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March 1, 2006

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

Re: Cellular early termination fees, WT Dockets 05-193, 05-194
Ex parte communication pursuant to Section 1.1206 of the Rules.

Dear Ms. Dortch:

On February 28 and March 1, 2006, representatives of Wireless Consumers Alliance ("WCA")[1] met with:

Fred Campbell, Legal Advisor to Chairman Martin,
John Giusti, Legal Advisor to Commissioner Copps,
Commissioner Tate and her Senior Legal Advisor, Dana Shaffer,
Barry Ohlson, Senior Legal Advisor to Commissioner Adelstein,
Cathy Seidel, Acting Chief of the Wireless Telecommunications Bureau and staff,
General Counsel Sam Feder and staff, and
Monica Desai, Chief of the Consumer & Governmental Affairs Bureau and staff.

Participating for WCA were Carl Hilliard, Scott Bursor and the undersigned. We spoke from the outline and exhibits attached. We also discussed certain information appearing in the WCA "Confidential Ex Parte Supplemental Appendix"

[1] WCA has participated in these proceedings on behalf of itself and Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Astrid Mendoza, Christina Nguyen, Bruce Gatton, Margaret Schwarz, Kathryn Zill, Mark Lyons, Richard Samko and Amanda Selby.

submitted December 28, 2005, and recently made the subject of a Protective Order, DA 06-257, released February 3, 2006. All conditions of the Order were met in the discussions.

We also discussed *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 at *14-*15 (8th Cir. December 9, 2005) along the same lines as presented in our ex parte letter of January 11, 2006 filed in the referenced dockets.

Please direct any questions to the undersigned.

Sincerely,

James R. Hobson

cc: Fred Campbell, John Giusti, Dana Shaffer, Barry Ohlson, Cathy Seidel, Sam Feder, Monica Desai, Carl Hilliard, Scott Bursor

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

I. Neutral Application Of State Contract Law Is Not Preempted Rate Regulation

A. California Civil Code § 1671 (attached as Exh. A).

1. The statute at issue in the California ETF litigation – enacted in 1872 based on common law rules in effect in every U.S. jurisdiction.

2. Generally applicable to contracts in any industry – not just CMRS.

B. Minnesota Statutes § 325F.695 (attached as Exh. B).

1. The statute at issue in *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 (8th Cir. Dec. 9, 2005) – enacted in 2004 specifically to regulate only CMRS contracts.

2. *Not* generally applicable – titled "Consumer protections for wireless customers."

C. The Relief CTIA Seeks Would Exempt The CMRS Industry From Generally Applicable State Contract Law

1. CTIA has submitted two *ex parte* presentations stating "States would still have the ability to enforce state consumer protection statutes of general applicability (*e.g.*, fraud statutes)." 1/18/06 CTIA Slide Deck at 9; 2/16/06 CTIA Slide Deck at 8.

a. Why does CTIA mention only fraud statutes? Does CTIA recognize that it seeks to preempt generally applicable **contract** statutes?

b. "The Commission has … determined that section 332(c)(3)(A) does not preempt the 'neutral application of state **contractual** or consumer fraud laws.'" Nov. 12, 2004 FCC Amicus Brief in *Cellco Partnership v. Hatch*, at 21 (bold added), *quoting In re Southwestern Bell Mobile Sys.*, 14 FCC Rcd 19903, ¶ 10 (1999).

c. "[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)." *In re Truth-In-Billing*, 20 FCC Rcd 6448, ¶ 53 (2005) (bold added).

2. If generally applicable state contract laws are preempted, will CMRS providers be able to enforce subscriber contracts in state court?

II. Real-World Experience Confirms That ETFs Are Not "Rates Charged"

A. Courts have overwhelmingly rejected the same preemption arguments made in the CTIA and Suncom petitions. *See* WCA 9/23/05 *ex parte* presentation and appendix of cases submitted therewith.

B. ETFs are not "rates charged" because they are rarely charged and are almost never paid. USPIRG's survey, submitted Aug. 16, 2005, shows that only 3% of customers pay an ETF in a given year.

C. In the real world, variations among ETFs have no effect on "rates," "rate structures," or "handset subsidies."

1. Variations in Cingular's ETFs (pro-rated in some states, flat in others) has no effect on Cingular's prices for service or for handsets. *See* 8/25/05 Reply Comments of Carver Ranches National Park, Inc., at 3-4.

2. 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' prices for service or for handsets. *See id.*

3. There is no relationship between ETFs and "handset subsidies." (*See* Exh. C, attached, USITC data on handset prices, showing that the typical ETF of $150 to $240 is substantially greater than the entire wholesale cost of the handset.)

D. Wireless carriers' internal documents and other evidence described in WCA's confidential *ex parte* supplemental appendix confirm that ETFs are not "rates charged"

1. Wireless carriers' internal documents show that the carriers consistently characterize and treat ETFs as a remedy for breach of contract.

2. Wireless carriers' internal documents show that primary purpose of ETFs is to prevent churn by penalizing customers for changing carriers.

E. Professor Hausman's opinions (submitted October 25, 2005 by Verizon) concerning the relationship between ETFs and CMRS prices are irrelevant and are contrary to real-world data.

EXHIBIT A

LEXSTAT CAL. CIV. CODE 1671

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THROUGH 2006 CH. 7, APPROVED 2/9/06 ***

CIVIL CODE
DIVISION 3. Obligations
PART 2. Contracts
TITLE 4.5. Liquidated Damages
CHAPTER 1. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Civ Code § 1671 (2006)

§ 1671. Liquidated damages provision for breach of contract

(a) This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.

(b) Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

(c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either:

(1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or

(2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.

(d) In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

HISTORY:
Enacted 1872. Amended Stats 1977 ch 198 § 5, operative July 1, 1978.

NOTES:
Amendments:
1977 Amendment:
Substituted the section for the former section which read: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."Historical Derivation:

EXHIBIT B

LEXSTAT MINN. STAT. 325F.695

LEXISNEXIS (TM) MINNESOTA ANNOTATED STATUTES

*** CURRENT THROUGH THE 2005 LEGISLATION SESSION ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 25, 2005 ***

Trade Regulations, Consumer Protection
CHAPTER 325F CONSUMER PROTECTION; PRODUCTS AND SALES
PREVENTION OF CONSUMER FRAUD

GO TO MINNESOTA STATUTES ARCHIVE DIRECTORY

Minn. Stat. § 325F.695 (2005)
325F.695 Consumer protections for wireless customers

Subdivision 1. Definitions. The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

(b) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

(c) "Provider" means a provider of wireless telecommunications services.

(d) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. Copy of contract. A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the date the contract is entered into. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Subd. 3. Provider-initiated substantive change. A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. Customer-initiated change. If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

Subd. 5. Expiration. This section expires August 1, 2007.

HISTORY: *2004 c 261 art 5 s1*

EXHIBIT C

There is no relationship between ETFs and "handset subsidies"

In connection with the Commission's consideration of WT Docket Nos. 05-193 and 05-194, Wireless Consumers Alliance ("WCA") *et al.* have provided 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. 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:

Year	Avg Wholesale Handset Price
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.