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September 23, 2005

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Dockets 05-193, 05-194, cellular early termination fees (“ETFs”)

Dear Ms. Dortch:

On September 21 and 22, 2005, Carl Hilliard, Scott Bursor and I, as representatives of Wireless Consumers Alliance (“WCA”) and certain cellular customers challenging ETFs, met with Commission staff as follows:

September 21<sup>st</sup>

Jordan Goldstein, Senior Legal Advisor to Commissioner Copps  
John Branscome, Legal Advisor to Commissioner Abernathy  
Barry Ohlson, Senior Legal Advisor to Commissioner Adelstein  
Fred Campbell, Legal Advisor to Chairman Martin

September 22<sup>nd</sup>

Cathy Seidel and WTB staff  
Sam Feder and OGC staff  
Monica Desai and Peter Tenhula of CGB

We spoke from the presentation marked Exhibit 1. We also left copies of Exhibit 1 supplemented with the full texts of the decisions listed in the appendix to the Exhibit.

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In response to a request from the General Counsel, we compiled the attached Exhibit 2 from public information available on the web site of the U.S. International Trade Commission ("USITC").

Please direct any questions to the undersigned.

Sincerely,

James R. Hobson  
Counsel to WCA, et al.

cc: Fred Campbell, John Branscome, Jordan Goldstein, Barry Ohlson, Cathy Seidel, David Furth, Sam Feder, Joel Kaufman, Monica Desai, Peter Tenhula.

**EXHIBIT 1**

**Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers' Early Termination Fees ("ETFs") (Docket Nos. 05-193 and 05-194)**

**I. Pro-Competition Policies Weigh Heavily Against The CTIA & SunCom Petitions.**

- A. In a freely competitive market, CMRS carriers should be held to the same generally applicable state contract laws as every other industry.
- B. GAO and USPIRG surveys show that millions of subscribers want to switch carriers for competitive reasons but are impeded by ETFs.
- C. ETFs undermine the Commission's purpose in enacting Wireless Number Portability.

**II. Preemption Law Weighs Heavily Against The CTIA & SunCom Petitions**

- A. Congress enacted two savings clauses to restrict the scope of preemption.
  - 1. 47 U.S.C. § 332(c)(3)(A) limits the scope of preemption to "rates charged for service" and excludes "other terms and conditions," which remain subject to state law.
  - 2. 47 U.S.C. § 414 preserves state law remedies that are not specifically preempted.
- B. Courts have overwhelmingly rejected the same preemption arguments made in the CTIA and Suncom petitions.
  - 1. Five federal courts and two state courts have ruled that ETFs are not "rates charged" and that Congress did not intend to preempt state contract law challenges to ETFs. (See appendix of cases.)
  - 2. For example, *Phillips v. AT&T Wireless*, 2004 WL 1737385 (S.D. Iowa July 29, 2004) explains: "[T]he Court finds the AT&T early termination fee is not a 'rate'. Both Judge Pratt and Judge Melloy have rejected this same argument, finding that such 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 the 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 \*10 (emphasis added).

3. Only two reported cases (from the same district judge) have held otherwise. Both cases are procedurally defective and devoid of any reasoning. They have never been followed by any other court.

### III. Commission Precedent Weighs Heavily Against The CTIA & SunCom Petitions

A. *In re Truth-In-Billing*, 20 FCC Rcd 6448 (2005) held that state laws specifically targeting CMRS carriers and seeking to regulate line items in CMRS carriers’ bills were preempted rate regulation. But the Commission emphasized that generally applicable state laws were not preempted under the ruling.

1. “[W]e believe that states’ enforcement of their own generally applicable contractual and consumer protection laws – to the extent such laws do not require or prohibit the use of line items – would *not* constitute rate regulation under section 332(c)(3)(A).” *Id.* ¶ 53 (emphasis added).

2. State law restrictions on liquidated damages clauses do not target CMRS providers. The same rules apply across the board to every industry and, as the Commission recognized in *Truth-In-Billing*, “would *not* constitute rate regulation under section 332(c)(3)(A).”

B. *In re Wireless Consumers Alliance*, 15 FCC Rcd 17021 (2000) recognized that “Section 332 was designed to promote the CMRS industry’s reliance on competitive markets in which private agreements and other contract principles can be enforced.” *Id.* ¶ 24. Thus the Commission recognized that the same generally applicable contract principles that apply to every other industry should also apply to the CMRS industry in a competitive marketplace.

### IV. Real-World Experience And Common Sense Weigh Heavily Against The CTIA & Suncom Petitions

A. ETFs are not “rates charged” because they are rarely charged and are almost never paid. USPIRG’s survey shows that only 3% of customers pay an ETF in a given year.

B. Real-world experience has shown that variations among ETFs have no effect on “rates,” “rate structures,” or “handset subsidies.” Variations in Cingular’s ETFs (pro-rated in some states, flat in others) has no effect on Cingular’s rates. And changes to ETFs required by the 32-state settlement in 2004 between Sprint,

Cingular, and Verizon and 32 state attorneys general had no affect on those carriers' rates.

- C. The Commission should not grant the extraordinary blanket immunity that the CTIA and SunCom petitions seek. The Commission should adhere to its stated position that “the determination of whether any particular claim or remedy is consistent with § 332 must be determined in the first instance by the state trial court based on the specific claims before it.” *In re Wireless Consumers Alliance*, 15 FCC Rcd. 17021, ¶ 28.

**Appendix Of Cases**

Five federal courts have ruled that ETFs are not “rates charged” and that claims challenging them are not preempted under § 332:

- *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004) (**TAB 1**)
- *State of Iowa v. United States Cellular Corporation*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000) (**TAB 2**)
- *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000) (**TAB 3**)
- *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S. D. Fla. Sept. 23, 2004) (**TAB 4**)
- *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996) (**TAB 5**)

Two state courts have ruled that ETFs are not “rates charged” and that claims challenging them are not preempted under § 332:

- *Hall v. Sprint*, State of Illinois, Third Judicial Circuit, Case No. 04L113 (Aug. 10, 2004) (**TAB 6**)
- *Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, (S.D. Ill. Nov. 8, 2002) (**TAB 7**)

Two reported cases involving the same district judge and same plaintiffs’ lawyers – who failed to attend the hearing to argue the issue – have held the contrary:

- *Redfern v. AT&T Wireless Services, Inc.*, 2003 U.S. Dist. LEXIS 25745, at \*2 (S.D. Ill. 2003) (“no one attended the hearing on Plaintiff’s behalf”) (**TAB 8**)
- *Chandler v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004) (same district judge cited his prior ruling in *Redfern* and reached the same conclusion with no further analysis) (**TAB 9**)

**EXHIBIT 2**

In connection with the Commission’s consideration of WT Docket Nos. 05-193 and 05-194, WCA et al. are providing the United States International Trade Commission (USITC) data showing the average wholesale price for handsets. The USITC compiles data on the declared value of consumer goods, including handsets, imported into the United States. These data are tracked by the USITC according to Customs Entry Summary Value Declaration Forms – forms used by U.S. Customs to collect duties and taxes on imported merchandise, to record statistical data on imports, and to provide a concise summary of the import transaction by classification and value. These data are publicly available on the Internet through the USITC’s Interactive Tariff and Trade DataWeb, at [www.usitc.gov](http://www.usitc.gov). Since nearly all handsets sold in the U.S. are manufactured abroad and imported, the USITC data can be used to compute the average wholesale prices for handsets in the United States, as shown below:

<u>Year</u>	<u>Avg Wholesale Handset Price</u>
1997	\$115.82
1998	101.91
1999	111.98
2000	117.19
2001	110.67
2002	107.79
2003	105.35

Source: USITC DataWeb, HTS codes: 8525.20.90.70 & 8525.20.60.70. Average wholesale handset price calculated by dividing reported aggregate value by reported volume in units.

These data confirm that handset “subsidies” are actually quite small – especially in relation to the amount of early termination fees (ETFs), which range from \$150 to \$240 depending on the carrier. The typical ETF is therefore substantially greater than the entire wholesale cost of the handset, and often may be more than ten times the amount of the handset “subsidy.” These data should dispel the myth that ETFs can be explained or justified in terms of recovering a subsidy on a discounted handset.