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May 1, 2008

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 05-194: Petition of CTIA - The Wireless Association

Dear Ms. Dortch:

Verizon Wireless urges the Commission to grant the long-pending Petition of CTIA - The Wireless Association to declare that wireless carriers' early termination fees (ETFs) are "rates charged" by carriers within the meaning of Section 332(c)(3)(A) of the Communications Act.¹

If the Commission believes that there is a need to consider federal regulation of wireless ETFs, it can issue a notice of proposed rulemaking that would seek comment on whether prospective regulation is necessary. That rulemaking proceeding would be a lawful exercise of the Commission's authority to consider the need for national wireless regulation. However, the Communications Act clearly preempts litigation challenging the reasonableness of carriers' ETFs under state law and other state regulation of ETFs, and the Commission should so declare.

These actions will ensure that the oversight of wireless carriers' ETFs occurs at the federal level, as the Communications Act expressly directs. Moreover, any rules that the Commission determines should be adopted would ensure that all wireless consumers, in every state, have the benefit of a consistent, national set of rules. For example, Verizon Wireless would endorse a federal rule requiring that wireless ETFs be pro-rated or otherwise reduced over the life of the contract.

The extensive record in this proceeding provides ample factual and legal grounds for the Commission to grant the Petition and confirm that state regulation of ETFs is preempted under Section 332(c)(3)(A) of the Act. It should thus declare as follows:

¹ Petition of CTIA – The Wireless Association for an Expedited Declaratory Ruling, WT Docket No. 05-194, filed Mar. 15, 2005.

We conclude that: (1) ETFs are “rates charged” for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful “liquidated damages” or penalties, constitutes prohibited rate regulation and is therefore preempted by Section 332(c)(3)(A). The following cases—along with any other pending or future case, demand for arbitration, or dispute attempting to regulate CMRS ETF practices—accordingly are hereby preempted to the extent they raise state law claims.²

Verizon Wireless also notes that a number of complaints brought pursuant to Section 201 are currently pending in federal district courts and before other tribunals or arbitrators, and that these proceedings would not be directly affected by the agency’s preemption of state law claims as required by Section 332. In granting CTIA’s declaratory ruling, the Commission should also strongly encourage federal district courts and other tribunals and arbitrators faced with claims arising under Section 201 to refer those claims to the FCC under the doctrine of primary jurisdiction.³ It is routine for

² *California Cellphone Termination Fee Cases*, State of California, County of Alameda, Case No. JCCP004332 (Cal. Super Ct. Feb. 11, 2004); *Hellman v. T-Mobile, USA, Inc.*, State of Florida, Palm Beach County, Case No. 50 2004 CA 005061 (15th Jud. Cir. Ct. May 17, 2004); *Brown v. Verizon Wireless Services, LLC*, State of Florida, Palm Beach County, Case No. 04-80606-CIV (15th Jud. Cir. Ct. May 17, 2004); *Carver Ranches Washington Park, Inc. v. Nextel South Corp. d/b/a Nextel Communications*, State of Florida, Palm Beach County, Case No. 50 2004 CA 005062 (15th Jud. Cir. Ct. May 17, 2004); *Graber v. AT&T Wireless PCS, LLC et al.*, State of Florida, Palm Beach County, Florida, Case No. 50 2004CA004650MB(AI) (15th Jud. Cir. Ct. March 7, 2005); *Molfetas v. Sprint Spectrum, L.P.*, State of Florida, Palm Beach County, Case No. 50 2004 CA-005317-CIV (15th Jud. Cir. Ct. May 25, 2004); *S.C. Suncom Compl; Hall v. Sprint Spectrum L.P., d/b/a Sprint PCS Group*, Case No. 04-L-113 (3d Jud. Cir. Ct. Feb. 2, 2004); *Lemaldi v. T-Mobile, U.S.A, Inc.*, State of Washington, King County, Case No. 05-2-04408-0, (Super. Ct. Feb. 2, 2004); *Gentry v. Cellco Partnership*, Central District of California, CV 05 7888 GAF; *Waudby v. Verizon Wireless Services LLC et al.*, District of New Jersey, Civ. Act. No. 07-0470 (FLW). Furthermore, there are pending arbitration proceedings arising out of state court complaints. *Zobrist v. Verizon Wireless, Cellco P’ship, Verizon Communications, Inc.*, American Arbitration Association No. 11 494 00324 05; *Brown et al. v. Cellco Partnership*, American Arbitration Association No. 11-494-01275-05. As the record shows, the particular state law claims asserted in these suits ultimately challenge the reasonableness, fairness, or cost-basis of ETFs. See CTIA Letter to Supplement the Record at 1 n.3 (filed Mar. 13, 2006); CTIA Petition for an Expedited Declaratory Ruling at 2 n.7 (filed Mar. 15, 2005).

³ As the Supreme Court has stated: “Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.” *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952).

inquiries under Sections 201 and 202 to be referred to the Commission by federal courts for resolution,⁴ and the FCC has previously encouraged courts to do so.⁵ Such referrals would ensure that all ETFs can be subject to *uniform* decisionmaking by the FCC rather than through potentially varying judge-made law that might develop in conflict with the FCC’s guidance. This would further Congress’s clear intent “to establish a national regulatory policy” for CMRS.⁶

Should the Commission determine to initiate a notice of proposed rulemaking, it should also make clear that any new federal ETF rules that may be adopted will apply prospectively only and therefore may not be used to subject CMRS carriers to liability for ETF practices that occurred before the effective date of the rules.

The Administrative Procedure Act provides that rules adopted by federal agencies are intended to apply only to future conduct.⁷ Newly-adopted federal ETF rules should be no exception. Indeed, retroactive application of newly-enacted ETF rules would be unlawful. As the D.C. Circuit has explained, newly-enacted administrative rules cannot be applied retroactively unless, “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.”⁸ Here, CMRS carriers could not have anticipated – let alone with the requisite

⁴ See, e.g., *In the Matter of Digital Cellular, Inc., Petition for Declaratory Ruling regarding a Primary Jurisdiction Referral from the United States District Court for the Central District of California*, 20 FCC Rcd. 8723, 8723 (2005) (“The Court’s referral concerns an allegation by Digital that AirTouch Cellular, Inc. violated the Federal Communication Commission’s former commercial mobile radio services resale rule and Sections 201 and 202(a) of the Communications Act of 1934”); *In re Ryder Communications, Inc. v. AT&T Corp.*, 18 FCC Rcd. 13,603 (2003) (evaluating on primary jurisdiction referral claim whether termination fee under was unreasonable and unenforceable under Section 201).

⁵ *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd. 18,962 (¶24) (1998) (“we reiterate our statement . . . that a court may refer an issue to us under the doctrine of primary jurisdiction, which promotes proper relationships between courts and administrative agencies and is ‘specifically applicable to claims cognizable in court that contain some issue within the special competence of an administrative agency.’ Where cases involve the determination of novel issues, we encourage courts to refer those issues to the Commission.”).

⁶ *Petition of the Conn. Dep’t of Pub. Util. Control to Retain Regulatory Control of Wholesale Cellular Service Providers*, 10 FCC Rcd 7025, 7034 (1995).

⁷ See 5 U.S.C. § 551(4) (explaining that a “rule” is a “statement of general or particular applicability and *future effect*”) (emphasis added).

⁸ *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2001); see also *General Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (“In the absence of notice for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”).

“ascertainable certainty” – the substance of ETF rules.⁹ Indeed, ETF rules would be the Commission’s first regulation of the rates of wireless carriers. The Commission has repeatedly indicated that the CMRS market is vibrantly competitive,¹⁰ and therefore has decided to forbear from tariff and most other regulation of CMRS.¹¹ Last year, it *declined* to regulate carriers’ roaming rates.¹² In addition, both the Commission and the D.C. Circuit have ratified the validity of similar termination-type fees in the past.¹³ The Commission also has assured CMRS carriers that other federal regulatory actions did not detract from their ability to collect ETFs.¹⁴

For the same reasons, a notice of proposed rulemaking should not (and legally could not) include findings as to the lawfulness of carriers’ existing ETF rates or

⁹ See *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without providing adequate notice of the substance of the rule.”)

¹⁰ See, e.g., *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Eleventh Report, WT Docket No. 06-17, FCC 06-142 (¶ 3) (explaining that “competitive pressure continues to drive carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers”); *id.* (¶ 5) (“Indicators of market performance show that competition between wireless carriers continues to yield significant benefits to consumers.”).

¹¹ See e.g., *Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1478-81 ¶¶ 175-182 (1994) (concluding that, for CMRS, it was appropriate to forbear from Sections 203, 204, 205, 211, 212, and most applications of Section 214).

¹² *Reexamination of the Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, FCC 07-142 (2007), at ¶ 37 (“We decline to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier’s customer roams on another carrier’s network.”).

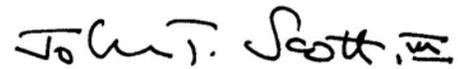
¹³ See, e.g., *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987) (“In the past, AT&T recovered [the costs stemming from last-minute cancellation and early termination] by raising its general rates for private-line service, thereby spreading the costs among all ratepayers. The Project Liability charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs. This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service”); *Equipment Distributors’ Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987) (noting and approving FCC’s conclusion that “termination charges . . . and their application in practice were not illegal or anticompetitive but were consistent with the public interest.”).

¹⁴ See, e.g., *Local Number Portability*, 18 FCC Rcd 20971, 20976 (¶ 14) (2003) (emphasis added) (“Although we prevent carriers from imposing restrictions on porting beyond necessary customer validation procedures, this does not in any way invalidate provisions in carrier contracts pertaining to minimum contract terms, *early termination fees*, credit requirements, or other similar provisions.”).

practices. CTIA's petition sought a ruling on an important but specific legal issue – the application of Section 332 of the Communications Act to wireless carriers' ETFs. It did not address whether, and to what extent, existing ETF practices should be regulated at a federal level. That is precisely what the record in response to a notice of proposed rulemaking would help to determine.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a small flourish at the end.

John T. Scott, III