

Before the  
Federal Communications Commission  
Washington, D.C. 20554

2006 FEB -6 P 4: 32

In the Matter of	)	
	)	RECEIVED & INSPECTED
SunCom Wireless Operating Company, L.L.C	)	WT Docket No. <u>05-193</u>
Petition for Declaratory Ruling	)	
	)	
CTIA – The Wireless Association Petition for	)	WT Docket No. 05-194
Declaratory Ruling	)	
	)	
Debra Edwards Cross-Petition for Declaratory	)	
Ruling	)	
	)	
Determination of Whether State Law Claims	)	
Regarding Early Termination Fees are Subject to	)	
Preemption Under Section 332(c)(3)(A) of the	)	
Communications Act, as Amended	)	

**PROTECTIVE ORDER AND ACKNOWLEDGEMENT**

**Adopted: February 2, 2006**

**Released: February 3, 2006**

By the Chief, Consumer & Governmental Affairs Bureau:

1. On February 22, 2005, and March 15, 2005, respectively, SunCom Wireless Operating Company, L.L.C., (SunCom) and CTIA – The Wireless Association filed petitions for declaratory ruling seeking a finding that early termination fees contained in wireless service contracts are “rates charged” within the meaning of the Communications Act of 1934, as amended (Act),<sup>1</sup> and that state laws attempting to regulate early termination fees are preempted by the Act.<sup>2</sup> Further, on March 4, 2005, Debra Edwards, a plaintiff in a private action against SunCom, filed an Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings.<sup>3</sup> On May 18, 2005, the Commission’s Wireless Telecommunications Bureau released two public notices seeking comment on the three petitions.<sup>4</sup> The Wireless Consumers Alliance, together with Porsha Meoli, Leslie Armstrong, Sridhar

<sup>1</sup> See 47 U.S.C. §§ 151 *et seq.*

<sup>2</sup> See Petition for Declaratory Ruling filed by SunCom Operating Company, L.L.C, WT Docket No. 05-193 (filed Feb. 22, 2005); Petition for Declaratory Ruling filed by CTIA – The Wireless Association, WT Docket No. 05-194 (filed March 15, 2005).

<sup>3</sup> See Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings, WT Docket No. 05-193 (filed March 4, 2005).

<sup>4</sup> See *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Petition For Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition for Declaratory Ruling Filed by Debra Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A), WT Docket No. 05-193, 20 FCC Rcd 9100 (2005); *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees are “Rates Charged” Within 47 U.S.C. Section 332(c)(3)(A), WT Docket No. 05-194, 20 FCC Rcd 9103 (2005). This proceeding subsequently was transferred to the Commission’s Consumer & Governmental Affairs Bureau.

Krishnan, Astrid Mendoza, Christina Nguyen, Bruce Gattton, Margaret Schwarz, Kathryn Zill, Mark Lyons, Richard Samko and Amanda Selby (collectively "WCA"), submitted comments and reply comments in these proceedings.<sup>5</sup> In support of its comments and reply comments, on December 28, 2005, WCA made an *ex parte* filing appending documents obtained pursuant to discovery in pending California state court litigation against several wireless carriers, *In re CellPhone Termination Fee Cases*, J.C.C.P. 4332 (Superior Court of California, County of Alameda) (hereinafter defined as "California Litigation"), and containing approximately nine pages of argument referencing and quoting information contained in these documents.<sup>6</sup> WCA requested confidential treatment of the entirety of its *ex parte* filing pursuant to section 0.459 of the Commission's rules,<sup>7</sup> to enable it to comply with a protective order issued by the court in the California Litigation.<sup>8</sup>

2. In response to WCA's filing, counsel for Verizon Wireless, T-Mobile USA, and Sprint Nextel individually sought the bates numbers assigned in the California Litigation to the confidential documents pertaining to their individual companies and submitted by WCA.<sup>9</sup> Verizon Wireless and T-Mobile USA state that they request this information "[t]o ensure that the procedures set forth in the Court's order are adhered to and that no [Verizon Wireless or T-Mobile] proprietary information is disclosed publicly." The Commission's Secretary has provided these bates numbers to Verizon Wireless and T-Mobile USA, and will shortly provide them to Sprint Nextel.<sup>10</sup> In addition to providing the bates numbers, the Secretary noted that "the WCA filing also contains nine pages of argument that intersperses references to [the confidential documents of the individual companies] attached as appendices to the filing."<sup>11</sup> This statement prompted counsel for Verizon Wireless and T-Mobile USA to seek copies of WCA's "argument."<sup>12</sup>

3. To enable Verizon Wireless and T-Mobile (as well as any other party seeking to maintain

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<sup>5</sup> See Comments of WCA, WT Docket Nos. 05-193 and 05-194, filed August 5, 2005; Reply Comments of WCA, WT Docket Nos. 05-193 and 05-194, filed August 25, 2005. 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.

<sup>6</sup> See Letter to Marlene Dortch, Secretary, from James R. Hobson, Counsel for WCA, WT Docket Nos. 05-193 and 05-194, dated December 28, 2005.

<sup>7</sup> 47 C.F.R. § 0.459.

<sup>8</sup> See *In re CellPhone Termination Fee Cases*, J.C.C.P. 4332, "Order Granting Partial Relief from Protective Order" (Superior Court of California, County of Alameda, Aug. 2, 2005).

<sup>9</sup> See Letter to Marlene Dortch, Secretary, from Helgi C. Walker, Counsel for Verizon Wireless, WT Docket Nos. 05-193 and 05-194, dated Jan. 10, 2006; Letter to Marlene Dortch, Secretary, from Sara F. Liebman, Counsel for T-Mobile USA, WT Docket Nos. 05-193 and 05-194, dated Jan. 13, 2006; Letter to Marlene Dortch, Secretary, from Christopher J. Wright, Counsel for Sprint Nextel, WT Docket Nos. 05-193 and 05-194, dated Jan. 26, 2006.

<sup>10</sup> See Letter to Helgi C. Walker from Marlene Dortch, Secretary, WT Docket Nos. 05-193 and 05-194, dated Jan. 10, 2006; Letter to Sara F. Liebman from Marlene Dortch, WT Docket Nos. 05-193 and 05-194, dated Jan. 16, 2006. We also note that the presiding judge in the California Litigation has ordered WCA to identify the bates numbers of the documents attached to its filing and provide these to defendants in that litigation by January 31, 2006. See *Cell Phone Termination Fee Cases*, J.C.C.P. 4332, Minutes of Case Management Conference, Jan. 24, 2006, available at <http://apps.alameda.courts.ca.gov/fortecgi/fortecgi.exe?ServiceName=DomainWebService&TemplateName=html/sample.html&rofact=01/24/06&Action=17888942>.

<sup>11</sup> See, e.g., Letter to Helgi C. Walker from Marlene Dortch, Secretary, WT Docket Nos. 05-193 and 05-194, dated Jan. 10, 2006 at 1.

<sup>12</sup> See Letter to Marlene Dortch, Secretary, from Helgi C. Walker, Counsel for Verizon Wireless, WT Docket Nos. 05-193 and 05-194 (dated Jan. 16, 2006); Letter to Marlene Dortch, Secretary, from Sara F. Liebman, Counsel for T-Mobile USA, WT Docket Nos. 05-193 and 05-194, dated Jan. 18, 2006.

the confidentiality of information pertaining to it and filed by WCA in this proceeding) to review this argument, and to assist Verizon Wireless and T-Mobile in their desire to comply with the order in the California Litigation, we adopt this Protective Order. The Protective Order is intended to facilitate and expedite the review of documents that are alleged to contain trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. The Protective Order is not intended to constitute a resolution of the merits concerning whether any of the information subject to the Protective Order would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including section 0.442 of the Commission's rules.<sup>13</sup>

4. *Definitions.*

a. "California Litigation" means *In re CellPhone Termination Fee Cases*, J.C.C.P. 4332 (Superior Court of California, County of Alameda).

b. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information; and (iii) information that the Commission has allowed to be examined off-site and that otherwise complies with the requirements of this paragraph. Confidential Information includes additional copies of, and information derived from, Confidential Information. Further, by using the designation "Confidential Information," the Submitting Party and any party for which the Submitting party has filed confidential information, signify that they believe the information so designated to be subject to protection under the protective order issued in the California Litigation.

c. "Counsel" means In-House Counsel and Outside Counsel of Record;

d. "In-House Counsel" means the attorney or attorneys employed by a party to these proceedings or who are employed by an affiliated entity and who are actively engaged in the conduct of this proceeding, *provided that*, such counsel are not involved in competitive decision-making, *i.e.*, In-House Counsel's activities, association, and relationship with a client are not such as to involve such counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor; and

e. "Outside Counsel of Record" means the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in these proceedings, provided that the Outside Counsel of Record is not involved in competitive decision-making.

f. "Submitting Party" means a person that seeks confidential treatment of Confidential Information pursuant to this Protective Order including any party whose information subject to the protective order in the California Litigation was filed by the Submitting Party in this proceeding.

5. *Use of Confidential Information.* Persons obtaining access to Confidential Information pursuant to this Protective Order shall use the information solely for the preparation and conduct of this

<sup>13</sup> 47 C.F.R. § 0.442. This Protective Order applies to the Confidential Information described herein as well as any subsequent filings in this proceeding for which confidential treatment pursuant to section 0.459 of the Commission's rules, 47 C.F.R. § 0.459, is sought.

proceeding before the Commission as delimited in this paragraph and paragraphs 7, 12, and 13, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of any Confidential Information in its decision in this proceeding, it will do so by redacting any Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Confidential Information under this Protective Order.

6. *Non-Disclosure of Confidential Information.* Except with the prior written consent of the Submitting Party, or the party for which the Submitting Party filed Confidential Information in this proceeding, or as hereinafter provided under this Protective Order, neither a Stamped Confidential Document nor any Confidential Information may be disclosed by a Reviewing Party to any person other than the Commission and its staff.

7. *Permissible Disclosure.* Subject to the requirements of paragraph 10, Confidential Information may be reviewed by Counsel. Subject to the requirements of paragraph 10, Counsel may disclose Confidential Information and other Confidential Information to: (1) outside consultants or experts retained for the purpose of assisting Counsel in this proceeding, *provided that*, the outside consultants or experts are not involved in the analysis underlying the business decisions of any competitor of any Submitting Party or any party for which the Submitting Party has filed Confidential Information or participate directly in those business decisions; (2) paralegals or other employees of such Counsel not described in clause 3 of this paragraph 4 assisting Counsel in this proceeding; (3) employees of such Counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding; and (4) employees of third-party contractors performing one or more of the functions set forth in clause 3 of this paragraph 7. Individuals who have obtained access to Confidential Information in accordance with the provisions of this paragraph 7 and paragraph 10 may discuss and share the contents of the Confidential Information with any other person who has also obtained access in accordance with the provisions of this paragraph 7 and paragraph 10, and with the Commission and its staff.

8. *Protection of Confidential Information.* Persons described in paragraph 7 shall have the obligation to ensure that access to Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that: (1) Confidential Information is used only as provided in this Protective Order; and (2) Confidential Information is not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 12.

9. *Prohibited Copying.* If, in the judgment of the Submitting Party or any party for which the Submitting Party filed Confidential Information, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for the Submitting Party and any party for which the Submitting Party filed Confidential Information.

10. *Procedures for Obtaining Access to Confidential Information.* In all cases where access to Confidential Information is permitted pursuant to paragraph 7, before reviewing or having access to any Confidential Information, each person seeking such access shall execute the attached Acknowledgment of Confidentiality (Acknowledgment) and file it with the Consumer & Governmental Affairs Bureau (Bureau) and serve it upon the Submitting Party through its Outside Counsel of Record, and each party for which the Submitting Party filed Confidential Information through its Outside Counsel of Record, so that the Acknowledgment is received at least five business days prior to such person's

reviewing or having access to the Submitting Party's Confidential Information, except that, where the person seeking access is one described in either clause 2, 3 or 4 of paragraph 7, the Acknowledgment shall be delivered promptly prior to the person's obtaining access. The Submitting Party and each party for which the Submitting Party filed Confidential Information shall have an opportunity to object to the disclosure of Confidential Information to any such persons. Any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment (or where the person seeking access is one described in either clause 3 or 4 of paragraph 7, such objection shall be filed and served as promptly as practicable after receipt of the relevant Acknowledgment). Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party or any party for which the Submitting Party filed Confidential Information shall not have access to Confidential Information. The Submitting Party shall make available for review Confidential Information at the offices of its Outside Counsel of Record.

11. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside the terms of this Protective Order, requests will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.<sup>14</sup>

12. *Filings with the Commission.* Persons described in paragraph 7 may, in any documents that they file in this proceeding, reference Confidential Information, but only if they comply with the following procedure:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this order must be clearly marked: "Confidential Information included pursuant to Protective Order, WT Docket Nos. 05-193 and 05-194;" and

d. The confidential portion(s) of the pleading shall be served on the Secretary of the Commission, the Bureau, the Submitting Party, and any party for which the Submitting Party has filed Confidential Information. Such confidential portions shall be served under seal, and shall not be placed in the Commission's public file. A party filing a pleading containing Confidential Information shall also file redacted copies of the pleading containing no Confidential Information, which copies shall be placed in the Commission's public files. Parties should not provide courtesy copies of pleadings containing Confidential Information to Commission staff unless the Bureau so requests. Any courtesy copies shall be submitted under seal.

13. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose Confidential Information.

14. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by the Submitting Party or any party for which the

<sup>14</sup> 47 C.F.R. §§ 0.442 and 0.461

Submitting Party filed Confidential Information of any privilege or entitlement to confidential treatment of such Confidential Information. Individuals who have obtained access to Confidential Information in accordance with the provisions of paragraph 7 and paragraph 10, by viewing this material agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information by a Submitting Party or any party for which the Submitting Party filed Confidential Information shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party or any party for which the Submitting Party filed Confidential Information takes prompt remedial action.

15. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify the Submitting Party and each party for which the Submitting Party filed Confidential Information of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that the Submitting Party and any party for which the Submitting Party filed Confidential Information has a full opportunity to oppose such production prior to the production or disclosure of any Confidential Information.

16. *Violations of Protective Order.* Should a person that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission, the Submitting Party, and the party for which the Submitting Party filed Confidential Information. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including, but not limited to, suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party or any party for which the Submitting Party filed Confidential Information at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

17. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, persons described in paragraph 7 shall destroy or return to the Submitting Party and any party for which the Submitting Party filed Confidential Information all copies of the same. No material whatsoever derived from Confidential Information may be retained by any person having access thereto, except Counsel (as described in paragraph 7) may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) containing Confidential Information prepared on behalf of any party that Counsel represents. All Counsel shall make certification of compliance herewith and shall deliver the same to the Submitting Party and any party for which the Submitting Party filed Confidential Information not more than three weeks after conclusion of this proceeding. The provisions of this paragraph regarding retention of Confidential Information and copies of same shall not be construed to apply to the Commission or its staff.

FEDERAL COMMUNICATIONS COMMISSION

Monica S. Desai  
Chief, Consumer & Governmental Affairs Bureau

ACKNOWLEDGEMENT OF CONFIDENTIALITY

In the Matter of	)	
	)	
SunCom Wireless Operating Company, L.L.C	)	WT Docket No. 05-193
Petition for Declaratory Ruling	)	
	)	
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Regarding Early Termination Fees are Subject to	)	
Preemption Under Section 332(c)(3)(A) of the	)	
Communications Act, as Amended	)	

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any Confidential Information obtained as a result of the Protective Order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 7 of the foregoing Protective Order and that I will not use such Confidential Information in any other capacity or disclose such Confidential Information except as specifically provided in the Protective Order.

I hereby certify that I am not involved in “competitive decision-making” as that term is used in the definition of In-House Counsel in paragraph 4 of the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Confidential Information is used only as provided in the Protective Order; and (2) Confidential Information is not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 12 of the Protective Order. I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
 [Name]  
 [Position]  
 [Address]  
 [Telephone]