



N A R U C
National Association of Regulatory Utility Commissioners

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

VIA ECFS

December 3, 2009

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
Opposition to CTIA Request to Terminate Proceeding/Motion to Withdraw.***

Dear Ms. Dortch:

The National Association of Regulatory Utility Commissioners submits this written ex parte to the Commission generally supporting the June 26, 2009 joint opposition to CTIA's withdrawal notice filed by the National Association of State Consumer Advocates, the National Consumer Law Center, the U.S. Public Interest Research Group and Consumers Union.

The June 26th joint response correctly took exception to CTIA's assertion, in its abbreviated June 12, 2009 withdrawal notice,¹ that terminating the above-docketed proceeding was "fully consonant with the evolution of the competitive wireless marketplace during the more than four (4) years since the filing of the Petition for Expedited Declaratory Ruling and serves the principle of conserving the agency's administrative resources."² NARUC's June 12, 2008 testimony specifies that it is past time for "some FCC examination of these issues."³

¹ See, *Letter from CTIA's Christopher Guttman-McCabe to Marlene H. Dortch, FCC Secretary* (filed in WT Docket 05-194 on June 12, 2009), available online at: <http://fjallfoss.fcc.gov/ecfs2/document/view?id=6520220831>.

² See *Joint Response in Opposition to CTIA Withdrawal Notice*, p. 5 (filed in WT Docket 05-194 on June 26, 2009), available online at: <http://fjallfoss.fcc.gov/ecfs2/document/view?id=6520223351>.

³ See, "Summary Remarks of Indiana Utility Regulatory Commissioner Larry S. Landis" Before the Federal Communications Commission June 12, 2008 Hearing on Early Termination Fees, (filed June 13, 2009 in WT Docket No. 05-194) at 1, available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520027836>.

Among other things, the joint response noted that the “uncertainty” or “controversy” regarding wireless carriers’ imposition of early termination fees (“ETFs”), and state efforts to rein in those ETFs, has not been resolved in the years since CTIA filed its petition for declaratory ruling.⁴ Recent events have demonstrated just how correct that assertion remains.

Verizon Wireless recently announced that it was doubling its current ETF for “smartphones,” from \$175 to \$350, effective November 15, 2009.⁵ This move drew fire from a variety of consumer advocates, including U.S. Senator Amy Klobuchar. Senator Klobuchar had previously appeared before the FCC at its June 12, 2008 *en banc* hearing specifically to express concerns regarding wireless ETFs.⁶ A November 25, 2009 NASUCA *ex parte* contends that Verizon Wireless’ action is almost certain to provoke the sort of consumer complaints that generated both numerous class action lawsuits and review by state legislatures, regulators and attorneys general, as well the CTIA petition to preempt all those enforcement efforts that it is now attempting to withdraw.⁷ The November 25th NASUCA letter also points out that Verizon’s increase is “certainly evidence that the “controversy” or “uncertainty” cited by CTIA in its original 2005 petition for a declaratory ruling remains as vital today as it was nearly five years ago and that the Commission’s – and states’ – need to investigate such contract penalty clauses to fully understand their effects on consumer behavior and their alleged validity remains critically important.”

⁴ Id. at 7-9.

⁵ See, e.g., Paczkowski, John "Is Verizon's New Early-Termination Fee Anti-Consumer?" CNET News (Nov. 7, 2009), available online at: http://news.cnet.com/8301-1035_3-10392897-94.html; Cheung, Jacqui “Verizon's \$350 Early Termination Fee Rubs Senator Wrong Way,” ARS Technica (Nov. 10, 2009), available online at <http://arstechnica.com/telecom/news/2009/11/verizons-350-early-termination-fee-rubs-senator-wrongway>. Cauley, Leslie “Verizon Wireless Doubles Early Termination Fee”, USA Today (Nov. 4, 2009) available online at: <http://blogs.usatoday.com/technologylive/2009/11/verizon-wireless-doubles-early-termination-fee.html>; Albanesuis, Chloe “Verizon Ups Early Termination Fee to \$350” PC Magazine (November 5, 2009) available online at: <http://www.pcmag.com/article2/0,2817,2355493,00.asp>.

⁶ See, Klobuchar, Amy, Senator “Klobuchar: Wireless Carriers Early Termination Fees are Anti-Competitive and Anti-Consumer—Criticizes Verizon Wireless plan to double Early Termination Fees for new Smart Phone Customers,” (Nov. 9, 2009), available at http://klobuchar.senate.gov/newsreleases_detail.cfm?id=319787&.

⁷ See, Letter from Deputy Consumer Advocate of the West Virginia Public Service Commission Patrick W. Pearlman and Executive Director of the National Association of State Utility Consumer Advocates Charles Acquard to Marlene H. Dortch, Secretary, Federal Communications Commission (NASUCA letter), filed Nov. 25, 2009, in the proceeding captioned *In the Matter of Petition for Declaratory Ruling filed by CTIA*, WT Docket No. 05-194 , available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020350164>. Note also, just yesterday, a *Consumer Reports* survey of over 50,000 readers found that “only 54 percent of respondents were completely or very satisfied with their cell-phone service” and that “almost two thirds of respondents had at least one major complaint.” According to the release “cell service continues to be among the lower-rated of all the services that *Consumer Reports* evaluates.” See, *Consumer Reports Survey Found Cell-Phone Service Providers Among Lower-Rated Services, Only About Half of Survey Respondents Were Completely or Very Satisfied With Their Service; Verizon Top Provider Overall* PR Newswire [December 1, 2009 Consumer Reports Press Release], available online at: <http://www.prnewswire.com/news-releases/consumer-reports-survey-found-cell-phone-service-providers-among-lower-rated-services-78272857.html>.

It is long past time for the FCC to take a closer look at ETFs generally. In July of 2007, both NARUC and NASUCA passed resolutions suggesting one focus for such an inquiry. Significantly, both specify that the imbedded request for the FCC to act – should not “. . . in any way, be construed as endorsing the proposition asserted by wireless carriers that the FCC has exclusive jurisdiction over wireless carriers’ ETFs under 47 U.S.C. §332(c)(3)(A).”⁸

The most frequently proffered justification for ETFs is that carriers need them to recover the cost of incentive offers that bundle subsidized cellular customer premises equipment (CPE) with cell phone services. The FCC’s elimination of the prohibition of cellular CPE-service bundling was specifically based on the market structure and conditions extant in 1992.⁹

By any measure, the structure and conditions of the CPE and Cellular Service Market have changed radically since 1992. Indeed, it is beyond question that the industry has experienced very significant consolidation since 1992.¹⁰

⁸ Indeed, as NARUC witness Landis pointed out in his June 12, 2008 testimony at the FCC *en banc* on ETFs referenced in footnote 3, *supra*: “NARUC generally agrees with Chairman Martin: ***ETFs are not rates.*** [.] If the FCC made such a finding, industry attorneys will argue that the FCC is the only possible venue for customers with complaints to seek resolution. From a policy perspective, basing any FCC ETF rule on a legal finding that ETFs are Section 332 “rates” makes no sense. There is no logical reason to take State cops off the beat – whether they are State Attorneys General or NARUC member commissions. There is simply no possible justification to limit the number of cops that can enforce any federal standard.[.]” {emphasis added and internal references omitted}

⁹ In 1992, noting that “significant changes had occurred in the industry,” the FCC eliminated the prohibition that prevented carriers from bundling cellular customer premises equipment and cellular service. When the Commission first prohibited such bundling, the industry was in its infancy and, the agency determined, there was no way to predict how the industry would evolve. Because “significant changes . . . occurred in the industry”, the FCC, in March 1991, sought comment on whether it should allow cellular CPE and cellular service to be offered on a bundled basis. The FCC analyzed the record and found that while the 1992 CPE market was competitive, the 1992 cellular service market was not fully competitive leaving open the theoretical possibility that bundling could be used for anticompetitive purposes. Nevertheless, the FCC did not believe the potential for carriers to engage in anticompetitive conduct provided a basis to prohibit bundling *per se*. Despite reservations about the state of competition in cellular service, the FCC found the record supported a conclusion that eliminating the antibundling policy would not adversely impact the CPE market because of overall structural conditions. The FCC pointed out that it is unlikely that individual cellular companies possess market power that could impact the numerous CPE manufacturers. While the FCC recognized the customer benefits of CPE discounting as a part of the sale of cellular service, the Commission stated that it intends to monitor the bundling of cellular service and CPE. The Commission also stated that if parties can demonstrate that carriers' incentive offerings can result in unlawful discrimination, the Commission will be open to further action. Significantly, the commission specified its decision was “. . .based on the unique conditions in the cellular market today and on the public interest benefits associated with bundling in that market.” *See, In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, FCC 92-207, 7 FCC Rcd 4028, adopted May 14, 1992, released June 10, 1992.

¹⁰ *See* Katx, Raul L., Weise, Maximilian E., Yang, Daniel H., “*Business Consolidation: The Wireless Way*” Strategy & Business (Fourth Quarter, 2002) available at (Noting presciently – in 2002 – that while “. . . [t]he U.S. wireless industry is barely catching its breath from a sweeping round of consolidation over the last five years . . . it’s likely to launch into another one . [.]Industry landscape has been reshaped by multibillion-dollar acquisitions and ambitious partnerships that produced powerhouses Verizon Wireless Inc. . . .Cingular Wireless. . . and T-Mobile USA Inc.”) *See also*, Edmund Mierzwinski, “*Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers*,” U.S. PIRG Education Fund, p.1 (Aug. 2005) which notes: “In mid-2004, six companies – AT&T, Nextel, Sprint, Cingular, Verizon and T-Mobile- controlled approximately 80% of the market. Since then, four of the six – Cingular and AT&T, and Sprint and Nextel – have merged. Now just four firms will control 80% of the market.” The Mierzwinski article is specifically cited in the July 2007 NARUC resolution.

As part of its inquiry in this proceeding, the FCC should reexamine the economic and policy assumptions underlying its 1992 decision to determine if use of ETFs remains a needed and “efficient promotional device” that benefits both consumers and wireless carriers and also fully investigate the equipment and customer acquisition costs cited as justification for ETFs to determine if such costs are being reasonably and appropriately recovered.

For the forgoing reasons, NARUC reiterates its opposition to the withdrawal petition filed by CTIA and respectfully requests, as part of its examination of ETFs, that the FCC investigate the justifications and use of ETFs and bundling as outlined, supra. A copy of NARUC’s resolution is appended to this letter. Do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org if you have any questions about this pleading.

Respectfully Submitted,

/s/

James Bradford Ramsay

General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, N.W. Suite 200
Washington, D.C. 20005

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Commissioner Robert M. McDowell
Colin Crowell, Senior Counselor to Chairman Genachowski
Bruce Liang Gottlieb, Chief Counsel to Chairman Genachowski
Priya Aiyar, Legal Advisor to Chairman Genachowski
Jennifer Schneider, Legal Advisor to Commissioner Copps
Christine D. Kurth, Policy Director and Counsel to Commissioner McDowell
Carol Simpson, Acting Legal Advisor to Commissioner Clyburn
Christi Shewman, Legal Advisor to Commissioner Attwell Baker

Resolution Calling on the FCC to Reexamine Wireless Carriers' Early Termination Fees

WHEREAS, Many wireless customers sign service contracts with wireless carriers that include early termination fees (ETFs) and obligate customers for one or more years; *and*

WHEREAS, Some contracts are extended by carriers due to customer initiated changes; *and*

WHEREAS, In addition to these ETFs, many independent vendors of wireless equipment and services may impose additional ETFs that vary in amount, depending on the vendor; *and*

WHEREAS, From 2002-2004 the U.S. Public Research Interest Group estimated that ETFs cost consumers \$4.6 billion in penalties for canceling their contracts or lost opportunities to obtain lower-cost services, thus limiting consumers' choices among carriers and services; *and*

WHEREAS, Wireless carriers continue to assert that (1) ETFs are necessary in order to reduce, or subsidize, customers' costs of wireless products (i.e., handsets) and services (rate plans) and to ensure that carriers fully recover customer-acquisition costs; and (2) ETFs may help lower transaction costs by isolating the cost of prematurely cancelled services to the cost-causer; *and*

WHEREAS, Wireless carriers provide prepaid services, including pay-as-you-go, month-to-month, hybrid plans and in few cases pro-rated plans which customers may purchase in advance; *and*

WHEREAS, Conditions in the wireless market that may have justified the economic and policy assumptions underlying the Cellular Bundling Order have changed since 1992; *and*

WHEREAS, The wireless industry has flourished since 1992, growing its subscriber base from just under 9 million, according to the wireless industry's website, to over 239 million by July 3, 2007, and consistently showing solid revenue and profit increases compared to the traditional wireline sector during this time frame; *and*

WHEREAS, Wireless carriers have sought and obtained designation as Eligible Telecommunications Carriers ("ETCs") under 47 U.S.C. §214(e), allowing them to support their costs to serve customers in high-cost areas with monies disbursed from the federal Universal Service Fund ("USF"); *and*

WHEREAS, According to the most recent data compiled by the Universal Service Administration Company, the total amount of federal USF subsidies received by wireless carriers has more than doubled in the last two years, from \$471 million to approximately \$1.10 billion in 2006, and constitutes over 99 percent of all federal USF subsidies received by competitive ETCs; *and*

WHEREAS, On July 12, 2007, the National Association of State Utility Consumer Advocates (NASUCA), passed a resolution calling on the Federal Communications Commission to reexamine the 1992 Cellular Bundling Order to determine if use of ETFs benefits both consumers and wireless carriers; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its July 2007 Summer Meetings in New York, New York, calls upon the Federal Communications Commission to reexamine the economic and policy assumptions underlying its 1992 Cellular Bundling Order, in order to determine whether wireless carriers' – or their independent vendors' – use of ETFs remains a needed and “efficient promotional device” that benefits both consumers and wireless carriers; *and be it further*

RESOLVED, That the FCC should fully investigate the equipment and customer acquisition or retention costs cited by the wireless industry as justification for ETFs, in order to determine whether such costs are being reasonably and appropriately recovered from consumers; *and be it further*

RESOLVED, That this Resolution shall not, in any way, be construed as endorsing the proposition asserted by wireless carriers that the FCC has exclusive jurisdiction over wireless carriers' ETFs under 47 U.S.C. §332(c)(3)(A).

Sponsored by the Committee on Consumer Affairs

Adopted by the NARUC Board of Directors July 18, 2007