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June 13, 2008

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

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

Dear Ms. Dortch:

In the course of the Commission's public hearing yesterday on early termination fees ("ETFs"), the witness for the Cellular Telecommunications Industry Association ("CTIA") reported that the jury in a California case had found in favor of defendant Sprint and against the plaintiff class on the question of the relative damages suffered by defendant and plaintiffs as a consequence of early terminations by Sprint customers and the ETFs assessed by Sprint on those customers.

The witness appearing on behalf of the Wireless Consumers Alliance ("WCA"), Alan Plutzik, co-counsel in the California case, immediately cautioned that the issue of who won and who lost could not be resolved without a look at the sheet by which the jury answered the questions posed to it. We are attaching that jury sheet, together with an e-mail from Mr. Plutzik analyzing the jury's findings.

Early news reports of the jury's verdict have focused on the approximately \$74 million that the plaintiff class actually paid to Sprint in ETFs, compared with the nearly \$226 million in damages that Sprint suffered from the loss of revenues from the terminating customers. As Mr. Plutzik explains, that is not a correct comparison. Because the total amount of the ETFs paid or charged was nearly \$300 million, the plaintiff class actually was overcharged by about \$74 million. The \$300 million paid to or charged by Sprint was not disputed. Finally, Mr. Plutzik notes that Sprint

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had asked the jury to find that its damages were some \$1.2 billion, more than five times greater than the jury actually found.

Please direct any questions to the undersigned.

Sincerely,



James R. Hobson
Counsel to WCA

cc: Aaron Goldberger, Bruce Gottlieb, Renee Crittendon, Wayne Leighton, Angela Giancarlo, Nicole McGinnis, Brent Greenfield

Attachment

From: Alan Plutzik
> Sent: Friday, June 13, 2008 10:09 AM
> To: 'jhobson@millervaneaton.com'
> Cc: 'jacquim@lerachlaw.com'; 'scott@bursor.com'; L. Timothy Fisher; 'jdfranklaw@san.rr.com'; 'jeffreyl@lerachlaw.com'; 'aelishb@lerachlaw.com'
> Subject: The Sprint Class Action Verdict
>
> Jim:
>
> As you know, the jury returned its verdict in the California Sprint class action yesterday. Mr. Guttman-McCabe, CTIA's lawyer, reported to the Commission during yesterday's hearing that "the jury found that Sprint's damages were \$100 million greater than plaintiffs' damages," and represented that result as a win for Sprint. Moreover, Sprint spokesmen have been claiming victory, and unfortunately certain media outlets have uncritically accepted Sprint's characterization of the result and published pieces representing the result as a win for Sprint. But Sprint is mischaracterizing the jury verdict. It is a win for the class and a loss for Sprint. Let me explain why:
>
> In the Sprint class action, certain issues will be decided by the judge and certain other issues by the jury. The jury will rule first on the issues that it has been asked to decide, then the judge will take the jury's rulings into account deciding the issues that she will decide.
>
> The jury was asked to decide three questions. Questions 1 and 3 are the ones that matter in determining who won.
>
> Question 1 was: "What is the total dollar amount of early termination fees that plaintiffs and the class paid to Sprint?" The jury answered: "\$73,775,975."
>
> Question 3 was: "State the total dollar amount of Sprint's actual damages, if any, caused by early terminations of plaintiffs' and the class members' contracts." The jury concluded that the amount of Sprint's classwide damages was "225,697,433."
>

> The judge will take the jury's findings into consideration when she decides whether the ETF clause violated California law. If she finds that it does, she will offset the harm suffered by the class against Sprint's actual damages to determine which side is entitled a net judgment.

>

> Sprint's claim of victory is based on the observation that \$225,697,433 million is a higher number than \$73,775,975. That's true. But it is an apples to oranges comparison. Here's why:

>

> The class consists not only of Sprint subscribers who paid an ETF but also of subscribers who were charged an ETF but didn't pay one. \$73,775,975 is only the amount of early termination fees paid by the class members to Sprint; but there was an additional amount charged that was not paid. The total amount of ETFs charged, whether paid or unpaid, was \$299,473,408. The jury was not asked to compute the total amount charged because the jury's province was damages and the portion of the class that didn't pay was only seeking injunctive and declaratory relief, which can only be granted by the judge. That is why \$299,473,408 does not appear on the verdict form. However, the evidence presented at the trial as to the amount charged to class members was and is undisputed, and there is no doubt that the judge is going to use the \$299,473,408 number in her calculations.

>

> To prove that its ETFs were valid liquidated damages amounts rather than unlawful penalties, Sprint had to show (among other things) that the actual damages it suffered from the class members' early terminations were equal to or greater than the amount of ETFs it charged to class members, not the amount of those charges that the class members actually > paid. In other words, Sprint had to show that its actual damages were greater than \$299,473,408. It fell short of doing that by nearly \$74 million.

>

> To put this in plain English, we proved that the class was charged an ETF that did not bear a reasonable relationship with the actual losses that Sprint suffered when people terminated early. We proved, in other words, that the charge is unreasonably high -- approximately one-third too high. Due to the division of responsibility between the judge and the jury, the jury wasn't asked to make the ultimate determination

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regarding the reasonableness of the charge. The judge will make it. But in essence, that determination has already been made by the jury's findings -- the ETF was too high.

>

> Just one other fact to put this in perspective: The damages Sprint asked the jury to award it were over 1.2 billion. The jury awarded Sprint less than 1/5 of the damages it sought.

>

> Obviously, the questions the judge put to the jury were designed to address the specific legal and procedural requirements of the case. When we were designing the verdict form, nobody thought about whether the verdict would be comprehensible to the press or the public without further explanation when the verdict was rendered. Maybe we should have. But anyway, this is the straight scoop about what the verdict means. Feel free to share this e-mail with anyone you think would want to know the true facts.

>

> I note that Chairman Martin, in comments reported in the press yesterday, said that Sprint's win makes it particularly important for the Commission to take action on ETFs quickly. The article didn't say whether the action the Chairman would ask the Commission to take would include an order preempting state laws regarding ETFs. But in any event, it would be truly unfortunate if the Commission were to take action of any sort based on the mistaken belief that the California jury verdict, which was actually favorable to consumers, was a win for Sprint.

>

> Please let me know if you have any questions. If need be, I can provide evidence, court orders and citations to the record for all of the facts stated herein.

>

> Regards,

>

> Alan

>

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1 VERDICT FORM

2 We answer the questions submitted to us as follows:
3

4 1. What is the total dollar amount of early termination fees that
5 plaintiffs and the class members paid to Sprint?

6 \$ 73,775,975
7

8 2. Did plaintiffs and the class members breach their contracts with
9 Sprint?

10 Yes No
11

12 3. State the total dollar amount of Sprint's actual damages, if any,
13 caused by early terminations of plaintiffs' and the class members' contracts:

14 \$ 225,697,433
15

16
17 Signed: *Dennis H. [Signature]*
18

19 Presiding Juror

20 Dated: *June 12, 2008*
21

22 After it has been signed, deliver this verdict form to the Court Attendant.
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