004.

GUNSTER, YOAKLEY, & STEWART, P.A.  
777 South Flagler Dr.  
Philips Point - Suite 500 East  
West Palm Beach, FL 33401  
Tel: (561) 650-1980  
Fax: (561) 650-5677

By: 

Clinton R. Losego  
Florida Bar No. 818054  
Gregor J. Schwinghammer, Jr.  
Florida Bar No.: 090158  
Bryan S. Miller  
Florida Bar No. 0312230

Dominic Surprenant, Esq.  
Quinn Emanuel Urquhart Oliver & Hedges  
865 South Figueroa Street  
10th Floor  
Los Angeles, CA 90017  
213-443-3166 - Phone  
213-624-7707- Facsimile

777148.1

IN THE UNITED STATE DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. \_\_\_\_\_

CARVER RANCHES WASHINGTON PARK,  
INC., On Behalf of Itself and All Others  
Similarly Situated,

Plaintiff,

v.

NEXTEL SOUTH CORPORATION d/b/a  
NEXTEL COMMUNICATIONS,

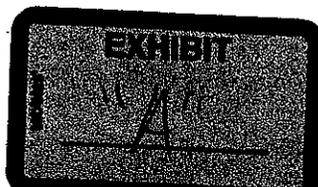
Defendant.

**DEFENDANT'S NOTICE OF REMOVAL**

Defendant Nextel South Corp., d/b/a Nextel Communications ("Nextel"), by and through its undersigned counsel and pursuant to 28 U.S.C. §§ 1441 and 1446, respectfully notifies this Court that it has removed this action to this Court from the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In support of removal, Nextel states as follows.

**Preliminary Statement**

1. This putative class action was filed ostensibly to address the "unfair and wrongful . . . imposition [by Nextel] of unlawful arbitrary penalty clauses" in its subscribers contracts for the provision of cellular and related services. (Complaint ¶ 1.) The Complaint alleges that Nextel requires that its subscribers sign up for term contracts of 12 or 24 months, and that if the subscriber terminates the contract early, Nextel charges the subscriber the early termination fee ("ETF") of \$200 stipulated in the contract. (Complaint ¶¶ 16-17.) Plaintiff alleges that Nextel's ETF is "unlawful, unfair, void or unenforceable" (¶ 11) and seeks to permanently enjoin its use (¶¶ 29, 34). Mindful



of the fact that its state law claim faces the challenge of complete field preemption (as Nextel demonstrates below), plaintiff is careful to allege that the "early termination penalty is not a rate charged by Nextel, nor is it a rate component" (§ 26).

2. Plaintiff alleges that the ETF is a "penalty," and is careful to call out that it is purportedly not a "rate," because if the ETF is a rate, plaintiff's state law claims are subject to the complete preemption doctrine. A federal court reviewing a removal petition, however, is not bound by the allegations in the complaint, but may properly look beyond the plaintiff's allegations to determine if the removing defendant has properly invoked the Court's subject matter jurisdiction. See paragraph 7 *infra* (quoting Geddes v. American Airlines, Inc., 321 F.3d 1349, 1352-53 (11th Cir. 2003)). Here, if plaintiff's convenient albeit conclusory labeling of Nextel's ETF as a "penalty" and not as a rate is discarded and the matter is looked at afresh, it becomes obvious that plaintiff's state law claim, if successful, would directly change Nextel's rates, the way Nextel calculates its rate and would involve the state court in the direct regulation of Nextel's rate structure. For each of these reasons, Nextel's ETF is a rate and plaintiff's state law claim is subject to complete field preemption. See Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983, 990 (7th Cir. 2000) (finding removal on complete preemption under § 332(c)(3)(A) appropriate because the plaintiff's complaint, "although fashioned in terms of state law actions, actually challenges the rates . . . offered by AT&T Wireless, an area specifically reserved to federal regulation"); Gatton v. T-Mobile USA, Inc., 2003 WL 21530185 \*8 (C.D. Cal. April 18, 2003) (finding removal on complete preemption appropriate under § 332(c)(3)(A) because "the relief sought by Plaintiffs . . . would change the way T-Mobile calculates its rates"); cf. In re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193, 1201, 1205 (E.D. Pa. 1996) (the plaintiffs' state law claims were preempted because the remedies sought would require "that the court regulate the manner in which [the defendant] calculates its rate schedules") (finding removal proper on the basis of the "artful pleading" doctrine and, for that reason, finding it unnecessary to decide whether removal was also appropriate under the complete preemption doctrine).

3. Plaintiff's claims challenge Nextel's rates and rate structure and for that reason trespass on matters as to which the federal government, and in particular the Federal Communications Commission ("FCC"), have complete and exclusive authority.

A. **Federal Regulation Of Rates Charged By Cellular Providers**

4. In 1993, Congress "dramatically revise[d] the regulation of the wireless telecommunications industry." Conn. Dept. of Public Utility v. F.C.C., 78 F.3d 842, 845 (2d Cir. 1996). This dramatic revision had two principal components. First, Congress amended § 2(b) of the Federal Communications Act of 1934 ("FCA") to exclude commercial mobile radio services ("CMRS"), or wireless telephony, from the general prohibition on FCC regulation of intrastate telecommunications services. By doing so, Congress exempted CMRS from the system of dual state and federal regulation that governs traditional land-based telephone services. See 47 U.S.C. § 152(b). Second, Congress amended the FCA to make the FCC's complete authority over cellular rates explicit. As amended, the FCA unambiguously states that: "no State or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). In sum, states may not "prescribe how much may be charged" by cellular carriers, nor can they dictate the "rate elements for CMRS," or otherwise regulate a carrier's "rate structure." In re Southwestern Bell Mobile Systems, Inc., 14 F.C.C.R. 19898, ¶ 20 (1999). Rather, the subscriber's remedy must be sought in a federal forum. See 47 U.S.C. § 207.

5. Congress' goal in these amendments was to "engender a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure." In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order, 9 F.C.C.R. 1411, ¶ 25 (1994). Congress and the FCC believed that uniform, predictable regulation was essential to a viable and innovative market for the provision of wireless services:

We believe our decisions in this Order will have a positive effect on job stimulation and economic growth because these decisions continue our efforts to foster competition in the mobile marketplace . . . . [C]ompetitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- and not by strategies in the regulatory arena. The even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.

Id., ¶ 19 (emphasis added). Thus, "Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers." Id., ¶ 12.

6. Since 1993, Congress has repeatedly emphasized its intent to create a comprehensive and uniform federal regulatory framework for all wireless telephone services. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993). Section 332 is integral to that mandate:

Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest.

Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order, 9 F.C.C.R. 1411, ¶ 250 (1994).

**B. Plaintiff's State Law Claims Are Completely Preempted by 47 U.S.C. § 332(c)(3)(A)**

7. The Supreme Court recently found that, whenever federal law provides "the exclusive cause of action" for a particular claim, "the cause of action necessarily arises under federal law and the case is removable" because "the federal statute completely preempts the state-law cause of action." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8-9 (2003). See also Geddes v. American Airlines, Inc., 321 F.3d 1349, 1352-53 (11th Cir. 2003) (complete preemption "looks beyond the

complaint to determine if the suit is, in reality, 'purely a creature of federal law,' even if state law would provide a cause of action in the absence of the federal law. It transforms the state law claim into one arising under federal law, thus creating the federal question jurisdiction requisite to removal to federal courts").

8. Under Bastien, Gatton and Comcast, removal of state law claims to federal court is appropriate pursuant to § 332(c)(A) when the plaintiff's state law claims, if successful, "would directly alter . . . rates for service," or "would change the way [the cellular provider] calculates its rates," or would require the state court to "regulate the manner in which [the cellular provider] calculates its rates schedules." See paragraph 2, supra. Plaintiff's state law claims here, if successful, would do all three, and therefore are completely preempted by federal law.

9. In this case, plaintiff alleges that Nextel's ETF is an unlawful penalty and not a rate. (Complaint ¶ 26.) The Court on this removal petition is free to disregard plaintiff's allegation and look at the actual facts. See Geddes, 321 F.3d at 1353. Nextel recently described its ETF in detail in a verified interrogatory response in a separate action brought by many of plaintiff's lawyers here. The verified response establishes the following points:

- a. **Nextel's ETF allows it to offer the lowest initial handset rate and lowest monthly recurring service rate.**

Nextel's verified response states in part:

The ETF contained in Nextel's current subscriber agreement is an integral part of Nextel's rate structure. Nextel's rates depend upon and vary according to the assured length of the service commitment from the customer. A longer assured commitment enables Nextel to reduce handset prices (and incur a greater subsidy) at the inception of the term and lower monthly recurring prices. In Nextel's experience, most customers, when presented with multiple plan terms, some involving ETFs, some without, will choose the option that offers the lowest initial cost and/or lower monthly recurring charges. That option is the plan with the longest term commitment, because Nextel offers the lowest handset price (and greatest initial subsidy), as well as the lowest monthly recurring service rates when it is assured of the longest time of return. Nextel believes that this is the current business model used by the wireless service industry, and has been since approximately mid-2000. This rate model developed to most effectively serve the wishes of the

customer (who typically wants cheap initial access to the network and lower monthly recurring charges) while still enabling Nextel to maintain a sustainable profit margin (based upon revenues less the upfront cost of acquisition and ongoing operating expenses received from the customer over the life of their contract) in a highly-competitive marketplace. This rate model has evolved from the early days of cellular service, when initial handset costs borne by the customer were extremely high (often more than \$3,000), to one that has enabled cellular service to be obtained by a much larger customer base, at a much lower initial price. . . .

Nextel's handset costs, and therefore its handset subsidies, are the highest in the wireless industry, in large part because Nextel uses primarily Motorola brand equipment for its handset equipment, which is competitive with the highest quality equipment on the market and offers the greatest availability of features sought by consumers of wireless services.

**b. Absent an ETF, Nextel would be forced to dramatically revise its rates and rate structure.**

Nextel's verified response went on to explain that:

In California, Boost Mobile, an indirect subsidiary of Nextel Communications, Inc., provides wireless services to customers on a prepaid basis with no ETF. For such customers, Nextel provides lower subsidies to offset the customer's price for handset equipment because Nextel has no contractual commitment by such customers that they will continue to use Nextel's wireless services for any predetermined length of time. Additionally, Boost Mobile subscribers pay higher monthly service charges in the form of rates per minute due to the absence of a long-term contractual commitment.

In contrast, the 12-month and 24-month subscriber agreements currently offered by Nextel of California both contain ETF provisions. Under the 12-month plan, Nextel provides a substantial subsidy to offset the price that must be paid by the customer to obtain new handset equipment to access the network. Under the 24-month plan, Nextel provides a greater subsidy to offset the price that must be paid by the customer for new handset equipment. Implementation of the ETF provision has enabled Nextel to offer more to its customers better equipment at a lower initial cost than Nextel could before implementation of the ETF. If Nextel were not permitted to charge an ETF, Nextel believes that it would have to resort to a rate model more like the Boost Mobile rate model (with higher initial equipment costs and higher per-minute costs) on a wide-spread basis in order to maintain sustainable levels of operating profit.

**c. Nextel's ETF is a rate that is intended to and does charge customers for service Nextel provides.**

In its verified interrogatory response, Nextel explained that:

The amount of the ETF is fixed at \$200 in large part because Nextel operates in a competitive marketplace that would not permit Nextel to charge a higher ETF. Nextel's actual gross costs to add a customer to its network are substantially higher than the amount of the current ETF, and, for the past five years, have exceeded \$[. . .] per customer, while the amount of revenue obtainable from customers added is inherently variable and impossible to accurately estimate on an individual basis in advance of termination. For this reason, Nextel has alleged that, if the ETF were determined by this Court to be unenforceable, Nextel would be entitled to seek and prove, as an offset, the actual amount of damages suffered by Nextel as a result of each individual customer's termination of their contracts before the expiration of the agreed term. The amount of actual damages (and the "break-even" point in terms of profitability) varies by customer, according to several factors including, but not limited to, the type of equipment purchased, the amount of the equipment subsidy provided by Nextel, and the amount of revenue each customer generated over and above the service each customer cost Nextel (for example, a customer who heavily used free or low cost minutes, lightly used full-price minutes for a short period of time, and made several customer service calls seeking credits would have a substantially longer break-even time than a different type of customer). Nextel's gross costs to add each customer include, but are not limited to, equipment subsidies, commissions, equipment distribution and freight costs, advertising, marketing and inventory costs. Some or all of these costs may be incurred by Nextel when a customer renews a contract, depending upon such factors as the customer's reason for contract renewal, the nature of the contract renewal, and the components of the bargain reached with the customer. Nextel's gross cost per new customer has exceeded \$[. . .] for each year between 1999 and 2003. Nextel's gross cost to renew a customer is variable for each customer, as set forth above.

**d. Nextel accounts ETF-generated revenue as revenue generated from the provision of cellular services to its subscribers.**

Finally, Nextel describes its collection of ETF-generated revenues:

The existence of an ETF is included not only in Nextel's rate-setting process, but collected ETF proceeds are included in Nextel's operating revenues. ETF collection has been a subject of increased focus by Nextel in the past year in order for Nextel to offset costs and continue to provide competitive rates to customers . . . . Prior to the nationwide implementation of the ETF, Nextel had no consistent, economical means of collecting damages from customers, and many more customers were not on defined-term rate plans.

10. As the foregoing makes clear, plaintiff's state law claims against Nextel's ETFs, if successful, would directly alter Nextel's rates, would change the way in which Nextel calculates its rate, and would require the Florida state court to regulate the manner in which Nextel is allowed to calculate its rates. For each of those reasons, plaintiff's state law claims are completely preempted by federal law. See paragraph 2 supra (citing cases).

11. Should plaintiff move to remand, it will likely cite cases holding that § 332(c)(3)(A) does not completely preempt state law claims. Nextel submits that a number of those cases are of limited relevance because they pre-dated the FCC's important discussion of the intended role of § 332(c)(3)(A) preemption contained in In re Wireless Consumer Alliance, Inc., 15 F.C.C. R. 17,021, ¶ 12, WL 1140570 (2000). See TPS Utilicom Services, Inc. v. AT&T Corp., 223 F. Supp. 2d 1089, 1098 (C.D. Cal. 2002) (finding case law divided on complete preemption with respect to § 332(c)(3)(A) but noting that the Seventh Circuit (in Bastien) and the FCC (in In re Wireless Consumers Alliance) have so held). Moreover, none of the contrary cases have considered the direct impact a state court ruling enjoining Nextel's ETF (or ruling what a "reasonable" ETF should be) would have on Nextel's rates and how should a ruling would impermissibly transform the state court into a regulator of Nextel's rate structure.

**B. Plaintiff's State Law Claims Are Also Properly Removed Under the Artful Pleading And Substantial Federal Questions Doctrines.**

12. As discussed in paragraph 2 supra, the court in In re Comcast held that a state law claim that would require the state court to "regulate the manner in which [the cellular provider] calculates its rate schedules" was properly removed to federal court under the artful pleading doctrine. See 949 F. Supp. at 1204 ("Because a state court would be prevented from giving Plaintiffs the remedies they seek without engaging in regulation of the rates of a CMRS provider, it is apparent that by labeling their complaint as aimed solely at Defendant's failure to disclose its rates, Plaintiff have engaged in the same type of artful pleading

described in Marcus. This court will not allow the Plaintiffs to engage in artful pleading to deny the Defendant's a federal forum"). Because plaintiff's state law claim would require the state law to regulate Nextel's rates, it may also be removed under the artful pleading doctrine.

13. Relatedly, removal of this action is required under the "substantial federal question" doctrine because adjudication of plaintiff's claims will require resolution of substantial disputed questions of federal law. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Ayres v. General Motors Corp., 234 F.3d 514, 519-20 (11th Cir. 2000) (federal question would "confer federal question jurisdiction" on court because the "federal question at issue . . . is a matter of considerable magnitude and substantial federal interest").

14. Here, plaintiff's claims implicate a substantial, disputed question that can only be resolved by interpreting and applying federal law. Plaintiff asks the state court to enjoin Nextel from charging an ETF because its ETF is purportedly "unfair," "wrongful" and "unlawful" under Florida state law. Congress has declared, however, that states, including state courts in awarding relief in civil actions, cannot regulate rates on the basis that such rates are "unreasonable." Whether Nextel's ETF is reasonable (as it plainly is) or unreasonable (as plaintiff's class action lawyers find it in their attempt to micro-manage Nextel's reasonable business decisions) is a matter within the exclusive purview of the FCC. It is simply not a question that may be resolved under state law. Rather, it is an inherently federal question.

15. This is a substantial question that justifies the exercise of federal jurisdiction. To permit state courts to entertain claims such as plaintiff's would inevitably lead to the creation of fifty different determinations regarding whether cellular providers may charge ETFs and the range across which such fees would be "reasonable." Yet the relevant statutory framework is plainly intended to create a uniform national policy in these matters. The

exercise of removal jurisdiction is appropriate in these circumstances. See Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 807 (4th Cir. 1996).

16. If Florida can decide that cellular providers cannot charge ETFs and, as a consequence, must therefore fundamentally alter their rates and rate structures, other state could decide ETFs are allowed, or only certain ETF charges, in certain circumstances, are allowable. A balkanization of fifty different regulations would create an unworkable morass for national providers of cellular services such as Nextel. Because there is no place for state regulation of cellular rates, plaintiff's claims are federal in character.

#### **Procedural Statement**

17. Plaintiff commenced this action on May 17, 2004, by filing its Complaint in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Civil Division, which is docketed at Cse No. 50 2004 CA 005062 XXXX MB-AH.

18. Service of plaintiff's complaint was made on or after June 1, 2004. According, this Notice of Removal is filed within the applicable thirty day period. See 28 U.S.C. § 1446(b).

19. Pursuant to § 1446(b), Nextel has attached hereto as "Exhibit A" true and correct copies of all process, pleadings and orders served upon it as of the date of this Notice of Removal.

20. Pursuant to § 1446(b), Nextel will promptly serve upon plaintiff's counsel and file with the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Civil Division, a true and correct copy of this Notice of Removal.

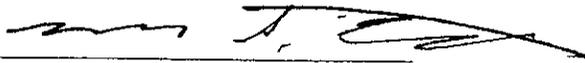
WHEREFORE, Nextel respectfully removes this action from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Civil Division, to this Court pursuant to 28 U.S.C. §§ 1441 and 1446.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy hereof was furnished by U.S. Mail to: **Jayne A. Goldstein, Esquire**, Mager, White & Goldstein, LLP, 2825 University Drive, Suite 350, Coral Springs, Florida 33065 (fax 954 341-0855); **Ann D. White, Esquire**, **Michael J. Kane, Esquire** and **Lee Albert, Esquire**, Mager, White & Goldstein, LLP, One Pitcairn Place, Suite 2400, 165 Township Line Road, Jenkintown, Pennsylvania 19046 (fax 215 481-0271); **Scott A. Bursor, Esquire**, Law Offices of Scott A. Bursor, 500 Seventh Avenue, 10<sup>th</sup> Floor, New York, New York 10018 (fax 212 989-9163); **Adam Gonnelli, Esquire**, Faruqi & Faruqi, LLP, 320 East 39<sup>th</sup> Street, New York, New York 10016 (fax 212 983-9331); **David Pastor, Esquire**, Gilman & Pastor, LLP, Stonehill Corporate Center, 999 Broadway, Suite 500, Sangus, Massachusetts 01906 (fax 781 231-7840); and **Alan R. Plutzik, Esquire** and **L. Timothy Fisher, Esquire**, Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598 (fax 925-945-8792), this 30<sup>th</sup> day of June, 2004.

GUNSTER, YOAKLEY, & STEWART, P.A.  
777 South Flagler Dr.  
Philips Point - Suite 500 East  
West Palm Beach, FL 33401  
Tel: (561) 650-1980  
Fax: (561) 650-5677

By: \_\_\_\_\_

  
Clinton R. Losego  
Florida Bar No. 818054  
Gregor J. Schwinghammer, Jr.  
Florida Bar No.: 090158  
Bryan S. Miller  
Florida Bar No. 0312230

Dominic Surprenant, Esq.  
Quinn Emanuel Urquhart Oliver & Hedges  
865 South Figueroa Street  
10th Floor  
Los Angeles, CA 90017  
213-443-3166 - Phone  
213-624-7707- Facsimile



CORPORATION SERVICE COMPANY

# Notice of Service of Process

NJP / ALL  
m~~is~~itt~~er~~ Number: 3545078  
D~~ate~~ Processed: 06/01/2004

Pr~~imary~~ Cont~~act~~: Ryan Robertson  
Nextel South Corp.  
2001 Edmund Halley Drive  
Reston, VA 20191

RECEIVED JUN 02 2004

<b>Entity:</b>	Nextel South Corp. Entity ID Number 1612911
<b>Entity Served:</b>	Nextel South Corporation d/b/a Nextel Communications
<b>title of Action:</b>	Carver Ranches Washington Park Inc vs. Nextel South Corporation
<b>Docu<del>ment</del>(s) type:</b>	Summons/Complaint
<b>N<del>ature</del> of Action:</b>	Contract
<b>Court:</b>	Palm Beach County 15th Judicial Circuit Court , Florida
<b>C<del>ase</del> Nu<del>ber</del>:</b>	502004CA005062XXXXMB AH
<b>Jurisdiction Served:</b>	Florida
<b>D<del>ate</del> Served:</b>	06/01/2004
<b>Answer or Appe<del>al</del>ance Due:</b>	20 Days
<b>Origin<del>ally</del> Served On:</b>	CSC
<b>How Served:</b>	Personal Service
<b>Pl<del>aintiff</del>'s Attorney:</b>	Jayne A. Goldstein 954-341-0844

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IN THE CIRCUIT COURT OF THE 15<sup>TH</sup>  
JUDICIAL CIRCUIT, IN AND FOR  
PALM BEACH COUNTY, FLORIDA

Case No:

Judge:

CARVER RANCHES WASHINGTON PARK,  
INC., On Behalf of Itself and All Others Similarly  
Situated

50 2004 CA 005062 XXXX MB

Plaintiff,

vs.

NEXTEL SOUTH CORPORATION d/b/a  
NEXTEL COMMUNICATIONS,

Defendant.

SUMMONS

THE STATE OF FLORIDA:

To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in  
this action on defendant:

*NEXTEL SOUTH CORPORATION d/b/a NEXTEL COMMUNICATIONS*  
*Co Corporation Service Company*  
1201 Hays Street  
Tallahassee, FL 32301-2525

Each defendant is required to serve written defenses to the complaint or petition on Plaintiff's  
Attorney: Jayne A. Goldstein, Esq., whose address is: 2825 University Drive, Suite #350, Coral Springs,  
Florida 33065, within 20 days after service of this summons on that defendant, exclusive of the day of  
service, and to file the original of the defenses with the Clerk of this Court either before service on  
Plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered  
against that defendant for the relief demanded in the complaint or petition.

DATED on ~~MAY 17 2004~~, 2004

DOROTHY H. WILKEN

As Clerk of Court

JOSIE LUCCE

By: \_\_\_\_\_

As Deputy Clerk

Rcvd 6/11/04 at 1020A.m and  
Srvd 6/11/04 at 1140A.m by

Chris J. Colson #142  
Certified Process Server, 2nd Judicial Crct of Florida

### **IMPORTANTE**

Usted he sido demandado legalmente. Tiene 20 días, contados a partir del recibo de esta notificación, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Una llamada telefonica no lo protegera. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el numero del caso y los nombres de las partes interesadas. Si usted no contesta la demanda a tiempo, podiese perder el caso y podria ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, puede usted consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guía telefonica.

Si desea responder a la demanda por su cuenta, al mismo tiempo en que presenta su respuesta ante el tribunal, debera usted enviar por correo o entregar una copia de su respuesta a la persona denominada abajo como "Plaintiff/Plaintiff's Attorney" (Demandante o Abogado del Demandante).

### **IMPORTANT**

Des poursuites judiciaires ont ete entreprises contre vous. Vous avez 20 jours consecutifs a partir de la date de l'assignation de cette citation pour déposer une reponse ecrite a la plainte ci-jointe aupres de ce tribunal. Un simple coup de telephone est insuffisant pour vous proteger. Vous etes obliges de déposer votre reponse ecrite, avec mention du numero de dossier ci-dessus et du nom des parties nommees ici, si vous souhaitez que le tribunal entende votre cause. Si vous ne deposez pas votre reponse ecrite dans le relai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent etre saisis par la suite, sans aucun preavis ulterieur du tribunal. Il y a d'autres obligations juridiques et vous pouvez requerir les services immediats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez telephoner a un service de reference d'avocats ou a un bureau d'assistance juridique (figurant a l'annuaire de telephones).

Si vous choisissez de déposer vous-meme une reponse ecrite, il vous faudra egalement, en meme temps que cette formalite, faire parvenir ou expedier une copie de votre reponse ecrite au "Plaintiff/Plaintiff's Attorney" (Plaignant ou a son avocat) nomme ci-dessous.

In accordance with the Americans With Disabilities Act of 1990, ("ADA"), disabled persons who, because of their disabilities, need special accommodations to participate in this proceeding should contact the ADA Coordinator at 205 N. Dixie Hwy., West Palm Beach, Florida 33402, telephone/TDD (561) 355-2996, not later than 5 business days prior to such proceedings.

IN THE CIRCUIT COURT OF THE  
15<sup>th</sup> JUDICIAL CIRCUIT, IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CARVER RANCHES WASHINGTON PARK,  
INC., On Behalf of Itself and All Others Similarly  
Situated

Plaintiff,

v.

NEXTEL SOUTH CORPORATION d/b/a  
NEXTEL COMMUNICATIONS,

Defendant.

CLASS REPRESENTATION

50 2004 CA 005062 XXXX MB

Civil Action No. \_\_\_\_\_

CLASS ACTION COMPLAINT FOR DAMAGES  
AND DEMAND FOR JURY TRIAL

Plaintiff, Carver Ranches Washington Park, Inc., by its attorneys, brings this action on behalf of itself and all other similarly situated businesses and individuals, against defendant Nextel South Corporation d/b/a Nextel Communications ("Nextel"), and on information and belief, except as to his own acts, alleges as follows:

**NATURE OF ACTION**

1. This is a consumer class action lawsuit filed to redress unfair and wrongful practices inflicted by defendant on Florida residents: the imposition of unlawful arbitrary penalty clauses in connection with the early termination of cellular/PCS telephone ("cell phone") service contracts.

2. Plaintiff seeks relief in this action pursuant to the Florida Deceptive and Unfair

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Trade Practices Act, Fla. Stat. § 501.201, *et seq.* ("FDUTPA"), individually and as a class action on behalf of the following class of Florida residents:

All Florida residents who are or were subscribers to the defendant's wireless telephone services and were required to enter into agreements that purport to require the payment of an early termination penalty. Plaintiff and members of the Class contend that the imposition of these penalties is an unfair and deceptive business practice which harms consumers.

### **JURISDICTION AND VENUE**

3. Jurisdiction is proper in this Court as Defendant has engaged and continues to engage in unfair and deceptive practices in Florida in violation of FDUTPA. Jurisdiction is also proper pursuant to F.S.A. §48.193(1)(a) as Defendant operates, conducts, engages in, or carries on a business or business venture in the State of Florida. Jurisdiction is also proper pursuant to F.S.A. §48.193(1)(b) as Defendant committed a tortious act in this State by virtue of its unlawful conduct targeted at Florida and its residents.

4. Venue is proper in Palm Beach County because:

- a. Defendant transacts business, or has agents who are found or transact business in this county;
- b. Defendant committed tortious actions in this county; and
- c. Defendant markets and sells its wireless communication services and equipment in this county.

5. By virtue of its own business activities and those of its subsidiaries and other related entities, Defendant is subject to the personal jurisdiction of this Court.

### **PARTIES**

6. Plaintiff, Carver Ranches Washington Park, Inc., is a corporation located in

Hollywood, Florida. Plaintiff entered into a service contract to receive cell phone service from Nextel. The contract contains a clause which purports to impose a flat-fee charge in the event the contract is terminated early. Plaintiff continues to be a subscriber to Nextel's service.

Plaintiff is a consumer within the meaning of the FDUTPA.

7. Defendant Nextel South Corporation d/b/a/ Nextel Communications ("Nextel") is a Georgia corporation with its principal place of business in Maitland, Florida.

8. Defendant Nextel Communications, Inc. is and at all times relevant hereto has been engaged in the business of providing cell phone service and related products and services to the public in Florida and in other states.

#### CLASS ACTION ALLEGATIONS

9. Plaintiff brings this action on behalf of itself and all others similarly situated under Rule 1.220(a) and (b)(3) of the Florida Rules of Civil Procedure on behalf of the Class, as defined in Paragraph 2 above.

10. Pursuant to Rule 1.220(a)(1), the Class is so numerous that joinder of all Class members is impracticable. Plaintiff does not know the exact size of the Class. Nevertheless, because of the nature of the trade and commerce involved, Plaintiff believes that the size of the Class is sufficiently numerous that joinder of all Class members is impracticable.

11. Pursuant to Rule 1.220 (a)(2), there are questions of law or fact common to the Class, including, but not limited to, the following:

a. Whether the termination penalty clause common to all Nextel contracts is unlawful, unfair, void or unenforceable;

b. Whether Nextel should be required to make restitution to Class members of the termination penalties that it has collected;

c. Whether Nextel should be required to disgorge the termination penalties that it has collected;

d. Whether Nextel violated the provisions of the FDUTPA and/or other provisions of law; and

e. Whether Nextel should be enjoined from disseminating contracts containing the termination penalty provision and/or from enforcing the provision in existing contracts.

12. Pursuant to Rule 1.220(a)(3), Plaintiff's claims are typical of the claims of each Class because the Defendant's unfair and unlawful termination penalties are uniform and standard practices which are directed equally at and affect all members of each respective Class in the same manner.

13. Pursuant to Rule 1.220(a)(4), Plaintiff will fairly and adequately represent the interests of the Class because the interests of the Plaintiff as a purchaser of Nextel telephone services and handset are coincident to, and not antagonistic to, those of the other members of the Class. Furthermore, Plaintiff has retained competent counsel experienced in consumer and other class action litigation.

14. This action should proceed as a class action under Rule 1.220(b)(3) because questions of law and fact predominate over any question affecting only individual Class members. Furthermore, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendant. In addition, it would be undesirable and impracticable for each member of the Class to bring an individual action because the bringing of such actions would put a substantial and unnecessary burden on the courts of this State.

15. A class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual Class member may be relatively small, especially given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by the Defendant's conduct. Furthermore, it would be virtually impossible for the Class members individually to redress effectively the wrongs done to them. Moreover, even if the Class members themselves could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgment. Individual litigation also increases the delay and expense to all parties and the court system due to the complex legal and factual issues presented by this case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

#### **FACTUAL ALLEGATIONS**

16. The defendant requires its customers to abide by wireless customer service agreements it distributes on preprinted standardized forms that are not subject to modification or negotiation and are presented to prospective subscribers on a "take it or leave it" basis. Each of the defendant's service agreements is a contract of adhesion under Florida law.

17. Each of the defendant's service agreements includes, as a term and condition of service, that subscribers pay early termination penalties if for any reason they seek to terminate service before the expiration of the contract period. Typically, defendant's wireless service agreements expressly require, as a term and condition of service, that customers terminating service before the expiration of a specified term will pay penalties of \$200.00 per telephone number or telephone. These early termination penalties are also due if the defendant terminates

the agreement for, among other things, nonpayment by the customer.

18. In addition, plaintiff is informed and believes that defendant requires its customers to renew their initial contract term each time a change in service is requested as a condition of modifying the terms of their service, thereby extending the contract an additional year (or two years) as of the date of the modification. These extensions of the contract term prevent plaintiff and Class members from changing their service to obtain lower rates or otherwise modify their plan without subjecting themselves to a renewed term and renewed early termination penalties. Plaintiff is informed and believes that the majority of defendant's customers are locked into defendant's customer service agreements for more than the first year of their agreement and often for much longer periods.

19. Plaintiff is informed and believes that the vast majority of defendant's consumer subscribers, *i.e.*, their non-corporate customers, are required, as a term and condition of service, to initially commit to defendant's wireless services for a minimum term of one or two years. Hence, should plaintiff or another member of the Class terminate service before expiration of the contract period for any reason, the consumer must pay early termination penalties of \$200.00 per telephone number or "unit," or alternatively continue paying for the unwanted service until expiration of the term, longer than he or she otherwise would have if not for the early termination penalty.

20. Plaintiff and Class members are further strongly discouraged and, as a practical matter effectively prevented, from terminating service with defendant because all other major wireless providers who provide service to the vast majority of Florida consumers also require payment of early termination penalties in similar amounts and subject to similar terms.

21. Plaintiff is informed and believes that defendant's early termination penalty

provisions have permitted defendant to collect revenues and generate enormous profits as a result of: (a) the payment of the early termination penalties; and (b) the revenue generated by tethering plaintiffs to defendant's service for at least the original contract period, and, in most cases, for additional years.

22. The termination penalty does not vary during the term of the contract. The customer is required to pay the full penalty whether he cancels one day after the contract goes into effect or one day before the date it is scheduled to expire.

23. The termination penalty is not a reasonable measure of the anticipated or actual loss that the termination causes Nextel.

24. The termination penalty is not designed to compensate Nextel for any damages arising from the termination, but rather is designed to lock in the subscribers of Nextel and serve as a disincentive to prevent Nextel's subscribers from switching to competing services in the event they become dissatisfied with the service provided by Nextel.

25. The early termination penalties imposed by defendant are unconscionable, void and unenforceable penalties and constitute an unlawful, unfair and deceptive practice under the provisions of the FDUTPA.

26. The early termination penalty is not a rate charged by Nextel, nor is it a rate component.

#### **FIRST CAUSE OF ACTION**

#### **Violation Of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, et seq.**

27. Plaintiff incorporates by reference and realleges paragraphs 1-26 of this Complaint as if fully set forth herein.

28. The defendant's actions, as alleged herein, constitute the "conduct of any trade or commerce" within the meaning of FDUTPA, Fla. Stat. §§ 501.201, et. seq.

29. Plaintiff and the Class members seek injunctive relief to force Nextel to alter its conduct related to its termination penalty practices.

30. Plaintiff and the Classes are entitled to injunctive relief and reasonable attorneys' fees, pursuant to FDUTPA, Fla. Stat. §§ 501.201, et. seq.

## **SECOND CAUSE OF ACTION**

### **Equitable Relief**

31. Plaintiff incorporates by reference and realleges paragraphs 1-26 of this Complaint as if fully set forth herein.

32. Nextel continues to impose, collect and retain early termination penalties from its customers. The imposition, collection and retention of these penalties violate provisions of the FDUTPA.

33. The continued imposition of the termination penalties has caused and will continue to cause plaintiff and Class members to suffer further irreparable harm.

34. Therefore, plaintiff and the Class members are entitled to a Court order requiring Nextel to: cease the imposition of its early termination penalties.

## **REQUEST FOR RELIEF**

WHEREFORE, plaintiff, on its own behalf and on behalf of the other members of the Classes, requests judgment and relief on all causes of action as follows:

A. An order certifying that this action is properly brought and may be maintained as a statewide class action under Rule 1.221 of the Florida Rules of Civil Procedure, that plaintiff be appointed as the Class Representative, and plaintiff's counsel be appointed Class Counsel;

- B. An order requiring Nextel to cease and desist all deceptive, unjust, and unreasonable practices described herein;
- C. An award of reasonable attorneys' fees and costs of this suit, including fees of experts;
- D. An order requiring Nextel to disgorge all revenues received from the imposition of its termination penalty;
- E. An award of pre- and post-judgment interest; and
- F. Such other and further relief as the Court may deem necessary or appropriate.

**JURY DEMAND**

Plaintiff demands a trial by jury on all issues which may be so tried.

Dated: 5/17/04

Respectfully submitted,

MAGER WHITE & GOLDSTEIN, LLP

By: Jayne A. Goldstein

Jayne A. Goldstein  
Fla. Bar No. 0144088  
2825 University Drive, Suite 350  
Coral Springs, FL 33065  
954-341-0844 Telephone  
954-341-0855 Facsimile  
Email: jgoldstein@mwg-law.com

-and-

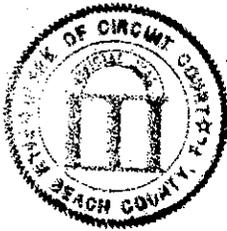
MAGER WHITE & GOLDSTEIN, LLP  
Ann D. White  
Michael J. Kane  
Lee Albert  
One Pitcairn Place, Suite 2400  
165 Township Line Road  
Jenkintown, PA 19046  
(215) 481-0273 Telephone  
(215) 481-0271 Facsimile

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor  
500 Seventh Avenue, 10<sup>th</sup> Floor  
New York, NY 10018  
(212) 989-9113  
(212) 989-9163

FARUQI & FARUQI, LLP  
Adam Gonnelli  
320 East 39<sup>th</sup> Street  
New York, NY 10016  
(212) 983-9330  
(212) 983-9331

GILMAN AND PASTOR, LLP  
David Pastor  
Stonehill Corporate Center  
999 Broadway, Suite 500  
Saugus, MA 01906  
(781) 231-7850  
(781) 231-7840

BRAMSON, PLUTZIK, MAHLER &  
BIRKHAUSER, LLP  
Alan R. Plutzik  
L. Timothy Fisher  
2125 Oak Grove Rd., Suite 120  
Walnut Creek, CA 94598  
(925) 945-0200



PALM BEACH COUNTY - STATE OF FLORIDA  
I HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY OF RECORD IN MY OFFICE  
THIS 30 DAY OF June 2004  
LORCHLEY M. WILKINSON  
CLERK CIRCUIT COURT

BY Elizabeth J. Bruce

# EXHIBIT I

ORIGINAL COPY

1 BUCHALTER, NEMER, FIELDS & YOUNGER

A Professional Corporation

2 BERNARD E. LESAGE (State Bar No. 61870)

3 CLINTON D. WILBURN (State Bar No. 192053)

601 South Figueroa Street, Suite 2400

Los Angeles, California 90017-5704

4 Telephone: (213) 891-0700 / Facsimile: (213) 896-0400

5 Attorneys for Defendant PACIFIC BELL WIRELESS, LLC,  
d/b/a CINGULAR WIRELESS

ORIGINAL FILED

2002  
LOS ANGELES  
SUPERIOR COURT

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF LOS ANGELES

11 CONSUMER JUSTICE FOUNDATION, a )  
California non-profit corporation on behalf of )  
12 the general public )

13 Plaintiff,

14 v.

15 PACIFIC BELL TELEPHONE CO., a )  
California corporation; PACIFIC TELESIS )  
MOBILE SERVICES, LLC, a Nevada limited )  
16 liability company; Liability company; )  
CINGULAR WIRELESS, LLC, a Delaware )  
17 limited and DOES 1 through 100, inclusive, )

18 Defendants. )

CASE NO. BC 214554

[Assigned for all purposes to the  
Hon. Emilie H. Elias]

NOTICE OF ENTRY OF ORDER  
GRANTING DEFENDANT PACIFIC  
BELL WIRELESS, LLC, d/b/a  
CINGULAR WIRELESS' MOTION FOR  
SUMMARY JUDGMENT AS AGAINST  
PLAINTIFF CONSUMER JUSTICE  
FOUNDATION AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY ADJUDICATION

19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 NOTICE IS HEREBY GIVEN that the Order Granting Defendant Pacific Bell Wireless,  
21 Llc, d/b/a Cingular Wireless' Motion for Summary Judgment as Against Plaintiff Consumer  
22 Justice Foundation and Denying Plaintiff's Motion for Summary Adjudication was signed and  
23 entered on July 29, 2002. A copy of said Order is attached hereto.

24 DATED: August 2, 2002

BUCHALTER, NEMER, FIELDS & YOUNGER  
A Professional Corporation

25 By:   
26 CLINTON D. WILBURN  
27 Attorneys for Defendant  
28 PACIFIC BELL WIRELESS, LLC  
dba CINGULAR WIRELESS

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**FILED**  
LOS ANGELES SUPERIOR COURT  
JUL 29 2002  
JOHN A. CLARKE, CLERK  
BY R. THRALL, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

CONSUMER JUSTICE  
FOUNDATION, a California non-profit  
corporation on behalf of the general  
public  
Plaintiff,  
  
v.  
PACIFIC BELL TELEPHONE CO.,  
a California corporation; PACIFIC  
TELESIS MOBILE SERVICES, LLC, a  
Nevada limited liability company;  
Liability company; CINGULAR  
WIRELESS, LLC, a Delaware limited  
liability company; and DOES 1 through  
100, inclusive,  
Defendants.

CASE NO. BC 214554

[Assigned for all purposes to  
the Hon. Emilie H. Elias]

~~REVISED (PROPOSED)~~

ORDER GRANTING DEFENDANT  
PACIFIC BELL WIRELESS, LLC, d/b/a  
CINGULAR WIRELESS' MOTION FOR  
SUMMARY JUDGMENT AS AGAINST  
PLAINTIFF CONSUMER JUSTICE  
FOUNDATION AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY ADJUDICATION

DATE: June 11, 2002  
TIME: 8:45 a.m.  
DEPT: 3

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On June 11, 2002, Defendant PACIFIC BELL WIRELESS, LLC dba  
CINGULAR WIRELESS' ("Defendant" or "Cingular") Motion for Summary Judgment, or in  
the alternative, Summary Adjudication, and Plaintiff CONSUMER JUSTICE FOUNDATION's  
Motion for Summary Adjudication came on regularly for hearing in Department 3 of the above-  
entitled court, the Honorable Emilie H. Elias, Judge presiding.

1 Bernard E. LeSage, Esq. and Clinton D. Wilburn, Esq., of Buchalter, Nemer,  
2 Fields, and Younger, and Seamus C. Duffy, of Drinker, Biddle & Reath appeared on behalf of  
3 Defendant.

4 Robert Hancock, Esq. appeared on behalf of Plaintiff Consumer Justice  
5 Foundation.

6  
7 **The Parties' Claims**

8 In its Complaint, Plaintiff Consumer Justice Foundation, on behalf of the general  
9 public, alleges that the assessment and collection by Defendant of an early termination fee of  
10 \$150.00, charged when a wireless services customer breaches or terminates a wireless services  
11 contract prior to the expiration of the contract, violates Civil Code section 1671.

12 Defendant, a wireless services provider, contends that the early termination fee  
13 is part of its overall rate structure. Therefore, Plaintiff's claims are preempted by Federal  
14 Communications Act 47 U.S.C. 332(c)(3)(A) which provides "[N]o state or local government  
15 shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile  
16 service . . . ." (Emphasis added).

17 Pursuant to the stipulation between the parties, and executed by this Court, the  
18 parties each moved for summary judgment on the issue of federal preemption.

19  
20 **Evidence Offered**

21 Plaintiff, in its Separate Statement of Undisputed Material Facts and the  
22 Declaration of Robert Hancock, offers evidence that during an in-chambers status conference  
23 on March 30, 2001, the parties stipulated that the federal preemption defense under 47 U.S.C.  
24 332(c)(3)(A) was inapplicable based on the Federal Communications Commission's ruling in *In*  
25 *re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 39 (2000).

26 Defendant, in its Separate Statement of Undisputed Material Facts and the  
27 Declaration of Leann Priebe, offers evidence that Defendant's cost to provide origination  
28 services, as well as acquisition-related marketing and advertising costs is significantly in excess

1 of the amount of the termination charge. These origination services include: (a) qualifying the  
2 customer for the appropriate plan and equipment; (b) running a credit check on the consumer; (c)  
3 programming the phone with the customer information; (d) provisioning the services in the  
4 network; (e) identifying and/or providing a phone compatible with the service and plan selected;  
5 (f) setting up an account profile in our billing system for the customer and selecting the rate plans  
6 and features; (g) counseling and educating consumers about the products and services offered; (h)  
7 providing the customer with the brochures and publications explaining the rate plans and features  
8 selected; (i) providing the customer with a contract and explaining the service; and (j) providing  
9 post-sale initial customer services such as welcome letters further explaining the service and other  
10 correspondence regarding the service, billing verification checks to ensure bills are accurate, and  
11 the provision of customer service representatives by phone to answer initial questions regarding  
12 the service.

13 Defendant offered further evidence that the significant costs associated with  
14 origination services and the revenue generated by the overall cellular rate does not exceed the  
15 costs of initiating and continuing service until well into the customer relationship. Moreover,  
16 many of Defendant's customer relationships do not become profitable until more than a year after  
17 they commence. The early termination fee acts to maintain the overall cellular rate at an  
18 acceptable level if the customer terminates early. As such, the early termination charge is a  
19 critical component of the overall rate structure.

#### 20 21 The Court's Findings

22 Plaintiff Consumer Justice Foundation's Motion for Summary Adjudication is  
23 hereby DENIED, pursuant to grounds set forth herein.

24 Defendant PACIFIC BELL WIRELESS, LLC dba CINGULAR WIRELESS'  
25 Motion for Summary Judgment as to the First Amended Complaint of Plaintiff Consumer  
26 Justice Foundation is hereby GRANTED, pursuant to grounds set forth herein.

27 After full consideration of all of the evidence, including those items judicially  
28 noticed by the Court, the separate statements of each party, and the authorities submitted by

1 counsel, as well as counsel's oral argument on June 11, 2002, the Court finds there are no  
2 triable issues of material fact in this action and that Defendant is entitled to summary judgment  
3 as a matter of law for the following reasons:

4 1. Defendant has provided sufficient and competent evidence to show that  
5 the early termination fee assessed by Defendant in the event of a breach or cancellation of a  
6 contract for wireless services is inextricably linked to the rates charged by Defendant for  
7 providing those wireless services and it is designed to enable Defendant to recover the  
8 origination costs incurred at the beginning of the contractual relationship with the customer.

9 2. Applicable authority, specifically, the Federal Communications Act, 47  
10 U.S.C. 332(c)(3)(A), provides "[N]o state or local government shall have any authority to  
11 regulate the entry of or the rates charged by any commercial mobile service..." (Emphasis  
12 added).

13 3. Applicable authority, specifically, the California Court of Appeal's ruling  
14 in *Ball v. GTE Mobilnet* (2000) 81 Cal. App. 4th 529, and the Federal Communications  
15 Commission's ruling in *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 39  
16 (2000), prohibits state law actions that challenge the "reasonableness" of any component of a  
17 wireless provider's rate structure. *Wireless Consumers Alliance*, 15 F.C.C.R. 17021, at 39.

18 4. Any "stipulation" between the parties that the federal preemption defense  
19 has been waived is unenforceable as it was not executed by the Court and federal preemption  
20 pursuant to the Federal Communications Act is not waivable.

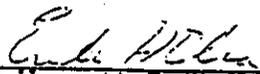
21 Accordingly, this Court is preempted by federal authority from adjudicating any  
22 issue pertaining to the reasonableness of the early termination fee assessed by Defendant and  
23 Defendant is entitled to Summary Judgment as a matter of law.

24 Defendant's Motion is GRANTED. Plaintiff's Motion is DENIED.

25 IT IS SO ORDERED.

26 Dated:

27 JUL 29 2002

28 By: 

The Honorable Emilie H. Elias,  
Judge of the Superior Court

EMILIE H. ELIAS  
JUDGE OF THE SUPERIOR COURT

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is at Buchalter, Nemer, Fields & Younger, A Professional Corporation, 601 South Figueroa Street, Suite 2400, Los Angeles, California 90017-5704.

On August 2, 2002, I served the foregoing document described as: NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT PACIFIC BELL WIRELESS, LLC, d/b/a CINGULAR WIRELESS' MOTION FOR SUMMARY JUDGMENT AS AGAINST PLAINTIFF CONSUMER JUSTICE FOUNDATION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION on all other parties and/or their attorney(s) of record to this action by placing a true copy thereof in a sealed envelope as follows:

Melvin B. Pearlston, Esq.  
PACIFIC JUSTICE CENTER  
P.O. Box 570  
Trinidad, CA 95570

Robert B. Hancock, Esq.  
LAW OFFICES OF ROBERT B. HANCOCK  
101 West Broadway, Suite 1950  
San Diego, CA 92101

**BY MAIL** I am a resident of, or employed in, the county where the mailing occurs; I am over the age of 18 years and am not a party to the cause. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. The correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. The address(es) shown above is(are) the same as shown on the envelope. The envelope was placed for deposit in the United States Postal Service at Buchalter, Nemer, Fields & Younger in Los Angeles, California on August 2, 2002. The envelope was sealed and placed for collection and mailing with first-class prepaid postage on that date following ordinary business practices. Service made pursuant to CCP § 1013a(3), upon motion of a party served, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit.

State I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on August 2, 2002, at Los Angeles, California.

ZSHONETTE REED

  
(Signature)

# EXHIBIT J

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

JESSICA HALL, individually  
and on behalf of others similarly situated,

Plaintiff,

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS  
GROUP and SPRINTCOM, INC. d/b/a SPRINT  
PCS GROUP,

Defendants.

Case No. 04-L-113

FILED  
MAY 20 2005  
CLERK OF CIRCUIT COURT #68  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

**ORDER**

Plaintiff, Jessica Hall ("Plaintiff") on behalf of herself and all others similarly situated moves this Court in her Motion for Class Certification pursuant to the Illinois Code of Civil Procedure (735 ILCS 5/2-801, *et seq.*). Having reviewed the record before the Court, including all briefs and other submissions of the parties, having heard argument and considered the evidence presented, and all parties having had an opportunity to present arguments, testimony and to raise issues, for the reasons that follow, the Motion of Plaintiff is granted.

**BACKGROUND FACTS RELEVANT TO THE MOTION**

Defendants Sprint Spectrum L.P. and SprintCom, Inc. both d/b/a Sprint PCS Group (collectively hereinafter, "Sprint" or "Defendants"), are in the business of providing wireless telecommunications services under the name "Sprint PCS." Sprint provides wireless communications services to millions of customers throughout the United States. Sprint is headquartered in Overland Park, Kansas, but operates and conducts its business throughout the United States, including within the State of Illinois.

Plaintiff is a resident of Madison County, Illinois who entered into a term service agreement with Sprint; terminated her agreement early; and paid an Early Termination Fee ("ETF") to Sprint. It is the imposition by Sprint and the payment by Plaintiff of this Early Termination Fee that lies at the center of the controversy.

In this action, Plaintiff alleges that: (1) Sprint committed statutory consumer fraud by imposing an unconscionable penalty on Plaintiff and all members of the class who were charged and paid an ETF for terminating their service agreements before expiration; (2) Sprint's collection of unconscionable penalties was unlawful meriting restitution; (3) Sprint breached the term service agreements by charging an illegal penalty; and (4) Sprint was unjustly enriched by payments of the ETF. Sprint disagrees and argues the ETF is either an alternative means of performance or a legitimate liquidated damage provision rather than a penalty, and as such, is lawful.

The underlying facts of Plaintiff's claim and the legal issue in the case is whether the ETF contained within the term services agreements is a penalty, presumably therefore invalid and unenforceable; or alternative means of performance or a valid liquidated damages clause, and presumably therefore lawful and enforceable.

#### **LEGAL STANDARD**

For a suit to proceed as a class action in Illinois, a court must find that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) a class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801.

The Court has carefully considered all arguments of counsel, and the briefs, pleadings, and exhibits submitted to the Court. The Court has assigned to Plaintiff the burden of satisfying the four requirements of 5/2-801. *Wheatley v. Board of Ed. Of District 205*, 99 Ill. 2d 481, 486 (1984). The Court has not reached any determinative conclusions regarding the underlying merits of the parties' claims other than to consider them in proper proportion at this early stage of the proceedings. See *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1973); *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 544-45 (5th Dist. 2003), *app. pending*. After full consideration the Court has determined that the Plaintiff has met her burden under 735 ILCS 5/2-801 and finds that the statutory requisites for class certification are satisfied at this time. See *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1075 (1st Dist. 1988). In the exercise of its discretion, the Court concludes that the proposed class is hereby certified and retains jurisdiction to modify or amend this order as circumstances dictate.

## DISCUSSION

### (1) NUMEROSITY

The Plaintiff's complaint alleges thousands of members nationwide, and Sprint does not contest that the class is so numerous that the joinder of all members would be impractical.<sup>3</sup> Accordingly, the first prerequisite of section 2-801 of the Code of Civil Procedure is met. 735 ILCS 5/2-801(1); *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320 (1977); *TAP Pharmaceutical*, 343 Ill. App. 3d at 545.

### (2) COMMON QUESTIONS OF FACT OR LAW

The record currently before the Court is preliminary and subject to development and refinement as the parties proceed through discovery. Nothing in the foregoing is or

should be considered as a finding by this Court on the merits of any factual or legal issues of the litigation other than what is necessary to the question of certification.

The record before the Court at this time indicates that Sprint employs uniform contracts and agreements in dealing with its customers. These include the PCS Advantage Agreement (Exhibit B to the Complaint and hereinafter referred to as the "Term Service Plan" or "TSP") and the "Terms and Conditions of Service" (Exhibit A to the Complaint and hereinafter referred to as the "Terms and Conditions" or "TC") which are found in various locations such as the Sprint Website and published materials provided and available to Sprint customers. The Terms and Conditions are incorporated by reference into the Term Service Plan and may be modified by Sprint without notice. The agreement between Sprint and its wireless customers is comprised of the Terms and Conditions and the Term Service Plan. The provisions contained within the TSP and the TC are not the subject of negotiation between Sprint and its customers but are form documents prepared by Sprint and applicable to all Sprint's wireless customers.

It appears that Plaintiff's claims arise from the provisions of these uniform documents, the alleged legal implications of those uniform provisions, and the alleged manner those uniform provisions have been allegedly applied by Sprint to its wireless customer base. This presents a core of common and predominant factual and legal questions the successful adjudication of which will establish a right of recovery, or resolve central issues on behalf of class members. *Society of St. Francis v. Dulman*, 424 NE 2d 59 (1981); and *Weiss v. Waterhouse*, 804 NE 2d 536 (2004).

It has been suggested to the Court by Sprint that there may be versions of these documents pre-dating Plaintiff's experience as a Sprint customer, however Sprint has not

seen fit to place them before the Court at this time, and has not identified any material variance in the language of the prior iterations. In the event that some subclass need be created by virtue of contract language variation, the Court retains jurisdiction to make those determinations. Further discovery may refine the scope of the class or necessitate the creation of subclass(es). Nevertheless such issues are hypothetical at this stage of the proceedings.

In addition to using of uniform contracts, Sprint implements its ETF in a common way. The record indicates the following: (1) Sprint collects ETF's in every state where Sprint conducts business;<sup>1</sup> (2) Sprint charges \$150 for early termination, regardless of how early or late the customer terminates, the amount of the charge does not vary among consumers; (3) Sprint does not prorate the ETF, unless apparently it is threatened with suit or agency referral; (4) Sprint allegedly did not attempt to estimate the amount of actual damage it might incur (if any) were a customer to cancel early; (5) Sprint allegedly is capable of calculating (with remarkable specificity) the actual alleged damages sustained in the event of early termination; (6) Payment of the ETF does not satisfy any outstanding obligations the customer owes to Sprint at the time of cancellation; (7) none of the operative documents state that the ETF is a "liquidated damage", therefore, the contention<sup>2</sup> of Plaintiff is there could be no meeting of the minds that such was its intended purpose is accepted as argument; and (8) Plaintiff has presented Sprint documents that indicate that at least one purpose of the ETF policy was to prevent customers from canceling and is thereby both a threat to secure future performance and a penalty for having done so.

---

<sup>1</sup> The record demonstrates that Sprint does not conduct business in Montana or Alaska.

Sprint argues that individualized issues of fact predominate because the problem of proving, calculating and distributing damages to plaintiff's proposed class requires highly individualized inquiries that renders the task "Herculean." Sprint further contends that an "individualized inquiry dependent on myriad variables pertaining to each individual subscriber's particular usage and rate plan history" is necessary. While the Court does not here pass judgment on the merits of Sprint's defenses, but on the issue of certification only, the record presented by Sprint does not support the assertion that particularized issues predominate.

On the questions of proving, calculating, and distributing damages, Plaintiff's case could not be more straightforward. The purported unlawfully exacted "penalty" was \$150 dollars from each class member. Sprint itself claims the ETF to be a "liquidated damage" and as such its proof and calculation is already known. Sprint's presentation to the Court indicates an ability to track payments by customer, as such it can determine which customers paid the ETF, when they made payment, and the amount paid.

This Court finds that Sprint's assertions that each customer's individual wireless usage, the net profit or loss arising from that usage, and the actual damages realized from each cancellation, are not predominating individual issues sufficient to defeat certification. Sprint implemented a flat rate of \$150 for the ETF. The core issue in the litigation is whether or not it had the right to do so, not whether any particular customer's "usage" made the relationship profitable or unprofitable for Sprint. The predominant issue framed at certification involves the ETF itself rather than any "actual damages" arising from early cancellation. The record indicates that Sprint uses standardized means

and methods to impose and collect early termination fees and every class member has essentially the same claim against Sprint. This is a classic case for certification.

Class actions can provide an efficient means for resolving claims about wrongful practices perpetrated through uniform or standardized misconduct. "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to the entire class." *Gordon*, 224 Ill. App. 3d at 200-01, citing *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266 (1st Dist. 1977). When at least one issue of fact or law is common to the class, and the issue predominates over questions affecting only individual members, subsection 2-801(2) is satisfied. 735 ILCS 5/2-801(2). See *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 338 (1977). "[C]ertification require[s] only that there be either a predominating common issue of law or fact, not both." *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 38, 81 (1994).<sup>2</sup> A common issue may be shown when the class members are aggrieved by the same or similar conduct or by a standardized pattern of conduct. *Miner v. Gillette Co.*, 87 Ill. 2d 7; 19 (1981)

Sprint argues "nationwide consumer class actions are impossible to certify due to the wild divergence among the consumer protection statutes of the several states." The Court has conducted an extensive analysis of the varying state consumer protection laws and cannot find the "wild divergence" Sprint decries. In fact the Court has not found, nor has Sprint presented, any outcome determinative differences in the substantive laws reviewed. Nor has the Court found outcome determinative variations in the substantive

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<sup>2</sup> See also *Gordon v. Boden*, 224 Ill. App. 3d 195, 200-01 (1st Dist. 1991) ("Section 2-801(2) of the class action statute is couched in the disjunctive 'common questions of fact or law.' It does not, therefore, require the presence of both a common question of fact and a common question of law. So long as there are questions of fact or law common to the class and these predominate over questions affecting individual members of such class, the statutory requisite is met").

law of contracts or unjust enrichment. The Restatements have taken root in the multi-state jurisdictions implicated in this litigation providing the requisite uniformity to merit certification. Indeed, all states are in accord regarding penalties. *Lawyers Title Ins. Co. v. Dearborn Title Corp.*, 118 F.3d 1157, 1160 (7th Cir. 1997) (“Illinois like all other states does not enforce penalty clauses in contracts.”)

However, Sprint’s Terms and Conditions provide as follow: “This agreement is governed by and must be construed under ... the laws of the State of Kansas, without regard to choice of law principles.” Sprint’s choice of law provision makes debate over unmanageable divergence academic. “Where the parties to a contract have entered an agreement that incorporates a choice of law provision, Kansas courts generally effectuate the law chosen by the parties to control the agreement.” *Brenner v. Oppenheimer & Co., Inc.*, 44 P.3d 364, 375 (Kan. 2002) (citing Restatement (Second) Conflict of Laws § 187). Illinois law is the same. “Generally, choice of law provisions will be honored.” *Belleville Toyota v. Toyota Motors*, 199 Ill.2d 325, 351 (Ill. 2002); *Hofeld v. Nationwide Life Ins. Co.*, 59 Ill.2d 522, 528-29 (Ill. 1975) (“Generally, the law applicable to a contract is that which the parties intended....”).

The Kansas Consumer Protection Act (“KCPA”) precludes contractual penalties. “No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction.” Kan. Stat. Ann. § 50-627(a). The Kansas Supreme Court has held that a clause that exacts a penalty for termination of the contract is unconscionable, as a matter of law. *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 758-59, 549 P.2d 903 (Kan. 1976) (unconscionability includes “the inclusion of penalty clauses.”); *John Deere Leasing Co. v. Blubaugh*, 636 F.Supp. 1569, 1574 (D. Kan. 1986) (“The

distinction between a liquidated damages clause and one for penalty is that a penalty is to secure performance, while a liquidated damages provision is for payment of a sum in lieu of performance. [citation omitted] A penalty provision is unconscionable as a matter of law. [citation omitted]"). The KCPA also allows class actions for damages. See Kan. Stat. Ann. § 50-634 ("A consumer who suffers a loss as a result of a violation of this act may bring a class action for the damages caused by an act or practice: (1) violating any of the acts or practices specifically proscribed in K.S.A. ... § 50-627....").

Plaintiff has shown that common questions of fact and law predominate, and this case is manageable and within the norm of cases certified in Illinois. Thus, in accordance with 735 ILCS 5/2-801(2), the Court finds there is predominance.

A single common question of fact can justify class certification. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 338 (1977). Such common questions typically predominate where, as here, a "defendant is alleged to have acted wrongfully in the same basic manner as to an entire class." *Gorden v. Boden*, 224 Ill. App. 3d 195, 200-01 (1st Dist. 1991). In such circumstances, the common class questions still predominate the case, and the class action is not defeated. *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 273 (1st Dist. 1977).

### (3) ADEQUACY OF REPRESENTATION

735 ILCS 5/2-801(3) conditions class certification upon a finding that "[t]he representative parties will fairly and adequately protect the interest of the class." "The purpose ... of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the

presentation of the claim.” *Gordon*, 224 Ill. App. 3d at 203; *Avery*, 321 Ill. App. 3d at 285.

The Court concludes that Plaintiff has zealously pursued her claims against Sprint. Plaintiff has demonstrated her intent, ability, and adequacy to represent the entire class. The Court further finds that no conflicting interests exist between Plaintiff and the Plaintiff Class as it is clear from the Court’s review of the material submitted in support of class certification that the representative herein and Class members share common objectives and legal and factual positions. The Court also has considered the quality and experience of the attorneys for the Class. The Court finds, after a rigorous analysis and review of the pleadings submitted by Plaintiffs’ counsel and having observed their conduct in open court, that they are able advocates for the Class. Counsel for Plaintiff have regularly engaged in major complex litigation of the size, scope, and complexity similar to this case and have successfully prosecuted many and varied class actions or other complex litigation. The Court finds that counsel for Plaintiff are well suited for this case and that Plaintiff will fairly and adequately protect the interest of the Class in compliance with the mandate of 735 ILCS 5/2-801(3).

**(4) APPROPRIATE METHOD FOR THE FAIR AND EFFICIENT ADJUDICATION OF CONTROVERSY**

735 ILCS 5/2-801(4) conditions class certification on a finding that “[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy.” In considering the fourth prerequisite, the Court has balanced whether a class action can best secure economies of time, effort, and expense, and promote uniformity of decision or accomplish other ends of equity and justice. *Gorden*, 224 Ill. App. 3d at 203. Where, as

here, the first three statutory criteria are met this “manifest[s] that the final requirement of the statute . . . is fulfilled.” *Steinberg*, 69 Ill.2d at 339.

Individual adjudication of the claim Plaintiff has brought would be manifestly unfair and inefficient.

In sum, individual lawsuits for small amounts would be too expensive, and absent a class action, individual lawsuits run a substantial likelihood of inconsistent adjudications. The Court concludes, pursuant to 735 ILCS 5/2-801(4), that a class action is an appropriate method for the fair and efficient adjudication of this controversy for all parties.

### CONCLUSION

Pursuant to 735 ILCS 5/2-801, this Court concludes that Plaintiff has adequately satisfied the requirements for class certification of this action under Illinois law. The Court concludes that the proposed Class is manageable.

Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification. In sum, Plaintiff has shown that common issues predominate, this case is manageable and within the norm of cases certified in Illinois. The Court notes that if Sprint wins the common issues, then Sprint will have resolved the controversy in its favor against the entire class. Alternatively, if Plaintiff wins the point, then the issue will be resolved in favor of the class and support Plaintiff's claim that Sprint's Early Termination Fees are not valid liquidated damages, but rather illegal penalties. Either way, the benefits a class proceeding offers—consolidated proceedings and resolution of identical small claims—will be achieved.

The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

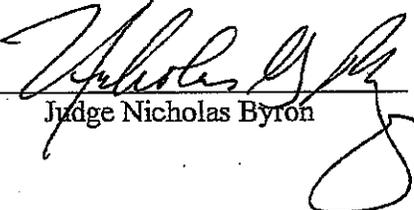
All persons who were charged a Sprint Early Termination Fee because they canceled their cellular or wireless agreement before the end of its term.

Defendant and the members of the Illinois judiciary are excluded from the class.

The Court hereby appoints Plaintiff Jessica Hall as the representative class plaintiff and appoints The Lakin Law Firm, P.C. and Freed & Weiss, LLC, as co-lead class counsel and Diab & Bock additional class counsel.

The Court is always mindful of the fact that, should manageability issues arise that have not currently been manifested, this Court's order "may be amended before a decision on the merits." 735 ILCS 5/2-802.

ENTERED: May \_\_, 2005

  
Judge Nicholas Byron

# EXHIBIT K

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**First Quarter - Calendar Year 2002**

	January	February	March	Quarter Total
<b>Cable Services</b>				
Billing & Rates	18	18	52	88
Broadband-Related	2	3	6	11
Connections to Cable TV System	3	4	3	10
Service Quality	9	14	18	41
Satellite Home Viewer Improvement Act	8	6	3	17
<b>Totals</b>	<b>40</b>	<b>45</b>	<b>82</b>	<b>167</b>
<b>Radio &amp; Television Broadcasting</b>				
Programming - General Criticism	9	0	2	11
Programming - Indecency/Obscenity**	45	36	161	242
Programming - Religious	1	1	4	6
Other Programming Issues	6	1	4	11
<b>Totals</b>	<b>61</b>	<b>38</b>	<b>171</b>	<b>270</b>
<b>Wireless Telecommunications</b>				
Billing & Rates	455	522	873	1,850
Carrier Marketing & Advertising	128	121	137	386
Contract - Early Termination	78	93	23	194
Cramming	5	12	26	43
Equipment	39	31	73	143
Service Quality	110	109	143	362
<b>Totals</b>	<b>815</b>	<b>888</b>	<b>1,275</b>	<b>2,978</b>
<b>Wireline Telecommunications</b>				
Billing & Rates	927	903	1,520	3,350
Carrier Marketing & Advertising	254	238	303	795
Cramming	153	156	306	615
Service Quality	138	122	144	404
Slamming	165	204	398	767
Telephone Consumer Protection Act	296	450	527	1,273
<b>Totals</b>	<b>1,933</b>	<b>2,073</b>	<b>3,198</b>	<b>7,204</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from individuals who complain about the alleged unlawful actions or omissions of an entity regulated by the FCC. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau for appropriate handling. The numbers reported in this category include complaints forwarded to the Enforcement Bureau as well as complaints received separately by the Enforcement Bureau. Of the 242 complaints, 233 were referred to or received by the Enforcement Bureau.

**Summary of Top Consumer Inquiry\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**Second Quarter - Calendar Year 2002**

	April	May	June	Quarter Total
<b>Cable Services</b>				
Over the Air Reception Device Issues	473	442	349	1,264
Programming Issues	211	154	165	530
Rates	160	154	131	445
Satellite Home Viewer Improvement Act	310	276	247	833
Service-Related Issues	488	471	420	1,379
<b>Totals</b>	<b>1,642</b>	<b>1,497</b>	<b>1,312</b>	<b>4,451</b>

	April	May	June	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
General Broadcast Information	264	297	268	829
How to Start Broadcast Station	217	267	241	725
Low Power Broadcast Information	218	266	247	731
Madalyn M. O'Hair Religious Broadcast Rumor	33	66	53	152
General Programming & Content	506	452	437	1,395
<b>Totals</b>	<b>1,238</b>	<b>1,348</b>	<b>1,246</b>	<b>3,832</b>

	April	May	June	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	897	825	975	2,697
Carrier Marketing	56	61	68	185
Contract - Early Termination	100	125	145	370
Cramming	12	14	15	41
Equipment	48	48	51	147
Service Quality	76	60	73	209
<b>Totals</b>	<b>1,189</b>	<b>1,133</b>	<b>1,327</b>	<b>3,649</b>

	April	May	June	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	3,379	3,054	2,658	9,091
Carrier Marketing & Advertising	163	147	165	475
Cramming	5,062	4,749	4,403	14,214
Service Quality	96	82	328	506
Slamming	10,311	10,928	9,880	31,119
Telephone Consumer Protection Act	2,103	2,575	2,316	6,994
<b>Totals</b>	<b>21,114</b>	<b>21,535</b>	<b>19,750</b>	<b>62,399</b>

**NOTES:**

\* An inquiry is defined as a correspondence received at CGB's consumer centers either via letter, fax, email or telephone from individuals seeking information on matters under the FCC's jurisdiction.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**Third Quarter - Calendar Year 2002**

	July	August	September	Quarter Total
<b>Cable Services</b>				
Billing & Rates	6	6	2	14
Connections to Cable TV System	3	2	5	10
Disability Issues	13	6	6	25
Satellite Home Viewer Improvement Act	2	0	0	2
Service Related Issues	1	1	3	5
<b>Totals</b>	<b>25</b>	<b>15</b>	<b>16</b>	<b>56</b>

	July	August	September	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues**	9	206	30	245
Programming - General Criticism	14	5	7	26
Programming - Indecency/Obscenity***	35	30	28	93
Programming - Religious	1	0	1	2
Other Programming Issues	3	0	0	3
<b>Totals</b>	<b>62</b>	<b>241</b>	<b>66</b>	<b>369</b>

	July	August	September	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	821	854	896	2,571
Carrier Marketing & Advertising	126	123	151	400
Contract - Early Termination	161	206	188	555
Equipment	47	70	71	188
Service Quality	196	203	192	591
<b>Totals</b>	<b>1,351</b>	<b>1,456</b>	<b>1,498</b>	<b>4,305</b>

	July	August	September	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	1,344	1,632	1,258	4,234
Carrier Marketing & Advertising	257	232	230	719
Cramming	248	292	303	843
Slamming	505	527	554	1,586
Telephone Consumer Protection Act	611	667	544	1,822
<b>Totals</b>	<b>2,965</b>	<b>3,350</b>	<b>2,889</b>	<b>9,204</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* There was a 20-fold increase in this category, attributable to an organized campaign to protest an alleged lack of closed-captioning availability during a flooding emergency in San Antonio, Texas in July 2002.

\*\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. The numbers reported in this category include complaints forwarded to EB as well as complaints received separately by EB. The Commission received thousands of e-mails regarding one specific program. The Enforcement Bureau has treated these e-mails as one consolidated complaint which is included in the 73 complaints it received this quarter.

*The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.*

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**Fourth Quarter - Calendar Year 2002**

	October	November	December	Quarter Total
<b>Cable Services</b>				
Billing & Rates	28	6	18	52
Cable Modem Service	6	3	6	15
Connections to Cable TV System	4	2	4	10
Disability Issues	9	8	3	20
Service Related Issues	21	22	16	59
<b>Totals</b>	<b>68</b>	<b>41</b>	<b>47</b>	<b>156</b>

	October	November	December	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	15	16	4	35
Programming - General Criticism	34	9	14	57
Programming - Indecency/Obscenity**	39	41	17	97
Programming - Religious	4	0	0	4
Other Programming Issues	30	15	15	60
<b>Totals</b>	<b>122</b>	<b>81</b>	<b>50</b>	<b>253</b>

	October	November	December	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	1,163	678	757	2,598
Carrier Marketing & Advertising	190	98	89	377
Contract - Early Termination	228	141	122	491
Equipment	71	55	40	166
Service Quality	178	125	124	427
<b>Totals</b>	<b>1,830</b>	<b>1,097</b>	<b>1,132</b>	<b>4,059</b>

	October	November	December	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	2,087	1,317	1,449	4,853
Carrier Marketing & Advertising	322	203	216	741
Cramming	480	300	347	1,127
Slamming	878	507	510	1,895
Telephone Consumer Protection Act	1,197	903	909	3,009
<b>Totals</b>	<b>4,964</b>	<b>3,230</b>	<b>3,431</b>	<b>11,625</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. The numbers reported in this category include complaints forwarded to EB as well as complaints received separately by EB. The Commission received at least 6,900 correspondences regarding one specific program, and the Enforcement Bureau has accounted for these correspondences as one consolidated complaint in its complaint counts this quarter.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**First Quarter - Calendar Year 2003**

	January*	February	March	Quarter Total
<b>Cable Services</b>				
Billing & Rates	30	18	18	66
Cable Modem Service	10	16	6	32
Disability Issues	9	6	9	24
Programming Issues	21	7	11	39
Service Related Issues	78	24	45	147
<b>Totals</b>	<b>148</b>	<b>71</b>	<b>89</b>	<b>308</b>

	January*	February	March	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	8	9	6	23
Programming - General Criticism	52	23	36	111
Programming - Indecency/Obscenity***	46	45	53	144
Programming - Religious	3	1	0	4
Other Programming Issues	42	64	51	157
<b>Totals</b>	<b>151</b>	<b>142</b>	<b>146</b>	<b>439</b>

	January*	February	March	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	1,173	670	705	2,548
Carrier Marketing & Advertising	185	141	128	454
Contract - Early Termination	207	137	137	481
Equipment	86	42	58	186
Service Quality	215	135	100	450
<b>Totals</b>	<b>1,866</b>	<b>1,125</b>	<b>1,128</b>	<b>4,119</b>

	January*	February	March	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	2,411	1,534	1,578	5,523
Carrier Marketing & Advertising	336	272	215	823
Cramming	555	414	362	1,331
Slamming	737	524	479	1,740
Telephone Consumer Protection Act	1,639	1,183	1,263	4,085
<b>Totals</b>	<b>5,678</b>	<b>3,927</b>	<b>3,897</b>	<b>13,502</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* Due to processing delays caused by adverse weather, 2,858 top category complaints received in December 2002 were not recorded on OSCAR until January 2003. All of these complaints are accounted for in the statistics for January.

\*\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. The numbers reported in this category include 61 complaints forwarded to EB or received separately by EB.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**Second Quarter - Calendar Year 2003**

	April	May	June	Quarter Total
<b>Cable Services</b>				
Billing & Rates	21	11	21	53
Cable Modem Service	9	10	9	28
Disability Issues	9	5	5	19
Programming Issues	12	13	15	40
Service Related Issues	48	37	48	133
<b>Totals</b>	<b>99</b>	<b>76</b>	<b>98</b>	<b>273</b>

	April	May	June	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	2	172	98	272
Loud Commercial	16	0	0	16
Programming - General Criticism	42	19	14	75
Programming - Indecency/Obscenity**	47	62	242	351
Other Programming Issues	7	3	0	10
<b>Totals</b>	<b>114</b>	<b>256</b>	<b>354</b>	<b>724</b>

	April	May	June	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	913	755	770	2,438
Carrier Marketing & Advertising	149	134	127	410
Contract - Early Termination	161	146	197	504
Equipment	56	60	68	184
Service Quality	128	118	119	365
<b>Totals</b>	<b>1,407</b>	<b>1,213</b>	<b>1,281</b>	<b>3,901</b>

	April	May	June	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	1,559	1,246	1,385	4,190
Carrier Marketing & Advertising	205	213	201	619
Cramming	338	282	171	791
Slamming	517	483	476	1,476
Telephone Consumer Protection Act	1,234	985	1,123	3,342
<b>Totals</b>	<b>3,853</b>	<b>3,209</b>	<b>3,356</b>	<b>10,418</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. The numbers reported in this category include complaints forwarded to EB as well as complaints received separately by EB. Of the 234 indecency complaints the Enforcement Bureau received in June 2003, 218 involved multiple, and in many cases, identical complaints against three separate programs.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**Third Quarter - Calendar Year 2003**

	July	August	September	Quarter Total
<b>Cable Services</b>				
Billing & Rates	33	23	16	72
Cable Modem Service	13	13	6	32
Disability Issues	9	11	8	28
Programming Issues	23	8	5	36
Service Related Issues	50	14	21	85
<b>Totals</b>	<b>128</b>	<b>69</b>	<b>56</b>	<b>253</b>

	July	August	September	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	7	8	7	22
Loud Commercial	1	1	0	2
Programming - General Criticism	16	17	34	67
Programming - Indecency/Obscenity**	5,552	8,876	5,492	19,920
Other Programming Issues	41	30	21	92
<b>Totals</b>	<b>5,617</b>	<b>8,932</b>	<b>5,554</b>	<b>20,103</b>

	July	August	September	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	844	794	1,028	2,666
Carrier Marketing & Advertising	152	178	254	584
Contract - Early Termination	184	215	266	665
Equipment	86	78	99	263
Service Quality	179	205	263	647
<b>Totals</b>	<b>1,445</b>	<b>1,470</b>	<b>1,910</b>	<b>4,825</b>

	July	August	September	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	1,373	1,548	1,245	4,166
Carrier Marketing & Advertising	209	263	204	676
Cramming	108	123	97	328
Slamming	484	449	534	1,467
Telephone Consumer Protection Act	1,511	1,523	1,422	4,456
<b>Totals</b>	<b>3,685</b>	<b>3,906</b>	<b>3,502</b>	<b>11,093</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. The numbers reported in this category include complaints forwarded to EB as well as complaints received separately by EB. Of the 19,920 indecency complaints, the Enforcement Bureau received 63, while 19,847 involved multiple, and in many cases, identical complaints against two separate programs.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

**Summary of Top Consumer Complaint\* Subjects  
Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)  
Fourth Quarter - Calendar Year 2003**

	October	November	December	Quarter Total
<b>Cable Services</b>				
Billing & Rates	28	12	25	65
Cable Modem Service	9	5	7	21
Disability Issues	5	4	8	17
Programming Issues	9	5	8	22
Service Related Issues	18	14	28	60
<b>Totals</b>	<b>69</b>	<b>40</b>	<b>76</b>	<b>185</b>

	October	November	December	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	8	5	7	20
Loud Commercial	3	1	2	6
Programming - General Criticism	34	19	45	98
Programming - Indecency/Obscenity**	28,206	41,075	76,987	146,268
Other Programming Issues	7	1	3	11
<b>Totals</b>	<b>28,258</b>	<b>41,101</b>	<b>77,044</b>	<b>146,403</b>

	October	November	December	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	906	793	1,241	2,940
Carrier Marketing & Advertising	213	193	279	685
Contract - Early Termination	208	217	311	736
Number Portability	n/a	204	3,243	3,447
Service Quality	211	235	258	704
<b>Totals</b>	<b>1,538</b>	<b>1,642</b>	<b>5,332</b>	<b>8,512</b>

	October	November	December	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	1,372	1,115	1,590	4,077
Carrier Marketing & Advertising	241	218	257	716
Service Quality	196	125	149	470
Slamming	506	390	473	1,369
Telephone Consumer Protection Act	6,518	4,315	2,958	13,791
<b>Totals</b>	<b>8,833</b>	<b>6,163</b>	<b>5,427</b>	<b>20,423</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer centers either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved. The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. Commencing with this report, the reported counts reflect complaints received directly by CGB, complaints received directly by EB, and complaints emailed directly to the FCC Commissioner's offices and FCC INFO. In addition, the Commission received over 100,000 emails related to FCC indecency rulings about certain broadcast programs.

**Summary of Top Consumer Complaint\* Subjects**  
**Processed by the FCC's Consumer & Governmental Affairs Bureau (CGB)**  
**First Quarter - Calendar Year 2004**

	January	February	March	Quarter Total
<b>Cable Services</b>				
Billing & Rates	28	16	16	60
Cable Modem Service	8	10	16	34
Disability Issues	13	5	4	22
Programming Issues	17	9	3	29
Service Related Issues	16	10	4	30
<b>Totals</b>	<b>82</b>	<b>50</b>	<b>43</b>	<b>175</b>

	January	February	March	Quarter Total
<b>Radio &amp; Television Broadcasting</b>				
Disability Issues	7	14	13	34
Programming - General Criticism	18	23	24	65
Programming - Indecency/Obscenity**	119,271	543,255	30,554	693,080
Other Programming Issues	1	5	5	11
<b>Totals</b>	<b>119,297</b>	<b>543,297</b>	<b>30,596</b>	<b>693,190</b>

	January	February	March	Quarter Total
<b>Wireless Telecommunications</b>				
Billing & Rates	1,347	1,102	1,138	3,587
Carrier Marketing & Advertising	264	228	288	780
Contract - Early Termination	358	291	290	939
Number Portability	1,679	683	542	2,904
Service Quality	256	179	185	620
<b>Totals</b>	<b>3,904</b>	<b>2,483</b>	<b>2,443</b>	<b>8,830</b>

	January	February	March	Quarter Total
<b>Wireline Telecommunications</b>				
Billing & Rates	1,269	1,122	1,222	3,613
Carrier Marketing & Advertising	216	173	180	569
Service Quality	180	167	163	510
Stamming	491	464	539	1,494
Telephone Consumer Protection Act	4,120	3,416	3,958	11,494
<b>Totals</b>	<b>6,276</b>	<b>5,342</b>	<b>6,062</b>	<b>17,680</b>

**NOTES:** (1) See attachment for brief description of subject categories.

\* A complaint is defined as a communication received at CGB's consumer center either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.

\*\* Complaints regarding alleged indecency/obscenity during specific broadcasts are forwarded to the Enforcement Bureau (EB) for appropriate handling. Commencing with this report, the reported counts reflect complaints received directly by CGB, complaints forwarded to EB, complaints received separately by EB, and complaints emailed directly to the FCC Commissioner's offices and FCCINFO. The reported counts may also include duplicate complaints or contacts that subsequently are determined insufficient to constitute actionable complaints.

The data within this report account for statistics at the national level as reported to the Commission, and therefore are not necessarily indicative of corresponding state or local trends.

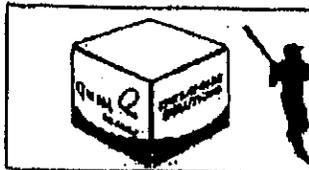
<b>Year</b>	<b>Wireless Telecommunica tions Complaints To FCC</b>	<b>Complaints Concerning Contract – Early Termination</b>	<b>Arbitrations</b>
2002	14,991	1,610	0
2003	21,357	2,386	0
2004	29,748	3,958	0

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## Cell phone firms agree to consumer rights

### Users to get penalty-free trial period, more disclosure

The Associated Press  
Updated: 4:29 p.m. ET July 21, 2004

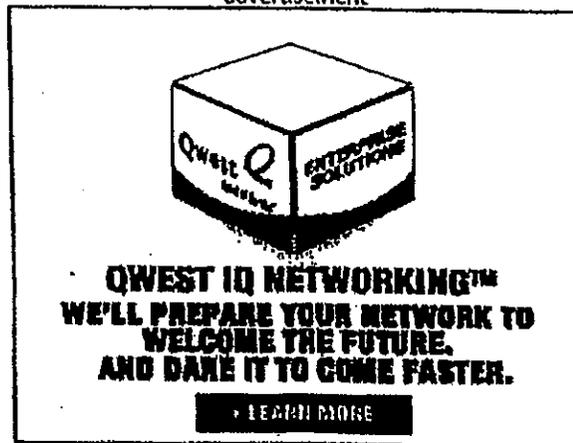
NEW YORK - Three of the nation's largest cellular phone companies have reached a deal with 32 states that requires them to be more upfront with customers in their advertisements and service plans.

Verizon Wireless, Cingular Wireless and Sprint PCS will be required to provide more detailed coverage maps to consumers, give customers a two-week grace period to end service without penalty and offer full disclosure of service contract rates and conditions. Their marketing also must be more specific about the costs and limits of services.

"Under the agreement, consumers will have a trial period to find out if they have wireless service where they live, work and play," said Tennessee Attorney General Paul Summers.

The agreements end investigations in the participating states that

advertisement



<b>LIVE QUOTE</b>
<b>Verizon Communicati</b>
PRICE
38.81
• Company Re
• Stock Scout
• Add this sto-
your watch l
<b>Sprint Corp (I</b>
PRICE
18.97
• Company Re
• Stock Scout
• Add this sto-
your watch l
<b>BellSouth Cor</b>
<b>(BLS)</b>
PRICE
27.45
• Company Re
• Stock Scout
• Add this sto-
your watch l
<b>SBC Commun</b>
<b>Inc. (SBC)</b>

**Advanced Search**

**My MSN**  
 Personalized news and content

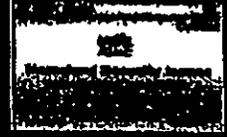
**Advertisement**  
**MSN SHOPPING**  
**Back to School**



**Shop**

- Backpacks
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focused on allegations of misleading advertising and a lack of disclosure on rates, terms and conditions, said Colorado Attorney General Ken Salazar.

Together, the three companies have about 85 million customers and provide cell-phone service to more than half the nation's wireless customers.

Mobile carriers were the No. 2 industry for complaints to Better Business Bureaus last year, after auto dealers. The industry had the second-lowest consumer satisfaction ranking, beating only cable providers, in the University of Michigan's June consumer satisfaction index.

The California Public Utilities Commission adopted a Telecommunications Bill of Rights in May that requires companies to inform customers about rate increases, bill customers only for services they request and allow consumers to drop a wireless service, without penalty, within 30 days.

"This and the California consumers' bill of rights show that elected officials and policy-makers have heard consumers and they're taking action to improve conditions in cell phone marketing, instead of waiting for the market to clean up its own act," said Jane Briesemeister, a senior policy analyst at Consumers Union.

The states in the settlement are Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming.

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**MORE FROM TECH & GADGETS**

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- MusicMatch offers limited file sharing
- EU court sets Microsoft hearing for Sept. 30
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# EXHIBIT M

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## **Terms Applicable to All Plans:**

Requires GSM or multi-network phone programmed with Cingular Wireless' preferred roaming database. Wireless service is subject to credit approval and early cancellation fees. A 24-month agreement required. Prices do not include taxes, directory assistance, roaming, universal service fees or other exactions. Cingular Long Distance is required. Airtime and other measured usage is billed in full minute increments and actual airtime and usage is rounded up to the next full increment at the end of each call for billing purposes. Cingular Wireless charges a full minute of usage for every fraction of the last minute used on each wireless call. Airtime incurred in previous months may be included in current month's bill. Prices are subject to change. \$36 Activation Fee for new accounts; waived activation on select plans with a 2-year agreement. Cingular does not guarantee availability of the network. Rates do not apply to International long distance, International roaming or calls requiring operator assistance. Night and Weekend hours are Monday through Friday 9:00 p.m. to 7:00 a.m. and all day Saturday and Sunday. Unused included minutes do not roll over to the next billing period and are forfeited. Certain other conditions and restrictions apply. See wireless service agreement for details. All new Cingular rate plans include long distance. Nationwide long distance at no extra charge applies to calls originating from your Home Calling Area for Home Plans, your Regional Calling Area for Region Plans or within the 50 United States for Cingular Nation Plans to anywhere in the U.S. Calls subject to roaming charges. International calling will incur separate long distance charges. Early termination fee of \$240 prorated over the length of the service agreement applies to subscriptions in the following states: FL, GA, SC, NC, AL, KY, TN, LA, NY and parts of IN and NJ. A non-prorated \$150 early termination fee applies in all other Cingular areas. Cingular also imposes the following charges: a Regulatory Cost Recovery Fee of up to \$1.25 to help defray its cost incurred in complying with obligations and charges imposed by State and Federal telecom regulations, a gross receipts surcharge, and State and Federal Universal Service Charges. The Regulatory Cost Recovery Fee is not a tax or a required charge.

## **Terms Applicable to Cingular SuperHome Plans:**

Requires GSM or multi-network phone programmed with Cingular Wireless' preferred roaming database. Wireless service is subject to credit approval. Early termination fee of \$240 prorated over the length of the service agreement applies to subscriptions in the following states: FL,

GA, SC, NC, AL, KY, TN, LA, NY and parts of IN and NJ. A non-prorated \$150 early termination fee applies in all other Cingular areas. Prices do not include taxes, directory assistance, roaming, universal service fees or other exactions. Minutes used will be counted against minutes included in the plan (as applicable depending on the type and time of the call and which types of minutes are included in the plan) in the following order: mobile to mobile minutes, night and weekend minutes, anytime minutes, rollover minutes and additional minutes. Cingular long distance is required. International long-distance rates vary. Airtime and other measured usage are billed in full-minute increments, and actual airtime and usage are rounded up to the next full increment at the end of each call for billing purposes. Cingular Wireless charges a full-minute increment of usage for every fraction of the last minute used on each wireless call. Calls placed on networks served by other carriers may take longer to be processed, and billing for these calls may be delayed. Those minutes, if part of your SuperHome Calling Area service, will be applied against your anytime monthly minutes in the month in which the calls appear on your bill. Unanswered calls of 30 seconds or longer incur airtime. Last month's charges are not prorated. Prices are subject to change. \$36 Activation Fee for new lines. Cingular does not guarantee availability of the network. Nights are 9:00 p.m. to 7:00 a.m. Weekends are 9:00 p.m. Friday to 7:00 a.m. Monday. Included long distance applies to calls within the 50 United States, Puerto Rico and the Virgin Islands. New Plans are limited to Plans described in this Calling Plan Brochure. Calls originated or received while outside of your Cingular SuperHome Calling Area are subject to roaming charges. Your billing name may be displayed along with your wireless number on outbound calls to other wireless and landline phones with Caller ID capability. Contact customer service for information on blocking the display of your name and number. See Wireless Service Agreement for additional conditions and restrictions. FamilyTalk requires a one- or two-year service agreement for each line. FamilyTalk plans include only package minutes included with primary number and are shared by the additional lines. The rate shown for additional minutes applies to all minutes in excess of the anytime minutes. If the rate plan for the primary number is changed to an ineligible plan or the primary number is disconnected, one of the existing additional lines shall become the primary number on the rate plan previously subscribed to by the former primary number. Mobile to Mobile feature is only available with select Cingular calling plans. Mobile to Mobile minutes do not roll over. A call will only be rated as Mobile to Mobile if the caller and the receiving party are both on the Cingular network, using Cingular phones, and in the Cingular Mobile to Mobile Calling Area. If the phone displays "Cingular Extend" while in the Mobile to Mobile Calling Area, the call will not be rated as Mobile to Mobile. On occasion, the frequency of which will depend on your calling habits, Mobile to Mobile Calling will be charged to your anytime minutes, instead of to your Mobile to Mobile minutes.

## **Terms Applicable to Cingular**

## SuperHome Rollover:

Rollover Minutes apply to Cingular SuperHome Plans \$39.99 and higher. Unused anytime minutes expire: (1) after twelve months; (2) immediately upon default or if customer changes rate plans to a non-rollover plan. Rolled over minutes are not redeemable for cash or credit and are not transferable. Minutes will not roll over until after the first month's billing. Night and Weekend Minutes do not roll over.

## Terms Applicable to Cingular Nation Plans:

For Nation plans, customer must use a multi-network digital phone programmed with Cingular Wireless' preferred roaming database. For GSM Nation plans, customer must use a GSM phone programmed with Cingular Wireless' preferred roaming database. Wireless service is subject to credit approval. Early termination fee of \$240 prorated over the length of the service agreement applies to subscriptions in the following states: FL, GA, SC, NC, AL, KY, TN, LA, NY and parts of IN and NJ. A non-prorated \$150 early termination fee applies in all other Cingular areas. Prices do not include taxes, directory assistance, universal service fees or other exactions. Minutes used will be counted against minutes included in the plan (as applicable depending on the type and time of the call and which types of minutes are included in the plan) in the following order: night and weekend, package minutes. Cingular Wireless Long Distance is required. International long-distance rates vary. Airtime and other measured usage are billed in full-minute increments, and actual airtime and usage are rounded up to the next full increment at the end of each call for billing purposes. Cingular Wireless charges a full-minute increment of usage for every fraction of the last minute used on each wireless call. Charges for calls made while outside your local Home Calling Area or in portions of your Home Calling Area served by other carriers may take longer to be processed, and billing for these calls may be delayed. Those minutes will be applied against your included monthly minutes, if applicable, in the month in which the calls appear on your bill. Unanswered calls of 30 seconds or longer incur airtime. Last month's charges are not prorated. Prices are subject to change. \$36 Activation Fee for new accounts. Cingular Wireless does not guarantee availability of the network. Please note that the display on your phone will not indicate whether you will incur roaming charges. Please retain this rate plan map to determine the scope of your rate plan calling area. Night hours are Monday through Thursday 9:00 p.m. to 7:00 a.m., and weekend hours are 9:00 p.m. Friday until 7:00 a.m. Monday. Included long distance applies to calls within the 50 United States. Unused included and night and weekend minutes do not roll over to the next billing period and are forfeited. New Plans are limited to Plans described in this Rate Plan Brochure. See Wireless Service Agreement for additional conditions and restrictions. Customer must (1) use a multi-

network phone programmed with Cingular Wireless' preferred roaming database; and, (2) have a mailing address and live in the Home Area in which subscription is made. In the event that the conditions of these plans as described above are violated, Cingular Wireless may move subscriber to another rate plan. No additional roaming charges will apply for calls originating within the 50 United States for Cingular Nation Plans. Once package minutes are depleted, calls placed within the 50 United States for Cingular Nation Plans will be billed as shown on the rate plan chart. When the network of the Cingular Wireless preferred roaming carrier is unavailable, customer may reach an intercept service allowing the use of a credit card to pay for roaming. Calls requiring the use of a credit card or operator assistance are additional and do not apply to package minutes. ~~These plans exclude charges incurred when roaming in the Gulf of Mexico. Cingular Wireless reserves the right to terminate your service if you use less than 50% of overall minutes on the Cingular Wireless Network over three consecutive billing cycles. These plans are not eligible for promotional discounts or add-on package minutes.~~

## **Terms Applicable to Cingular Nation Rollover:**

Rollover minutes apply only to select nation plans. Minutes roll over for up to 12 months. Night and Weekend Minutes do not roll over. Rollover only applies to the included anytime minutes. Rolled-over minutes are not redeemable for cash or credit and are not transferable. Minutes will not roll over until after the first month's billing cycle. Unused minutes do not roll over to the next billing period and are forfeited on non-qualifying plans. Rollover not available in Kauai.

## **Terms Applicable to FamilyTalk plans:**

FamilyTalk requires a one or two-year service agreement for each line and is available only with select Cingular rate plans. A termination fee as shown in the rate plan brochure is applicable to any line terminated prior to the end of its contract term. An \$18 activation fee applies to each line. FamilyTalk plans are limited to three additional lines and require account holder of primary number to be in good standing and liable for all monthly billings. FamilyTalk plans are available only with select Cingular rate plans and include only package minutes included with primary number and are shared by the additional lines. The rate shown in your rate plan brochure applies to all minutes in excess of the included minutes. Airtime and other measured usage are billed in full-minute increments, and actual airtime and usage are rounded up to the next full increment at the end of each call for billing purposes. Cingular Wireless charges a full minute of airtime for usage for every fraction of the last minute of airtime used on each wireless call. If the rate plan for the

primary number is changed to an ineligible plan or the primary number is disconnected, one of the existing additional lines shall become the primary number on the rate plan previously subscribed to by the former primary number. Nights and weekend hours are set out in the Cingular rate plan brochures for your area. Included long distance is limited to calls within the 50 United States. Rollover Minutes: Minutes roll over for up to 12 months. Night and Weekend and Mobile to Mobile Minutes do not rollover. Rolled over minutes are not redeemable for cash or credit and are not transferable. Minutes will not roll over until after the first month's billing. Unused minutes do not roll over to the next billing period and are forfeited on non-Rollover plans. Airtime charges will be incurred to access select features from your wireless phone. See your rate plan brochure for other terms and conditions applicable to Cingular Plans. Other restrictions may apply. Limited time offer. ©2003 Cingular Wireless LLC. All rights reserved.

## Terms Applicable to Features:

Certain features will not be available in all areas at all times. Regular per-minute airtime rates and other charges apply for calls when included features are used (call waiting, 3-way calling, call forwarding and voice mail). Mobile to Mobile Calling applies only to and from other local Cingular Wireless subscribers' phones. FamilyTalk Mobile to Mobile Calling is restricted to members on the same account. Mobile to Mobile and FamilyTalk Mobile to Mobile Calling are restricted to calls made and received within the Mobile to Mobile Calling Area. See [mywirelesswindow.com](http://mywirelesswindow.com) for terms applicable to Cingular DirectBill.

Boston