BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
2125 OAK GROVE ROAD, SUITE 120
WALNUT CREEK, CALIFORNIA 94598
(925) 945-0200
(925) 945-8792 (Fax)
E-MAIL: INFO@BRAMSONPLUTZIK.COM

RECEIVED & INSPECTED
AUG 26 2005
FCC - MAILROOM

Facsimile Cover Sheet

August 19, 2004 3:13 PM

To:	*Company:*	*Telephone No.:*	*Fax No.:*
Kristin Linsley Myles, Esq.	Munger, Tolles & Olson, LLP	(415) 512-4000	(415) 512-4077
J. David Franklin, Esq.	Franklin & Franklin, APC	(619) 239-6300	(619) 239-6369
Jacqueline Mottek, Esq.	Lerach Coughlin Stoia Geller Rudman & Robbins LLP	(415) 288-4545	(415) 288-4534
Thomas S. Hixson, Esq.	Bingham McCutchen LLP	(415) 393-2000	(415) 393-2286
Dominic Surprenant, Esq.	Quinn Emanuel Urquhart Oliver & Hedges, LLP	(213) 624-7707	(213) 624-0643
Michele D. Floyd, Esq.	Reed Smith Crosby Heafey LLP	(415) 543-8700	(415) 391-8269
Sam Feder, Esq.	Federal Communications Commission	(202) 418-2159	(202) 418-0232

From: Alan R. Plutzik

Number of Pages: 4 *(including these pages)*

Regarding: Cellphone Termination Fee Cases

Original to follow by mail: ☒ *Yes* ☐ *No*

Comments:

Please contact Lisa Baker at (925) 945-0200 if this facsimile is not received in full.

No. of Copies rec'd 0
List A B C D E

45325

The information contained in this facsimile is confidential and may also be privileged. The information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this facsimile in error, please immediately notify us by a collect telephone call to the telephone number listed above, and return the original message to us at the address above via the US Postal Service. Thank you.

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
2125 OAK GROVE ROAD, SUITE 120
WALNUT CREEK, CALIFORNIA 94598
E-MAIL: INFO@BRAMSONPLUTZIK.COM

ROBERT M. BRAMSON
ALAN R. PLUTZIK
PAUL F. MAHLER
DANIEL E. BIRKHAEUSER
JENNIFER S. ROSENBERG
L. TIMOTHY FISHER
KATHRYN A. SCHOFIELD
ARAM S. DURPHY

HAROLD R. FARROW
1926 - 2001

FACSIMILE
(925) 945-8792

TELEPHONE
(925) 945-0200

Alan R. Plutzik
APlutzik@BramsonPlutzik.com

August 19, 2005

VIA FAX AND MAIL

RECEIVED & INSPECTED
AUG 26 2005
FCC - MAILROOM

Kristin Linsley Myles, Esq.
Munger, Tolles & Olson, LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907

Re: Cellphone Termination Fee Cases

Dear Ms. Myles:

This will respond to the August 11, 2005 and August 12, 2005 letters that you addressed to me and certain other counsel in connection with FCC Docket Nos. 05-193 and 05-194, in which the Commission has been asked by certain cellphone industry interests, including your client Verizon Wireless, to issue a declaratory ruling that all state-law claims that in any way challenge the early termination fee ("ETF") provisions of any cellphone carrier's subscriber contract are preempted by federal law. Wireless Consumers Alliance ("WCA"), Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Astrid Mendoza, Christina Nguyen, Delores Johnson, Bruce Gatton, Katherine Zill, Mark Lyons, Richard Samko and Amanda Selby (hereinafter collectively referred to as the "WCA Commenting Parties") collectively filed Comments in those proceedings on August 5, 2005 (the "WCA Comments").

In your August 11, 2005 letter, you claim that counsel for the WCA Commenting Parties violated a Protective Order issued by the Hon. Ronald M. Sabraw, Judge of the Alameda County (California) Superior Court, in the litigation entitled *In re Cellphone Termination Cases*, J.C.C.P. 4332 (the "California Litigation"), by including in the WCA Comments the statement that less than half of the ETFs imposed by cellphone carriers have been collected -- a statement that you assert could only have been derived from discovery materials produced in the California Litigation. However, counsel have not violated the Protective Order in the California Litigation. They have not publicly disclosed the confidential information of any party to the California Litigation. The general statement from the WCA Comments about the collection of ETFs that is cited in your letter derived from sources independent of the discovery materials produced in the litigation. We are not obligated to disclose all of the sources of information contained in the WCA Comments, but one need go no further than the survey submitted by USPIRG in Dockets No. 05-193 and 05-194 for publicly available evidence tending to show that less than 50% of ETFs are collected. Thus, the USPIRG survey, at p. 10, observes that only about 3% of cellphone customers pay an ETF each year. Compare this with widely publicized estimates of churn that have ranged as high as 3% per month, or 36% per year, for some wireless carriers

No. of Copies rec'd 0
List A B C D E

(*See, e.g.*, *The State of CRM* [*Customer Relationship Management*] *in the North American Market 2002*, A Fujitsu Research Report, http://72.14.207.104/search?q=cache:goUEyG05-YwJ:www.crm2day.com/library/docs/rr0001.pdf+%22Churn+rates%22+%223%25+per+month%22+cell+phone+carriers+AT%26T&hl=en.

As disclosed in the WCA Comments, the WCA Commenting Parties intend to submit a separate pleading, with a request for confidential treatment, that will include internal documents obtained from the carriers in discovery and a discussion of the information contained in those documents. Some of these documents may address in detail the extent to which the ETFs that cellphone subscribers have incurred were actually collected. In your August 12, 2005 letter, you attempt to interfere with this forthcoming submission. You argue that WCA and Mark Lyons, two of the twelve parties whose names appear on the WCA Comments are not currently parties to the California Litigation, and that Judge Sabraw's order permitting plaintiffs in that action to submit confidential discovery materials to the Commission in Docket Nos. 05-193 and 05-194 does not extend to WCA or Lyons. Implicitly, you seem to be suggesting that while the Court's order permits these materials to be submitted to the Commission on behalf of the other ten commenting parties, they cannot be submitted on behalf of WCA or Lyons. Your contentions in this regard are without merit.

Both WCA and Lyons filed ETF cases as "private attorneys general" under California law -- WCA against T-Mobile and Lyons against Nextel. Those cases were coordinated and consolidated in the California Litigation. Thus, both WCA and Lyons are bound by the Protective Order entered in the California Litigation. Earlier this year, Judge Sabraw ruled in the California action that Proposition 64, enacted by the California voters in the November, 2004 general election, was retroactive to pending cases and, accordingly, held that the "private attorney general" claims asserted by both WCA and Lyons should be dismissed. As you know, whether or not Proposition 64 is retroactive is still unsettled -- conflicting rulings on this point were rendered by various California courts of appeal, and they have all been vacated while the State Supreme Court decides the issue. If the California Supreme Court decides that Proposition 64 is not retroactive, the claims asserted by both WCA and Lyons will go forward in the trial court. Moreover, no judgment has been rendered in the trial court against Mr. Lyons, and the court only entered judgment against WCA after plaintiffs had requested the Court to enter an order allowing them to use discovery documents in opposing the CTIA and Suncom petitions at the FCC. Furthermore, the judgment against WCA is not final under California law, because WCA, on August 1, 2005, filed a Notice of Appeal. Under ¶ 19 of the Protective Order, the "Conclusion of the Litigation" is defined as "30 days after the expiration of the time to challenge any judgment, settlement or consent decree" – a date which has not occurred as to either WCA or Lyons. Furthermore, the same paragraph states that the Protective Order continues to bind the parties even *after* the "conclusion of the litigation." Accordingly, your statement that WCA and Lyons are not "plaintiffs" in the California Litigation is misleading. We therefore submit that Judge Sabraw's Order permits the discovery materials to be submitted on behalf of WCA and Lyons as well as the other ten commenting parties.

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP

If you disagree, the place for you to seek relief is in the trial court. I would be happy to participate in a telephone conference call with you and the Court at any time. I am available on Monday for that purpose.

I regret that you elected to send copies of your letters to the Acting General Counsel of the FCC, Sam Feder. The issues raised in your letter concern the trial court, not the Commission. However, because you have seen fit to copy Mr. Feder on your letters, I will do likewise.

Very truly yours,

BRAMSON, PLUTZIK, MAHLER
& BIRKHAEUSER, LLP

Alan R. Plutzik

ARP:lb

cc: J. David Franklin, Esq.
Jacqueline E. Mottek, Esq.
Thomas Hixson, Esq.
Michele Floyd, Esq.
Dominic Surprenant, Esq.
Sam Feder, Esq.

45313