BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
Petition for Declaratory Ruling	)	WT Docket No. 05-194
Cellular Telecommunications &	)	
Internet Association	)	
	)	
Petition for Declaratory Ruling Filed by	)	WT Docket No. 05-193
SunCom Wireless Operating Company	)	
L.L.C. and Opposition and Cross-Petition for	)	
Declaratory Ruling Filed by Debra Edwards	)	

REPLY COMMENTS OF

CONSUMERS UNION

NATIONAL ASSOCIATION OF STATE PIRGS

NATIONAL CONSUMER LAW CENTER

On August 5, 2005, Consumers Union, National Association of State PIRGs, and the National Consumer Law Center (collectively the "Consumer Groups") jointly submitted Initial Comments in the above-captioned proceeding, regarding the petition for expedited declaratory rulemaking filed by the Cellular Telecommunicates & Internet Association ("CTIA" and "CTIA Petition"), seeking a declaratory ruling that early termination fees ("ETFs") in wireless carriers' service contract are "rates charged" for CMRS within the meaning of the Communications Act. Consumer Groups hereby submit these reply comments in this proceeding.

I. INTRODUCTION

"Early Termination Fees" or "ETF" are clearly a source of frustration and complaints by consumers. The fees, ranging from $150 to $240, lock consumers into sticking out bad and even nonexistent service. Carriers argue that the prevalence of contract plans with ETFs proves they are popular with consumers.[1] Talking to consumers themselves about what they prefer, a new report by US PIRG Education Fund, found that nearly half of cell phone users polled nationwide do not switch service when they are dissatisfied because of the penalties for early termination.[2] Because consumers cannot "vote with their feet" when they are dissatisfied, cell phone companies can get away with providing poor service and inattentive customer service. For example, consumers who find their cellular phone service subject to an unacceptable level of dropped calls, static or busy lines believe their carrier is not living up to their end of the contractual bargain.

[1] Nextel at p. 5; Sprint at pp. 2-3; T-Mobile at p. 7.
[2] Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," U.S. PIRG Education Fund (August 2005) (http://uspirg.org/uspirg.asp?id2=18537).

Yet those consumers are told to live with bad service or pay an ETF. ETFs allow cell phone companies to provide a level of service that would not be tolerated by consumers in a market where there is free movement between competitors.

While most consumers understand that an ETF is part of a cell phone contract, they also understand that ETFs are designed as a penalty. US PIRG found that 89 percent of consumers view ETFs as a penalty designed to discourage them from switching. ETFs are also often applied punitively, where allowing a consumer to discontinue service would have virtually no impact on carrier revenue, such as imposing the charge when a consumer cancels just one day before the contract expires.

II. PREEMPTING STATE CONSUMER PROTECTION LAWS WILL HARM CONSUMERS

Carriers' claims that consumers would suffer if they could not charge an ETF, or if ETFs were reduced, are not unsupported.[3] Instead, granting the petitions will make matters worse for consumers, subjecting them to fraud and abuse without any adequate or effective avenue for recourse or remedy.[4] Worse, the ruling could encourage carriers to increase ETFs to such a level that even customers in the most extreme circumstances, such as those who are receiving absolutely no service, would be unable to afford to end an abusive contract.

ETFs are not pro-consumer, as the carriers', with some audacity, ask this Commission to accept. The fact that all of the nation's top consumer organizations, as well as organizations representing only cell phone customers, are aligned in opposition to

[3] T-Mobile, p 7; Nextel, p. 7; USCellular, p. 4; Dobson, p. 4; Sprint, p. 5; Verizon, pp. 5-6.
[4] A few carriers, including Verizon at p. 24, suggest that if state laws are preempted, consumers will continue to have recourse to challenge unjust or unreasonable rate in "a forum dictated by Congress" presumably, the FCC and Federal Courts. Consumer Groups find no comfort in the suggestion when the FCC has failed to take enforcement action against wireless carriers despite thousands of consumer complaints about billing, rates, and contracts.

these petitions should make it clear where consumers stand.[5] As cited above, the recent US PIRG study has shown cancellation penalties are unpopular with consumers. The U.S. PIRG findings are also supported by the growing number of complaints regarding wireless contracts and ETFs noted in the Commission's quarterly complaint reports,[6]

The granting of CTIA's and SunCom's petitions will harm consumers by effectively allowing carriers to impose ETFs or any dollar amount and regardless of the situation, including situations involving outright fraud and deception, and violations of other state laws.[7] Such a reach into states' traditional police powers is itself an unconscionable act that will, in effect, give cell phone companies a free pass to lock consumers into unfair and abusive contract terms. Moreover, taking away the threat of state action will make the current situation worse, as carriers demand consumers enter longer contracts with higher cancellation penalties, and even less incentive to keep the captive customer satisfied.

However, denying the petitions will not have the effect of banning ETFs or long term cell phone contracts containing ETF clauses. Rather, denying the petitions will ensure that states can continue to use their traditional police powers to protect citizens from abusive ETFs.

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[5] Consumer organizations opposing the petitions, in addition to Consumers Union, U.S. PIRG and National Consumer Law Center, include AARP, the National Association of State Utility Consumer Advocates, the Utility Consumer Action Network, and the Wireless Consumers Alliance.

[6] *See* AARP, p. 24; *see also* Report on Informal Inquiries and Complaints: First Quarter Calendar Year 2005, Consumer & Governmental Affairs Bureau, Executive Summary at 9 (rel. Aug. 12, 2005).

[7] See for example, Sprint at p. 16, "A state court ruling that ETFs are unlawful under state law, regardless of the specific law involved (e.g., deceptive practices or unfair debt collection statutes, unconcionability, quantum meruit, unjust enrichment) would necessarily conflict with federal law…."

III. IT IS UNSUBSTANTIATED THAT RATES WILL INCREASE, THAT LOW INCOME CONSUMERS WILL BE ADDITIONALLY HARMED, AND HANDSETS WILL BECOME MORE EXPENSIVE UNLESS THE PEITTIONS ARE GRANTED

Carriers claim that consumers, especially low income consumers, would be harmed unless these petitions are granted because rates would increase.[8] Further, they claim that because most customers receive service under a long term contract with an ETF, that they therefore do not find ETFs objectionable. US PIRG has already shown that consumers do find ETFs objectionable. Each of these assertions is also easily countered when one looks at market trends.

To support their warning that rates will increase unless the preemption petitions are granted, carriers claim that service provided under contracts with ETFs is more competitively priced than other options—namely prepaid and month to month plans—and that unless these petitions are granted, competitively priced contract plan options will evaporate. The argument hinges on the assumption that ETFs guarantee lower rates to consumers in all circumstances. In fact, prepaid and month to month service options are becoming more price competitive and prepaid service is reported to be the fastest growing segment of the cell phone industry. A recent news story reports that about 13 percent of U.S. cell users are now on prepaid plans, and quotes a Yankee Group prediction that almost a quarter of all wireless customers will be free of long-term contracts by 2009. Analysts also expect prepaid price wars over the next 12 to 18 months

[8] Sprint, p. 5; US Cellular, p. 4; Cingular, p. ii

"will make 10-cent minutes the norm for those without long-term contracts."[9] Carriers are also offering discounts and rebates on phones associated with pre-paid plans. [10]

Comparing the per minute charges for long-term contracts and prepaid plans also masks the effect of below the line fees and surcharges on the overall price paid by consumers for contract service.[11] Nextel, for example, compares its long-term contracts and prepaid offerings to demonstrate "the lower rate plan pricing offered in a term plan".[12] The footnote associated with Nextel's comparison notes the price for contract service is less "applicable taxes, fees and additional charges."[13] These hefty add-ons are already included in the per minute price of prepaid service, not only giving consumers a more accurate picture of costs upfront, but shrinking the difference between the bottom line costs of prepaid and long-term contract service.

More pertinent to this proceeding, pre-paid plans are becoming more popular because they do not require a contract or subject the consumer to an ETF. In fact, the carriers themselves use the lack of a contract and credit check as a marketing tool when advertising prepaid plans. Clearly, a growing number of consumers are willing to pay slightly higher rates in order to avoid contracts and contract penalties.

A few carriers[14] also cite the potential negative impact on low income consumers unless the petitions are granted. This claim is ludicrous, given that many lower income

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[9] "Prepaid Cell Phones Move Into Mainstream", RedNova.com, August 20, 2005, <www.rednova.com/news/display/?id+215161&surce=r_technology>, access on 8/23/05.
[10] See for example, T-Mobile.com, offering rebates of $20 to $50 on handsets associated with Pay As You Go plans, <www.t-mobile.com/prepaid/starterkits.asp> accessed on 8/23/05.
[11] See comments of Consumer Groups filed in CC Docket No. 98-170, *In the Matter of Truth-In-Billing Format*, June 24, 2005 and July 25, 2005.
[12] Nextel, p. 7.
[13] Nextel, footnote 10.
[14] Sprint, p. ii; Cingular, p. ii.

consumers, who may have poor credit histories or have not yet established credit, often have a difficult time qualifying for a contract plan in the first instance, or must pay a deposit in addition to being subject to an ETF.[15] "No credit check" is a key marketing feature of prepaid cell phone plans, and has expanded the cell phone market to both lower income households and younger buyers who have not yet established credit. Contracts with stiff penalties actually raise the barrier for consumers without "approved credit".

Finally, carriers proffer the boogey man of unaffordable handsets if ETFs remain subject to state consumer protection or other laws. If an ETF is in fact allowing "the wireless provider to recoup the costs of giving a phone to a consumer for a steep discount"[16] then cell phone contracts could easily be structured to give the consumer the option of agreeing to a contract, with a cancellation fee based on the handset price and duration of time remaining in the contract. Such an arrangement would be preferable to current practice where carriers charge the same ETF to all customers regardless of the value of the handset, and do not pro-rate the ETF as the contract term matures.[17] Most handsets can be activated only by a particular carrier's network, due either to incompatible technology or the practice of "locking" handsets to prevent consumers from taking them to other compatible networks. Because handsets are not portable, consumers are forced to buy new handsets when switching service. The result of these practices is that most handsets are inextricably tied to service, and consumers have little incentive to

[15] UCAN, p. 3.
[16] Joe Farren, director of public affairs for CTIA quoted in "Contracts Lock Phone Users in Cell Block," washingtonpost.com, August 18, 2005.
[17] Cingular does pro-rate ETFs in several states, however, the ETF is those states is set at $240, the highest charged by any of the national carriers and well above the level charged by Cingular in other states.

"game the system"[18] and cancel contracts in order to walk away with expensive phones, as carriers suggest. Further, because phones are not portable, carriers will lose business if they make handsets unaffordable for the majority of customers, regardless of the outcome of this proceeding.

IV. SUPPORTERS OF THE CTIA AND SUNCOM PETITIONS FAILED TO PROVE THE CLAIM THAT ETFS ARE "RATES" OR "RATE STRUCTURES" WITHIN THE MEANING OF 332(c)(3)(A).

Carriers have attempted to show that ETFs are "rates" under 332(c)(3)(A) by repeating the petitioners in citing a series of inapposite cases relating to inapplicable situations, including tarriffed telecommunications services, electric power, and arms-length contracts negotiated by commercial parties. Initial comments filed by Consumer Groups and other consumer advocates have already refuted the assertion that ETFs are rates, as well as the inapplicability of cases cited by the carriers and their misreading of Congressional intent.[19]

V. SUPPORTERS OF THE CTIA AND SUNCOM PETITIONS HAVE FAILED TO PROVE PREEMPTION APPLIES

Similarly, carriers filing initial comments parrot the same preemption arguments made by petitioners, which have been rebutted in initial comments of Consumer Groups and other consumer organizations. Congress did not express a "clear and manifest" intent to preempt state consumer protection laws. The implied preemption argued by carriers based on Congress' stated preference for a deregulated telecommunications market

[18] Joe Farren, director of public affairs for CTIA quoted in "Contracts Lock Phone Users in Cell Block," washingtonpost.com, August 18, 2005.

[19] See Consumer Groups, pp. 6-9; AARP, pp. 9-12 and 20-24; NASUCA, pp. 21-27; UCAN, pp. 2-5; WCA, pp. 6-37.

simply does not hold water. The very same state laws complained about by carriers are designed to protect consumers from fraud and other abusive practices in markets that are not otherwise subject to regulation. This proceeding is an attempt by carriers to "have their cake and eat it too" by keeping the industry both deregulated and free from scrutiny under state consumer protection or other laws.

The carriers' unspecified claims of state regulation of ETFs run amok are not grounded in reality. Only Nextel gives an example of a state regulation directed only at the cell phone industry—and the regulation it cites has absolutely nothing to do with setting the level of ETFs. Nextel points to a provision in the California Telecommunications Consumers Bill of Rights that would give consumers a 30 day service trial period before an ETF could be assessed, and cites this as evidence of California attempting to regulate an ETF.[20] Trial periods are common among carriers, and the nation's largest carrier already offers consumers a 30-day trial period. This example merely grasps at straws.

VI. CONCLUSION

Consumer Groups strongly urge the Commission to deny CTIA's and SunCom's petitions.

Respectfully Submitted,

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[20] Nextel, p. 13.

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August 25, 2005