

**Alan R. Plutzik Presentation on Behalf of Wireless Consumers Alliance**  
**FCC Open Meeting on Early Termination Fees**  
**June 12, 2008**

I'm Alan Plutzik. I represent Wireless Consumers Alliance (WCA), an advocacy organization for consumers of wireless services that has been an active participant in this proceeding.<sup>1</sup> I am also co-counsel for plaintiffs in California class actions that challenge certain cellphone carriers' early termination fees ("ETFs"). In WCA's view, the Commission should deny CTIA's petition for a declaratory ruling preempting state laws or state regulation regarding ETFs.

**1. The Cellphone Industry's Preemption Proposal Presents an Issue of Concern to Tens of Millions of American Consumers**

CTIA's petition seeks broad, sweeping relief that would extinguish the legal rights of tens of millions of consumers nationwide. The undisputed evidence in the California class action against Sprint shows that approximately 2,000,000 Sprint customers paid or were charged ETFs between July, 1999 and March, 2007. Extrapolating from that figure, the number of cellphone customers of all carriers in the country as a whole who paid or were charged an ETF may be as high as *forty to fifty million people*. And that does not even include the millions of Americans who did not pay and were not charged an ETF but were forced to put up with bad service, overcharges or unfair treatment because they were unable or unwilling to incur an ETF.

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<sup>1</sup> Attached hereto as Appendix A is a list of the filings made by WCA in this proceeding.

Because the CTIA’s proposal would disenfranchise such a high percentage of the U.S. population, the Commission should use particular caution in considering the merits of the CTIA petition. There is a significant potential for a public outcry if the wrong decision is made. The Commission should not lightly interfere with the ability of the states to protect their own citizens.

## **2. Preemption Is a Legal Question, Not a Question of Regulatory Policy**

The cellphone industry argues that the Commission should preempt because wireless carriers shouldn’t be subjected to a “patchwork” of state laws regarding ETFs. But whether 47 U.S.C. Section 332(c)(3)(A) preempts state laws affecting ETFs is a *legal* issue, not a question of regulatory policy. The Court in *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11<sup>th</sup> Cir. 2006), so held in reversing a Commission order preempting state regulation of line items on customer bills. The court ruled that *the intent of Congress* is the touchstone of preemption analysis – and it found that Section 332 *did not* reflect a Congressional intent to impose a uniform national regulatory regime on cellphone companies.

The Supreme Court has held that preemption is “disfavor[ed].” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).<sup>2</sup> A federal statute will not

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<sup>2</sup> *Bates* at 449 (“we... have a duty to accept the reading [of the statute] that disfavors preemption.”) See *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”); *Rice v. Santa Fe Elevator Corp.*, 331

preempt state law unless its language clearly and unambiguously expresses Congress’s intention to preempt. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

Section 332 preempts *only* state regulation of “*rates charged*” for cellphone service. It expressly allows states to regulate “other terms and conditions” of service. The Commission cannot go beyond the clear language of the statute and try to preempt anything other than state regulation of rates.

### **3. ETFs Are Not “Rates Charged”**

In determining whether ETFs are “rates charged,” the Commission is not writing on a blank slate. The Courts have spoken. The Commission itself has spoken. The answer is clear: ETFs are not “rates charged.”

The *NASUCA* court held that a “rate” within the meaning of Section 332 is “[a]n amount paid or charged for a good or service,” or “a charge per unit of a public-service commodity.” *Id.*, 457 F.3d at 1254. ETFs don’t satisfy either definition. They aren’t charges for service at all. Rather, they’re charges imposed for the *termination* of service. ***Every Court before which this issue was actually litigated has held that ETFs are not “rates charged.”*** See citations attached to this presentation as Appendix B.<sup>3</sup> The industry’s

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U.S. 218, 231 (1947) (“the historic police powers of the States [a]re not to be superseded ... unless that was the clear and manifest purpose of Congress.”).

<sup>3</sup> Only two courts have ever held otherwise – and in both of those courts, the party opposing preemption *failed to show up and argue the point*. See Appendix B.

attempt to characterize ETFs as “part of their rate structure” rather than as “rates” doesn’t change a thing. As the *NASUCA* court cautioned:

The inclusion of the specific components of “rate levels” or “rate structures” within the general term “rates” does not magically expand the authority of the Commission beyond what the statutory language allows.”

The industry argues that ETFs are “rates charged” because they *affect* rates – in other words, that if ETFs were eliminated, reduced or modified, monthly rates would go up or handset discounts would shrink. The *NASUCA* court rejected that argument too, holding that Section 332(c)(3)(A) preempts only “rates charged,” not merely contract provisions that *affect* rates.<sup>4</sup> Indeed, the court correctly noted that *the Commission itself* had “disavowed” the argument that a regulation with some effect on prices is per se regulation under Section 332(c)(3)(A). *Id.*<sup>5</sup>

Moreover, the assertion that there is a direct link between ETFs, monthly rates and handset prices has been refuted by real-world events. Verizon pro-rated its ETFs. Other carriers announced that they would follow suit. The sky didn’t fall. Monthly rates and handset prices didn’t go up.

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<sup>4</sup> *NASUCA*, 457 F.3d at 1256 (“That the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of ‘rates’ and outside the ambit of state regulation of ‘other terms and conditions.’”). See *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (to equate state action that may increase the cost of doing business with rate regulation would forbid nearly all forms of state regulation, a result at odds with the “other terms and conditions” language of Section 332).

<sup>5</sup> See *In re Wireless Consumers Alliance*, 15 FCC Rcd 17021 (2000) (hereinafter cited as “*WCA*”), at Paragraph 24 (although state-court damage awards may *affect* “rates,” they *are not* rates and are not preempted by Section 332); *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. 19898 (1999) (the cellphone industry is not exempt from the neutral application of state contract or consumer fraud laws).

Evidence offered during the recent Sprint ETF trial showed that over an eight-year period ending in 2007, the ETFs that Sprint collected were less than 1/2 of 1% of the company's total wireless revenues – not nearly enough to have an effect on real-world monthly service or handset prices.

#### **4. Preemption Would Be Unfair and Harmful to Consumers**

The Commission not only lacks authority to preempt; it *should not* preempt even if it concludes it has the authority to do so because preemption would be unfair and harmful to consumers. Commission records show that ETFs elicit large numbers of consumer complaints, year after year. Verizon's CEO, Denny Strigl, admitted publicly in 2006 that ETFs were a "black eye" for the industry; that customers hated them, and that they were unfair. Now his company is claiming that ETFs are good for consumers. But Mr. Strigl was right the first time – ETFs cause real harm to real people:

- Linda Mackenzie of Fresno, California couldn't get adequate service. Sprint told her it would charge her *four* ETFs, for a total of \$600, if she quit, so she hung on to the end of her contract. But she needed cellphone service, so she subscribed to a second company's service and paid two monthly rates to two different companies at the same time until her Sprint contract ran out.

- Michael St. Amand of Los Alamitos, California, couldn't receive service at his home. He asked Verizon to fix the problem but Verizon wasn't able to do so. St. Amand couldn't remain on a service that he wasn't able to

use, and he refused to pay the ETF Verizon charged him when he terminated his service. Instead, he took Verizon to arbitration. The arbitrator ruled that the ETF should never have been imposed.

- Sprint secretly extended the contracts of Jeweldean Hull of Boise, Idaho, when she changed her phone number, and Jerry Deganos of Loma Linda, California when he changed his plan. When they terminated, they believed they had fulfilled their contracts. But Sprint charged them both ETFs.

- Verizon did the same thing to Rhonda Avery, a single mother from Bakersfield, California and a 12-year Verizon customer. She thought her contract was over. But unbeknownst to her, Verizon had secretly renewed it. Verizon now claims she owes it *five* ETFs, or \$875. The unpaid charges, which she can't afford to pay, have ruined her credit and prevented her from refinancing her house.

Stories like these are commonplace. An estimated 40 to 50 million cellphone consumers throughout the country have been charged an ETF. Fortunately, consumers have rights under state law – rights to seek relief for breach of contract, consumer fraud and unfair business practices, rights to defend themselves when a carrier makes an illegitimate claim that they owe an ETF. The carriers want this Commission to deprive consumers of those rights.

The cellphone carriers say they deserve special treatment because they do business nationally. But Wal-Mart, General Motors and hundreds of other companies are also national in scope. Customers of those companies can avail themselves of the contract, fraud and consumer protection laws of the states where they live. Why should cellphone customers be second-class citizens?

Meanwhile, even as they urge the Commission to preempt the rights of their subscribers to invoke state laws to *challenge* ETFs, the cellphone companies want to preserve *their own* right to sue their subscribers for ETFs under those very same laws. The defendants' own contracts so provide. In fact, Sprint, Nextel, Verizon and AT&T *have already filed* cross-claims for breach of contract in the California cases under which they are seeking relief against every single class member. *See* Sprint Cross-Claims, attached hereto as Appendix C. However, when the carriers sue, they don't want the subscribers to be able to assert contract *defenses* or counterclaims for consumer fraud, unconscionability or improper liquidated damages. Instead, they want this Commission to put its thumb on the scales of justice and make every subscriber who is charged an ETF pay, even if he or she was charged unfairly. Under CTIA's preemption proposal, the carriers would continue to have the right to seek relief against their subscribers in court or through arbitration but the subscribers would be prohibited from defending themselves. Where is the justice in that result?

Without the ability to seek relief under state laws, in state courts, consumers would have no avenue to vindicate their rights. The Commission isn't equipped to adjudicate the complaints of thousands or tens of thousands of individual consumers. It can't do so, and it has indicated that it doesn't want to do so. You heard from H.P. Schroer, who sought relief from this Commission, was turned away on the grounds that the Commission lacked authority to help him, and then filed a classwide arbitration against Verizon. After years of intensive litigation, the arbitrator has certified his case to go forward as a 49-state class. And now the same Commission that turned a deaf ear to Mr. Schroer is being pressed to step in and prevent him from pursuing his claims in the only forum that has agreed to hear them.

Moreover, CTIA wants the Commission to extinguish Mr. Schroer's claims, and the claims of the 40 to 50 million other subscribers who were charged or paid ETFs, *retroactively*. The claims of these subscribers amount, in the aggregate, to *billions* of dollars. But the industry is careful to say that if the Commission adopts any regulations limiting ETFs, *those* regulations *should not* be retroactive because that would be unfair to the carriers. *See* Verizon May 1, 2008 *ex parte* submission. That's inconsistent and grossly unfair.

**5. That Cellphone Companies Incur Upfront Costs or Provide Handset Discounts Doesn't Justify Preemption**

That cellphone companies incur upfront costs or provide handset discounts isn't a justification for treating ETFs as sacrosanct. As the

evidence at the California Sprint trial demonstrated, the lion's share of these supposed upfront costs are not handset subsidies but advertising expenses and commissions. True handset discounts, to the extent they exist, are dwarfed by the amount of the ETF.

In any event, *most* businesses incur upfront costs that they recover over time. Many incur advertising expenses, pay commissions or allow their customers to finance their purchases of equipment through upfront discounts, just as the cellphone companies do. But they don't claim that that immunizes them from liability under state consumer protection laws – laws like the prohibition against improper liquidated damages, which has been a longstanding part of the law of all fifty states and the Uniform Commercial Code. The duty of complying with these laws falls no more harshly on cellphone carriers than on other businesses.<sup>6</sup> Indeed, there is no “patchwork” of conflicting laws when it comes to laws limiting liquidated damages – the laws of all 50 states are substantially similar to each other and to the UCC provision.

Furthermore, there is no link between ETFs and the recoupment of upfront costs or handset discounts. In the California, Sprint was unable to offer even a single document that purported to show any connection between ETFs and the recovery of *any* costs. To the contrary, internal Sprint and Nextel documents and testimony introduced at the trial showed that those

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<sup>6</sup> *See, WCA*, at Paragraph 33 (the award of damages for breach of contract or consumer fraud is simply a cost of doing business).

companies' ETFs *were not* adopted to recover costs. Rather, they proved that both companies regarded ETFs as "penalties" intended to coerce customers not to switch carriers. *See* Trial Exh. 543 at p. 06390 (Nextel Vice-President of Pricing Scott Wiener, who later served in the same capacity for Sprint, and who was responsible for implementing ETFs at both companies, refers to ETFs as penalties, stating, "The govt will never, never accept such penalty amounts...."); Trial Exhibit 294 at p. SPR 0509 (internal Sprint document characterizing Sprint's ETF as a "penalty."<sup>7</sup>

Indeed, proof positive that Sprint's ETFs were not intended to defray *any* costs is found in the fact that Sprint never expected to collect or otherwise enforce the ETFs. Thus, in the internal document from December, 1999, in which it posed the question of whether ETFs would be beneficial for the Company, Sprint assumed a *zero* collection rate. Trial Exhibit 306 at p. SPRINT 0584 ("The previous analysis assumed that the contract termination fees would not be collected.") Moreover, for the first several years, Sprint's collection rate for ETFs was a *single-digit* percentage. Trial Exhibit 302 at p. SPR 0777 (during the last half of 2002, Sprint wrote off or waived 92% of its ETFs; Trial Exhibit 301 (collection rate of 7%). Indeed, collections were so low as to lead Sprint's internal auditors to fear that the costs of administering the ETF might exceed the revenues generated by it. Trial

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<sup>7</sup> Copies of exhibits from the Sprint trial are attached hereto as Appendix D, in exhibit number order.

Exhibit 301 at p. SPRINT0212. Clearly, this was not a charge that was designed to recover costs, upfront or otherwise.

**6. The Courts in the Existing Class Actions Are Not Being Asked to Engage in Ratemaking**

The carriers argue that the Commission must preempt the existing class action lawsuits because the courts, in the guise of ruling on the “reasonableness” of ETFs, are being asked to engage in ratemaking. However, that argument is outrageously deceptive. The cellphone industry has improperly conflated the legal requirements for liquidated damages under state contract laws with judicial “ratemaking.”

California law requires the party imposing a liquidated damages clause in a consumer contract – in this case, the carrier – to conduct a reasonable endeavor to estimate the actual damages it would suffer upon breach, and limits the liquidated damages amount to the amount so determined. It also forbids the imposition of liquidated damages at all unless actual damages are extremely difficult or impracticable to determine. *See, e.g., Beasley v. Superior Court*, 235 Cal.App.3d 1383 (1991). The Courts in the pending class actions are being asked to determine whether the carriers’ ETFs meet the statutory standards. There is no ratemaking going on in those courts – not least because ETFs are not “rates.” Rather, the courts are merely enforcing neutral longstanding state consumer protection statutes. That is precisely the role that Congress, in Section 332, permitted and

intended them to perform – and a role that the Commission, in *Wireless Consumers Alliance*, endorsed and approved.<sup>8</sup>

## 7. Conclusion

Statutory and decisional law prohibits the Commission from giving the cellphone carriers a “get out of court” card for early termination fees. Congress has spoken in the statute. It said that only state laws or regulations that challenge the “rates charged” by cellphone companies are preempted, and it expressly provided that state courts and regulatory bodies are free to adjudicate matters regarding “other terms and conditions” of service. The courts have spoken about what the statute means. They have held, in every case in which the issue was contested, that ETFs are “terms and conditions,” not “rates.” Accordingly, the Commission lacks the authority to preempt. Moreover, preemption would retroactively wipe out billions of dollars of claims by tens of millions of consumers, and would unfairly deprive consumers of access to the courts in the future, while giving no assurance that the Commission would or could provide comparable relief. The Commission should deny CTIA’s petition for declaratory relief.

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<sup>8</sup> See *WCA* at Paragraphs 36, 38 (the award of monetary damages based on a State contract or tort action is not necessarily equivalent to rate regulation and does not require the court to prescribe, set or fix rates).

**Appendix A****Filings of Wireless Consumers Alliance in FCC Docket 05-194  
CTIA Petition, Cellular Early Termination Fees (“ETFs”)**

8/5/05 – Original Comments

8/25/05 – Reply Comments

9/23/05 – Letter – Giving to to the FCC United States International Trade Commission (USITC) data showing the average wholesale price for handsets.

1/11/06 – Letter – Discussing *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 at \*14-\*15 (8th Cir. December 9, 2005).

3/1/06 – Letter – Attaching for the Commission the ‘Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers’ Early Termination Fees’, a CA statute - Cal Civ Code § 1671, and a MN statute - Minn. Stat. § 325F.695.

3/20/06 – Letter – Redacting confidential information in the Protective Order

4/18/06 – Reply Comments – to “White Paper” of Verizon Wireless

5/11/06 – Declaration of Lee L. Selwyn – in regard to Reply Comments

5/31/06 – Appended redaction of Declaration of Lee L. Selwyn

7/7/06 – Letter – Attaching ‘Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers’ Early Termination Fees’ and appendix of cases including *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California*, Case No. G034991 (Cal. Ct. App., 4th Dist., June 20, 2006).

4/5/07 – Letter – Attaching ‘Wireless Consumers Alliance Presentation Re Early Termination Fees’.

### Appendix B – List of Relevant Cases

#### Cases Rejecting the Proposition that Claims Affecting ETFs are Preempted

*Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 at \*36 (S.D. Iowa 2004);

*Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004), attached to WCA's Initial Comments, filed 8/5/05, as Exhibit A;

*Gatton v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 25922 (C.D. Cal. April 18, 2003);

*Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002), Exhibit G to CTIA's initial Petition;

*State of Iowa v. United States Cellular Corporation* 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000);

*Cedar Rapids Cellular Telephone LP 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);

*Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, 2004 Cal. PUC LEXIS 577 (December 16, 2004);

*Pacific Bell Wireless, LLC v. Public Utilities Commission* (2006) 140 Cal.App.4<sup>th</sup> 718.

#### Cases Rejecting § 332 Preemption in Analogous Circumstances

*Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000) (case challenging wireless company's late fees not preempted under § 332);

*Mountain Solutions v. State Corporation Commission of Kansas*, 966 F. Supp. 1043 (D. Kan. 1997) (holding state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by § 332);

*Dakota Systems, Inc. v. Viken*, 694 N.W.2d 23, 40, 2005 S.D. LEXIS 28 (So. Dakota Supr. Ct. Feb. 23, 2005) (state licensing and tax statutes not preempted by § 332);

*Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7<sup>th</sup> Cir. 2004) (suit alleging improper billing not preempted by § 332).

Relevant Commission Authorities Rejecting Preemption

*In re Wireless Consumers Alliance* (2000) 15 FCC Rcd 17021;

*In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19901, ¶ 7 (1999);

*Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1737, 1745 ¶ 20 (1997).

Cases Finding Preemption Where the Party that Would Have Opposed Preemption Did Not Argue the Issue

*Redfern v AT&T Wireless*, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. 2003);

*Chandler v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill., July 21, 2004);

*Consumer Justice Foundation v. Pacific Bell Tel. Co.*, No. BC 214554 (Cal. Super. Ct. July 29, 2002) (Unpublished California trial court decision – not citable under California law. *Santa Ana Hospital v. Superior Court*, 56 Cal.App.4th 819, 831 (1997)).