Testimony of

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Before the
Federal Communications Commission

on

Cell Phone Early Termination Fees

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Submitted by:
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Good morning Chairman Martin and Commissioners Tate, McDowell, Adelstein and Copps. I am Pamela Gilbert and I am a partner in the law firm of Cuneo Gilbert & LaDuca. My firm serves as Washington counsel in the Cellphone Termination Fee Cases that are pending in Superior Court in Alameda County, California. I have been a consumer advocate for almost 25 years – I came to Washington, DC directly out of law school and spent ten years as an advocate for national consumer organizations. From 1995 – 2001, I served as executive director of the Consumer Product Safety Commission, and my practice now consists entirely of consumer protection issues.

Thank you for giving me the opportunity to testify on an issue that is very important to consumers across the country – the early termination fees (ETFs) cell phone customers are forced to pay whenever they leave their cell phone service while the contract is still in place. Early termination fees force consumers to choose between staying with a carrier that doesn't meet their needs because of poor service, high fees, or other problems, or paying a fee of about $175 just to switch to a better product. Early termination fees operate as illegal penalties that are unfair and anti-competitive because they are intended to prevent consumers from switching to another carrier.

In 2005, the U.S. Public Interest Research Group (U.S. PIRG) conducted a nationwide survey of U.S. households regarding cell phone service and early termination fees. U.S. PIRG found:

- Nearly 9 out of 10 consumers (89%) agreed that the early termination fee is "a penalty to discourage switching cell phone companies;"
- Nearly half, or 47%, of cell phone customers would "switch cell phone companies as soon as possible," or "consider switching cell phone companies" if early termination fees were eliminated;" and
- Customers who are dissatisfied with cell phone service and want to choose a better service provider are saddled with two highly unsatisfactory options: either pay an expensive penalty or continue enduring poor quality service.

In response to their dissatisfaction with fees that locked them into cell phone service they didn't want, consumers banded together across the country to challenge the fees. By 2005, when CTIA petitioned the FCC to declare that early termination fees are rates charged by cell phone companies in order to preempt the state court actions, the companies themselves cited at least 8 cases and 1 arbitration pending against the major cell phone carriers in the U.S. In general, these cases claim that ETFs are not designed to compensate the cell phone companies for any damages arising from termination, but rather they are designed to lock customers into staying with their current service, whether they want to or not. As such, the cases claim that under state contract law, ETFs operate as illegal penalties for switching to a competing cell phone carrier.

Three years later, these cases have progressed through the court and arbitration systems to a point very close to resolution. In fact, as I write this testimony, the jury is deliberating in the California case against Sprint. The case against Verizon is scheduled to begin in the same court this Monday, June 16th. An arbitration representing cell phone consumers in the other 49 states challenging Verizon's ETFs has been certified for class-wide treatment. Similar cases are pending in Florida, Illinois, Washington State and New Jersey.

Imagine how shocked dissatisfied cell phone subscribers across the country would be to learn that a federal agency sitting hundreds or thousands of miles away in Washington, D.C. is considering whether to grant the special pleadings of the cell phone companies and immunize them from judgments in cases that have been pending in state courts for five years or more and are on the verge of resolution.

It has been argued that action by the FCC to preempt these lawsuits with federal regulation of ETFs will be better for consumers across the board. With all due respect, providing more special legal protections to the cell phone industry will not further consumer protection. The cell phone industry began this proceeding for one reason only – to obtain retroactive immunity for their unlawful ETF practices. Now, after litigating for half a decade, cell phone consumers may be told they cannot recover damages even if the fees they paid are found to be illegal under state laws, all in the name of consumer protection. I don't think they are going to buy it.

The cell phone industry claims it is a national industry that should not be subject to a "patchwork of state laws." But the state lawsuits challenging ETFs are based on provisions in the Uniform Commercial Code and the common law that exist in every state. These laws provide that parties to a contract may not be charged a penalty for breaching the contract. Valid contracts may only provide for compensation for losses sustained in the event of a breach. Contract provisions that are intended to prevent a party from leaving a contract by charging a penalty for the breach are illegal in every state. The ETF cases do not single the cell phone companies out for special treatment – all that consumers are demanding is that cell phone companies play by the same rules everyone else must follow.

In fact, cell phone companies already enjoy special protections that other industries don't have – for example, the industry is immune from state rate regulation and from the Federal Trade Commission's rules governing fraud and unfair trade practices. The FCC must not now take away the only protection left from unfair cell phone business practices – state consumer protection and contract law.

It also would not serve consumers to centralize the oversight of early termination fees in the FCC. The FCC is already underfunded and overburdened. If we are concerned about cell phone customers, as opposed to cell phone *companies*, it doesn't make sense to take away the ability of state courts, legislatures and regulators to oversee ETFs. Consumers are best served when they can turn for protection to government bodies that are close to home and tied to their local community. It is highly inefficient and ineffective to take away the ability of local officials to protect the citizens of their states from unfair practices.

Congress has already considered this issue, and in its wisdom, it placed responsibility for terms and conditions of cell phone service under both federal *and* state jurisdiction. This scheme can only be undone if the FCC accepts the tortured, results-oriented proposal by the cell phone industry to declare that ETFs are actually rates charged for cell phone service. I am not an expert in the precedents governing this question, but I know it doesn't meet the common sense test to say that a fee that is charged after service is terminated is a rate charged for that service. The argument is further undermined when we consider that the ETFs at issue in the state cases were not pro-rated over the course of the contract, and they could be assessed many years after the first contract was signed, because of the practice of extending contracts every time a consumer changed his or her service. It defies credulity to think that this inflexible, flat fee could be rationally tied to any cost of cell phone service that is part of the rate for that service.

Cell phone companies also claim that, if ETFs are eliminated, the cost of cell phone service would increase. In fact, if ETFs are eliminated, competition in the cell phone industry would increase because consumers would be free to switch carriers without paying a penalty. Increased competition should bring lower prices and higher quality. In a submission on behalf of the U.S. PIRG to the FCC in this proceeding, Ph.D. economist Allen Rosenfeld concluded that, "Intensified competition for consumers among carriers, in the event that ETFs were eliminated, would result in a 'freer' cell-phone-service market characterized by increased competition, greater economic efficiency, enhanced consumer economic well-being, more consumer flexibility, and improved consumer decision-making due to better access to information."

The best way to serve cell phone customers is to allow the marketplace to work. For every unregulated industry in America, the marketplace includes the body of state contract law and consumer protection law that govern commercial transactions in the fifty states. To now exempt cell phone companies from the laws everyone else has to follow would be the ultimate sweetheart deal for the industry.

In conclusion, I urge the Commission to view this proceeding from the standpoint of what is best for cell phone consumers, not for the industry that is seeking yet another special favor. Looked at through the prism of consumer protection, I believe that only one answer is possible. The FCC should not provide retroactive immunity from state law requirements for the cell phone industry. In addition, the FCC should not take any action that would remove the authority of states to protect cell phone consumers from unfair or illegal ETF practices.

Thank you for the opportunity to testify today. I look forward to answering your questions.