

March 28, 2007 <http://www.techlawjournal.com/home/newsbriefs/2007/01d.asp>

## **NATIONAL -- Martin hopeful that talks on ETFs produce agreement**

ORLANDO - FCC Chairman Kevin J. Martin said yesterday that he's hopeful that the wireless industry and consumer groups can reach an agreement on rules the FCC should adopt as it addresses pending early termination fee (ETF) petitions.

"I've met with both the industry representatives and consumer groups about it recently -- and actually I met with both of them together -- in trying to see if there isn't ... some kind of compromise that everybody can end up supporting on the ETF issue," Mr. Martin told reporters during a briefing after he spoke at a keynote session at CTIA's Wireless 2007 here. "And I think that they've had a couple of follow-up meetings since then and ... we'll be interested to see whether there's any kind of progress. ... We'll see, but I'm at least optimistic."

Mr. Martin said he expects industry and consumer groups to know within about a month whether they will be able to reach an agreement. He also said he hopes the Commission will act in the ETF proceeding in the "next few months."

CTIA has asked the FCC to rule (1) that ETFs constitute "rates charged" within the meaning of section 332 of the Communications Act of 1934, as amended, and (2) that section 332 preempts state regulation of ETFs. Consumer groups and other opponents have argued that ETFs constitute "other terms and conditions," which section 332 allows states to regulate. Also pending before the FCC are a petition filed by SunCom Wireless Operating Co. LLC and a cross-petition filed by the plaintiff in a South Carolina state class-action court case relating to ETFs.

On Feb. 28, Mr. Martin and other FCC officials met with several CTIA officials, including its president and chief executive officer, Steve Largent, and its vice president-regulatory affairs, Christopher Guttman-McCabe, as well as Jeannine Kenney of Consumers Union and Debbie Berlin of AARP.

Mr. Guttman-McCabe told reporters here yesterday that the two sides are hoping to agree on a proposal that they can bring to the FCC to be incorporated into its rules. He said the industry is willing to negotiate such provisions with the expectation that the Commission will confirm that ETFs are rates charged and thus barred from state regulation. The question is whether rules adopted by the Commission would be broader than that confirmation, Mr. Guttman-McCabe said. "It's very much a work in progress, but we're getting close," he said of the discussions.

Ms. Kenney, a senior policy analyst at CU, told TRDaily yesterday that her group wants to make sure consumers are protected from abusive practices surrounding ETFs if the FCC rules that states can not regulate them. For example, if state courts no longer have jurisdiction over ETF cases, there must be "comparable protection" at the federal level, she said.

In an ex parte filing with the Commission last November, Ms. Kenney said that federal preemption of ETFs could "eliminate a wide range of consumer rights to challenge contract provisions under state law and to seek remedies for state law violations by cell phone providers." Among the concerns about ETFs Ms. Kenney raised were their "exorbitant size ... and the lack of any apparent relationship between those fees and the monetary damages carriers might suffer from a consumer's early cancellation of a cell phone contract." She also criticized carriers that assess ETFs on all numbers assigned to a single contract, the failure of some to pro-rate the charges, the lengthy terms of service contracts, and the requirement that contracts be extended when subscribers change their plans.

"We've pretty clearly laid out where we think the major concerns are," Ms. Kenney said yesterday of the discussions consumer advocates have had with the wireless industry. "I think the ball is in their court to determine whether or not they're interested in providing consumers protections against those practices."

ETFs came up during an afternoon panel discussion here. Several industry representatives said consumers repeatedly choose plans that carry ETFs. "People like getting savings up front," said Thomas Sugrue, VP-government affairs for T-Mobile USA, Inc., noting that carriers offer greater discounts on handsets when plans are longer and have ETFs. He said his carrier found many consumers want two-year, rather than one-year, service plans so they can get greater handset discounts.

"I think the industry can do a little bit better job in the information department" regarding the features of various plans, including ETFs, said Mike Bennett, executive director-consumer and government affairs for AT&T Mobility LLC.

Iowa Utilities Board Commissioner Curt Stamp said that some consumers feel "trapped" by long service plans. However, he said, "I don't know that there's a big need to regulate them." He said that carriers had made progress in making ETFs "a little less arduous," although he said state attorneys general should still be able to ensure that consumers are being treated fairly.