



May 20, 2008

NOTICE OF EX PARTE PRESENTATION
(47 C.F.R. § 1.1206)

VIA ECFS

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

Re: *Petition for Declaratory Ruling Filed by CTIA, WT Docket No. 05-194*

Dear Ms. Dortch:

The National Association of State Utility Consumer Advocates (“NASUCA”) submits this response to two written ex parte presentations in WT Docket No. 05-194 that were submitted to the Commission by Verizon Wireless on May 1 and May 7, 2008, respectively. In the ex parte presentations, Verizon Wireless urges the Commission to declare that wireless carriers’ early termination fees (“ETFs”) are “rates charged” within the meaning of 47 U.S.C. § 332(c)(3)(A), and that therefore state regulation of such ETFs is expressly preempted. Verizon Wireless claims – without substantiation or citation – that the “extensive record in this proceeding provides ample factual and legal grounds” for such a determination. Nothing could be further from the truth.

As NASUCA made clear in its initial and reply comments previously filed in this proceeding, Verizon Wireless and other wireless carriers supporting preemption have yet to reconcile their claim that ETFs are “rates charged” with Congress’ expression of intent that such fees are within the broad scope of “other terms and conditions” of wireless service over which state authority was preserved. In fact, as far as NASUCA can discern, not a single wireless carrier – including Verizon Wireless – has bothered to discuss the legislative history of the 1993 amendments to 47 U.S.C. § 332(c)(3), let alone reconcile their assertions with that history. There is a simple reason for the wireless carriers’ silence: Because it is impossible to reconcile the notion that ETFs are “rates” with the legislative history of those amendments, the carriers simply ignore it.

In contrast to the wireless carriers, NASUCA did address the legislative history of the 1993 amendments and discussed why that history makes it clear that ETFs are within the scope of matters Congress considered “other terms and conditions” of wireless service. The relevant portion of the legislative history provides:

It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. *By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”*¹

The Commission need look no further than the wireless carriers’ own comments to see that ETFs fall within the range of matters that Congress intended to be considered “other terms and conditions” of wireless service. As NASUCA noted in its comments, CTIA conceded that ETFs, coupled with term contracts, were intended to subsidize the cost of handsets and other equipment provided in conjunction with wireless service.² In other words, ETFs are part and parcel of wireless carriers’ bundling of equipment with service. Verizon Wireless’ comments in this proceeding, and those of other wireless carriers, candidly and profusely confirmed this point.³ Indeed, T-Mobile, which participated in this proceeding, made this same concession to the United States Supreme Court in a petition for certiorari recently filed with the Court.⁴

Despite having conceded that ETFs are an integral part of wireless carriers’ bundling of services and equipment and therefore fall squarely within the “other terms and conditions” of wireless service Congress intended states to continue regulating, Verizon Wireless nonetheless

¹ H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H. Rpt. 111, at 4 (1993) (emphasis added).

² NASUCA Comments, p. 12.

³ *See* Verizon Wireless Comments at 15 (fixed-term plans depend on ETFs to allow carriers to offer a substantial subsidy to offset the price of new handset equipment); Cingular Comments at 6 (ETF-supported term rate plans allow carriers to recoup expenses associated with customer acquisition and reduced handset prices); Dobson Comments at 2 (fixed long-term arrangements coupled with ETFs allow the carrier’s handset subsidy to be amortized over a long term); Nextel Comments at 4-5 (in order to provide competitive offerings, Nextel bundled equipment and rate plans that included service agreements with an ETF); Sprint Comments at 2-3 (term plans, which include ETFs, allow customers to get free or heavily discounted phones and lower prices during the term); T-Mobile Comments at 5 (plans that include ETFs allow customers to be offered handsets or accessories at low or no cost and reduced rates for service).

⁴ *See T-Mobile USA v. Laster*, No. 07-976, Petition for certiorari, pp. 6-7 (filed Jan. 23, 2007) (“Wireless service and phones often are sold together in ‘bundled’ transactions, in which consumers receive a free or significantly discounted phone in exchange for agreeing to wireless service contracts for a term of one or two years.”); available at: http://www.scotusblog.com/wp/wp-content/uploads/2008/05/07-976_pet.pdf

continues to assert that there are “ample” legal grounds for concluding that ETFs are “rates.” While ignoring directly conflicting authority is a tempting strategy for partisan advocates like Verizon Wireless, it is not an option available to the Commission in resolving the pending petitions.

In addition, NASUCA notes that Verizon Wireless’ ex parte submissions ignore the Eleventh Circuit’s ruling in *National Ass’n of State Utility Consumer Advocates v. FCC*⁵ – a proceeding in which Verizon Wireless was an intervenor – that rejected the broad interpretation of “rates charged” that Verizon Wireless advocates here. The Eleventh Circuit rejected the Commission’s finding that state laws requiring or prohibiting wireless carriers’ line item charges regulated such carriers’ “rates” and thus were preempted by 47 U.S.C. § 332(c)(3)(A). Instead, the Eleventh Circuit construed “rates” following the narrower interpretation warranted by the term’s ordinary meaning and usage, consistent with the statutory context and legislative history of the 1993 amendments, and in accordance with the interpretation of “rates” previously applied by the Commission itself. Under this construction, which is binding authority upon both the Commission and wireless carriers,⁶ a “rate” represents “[t]he amount of a charge or payment . . . having relation to some other amount or basis of calculation,” “[a]n amount paid or charged for a good or service,” or “a charge per unit of a public-service commodity.” 457 F.3d at 1254, 1258. An ETF simply cannot be equated with a “rate” under this construction.⁷

Nor is Verizon Wireless’ assertion that the facts “ampl[y]” sustain the conclusion that ETFs are “rates” based on the record before the Commission in this proceeding. As NASUCA noted in its comments in this proceeding, the facts show that wireless carriers segregate ETFs from the rates for service that they charge, and typically disclose such fees in the “fine print” describing the other terms and conditions of service in their marketing materials.⁸

On one point, however, NASUCA and Verizon Wireless agree – at least somewhat. NASUCA and Verizon Wireless both agree that the Commission cannot adopt any rules associated with wireless carriers’ ETFs in the context of this proceeding but rather can do so only

⁵ *Nat’l Ass’n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006), *cert denied sub nom. Sprint Nextel v. Nat’l Ass’n of State Utility Consumer Advocates*, 128 S.Ct. 1119 (2008).

⁶ As noted above, the United States Supreme Court denied a petition for review of the Eleventh Circuit’s decision, filed by Sprint Nextel and T-Mobile U.S.A., on January 22, 2008. *See n. 5, supra*.

⁷ The Eleventh Circuit’s ruling is also consistent with numerous federal court decisions concluding that wireless ETFs are not “rates”. *See, e.g., Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004); *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S.D. Fla., Sept. 23, 2004); *Zobrist v. Verizon Wireless*, No. 02 Civ. 1000-DRH (S.D. Ill., Dec. 3, 2002); *Kinkel v Cingular Wireless, LLC*, Case No. 02-999-GPM (S.D. Ill., Nov. 8, 2002); *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000); *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F.Supp. 713 (S.D. Tex. 1996). State courts have reached a similar conclusion. *See, e.g., Pacific Bell Wireless, LLC v. California Pub. Util. Comm’n.*, 140 Cal. App. 4th 718 (Cal. Ct. App., 4th Dist.), *review denied*, 2006 Cal. LEXIS 12459 (Cal. 2006); *writ of cert. dismiss’d sub nom., AT&T Mobility v. California Pub. Util. Comm’n.*, 127 S.Ct 1931 (2007); *Hall v. Sprint Spectrum, L.P.*, Case No. 04L113 (Ill. Cir. Ct., Madison Co., Aug. 10, 2004).

⁸ NASUCA Comments, pp. 30-31.

after it initiates a proper rulemaking proceeding and provides public notice thereof.⁹ The Commission’s public notice issued at the outset of this proceeding makes it clear that this proceeding is limited to the issue of whether, under 47 U.S.C. § 332(c)(3)(A), ETFs are “rates charged by” wireless services and therefore not subject to state regulation or whether ETFs are “other terms and conditions of” wireless service over which Congress expressly preserved state regulatory authority.¹⁰ Standards or regulations governing wireless carriers’ ETFs and business practices relating to those fees would be legislative rules that may only be adopted by the Commission *after* providing adequate notice to the public of its proposed rules and a meaningful opportunity to comment on those rules, in accordance with the Administrative Procedure Act.¹¹

Finally, NASUCA challenges Verizon Wireless’ exhortation that the “Commission should also strongly encourage federal district courts and other tribunals and arbitrators faced with claims arising under Section 201” of the Communications Act, presumably involving ETFs, “to refer those claims to the FCC under the doctrine of primary jurisdiction.”¹² Verizon Wireless suggests that it is “routine for inquiries under Sections 201 and 202 to be referred to the Commission by federal courts for resolution” and that “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.”¹³ Verizon Wireless’ assertions badly misapprehend the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the “conventional experiences of judges” or “falling within the realm of administrative discretion” to an administrative agency with more specialized experience, expertise, and insight.¹⁴ Specifically, courts apply the doctrine of primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.¹⁵ While “no fixed formula has been established for determining whether an agency has primary jurisdiction,”¹⁶ courts generally consider the following four factors in determining whether referral to an agency is appropriate: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations

⁹ Verizon Wireless ex parte, pp. 3-5 (May 1, 2008).

¹⁰ See Public Notice DA 05-1389 (May 18, 2005).

¹¹ See, generally, 5 U.S.C. § 553.

¹² Verizon Wireless ex parte, p. 2 (May 1, 2008). Oddly enough, however, Verizon Wireless *does not cite the Commission to a single proceeding pending in federal court* that involves the issue presented in this proceeding. It is thus hard to discern to what federal court, if any, the Commission should address the encouragement of referral urged by Verizon Wireless. The state court and state arbitration proceedings cited by Verizon Wireless (*id.* at 2, n.2) involve claims arising under state law rather than Sections 201 or 202 of the Communications Act.

¹³ *Id.* at 2-3 (emphasis added).

¹⁴ *Far East Conference v. United States*, 342 U.S. 570, 574 (1952).

¹⁵ *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 851 (2d Cir. 1988).

¹⁶ *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 65 (1956).

within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.¹⁷ In addition, courts must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.¹⁸

Based on these principles, it is quite clear that the issue presented in the petition filed by CTIA, *i.e.*, whether ETFs are “rates charged” by CMRS carriers or are “other terms and conditions of CMRS” under 47 U.S.C. § 332(c)(3)(A), is not the sort of issue that warrants referral under the doctrine of primary jurisdiction. The question presented by CTIA’s petition is one of statutory interpretation – a purely legal question well within the conventional competence of the courts,¹⁹ or more succinctly, part of “the daily fare of federal judges.”²⁰ In fact, it would be inappropriate for a federal court to refer such an issue to the Commission on primary jurisdiction grounds.²¹

Nor do the other factors identified in primary jurisdiction analysis warrant referral. Matters of statutory interpretation, such as presented in this proceeding, are not the sorts of questions committed to agency discretion. Nor is the preference for uniformity particularly important.²² Further, given the fact that this Commission proceeding is already over three years old, referral of pending court or arbitration cases to the Commission would be contrary to the interests of justice, since litigants would likely to have to wait an indefinite period of time for the Commission to answer a question the courts are likely to answer much more speedily.²³

¹⁷ *Nader v. Allegheny Airlines Inc.*, 426 U.S. 290, 304 (1976); *Far East Conference*, 342 U.S. at 574; *Nat’l Communs. Ass’n v. AT&T*, 46 F.3d 220, 222 (2nd Cir. 1995); *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 223 (3d Cir. 1974); *Global NAPS N.C., Inc. v. BellSouth Telecommuns., Inc.*, 455 F.Supp.2d 447, 448-49 (E.D. N.C. 2006); *Lipton v. MCI Worldcom, Inc.*, 135 F.Supp.2d 182, 190 (D.D.C. 2001); *RCA Global Communications, Inc. v. Western Union Telegraph Co.*, 521 F. Supp. 998, 1006 (S.D.N.Y. 1981).

¹⁸ *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 321 (1973).

¹⁹ *Nat’l Communs. Ass’n*, 46 F.3d at 223; *FTC v. Feldman*, 532 F.2d 1092, 1096 (7th Cir. 1976). *See also Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Central Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999)..

²⁰ *Schiller v. Tower Semiconductor, Ltd.*, 449 F.3d 286, 296 (2nd Cir. 2006). The scope of preemption under 47 U.S.C. § 332(c)(3)(A) exemplifies such a question. *See Virginia Imports, Inc. v. Kirin Brewery of America, LLC*, 296 F.Supp.2d 691, 698 (E.D. Va. 2003).

²¹ *Board of Educ. v. Harris*, 622 F.2d 599, 607 (2nd Cir. 1979); *Bernhardt v. Pfizer, Inc.*, 2000 U.S. Dist. LEXIS 16963, *6-7 (S.D.N.Y. 2000).

²² *See Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922) (“[I]t is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the [agency] . . . a construction given by any court . . . may ultimately be reviewed by this court . . . and thereby uniformity in construction may be secured.”).

²³ *Nat’l Communs.*, 46 F.3d at 225, *citing* 2 K. Davis, *Administrative Law*, § 12.1 at 211 (3d Ed., 1994) (noting that “[a]gency decisionmaking often takes a long time” and that the delay “imposes enormous costs on individuals, society and the legal system.”).

Moreover, the Commission should recall, as NASUCA (and others) pointed out in comments, that most federal courts – with the exception of three decisions arising out of one district court in Illinois – have previously ruled that state laws regulating wireless carriers’ ETFs are not preempted under 47 U.S.C. § 332(c)(3)(A) – without resort to the doctrine of primary jurisdiction.²⁴ Finally, NASUCA submits that the primary jurisdiction doctrine works both ways: Just as courts employ the primary jurisdiction doctrine to “protect[] the administrative process from judicial interference,”²⁵ the Commission should take care not to invoke the doctrine to interfere with the judicial process, as Verizon Wireless urges here.

Please do not hesitate to contact me if you have any questions about the foregoing.

Very truly yours,

/s/

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²⁴ See NASUCA Comments, pp. 14-17; *cf. id.* at 23.

²⁵ *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000).