



N A R U C
National Association of Regulatory Utility Commissioners

January 26, 2009

The Honorable John D. Rockefeller
Chairman
Committee on Commerce, Science
and Transportation
254 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science
and Transportation
560 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Cell Phone Early Termination Fee, Transparency, and Fairness Act (S. 2825)

Dear Chairman Rockefeller and Ranking Member Hutchison:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I am writing to express support for Sen. Klobuchar's *Cell Phone Early Termination Fee, Transparency, and Fairness Act* or *Cell Phone Act* (S. 2825). While NARUC has not taken a position on all aspects of S. 2825, we have consistently urged the Federal Communications Commission (FCC) to reexamine the economic and policy assumptions to determine whether wireless carriers' use of early termination fees (ETFs) remains a needed and efficient promotional device that benefits *both* consumers and wireless carriers.

NARUC represents the public utility commissions in each State charged with the oversight of telecommunications carriers and other utilities. NARUC's members share your commitment to assure all U.S. citizens receive the benefits of competitive communications markets and new services. ETFs have been the focus of considerable constituent concern and are therefore also necessarily an issue that continues to attract the attention of NARUC member commissions. In 1992, when the FCC first determined ETFs were a reasonable business practice, the industry was, relatively speaking, still in its infancy with just over 10 million subscribers.¹ Today almost 90 percent of Americans, *more than 276 million*, subscribe to cellular service.² In those intervening 18 years, wireless technology, the relative costs and availability of handsets, and the wireless market itself has changed dramatically. Adoption has been driven in part by improved call quality and reliability, as well as new handset data capabilities. Indeed, a significant percentage of American consumers are "cutting the cord" of traditional landline to rely solely on wireless. This increase in subscribership necessarily brings increased responsibility and increased consumer expectations.³

¹ *Timeline of Cell Phones and Wireless Communications 1876-2003*, accessed January 22, 2010, available online at: <http://www.cell-phone-accessories.com/timeline-cell-phones.html>.

² In just the last ten years, subscribership has more than quadrupled from 55 million in 1997 to over 276 million today. See: http://www.ctia.org/media/industry_info/index.cfm/AID/10323. (Accessed January 22, 2010).

³ See, e.g., the *FCC Quarterly Report on Informal Consumer Inquiries and Complaints* found wireless complaints increased over 29% between the 4th quarter 2008 and the 1st quarter of 2009, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293273A1.pdf. (Sept. 9, 2009) See also, GAO, *Telecommunications: Preliminary Observations about Consumer Satisfaction and Problems with Wireless Phone Service and FCC's Efforts to Assist Consumers with Complaints*, GAO-09-800T (Washington, D.C. June 17, 2009).

A thorough reexamination of the economic and policy assumptions underlying the use of ETFs is needed. While ETFs may have made sense in 1992, now these fees appear to be hampering competition by tying consumers to a particular carrier through multiple year contracts. Moreover, the efficiency and economic justifications for the fees provided by industry, as FCC Chairman Genachowski recently noted, appear to “raise more questions than they answer.”⁴ Policy makers need to understand why early termination fees continue to rank among the top consumer reported complaints within the industry.⁵ Since 2007, NARUC has been urging the FCC to undertake the analysis needed of the economic and policy assumptions for ETFs. That analysis should include an investigation of the equipment and customer acquisition costs industry claims justifies the use of these fees. Although, commendably, the FCC is currently investigating this issue, several consumer groups and NARUC continue to press for movement in the current proceeding or additional FCC action.⁶ Senator Klobachar’s legislation calls for a needed and long overdue analysis and NARUC supports it.

We look forward to working with Congress to see that consumers are not harmed by ETFs or other potentially anti-competitive carrier practices. If you have questions about NARUC’s positions, please do not hesitate to contact NARUC Legislative Director Brian O’Hara at (202) 898-2205, bohara@naruc.org or NARUC General Counsel Brad Ramsay at (202) 898-2207, jramsay@naruc.org.

Sincerely,



David D. Coen
President, NARUC

cc: Members of the Committee on Commerce, Science and Transportation

⁴ Genachowski seeks clarity on Verizon Mobile Fees, Reuters (January 8, 2010), last accessed January 21, 2010 online at: <http://in.reuters.com/article/governmentFilingsNews/idINN0826136420100108>.

⁵ GAO, *Telecommunications: FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34 (Washington, D.C.; Nov. 2009), Pages 26 & 38, available online at: <http://www.gao.gov/new.items/d1034.pdf>. Indeed, this report, which significantly - *also touts the obvious benefits of coordinated federal and State action*, suggests at page 12, that the FCC data significantly *under-reports* the problem finding most wireless consumers with problems would not complain to the FCC and many do not know where they could complain. As an aside, no federal law should undermine existing State authority to protect consumers. S.2825 does not. The GAO report and the attached 2007 NARUC resolution have it right. ETFs are “terms and conditions” of wireless service contracts within the meaning of federal law and are subject to State jurisdiction. They are not “rates” as the industry asserts in an effort to eviscerate, what unquestionably are currently, the most effective and convenient avenues for your constituents to seek relief.

⁶ See, January 6, 2010 *Letter to FCC Wireless Bureau Chief Milkman, FCC Consumer & Governmental Affairs (CGB) Bureau Chief Gurin, & CGB Deputy Chief Stone from C. Riley, Free Press, J. Kelsey, Consumers Union, M. Wood & P. Desai, Media Access Project*, available at http://www.freepress.net/files/VZW_Response_Letter.pdf. See also, December 3, 2009 *Ex Parte filed by NARUC General Counsel J. B. Ramsay with FCC Secretary Dortch opposing termination of the open docket on ETFs*, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020350964>.

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 vendor¹; *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;² *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;³ 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;⁴ *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*

¹ See *In re Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, WT Docket No. 05-194, Utility Consumers Action Network Comments, pp. 15-19 (Aug. 5, 2005).

² See Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," U.S. PIRG Education Fund, pp. 20-21 (Aug. 2005) available at: <http://www.uspirg.org/uploads/6K/L1/6KL1e4XLE1QzgyFz7hpKKQ/lockedinacell05.pdf>.

³ See "Early Termination Fees – CTIA Position," http://ctia.org/industry_topics.cfm/TID/41/CTID/12 (accessed Feb. 5, 2007).

⁴ See <http://files.ctia.org/pdf/CTIAMidYear2006Survey.pdf>.

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