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# CONSUMER WIRELESS ISSUES

## HEARING

BEFORE THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 17, 2007

Printed for the use of the Committee on Commerce, Science, and Transportation

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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WITNESSES



APPENDIX

# CONSUMER WIRELESS ISSUES

**WEDNESDAY, OCTOBER 17, 2007**

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:08 a.m. in Room SR–253, Russell Senate Office Building, Hon. John D. Rockefeller IV, presiding.

## OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

Senator ROCKEFELLER. Good morning, all. I call this meeting to order. I would say two things. One is that I will have to leave shortly after my statement in order to do some final work on the Children's Health Insurance Program, and I apologize for that, but I'm rescued in my pursuit by the presence of Senator Amy Klobuchar, who will chair this full Committee hearing. She will come sit here. We all have opening statements to make. That is why we came here, so that everybody can do that.

Cell phones have become an indispensable part of our lives. I carry one in my pocket. It's often turned off. Families routinely use them to keep in touch with loved ones across the country. And there is now music downloading, e-mail, browsing, everything.

So it's not really very surprising that during the last 13 years over 230 million Americans have become mobile phone consumers. 230 million is a lot of people. It's about 70 million short of our total population. It's an astounding number. But what's even more amazing is that for over 18 percent of these people their mobile phone is in fact their primary telephone. So there's no question that mobile phones have contributed to a revolution in communications.

As this technology becomes widely available it has also resulted in headaches to consumers, who are simply trying to make sense of the hodge-podge of charges on their cell phone bills or simply deciphering a 10,000-word contract written in legal doublespeak. That's in addition to the frustration many especially rural Americans have, including this Senator, with inaccurate coverage maps. I along with ever other West Virginian in existence have experienced that particular problem, which means you can't make a telephone call when you need to make a telephone call, and you have to memorize the interstates and precisely that part of the interstate where you can make a phone call, even it's the same site, the same place, but it's just a mile further down the road.

So to combat some of these frustrations, I've worked for the last decade in various ways with various people to bring truth in billing. I believe that truth in billing as a total principle started with the E-Rate and continues, because I believe that the relationship between consumers and the telephone company has become completely unbalanced.

I'm deeply grateful to Senator Klobuchar's work on the issue and I am very proud to join her as a cosponsor of her legislation. In 1993, Congress instituted a minimal regulatory regime to spur this nascent, at that time, technology. As one of the handful of Senators on this Committee who was there in 1993, I can say it was the right policy then. But I do not believe that this limited regulatory scheme is now working, given the industry's size and its domination by four major companies, carriers. So I believe it's time to revisit the entire regulatory framework that governs wireless communication.

One practice of deep concern to me is the explosion of deceptive charges that now appear on wireless bills. I'll be specific. In the last few years, traditional wireless carriers have concocted a number of line item charges, fees, and surcharges. The industry has euphemistically referred to them as "regulatory" or "administrative," inferring that they are, "government-mandated," which is a very bad word to use, that that's the kind of fees they are, when most of them are most definitely not, when they are most definitely not.

So let's be clear. The industry is literally passing the buck for ordinary operating costs and tax liabilities on to the consumer, and that's not right.

But deceptive line items are just one issue. Consumers are frustrated by a number of industry practices. We will hear from industry witnesses today that the industry is so competitive that Congress should eliminate what limited State authority over the wireless industry persists on a present basis. If the industry were so competitive, one would expect that these deceptive line charges would have evaporated. Instead, when one company imposed them on them, the second one got going, the others followed. It sounds like more a collusion thing than competition to me.

Again, we went through all of this with the E-Rate and I'm very familiar with it, and I don't like it and I'm not amused by it.

We will also hear that consumers love their cell phones and that the minuscule percentage of people who file a formal complaint to the FCC proves that no further regulation is needed. I know that people love the freedom of their mobile phones and I'm sure that consumers love or believe that they are treated fairly by their wireless provider. We know that the FCC only receives 10,000 to 15,000 complaints a year from consumers about their wireless providers. But we also know that most people don't file formal complaints because they just think it's a waste of time, they don't know where to send it, and they know they're not going to get an answer. They know that filing a formal complaint is meaningless.

For example, the Department of Transportation received 1,634 complaints about airlines in October of 2007. Senator Dorgan and I do not believe that there were only 1,634 unhappy airline passengers in October of 2007.

The one area where the FCC has been at the forefront of protecting consumers is making sure that industry complies with emergency communications, that is the E–911 requirements. I can think of no more important consumer issue than making sure that a call to 9-1-1 reaches an emergency communications center. I'm deeply dismayed that, rather than embrace the new FCC rules, the industry is looking for ways to weaken these rules, and I have written right here that that is shameful.

We all know that the telecommunications industry is changing rapidly. New technologies are being created and changing the way we communicate. But we must never forget that, regardless of the technology or changes in the industry, consumer protection must remain a cornerstone of our regulatory policy.

I would now call on other Senators to speak. Senator Dorgan, if you have a statement we would welcome it, sir.

**STATEMENT OF HON. BYRON L. DORGAN,**
**U.S. SENATOR FROM NORTH DAKOTA**

Senator DORGAN. Senator Rockefeller, thank you very much. I was sitting here thinking of how wonderful cell phones are and one of the most interesting moments I recall on a cell phone was not for me, but sitting in the Oval Office of the White House with about five people and the President. And one of the individuals had his cell phone turned on and the cell phone was turned on loud, and it began to ring in the Oval Office, and he couldn't figure out which pocket it was in. It took some long while. I have never seen someone more embarrassed with a cell phone than in the Oval Office.

But cell phones are remarkable. I mean, all of us carry them. You indicate you have one. I carry one. They offer us remarkable opportunities. Just coming from, in the last week, a retail store with my daughter, who's in college. The contract is up, so I'm well familiar now with contracts and locked in and so on and shopping for a cell phone, being presented with all of the new techniques and opportunities with the cell phones. You know, they suggest they'll do almost everything except brush your teeth and drive your car. They'll take pictures, they'll do video, they'll do almost everything—alarm clocks.

So the hearing today is not about whether this is a wonderful device or whether people are attracted to it. The American people and the people around the world have voted on cell phones. The piece of legislation that Senator Rockefeller and Senator Klobuchar have offered and I have cosponsored is a good piece of legislation. We need to do something about early termination fees that prevent, I think, a competitive market by trapping consumers with their provider.

We need to do something about better data on coverage areas, transparency in contracts and billing. And I think the practice of locking in phones, which is not done in many other countries, locking in phones, making them exclusive to one provider, requiring consumers to purchase a new phone when changing carriers. I think that's something we need to deal with as well.

But I want to make one other point today. This is an opportunity as well to talk about—and I expect you would want me to do that—

talk about the issue of network neutrality, or what I call Internet freedom. I and Senator Snowe have introduced legislation on that. There's a story in the Wednesday *Post,* today's *Washington Post,* an op-ed piece. It's titled "Can You Hear Us Now?" It's an op-ed piece by Nancy Keenan and Roberta Combs, Presidents of NARAL Pro-Choice America and the Christian Coalition of America. They are talking about something that was done recently at Verizon Wireless, where they chose to block a series of text messages by NARAL, a pro-choice group, on the grounds the subject matter was too controversial.

To the credit of Verizon Wireless, they very quickly corrected that and took action and, as I say, to that company's credit, they moved quickly to change that. But it demonstrates, as the discussions we've heard and seen before by Mr. Whitaker and others, it demonstrates in my judgment the need to have a provision, pass legislation, keeping the Internet free, free from censorship, free from gatekeepers. I am asking that this Committee will hold a hearing on those issues. I just think it's very important that we hold a hearing on the issue of discrimination, because we have for the development of the Internet, as you know, we've had nondiscrimination policies right up until a recent period, and action by the FCC has changed that. But we should, it seems to me, require the same nondiscrimination.

So I'm asking that we would hold a hearing on that. But I thank you for this hearing. I want to make one final point. I mentioned Verizon and when it is mentioned in this way it's a critical mention. We just had a little town in North Dakota devastated by a tornado. A tornado came around, it just flattened a town called Northwood, North Dakota. And even before the tornado, they had terrible cell phone service. When that tornado hit, they desperately needed cell phone service to help deal with emergency requirements, and Verizon was the company that moved in quickly and put up temporary service.

So even as I describe Verizon perhaps in a not complimentary way, I also want to say the people of Northwood, North Dakota, where I toured recently, would want to say thank you to Verizon for helping them in times of difficulty.

Senator ROCKEFELLER. Thank you, Senator Dorgan.

Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,**
**U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you, Senator. I'd first like to welcome Attorney General Swanson from the state of Minnesota. We both bring you greetings from Minnesota, where, as Garrison Keeler, our poet laureate, says, the women are strong, the men are good-looking, and all the cell phone users are above average.

I will say this. 20 years ago when the cell phones first hit the market—this was back when it was a niche industry in the hands of tycoons and Wall Street people and in the movie with Gordon Gekko on Wall Street with his phone—there were only a few subscribers. Now, 2 decades later, there are 200 million cell phone users and the revenues top $100 billion per year.

Cell phones are no longer a luxury, but a necessary part of our lives, and for an increasing number of people, especially younger people, it is their only phone.

Despite the explosion in the market, the wireless industry continues to operate under the same rules that they had 20 years ago, when cell phones were this niche market and the service was limited to these urban areas. Now it has gone from Wall Street to Main Street, middle class people, lower income people, and basically the users have changed, but the rules are outdated.

Consumers often feel that wireless providers have the upper hand and consumers enter into these restrictive contracts without full information. Once they've signed the contract, they often find the quality of the service is not what they expected, and they face cancellation fees that can total hundreds of dollars if they try to find better service before the end of their multi-year contract.

A recent *Washington Post* article illustrates the anger consumers feel toward their wireless providers. The article featured a man who was desperate to try to avoid paying his early termination fee, to the point that he faked his own death by filling out a death certificate, and not even that worked.

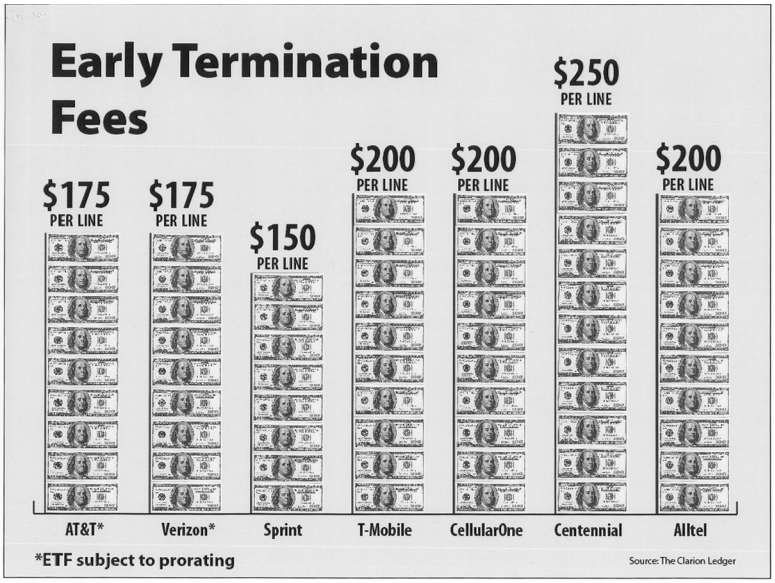
We believe it's time for some new rules in the wireless industry. The legislation that Senator Rockefeller and I have introduced, A Cell Phone Bill of Rights—and we appreciate Senator Dorgan's cosponsorship—has a very simple goal: to enable consumers to make the best choice that fits their particular needs. This legislation is narrowly tailored to allow consumers to make true market-based decisions. It's not rate regulation. It just allows the consumers to decide what's the best price they can get and what's the best quality of service, which is what the cell phone industry claims that they want.

To do this, you need to be able to change carriers to get that better service or better price. That's why our legislation places some simple limits on the so-called early termination fees, which have been a real sore spot for consumers. Most of the more than 200 million cell phone subscribers in this country are in long-term contracts with their providers. But too often the consumers find out after the fact that they're committing to a multi-year contract and then they find out that the wireless service doesn't meet their needs. Perhaps the quality of service is not what they expected, providing only weak signal strength in the locations they need it most. Maybe they get sticker shock because they realize that the bill isn't quite what they thought they signed up for because of regulatory fees and other things that Senator Rockefeller identified. Or they move. They move their house, they go to a new office, and they find out that their existing cell phone service doesn't work at all.

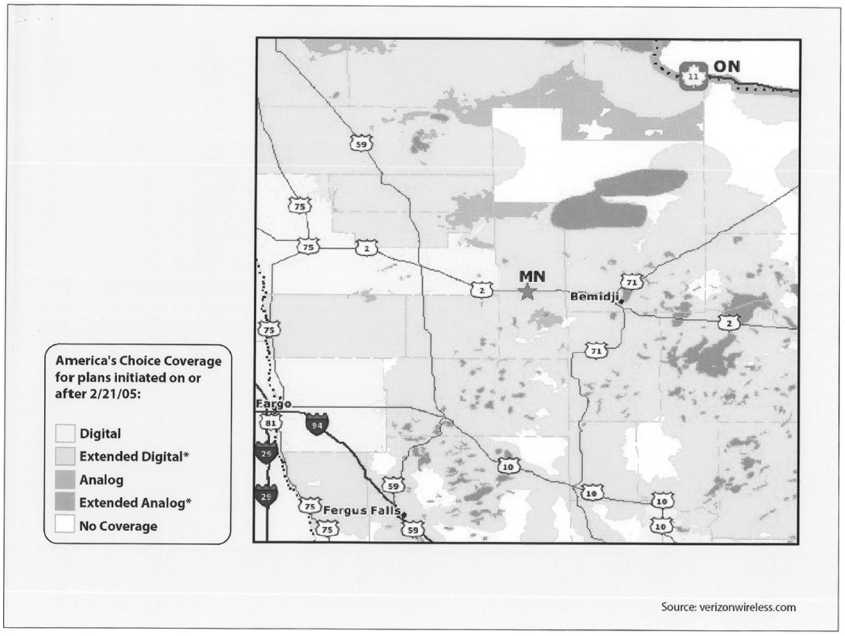
But these realizations come after it's too late to exit without paying excessive penalties. I know that just yesterday before this hearing AT&T announced that it would prorate its ETF, and that Verizon has done that for some time now. But together AT&T and Verizon comprise 55 percent of the market, meaning that over 100 million Americans may still be subject to these fees.

Our legislation would require all wireless providers to prorate their fees so that at a minimum a consumer who exits a 2-year con-

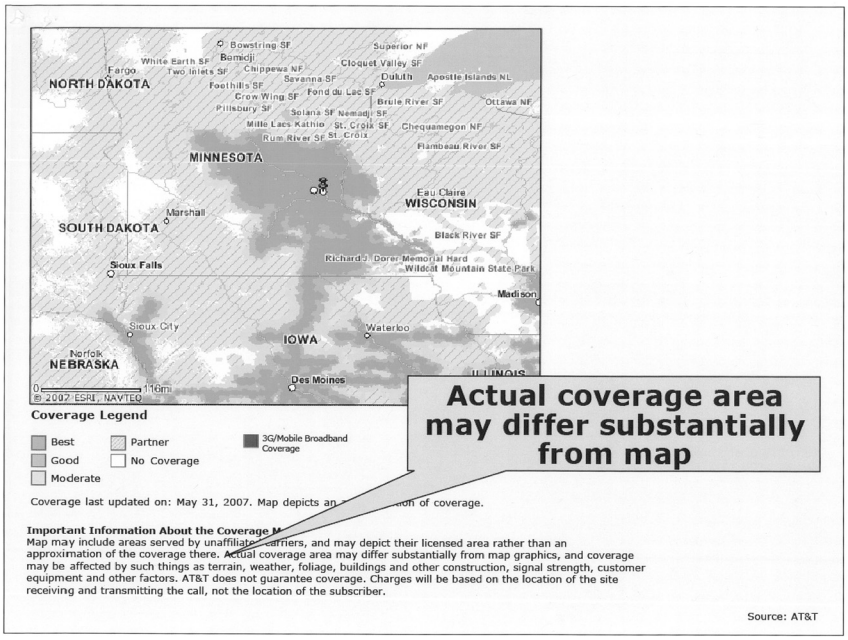
tract after the end of the first year would have to pay only half of the termination fee.




Senator KLOBUCHAR. The legislation will also require that wireless carriers provide consumers with information on their service quality, including maps that are honest and up to date. I think in this day and age there must be a way to map this and at least show where the dropped calls are. You know, if the cell phone providers are advertising who has the least number of dropped calls, then the consumer should have the right to say by area code or by county, be able to know by comparing the cell phone carriers where the dropped calls are.




Senator KLOBUCHAR. We have a map to show, I think one of the carriers' maps. They provide these maps and they actually provide language in the small print that says the actual coverage area may differ substantially from the map. So this is no way for consumers to price compare in a market.



Senator KLOBUCHAR. Consumers also need to understand their bills so they can compare wireless carriers by price. To do this, our legislation will require that wireless companies refrain from including on their bills charges or fees other than those for wireless service or that are expressly authorized by Federal, State, or local regulation.

Finally, this legislation will put a stop to automatic secret extensions of cell phone bill contracts. For example, some cell phone companies will extend your contract without telling you simply when you call up and you add minutes or you add a person or a kid. I think Attorney General Swanson has some examples of that in the recent lawsuit she filed.

Competitive markets work best when consumers have access to full information, and that is the overriding purpose of this legislation, to ensure that cell phone consumers have the necessary information that they need to make the best decisions for themselves and for their families.

Thank you very much.

Senator ROCKEFELLER. Thank you, Senator Klobuchar.

In order of appearance, Senator DeMint would be next, then Senator McCaskill and Senator Pryor. But we have been joined by the former Chairman of this Committee, Senator Stevens, and I would ask if——

Senator DEMINT. I would certainly yield.

**STATEMENT OF HON. TED STEVENS,**
**U.S. SENATOR FROM ALASKA**

Senator STEVENS. Mr. Chairman, thank you very much. I apologize for being late. I just ask that my opening statement be printed in the record. Thank you.

[The prepared statement of Senator Stevens follows:]

PREPARED STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

Today's hearing presents an important opportunity for the Committee to examine the consumer experience relative to mobile phone service.

The FCC's annual report tells us that mobile service is the most competitive sector of communications. The FCC report also found that consumers frequently change services and that new services are constantly being introduced for consumers.

I certainly understand and experience the frustration that all consumers feel sometimes when dealing with mass products. But, I also worry that if Congress acts too rashly, the end result could be that consumer prices would go up, or that some consumers would be forced into less attractive wireless plans.

Senator ROCKEFELLER. It was long, but it was cogent.

Senator DeMint?

**STATEMENT OF HON. JIM DEMINT,**
**U.S. SENATOR FROM SOUTH CAROLINA**

Senator DEMINT. Thank you, Mr. Chairman. Thank you for holding this hearing. We're talking about the wireless industry, which is one of the most successful American success stories that we have to talk about, one of the I guess most competitive and successful in the world, and the one that has had the least government regulation. I would like to contend that there is a correlation there. If this Government had set about trying to get 200 million cell phones

in the hands of Americans, it would have cost us hundreds of billions of dollars and taken many years.

I'd like us also to think about today that, despite good intentions, which I know we have, to protect the consumer and a lot of good ideas here in this bill, we do need to be reminded—and I'm sure my colleagues will agree—that every week in my office in Washington and my offices back in South Carolina, we receive hundreds of requests for help dealing with the biggest monopoly in our Nation, which is the Federal Government. Complaints about passports and food stamps and Social Security payments and Social Security disability, Medicare reimbursement, veterans benefits, we get them every day, because our Government has consistently shown that it cannot effectively manage complex functions.

I think the Chairman even in his opening statement made it clear that when many people have a problem with the Government or with something like a wireless provider, they don't bother to call the Government because they know they're not going to get a response. For us to suggest that somehow we are going to be able to design a system that more effectively protects consumers than a competitive market is well intended, but very naïve.

I don't receive calls from my constituents complaining about the wireless industry, but I receive hundreds that are complaining about government service. So my first question to our panel today is, what problems for America's wireless consumers require Congress to act? I would like to have the wireless industry competing for the best billing system. Once we create a format here that everyone has to follow, that's the end of competition in best practices.

So I expect today's hearings will reveal that there is actually no compelling reason for government to get more involved in one of our most successful industries in this country today. To the contrary, I think most of us know and hopefully will see more clearly that consumers really benefit when government removes itself from their decisions.

Today there are more than 150 companies competing in the U.S. wireless industry. It is the most competitive market, one of the most competitive markets in the world, with the most choices for consumers. This competition has resulted in lower prices and ever-expanding coverage and better customer service and consumer satisfaction.

These low prices enable Americans to use on average 843 minutes per month, which is over 500 minutes more than the closest European country. That disparity likely results from European customers paying four times more than Americans in a less regulated industry. Why would we even consider praising the European model, much less following it, when their wireless service is so expensive and usage is so much less? Consumers really are empowered through greater choice and competition.

The wireless industry, as a lot of us know, has committed more than $223 billion in capital expenditures to provide customers with seamless wireless coverage. Sure it's not completely perfect, but it's a lot better than anything government could design or implement or enforce, and we're moving quickly towards complete coverage throughout the country, which has really been an amazing phenomenon.

The companies that are competing in this industry are meeting consumer needs. The average churn rate for the industry is less than 2 percent. So wireless complaints at the FCC have fallen from 32.9 percent in 2005 and now only 20 complaints per one million customers. I wish we had a government service that only had 20 complaints per one million service. We can't say that about any government service.

The wireless complaints made to the Better Business Bureau have a higher rate of resolution than such industries—other industries such as the cable industry that are heavily regulated. Companies offer a variety of contract options for consumers. We know there are prepaid options, month to month, year contracts, 2-year contracts, and more options every day.

I think one important thing to consider, and it makes a point again that government regulation cannot possibly keep up with this dynamic industry, that most of what is prescribed in this bill has already happened. The bill mandates a 30-day trial period for new customers. Yet many companies already offer risk-free 30-day trial periods to enable consumers to test service availability in the areas they travel. The bill also mandates full disclosure of contract terms and plans. But the major wireless companies already do this on their websites. This bill mandates prorated early termination fees. Of course, Verizon already prorates these fees. AT&T has announced that they'll soon do the same. So competition is quickly moving towards the goals of this bill.

This bill mandates detailed mapping of service coverage. All four major carriers already offer street-level service maps.

The bill mandates that wireless companies allow unlocked phones in their networks. AT&T, T-Mobile, Verizon, and Sprint all allow the use of unlocked handsets.

The point is this. The industry is already moving to satisfy a lot of concerns and is doing it better than any government regulation possibly could. We know that, despite the good intentions of this legislation, once the FCC writes up the regulations for it is likely to set back the wireless industry many years.

We have to look at an industry that's working and recognize that the consumer services and consumer satisfaction is as good or better than any industry that we can name. I would just ask this committee before we move to get government involved that we recognize that first of all there is no track record that we can show that government has effectively improved service, particularly a service that is so fast-paced, so fast-changing, as the wireless industry. If we look at what is actually happening in the market, the penetration of services and what is happening with innovation in the industry, let's don't try to fix something that is doing so well.

Despite the good intentions, I would just encourage my colleagues to just take a step back. Let's let the wireless industry solve what problems we think there are and let them continue to be the best in the world.

With that, I yield back.

Senator KLOBUCHAR [presiding]. Thank you.

I think Senator Stevens has another Committee hearing.

Senator STEVENS. Yes, I do, I have a conflict. I got here late, I'm sorry, but I would like to put the questions in the record and have

them responded to by the Committee witnesses if possible. Thank you.

Senator KLOBUCHAR. Thank you.

Senator McCaskill?

**STATEMENT OF HON. CLAIRE MCCASKILL, U.S. SENATOR FROM MISSOURI**

Senator MCCASKILL. Thank you, Madam Chair.

First, I think that one of the issues that has really caused some of the consumer angst on this area is that the first goal of a new technology, wireless communication, was to acquire new customers. So much of the business models were focused on how do we get more of the market share. As the industry has matured, customer service becomes a much more important part of the equation, because now it's beginning to shift from, yes, we need more new customers, but we need to hold onto the customers we have.

That's where I don't think that the wireless industry has been particularly nimble. As a well-connected and a well-informed consumer, I can tell you horror stories about—I have had Sprint, I have had Nextel, I have a large multi-family AT&T cellular account, and Verizon. I have examples of all of them.

Perhaps the one that caused the most heartburn for me was realizing, even though I did purposely not buy text messaging for my three teenagers when I added them to the plan, that unbeknownst to me they could receive text messages with me not knowing it and I had to pay for every one of them. You say, well, it was just one month before you figured it out. Any of you who have three teenagers that have text messaging, it was a horrendous situation when I realized my kids—even though I hadn't paid for text messaging, I was paying for text messaging.

And obviously, I think the technology advances need to be made very available to the consumer without trapping them into another 2 years. As the technology advances and you want to get the new stuff, then there is this trick. You can't get it unless you want to pay a whole bunch of money for the phone or you've got to sign up for another 2 years. I'm not sure that that model, business model, will end up applying.

I appreciate what Senator DeMint said and I do realize that competition will take care of some of these problems and has taken care of some of these problems. But I do think we need to look and consider about making sure that the playing field is level for the consumer.

If I could right now segue just for a moment into leveling the playing field in regards to something that is relevant to this hearing this morning, but not particularly to the wireless industry specifically. This morning, today I'll be filing a bill to prohibit the practice of paying people to stand in line for committee hearings. Sometimes new people to Congress take a look around and they go: Well, what is that? Why is that going on? Well, I did that.

I was walking down the hall one day and I saw all these people standing in line. And I just looked at them, and they all were holding signs that had businesses' names on them. I thought, well, what's going on there? So I began to look into it and I found out that in all the Committee hearings where there's real money in-

volved the lobbyists are paying people to stand in line for them, and the practice is so commercialized that there's a special classified section of *The Hill* newspaper for line-standing companies. And the technology, thanks to the wireless industry, is now so good that they will even tell you when you need a line-stander. You just tell them your areas of interest of your clients and they will inform you by text message or e-mail who you need to be hiring to make sure that you have a spot at the hearing.

I am uncomfortable with the fact that everyone in this room probably is being paid by somebody. Now, are we going to get a lot of average citizens in here if we stop the practice of allowing lobbyists to hire line-standers? I don't know how many average citizens will get in here, but at least they got a shot.

We shouldn't be selling the seats to Committee hearings, whether it's the Finance Committee, the Commerce Committee, the Judiciary Committee, or any of the Committees where there are a lot of commercial interests at stake. So if we can prohibit you from having to buy us meals and prohibit you from buying us gifts, we ought to be able to prohibit you from buying somebody to secure you a seat at a public hearing.

I don't honestly believe that the Founding Fathers would be pleased with this development. I think they'd be horrified that we are selling seats at public hearings. And hopefully we can amend—if I had known about this in time, I would have tried to get it on the ethics bill. But hopefully we can put this into law, and look at all the money you guys are going to be saving. No more lunches, no more chartered plane trips, and no more paying people to stand in line to own all the seats at Committee hearings.

Thank you, Mr. Chairman.

Senator DORGAN. Senator McCaskill, would you yield on that point just to make certain—you don't mean that government is involved in selling seats at hearings. What you mean is the private sector, as Senator DeMint would suggest, the private sector is involved in a market system here and you want to interrupt that market system.

Senator MCCASKILL. Just as someone buying you lunch, Senator Dorgan, who is not buying your vote, I think somebody buying a seat at a public hearing by virtue of having the money to pay somebody $60 an hour for as long as 24 hours or longer, through the dead of the night, to camp out and make sure they have the seats, is prohibited.

Senator DORGAN. I share your point. My only point was that the government is not selling seats.

Senator MCCASKILL. The Government is not selling seats. The lobbyists are buying seats by virtue of hiring people to stand in line.

Senator KLOBUCHAR. She's just trying to regulate the seats.

Senator MCCASKILL. I'm making sure the seats are available. This isn't a concert.

Senator KLOBUCHAR. Okay. Thank you, Senator McCaskill.

Senator Pryor?

**STATEMENT OF HON. MARK PRYOR,**
**U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. Thank you, Madam Chair.

Yesterday I introduced the Uniform Wireless Consumer Protection Act to require the Federal Communications Commission to establish uniform national customer service and consumer protection rules for wireless customers. In 1993 Congress limited State and local regulatory authority on wireless carriers to help the fledgling industry get itself established. That decision has helped to drive today's market, as Chairman Rockefeller said a few moments ago, to drive today's market to 240 million wireless customers in the United States.

So we've accomplished the goal of growing the wireless industry, but we've yet to establish a uniform set of customer service and consumer protection requirements. I think it's time for us to establish a national framework for this new era of consumer-friendly wireless services.

The national consumer framework, though, is not without its challenges. The ability of the wireless customer to travel beyond State boundaries tests our customary approaches to customer service and consumer protection standards at a State and local level. I want to applaud my colleagues Senator Klobuchar, Senator Rockefeller, and Senator Dorgan for offering their bill, S. 2033. We have the same goals in mind.

I would say this about complaints, though. I don't want to get too hung up on the number of complaints. My experience as Attorney General is that the overall number relative to the number of customers was relatively small. But not everybody complains to the FCC. Many people don't complain at all. Many complain just to the companies. Some complain to the Better Business Bureau. Some complain to the State attorney general. They complain in different ways and different places. So I don't want to get too hung up on the numbers, but the bottom line is that there are a number of consumers who are dissatisfied with their service for various reasons. Some of those things I think we need to address in Federal law.

Uniform wireless consumer protection rules must be comprehensive and they should address in my view a broad range of issues, including disclosures of contract terms and conditions, service area maps, trial periods, and early termination fees. We could add more to the list if you wanted to, but I think it's important that we build a uniform and comprehensive set of consumer protection rules that are fair, that encourage fairness, transparency, and quality of service.

So I look forward to working with my colleagues in the Senate, certainly colleagues on this Committee, and the industry and customers all over America to try to get a solid Federal system of consumer protection for wireless customers. Thank you.

Senator KLOBUCHAR. Thank you.

Senator Cantwell?

**STATEMENT OF HON. MARIA CANTWELL,**
**U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Madam Chair, and thank you for holding this important hearing. The wireless industry is certainly

one of, I think, the great innovation and success stories in America. In Washington State we know that well, being the original home of McCall Cellular, VoiceStream, Western Wireless, Nextel Partners, and today headquarters of AT&T Wireless, U.S. headquarters of T-Mobile and Clearwire.

In 1993 America had 11 million cell phones in use and now there are over 230 million. The percentage of cord-cutters, people who use their cell phones as their only phone, has grown to double digits. The growth has been so strong that a few years ago the wireless industry told us they needed additional spectrum, and this Committee responded and has been working on plans to make more wireless spectrum available.

These are exciting innovations and opportunities in business models and development, everything from advanced multi-media data services, 3G broadband networks, and I certainly look forward to location commerce and mobile commerce and the great inventions and opportunities for consumers to better identify products and services that they want to purchase.

These are great innovations and I think that Congress in the past has had a light touch. At least the 1993 clarifications for the brand new cellular industry I believe were a light touch, prohibiting states from regulating rates and terms of market entry, but allowing them to regulate other terms and conditions.

I think the issue is that Americans know that early termination fees are not part of their rates. They view them as significant penalties and barriers to switching carriers. I was heartened by Verizon's 2006 announcement that it would prorate early termination fees and yesterday AT&T announced that they would do the same. But I'm waiting for other carriers to step up to the plate on this issue.

In our State, year after year consumer complaints about wireless service are the most frequent complaints registered at our State AG's office. It takes a lot really, I think, for consumers to be upset enough to file a complaint with the State AG, and I suspect that the complaints the AG's office, as my colleague Senator Pryor mentioned, having been a former AG, that they're only the tip of the iceberg of a larger problem representing the number of people that aren't filing complaints.

The five primary areas of consumer disputes are: misrepresentation of plan or service, coverage failures, consumer service, billing, and failure to disclose. So I think that there are lots of issues that we should discuss and I know that the industry probably feels that it has had great efforts in self-regulation. I'm not convinced at this point in time that that self-regulation is being effective enough for consumers.

I also believe that, Madam Chair, privacy, as we continue to look at M-commerce and L-commerce, which hold great promise, I believe, for Americans, they have to be balanced with the consumer privacy issues that are needed to protect consumers.

So I look forward to this Committee's continued work on this issue and I look forward to hearing the witnesses talk about the great opportunities, but also how we give consumers the rights and demands that they need for advancing these great innovations in America. Thank you.

Senator KLOBUCHAR. Thank you.
Senator Thune?

**STATEMENT OF HON. JOHN THUNE,**
**U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Madam Chair. I, too, want to express my appreciation to the Chair for calling the hearing today and also for our panelists for being willing to come up and to testify. There's no question that wireless communications technology continues to change rapidly. It holds great potential for the future for our Nation's economy. The expansion of investment in new wireless technology is critical to our global competitiveness, both our businesses and our economy as a whole.

In June 2007, there were 240 million mobile phone subscribers. Mobile revenues are over a billion, or $100 billion, I should say, and the cost per minute for wireless phone service continues to drop and has dropped considerably in recent years. I think it's fair to say that consumers have benefited enormously from competition in the wireless marketplace.

The challenge I think we have as policymakers is to ensure that sustained competition results in lower prices, innovative services, and new technologies being made available to consumers. As those new technologies come online and existing technologies evolve, the public policy is also going to have to evolve to ensure that consumers and businesses continue to have access to affordable and reliable wireless communications technology.

I look forward to hearing testimony today from our panelists about how regulation of new generations of communications technology is working, things that we should be doing, things that we shouldn't be doing. I think this forum today gives us an important opportunity to exchange those ideas, and I'm particularly interested in hearing about how consolidation in the marketplace has affected the level of competition.

So again, Madam Chair, thank you for holding the hearing and I look forward to the testimony that will be provided by our panelists. I was interested in, just as I walked in—is $60 really the going rate? Those are pretty good-paying jobs. Too bad we can't get a few of those in South Dakota. But thank you, Madam Chair.

Senator KLOBUCHAR. Thank you.
Senator Sununu?

**STATEMENT OF HON. JOHN E. SUNUNU,**
**U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. Thank you very much. Interesting hearing, interesting topic. I appreciate the witnesses being here.

A couple of points that I think are important to make. That is, first of all, if we go back to the legislation that really created a preemption and a national regulatory structure for wireless back in the early 1990s, 1992, 1993, 1994, the motivation for that wasn't that this is a new industry. That's not the principle underlying a national regulatory framework. The recognition was that this is an interstate and a national network that we're setting up. As a new, effectively new national telecommunications system, it made sense

to have clearer, more standardized regulatory structure in order to encourage investment and build-out and competition.

That's an important point to recognize because from that we then ask, well, that was the principle behind national standards and preemption; did it work? What was the result? Well, if we go back to 1992, there were 9 million wireless subscribers. Today there are nearly 200—well, there are over 200 million. So over a 20 times increase in use; nearly 85 percent penetration and saturation in the marketplace, hundreds of millions of users. I think by the measurement of usage, growth, consumer demand, you'd have to say it's a pretty successful regulatory structure.

That may not be enough. What about competition? Are consumers served by only one competitor? We talk often about competition in broadband and in the cable industry, trying to find ways to encourage broadband competition in areas that might only be served by one or two Internet providers. We want that number to be three or four. Well, what is it in the wireless industry? I think in most population centers, most parts of the country, or for most consumers, there are really four or five choices. Even in rural counties, the average is 3.6 competitors or different providers. That doesn't mean that it's a perfect system, but it means that in the area of competition this model has served us pretty well.

What about the consumers? I think there has already been some discussion of the level of complaints. That's not the only measurement of customer service by any stretch. But people have pointed out, I think there are statistics I saw in West Virginia, where they do collect consumer complaints, and that's certainly appropriate, there were 60 or 70 last year. I've seen other statistics that have the rate at well below one-hundredth of one percent on a national level.

Some consumers might not complain about problems they have and that may be true. But again, here the question you ask is, how does this compare to other areas, other industries, other services, or even other products that are sold in the country? I certainly haven't seen any indication that the level of complaint, the areas where customer service has failed the consumer, is significantly higher or at a level that warrants significant intervention in the marketplace.

Another area of consumer satisfaction I think it's fair to say is price. What's happened to prices? Over the last couple of years, cost per minute has gone down 25 percent. Now, I don't know of any other service or product that has seen that kind of a reduction in prices over the last 2 or 3 years. I don't have the data in front of me, but I imagine that cost per minute since 1993 or 1994, 1995, has dropped much more dramatically.

I think we use twice the number of minutes of wireless phone users in any other country. I don't know if that's a good thing or a bad thing, but I think that's an indication that consumers find that price relative to the service or the quality that they're getting is a pretty good deal. They're obviously using their cell phones a great deal. As a father of a 14-year-old son, I can attest to that fact.

So the system seems to be working. I think we can talk about areas where it might be improved. But I look at some of the pro-

posals that are out there and I start with the idea of regulating rates and regulating prices, and I think that is exactly the wrong idea, exactly the wrong idea. When you regulate prices, when you set price controls for any component of a service, every experience at the Federal level with price controls has not worked. It's resulted in some consumers not getting service that desperately need service. It's resulted in less competition. Sometimes it has the effect of protecting the incumbents, and I have no interest in doing this in this case. I want as much competition out there as possible. But price controls restrict markets' ability to respond to consumers' need to innovate and deliver new products and oftentimes restrict the very industries where we want to see the most competition.

Additional fragmented regulation, blowing up this system and giving all responsibility to 50 different states on the regulatory side and the pricing side, I don't think that makes a great deal of sense. I think we need to look at the industry. If there are specific problems with the industry where it is performing significantly below other services or other products that are important to consumers, I think that's where we need to look to take measured action.

But I see this largely as a success story and I want to do everything possible to make sure that it continues to be that success story. Forget about 1993. I think if you had gone back just 4 or 5 years and made the statement that in 2007 there would be 70 million more cellular phone users, wireless users, than wireline telephone users, people would have said, no, that's not going to happen; you know, it'll never exceed wireline users. But at the same time, if you had told the wireline companies that they would be losing 20,000 and 30,000 subscribers a month, as I did a couple of years ago—they said, no, no, the rates will never get that high.

We don't know where these technologies are going. We need to maintain the best, most competitive environment possible. In the case of wireless, I think we've struck a pretty good balance.

I look forward to hearing from the witnesses. Perhaps they think that some changes are needed, but I say to consumers across the country: Always be careful when someone steps up and says: I'm from the government and I'm here to help you.

Thank you very much, Madam Chair.

Senator KLOBUCHAR. Thank you, Senator Sununu.

We've now been joined by Senator Vitter. This is one of our most well-attended hearings that we've had recently, so this is a tribute, I'm sure, to our witnesses.

Senator Vitter?

**STATEMENT OF HON. DAVID VITTER,**
**U.S. SENATOR FROM LOUISIANA**

Senator VITTER. Thank you, Madam Chair. I'll waive opening remarks because I'm also eager to hear from the witnesses.

Senator KLOBUCHAR. Thank you.

Now I'm going to introduce our witnesses. We will start with Attorney General Lori Swanson, who is the Attorney General for the State of Minnesota. Then we have Mr. Lowell McAdam, who is the President and CEO of Verizon Wireless. We also have with us Mr. Patrick Pearlman, who is a consumer advocate for the Public Serv-

ice Commission of West Virginia. Senator Rockefeller told me to thank you for coming and said you do good work.

We then have Mr. Chris Murray, who's a Senior Counsel with the Consumers Union; Mr. Mike Higgins with West Central Wireless; and then finally, Dr. Jerry Ellig with George Mason University.

So we will start with Attorney General Swanson. And each witness, if you could keep your remarks to 5 minutes so we have time for questions, we'd appreciate that.

**STATEMENT OF HON. LORI SWANSON, ATTORNEY GENERAL, STATE OF MINNESOTA**

Ms. SWANSON. Well, good morning. My name is Lori Swanson. I'm the Attorney General of the State of Minnesota. Madam Chair, Members of the Committee: Thank you for conducting this morning this important hearing.

Every day our office hears from consumers with complaints about their cell phones. I recently met with a woman named Kelly Effinger who is a sign language interpreter from Brooklyn Park, Minnesota. She told me that when she added a third phone to her service she was specifically promised by her cell phone carrier that she could cancel at any time and that she was not extending her service. In fact, when she later tried to cancel her cell phone company charged her a $175 early termination fee, despite its promises. This was news to her, and unfortunately Kelly is far from alone.

The cell phone industry, through a series of mergers and acquisitions, has become much more concentrated in recent years. By some estimates, just four companies control 80 percent of the market. Less competition makes it more difficult for consumers to shop around for the best service at the lowest rates.

The companies' contracts, however, also make it more difficult for a consumer to move to a competing carrier when a company provides poor service. Many cell phone companies require their customers to enter into long-term contracts of up to 2 years in length and require customers who terminate the contract early to pay substantial termination fees, often of several hundred dollars. These termination fees often bear little or no relation to the actual costs incurred by the company when the contract is terminated early. The lengthy contracts and early termination penalties have the tendency to lock consumers in with one company for extended periods of time.

My office has received complaints from consumers who were asked to pay sizable termination fees even when they cancelled their contracts for very legitimate reasons, like because their phone didn't work, they couldn't get the service that was promised in their home area, or because they were military personnel deployed to serve this country abroad in Iraq or Afghanistan.

Now, in a fair consumer transaction there's transparency and there is a meeting of the minds between the business and the consumer. The business agrees to sell the consumer a product with disclosed terms for a disclosed price. The consumer agrees to pay it. Both sides know what the deal is. They both want to enter the

deal and they both give their knowing consent to the terms. In other words, there is a fair agreement.

Many consumers don't feel this sense of fair dealing when it comes to dealing with their cell phone company. Over the last 3 years, the Better Business Bureau reports that the cell phone industry has received more complaints than any industry in America, and that counts 3,600 industries in America. Complaints like the one my office recently received from First Lieutenant Andrew Malander, who is serving in the United States Marine Corps. Lieutenant Malander was charged about $100 a month for cell phone service he couldn't use when he was deployed to Kuwait recently. He tried to contact his cell phone carrier repeatedly, had his family contact the carrier repeatedly too, to try to put the service on hold. But they wouldn't listen. It finally took the involvement of my office to undo hundreds of dollars of fees that this officer had to pay for cell phone service he couldn't use when serving the United States Government.

We at first couldn't work it out with the carrier either and only did the carrier relent after I filed a lawsuit against a competing carrier several days earlier.

Some companies use even the smallest changes in the consumer's phone service, like adding or dropping minutes, adding or deleting a family member, or adding a new number, as justification to extend the consumer's contract for yet another lengthy period of time, often as long as 2 years, with new termination penalties of up to $200 when that happens. *Consumer Reports* writes that this is the single biggest nationwide complaint that it receives from consumers about their cell phone.

Last month my office filed a lawsuit against one of the top carriers in the country alleging that it violated Minnesota's consumer protection laws by extending the terms of consumers' wireless contracts for up to 2 years without giving adequate disclosure or obtaining knowing consent of the customer when they made even the smallest change to their plan, like adding minutes, dropping minutes, or adding a family member.

It is a practice that affects small businesses, not just individuals. There is a company in Minnesota, in St. Paul called Semple Enterprises. It's a family-owned excavating business. When the employees went to retail stores to buy equipment for their phones, buy batteries, repair their phones, their carrier extended the company's contract without its knowledge or permission, and now the company is locked into service because it would have to pay thousands of dollars in early termination fees if it exited early. The owner of the small business told me if she ran her business that way she wouldn't be in business very long.

It affects consumers, too. Celina Haselitts, a realtor from Apple Valley, Minnesota, called her carrier several times to adjust her bill when she was overcharged by about $300. Each time she made a call to the carrier, the carrier extended her contract without her knowledge. She told my office: "I found it ridiculous. I was forced to remain in a contract with a company that had treated me so badly."

The burden should not be on the consumer to figure out the rules of the cell phone shell game. There needs to be more transparency

and more fundamental fairness in consumer cell phone transactions. The United States Congress should pass meaningful consumer protection legislation so that consumers are treated fairly and not subjected to a game of hide the ball when navigating the cell phone maze.

Madam Chair, Members, I thank you again for the opportunity to be here today.

[The prepared statement of Ms. Swanson follows:]

PREPARED STATEMENT OF HON. LORI SWANSON, ATTORNEY GENERAL, STATE OF MINNESOTA

Good morning. My name is Lori Swanson, and I am the Attorney General of the State of Minnesota. I thank Chairman Inouye, Vice Chairman Stevens, and the Members of the Committee on Commerce, Science, and Transportation for conducting these important hearings on the topic of consumer protections relating to the cellular phone industry.

**I. The Cell Phone Industry**

The cell phone industry has undergone big changes since the last decade. In 1995, an estimated 33 million Americans had cell phone service; last year, an estimated 233 million Americans did. For a growing number of Americans, the cell phone is their only phone or their primary phone.

At the same time, the cell phone industry, through numerous mergers and acquisitions, has become much more concentrated. By some estimates, just four companies control about 80 percent of the market. In some smaller markets, there are even fewer carriers with adequate service. Less competition makes it more difficult for consumers to shop around for the best service at the lowest rates.

Over the last 3 years, the Better Business Bureau reported that the cell phone industry has generated more complaints than any other of the 3,600 industries in America. According to the American Customer Satisfaction Index, the cell phone industry has continually ranked in the bottom five industries for customer satisfaction.[1]

**II. Contracts and Contract Extensions**

Mergers and acquisitions are not the only thing that has reduced competition in this industry. The companies' business and contracting practices have also impeded consumers' ability to move to a competitor when a company provides poor service. Many cell phone companies require their customers to enter into long-term contracts of up to 2 years in length and require customers who terminate the contract early to pay substantial termination fees, often of several hundred dollars. These termination fees often bear little or no relation to the actual costs incurred by the company in terminating the contract early. The lengthy contracts and early termination penalties have the effect of locking consumers in with one company for extended periods of time. My office has received complaints from consumers who were asked to pay sizable termination fees even when they canceled their contracts for very legitimate reasons, such as because their phone did not work or they couldn't get the service that was promised in their home area.

In other words, consumers have found themselves trapped in lengthy contracts even where, as a practical matter, they could not even use their phone. Indeed, after hearing from many men and women in the military who were required to pay termination penalties to cancel their service when they were deployed to active duty, my office drafted and the Minnesota legislature passed this year consumer protections that allow men and women in military service to cancel their service without penalty when deployed to active duty. The fact that it takes a law to stop cell phone companies from penalizing men and women in uniform with early termination penalties simply because they needed to cancel their phone service while serving their country highlights the problems in this industry.

In a fair consumer transaction, there is transparency and a "meeting of the minds" between the business and the consumer. The business agrees to sell the consumer a product with disclosed terms for a disclosed price, and the consumer agrees to pay it. Both sides know what the deal is, they both want to enter the deal, and they both give knowing consent to its terms. In other words, there is a fair agreement.

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[1] Eleazar David Melendez, I'm About to Lose You, *Newsweek,* August 6, 2007, at 36.

Many consumers report to our office that their cell phone companies didn't treat them that way. Some companies use even the smallest change in a customer's phone service—such as adding or dropping minutes, adding or deleting a family member, or adding a new number—as justification to extend the consumer's contract for yet another lengthy period of time, often as long as 2 years. These companies have used even the smallest change in a customer's phone service as an opportunity to trap the consumer in a new contract of up to 2 years with termination penalties of up to $200. *Consumer Reports* writes that the biggest nationwide complaint that consumers have about their cell phone is that making minor changes to their service—such as increasing minutes or adding a number—can result in lengthy contract extensions. Many consumers who complain to my office report that they first learned that their contracts were extended after the fact, when they changed to a different wireless service or canceled their service and were hit with substantial termination penalties.

The consumers who have complained about these practices range from individuals to businesses, rural to metro, elderly to young, and include people from all walks of life, ranging from Ph.D.'s and business executives to retirees and construction workers. Last month my office filed a lawsuit against one large national provider alleging that it violated Minnesota consumer protection laws by extending the terms of consumers' wireless contracts for up to 2 years without giving adequate disclosure or obtaining the knowing consent of the customer when they made small changes to their wireless phone service. *See State of Minnesota* v. *Sprint Nextel Corporation*.

**III. Why Federal Legislation Is Important**

In addition to the problems discussed above, consumers have complained to our office about a variety of other cell phone problems, including that their companies did not provide them with coverage maps that adequately described the coverage areas, that they cannot understand the convoluted bills sent to them by their carriers, and that their carriers changed the terms of the deal without giving them adequate notice of the changes.

To address some of these abuses, in 2004, the Minnesota Legislature enacted the "Consumer Protections for Wireless Customers" Act. Among other things, the statute required providers to give customers 60 days' notice before any substantive change in the contract, which would not become effective unless the consumer "opted in" to the change. The cell phone industry challenged the law in Federal court before it was set to go in effect, arguing that Federal law preempts states' ability to regulate the rates that companies charge and that the Minnesota law in effect regulated rates. The district court rejected the industry's arguments, but the U.S. Court of Appeals for the Eighth Circuit struck down Minnesota's law as being preempted by Federal law. The propensity of the cell phone industry to challenge legitimate state consumer protection regulations is another reason why Congress should act in this area.

The Eighth Circuit Court of Appeals did recognize that states can regulate "other terms and conditions" of cell phone service besides rates, such as consumer protection, consumer fraud and contract law matters. I note that Senate File 2033 by its express terms does not preempt state laws. This is an important provision, and I strongly encourage the Congress not to preempt state consumer protection laws that are more protective of consumers.

Fair business dealings require transparency so that consumers can shop for the best service at the lowest rates. Transparency requires that the consumer be armed with information to make an informed, knowing decision. That does not occur when companies fail to provide adequate coverage maps or fail to adequately inform the consumer that even minor changes to their plans will trap them in lengthy contract extensions that they can only exit at a steep price.

The burden should not be on the consumer to figure out the rules of the cell phone shell game. There needs to be more transparency and more fundamental fairness in consumer cell phone transactions. The U.S. Congress should pass meaningful consumer protection legislation so that consumers are treated fairly and not subjected to a game of "hide the ball" when navigating the cell phone maze.

I thank you again for holding these important hearings.

Senator KLOBUCHAR. Thank you very much.
Mr. McAdam?

**STATEMENT OF LOWELL C. MCADAM, PRESIDENT AND CHIEF EXECUTIVE OFFICER, VERIZON WIRELESS**

Mr. MCADAM. Thank you, Madam Chair. With your permission, what I would like to do is set aside my oral testimony and just speak to the Committee here for a few minutes about the industry that I am so proud to be here representing today.

It's been very gratifying to hear what the Senators have said. You clearly recognize the vibrance, the competitive nature, and the innovative spirit that's alive in the wireless industry today. I personally worked starting up wireless companies in Europe and in the Far East and I can tell you that by any measure we have the most vibrant company and industry around wireless of anywhere in the world.

Now how did we get here? Well, I think we got here through the vision and the wisdom of the Clinton Administration in 1993 by establishing the light touch on this industry that was mentioned by several of the Senators. The Administration recognized that the best way to take care of customers was to let multiple carriers compete for their business and earn it every day, and that's what we have created in the industry.

Now, we've been invited here to talk about what we can do better. Let me say for Verizon Wireless, we are always focused on what we can do better. We talk to customers every day. We don't need interference in talking directly to customers because we have to compete to earn their loyalty and keep them as customers as we move forward.

We've also been asked to come and comment on S. 2033. I don't believe that this is necessary legislation and in fact I think that it could be harmful to the consumer. Now let me say what I mean by that. First, I think a set of regulations will establish a minimum requirement that when a carrier diverts from that minimum requirement they will be questioned by regulators across the country. All that will do is slow down a very innovative and dynamic industry.

Second, I think it will create a patchwork of regulation. As Senator DeMint said, our industry has evolved long ago from a state-by-state industry. We are a national industry. If an industry needs to respond on a state-by-state basis, how will it serve its customers that today are made up, in our case of 60 percent of family share plans, where children are scattered in schools across the country? We need to be able to service on a national basis with a consistent set of rules.

Finally, I think we have demonstrated the innovative nature, the investment we have made in this business. We have a lot to be proud of. But I think we have the most to be proud of that we have put the ultimate authority and the ultimate power in the customers' hands. They can take their service and leave and go to one of seven carriers, the one that earns their business the most. The carriers are focused on competing every day to make sure that they attract as many of those customers and retain them as they can.

So my plea to the Committee is let the industry continue to compete.

[The prepared statement of Mr. McAdam follows:]

PREPARED STATEMENT OF LOWELL C. MCADAM, PRESIDENT AND CHIEF EXECUTIVE OFFICER, VERIZON WIRELESS

Good morning, Chairman Inouye, Co-Chairman Stevens and Members of the Committee. It is a privilege to be here this morning. Thank you for affording me this opportunity to share with you the views of Verizon Wireless on "Consumer Practices of the Wireless Industry."

I want to make two overall points in my testimony today:

First, the wireless industry is one of the greatest success stories in the history of the American economy. We began in the mid-1980s, offering only car phones and then progressing to large, bulky bag and brick phones. Coverage was spotty, voice quality was poor, and prices were high. The industry mustered only a few hundred thousand customers during its early years.

Look how far we've come in the short 20 years of our existence. The wireless industry today serves over 230 million customers. The industry has invested tens of billions of dollars, creating millions of well-paying jobs and building multiple state-of-the-art networks covering nearly the entire population of the United States. Twenty years ago we offered one service—voice calling—over a small number of devices. Today we offer a multitude of futuristic devices and thousands of amazing applications, delivered at broadband speeds unimaginable even 5 years ago.

Wireless devices today are highly sophisticated consumer electronics computers, not mere telephones. Consumers now have a myriad of choices among cellphones, PDAs, air cards, and other devices. Yes, these devices can make and receive calls, but they're also digital cameras and camcorders, Internet access devices, computer modems, video and television receivers, tape recorders, and calculators. Bluetooth technology has unleashed even more capabilities, allowing customers to work more easily while on the go. New and better devices, with faster processors, larger memory capacity, and better battery life are introduced weekly.

Today's wireless devices can receive live television broadcasts, send and receive e-mails and attachments, check local traffic reports, locate the cheapest gas station, send text and picture messages, download music both over-the-air and from our library of over 2 million songs, download videos, ring-tones, ring-back tones, and hundreds of additional applications developed by thousands of entrepreneurs, including navigation services, puzzles and games. Customers are gobbling up these 21st century applications at astonishing rates. Just last month, for example, our customers sent over *ten billion* text messages across our network. We are constantly offering new and innovative cellphones and applications to satisfy consumer demand for the latest and greatest products and services.

Perhaps the most amazing aspect of this story is that even as the industry has invested tens of billions of dollars, prices have dropped dramatically for consumers. More than anywhere else in the world, the American consumer has reaped the benefits of lower wireless prices for better wireless services. The cost per voice minute, which was about one dollar twenty years ago, has dropped to *7 cents* today.

And let us not forget the key role cellphones now play in protecting and enhancing public safety. During the terrible hurricane seasons of 2004 and 2005, the wildfires in Southern California, and other recent emergencies customers and first responders have relied increasingly on commercial wireless networks to communicate with each other. We and other wireless companies have deployed portable cell sites to disaster areas, handed out devices free of charge, donated millions of dollars in cash and volunteer labor, and have helped those in need in countless other ways. We at Verizon Wireless are also very proud of our Hopeline® program, which recycles phones and makes donations of equipment, cash and services to Domestic Violence prevention programs and shelters throughout the Nation. In addition, the GPS technology in our phones has also enabled us to help public safety officers rescue missing persons and accident victims, and to apprehend criminal suspects. We have received countless commendations from Federal, state and local law enforcement officers for these efforts.

Why has this industry become such a model of success? I have a one-word answer—*Competition.* Back in 1993, when the industry was still young, Congress had the foresight to realize that the wireless industry is not a monopoly, and should not be regulated like a monopoly, either at the state or Federal level. The 1993 legislation removed state regulation of wireless rates and market entry, and opened the floodgates to competition. New companies entered the market. The industry spent billions buying spectrum at auction. Billions more were invested in networks, infrastructure, retail stores, and customer care centers, creating tens of millions of new jobs and stimulating enormous productivity gains for our economy resulting from consumers' ability to work on the go, around the country and around the world. Competition among carriers caused prices to fall, demand to rise, consumer com-

plaints to fall to lower and lower levels (only 11 out of every one million customers today, a rate of 0.00001 percent), and spurred still more innovation and investment, a highly beneficial cycle that has continued to this day. Indeed, just last week *The Washington Post* described our industry as "intensively competitive." The FCC has repeatedly reached the same conclusion.

Much has been made of the iPhone. We think the iPhone is *good* for the industry, even though one of our competitors is offering the device and we are not. The iPhone is far from perfect, as we all have seen. But it unquestionably has challenged the rest of the industry and the handset makers to go back to the drawing board and invent something even better. And now Verizon Wireless, less than 4 months after the iPhone hit the market, has announced that we will sell the Voyager, an amazing phone from LG Electronics that we think will give consumers something cooler, faster, and better. That's what *Competition* is all about.

The state of America's wireless industry today is exactly what Congress and President Clinton hoped for when they decided in 1993 to treat our industry differently from traditional landline telephony. No one can argue that their approach has worked far better than anyone envisioned at the time. The enormous economic growth we've spurred and the incredible yet affordable technology we have delivered to consumers should be celebrated. So why turn the clock back now and risk all that's been accomplished by re-regulating the industry?

The second point I want to make is that Congress should move forward to address two problems threatening the consumer benefits the wireless industry has generated: the threat of patchwork state utility-style, economic regulation, and the unfair and discriminatory state and local tax burden that has been inflicted on wireless customers.

*State Utility-Style Regulation:* The 1993 legislation recognized that states should not regulate wireless rates or entry, but it permitted states to regulate "other terms and conditions" of wireless service. As of today 30 states have chosen *not* to allow their public utility commissions to exercise this authority, in recognition that the competitive marketplace is working. Moreover, 12 of the remaining 20 states have chosen not to exercise any regulatory authority over wireless companies, even though the laws in those states allow such regulation. (I would note that the wireless industry is subject to the jurisdiction of the state Attorneys General in all 50 states, as evidenced by Attorney General Swanson's recent filing of a lawsuit against Sprint alleging violations of Minnesota's consumer protection statutes.)

The issue is not whether states should play a consumer protection role regarding the wireless industry. Of course they should. But they should exercise that role to the same extent they do for other competitive industries, no more and no less. And that means they should exercise that authority through their Attorneys General, by enforcing generally applicable consumer protection laws, *not* through the promulgation of wireless-specific economic regulations by their public utility commissions. Monopoly-style, state public utility regulation will not help consumers in a competitive, borderless, national industry like wireless. A patchwork of potentially conflicting, inconsistent state utility regulations would thwart the investment, innovation, and job creation that has brought so much benefit to wireless consumers since 1993.

The vast majority of states have not seen any need to use the "other terms and conditions" loophole to regulate the wireless industry. Those states have recognized that such authority is not necessary to protect their consumers. Last year, this Committee agreed with those states and acted to close the "other terms and conditions" loophole once and for all by a vote of 15–7. We would urge the Committee to do so again. Last year's bill called for one set of national rules for *all* consumers in *all* states rather than a patchwork of multiple, different and potentially inconsistent state rules. At the same time, the bill maintained state authority to protect consumers against unfair and deceptive practices in the wireless industry, just as states do for other competitive industries.

*Discriminatory Taxation:* Wireless customers have for years been burdened with unfair and discriminatory state and local taxation. On average, almost 15 percent of a typical consumer's wireless bill goes to pay taxes, fees and surcharges to the Federal and state/local governments, shouldering more than twice the taxes assessed on all other general business goods and services. Between January 2003 and July 2005 the effective tax rate for wireless services has increased nine times faster than the tax rate on other taxable goods and services.

The wireless industry and its consumers should pay our fair share to support the government but we shouldn't have to pay twice our share. Others at the State levels of government share our concerns—numerous times over the past 7 years, the National Governors Association and National Conference of State Legislatures have urged states to reform their telecommunications tax laws.

Last year, this Committee acted to redress discriminatory wireless taxes by passing Senator McCain's bill by an overwhelming 21–1 margin. That Bill would have prevented states and localities from enacting any new wireless-specific taxes. I urge the Committee to take action once again on Senator McCain's bill, and to add a provision that would repeal all existing discriminatory taxes.

**I. Competition Is Delivering Real Benefits to Wireless Consumers**

Competition is the greatest factor motivating businesses to please their customers. We strive every day in Verizon Wireless to make our existing customers happy, and to attract new customers from our competitors. Verizon Wireless has taken various actions in our continuing effort to offer the most customer-friendly experience in the industry. For example, our longstanding Worry-Free Guarantee provides the following significant consumer protections:

- It allows customers to change to any qualifying calling plan or airtime promotion at any time;
- It promises our customers that we will do our best to resolve any problems with our service or equipment the first time they call;
- It guarantees customer satisfaction for any equipment purchased from us;
- It allows customers to receive a free phone every 2 years with our New Every Two program; and
- Just this month, we expanded the Worry Free Guarantee. Our customers can now change their voice and data plans, selecting different minute allowances or text messaging and data use options, at any time during their contract without changing the end date of their contract or signing up for a new contract term.

In addition to the Worry Free Guarantee, we have taken additional pro-consumer steps in recent months. Two of the most significant are the following:

- In March 2007, we rolled out our "test drive" program which allows new subscribers to use our service for 30 days, and if they are not satisfied, to take their line to another wireless carrier during the first 30 days. We will then issue a credit for all the calls the customer made, along with the customer's monthly access and activation fees. Verizon Wireless stands behind its claims of network reliability, even to the extent of refunding charges for any dissatisfied customer's use of that network during the "test drive" period.
- In November 2006, we replaced the flat early termination fee we charged customers who cancel their service contract early, with a pro-rated fee that declines every month that the customer stays with us.

Verizon Wireless is not the only wireless company to take pro-consumer actions to gain a competitive advantage. Other companies have marketed programs such as rollover minutes, the ability to make unlimited calls to a select group of friends or family regardless of network affiliation, and so forth. Why do I mention these actions? Because they provide real-world examples of how the wireless industry is constantly responding to the needs of their customers. Because they show how providers are constantly differentiating their offerings from each other as a way to compete in this hyper-competitive business. And because they show that companies must listen to and respond to their customers—or lose business. This is precisely how Congress intended this market to work.

In 1993, Congress had the forethought to establish a deregulatory framework for the wireless industry. This limited regulatory approach led to explosive growth in innovation, competition, and investment in wireless networks, providing huge benefits to the national economy. The 1993 amendments Congress made to the Communications Act placed the wireless industry on a path toward innovation, expanded service, and competition that has well served consumers and the American economy. The industry has gone from serving just 11 million customers at the beginning of 1993 to more than 233 million Americans at the end of 2006. An economic study conducted by Ovum, a research firm, indicates approximately 3.6 million U.S. jobs were directly or indirectly dependent on the U.S. wireless industry, and that an additional 2–3 million jobs will be created in the next 10 years. The same study shows the wireless industry generated $118 billion in revenues in 2004 and contributed $92 billion to the U.S. gross domestic product. Ovum estimated that, over the next 10 years, the U.S. wireless industry will generate gains of more than $600 billion

from the use of wireless data services, and will add another $450 billion to the GDP.[1]

Wireless companies compete against each other every day to win new—and each other's—customers. Wireless customers have benefited enormously from this competition. The FCC recently reported that 97 percent of the U.S. population live in counties with at least three service providers, up from 88 percent in 2000,[2] and an average of nearly four carriers provide service in rural U.S. counties.[3] To secure and retain customers, carriers know they must invest in networks. Thus by the end of 2006, carriers had invested more than $223 billion—excluding the cost of spectrum—in building networks to deliver an increasing array of wireless services to consumers.[4]

Let me spend a few moments discussing two key attributes of the competitive wireless market—innovation and differentiation.

*Innovation* is obvious not only in the hundreds of new devices, features and applications that consumers can obtain every year, but also in the deployment of new technologies that allow them to send and receive data at faster speeds. Verizon Wireless, for example, has invested billions of dollars to make not one but two major network upgrades in the past 3 years. First, the company spent $1 billion to implement EV–DO Revision 0, which offered customers download speeds typically at 400–700 kilobits per second. This was in addition to significant network investment, which has averaged over $5 billion each year since 2000. Just as the investment in Rev 0 was finished, we again began upgrading our network to EV–DO Revision A, which further increases download speeds and also provides our customers the ability to upload files eight to nine times faster than before. With "Rev A" broadband service, customers can expect average download speeds of 600 kilobits to 1.4 megabits per second and average upload speeds of 500–800 kilobits per second. Our network allows downloads at these speeds while consumers are in a cab, on a train, or walking down the street, completely free of a desk.

And our competitors are innovating as well, announcing services such as Wi-Fi and Wi-Max, and introducing a broad array of new and different devices.

*Differentiation* is also a hallmark of the industry. Consumers are constantly benefiting from carriers' drive to differentiate themselves and to win customers. What a carrier chooses to offer depends on its assessment of what its own customers want and what it sees as the best path to growth. Some companies may focus on low prices but invest less in high-speed services. Some may focus on "all you can eat" local service in competition with landline telephone service as opposed to nationwide service. Some may focus on customers who don't want or need a month-to-month contract and instead want to prepay for service. Each company is making these choices every day as it focuses on how to win and retain its customers.

In addition to our constant focus on network quality and reliability, Verizon Wireless has sought to differentiate ourselves through our strong consumer and privacy protection actions. For example:

- In 2003, Verizon Wireless was the first national carrier to support Local Number Portability, allowing wireless customers to switch carriers while keeping their phone number.
- In 2004, we announced that we would help protect customer privacy by refusing to participate in a national wireless phone directory, effectively halting this project.
- In 2005, in a first of its kind lawsuit, we began prosecuting pretexters who were trying to illegally obtain and sell confidential customer telephone records.
- Beginning in 2005, we have obtained injunctions against spammers who sent text message solicitations to our customers. We have sued several telemarketing companies and individuals who used pre-recorded messages in Spanish as well as techniques and technology to mask the origin of the call, known as "spoofing."

In part due to these efforts, consumer complaints to Federal and state regulators are few. During each month in 2006, the rate for complaints from our customers

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[1] Entner, Roger and David Lewin, "The Impact of the U.S. Wireless Telecom Industry on the U.S. Economy," *Ovum-Indepen,* September 2005, p. 3.

[2] FCC, "Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Service: Eleventh Report," ¶2, FCC 06–142 (Sept. 29, 2006).

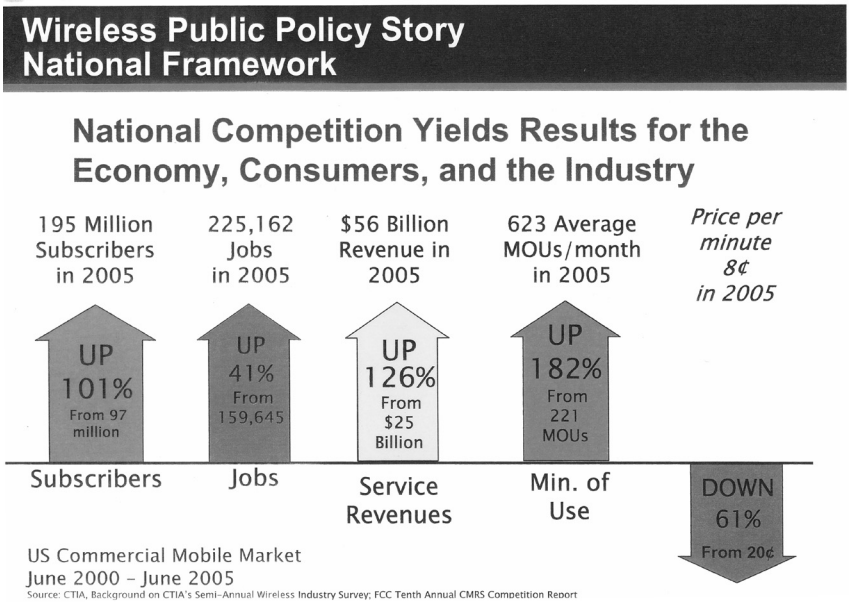
[3] *Id.,* ¶86.

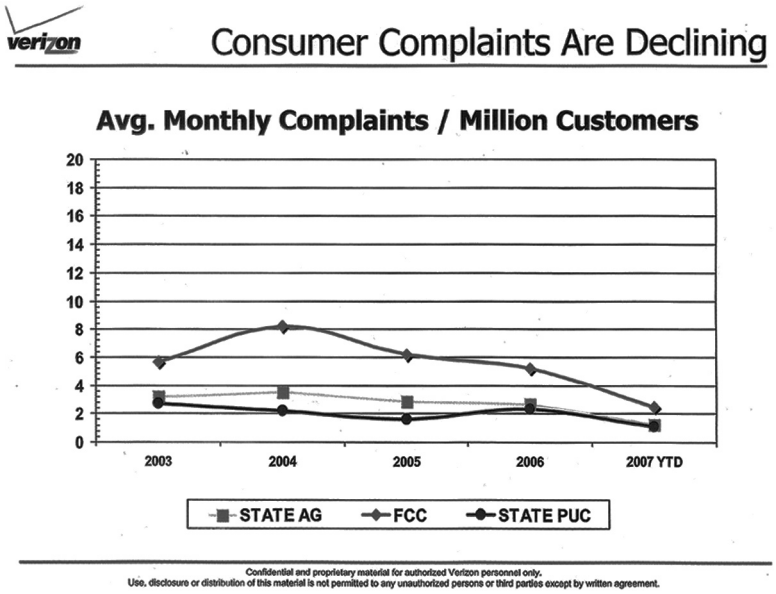
[4] *CTIA's Wireless Industry Indices, Semi-Annual Data Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Year-End 2006 Results,* released May 2007, at pages 7, 156.

to the FCC, state PUCs, or state Attorneys General was 11 out of every 1 million customers—a rate of 0.00001 percent.

Many other wireless providers have also taken similar pro-consumer actions, including adhering to CTIA's Consumer Code, which sets forth detailed practices that carriers must follow in marketing their services and in billing customers.

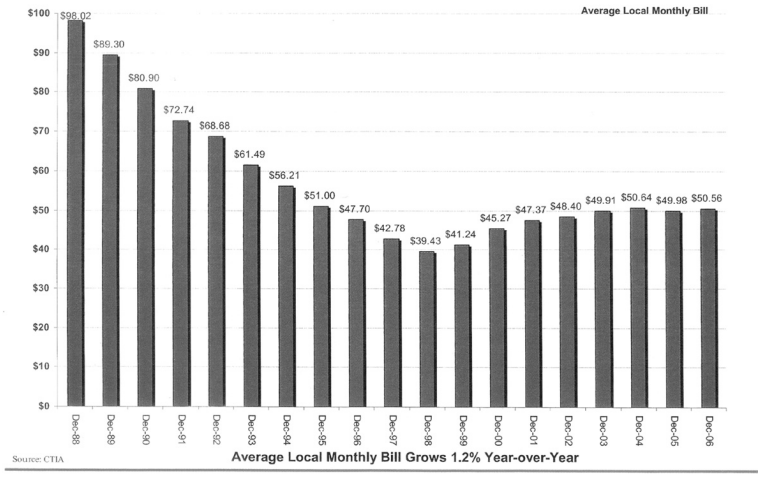
As these examples illustrate, the marketplace, not government intervention, has addressed concerns about the wireless industry listening to its consumers and providing benefits and features that consumers want.



verizon

## Wireless is Competitive




Source: CTIA

**Average Local Monthly Bill Grows 1.2% Year-over-Year**

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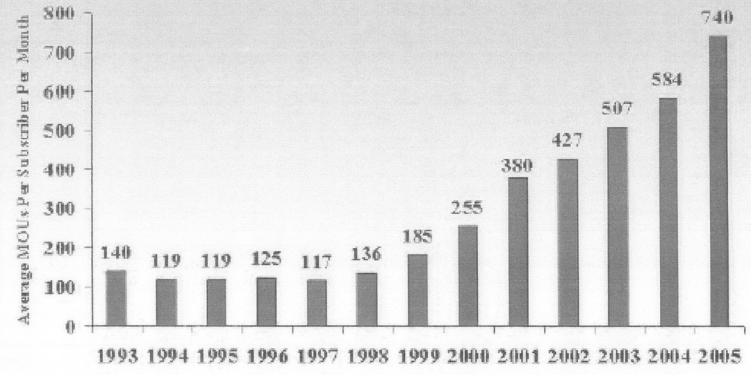
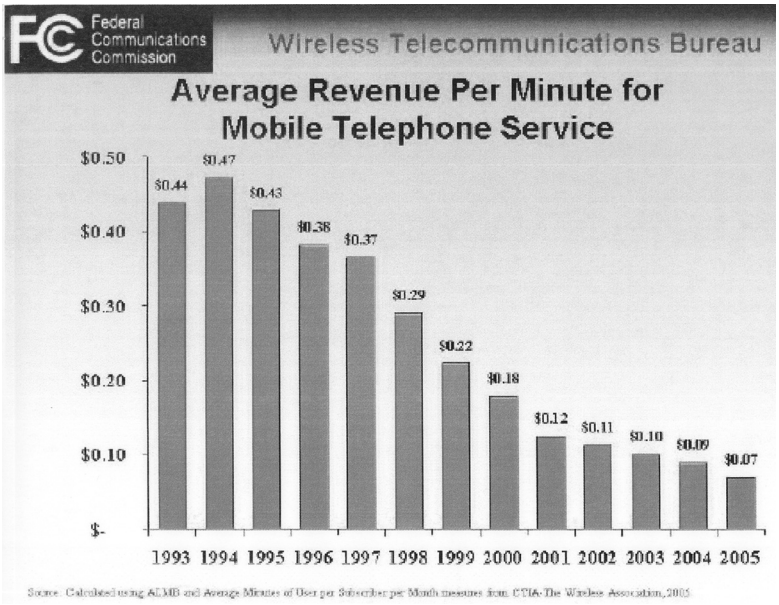
Federal Communications Commission

## Wireless Telecommunications Bureau

### Average Minutes-of-Use per Month




Source: CTIA-The Wireless Association




Despite wireless companies' constant efforts to win and retain customers by meeting their needs, some states are renewing efforts to turn back the clock and regulate wireless service as a public utility. State utility-style regulation is both unnecessary and harmful—unnecessary because the competitive market is already driving the prices, value and services consumers want; harmful because it discourages innovation and competition. Regulation can never respond to customers' demands in the flexible, constantly evolving way that the market does. In fact, it undercuts incentives to innovate and differentiate by establishing a "lowest common denominator" of required practices.

State-by-state wireless regulation is particularly harmful. Because it imposes fixed rules, but only on the carriers in one state, it forces those carriers to follow the same practices as they compete in that state, harming innovation and customer choice. But because state regulation is limited to one state, it imposes costs on carriers who seek to offer customers a unified experience wherever their customers live, work or travel. The FCC has repeatedly documented the many benefits that customers enjoy from the growth of national services and rate plans. But these services and plans succeed because companies are able to offer them consistently to all their customers, wherever they are. Left unchecked, these re-regulatory efforts will force wireless providers to follow different rules in different states and undo the benefits of deregulation.

The wireless industry long ago shed any vestige of monopoly, on which PUC-imposed regulation was based. We are an intensely competitive, 21st century consumer electronics business, far more like Apple and Dell and other high-tech businesses than we are like the telephone companies of 20 years ago. Yet state PUCs do not regulate companies like Apple and Dell. So why should they regulate us, as if we were a 20th century wireline telephone monopoly? We are not asking for special treatment, only the same treatment accorded other competitive businesses. States can and do act against high-tech companies, retailers and other firms when they believe those businesses engage in unfair consumer practices, without the need for utility-type regulation. Wireless should be no different.

**II. Congress Should Close the "Other Terms and Conditions" Loophole and Eliminate State Utility-Style Economic Regulation of the Competitive Wireless Industry**

Verizon Wireless believes that state public utility regulation is not appropriate or needed for the wireless industry. We also believe that the FCC's policy—first adopted during the Clinton Administration—of treating the wireless industry with a "light regulatory touch" is the appropriate model. The market is working and evolving in ways that no inherently rigid and static regulations can. We thus have seri-

ous concerns with S. 2033, which was introduced last month. The Bill contains highly prescriptive, detailed regulations that would deeply intrude into carriers' operating practices and interfere with carriers' ability to innovate and differentiate, essentially placing the FCC and state utility commissions in an operational role inside every wireless company. Moreover, the Bill would do nothing to control the potential for a patchwork of conflicting and inconsistent state regulation that could be imposed on top of the detailed Federal rules; indeed, section 12 of the Bill makes clear that states can impose additional regulations. But even if section 12 were eliminated, section 11(b)(1)(B) would still allow state public utility commissions to engage in their own independent interpretations of the Federal rules, raising the specter of 52 different interpretations of the *same* set of rules (50 State Commissions, the District of Columbia Commission, and the FCC). This sort of model cannot possibly be viewed as beneficial to consumers in a competitive marketplace.

The Committee should reject S. 2033, and instead complete the national, deregulatory structure for the wireless industry it began in 1993, by closing the "other terms and conditions" loophole and adopting a national framework for wireless oversight. This is exactly what this Committee did in June 2006 in the legislation it adopted by a 15–7, bipartisan vote. Section 1006 of the Senate substitute for H.R. 5252 set forth a national framework of consumer protection, while not discouraging the innovation and carrier differentiation that have been the hallmarks of wireless service. That framework would allow for the adoption of a set of comprehensive, national consumer protection standards for the industry that would be sufficiently flexible not to frustrate carriers' pro-competitive efforts to offer different products, services, contract terms and calling plans. State PUCs would no longer have authority to impose utility-style regulation on a competitive industry that is nothing like a utility. But the states would retain all of their power through their Attorneys General to protect against unfair and deceptive consumer practices if and when they determine such practices exist, under their generally applicable consumer protection statutes. Wireless companies would thus be subject to no less state oversight than other competitive businesses.

Only a national framework could serve the public interest because:

- It benefits *all* consumers in *all* states by setting uniform protection and service quality standards for wireless consumers. Individual state-by-state regulation cannot do that.
- It avoids disparate state requirements that raise operational costs and cause uncertainties for companies; create confusion and inconvenience for consumers; delay new services or options that consumers would otherwise enjoy; and discourage investment in new wireless jobs and technology.

*The states would not lose power to address unfair and deceptive practices.* Under the national framework, states would continue to enforce their consumer protection statutes of general applicability, but would not be able impose state-specific wireless regulations. State Attorneys General would thereby lose none of their authority to go after practices that they believe are unfair or deceptive. Our previous CEO made this point in a letter last year to Senator Lautenberg, which is attached to my testimony. States may also adopt consumer education programs, refer complaints to carriers for resolution, bring formal complaints to the FCC against carriers they believe are acting unlawfully, investigate wireless practices, and of course participate in the FCC's national consumer protection rulemaking. This new framework will maximize protections to consumers while avoiding the harms of patchwork state-by-state regulation.

The national framework would not grant any wireless carrier something different from other businesses. Instead, it would harmonize regulation. And, it would otherwise rely on market forces—consumers deciding which providers deserve their business and which do not—to compel providers to excel more effectively than patchwork state PUC regulation, and to drive providers to be more innovative and accountable.

**Conclusion**

We are at a crucial juncture in the development of the Nation's wireless industry. Over the past decade and a half, wireless consumers have come to expect—and rely on—their wireless phones, first as a safety device, then as a convenience, and increasingly an integral part of more than 230 million Americans' daily lives. It may seem like magic, but the work of thousands of dedicated men and women every day helps build, maintain and expand robust and secure wireless networks—and provide the customer service enabling two hundred and thirty million consumers to use our products and services every day. The innovation we see every day, from new products to new and more robust services to consumer friendly initiatives such as the

Worry Free Guarantee, has brought more benefits to the American consumer than any government mandate could deliver. Verizon Wireless urges the Committee to avoid the temptation to impose burdensome regulation on a competitive, innovative and robust industry. We call upon the Committee to vote once again to free our customers from the unfair burden of discriminatory state and local taxation. All we ask for ourselves, Mr. Chairman, is to LET US COMPETE.

Thank you for the opportunity to appear before you today and I look forward to answering any questions you may have.

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VERIZON WIRELESS
*Basking Ridge, NJ, June 27, 2006*

Hon. FRANK R. LAUTENBERG,
U.S. Senate,
Hart Senate Office Building,
Washington, DC.
RE: WIRELESS TELECOMMUNICATIONS LEGISLATION

Dear Senator Lautenberg:

I am writing to follow up on our telephone conversation this morning concerning the wireless provisions (section 1005) in the Commerce Committee's telecom bill.

Verizon Wireless, one of New Jersey's largest employers, strongly supports section 1005, and we ask for your support. You expressed concerns about the Bill's impact on protecting New Jersey consumers. As you know, the Bill specifically preserves the role of the states in protecting consumers, by guaranteeing States the power to continue enforcing against wireless carriers the same consumer protection laws that are "generally applicable to businesses in the state." Attorney General Farber will have *exactly* the same powers under the Bill as she does today to enforce New Jersey's consumer protection laws against wireless carriers.

The only change the Bill makes is to *protect* consumers from backward-looking, monopoly style economic regulation. State utility regulators want to treat the wireless business as if it were a monopoly, controlling the font size in our advertising, the prices we charge, the services we offer, and the investments we make. The prospect of fifty different sets of such rules would *harm* consumers by driving costs up and investment down. But wireless companies are not monopolies, and they should not be regulated as such. As you know, the wireless business is a fiercely competitive, nationwide industry. Wireless companies fight each other every day to win each other's customers. And wireless customers have benefited enormously from this competition. Wireless prices have fallen over *eighty percent* in the last 10 years. Employment and capital investment in New Jersey has skyrocketed. Innovation has delivered amazing new products and services to New Jersey consumers.

Verizon Wireless has competed successfully and become the leader in the wireless industry by focusing on consumer issues. We were the first carrier to support local number portability. We were the first carrier to announce we would not list our customers' numbers in a wireless telephone directory. We were the first carrier to fight spam and pretexting. We didn't need utility regulators to tell us to do these things. We did them to beat the competition, win new customers and keep our current customers happy. And tomorrow we'll do more of the same—in a major speech at the Yankee Group Conference in New York City, I will announce that Verizon Wireless will become the first carrier to pro-rate early termination fees nationwide, because that is something our customers want.

Senator, I ask for your support for this important legislation. We are at a crucial juncture in the development of the Nation's wireless industry. The choice is stark and simple: do we want state utility regulators to stunt the progress of the wireless industry with 20th century style economic regulation, or do we want to see this 21st century engine of economic growth generate more jobs, more investment, more innovation, and lower prices for New Jersey's wireless consumers, all the while under the watchful eye of the New Jersey Attorney General?

We hope you opt for the latter.

Very truly yours,

DENNIS F. STRIGL,
*President and Chief Executive Officer,*
Verizon Wireless.

Senator KLOBUCHAR. Thank you.
Mr. Pearlman?

**STATEMENT OF PATRICK PEARLMAN, DEPUTY CONSUMER ADVOCATE, CONSUMER ADVOCATE DIVISION, PUBLIC SERVICE COMMISSION, STATE OF WEST VIRGINIA**

Mr. PEARLMAN. Thank you, Madam Chair and Members of the Committee. Thank you for inviting me to testify today regarding wireless consumer protection as well as the Cell Phone Empowerment Act. My name again is Patrick Pearlman. I'm a Deputy Consumer Advocate with the Consumer Advocate Division of the West Virginia Public Service Commission, and my office's charge is to represent the interests of residential and small business consumers of utility services, and those include telephone service, which obviously also includes landline and wireless issues. Our office has taken a very active interest in matters relating to wireless consumer protection as well as matters regarding line items, truth in billing, early termination fees, and, as a member of the National Association of State Utility Consumer Advocates, or NASUCA, as we like to call it, my office has participated in Federal proceedings before the FCC as well as in Federal court dealing exactly with those issues.

I'm here to basically provide both my office's perspective on this legislation, the Cell Phone Empowerment Act, as well as appear on behalf of NASUCA and render at least some opinions of the organization as a whole, and also answer the Committee's questions.

At the outset, we'd like to commend Senator Klobuchar, Senator Dorgan, and Senator Rockefeller for sponsoring this legislation. I think it's fair to say that our experience is that consumers would say it's about time. For years consumers have been subject to a number of practices, all of which are identified in the proposed legislation, that have left consumers feeling like they're on the losing side of an unequal battle against the cell phone companies.

We're excited about the proposed legislation and we look forward to working with the Committee and the Committee's staff in the future to address specific provisions of the bill, as well as specific examples of problematic practices within the industry.

In the brief time that I have for an opening statement, I'd like to go ahead and address the most important points for the Senators to consider in addressing wireless practices, both in this bill and apparently in other bills that have been introduced recently. First, it's our belief that the wireless industry, as everyone has pointed out in this room, has grown to a very, very large industry indeed, with over 233 million customers. Since 1993 when there were approximately 11,000 cell sites, we now have over 195,000 cell sites. The industry makes over $100 billion in revenues a year.

One aspect that has not been addressed in our opening statements is the fact that wireless is indeed holding itself out as a substitute for landline service. We do have consumers who are cutting the cord. The exact percentage of those consumers is somewhat open to debate. But I think the best evidence that the wireless industry considers itself a substitute for landline is the number of wireless companies that have applied to states and to the FCC for designation as eligible telecommunication carriers. Such designation, as the Committee knows, entitles those carriers to receive Federal support from the Federal Universal Service Fund. In most States, conditions are associated with that status that are akin to

the sorts of conditions that are imposed on incumbent landline carriers.

Second, the market alone historically has not been a sufficient constraint on unreasonable wireless practices. That is the same experience that we have seen on the landline side as well. Examples of such market failures are instances where regulation was required to be implemented in order to deal with slamming complaints, with cramming complaints, the number of unauthorized charges appearing on landline customers' bills. Truth in billing issues had to be finally addressed by regulation, as did wireless number portability. The list goes on. There is also E–911.

These services, these issues, were not addressed by the market alone and in fact regulation was necessary in order to step in and constrain some of those practices.

Third, the FCC and Federal law has not been adequate in acting as a restraint on abusive carrier practices. We point out the fact that, in the Truth- in-Billing context, in the 8 years since the rules went into effect, there has been one FCC enforcement action dealing with Truth-in-Billing.

Fourth, we support the principle of national standards to serve as a floor so long as those are vigorously enforced, but we believe that it would be a serious mistake to preempt State law and enforcement of other terms and conditions altogether.

Thank you.

[The prepared statement of Mr. Pearlman follows:]

PREPARED STATEMENT OF PATRICK PEARLMAN, DEPUTY CONSUMER ADVOCATE, CONSUMER ADVOCATE DIVISION, PUBLIC SERVICE COMMISSION, STATE OF WEST VIRGINIA

My name is Patrick Pearlman. I am a Deputy Consumer Advocate with West Virginia Consumer Advocate Division. My office is charged with the responsibility of representing West Virginia's residential and small business utility ratepayers in state and Federal proceedings that may affect such consumers' rates for electricity, gas, telephone and water service. My office is also a member of the National Association of State Utility Consumer Advocates (NASUCA), an organization of state utility consumer advocate offices from more than 40 states and the District of Columbia, charged with representing utility consumers before state and Federal utility commissions and before state and Federal courts.[1] I have been a Deputy Consumer Advocate since May 2003 and have represented NASUCA in proceedings before the Federal Communications Commission ("FCC") and in Federal courts involving both wireless and landline carriers' billing practices, as well as proceedings involving wireless carriers' early termination fees ("ETFs") and related contractual issues. I have previously addressed the FCC's Consumer Advisory Committee and the National Association of Regulatory Utility Commissioners ("NARUC") regarding such matters. I greatly appreciate the opportunity to testify at this hearing regarding issues that affect wireless consumers and S. 2033, the Cell Phone Empowerment Act.

**I. Introduction**

For nearly twenty years, commercial mobile radio service ("CMRS") providers' (*i.e.,* wireless carriers) billing and contractual practices have been largely unregulated. This "hands off" approach may have made sense back in the day when a nascent wireless industry was struggling to establish itself as an alternative form of telecommunications service, subscribed to by a small minority of Americans, and needed protection from the monopoly-based regulatory regimes that applied to traditional landline service. That approach—specifically with respect to the wireless industry—no longer makes sense in today's telecommunications market. And that approach makes no sense where, as here, market forces have failed to protect wireless consumers against various practices that, in other markets, would historically have been characterized as "unconscionable" or in violation of fundamental principles of contract law.

**II. Background**

Prior to 1993, land mobile radio services (as wireless was then called) were subject to two inconsistent regulatory schemes depending on whether the services were "public" or "private." Providers of "public mobile services" were treated as common carriers, subject to regulation by both the FCC and States. "Private land mobile services," in contrast, were exempt from common carrier regulation altogether.[2]

In 1993, Congress altered this framework by amending Section 332(c) of the Federal Communications Act ("Act").[3] Among other things, Congress: (1) eliminated the disparate regulatory treatment of "private" and "public" mobile services by introducing the concept of "commercial mobile radio service;" (2) amended Section 332(c)(3)(A) of the Act to prohibit State and local governments from regulating "the entry of or the rates charged by any commercial mobile service or any private mobile service," but expressly preserved States' authority to regulate "other terms and conditions" of CMRS; (3) authorized States to petition the FCC for authority to regulate CMRS rates where the service is a replacement for landline service and the market fails to protect consumers from unjust and unreasonable rates; and (4) authorized the FCC to forbear from applying most provisions in Title II of the Act to CMRS and CMRS providers, which the FCC promptly did in 1994.[4] Congress made clear, however, that the amendments were intended to give the nascent wireless industry time and space to grow, by eliminating the disparate regulatory treatment of "private mobile" and "public mobile" wireless services, while providing consumers with needed consumer protections.[5]

Yet in the wake of Congress' 1993 amendments, and the FCC's orders implementing those amendments, many States ceased utility regulation over wireless carriers' "other terms and conditions" of service. In other States, some commissions adopted exemptions or greatly relaxed standards for, among other things, wireless billing and other business practices. Despite these actions, however, generally applicable State consumer protection laws and laws regulating the formation and enforcement of contracts continued to apply to wireless carriers. Since 1993, such laws have become a significant source of State efforts to restrain unfair billing and other, unreasonable non-rate practices of wireless carriers. As a result, the wireless industry has enjoyed huge Federal financial support based on technology-neutral rules governing universal service, while at the same time enjoying relative freedom from regulation based solely on their particular (wireless) technology.

**III. Wireless Industry's Efforts To Preempt State Law**

Even the minimal oversight States retain under the Act has been too much for the wireless industry. Over the past two decades, the wireless industry has vigorously sought to avoid virtually any State regulation of carriers' contractual, billing and related business practices on the theory that such laws are preempted "rate" regulation. Wireless carriers have sought to invalidate State laws governing:

- Late payment penalties/fees.[6]
- Municipal right-of-way and other assessments.[7]
- State universal service fund assessments.[8]
- Unilateral contractual provisions (*e.g.,* pre-printed contract terms limiting the carrier's liability, allowing carriers to change material terms without notice, requiring arbitration).[9]
- Deceptive advertising of rates and charges.[10]
- Early termination fees.[11]
- Regulatory fees and assessments.[12]

While wireless carriers have often failed to convince State and Federal courts that virtually any State law regulating their billing, contractual and related practices is preempted, the industry has been more successful selling this argument to the FCC. For example, purportedly in reaction to NASUCA's March 2004 petition for declaratory ruling that various "regulatory" line item charges imposed by wireless and landline carriers violated the FCC's Truth-in-Billing and other orders, the FCC in a 2005 order declared all State laws requiring or prohibiting line items included on wireless carriers' monthly bills to be preempted "rate" regulation.[13] I say "purportedly" because neither NASUCA's petition, nor the FCC's public notice regarding that petition, ever suggested preemption was an issue. In fact, the FCC's 2005 order candidly acknowledged that preemption arose in wireless carriers' reply comments or *ex parte* presentations after comment closed.[14] Moreover, in that same order the FCC initiated a rulemaking and sought comment regarding its proposal to adopt more stringent Truth-in-Billing regulations in response to evidence of significant consumer complaints and confusion regarding carriers' bills, but then, paradoxically,

sought comment regarding its tentative conclusion to preempt all State non-rate regulation of carrier billing practices.[15] The FCC has not yet adopted final rules or adopted its tentative conclusions regarding such preemption.

Nor has the FCC ruled on two petitions, filed by the wireless industry's trade association and a wireless carrier, seeking a declaratory ruling that early termination fees ("ETFs") are "rates" that States cannot regulate. However, press reports suggest Chairman Martin is leaning toward preemption.[16]

**IV. Continued State Regulation of Wireless Practices Is Needed**

Consumer advocates are concerned that the wireless industry will use S. 2033 to achieve ends counter to the bill's goals, much like the wireless industry used NASUCA's petition to tighten up the FCC's Truth-in-Billing rules as an opportunity to further its effort to preempt State laws. We hope that will not be the direction in which the Senate moves because State consumer protection laws need to continue to apply to the wireless industry.

**A. Wireless Carriers' Unreasonable, Anti-Consumer Practices**

About the only thing that keeps pace with the rapid changes and developments in wireless services and technologies is the ingenuity and creativity of wireless carriers in adopting a variety anti-consumer billing, contractual and related practices, including but not limited to those discussed below.

*1. Line Item Charges*

Wireless carriers continue to include a variety of line item charges and fees on consumers' monthly bills that primarily recover ordinary costs of doing business, such as complying with government laws and regulations. While some carriers pass along their cost of complying with State and Federal laws in their rates, others have adopted numerous line item charges in addition to their rates for service, often denominated in such a way as to suggest that the charge is imposed by the government rather than the carrier, and which are typically not advertised and disclosed, if at all, in the very fine print of the carrier's service agreement or other materials. Such line item charges are nothing more than hidden rate increases. In this era of mergers and consolidations, wireless carriers have often simply continued the line item charges of the carriers they have acquired. For example, AT&T Mobility (formerly Cingular) charges either pre-merger Cingular's "Regulatory Cost Recovery Charge of up to $1.25"[17] or pre-merger AT&T Wireless' Regulatory Programs Charge of $1.75. Potential customers have no way of knowing which charge applies, and in areas served by both carriers pre-merger, either charge could apply. Nor are customers likely to find out what costs each charge recovers, since both purportedly serve the same ends despite originating with different carriers and different networks.[18]

Likewise, Sprint Nextel continues imposing line item charges adopted by the pre-merger carriers, Sprint and Nextel. Customers will find it difficult to determine what those charges will be since Sprint Nextel's "Terms and Conditions of Service" simply advise customers that their "[r]ates exclude taxes and Sprint Fees, such as a USF charge, cost recovery fees, and state/local fees that vary by area."[19] Much further into Sprint's Nextel's contract, the carrier describes surcharges ("Sprint Fees") that may apply to customers as "including, but not limited to: Universal Service Fund, E–911, Federal Programs Cost Recovery, Federal Wireless Number Pooling and Portability, and gross receipts charges."[20] Customer bills, however, do not provide any itemization of these surcharges but rather simply provide a single line for "Taxes, Surcharges and Fees."

*2. Descriptions of Service Coverage*

Consumers continue to have difficulty determining whether and where they will have wireless service. It is generally understood that "dead spots" exist where a wireless signal may be lost, such as when a high hill or mountain blocks a driver's signal and indeed, the FCC's rules do not consider this a lack of service. However, it has been my experience in West Virginia that some "dead spots" are very large and never appear on the coverage maps provided by carriers in their marketing or sales materials. Another deficiency in coverage maps provided by carriers is the general lack of any information showing county boundaries, which is the sort of information that allows consumers to gain an accurate understanding of where they are likely to have service. We know that carriers have very detailed signal coverage maps but refuse to share them with customers, some going so far as to claim that the areas they actually serve constitutes competitively sensitive information. This is but one practice that deprives consumers of vital information they need to make an informed, intelligent choice among wireless carriers—and to avoid the costs that

flow from choosing a carrier who cannot provide adequate service at the price advertised.

More troubling, however, are those instances in which a wireless carrier targets its marketing efforts at consumers who are located in areas that the carrier does not, and cannot, serve. Such efforts led the California Public Utilities Commission ("CPUC") to fine Cingular $12.14 million, and to require the carrier to issue at least $18.5 million in refunds for ETFs collected from former customers who terminated their service from January 2000 through April 2002.[21] Similarly, wireless carriers' exaggerated representations regarding coverage led the Attorneys General of 33 states to investigate the three largest wireless carriers (at that time)—Cingular, Sprint and Verizon Wireless—and to ultimately enter into settlement agreements (called "Assurance of Voluntary Compliance") in 2004 that required the carriers to provide more accurate maps, disclaimers and to pay $1.66 million each to the States. In NASUCA's opinion, the AVC provisions regarding representations concerning service area would be a good model for either Congress or the FCC to build upon in addressing this issue.

*3. Early Termination Fees*

Another issue that has generated considerable heat, if not light, is the widespread use of ETFs by wireless carriers in conjunction with one- or two-year service contracts. The wireless industry asserts that 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 the carriers fully recover customer-acquisition costs, and claims consumers "prefer" long-term contracts coupled with ETFs in order to obtain lower cost service and equipment.[22] Such evidence as there is strongly contradicts these assertions.

For one thing, evidence supporting the wireless industry's claims about the extent to which equipment or customer acquisition costs are subsidized by ETFs is sorely lacking. No independent authority has ever reviewed the cost of equipment in order to verify, let alone quantify, the wireless industry's claims. For its part, the FCC has not considered the issue since its 1992 determination that "subsidizing wireless phones" via ETFs, coupled with fixed term contracts "is an efficient promotional device which reduces barriers to new customers."[23] That determination itself was not based on a thorough review of such costs. NASUCA called upon the FCC to revisit the issue in its comments in response to CTIA's petition for a declaratory ruling preempting State regulation of ETFs,[24] and recently adopted a resolution repeating that call.[25] To-date, the FCC has not responded.

In any event, the manner in which wireless carriers apply ETFs appears to undercut their assertions regarding the degree to which ETFs subsidize equipment and other costs. Most ETFs range from $150 to $200 per line/handset and, except for Verizon Wireless, no major wireless carrier prorates the ETF over the life of the contract or any other period.[26] Thus, a customer with a two-year contract who cancels service in the twenty-third month of the contract pays the same ETF as a customer with a similar contract who cancels service in the first month. Nor do the ETFs vary by wireless rate plan or by equipment purchased by the customer. If ETFs truly served to lower equipment prices and reduce customer acquisition costs rather than penalize customers for terminating service, one would expect ETFs to be prorated or to vary according to the equipment purchased or rate plan selected. The fact that they do not strongly suggests something other than the discounting of service is at play and, again, the evidence appears to bear this out.

In fact, ETFs are decidedly anticompetitive since they appear to be primarily aimed at tying customers to their carriers and reducing customer "churn." An August 2005 report issued by the Massachusetts Public Interest Research Group ("MASSPIRG") estimated that ETFs cost consumers $4.6 billion from 2002 through 2004 in penalties paid or foregone opportunities to obtain lower-cost services.[27] Moreover, a survey conducted on behalf of MASSPIRG found that, of the 775 wireless customers surveyed, 36 percent responded that ETFs had prevented them from switching carriers, while 47 percent indicated that they would "switch cell phone companies as soon as possible" or "consider switching cell phone companies" if ETFs were eliminated.[28] Only 10 percent of wireless customers surveyed responded that they had terminated service early at least once in the preceding 3 years (or roughly 3 percent per year) and had chosen to pay the ETF in order to switch, typically for either lower rates or better service.[29]

Finally, even if equipment prices are lowered by ETFs and long service contracts, such measures reduce potential competition because such restraints on customer choice are coupled with carriers' and manufacturers' practice of physically locking handsets to the carrier's service. Thus, in addition to any ETF liability a customer is willing to incur in order to obtain cheaper or better service, the customer is forced

to also incur the cost of a new handset as well as service activation or number porting charges. Such practices are a dead-weight waste of resources and a brake on more vibrant competition.

*4. Independent Sales Agents' ETFs*

Another problem with ETFs, and the justification for them, is the fact that independent sales agents for wireless service and equipment also charge ETFs, oftentimes much higher than those charged by wireless carriers. This problem was highlighted in the Utility Consumer Action Network's ("UCAN") comments to the FCC in response to the wireless industry's petition to preempt State regulation of ETFs. According to UCAN—and as found by the CPUC in the proceeding that led to the $12.14 million fine assessed against Cingular—independent sales agents in California tacked on additional ETFs of up to $550 per handset, in addition to Cingular's ETF.[30] Since sales agents do not provide either the service or the equipment, there is no reasonable justification for such ETFs; the fees simply ensure the agents will be paid—either their commission if the customer remains with the carrier for the allotted time, or their ETFs if the customer terminates service before the allotted time has lapsed. Independent sales agents' ETFs also benefit the wireless carrier, by providing a strong disincentive to terminating service early.[31] Significantly, independent sales agents are not subject to regulation by the FCC, though State consumer protection laws might apply—if they are not preempted.

*5. Contracts of Adhesion*

Under most wireless contracts, all the benefits flow in one direction (*i.e.,* to the carrier), and for residential and small business customers there is no real prospect of negotiating over these terms. Such contracts are adhesionary, especially when one considers that virtually all wireless carriers make use of such terms and conditions.

a. Unilateral modification of material terms

Most contracts allow carriers to unilaterally modify the material terms of service, with little or no notice. For example, AT&T Mobility's contract provides that the carrier "may change any terms, conditions, rates, fees, expenses, or charges regarding your service at any time," merely by providing notice to the customer. However, "changes to governmental fees, proportional charges for governmental mandates, roaming rates or administrative charges" require no notice whatsoever.[32] Customers can only terminate their contracts, without incurring ETFs, only for changes that "increase the price of any services . . . beyond the limits set forth in [the customer's] rate plan brochure" or that "materially decrease the geographical area in which your airtime rate applies."[33]

Similarly, Sprint Nextel's contract provides that it "may change any part of the Agreement at any time, including, but not limited to, rates, charges, how we calculate charges, or your terms of Service," commits to provide notice of "material changes" but only "may" provide notice of "non-material changes."[34] What constitutes a "material change that has a material adverse effect" on the customer, however, is solely within Sprint Nextel's discretion. Indeed, the inherently arbitrary power Sprint Nextel has in deciding what changes are "material and adverse" was highlighted twice in the past year when the carrier increased its text messaging charges. When it first increased its text messaging charge (from $0.10 to $0.15/message) in October 2006, Sprint Nextel declared the change to be "material" and allowed customers to terminate service without incurring an ETF.[35] Yet when Sprint Nextel increased the same charge (from $0.15 to $0.20/message) again just 10 months later, it declared the increase to be "non-material" and that customers who terminated service in response would be subject to its $200 ETF.[36] Verizon Wireless' contract likewise permits the carrier to make any changes it deems non-material.[37]

b. Limits on legal remedies

Wireless carriers make extensive terms limiting customers' legal remedies for any cause of action, again to the carriers' benefit. For example, AT&T Mobility's contract requires customers to submit any dispute ("whether based on contract, tort, statute, fraud, misrepresentation or any other legal theory" and regardless of whether the dispute predates the contract) to binding arbitration. Further, by signing up for service with AT&T Mobility, customers "waive their right to a trial by jury or to participate in a class action" and the carrier's liability is limited to $5,000 or the maximum amount allowed in small claims court.[38] Sprint Nextel likewise requires customers to agree to settle any disputes by binding arbitration, to waive their right to trial or arbitration by jury, or to participate in a class action suit.[39] Verizon Wireless' contract similarly requires customers to submit all claims to binding arbitration.[40]

*6. Other Practices*

Another wireless carrier practice merits consideration. In July 2006, after its acquisition of AT&T Wireless, Cingular began notifying roughly 4.7 million former AT&T customers using older, TDMA technology that, effective October 1, 2006, Cingular would begin charging $5/month for each handset.[41] Customers could avoid the surcharge by upgrading their service to Cingular's digital Global System for Mobile ("GSM") service. The surcharge came on the heels of a class action lawsuit, filed in Washington, alleging Cingular violated its merger commitment to maintain service to former AT&T customers by degrading their service to force them to move to Cingular's GSM service. According to that complaint, many of the 20 million former AT&T Wireless customers acquired by Cingular ended up paying $18 fees to switch service and were required to buy new phones and pay other fees to initiate service.[42] It appears Cingular did not consider the additional surcharge to be a service modification entitling customers to terminate service without incurring ETFs. At roughly the same time, Cingular began terminating customers who roamed (*i.e.,* made wireless calls carried on another carrier's network) for more than 50 percent of their monthly usage. The kicker here is that the coverage area for GSM service is typically smaller than that for analog or TDMA service, meaning that those former AT&T Wireless customers forced over to Cingular's GSM service could end up either no longer having service (in which case they were probably locked in by Cingular's ETF) or roaming more often (subjecting them to possible termination by Cingular, after spending the money to upgrade to GSM service).

**B. The FCC's Response Has Been Neither Timely Nor Adequate**

The FCC has not responded to complaints involving wireless carriers' billing and other practices, despite having ample authority to investigate and address unreasonable carrier practices under the Act. It is not as though the FCC is unaware of consumer dissatisfaction or complaints regarding the wireless industry's more egregious practices. According to the FCC's quarterly reports summarizing consumer complaints and inquiries received by its Consumer and Government Affairs Bureau, complaints regarding wireless carriers' billing and rates, early termination fees, marketing and advertising practices (including alleged misrepresentations) have consistently been in the top five categories of complaints received regarding wireless service since the first quarter of 2002.[43]

Despite the relatively high proportion of complaints involving wireless billing and rates (including line item fees and charges), ETFs and marketing practices, the FCC has not undertaken a single enforcement action against any wireless carrier involving such complaints. This is not surprising, given the similar lack of FCC enforcement against landline carriers for violations of its Truth-in-Billing rules. The lack of FCC action was cited by none other than Commissioner Michael J. Copps in his dissent criticizing the agency's 2005 decision to preempt state laws affecting wireless line items:

> The majority says that with the states preempted, the Commission will not hesitate to enforce its truth-in-billing requirements. But to date all the Commission has done is hesitate. In the 6 years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today—the only ones I find involve slamming. Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.[44]

Since Commissioner Copps wrote that dissent, the FCC has dramatically increased its enforcement tally—from 0 to 1.[45]

The wireless industry often cites the relatively low rate of complaints, as a percentage of total customers, received by the FCC as an indicator that there is no problem with its billing or other practices. However, this is more likely due to consumers' understanding that lodging a complaint with the FCC is largely a fruitless exercise. For one thing, customer satisfaction surveys typically show that the wireless industry generally experiences high rates of customer dissatisfaction, yet customers switch carriers "surprisingly infrequently."[46] Moreover, States' experience suggests that consumers often do not register complaints unless they know regulators are investigating wireless carriers' activities and the number of complaints lodged with State regulators is vastly outweighed by the number of complaints lodged with the carriers themselves. For example, while only a few thousand consumers lodged complaints with the CPUC regarding the fraudulent service claims and marketing efforts that led to the $12 million fine against Cingular, the record showed that nearly 144,000 "trouble tickets" regarding such claims were opened by the carrier during the same period.[47]

Similarly, a March 2007 report submitted by the Connecticut utility commission to the State's legislature noted that its toll-free wireless complaint hotline registered over 19,000 calls in 2006 alone (more than the total number of informal wireless complaints received by the FCC during the same time period). However, the report lamented the fact that only 507 callers registered their complaint—most callers aborting the process when they learned the agency had little ability to resolve their complaints.[48] Wireless carriers, naturally, disagreed with the State agency's request for authority to enforce wireless consumer rights and service quality, and instead suggested that the competitive market, combined with state and Federal consumer laws and FCC regulations (the same state laws wireless carriers have been trying to preempt), protects consumers sufficiently.

Consumers are not stupid. They are unlikely to bother agencies to register complaints that they know the agencies cannot, or will not, take meaningful action to address. NASUCA's members understand this practical limitation on consumer complaint statistics very well. It is also something a FCC Commissioner understands as well:

> [NASUCA's] petition was the ideal vehicle for the Commission to initiate a fresh dialogue on how to make bills more honest, readable and easy to understand. . . . Yet we forge ahead [by preempting State laws], bypassing the opportunity NASUCA gave us to rein in incomprehensible bills. I'm afraid consumers will remember that when they called this Commission for help understanding their phone bills, we hung up.[49]

**V. Preemption Is Unnecessary and Will Harm Consumers**

No doubt Congress will be told by the wireless industry that it must have preemption in order to flourish, that the cost of complying with 50 States' laws increases the cost of wireless service, and that that it cannot innovate or offer customers lower rates or better quality services without eliminating State laws that apply to it. Congress has heard this story before, and it is just that—a story.

When Congress amended the Act in 1993, wireless service was primarily a novelty, subscribed to by relatively few Americans (16 million customers) and with a limited footprint (11,550 cell sites).[50] Conditions have changed radically since then. According to the wireless industry's trade association's semi-annual survey, there were over 233 million wireless subscribers in the United States at the end of 2006, and 195,613 cell sites.[51] The wireless industry has experienced spectacular growth, posting double-digit growth in subscribership, revenues and usage virtually every year since 1993, all despite the application of the State laws wireless carriers are likely to claim must be preempted were in effect.[52] Moreover, while the wireless industry has experienced tremendous growth since 1993, it has also become increasingly concentrated. According to the FCC's most recent data, as of the end of 2005, the top four wireless carriers (AT&T Mobility, Verizon Wireless, Sprint Nextel and T-Mobile) held 86 percent of the wireless market. If the fifth largest carrier, Alltel, is included then the top five carriers held over 92 percent of the market.[53] Two of these carriers—AT&T Mobility and Verizon Wireless—are subsidiaries of the two largest landline carriers nationally as well. In other words, State laws that constrain wireless carriers' billing or other business practices are unlikely to jeopardize such large carriers' ability to provide service in the United States, or their relative profitability.

Finally, wireless service has become, more and more, a true substitute for landline service. While estimates vary, there is no doubt that a substantial number of traditional landline customers—especially those who are younger or with lower incomes—have "cut the cord," terminating their landline service and relying purely on wireless to serve their telecommunications needs. Moreover, wireless carriers themselves increasingly regard themselves in the same role as traditional landline carriers. Wireless carriers have sought—and obtained—designation as "eligible telecommunications carriers" ("ETCs") under Section 214 of the Act, thereby entitling them to subsidies from the Federal Universal Service Fund ("USF"), allowing them to collect over $1 billion in USF subsidies. In fact, over 99 percent of the growth in Federal USF subsidies is associated with subsidies to wireless carriers who have been designated as competitive ETCs.

The wireless industry is no longer a nascent industry that needs "kid glove" treatment in order to succeed, and wireless service has become, for all intents and purposes, a substitute for traditional landline service. Nor is the wireless industry's oft-cited evil of "Balkanized" regulation a legitimate basis for preempting long-standing State laws involving consumer protection, unfair trade practices, taxation, or other exercises of their historic police power. Many national industries are similarly subject to dual state and Federal regulation. For example, automobile manufacturers, oil and gas producers and refiners, and other manufacturers must comply with both

State and Federal environmental and workplace safety laws. Similarly, insurers and lending institutions are heavily regulated through disclosure laws, agent licensing, bond requirements and other state-specific requirements. Even so-called "borderless" industries like telemarketers and mail order houses must comply with State and Federal regulations on the time, place and manner of their contacts with consumers.

Traditional landline carriers have long been subject to State laws of general applicability and regulation as utilities, at least with respect to their intrastate services. As wireless carriers become more and more a substitute for traditional landline service, and hold themselves out to consumers and regulators as such, the argument for broad State preemption makes less and less sense. In fact, the preemption the wireless industry seeks violates notions of competitive neutrality and may very well upset the balance between wireless and landline service as they become increasingly competitive with one another.

The preemption the wireless industry seeks makes no sense from a public policy perspective either. For one thing, States have often taken the lead in protecting consumers or establishing fair business practices along with the Federal Government following suit and establishing laws governing interstate service based on models previously established by States—usually years later. This has proven to be the case time and again in telecommunications regulation. For example, Congress amended Section 258 of the Act to address "slamming" and "cramming" practices by carriers in 1996, long after States enacted laws or adopted regulations prohibiting such unreasonable carrier practices. Likewise, States were years ahead of the FCC and Federal Trade Commission in establishing "Do-Not-Call" registries to combat harassing telemarketing calls plaguing consumers. Similarly, States led the way in addressing carriers' misuse of customer proprietary network information, years before similar protections were enacted by Congress and implemented by the FCC. With all due respect, State legislators and regulators are far more accessible to their citizens, can more readily understand and address relevant local considerations (*e.g.,* geography and topography), and tend to respond more quickly to their citizens' needs, than the Federal Government.

The idea that a Federal regulator in Washington, D.C. can be the same advocate for a consumer in Wailuku, Hawaii; Brainerd, Minnesota; Eagle River, Alaska; or Mabie, West Virginia, or any of the myriad communities that State regulators call home is simply not credible. Even when Federal regulators want to help, studies show that consumers in locales far-removed from Washington, D.C. typically contact local regulators and officials with their complaints and are far less likely to turn to Federal regulators for help.[54]

Not preempting State laws governing wireless carriers' non-rate practices makes sense from an economic standpoint as well. Having State regulators and courts protect consumers from unreasonable business practices by wireless carriers or other utilities does not cost the Federal Government a penny—and that strikes NASUCA as a pretty good deal for the Federal Government. If Congress preempts State laws in conjunction with enacting the sort of consumer protections envisioned in S. 2033, such action will require the allocation and expenditure of substantial resources (money, time, personnel) to implement a purely Federal response to the sort of wireless consumer issues that States can provide themselves—if consumer protection is to be anything more than a hollow promise.

Finally, preempting State laws in favor of a single, one-size-fits-all Federal program overlooks the valuable role ordinary citizens play as private attorneys general in bringing to government's attention, through actions seeking legal and equitable relief in State courts, business practices that are unreasonable, deceptive, misleading or fraudulent. If Federal legislation deprives consumers of this role altogether, or forces them to seek redress only in Federal courts that are more expensive and more intimidating to consumers than state courts because they are more removed from the local community and citizens' experience, then this valuable tool of government is lost.

As Justice O'Connor noted, the Republic's Founders fully appreciated these realities:

> This Federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[55]

Preempting State laws as industry is likely to urge is analogous to combating rising crime by taking the local cop off the beat and makes about as much sense.

## VI. Conclusion

NASUCA certainly supports the goals and objectives embodied in S. 2033. The bill represents a good first step toward reining in a host of anti-consumer, anti-competitive practices that have been allowed to flourish in the wireless industry, and makes it clear that State laws that are more protective of consumers are not preempted. NASUCA hopes the goals and objectives of S. 2033 will not be subverted by arguments that preempting State laws is the price that must be paid to give consumers greater protection from such practices.

## Endnotes

[1] In most respects, my testimony reflects positions taken by NASUCA, although there are some areas where NASUCA has not yet reached a consensus position.

[2] *See* Pub. L. 97–259, 96 Stat. 1087, 1096, § 120(a) (1982).

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103–66, 107 Stat. 312, § 6002(b)(2)(A) (1993).

[4] *See In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* Second Report and Order, 9 F.C.C.R. 1411, 1418, 1478, ¶¶ 14 & 174 (1994); *see also* 47 C.F.R. § 20.15(a) & (c).

[5] H.R. Rep. No. 103–111, 103d Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (emphasis added).

[6] *See Brown* v. *Washington/Baltimore Cellular, Inc.,* 109 F.Supp.2d 421 (D. Md. 2000).

[7] *See AT&T Communications of the Pac. NW* v. *City of Eugene,* 35 P.3d 1029, 1048–51 (Ore. Ct. App. 2001).

[8] *See In re Pittencrieff Communications,* Memorandum, Opinion and Order, 13 F.C.C.R. 1735, 1742–43 ¶¶ 16–17 (1997), *aff'd sub nom. CTIA* v. *FCC,* 168 F.3d. 1332 (D.C. Cir. 1999); *see also Mountain Solutions, Inc.* v. *State of Kansas,* 966 F.Supp. 1043, 1048 (D. Kan. 1997), *aff'd sub nom. Sprint Spectrum* v. *State of Kansas,* 140 F.3d 1058 (10th Cir. 1998); *Texas Office of Public Utility Counsel* v. *FCC,* 183 F.3d 393 (5th Cir. 1999).

[9] *See, e.g., Moriconi* v. *AT&T Wireless PCS,* 280 F.Supp.2d 867, 873–78 (E.D. Ark. 2003).

[10] *See State ex rel. Nixon* v. *Nextel West Corp.,* 248 F.Supp.2d 885, 890–93 (E.D. Mo. 2003); *Fedor* v. *Cingular Wireless,* 355 F.3d 1069 (7th Cir. 2004); *see also In re Wireless Consumers Alliance Petition for Declaratory Ruling,* Memorandum, Opinion and Order, 15 F.C.C.R. 17021 (2000).

[11] *See Esquivel* v. *Southwestern Bell Mobile Systems, Inc.,* 920 F. Supp. 713 (S.D. Texas 1996); *Iowa* v. *U.S. Cellular Corp.,* 2000 U.S. Dist. LEXIS 21656 at * 4–6 (S.D. Iowa 2000); *Cedar Rapids Cellular Telephone, L.P.* v. *Miller,* 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000); *Phillips* v. *AT&T Wireless,* 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004).

[12] *See In re Wireless Telephone Federal Cost Recovery Fees Litigation,* 343 F.Supp.2d 838 (W.D. Mo. 2004); *NASUCA* v. *FCC,* 457 F.3d 1238 (11th Cir. 2006), *pet. for cert. pending sub nom. Sprint Nextel* v. *NASUCA,* No. 06–1184 (U.S., filed Feb. 27, 2007).

[13] *In re Truth-in-Billing and Billing Format: NASUCA Petition for Declaratory Ruling,* 2nd Report & Order, Declaratory Ruling, and 2nd Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448, 6462 ¶ 30 (2005).

[14] At least two FCC commissioners filed strong dissents to the preemption determination, pointing out the lack of notice that preemption was afoot, as well as the harm the order did to the successful Federal-state cooperation in consumer protection efforts. *See* 20 F.C.C.R. at 6500–04 (dissenting comments of Commissioners Michael J. Copps and Jonathan S. Adelstein). The FCC's order was vacated on appeal by the Eleventh Circuit, though a petition for review by the U.S. Supreme Court is still pending. *See NASUCA* v. *FCC,* n. 12, *supra.*

[15] *See* 20 F.C.C.R. at 6473–74, ¶¶ 49–51.

[16] *See, e.g.,* TechLawJournal, "Martin Discusses FCC Activities," TLJ News from Jan. 16–20, 2007 (Jan. 17, 2007), available at *http://www.techlawjournal.com/home/newsbriefs/2007/01d.asp;* Telecommunications Reports—TR State Newswire, "Martin Hopeful That Talks on ETFs Produce Agreement" (March 28, 2007), available at *www.tr.com/insight2/content/2007/in032807/In032807-02.htm*.

[17] The "up to" language is misleading itself since, in NASUCA's experience, this charge is never less than $1.25.

[18] AT&T Mobility claims the charges "help defray costs incurred to comply with State and Federal telecommunications regulations, such as E–911 deployment, State and Federal Universal Service, and other government mandates on AT&T Mobility." *See http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp.* State and Federal universal service costs are not the costs of the Federal universal service program; those costs are recovered through separate, specifically authorized surcharges. Moreover, whether a charge imposed on customers nationwide should recover State-specific universal service costs is also open to question.

[19] *See http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp*.

[20] *Id.* The Federal Programs Cost Recovery Fee was Nextel's $1.75 line item charge. Sprint imposed a line item charge for number portability, E–911 and number pooling that originally was $1.10/month but was later, after NASUCA filed its Truth-in-Billing petition with the FCC, reduced to $0.40 and then $0.25/month, in June and November 2004, respectively. *See http://www.washingtonpost.com/wp-dyn/articles/A52986-2004Nov15.html*.

[21] *See* Jeff Silva, "AT&T settles CPUC claims, agrees to pay $30M," *RCR Wireless News* (March 16, 2007).

[22] *See* "Early Termination Fees—CTIA Position," *http://ctia.org/industry_topics/topic.cfm/TID/41/CTID/12* (accessed Feb. 5, 2007); *see also In re CTIA Petition for Declaratory Ruling,* WT Docket No. 05–194, Petition of CTIA, Executive Summary 1 & pp. 1–2 (March 15, 2005).

[23] *See In re Bundling of Cellular Customer Premises Equipment and Cellular Service,* Report and Order, 7 F.C.C.R. 4028–30 (1992).

[24] *See In re CTIA Petition for Declaratory Ruling,* WT Docket No. 05–194, NASUCA Comments, pp. 32–33 (Aug. 5, 2005); available at *http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native__or__pdf=pdf&id__document=6518135277.*

[25] NASUCA Resolution 2007–03, "Calling for FCC Reexamination of Wireless Carriers' Early Termination Fees" (June 12, 2007); available at *http://www.nasuca.org/res/#tele.*

[26] According to their websites, the major wireless carriers' impose the following ETFs: AT&T Mobility ($175); Verizon Wireless ($175, with ETFs prorated for service initiated after Nov. 16, 2006); Sprint Nextel ($150 for service initiated before May 21, 2006 and $200 for service initiated thereafter); Alltel ($200); T-Mobile ($200).

[27] *See* Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," MASSPIRG Education Fund, pp. 20–21 (Aug. 2005); *http://www.uspirg.org/uploads/6K/L1/6KL1e4XLElQZgyFz7hpKKQ/lockedinacell05.pdf.*

[28] *Id.* at 13–16, 24–27.

[29] *Id.* at 14, 24–25.

[30] *See In re CTIA Petition for Declaratory Ruling,* WT Docket No. 05–194, UCAN Comments, pp. 15–19 (Aug. 4, 2005); available at: *http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native__or__pdf=pdf&id__document=6518129555.*

[31] *Id.* at 15.

[32] See AT&T Mobility Wireless Service Agreement, Changes to Terms and Rates; *http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp* (accessed October 12, 2007).

[33] *Id.*

[34] Sprint Nextel Terms and Conditions, "Our Right To Change The Agreement & Your Related Rights;" *http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans?filterString=Individual__Plans__Filter&id12=UHP__PlansTab__Link__IndividualPlans.* Sprint Nextel's contract further provides that customers may terminate service, without liability for the carrier's $200 ETF, only if "a change . . . is material and has a material adverse effect on you," and only if the customer calls Sprint Nextel within 30 days of the change's effective date (regardless of when the bill is received) and "specifically advise[s] that you wish to cancel Services because of a material change to the Agreement that we have made." Most customers are not lawyers and are unlikely to jump through all the hoops necessary to effectively terminate service without incurring the ETF, even where such action would be allowed under the contract.

[35] Kelly Hill, "Sprint ups text messages to 15 cents," *RCR Wireless News* (Oct. 16, 2006).

[36] Kelly Hill, "Sprint Nextel hikes text fee again, ETF remains in effect," *RCR Wireless News* (Aug. 21, 2007).

[37] Verizon Wireless, Customer Agreement, "Our Rights to Make Changes"; *http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER__AGREEMENT&jspName=footer/customerAgreement.jsp* (accessed Oct. 12, 2007).

[38] AT&T Mobility, Wireless Service Agreement, "Arbitration Agreement," n. 33, *supra.*

[39] Sprint Nextel, Terms and Conditions, "Instead Of Suing In Court, We Each Agree To Arbitrate Disputes;" "No Class Actions;" "No Trial By Jury."

[40] Verizon Wireless, Customer Agreement, "Dispute Resolution and Mandatory Arbitration."

[41] Bruce Meyerson, "Cingular to impose $5 surcharge on customers with older phones," *USA Today* (July 31, 2006); *http://www.usatoday.com/tech/news/2006-07-31-cingular-surcharge__x.htm.*

[42] "Cingular Adds Surcharge For Old Phones," *CBS News* (Aug. 1, 2006); *http://www.cbsnews.com/stories/2006/08/01/business/main1854442.shtml.*

[43] The FCC's quarterly reports on informal complaints and inquiries, going back to 2002, are published on the agency's website at *http://www.fcc.gov/cgb/quarter/welcome.html.* The FCC's reports provide only aggregate totals and do not identify carrier-specific information, nor do the FCC's report provide any information regarding the resolution of informal complaints submitted to it.

[44] 20 F.C.C.R. at 6499.

[45] *See In re TalkAmerica, Inc.,* Order, 21 F.C.C.R. 15148 (2006). Ironically, TalkAmerica's misleading surcharges were brought to the FCC's attention in NASUCA's petition for declaratory ruling, which the FCC denied in conjunction with its preemption decision.

[46] Vivian Witkind Davis, "Consumer Utility Benchmark Survey: Consumer Satisfaction and Effective Choice for Cellular Customers," National Regulatory Research Institute, NRRI 03–15, pp. iii and 1 (Nov. 2003); *see also, e.g.,* Christopher A. Baker and Kellie K. Kim-Sung, "Understanding Consumer Concerns About the Quality of Wireless Telephone Service," AARP Public Policy Institute Data Digest No. 89, p. 4 (July 2003); "Attorney General Cox Announces 2004 Top 10 Consumer Protection Issues," *U.S. State News* (Feb. 3, 2005) (telecommunications category which includes cell phones was 2nd from the top); Rick Barrett, "Cell phones ring up more complaints: Airlines, hospitals also at bottom of survey," *Milwaukee Journal Sentinel* (June 13, 2005) (Am. Soc. For Quality in Milwaukee survey); Kimberly Morrison, "Group lists top 10 consumer grips," *Detroit Free Press* (Feb. 12, 2005) (National Assoc. of Consumer Agency Administrators survey found complaints about cell phone contracts and solicitations are rising quickly).

[47] *Investigation to Determine Whether Cingular Has Violated the Laws, Rules and Regulations of this State in Its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers,* 2004 Cal. PUC LEXIS 453, slip op. at 53–65, 69 (2004).

[48] *DPUC Implementation of Public Act 05–241,* Docket No. 05–08–11, Decision, pp. 4–5 (March 7, 2007); available at *http://www.dpuc.state.ct.us/dockhist.nsf/f5c4efacb773316a8525664e0049ea32/9b49d442637ad4b3852572d700510499?OpenDocument&Highlight=0,05-241.*

[49] 20 F.C.C.R. at 2499.

[50] *See* CTIA Semi-Annual Wireless Industry Survey; *http://files.ctia.org/pdf/CTIA__Survey__Year__End__2006__Graphics.pdf.*

[51] *Id.*

[52] The FCC order preempting state laws affecting wireless line items, and the Eleventh Circuit's subsequent *vacatur* of that order, not surprisingly, did not have any impact on the wireless industry's growth. From March 2005, when the FCC's preemption order was released, until July 2006, when it was vacated, wireless subscribership grew 12.8 percent (adding 25 million subscribers) and revenues grew 9 percent ($5 million). Since the Eleventh Circuit's decision in July 2006, wireless subscribership grew at an annualized rate of 11.9 percent (13 million subscribers over 6 months), while revenues grew at an annualized rate of 8.3 percent ($5 million over 6 months).

[53] *See* 11th Annual CMRS Report, FCC Wireless Telecommunications Bureau, Table 4, p. 102 (Sept. 29, 2006). In calculating the carriers' share of the market, NASUCA included the number of subscribers served by separately listed carriers acquired by Sprint Nextel and Alltel (Nextel Partners, Alamosa PCS, and Ubiquitel for Sprint Nextel; Midwest Wireless for Alltel). NASUCA did not include in its calculation subscribers associated with iPCS, which is a Sprint affiliate. *Id.* at 103, Notes.

[54] A nationwide survey of wireless customers indicated that only 4 percent of survey respondents indicated that they would contact the FCC with service complaints. Baker & Kim-Sun, "Understanding Consumer Concerns About the Quality of Wireless Telephone Service" *AARP Public Policy Institute* (June 2003); available at *http://research.aarp.org/consume/dd89_wireless.html.*

[55] *Gregory* v. *Ashcroft,* 501 U.S. 452, 458 (1991) (citations omitted).

Senator KLOBUCHAR. Thank you very much, Mr. Pearlman.

Mr. Murray?

## STATEMENT OF CHRIS MURRAY, SENIOR COUNSEL, CONSUMERS UNION, ON BEHALF OF CONSUMER FEDERATION OF AMERICA, AND FREE PRESS

Mr. MURRAY. Good morning, Senators. Thank you for the opportunity to testify again before this Committee.

I've got good news and bad news today. The good news is that the pressure that policymakers are exerting in this marketplace actually appears to be working. While I'm sure that AT&T's announcement yesterday was completely disconnected from the timing of this hearing this morning, that is an announcement that I'm excited to hear. I'm glad to hear that two of the four carriers in this marketplace are now prorating early termination fees.

But there is some bad news in this marketplace as well. Consumers just aren't as happy as they ought to be. The magazine that we publish, *Consumer Reports,* does a survey of a basket of about 20 industries every year and what we see, unfortunately, is that the wireless industry is ranking near the bottom of that list rather than near the top. We see online electronics retailers up there. These are in our mind, this is what a vigorously competitive marketplace looks like, where you've got dozens and dozens of people competing.

We've heard a lot of numbers this morning about prices per minute of use going down. I like to look at the overall cost that consumers are paying in this industry. We see from the Organization of Economic Cooperation and Development in their 2007 report on the wireless marketplace, they said that U.S. subscribers are paying on average about $506 per year, significantly more than their counterparts in the OECD, who are paying an average of about $439 per year, and almost double what their counterparts are paying in very cell phone-forward countries like Sweden and Germany, where they're paying in the $200 and $300 range per year.

So yes, U.S. consumers may be getting a lot of value for what they're paying, but they're still paying more than consumers around the world.

This morning I want to just raise four quick pocketbook issues, and I'll summarize my remarks since you've got my full statement

for the record. The first concern I want to raise is early termination fees. We see consumers paying about $175 for the privilege of voting with their feet, even when they're not getting a subsidy on a particular phone. This is the head-scratcher for me. The justification that we were getting from the cell phone industry was that it's subsidy, subsidy, subsidy, that's why we're charging these early termination fees. Yet we see the iPhone, which does not give one thin dime of subsidy to consumers, yet consumers still get locked into that 2-year deal with a $175 early termination fee. I just don't understand that.

I think it's great that companies are prorating these fees, but if they're prorating an already unreasonable fee in the first place it still raises concerns.

The second pocketbook issue I want to raise is the practice of handset locking, or forcing consumers to throw mobile phones in the trash when they switch carriers or only activating affiliated phones with the network. We see in the U.S. about 90 to 95 percent of the cell phones that are sold are sold through the carriers themselves. In the rest of the world it's the converse. In some Asian markets we see about 80 percent of phones are sold through an independent market. We also see there's a lot more innovation, there's a lot more phones coming to market, and the choices seem to be better for consumers. I just don't see at all why Asian and European consumers should have better choices than U.S. consumers.

The third question I've got is of great concern, which is the practice of application blocking. We see companies like BlackBerry who want to offer a mapping service, for instance, to consumers for free. They want to just give it away on their phones so that people will buy their phones. But AT&T has said, "You know, I've got my own mapping program; I want to charge consumers ten dollars a month for that mapping program, so Blackberry, I want you to turn your mapping program off on your phones." Perfectly good electronics that aren't working as they were designed to work.

The other issue that I want to raise is the free speech issue that Senator Dorgan flagged earlier. We saw this flap a few weeks ago between Verizon and NARAL over the blocking of text messages, political text messages. In the rest of the world, SMS, or text messaging, has become probably the most important political organizing tool of the last 5 years. People are keeping elections straight in Nigeria. We see people organizing social protests in other countries. In the U.S., if you made a phone call it would be protected. There's no way that a network operator could interfere. I don't see any reason why data should have any less protection. Consumers expect their phone calls to work without interference from the network operator. They should have the same expectation of their cell phones.

So I'm here this morning to challenge the cell phone industry to begin to stop throwing switching costs at consumers. If they're saying that, look, we're so competitive that we don't need any oversight, they can't also say, well, here's a $200 switching cost, here's—for an early termination fee—here's a $400 switching cost for a new phone. These are just throwing gravel in the gears of

competition, and competition isn't working because of these switching costs.

So I thank you for your time today and I'll answer any questions that you may have.

[The prepared statement of Mr. Murray follows:]

PREPARED STATEMENT OF CHRIS MURRAY, SENIOR COUNSEL, CONSUMERS UNION, ON BEHALF OF CONSUMER FEDERATION OF AMERICA, AND FREE PRESS

Chairman Inouye, Vice Chairman Stevens, and esteemed Members of the Committee, thank you for the opportunity to testify again before you on behalf of Consumers Union (CU)[1] (non-profit publisher of *Consumer Reports*), Free Press, and the Consumer Federation of America.

Consumers are not as satisfied as they should be with the wireless industry as a whole. In an annual consumer satisfaction survey[2] of 20 industries conducted by our magazine, *Consumer Reports,* we see that "cell-phone service" ranks near the bottom of the list (18 of 20), with only "computer makers' tech support" and "digital cable TV service" receiving lower marks.

According to the OECD,[3] U.S. subscribers also pay more per month than wireless subscribers in other countries.[4] The average U.S. subscriber pays $506/year, well above the OECD average of $439/year, and significantly above countries such as Sweden ($246) and Germany ($317).

Consumers Union endorses the legislation proposed by Senator Rockefeller and Senator Klobuchar, the Cell Phone Consumer Empowerment Act of 2007. We think that the aim of this bill is on target—to provide consumers more fairness in the marketplace and to provide them with better information about the cell phone service they are buying. Markets work best with good information, and this bill aims to get real information into consumers' hands while also prohibiting some of the more egregious practices of the wireless industry. Disclosure alone is rarely sufficient to protect consumers, particularly if carriers engage in the same practices—consumers can't vote with their feet when they have no alternatives.

Today I would like to raise three pocketbook concerns with the wireless industry:

1. Early Termination Fees that companies are charging consumers (especially when subscribers are not receiving any subsidy for new phones);

2. The pernicious practice of handset locking, causing consumers to throw perfectly good phones in the trash if they want to switch carriers (or causing them to pay extra for phones "affiliated" with the network); and

3. The tight control wireless companies are exercising over applications development (such as mapping applications, ringtones, etc.), which causes consumers to pay higher prices for services and stops innovation from reaching the market.

But looking beyond these consumer cost issues, I also want to highlight some very serious free speech issues raised by an incident a few weeks ago between Verizon and NARAL, where political messages were prevented from reaching subscribers by actions of the network operator. Outside the U.S., text messaging (also called SMS, for "Short Message Service") has been called the most important technological development for political advocacy in the last 5 years,[5] with activists using text mes-

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports,* its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 4.5 million paid circulation) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] *Consumer Reports,* "Upfront: News, Trends, Advice," p. 8 (October 2007).

[3] Organization for Economic Co-operation and Development, "OECD Communications Outlook 2007."

[4] The industry is quick to note that on a per minute of use basis, U.S. consumers are better off, because U.S. wireless subscribers use 800 minutes/month on average, and their European counterparts, only 200 minutes/month. But if this is a high fixed-cost industry as the companies have claimed elsewhere, metrics based on minutes of use should matter less and aggregate numbers matter more.

[5] Ethan Zuckerman, "Mobile Phones and Social Activism: Why cell phones may be the most important technical innovation of the decade," white paper available at *Mobile*

Continued

saging to monitor elections (*e.g.,* Nigeria), and encourage political change (Phillipines and Ukraine). We have even seen allegations of governments blocking text messages (Belarus, Cambodia and Albania) to thwart political protest or ensure activists did not have "improper" influence over elections.

Surely blocking political messages would not be tolerated from the U.S. government—but do we have any enforceable protections against a wireless network operator? If this were a phone call being blocked, the non-discrimination provisions of the Communications Act would prevent this practice[6]—why should we abandon this policy for data?

While I am glad that Verizon changed its policy rapidly to ensure no further blocking would occur, why did this require a policy shift in the first place? Is the new policy permanent, or can it change as rapidly as their Terms of Service, with little or no notice to subscribers? Does this new policy have the force of law, or the enforceability of a pinkie swear? The FCC has told the policy community that if any kind of blocking incident occurs they will deal with it rapidly. Yet so far the response from the Commission has been radio silence.

Consumers have an expectation that their phone calls will not be tampered with by the phone company, and an expectation that text and data should be protected in the same manner as a voice call. The details of the Verizon text message blocking incident are not clear; what is clear is that this warrants further scrutiny and we encourage this Committee to hold hearings on this important matter.

While the wireless industry will argue that non-discrimination with the force of law is unnecessary because policymakers should rely on the force of competition to police bad behavior in this arena—yet at every turn the industry is operating to throw gravel in the gears of competition, with Early Termination Fees, handset locking and other practices that increase switching costs. They cannot have it both ways.

Early Termination Fees (ETFs) are ubiquitous in the wireless industry, with some carriers charging as much as $200 if a customer would like to leave before their (generally two-year) contract is completed. Verizon (and as of yesterday, AT&T) should be lauded for adopting a policy of pro-rating[7] these fees, but the other carriers have not taken this common sense, pro-consumer step. And let us be clear, it was "encouragement" from policymakers and lawsuits regarding these unseemly and unfair contracts in certain states that are helping pressure the carriers into pro-rating ETFs. That is why we applaud Senator Rockefeller's and Senator Klobuchar's bill which would require all carriers to pro-rate ETFs.

Early Termination Fees make it expensive for a wireless subscriber to vote with her pocketbook and switch carriers—and the justification for charging these penalties seems to be evaporating. The iPhone offers the clearest example—AT&T subscribers who want the iPhone will receive not one thin dime of subsidy, yet they will be charged a full $175 penalty if they want to leave before their contract is up. The story the wireless industry had been telling us about ETFs used to be "subsidy, subsidy, subsidy." We have yet to hear a convincing new story.

Imagine the shock of a consumer who buys a family share plan from a wireless company and then tries to terminate that plan—the account holder will be liable for an ETF for each line in the plan. For instance, let's say a family of five wanted to leave for another carrier with better service. That family could face $1,000 or more in termination penalties if they haven't completed their two-year contract. This is certainly a strong deterrent to competition.

Another problematic practice—and the practice our survey results[8] tell us users hate the most—is when carriers extend contracts for any change in service plan—

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*Active.org: http://mobileactive.org/mobile-phones-and-social-activism-ethan-zuckerman-white-paper* (May 9, 2007).

[6] Either blocking data is a violation of the communications act, or it is not. The idea that this issue can live in some sort of regulatory limbo forever is folly. The industry would have us believe that we do not require enforceable non-discrimination because of a vague notion that "consumers will never stand for blocking." Perhaps what they mean is that as long as it is a story for *The Wall Street Journal, New York Times,* or *Washington Post,* then there is some form on discipline on this kind of conduct. However, at a certain point if blocking data is not declared to be a violation of the Communications Act, it ceases to be remarkable and therefore ceases to be a story. But if it would be a clear violation of the Act for a company to block a phone call on political grounds, there is no reason it should be acceptable for that company to block our political messages or any other legal data.

[7] Verizon's ETF discount is not exactly a "pro-rate," which by definition would mean a fee reduction proportionate to the amount of time a subscriber has spent with the company—*i.e.* halfway through the contract should be a 50 percent reduction in ETF. Verizon reduces its $175 ETF by $6/month, resulting in a $72 ETF discount at the end of the contract's first year; the subscriber would still pay more than 50 percent of the ETF halfway through the contract.

[8] *Consumer Reports,* "Annual Cell Phone Survey" (Dec. 2007).

whether the change benefits the wireless carrier or not. In other words, if I am a wireless customer and I decide to increase my bucket of minutes, my carrier may automatically extend my contract for another year or two, and saddle me with another Early Termination Fee if I decide to leave before the contract is up.

Mobile phone "locking" is another area of concern for consumers. In Europe, phones work seamlessly between networks and carriers do not exercise control over which phones subscribers can use. This has created a robust, independent market for mobile phones where users have far greater choice than U.S. subscribers. In the U.S., analysts estimate that 90 to 95 percent of handsets are sold by the wireless carriers, whereas in some Asian markets approximately 80 percent are sold independently from the carrier.[9]

There are two basic kinds of mobile phone locking:[10] software locks (which actually disable the phone when the user leaves), and "approved phones only" policies (which do not allow users to activate phones they purchase through the network operator, even when independent phones are technologically compatible with the network).

Imagine that a consumer purchased an expensive new television set and decided to switch cable or satellite providers, but the provider said "I'm sorry, your new TV will not work on our cable system, you'll have to purchase a new one." Policymakers would not tolerate this behavior for long, yet this practice has been pervasive in the wireless industry for several years now. CU is grateful to Senator Klobuchar and Senator Rockefeller for requiring in their proposed legislation that the FCC study this issue of mobile phone locking.

Application and functionality blocking is another practice that costs consumers money, and denies our economy the dynamic benefits of innovation. As a recent *Wall Street Journal* article[11] notes, handset manufacturers have been trying to offer consumers services for free on new handsets, but network operators such as AT&T and Verizon have said "no" to those free services because they compete with services that the wireless carriers want to charge for.

According to the article, RIM (manufacturer of the BlackBerry) wanted to offer a free mapping service to customers who buy the BlackBerry, but AT&T said no, because they had a service that they wanted to charge users $10 a month for.

Another example is Verizon's Worldphone by RIM, which has the capability built in to work on cellular networks in Europe, as well as to work on other GSM networks here in the States. Yet Verizon locks down the device so that they can charge users extra fees for the privilege of phones working as they were actually designed to work. That is, the GSM capability built into the $600 handset simply won't work unless a user pays Verizon for a more expensive "international plan." As a user who does a lot of international travel, I don't need their international service plan—I just need my phone to work as it was designed.

Yet another instance of troubling conduct is the slow rollout of mobile phones that also do Wi-Fi—these phones allow consumers to use the Internet when they are near a Wi-Fi Internet "Hotspot." Most U.S. carriers are not making these phones available to consumers, although T-Mobile is currently offering them. But as the Chairman of the FCC noted in a recent *USA Today* article,[12] "[i]nternationally, Wi-Fi handsets have been available for some time, . . . but they are just beginning to roll out here. . . . I am concerned that we are seeing some innovations being rolled out more slowly here than we are in other parts of the world."

We can do better. It's not that consumers have no choices in this market; the issue is that they have fewer choices without openness and they would have more choices with it.

Today, Consumers Union would like to issue three broad challenges to the wireless industry:

1. *Stop charging consumers undue Early Termination Penalties.* Early Termination Penalties should be eliminated or pro-rated across the industry immediately, and the fees should be reasonable in the first instance. Pro-rating an

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[9] Marguerite Reardon, "Will 'unlocked cell phones' free consumers?" *CNET News.com,* January 24, 2007, available at: *http://news.com.com/Will+unlocked+cell+phones+free+consumers/2100-1039_3-6152735.html?tag=st.prev.*

[10] For more information on mobile phone locking, see Professor Wu's paper, "Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband." New America Foundation Working Paper #17, Wireless Future Program (February 17, 2007).

[11] Jessica Vascellaro, "Air War: A Fight Over What You Can Do on a Cell Phone—Handset Makers Push Free Features for Which the Carriers Want to Charge." *Wall Street Journal* (June 14, 2007).

[12] Leslie Cauley, "New Rules Could Rock Wireless World: Consumers, not carriers, may get to choose devices." *USA Today,* (July 10, 2007).

already unreasonable fee doesn't address the underlying concern that the fees are excessive and unrelated to any damages the carrier may incur from early cancellation.

2. *Stop crippling mobile phones.* Consumers who pay hundreds of dollars for a new phone should fully expect that phone to do all the things the manufacturer designed it to do. Network operators who lock down the functionality of mobile phones to better suit their business interests should be scrutinized by the FCC and Congress.

3. *Stop preventing new applications from reaching consumers.* Wireless carriers are locking out competitive applications because they don't want "revenue leakage." This kind of anti-innovation protectionism flies in the face of a century of open communications policymaking.

Wireless Internet services will increasingly become the way that consumers connect to the Internet. If we allow anti-innovation practices to continue, we should expect our international broadband rankings to continue to slide, innovation to be less robust, and our mobile phone markets to continue to lag behind Europe and Asia.

In contrast, by embracing openness, policymakers have an opportunity to save consumers money, get exciting new applications to market, regain our standing as a world leader in broadband, and provide citizens with a new wireless "town square" that is open and democratic. Consumers Union fervently hopes that policymakers will choose the latter.

Mr. Chairman and Mr. Vice Chairman, I'm grateful for the opportunity to testify before your Committee today. Thank you.

Senator KLOBUCHAR. Thank you, Mr. Murray.

Mr. Higgins?

**STATEMENT OF MICHAEL HIGGINS, JR., CEO, CENTRAL TEXAS TELEPHONE COOPERATIVE, INC. AND PRESIDENT AND CHAIRMAN OF THE BOARD, RURAL TELECOMMUNICATIONS GROUP**

Mr. HIGGINS. Good morning. Thank you for the invitation to be here. My name is Mike Higgins and I am the CEO of Central Texas Telephone Cooperative, and I'm also the President and Chairman of the Board of the Rural Telecommunications Group, a trade association representing rural wireless companies. Central Texas is a member of the National Telecommunications Cooperative Association, a trade association representing rural telecom companies.

Central Texas provides wireline telephone service and through its affiliates and subsidiaries it provides cellular service, PCS service, as well as video, Internet, and broadband wireless services in rural areas of central Texas. We hold cellular PCS, BRS, and AWS spectrum licenses throughout central Texas.

I'm here today to talk to you about some of the challenges rural consumers face in obtaining quality wireless service. Very often rural consumers are at the mercy of large nationwide carriers that for various reasons focus the build-out of their networks in urban areas and along highways connecting urban and secondary markets. When the choice is between building a site in or near a metropolitan area which will do millions of minutes a month or a rural site connecting two rural towns, which will log only 50,000 minutes a month, the nationwide carrier is not going to build the rural site.

Accordingly, for most rural consumers living outside of urban areas and highway corridors, where coverage is available, it's going to be—excuse me—it is going to be from a local rural wireless carrier. Rural wireless carriers provide critical coverage in rural and remote areas. While the cost of providing service in rural areas is generally higher, rural carriers work hard to provide service on the

same prices, terms, and conditions as their urban counterparts in order to stay competitive.

In doing so, however, rural carriers must operate in very small margins and must continually look for ways to innovate and cut costs. Accordingly, they're especially sensitive to the costs of complying with new regulations and mandates. And Congress for its part should be especially sensitive to regulations that would increase the cost for small and rural carriers to provide wireless service in rural areas.

Senate bill 2033, which is currently under consideration, is admirable in its effort to help consumers receive fair terms and conditions by prohibiting certain carrier practices and requiring the investigation of a large carrier practice known as handset locking. The bill, however, will impose additional unfunded government mandates that would increase the cost of service to rural consumers.

Rural carriers have had to comply with an ever-increasing array of unfunded government mandates and regulatory requirements in the past, such as CALEA, CPNI, E–911, and hearing aid compatibility. Bill 2033 would further increase costs that will have to be passed on to rural carriers and to rural consumers. This is simply not going in the right direction for the rural consumer.

While the mandates are well intentioned, the actual benefit to the public is significantly less than the substantial cost of compliance, particularly if these mandates are to be applied with one-size-fits-all blinders. Rural wireless carriers lack a large customer base over which to spread the cost of compliance and accordingly the impact on rural carriers and their customers is greater.

In general, rural carriers are more flexible in dealing with customers than some nationwide counterparts and do not lock handsets or impose surprise contract extensions. Our relationship with our customers is a close one. We have an incentive to make sure our rural customers are pleased with the quality and terms of service. In most cases, we live and work in the communities we serve, and in many cases our customers are our owners. When a customer is not happy, we hear about it immediately and bend over backwards to make sure we accommodate them because we cannot afford to lose the support of our community stakeholders.

There's no need to impose additional burdens on small carriers in order to protect consumers. To the extent that Congress finds that there is a need for additional rules to protect consumers, the rules should be developed by the FCC and applied on a national basis. In adopting such rules, the FCC must recognize the differences between large and small carriers and must take seriously its obligations under the Regulatory Flexibility Act to determine whether the requirements that apply to large carriers are necessary and appropriate to apply to small carriers.

While our general goal is to have fewer regulations, Congress could help both rural and urban consumers by focusing its attention on roaming practices of the large carriers. The customers of rural wireless carriers must be able to roam on networks of the large nationwide carriers at fair and reasonable rates. Unfortunately, the FCC's August 16 roaming order severely restricts the obligations of some large carriers to provide roaming to small car-

riers at just and reasonable rates by not requiring a large carrier to provide roaming at reasonable rates if a small carrier holds any wireless license in a particular area that could be used to provide CMRS. This exclusion of so-called in-market roaming applies even if a small carrier has not built out a market or has partially built out a market, or even if the small carrier is using the license to provide a completely different service, such as fixed wireless Internet access.

This creates significant barriers to entry, weakens competition, and deters the very facilities-based competition the FCC is seeking.

Handset locking is another practice that potentially harms consumers and one area in which this bill does not go far enough. By merely requiring the FCC to develop a report to Congress on the practice of handset locking and its impact on consumers and portability, the legislation fails to address the broader issue of the exclusive relationships between handset vendors and large carriers. Apple is not going to make an iPhone for Central Texas Telephone. Typically, small——

Senator KLOBUCHAR. Mr. Higgins, you're about a minute over. If you could finish up in the next 30 seconds. Thanks.

Mr. HIGGINS. I will, thank you.

In summary, we as rural wireless carriers with close contact to rural consumers in our service areas respond quickly to problems and have a track record of—and have a track record of service innovation. There is no need to impose the requirements of this bill on rural carriers. We do need help, however, in two main areas, handset locking and unfair roaming practices, in which the dominant nationwide carriers can thwart our ability to serve our customers. These are the areas the Senate should focus on with respect to helping rural consumers.

I thank you for the opportunity to speak today.

[The prepared statement of Mr. Higgins follows:]

PREPARED STATEMENT OF MICHAEL HIGGINS, JR., CEO, CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., AND PRESIDENT AND CHAIRMAN OF THE BOARD, RURAL TELECOMMUNICATIONS GROUP

Hello, and thank you for the invitation to speak here today. My name is Michael Higgins, Jr. and I am the Chief Executive Officer of Central Texas Telephone Cooperative, Inc. (Central Texas) in Goldthwaite, Texas, and the President of its subsidiary, CTCube, L.P. d/b/a West Central Wireless (West Central Wireless) in San Angelo, Texas. Central Texas, through its subsidiaries, holds spectrum licenses in and provides various wireless services, including mobile voice, high speed data, and wireless video, to rural regions of the central part of the state of Texas. I am also the President and Chairman of the Board of the Rural Telecommunications Group, Inc. (RTG),[1] and Central Texas is a member of the National Telecommunications Cooperative Association (NTCA).[2]

[1] RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG's members have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service and Personal Communications Services, among others, to their subscribers. RTG's members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RTG's members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies.

[2] NTCA is a 501(c)(6) industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 575 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and

I am here today to talk to you about some of the challenges rural consumers face in obtaining quality wireless services. Very often, rural consumers are at the mercy of large nationwide carriers that choose to focus the build out of their networks in urban areas and along highways connecting urban and secondary markets. For most rural consumers living outside these highway corridors, coverage is reliable only if they obtain their service from a local rural wireless carrier. Rural wireless carriers provide critical coverage in rural and remote areas. While the cost of providing service in rural areas is generally higher, rural carriers work hard to provide service on the same prices, terms and conditions as their urban counterparts in order to stay competitive. However, in doing so, rural carriers must operate on very small margins and must continually look for ways to cut costs and be innovative with technology. The cost per subscriber of providing reliable wireless service for small carriers is much higher than that of nationwide carriers.

Recently, the Honorable Senator Klobuchar and the Honorable Senator Rockefeller introduced a consumer protection bill (S. 2033). S. 2033 is admirable in its effort to help consumers receive fairer terms and conditions by prohibiting certain carrier practices like onerous early termination fees and extensions of contracts without prior notification—as well as investigating a large carrier practice known as "handset locking." However, there are certain unfunded government mandates in the form of regulatory reporting requirements and changes to billing software that would cause undue hardship on rural carriers by increasing costs that would ultimately have to be passed on to rural consumers. I think the last thing we want to do in enacting legislation is to increase the cost to the consumer when there are other means of approaching the problems identified in the proposed legislation.

Small and rural companies have an incentive to make sure their rural customers are pleased with the quality and terms of their service. In most cases, we live and work in the communities we serve. As a result, we hear immediately when our customers are not happy about our service coverage or any of our billing practices. When a customer is not happy, we bend over backward to make sure we accommodate them because we cannot afford to lose the support of our community stakeholders. We also make sure that the communities we serve have good quality coverage. Without good quality coverage, our rural consumers and small businesses suffer and in turn harm rural economic development in our rural communities. Central Texas and West Central Wireless are deeply concerned with and devoted to the economic development of the rural communities we serve. If they do not flourish, we cannot flourish. In today's interconnected global village, advanced wireless services are a must for rural consumers and our rural communities.

Rather than heaping more regulations and requirements on wireless companies, I have a number of recommendations for encouraging companies to deploy broadband wireless service to rural areas and to ensure that rural carriers and small rural businesses—major sources of innovation and competition—are able to play a role. As CEO of a small business serving rural communities, I understand the challenges of bringing broadband and innovative wireless services to those communities. I also understand how critical it is to the economic and social lives of such communities that they have the same access, through wireless services, to an interconnected world as urban communities. I believe that it is small and rural companies that are the most willing and able to provide service to their rural communities.

The large carriers will not build rural sites. The large carriers have to maximize stock prices, so if they have a choice to build a site in or near a metropolitan area which will do a million minutes a month or a rural site connecting two rural towns which will log only 50,000 minutes a month, the rural site will not get built. Rural carriers do and will continue to build those sites because our few customers need them, and we will find a way to live off the crumbs the large carriers will pass up. In the heart of Texas, Brady Texas, there is no CDMA coverage today. Verizon and Sprint customers can't talk there driving from San Antonio to Abilene. GSM coverage, however, is provided all over counties in central Texas even though the customer counts are small and the operating profits even smaller. We provide the service because these are our neighbors and this is our trade area and home.

Rural telecommunications carriers serve less densely populated areas and work to provide service throughout their entire license areas. These rural carriers already have the basic telecommunications infrastructure in place, the local expertise, and trained employees to make serving high cost rural areas economically feasible. As

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long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended. NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

residents of the regions they serve, small rural wireless carriers are also motivated by the public interest and not just profit when deciding where to provide service.

Rural wireless carriers also are a major source of innovation because they are nimble and responsive to local demand. At West Central Wireless, we have had to become innovative in lowering our costs to provide high quality service to our customers. With all of the unfunded government mandates such as CALEA, CPNI, E–911, as well as the high cost of switching equipment—we don't get the volume discounts larger carriers get—we have pooled our resources to provide services to other smaller rural carriers and offer switching to them as well as CALEA, CPNI and E–911 solutions. But West Central Wireless and Central Texas are not alone in this. Rural wireless carriers in general are a major source of innovation and the carriers willing to serve otherwise difficult to serve areas.

Accordingly, in order to encourage the deployment of wireless services to rural areas, and to promote innovation and competition, Congress and the FCC should ensure that small and rural companies have a meaningful chance to participate in such services. As I will discuss below, the government can do this by making sure that wireless customers are able to roam as widely as possible on the technically compatible networks of other carriers at reasonable rates. In addition, small companies must have access to the spectrum and equipment necessary to provide services, and the government (the gate-keeper of spectrum) must ensure that this public resource is not hoarded by a few large companies. Finally, in general, Congress and the FCC must ensure that regulations, however well intentioned, do not unduly burden and pull small carriers under.

I'll begin by addressing the latter concern—that of the cost and burden of complying with an ever increasing array of unfunded government mandates and regulatory requirements such as those contained in S. 2033. Rural wireless carriers are already required to comply with such mandates as CALEA, CPNI, E–911, and hearing aid compatibility; yet, rural wireless carriers lack a huge customer base over which to spread the cost of these mandates. Heaping the additional unfunded government mandates contained in S. 2033 such as: (1) a specially itemized and formatted invoice (that will require extensive and expensive billing software changes); (2) the production and delivery to consumers of updated quarterly maps that show each customer whether there is service currently available at their residence; and (3) the filing of semi-annual reports detailing lost calls, coverage gaps and dead zones, is simply not going in the right direction. While the mandates are well intentioned, the actual benefit to the public is significantly less than the substantial cost of compliance. Moreover, these mandates are often applied with one size fits all blinders. We estimate that the cost of complying with the legislation's mandates will raise prices to consumers in rural areas by $1.50–$3.50 per month based on recurring and non-recurring costs (spread out over a five-year period) depending on the customer base of the rural carrier.

Now, in addition to Federal mandates, the threat of state and local regulation of wireless services is a growing concern. Up to now, Congress, largely and wisely has allowed wireless services to develop under a single regulatory framework. This has lead to explosive growth of wireless services and lower costs to customers. We are concerned, however, that increasing state regulation of wireless services will lead to a maze of conflicting regulations without corresponding benefit to the public. In general, rural carriers are more flexible in dealing with subscribers than their nationwide counterparts and do not resort to unfair early termination fees and sneaky contract extensions. Our relationship with our customers is a close one. We work to resolve issues. There is no need to impose additional burdens on small carriers, particularly inconsistent and conflicting regulations, to protect consumers. Congress should be careful in its efforts to protect consumers from the questionable practices of large, wireless carriers not to unfairly and unnecessarily burden small carriers. To the extent that there is a need for additional rules to protect consumers, the rules should be developed on a national basis under the auspices of the FCC, with recognition of the differences between small and large carriers and the economic realities of the former, and not by individual states. In developing any such rules, the FCC must be mindful of it obligations under the Regulatory Flexibility Act (RFA) that the requirements that apply to large carriers may not be necessary or appropriate to apply to small carriers. All of the regulations designed to benefit wireless customers are meaningless if those customers can't get coverage.

While it is our goal to have fewer regulations, there is one area where consumer regulation is sorely lacking. If Congress is really interested in helping both rural and urban consumers then it should focus its attention on existing large carrier roaming practices. Customers of rural carriers need fair, low cost roaming when they leave their home-based rural carrier. Likewise, urban consumers need to be able to roam on the networks of rural carriers who have coverage instead of being

"locked out" by their national carrier. Specifically, the customers of rural wireless carriers must be able to roam on the networks of the large nationwide carriers at reasonable rates. The FCC's August 16, *Roaming Order,* FCC 07–143, although well intentioned, severely restricts the obligations of large carriers to provide roaming to smaller carriers at just and reasonable rates. Under the FCC order, a large carrier is not required to provide roaming at reasonable rates in a particular area if a small carrier holds any wireless license in that area that "could be used to provide CMRS [commercial mobile radio services]." The FCC refers to this as "in-market roaming." While this might make some sense if two carriers have fully built-out competing networks in the given market, the FCC order limits a large carrier's obligation to provide roaming even if the small carrier has not built out a market, or even if the small carrier is using its license to provide a completely different service, such as fixed wireless Internet access. This exception to the obligation to provide reasonable roaming deters innovation and creates a strong disincentive for small carriers to attempt to acquire wireless licenses to deploy various services. The prohibition on in-market roaming creates significant barriers to entry and deters the very facilities-based competition the FCC is seeking to create.

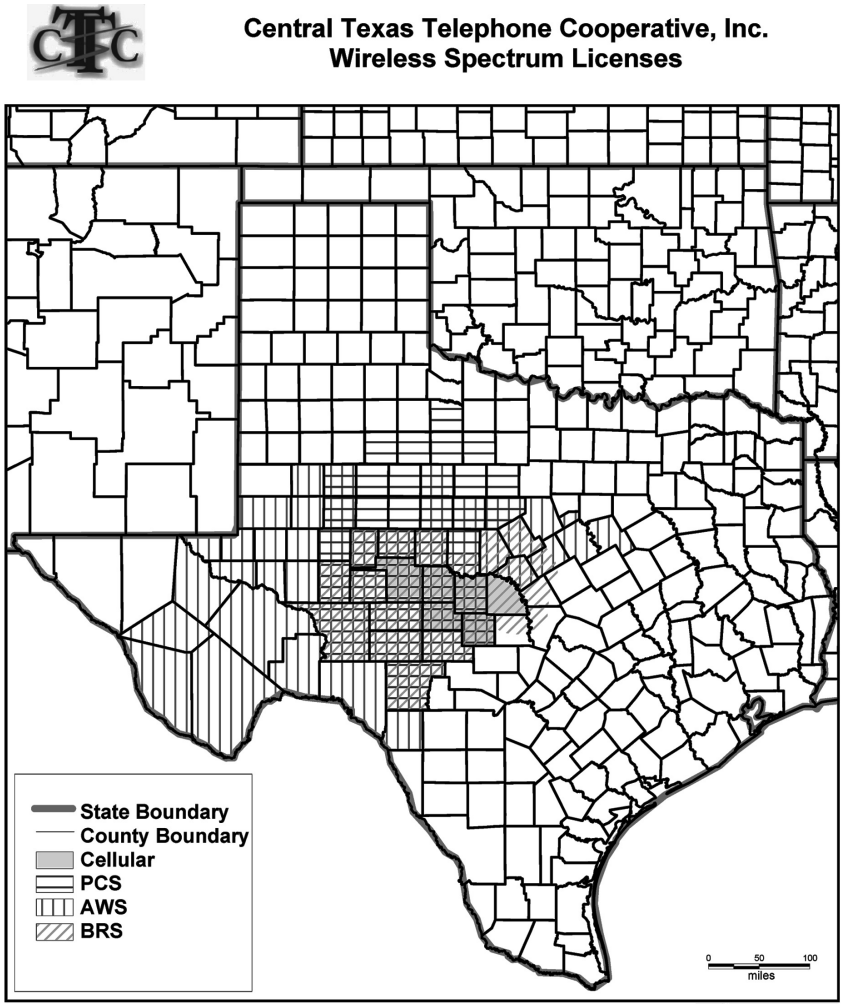
Even where a small carrier is building out a network to offer competitive service, in-market roaming must be allowed when such a small carrier licensee is just getting started. A small carrier cannot instantaneously build-out a network throughout its license area or areas. Accordingly, at a minimum, even where a small carrier is constructing a network to provide a competing service, in-market roaming should be allowed during a ramp up period of at least 5 years from the date its license is issued.

Urban consumers also are being harmed by the FCC's lack of regulation of roaming practices. Larger carriers often prevent their customers from roaming in rural areas by implementing various restrictions, such as restrictions on Location Area Codes (LACs), so called LAC restrictions. This often denies service to their customers even if though a rural carrier may be operating a technically compatible network on which the customer could otherwise roam. Denying customers roaming service prevents the consumer from having access to ubiquitous nationwide service thereby harming both the consumer trying to access the available service and the rural carrier who is ready, willing and able to provide it. Accordingly, the FCC should not permit large carriers to block their customers from roaming in rural areas on the technically compatible networks of rural carriers that offer reasonable roaming rates.

As long as customers are allowed to leave their home areas and roam on other compatible networks at just and reasonable rates, wireless services, including broadband applications, will be available to all citizens at all times and will develop and thrive. Thus, requiring unfettered roaming, including data and high speed application roaming, will broaden consumer choice and open up the wireless broadband market to new and unforeseen possibilities.

While reducing regulatory burdens and facilitating unfettered roaming are extremely important, the single most critical action to promote the deployment of wireless services in rural areas is ensuring that small and rural companies have reasonable access to spectrum. Section 309(j) of the Communications Act, as amended, directs the FCC to adopt rules that promote the deployment of service to rural areas and disseminate licenses to a wide variety of applicants including small businesses and rural telephone companies. *See* 47 U.S.C. § 309(j)(3)(A) & (B). It also directs the FCC to adopt performance requirements "to ensure prompt delivery of service to rural areas, [and] to prevent stockpiling or warehousing of spectrum by licensees or permittees. . . ." 47 U.S.C. § 309(j)(4)(B).

The FCC, however, typically licenses spectrum in gigantic geographic areas which small companies have no chance of acquiring. Central Texas cannot possibly hope to acquire a license for the entire southwest region of the U.S. Similarly, the FCC's performance requirements and service rules do not require large companies to deploy service in rural areas or to work with small companies that are willing to deploy in rural areas. Large companies can meet population-based performance benchmarks by serving only the urban and densely populated areas, leaving rural and secondary markets unserved. Accordingly, we typically see large, nationwide telecommunications carriers winning most of the licenses at auction and then overlooking rural towns and their outlying areas, and instead deploying service to the most profitable, highly populated pockets of their vast license areas.




Unfortunately, I fear that we are about to see the upcoming 700 MHz auction roll down this well rutted track. This is particularly unfortunate because 700 MHz spectrum is ideally suited to provide service to rural areas. Because of its favorable propagation characteristics—it can go out a long way—and capability of delivering large amounts of data at high speeds, I believe it will be economical to deploy wireless broadband services to many rural areas that would otherwise be uneconomical to serve with other spectrum bands. But I am afraid that this wonderful opportunity to serve rural areas will be lost since the FCC's 700 MHz rules present only limited opportunities for small businesses to participate.

The Upper 700 MHz spectrum will be auctioned in huge areas or on a nationwide basis. Moreover, the Upper 700 MHz C block licensee will be able to meet the applicable population-based benchmark by serving urban and dense areas. Accordingly, small and rural carriers have virtually no opportunity to participate in the provision of the anticipated high speed (*e.g.,* 4th Generation) services to be offered on the Upper 700 MHz C block spectrum. Since the "open platform" requirements apply only to the C block licenses, the open platform requirements may be of little benefit to small carriers.

Even the Lower 700 MHz licenses present little meaningful opportunity for rural carriers. Only one paired block of spectrum will be auctioned on the basis of cellular market areas (CMAs), and one paired block on the basis of Economic Areas (EAs).

Because only a handful of applicants will be able to compete for the huge Upper 700 MHz licenses, the myriad of large, medium, small and regional bidders will be competing for the CMA and EA licenses. In addition, with AT&T's announced purchase of Aloha—the largest holder of the previously auctioned Lower 700 MHz C block licenses—AT&T undoubtedly will be acquiring the adjacent Lower 700 MHz B block licenses. Accordingly, small companies will have little opportunity to acquire licenses in the upcoming 700 MHz auction.

AT&T's acquisition of Aloha also illustrates the increasing concentration of spectrum in the hands of a few companies and problems with the overall consolidation of wireless providers. Because of a variety of factors, not the least of which was uncertainty about when and if the DTV transition would ever occur, many small companies were able to acquire 700 MHz C block licenses in Auctions 44 or 49 at the time that Aloha acquired its vast 700 MHz holdings. Unlike Aloha, however, AT&T will not work with small carrier licensees. Small carriers have little chance of partnering with AT&T, for example, in the provision of mobile video or multimedia services. AT&T also has the weight to disregard contracts and the legal muscle to stiff-arm small companies into capitulation. For example, Neatt Wireless, LLC, a minority owned and managed wireless operator in Arkansas has filed a complaint against AT&T with the FCC and DOJ alleging that AT&T engaged in illegal conduct and behavior that resulted in Neatt's failure to compete in the markets it acquired from AT&T in Northeastern Arkansas in connection with AT&T's merger and divestiture of certain wireless assets. Neatt has alleged that AT&T's actions resulted in Neatt being forced to sell back to AT&T, at distressed prices, all of the subscribers Neatt acquired from AT&T in Northeastern Arkansas. Neatt alleges that AT&T's actions violate public policy, good business practices, the intent of Congress, and the antitrust provisions of the laws of the U.S., as well as the order of the FCC allowing the merger of AT&T Mobility and AWS. In addition, several of RTG's and NTCA's members who had been long standing partners of AT&T have had their agreements ignored leaving these carriers with huge operating losses on businesses that at best operated on slim margins.

But it is not just AT&T. The bottom line remains, fewer and fewer large companies hold increasingly large concentrations of spectrum. Fewer companies means fewer competitors, and fewer carrier partners with which small carriers can work. It also means less innovation and fewer opportunities. If the government wants to foster competition, encourage innovation and promote the deployment of services to rural areas, it should limit the amount of spectrum that the nationwide companies can hold in any one geographic area. This is particularly the case with spectrum below 1 GHz that is prime for providing service to rural and difficult to serve areas.

Handset locking is another component of S. 2033. In this instance the proposed legislation does not go far enough. It merely requires the FCC to develop a report to Congress on the practice of handset locking and its impact on consumers and portability. Locking a handset to a particular network may be practical if the handset is subsidized by the carrier, but what would be far better is for Congress to study the tying of the handset to the carrier through the relationship the carrier has with the handset vendor. It is common practice for handset vendors to cut special exclusive deals with large nationwide carriers. Steve Jobs is not going to make an iPhone just for West Central Wireless. This practice puts rural carriers (and rural consumers) at an extreme disadvantage because they are unable to gain access to the popular handsets. Rural consumers have to decide between a low end handset and good rural coverage or a high end handset and little coverage. Typically, small carriers have access to a much more limited choice of handsets and devices and typically must wait up to 2 years to get newer models. The lack of access to new devices harms consumers in rural areas and dampens competition. Accordingly, there is a need for requirements to enable the customers of small and rural carriers to acquire the latest handsets and devices.

Finally, while implementing the above suggestions will go a long way to getting wireless deployment and handsets to rural areas, there still may be some areas that need extra help. Unquestionably, it is more expensive to deploy services in rural areas. As the Federal-State Joint Board on Universal Service has recognized, there may be some areas where a support mechanism will be necessary in order for mobile broadband services to be viable.

As I have discussed here today, small and rural companies play a vital role in driving innovation and providing service to rural and otherwise underserved areas. To enable small and innovative companies to continue to provide wireless services, policymakers should: (1) license spectrum in smaller geographic areas; (2) limit the amount of spectrum that the nationwide carriers may hold, particularly in rural areas; (3) adopt performance requirements that promote deployment to rural areas and encourage partnering with small companies; (4) adopt rules to foster nationwide

roaming on reasonable rates; (5) adopt requirements so that individuals residing in rural areas have access to the latest devices and technologies; (6) seriously assess the impact of prospective regulation on small businesses under the RFA; (7) where necessary, support rural wireless services with universal support mechanisms; and, (8) use innovative and targeted licensing approaches, such as the licensing of TV White space for fixed backhaul applications in rural areas.[3]

In closing, I want to circle back to where I began with the need to avoid and eliminate regulations that burden small companies without corresponding benefit to the public. It is critical that the FCC and other government agencies take seriously their obligations to assess the impact of proposed regulations on small businesses under the Regulatory Flexibility Act. The FCC virtually always merely "cuts and pastes" boiler plate language in its rulemaking proceedings that finds no disproportionate impact on small businesses. Instead of rubber stamping regulations and discouraging small businesses, the FCC and other government bodies should carefully study the impact of their regulations on small businesses, and should ensure that their rules and policies encourage small and rural businesses to deploy innovative wireless services.

By instituting the suggestions I have outlined today, I am confident that policymakers can encourage the deployment of innovative wireless services, including wireless broadband connectivity, to rural citizens and rural businesses, supporting the economic and social health of such communities. Thank you for your time today.

Senator KLOBUCHAR. Thank you, Mr. Higgins.
Dr. Ellig?

**STATEMENT OF DR. JERRY ELLIG, SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY**

Dr. ELLIG. Thank you, Madam Chair. My name is Jerry Ellig. I'm a Senior Research Fellow at the Mercatus Center at George Mason University. The Mercatus Center is a research, education, and outreach center. Basically, I study regulation for a living. I'm an academic, but I've also worked for the U.S. Senate, and worked with the Federal Trade Commission, so I think I've got an understanding of the practical policy end of it that you have to deal with, as well as the academic theory.

I'm also a cell phone customer and, as you can probably tell from the size and the appearance of this thing, I've been with the same company for a long time, mostly because they keep giving my wife free telephones, so we sign up every couple of years. There are terms in our cell phone contract that I don't like. There are probably terms in our cell phone contract that I don't even know about that I don't like, because it's been a long time since I've read it and it's a long thing and I don't really have time to mess with it.

I've also spent some frustrating times on the phone trying to deal with billing issues or trying to deal with other kinds of informational issues. I wish they'd stop sending me a text message every month trying to get me to use text messaging, because I don't want to use it. I've been in West Virginia just this past weekend and couldn't use the phone to call the house 50 feet away. I've also been to my own home and can't use it in the house because our neighborhood inside the Beltway is shaped like a bowl and the coverage in the neighborhood is lousy, as seems to be the case with most of the carriers.

[3] In a recent White Paper, RTG noted that there may be 50 megahertz or more of TV white space spectrum in rural areas that could be used for licensed backhaul services without creating interference problems. *See Ex Parte* Filing by FiberTower Corporation and the Rural Telecommunications Group, Inc., ET Docket Nos. 04–186, 02–380, "Optimizing the TV Bands White Spaces: A Licensed, Fixed-Use Model for Interference-Free Television and Increased Broadband Deployment in Rural and Urban Areas."

But none of these things mean necessarily that new regulation of contract terms or new regulation of disclosures will necessarily solve my problems as a consumer in a way that would make me better off on net. Regulation might do that, but the mere fact that I have these problems does not necessarily guarantee that Congress can craft regulation that will solve those problems for me in a way that makes me better off.

To figure that out, we have to do more homework. What would you expect an academic to say, right? More homework. That's the challenge whenever a problem arises and new regulation is proposed: How can we know that the regulation will actually accomplish its intended purpose with a minimum of negative side effects?

Now, people who study regulation for a living will tell you that the way to figure this out is to answer at least three key questions. The first one: Is there a systemic problem here that regulation could solve? Secondly, how effective are the alternative solutions? What are the different ways of solving the problem and which one's likely to be most effective? And finally, what are the likely unintended consequences associated with the proposed new regulation? What other things are likely to happen when the regulated industry adjusts to the change in the rules of the game?

Let me address each of these briefly in the context of wireless markets. Is there a systemic problem? A systemic problem is some type of widespread problem that could actually be addressed by a change in the rules of the game, and that's different from a problem that occurs because it's a new technology and it hasn't been perfected yet or simple incompetence and human error. A lot of the consumer problems with wireless are endemic to almost any type of dealing with a company or with the Federal Government. I actually spent more time trying to straighten out my daughter's name on her Social Security card because I was given the wrong information over the phone on what kind of ID I had to bring to the Social Security office than I have ever spent dealing with my wireless company. So consumer complaints and problems are kind of endemic. But is there a systemic problem regulation can solve?

I'm skeptical that regulation of specific contract terms can do much to solve any type of a systemic problem here, because most of the evidence shows us that the wireless market is fairly competitive. Even in the Senators' opening statements, we heard numbers quoted anywhere from 3.6 to 50 or more competitors. If you look at the FCC's wireless report, they conclude the market's effectively competitive. This is consistent with most academic research on competition that finds that when you have three or four major competitors you're usually going to get a fairly competitive result.

So I'm skeptical about regulation of contract terms. Does competition always drive companies to disclose accurately and correctly? Many times yes, not always. There may be a strong argument for some type of regulation looking at disclosure. It has to be very carefully crafted so the consumers actually understand what the regulation is meant to accomplish, though.

Alternative solutions? One of the most significant solutions if there is a problem is more competition through greater allocation of spectrum to wireless service.

Finally, unintended consequences. The single most important unintended consequence we have to think about is this. Wireless contracts are not comprehensively regulated and that means if we regulate some terms of the contract the companies can simply change other terms of the contract to make up for it. This is true whether you think the industry is competitive or even if it were a monopoly. Regulatory commissions discovered a long time ago through 100 years of experience that if you don't comprehensively regulate something, like the terms of an agreement with a consumer, you often find that it's basically playing whack-a-mole. You regulate one term, but the company changes something else.

Unless we are willing to actually look at comprehensive regulation of all of the terms of the cell phone contract, which I don't think is very wise, I'm skeptical that regulation of particular terms like termination fees is actually in the long run going to benefit consumers, because other terms in the contract will change to substitute for things the companies can no longer do.

[The prepared statement of Dr. Ellig follows:]

PREPARED STATEMENT OF DR. JERRY ELLIG,[1] SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. Chairman and Distinguished Members:

Thank you for the opportunity to appear here today and testify on consumer wireless issues. I am a senior research fellow at the Mercatus Center, a research, education, and outreach organization affiliated with George Mason University and located a short Metro ride away on the Arlington, Virginia campus. The Mercatus Center's mission is to bridge academics and policy: we conduct interdisciplinary research in the social sciences that integrates practice and theory.

My own research focuses primarily on the causes and consequences of regulation, primarily "economic" regulation of network industries like telecommunications. During the past several years, I have published several studies examining consumer issues in wireless telecommunications—particularly the itemized "add-on" charges that appear on consumers' wireless bills. The two most relevant studies I have attached as appendices to this testimony.[2] Between 2001 and 2003, I also served as deputy director of the Office of Policy Planning at the Federal Trade Commission. While the FTC does not exercise jurisdiction over telecommunications, this experience familiarized me with the general economic concepts used to analyze the kinds of consumer protection issues under discussion today.

Consumer wireless issues involve two types of proposals that are conceptually distinct: regulation of specific contract terms and regulation of disclosures. To understand the effects of regulations mandating specific contract terms or disclosures, three questions need to be answered:

1. Is there a systemic problem that regulation might solve?
2. How effective are alternative solutions?
3. What are the likely unintended consequences of new regulation?

**1. Is there a systemic problem that regulation might solve?**

A systemic problem is a widespread problem created by the existing "rules of the game" under which wireless companies compete. This kind of problem should be distinguished from other sources of consumer complaints that cannot be readily remedied by new regulation, such as ordinary misjudgment or human error, misunderstanding, sloppy execution of corporate policy, technology that does not quite yet do what people would like it to do, or bad-faith actions that are already prohibited

[1] The views expressed in this testimony are solely my own and are not official positions of the Mercatus Center or of George Mason University.

[2] Jerry Ellig and James N. Taylor, "The Irony of Transparency: Unintended Consequences of Wireless Truth-in-Billing" *Loyola Consumer Law Review* 19, 43 (2006), available at *http://www.mercatus.org/publications/pubID.2494/pub_detail.asp;* Jerry Ellig, "Costs and Consequences of Federal Telecommunications Regulation," *Federal Communications Law Journal* 58, 37 (2006), available at *http://www.mercatus.org/publications/pubID.1229/pub_detail.asp*.

under existing rules. These other types of problems are either self-penalizing in competitive markets or can be dealt with via enforcement of existing regulations.

*Contract Terms*

In competitive markets, the bundle of contract terms offered to consumers tends to be the combination that consumers are most willing to accept, given all the relevant costs and tradeoffs. That does not mean some consumers will not wish that some contract terms were different. As consumers, we always want more for our money, and since we are all different, a standardized contract will not always please everyone. But when competition exists, competitors have strong incentives to find out what combination of contract terms will best satisfy most consumers, and offer tailored contracts when they can identify substantial groups of consumers who prefer something else.

The wireless market is undoubtedly the most competitive of all telecommunications markets. The Federal Communications Commission's annual wireless reports amply demonstrate this.[3] There are multiple competitors, the vast majority of Americans have a choice of three or more, average revenue per minute of use has steadily declined, subscribership and usage have steadily increased. "Churn" rates between 1.5 percent and 3.0 percent per month imply that the typical wireless carrier can expect to lose about one-third of its customers every year.[4] Given the extent of competition, it is unlikely that regulation of specific contract terms can significantly increase consumer welfare.

A critic seeking to dispute this contention might characterize wireless communication as an oligopoly—that is, a market with a small number of competitors. Despite the fact that it ends in "-poly," the term implies nothing about the relationship between the number of competitors and consumer welfare. The relationship between the number of competitors, their market shares, and the competitiveness of markets has been studied extensively by scholars for 50 years. This research reveals that there is no simple rule of thumb that tells us how many competitors, or what level of concentration, makes a market "competitive."

Recent studies on the relationship between concentration and prices have produced a wide variety of results that depend on the facts and circumstances in the industry studied. Some empirical research on railroads, for example, finds that two competitors are sufficient to produce the results one would expect in a competitive market.[5] Across a variety of industries, a number of studies find a positive relationship between concentration and prices, but not all do.[6] Laboratory experiments find that four sellers are usually enough to produce a competitive market outcome.[7] In general, the results seem to vary across industries and with the type of information buyers and sellers have.

The DOJ/FTC Merger Guidelines reflect the fact that there is no simple or mechanical relationship between the number of competitors and the competitiveness of the market. The guidelines indicate that mergers in more concentrated markets face a heightened level of review, but such mergers can still be legal.[8] Similarly, the FCC states in its 2006 wireless report, "We note that market structure is only a starting point for a broader analysis of the status of competition based on the totality of the circumstances, including the pattern of carrier conduct, consumer behavior, and market performance. . . ."[9] Examining the totality of the circumstances, the FCC concluded that wireless is effectively competitive in both urban and rural areas.[10]

*Disclosures*

Economists like to say that well-functioning markets require well-informed consumers. This shorthand statement can generate significant misunderstandings. Information, like anything else, is a scarce commodity that requires resources to produce and disseminate. Expecting *all* consumers to have *perfect* information is an ideal that neither competitive markets nor enlightened government regulation can achieve. Fortunately, that is not necessary for competition to work reasonably well.

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[3] See, *e.g.,* Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* WT Docket No. 06–17 (Adopted Sept. 26, 2006), available at *http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf.* [Hereinafter "FCC Wireless Report."]

[4] *Id.* at 65.

[5] Paul A. Pautler, "Evidence on Mergers and Acquisitions," *Antitrust Bulletin* 48, 1 (Spring 2003), pp. 181–82, and references cited therein.

[6] *Id.* at 189–95.

[7] *Id.* at 200–01.

[8] See Section 1.5, Concentration and Market Shares. A copy of the guidelines is available at *http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html.*

[9] FCC Wireless Report, at 40.

[10] *Id.* at 4, 40.

For competition to function well, it is sufficient that *enough* consumers have *sufficiently good* information to understand the material contract terms *that are important to them.* Under those conditions, a wireless firm that offers an inferior set of contract terms will find that it loses current and prospective customers to competitors. Indeed, the well-informed consumers who comparison shop create significant benefits for the consumers who are not very well-informed or who do not want to bother with comparison shopping. A firm whose contract terms are difficult to understand will find itself at a competitive disadvantage versus firms that clearly disclose contract terms. Information disclosure can facilitate competition, but competition also drives companies to disclose information.

For this reason, new disclosure regulations can only be justified if accompanied by a coherent theory explaining why competition systematically fails to produce clear disclosure, along with strong evidence that this is a significant systemic problem. Mandated disclosures should seek to ensure that enough consumers have sufficiently good information to understand the material contract terms that are important to them. Before mandating disclosures, decisionmakers must understand three key facts that require empirical research on consumer behavior:

1. How many well-informed consumers are "enough" to make competition effective? The answer to this question helps determine what percentage of consumers actually need to understand the mandated disclosures.

2. How much information is enough? The answer to this question helps determine the extent of the required disclosure.

3. What material contract terms are actually important to many or most consumers? This is different from asking what contract terms the legislator, regulator, or small group of vocal consumers thinks is important.

**2. How effective are different alternatives?**

When there is a systemic problem, there are usually alternative solutions available. Common sense suggests that decisionmakers should evaluate the pros and cons of each alternative before deciding which one to pursue.

Scholars affiliated with the Mercatus Center frequently offer comments to regulatory agencies when they propose new regulations. We find that agencies often feel that the scope of the alternatives they can consider has been severely limited by legislation—either because Congress ordered them to issue a specific regulation, or because Congress ordered them to issue some kind of proscriptive regulation, even though the agency might have been able to identify other, more effective approaches. For this reason, it is especially important that decisionmakers in Congress consider alternative solutions.

*Contract Terms*

Competitive markets tend to produce the bundle of contract terms that most consumers are most likely to want. The proposed legislation, S. 2033, reflects a belief that wireless markets have failed to do this, and so it mandates specific contract terms. But if competition is insufficient to produce the blend of contract terms consumers are most willing to accept and pay for, policymakers could address the root cause of the problem through competition policy, rather than regulation.

More competition in wireless requires more spectrum for wireless. As part of the Mercatus Center's ongoing program to assess the costs and outcomes associated with regulation, I recently examined the costs of major Federal telecommunications regulations.[11] Out of all Federal telecommunications regulations, spectrum policy has by far the biggest effect on consumer welfare. The costs of the current spectrum policy are large in an absolute sense—in the neighborhood of $77 billion or more annually. Spectrum allocation is by far the costliest aspect of U.S. Federal telecommunications regulation, and it represents a very large share of the total. Even if the actual costs of U.S. spectrum allocation policy were only one-tenth the size that scholars estimate, they would still account for more than 20 percent of the total consumer cost of telecommunications regulation.[12]

During the past two decades, U.S. spectrum policy has gradually become more market oriented. In 1993, Congress directed the FCC to auction an additional 120 MHz of spectrum for wireless communications. Consumers have reaped significant

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[11] See Ellig, *supra* note 2.

[12] Jerry Ellig, "The Economic Costs of Spectrum Misallocation: Evidence from the United States," presented to the conference on Spectrum Policy in Guatemala and Latin America, Universidad Francisco Marroquin, Guatemala City, Guatemala, June 9–10, 2005, available at *http://cadep.ufm.edu.gt/telecom/lecturas/JerryEllig.pdf.*

benefits as a result.[13] The upcoming 700 MhZ auction will eventually make more spectrum available for commercial use. But doling out a few more slices of spectrum is not the same thing as a comprehensive, market-based policy. Current policy still generates large inefficiencies by preventing reallocation of additional spectrum to its most highly-valued uses—most likely wireless voice and data communications. At a minimum, Congress could facilitate wireless competition by directing the administration to identify additional spectrum for auction that is currently unused or underutilized by Federal agencies.

*Disclosures*

If the goal is truthful and accurate disclosure of material information that consumers want to know, there are several possible alternative approaches. One option is specific, mandated billing formats that require certain types of disclosures and prohibit others, but this is hardly the only possible approach. Self-regulation via industry codes of conduct is another possibility. Another regulatory approach would be to require accurate disclosure of all material contract terms and charges without mandating the disclosure or billing format.

One particular regulation affecting disclosure required by S. 2033 involves a specific issue I have researched: wireless add-on charges. The language of the bill might prevent carriers from adding charges that recover regulatory costs or universal service assessments, though they could still treat taxes as an add-on charge.

Wireless add-on charges can be substantial, but most of them are in fact taxes. Using 2004 data, James N. Taylor and I estimated that total wireless add-on charges amounted to $110 per subscriber per year, or $9.20 per month, for a total of $18.8 billion. Add-on charges accounted for about 15.5 percent of the average wireless bill. Three-quarters of these charges, however, were Federal, state, and local taxes—which even S. 2033 would permit as a separate line item on the bill. About 16 percent of wireless add-on charges consisted of regulatory fees (averaging $1.43 per subscriber per month), and about 9 percent was Federal universal service contributions (averaging 83 cents per subscriber per month).[14]

Essentially, then, the legislation affects $2.00–$3.00 per month of add-on charges on the subscriber's bill. A naïve observer might think that the legislation's prohibition would therefore save every wireless consumer several dollars a month, since these add-on charges would be prohibited. But since the price of wireless service is not regulated, the carriers could simply roll these charges into the advertised contract price—either by raising the price, or by refraining from price reductions they would otherwise have offered.

The problem with this approach is that regulatory costs and universal service assessments behave pretty much like taxes. Companies have little control over these costs; the costs are imposed as a result of government decisions. Federal universal service assessments are adjusted quarterly, and state universal service assessments are also adjusted at various intervals. New regulatory mandates could appear at any time. Yet most wireless contracts guarantee the consumer a fixed price for at least 2 years. If the carrier must recover the regulatory and universal service costs in the contract price, then the carrier bears the risk that these costs might change over the life of the contract. If the carrier bears this risk, it will insist on a higher price or a change in some other contract term to compensate it for bearing this risk. There is no reason to believe that this new blend of contract terms will make consumers better off.

The FCC seems to have struck a reasonable balance in its current treatment of regulatory and universal service charges on wireless bills. Companies can add these charges to the bill if they choose, but they must disclose an estimate of these charges before the customer signs the contract. For regulatory charges, different carriers have actually taken different approaches. In 2004, some imposed minimal regulatory charges, while others imposed charges in the $1.55–$1.75 range.[15] The FCC's current approach addresses the core consumer protection concern—ensuring that consumers are informed of possible add-on charges before they commit to a contract—without getting the FCC into the business of regulating the size of the charges.

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[13] The results are documented succinctly in Robert W. Crandall and Jerry A. Hausman, "Competition in U.S. Telecommunications: Effects of the 1996 Legislation," in Sam Peltzman and Clifford Winston (eds.), *Deregulation of Network Industries: What's Next?* (AEI-Brookings Joint Center for Regulatory Studies, 2000), at 102–07.

[14] See Ellig and Taylor, *supra* note 2, at 52–59.

[15] See Ellig and Taylor, *supra* note 2, at 58.

**3. What are the unintended consequences?**

Even when decisionmakers select the most effective means of accomplishing the desired outcome, regulation can have unintended (and undesirable) consequences for consumers. The challenge is to regulate only in those situations where the intended, desirable consequences outweigh the unintended, undesirable consequences.

*Contract Terms*

Wireless service has a variety of dimensions, such as coverage areas, roaming, call clarity, dropped calls, whether the phone can be used as a computer modem without additional charges, quality of 9-1-1 service, and availability and responsiveness of customer service. Wireless contracts have many dimensions, such as the monthly fee, treatment of add-on charges, charge per minute over the monthly allowance, pricing of international calls, definition of free "evening" times, roaming charges, early termination fees, free or discounted telephones, and renewal clauses.

Terms of wireless contracts are not comprehensively regulated. As a result, carriers are free to alter any unregulated contract term—or even invent new ones—in response to new mandated contract terms. One specific example is the tradeoff between free telephones and early termination fees. S. 2033 requires companies to pro-rate early termination fees, apparently in the belief that such a "reasonable" requirement could induce carriers to continue offering free telephones. But there is a more general point here that should not be lost in the debate over one particular contract term. With dozens of unregulated contract terms and hundreds of contract terms that have not yet been invented, the carrier can always alter something else in the contract to make up for any revenue lost due to a mandate. Even a carefully crafted mandate cannot give consumers the proverbial "free lunch."

Mandated contract terms are unlikely to improve consumer welfare unless decisionmakers have evidence that the new bundle of contract terms, including both the mandates *and* other changes the carriers would likely make in response to the mandates, is better for consumers than the current bundle of terms.

*Disclosures*

Even disclosure requirements can have unintended negative consequences for consumers. One problem occurs when so much disclosure is required that consumers experience "information overload"; they simply ignore or only partially process all the information the company is required to give them. Another problem occurs when decisionmakers attempt to design disclosures without knowledge of how consumers interpret them. A recent FTC study, for example, found that significant percentages of both prime and subprime borrowers could not correctly identify various mortgage loan costs using information that lenders are currently required to supply, but redesigned disclosures substantially increased consumer understanding.[16] The point is not that mandated disclosures are never appropriate, but rather that decisionmakers need to do a substantial amount of homework in order to design mandated disclosures that actually convey information accurately to consumers. The FTC mortgage study is an excellent example of the type of homework that should be undertaken *before* new disclosures are mandated.

One aspect of S. 2033 would actually reduce, rather than increase, transparency and disclosure on wireless bills. A well-functioning democracy, like a well-functioning market, requires transparent transmission of information that allows citizens to evaluate the pros and cons of various policies. But if carriers cannot break out universal service and regulatory charges separately, then the substantial costs arising from these regulatory mandates will be concealed. Unfortunately, these are precisely the types of costs that consumers are least likely to be aware of or inform themselves about. If these costs are concealed, consumers have little or no ability to assess whether the benefits they receive from the mandates are worth the cost. Deprived of such information, consumers will be less effective participants in the public policy debate over regulation of wireless service.

Note that I am not saying that regulatory mandates are unwise because they create costs. I suspect, for example, that many wireless customers would say that an additional dollar or so per month for 9-1-1 service is a good deal. But if the cost information is concealed, consumers will never get to make that assessment.

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[16] James M. Lacko and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms,* Federal Trade Commission Bureau of Economics Staff Report (June 2007), available at *http://www.ftc.gov/be/econrpt.shtm.*

**Conclusion**

This Committee is considering proposals that would alter the terms of wireless contracts and mandate the content and form of certain disclosures. To determine which proposals will actually benefit consumers, decisionmakers need to answer three questions:

1. Is there a systemic problem that regulation might solve?
2. How effective are alternative solutions?
3. What are the likely unintended consequences of new regulation?

Given the substantial evidence on the competitiveness of the wireless market, I am skeptical that there is a systemic problem that regulation can solve. If there is a problem, I suspect Congress can more effectively solve it by requiring the administration to free up underutilized government spectrum for auction, to enhance competition in wireless services. Any new regulatory mandates should also be evaluated for unintended consequences, and I would like to emphasize two: (1) Since wireless contracts are not comprehensively regulated, companies could compensate for any mandates by altering other contract terms; consumers would likely be worse off as a result. (2) Preventing wireless companies from itemizing regulatory and universal service costs would reduce transparency and disclosure, or precisely the kind of information citizens need to make their own assessments of Federal policies affecting their wireless bills.

Even if you do not agree with all of my conclusions, I hope you will ask these three questions and demand rigorous answers. Without those answers, new regulatory mandates for wireless are just a faith-based initiative.

Thank you for your time.

Senator KLOBUCHAR. Thank you very much, Dr. Ellig, and thank you to all of our witnesses.

I'm going to start out here with some questions and then I think we'll be able to do another round of questions as well. I wanted to sort of address what you were talking about, Mr. McAdam, about letting the industry compete, I think you said, in your testimony. I think in that way we have the same goals, because I believe you can have a competitive industry when people have full knowledge and they're able to make decisions based on price comparison, like if you go to gas stations and you're trying to find out what the cheapest gas is, or based on the service quality comparisons.

I appreciate the fact that Verizon has been out front in doing some of the things that we're asking in this legislation, which I feel is very tailored. On the consumer complaints, we've heard from Attorney General Swanson, Mr. Pearlman and others regarding the early termination fee abuses, with regard to the cancellation issues and the transparency of contracts, and the issue I first wanted to talk about today, the service quality, because I think it's very difficult for my middle class people in Minnesota who don't have a lot of money, disposable income, to make their decisions if they don't have full information.

I think anyone who has turned on the TV, which my people do in Minnesota, or read a newspaper, is likely to see more than a few wireless company advertisements, and this is how they are getting their information, with slogans such as "Fewest number of dropped calls" or "More bars in more places" or "Can you hear me now?" or "Most reliable service" in a particular city.

The legislation that Senator Rockefeller and I have introduced would simply require that cell phone companies disclose to the FCC the number of dropped calls, if you're making these claims, within a geographic area, so that my consumers can best decide which service is better for their area. This must be the way you have de-

termined that people are making decisions on whom to choose. Yet our people are unable to evaluate whether these claims are true.

I would like to know whether you support this measure in our bill or whether you oppose it, and why.

Mr. MCADAM. Senator, coverage is obviously a very important issue to our customers and we have established our brand as the Nation's most reliable wireless service and coverage is key to that. We are very, very focused on not only measuring what our performance is—we drive millions of miles a year testing our network to make sure we know where the issues are, and then we do publish our coverage maps, not only online but also in our comprehensive collateral package that we show to customers when we first provide service.

We have dealt with the technical vagaries of predicting coverage by allowing customers to do what we call the 30-day test drive. You can put whatever map you want on a website. You can do your best to predict what the coverage would be. But the proof of the pudding is really in does the customer use the device that they have chosen—and by the way, there are lots of variations between device performance—but can they use the device they have chosen where they live, work, and play.

So our offer to customers is to take the device, use it wherever you want for 30 days, and not only can you return it without any ETF, but you can—we will also not charge you for one call——

Senator KLOBUCHAR. And Mr. McAdam, do all the carriers provide that kind of service?

Mr. MCADAM. Well, I think this is a perfect example of competition, Senator, because we have led the industry——

Senator KLOBUCHAR. Mr. McAdam, though, could you just answer my question? Do the other carriers also allow you to get out of your contract in 30 days?

Mr. MCADAM. At this time, some are at 30, some are at 14 days.

Senator KLOBUCHAR. Mr. McAdam, what I asked you basically, though, when you're advertising about these dropped calls, why you cannot disclose that information to the FCC?

Mr. MCADAM. Well, I think we do, we do disclose in a number of ways what our performance is.

Senator KLOBUCHAR. Do you disclose the number of dropped calls by region, where my people—let me just give you an example of this. Let us give out these things—I was driving to—no, I just wanted to hand those things out so he could look at it.

I was driving to Fosston, Minnesota, going around to visit all 87 of my counties, and one of the legislators brought this to my attention. It's the, I believe the second page in your packet there, that you have a billboard up for Verizon right near Fosston that says "Count on Verizon Wireless to keep you connected," and the phone service—and you can see the road that we were on—didn't work for Verizon while you could see the billboard. We just checked it out yesterday. The guy who is in my Moorehead office checked it out and his Verizon phone service didn't work within yards of that billboard.

So you can imagine that it's difficult for customers to make a decision like this when you actually have a billboard up telling them to get your service and then it doesn't work.

I'd say the other piece of this, which we identified earlier, is they're stuck in a 2-year contract and then people move and then they are not able to get out of the contract. So your 30-day deal doesn't help them.

Mr. MCADAM. Well, you brought up a number of important issues, Senator. First, I think the 30-day test drive does allow the customer to try this in any one of the locations to see if it works and then we do take it back.

But I think, secondly and an area where this committee can really help, is around streamlining site requirements. This is one that we have left to the States and the municipalities to set their own rules. I personally live in a town that it has taken us nine and a half years of legal battles in order to get a site approved. The largest number of complaints that I get when I'm out in town is, why can't I make a call at the local King's grocery store?

So we can listen to customers, we can upgrade our network, but if the regulatory bodies continue to get in the way of the industry we cannot meet customers' needs.

Senator KLOBUCHAR. Mr. McAdam, I'm going to give you a map of all the cell phone towers around this little town of Fosston and I think Attorney General Swanson would attest that they would not have legal battles over having a cell phone tower there. We have talked to people in the area and I don't believe that's the problem. They're not concerned about the aesthetics of it. They just want to get phone service.

Mr. MCADAM. Well, I'd certainly be happy to investigate that particular issue. We do work very hard and we spend about $4.6 billion a year on improving our cell coverage. But Senator, I certainly wouldn't stand here and tell you that every part of the country is perfectly covered.

Senator KLOBUCHAR. And I understand that, and I really appreciate actually how you've expanded your coverage. I can get my coverage in the Roslyn Metro Station, which is I don't know how many hundreds of feet underground and it's amazing. But my constituents can't get it. And I understand that it will take time to expand. My issue is, if they're not getting correct information to make their decisions, and that's all we're trying to do. We're not forcing you to put up towers. We're not trying to rate regulate you. We're just simply saying give the people the correct information.

Just with today's technology, when all of these carriers are advertising lowest number of dropped calls, I don't understand how they can do that and then not give the consumers that information by zip code or by county about who competes with the dropped calls. I've heard it could be because of foliage and, as you can see, there's not a lot of foliage in that map in Fosston, Minnesota, and other things. But they're all dealing with the same foliage and the same hills, and so if they were able to compare the cell phone service by an area then they could better decide. That's all we're trying to do.

Mr. MCADAM. Like any consumer product, Senator, I think the best thing to do is ask your friends and neighbors and to try the service yourself.

Just one last point around the predictability of coverage. One example that I use is the most popular cell phone that customers

have demanded is the Motorola Razr. It is also one of the products that, because it is so thin, because it is so fashionable, it has one of the poorer propagation characteristics and dropped call characteristics. I have had many customers tell me directly: I wish this phone would perform better from a dropped call perspective, but I sure love the way it looks when I pull it out of my pocket, and therefore I'm willing to take it.

Senator KLOBUCHAR. Do customers know that the Razr phone has a higher rate of dropped calls?

Mr. MCADAM. As I said, I've had many customers tell me exactly that as they were purchasing the device.

Senator KLOBUCHAR. But that's the kind of information we're talking about that would be helpful if we could evaluate the number of dropped calls by equipment and area.

Mr. MCADAM. And I think that opens up the issue of having again States involved and highly regulating the industry. In California, one of the PUC commissioners said exactly that, that he should have a chance to look at every device before we launched it and decide if that device was up to the requirements of the State. Is that really giving customers choice and does that really not slow down the industry and stifle innovation? I think it does.

Senator KLOBUCHAR. Again, Mr. McAdam, and I'll turn this over to Senator Thune, but our legislation doesn't require that a commissioner in California look at the coverage area. Our legislation simply asks the FCC to develop some reasonable rules about how we could best geographically give the consumer information on dropped calls.

Mr. MCADAM. My understanding is, though, that the States would be allowed to add additional features over and above what's been established by the legislation here. Our view is that if we want a national framework we need a national framework, not 51 national frameworks.

Senator KLOBUCHAR. And as you know, Mr. McAdam, because the FCC has said that the States can't regulate rates, a lot of their efforts, as Ms. Swanson knows, to do this have been stymied, and that's why we're introducing this legislation.

Senator Thune?

Senator THUNE. Thank you, Madam Chair.

I represent a State, of course, that's very rural as well and doesn't have much foliage, so that's not generally a problem we have to contend with. We name our trees in western South Dakota.

But I am interested in the access that people have in rural areas. Amazingly, South Dakota has 500,000 wireless customers, which I think is a remarkable figure considering we have a population of 760,000. I remember a couple years ago, my father, who will be 88 in December, we got him a cell phone. He lives in a town of about 600 people. I initially was a little skeptical that he'd ever be able to use it out there, but actually it works very, very well. So whatever is happening out there is working—extending coverage to more areas of the country, I think the quality continues to improve, and prices have come down substantially.

I know there are some things that are being addressed here in the form of the legislation that is before—that you are testifying about today and those are questions I guess to ask of you to see

how that legislation would impact the service that you deliver and how it would impact prices and that sort of thing.

But I guess I'm interested in knowing just as a general kind of question with regard to the consolidation that has occurred in the industry, whether or not there's enough competition out there. How has that affected you, Mr. McAdam, with the number of players, and particularly I guess competition in rural areas of the country and how does what's happening in the industry generally affect—Google's been talking about going wireless. You've got folks who are looking at getting into this industry, but I suspect that the barriers to entry are pretty high.

In my area we have a lot of smaller providers, cooperatives, independent telephone companies, that deliver services. But what is just the overall general state of competition in the wireless industry and how does that impact the consumer? And if other members of the panel would like to speak to that issue I would welcome your answers as well.

Mr. MCADAM. Would you like me to start, then, Senator?

Senator THUNE. That would be great if you could, yes.

Mr. MCADAM. I think that having four strong national carriers and seven really major carriers and, as was indicated in many of the testimonies, even in rural markets more than three on average carriers to choose from, has really put the power in the customer's hands.

Now, on the four carriers, I don't believe that means they can dominate the market, because we're all in the roughly 25 percent or less network—I'm sorry—customer share. So what we have to do is work very hard as we approach 80 percent of the population having coverage already. We have to work extremely hard to hold our customers as well as attract as many other customers from our competition as we can.

That's why you see the constant ratcheting up of applications that are available and services that are available. One that came about just recently that got a lot of press was the Apple iPhone. I applaud Steve Jobs and I applaud Stan Sigmund for bringing that product to market. We had the chance to do it, but we weren't regulated and told that we had to bring that product to market. In fact, we decided not to, and in the next 30 days we will launch a phone that we believe takes the competitive market up to the next level so that we can compete against AT&T and Apple.

So I think it's very healthy, and you hear a lot about the Yahoos and the Googles and the Intels joining the market, either through a Wi-Fi or a WiMax application or actually joining in the 700 megaHertz. That says to me that it is a healthy industry, that other competitors are willing to come in, and when they do they will take the competition to a further level yet. I don't think that is indicative of an industry that needs regulation.

Senator THUNE. Mr. Murray?

Mr. MURRAY. Senator Thune, if I could also address that. I think you raise an excellent question, which is where is consolidation taking us. We should remember where this industry came from. The reason that there are as many players in each marketplace is not just the result of competition. It's actually the result of a policy the FCC had in place on spectrum caps, where that policy ensured

that there was at least four players in every market. That was how we allocated spectrum. Spectrum again is the public's resource. The public owns it. We let companies use that resource, but with the rights that come along with that spectrum there are also some responsibilities.

If we use as a baseline the landline telephone market, this market looks competitive because we have about 90 to 95 percent plus residential sort of market domination by the major phone companies in those markets. But again, if we use the consumer electronics marketplace—I'm not saying the industry is not competitive, but it's not as competitive. And we've gone from six major national carriers to really two dominant national carriers with four carriers.

But what we miss sometimes is the power of the bundle, where if I've got a local telephone service where I'm dominant in my region, I'm the only carrier who can also offer the local and wireless bundle plus high-speed Internet, that's really hard to compete with if you're a player who doesn't have all those assets.

So we used to have these plans for $20 where consumers—3 and 4 years ago, I remember Sprint was offering a $20 plan and there were these great deals where companies were trying to get each other. I don't see those plans out there any more. There are some plans that are better deals than others. But again, we see most U.S. cell phone subscribers paying more than $500 a year for their service. That's a lot of money.

Senator THUNE. Madam Chair, I have to get to another, to something else. I have to be—I have to excuse myself here. But I would like to have a question, if I could, directed to Mr. Pearlman, maybe have you answer, and if not now for the record, but dealing with complaints. We had in South Dakota I think over the past 3 years 970 complaints about wireless service, which to me doesn't seem like, if you have 500,000 users, a lot.

But I'm interested in knowing, because you've mentioned the high rates of customer dissatisfaction, do those rates of satisfaction vary significantly between areas where you've got a greater number of providers versus those with a fewer number of providers, or are those low approval ratings primarily a function of what you describe as unfair charges and prices and that sort of thing? But if you could compare, I guess, the areas of the country where you've got more providers, more competition, and those with fewer. Does that affect the level of dissatisfaction and therefore the number of complaints?

Mr. PEARLMAN. Sure. I think West Virginia has been lucky in one sense in that we actually have a fairly large number of wireless customers who are served by smaller carriers. Easterbrook Cellular, Highland Cellular are two that come to mind. West Virginia Wireless is another. These are much more focused on the West Virginia market. They are in my experience, our experience, much more focused on customer satisfaction and quality of service. They have typically been much more responsive to our inquiries and raising issues of interest and concern.

For example, Easterbrook Cellular, Highland Cellular, in response to our prodding rolled out very, very advantageous low in-

come customer lifeline plans. This was a condition of their receiving ETC status.

So I think that's had an impact, frankly, on the number of complaints that we get from consumers and also the number of complaints that come in to our public service commission. I should point out, because we're an independent division of our commission, we don't handle, if you will, the intake of customer complaints. So we're dependent, if you will, on the public service commission's tracking of those.

I will say that the number that Senator Sununu pointed out for West Virginia is about accurate, although we have a legacy system that doesn't really do a particularly good job, and I think the staff member that oversees the informal complaint process would back me up on this, doesn't do a very good job of actually identifying what the complaints are, what type of—what those are in terms of billing. If it's a billing complaint, is it a line item? Is it an early termination fee? There's really no granularity in that data.

What it does seem to our experience—and this I think I can also speak on behalf of NASUCA—is it seems like the complaints tick up rather dramatically in areas where the larger carriers are present and competing with one another. The example that I give in my written testimony dealt with Cingular and the California Public Utility Commission's actions with regard to Cingular aggressively marketing its coverage when in fact it didn't serve areas in which it was aggressively marketing its service.

There I think the number of complaints that were actually filed or submitted—and this includes informal and formal complaints—was something in the neighborhood of a thousand, 2,000 complaints to the Commission, when at the same time the number of trouble tickets opened by Cingular relating to these types of issues was in the neighborhood of 144,000 over the same period of time. So clearly customers contact different entities when they have service problems. So the number that are actually coming into the carriers versus the number that are coming into the Commission, you're going to have significant mismatch in various areas.

I think the State of Illinois sent me some figures on their complaints and generally over the past 3 years wireless complaints exceeded long distance and local service complaints. So you're going to have a different experience in each area and it is going to be driven I think to some extent by who the carriers are, the customer quality orientation of the carriers, and also to some degree by what the response of the public service commissions or public utility commissions are to those complaints.

Quite honestly, in West Virginia if a consumer makes an informal complaint about wireless to our commission, in most cases I think the answer is: We don't regulate wireless; go to the FCC. And after a period of time, folks get the message.

Senator THUNE. Thank you, Madam Chair.

Thank you.

Senator KLOBUCHAR. Thank you. Thank you, Senator Thune.

I want to get to some other issues as we explore how we can best make this a transparent market so consumers can make the best decisions so that we can then have true competition. I wanted to ask you, Attorney General Swanson—and I want to clarify here

this area, where we talk about the contract extensions, is something where Verizon, Mr. McAdam's company, has been good in terms of their policy and they are not going to extend without having clear direction from a customer. I want to make that clear because Mr. McAdam is the brave one to come before our Committee today representing a company that has been a leader in trying to put some of these consumer protections in place.

Of course, for me this just shows that if people can do it then we can get the legislation passed so that we can make sure that people aren't getting ripped off.

But Attorney General Swanson, do you want to talk a little bit about this issue and the contract extensions? You used a few examples, about the lawsuit that you have against a different company and why you think this is such a problem?

Ms. SWANSON. Madam Chair, yes. I think it also goes to the competitive issue. You may have multiple carriers in any particular market, but if the consumer is in a long-term 2-year contract and they have to pay a $200 termination penalty to exit early, they effectively can't shop around. For most of the people that you and I represent, those middle income people, they're not going to be able to pay or not want to pay a $200 fee to exit based on bad customer service.

The lawsuit I filed is against Sprint Nextel Corporation and essentially what the company did is enroll people into very long-term contracts—1-year, 2-year contracts—and then, unbeknownst to the consumers, when they would go to the store or call up the company and make a very small change in their plan, add minutes, drop minutes, add a family member, fix a broken phone, unbeknownst to them Sprint Nextel extended their contract for a year, 2 years, again starting those sizable termination penalties over.

We filed a lawsuit alleging that the company engaged in a deceptive practice, a form of consumer fraud, because it was not adequately disclosing to the consumer that it was going to take these steps.

The early termination penalty issue even in the best of circumstances does hit people hard. We've received contact from many consumers who have very legitimate reasons for wanting to exit the carrier. They bought a phone and maybe it worked in the particular locale, but then the kid goes off to college and it doesn't work where the kid's going to college and they want to get out, and the termination penalties really hit ordinary consumers hard and hit them in the pocketbook.

So it is a significant issue and I applaud you, Senator Klobuchar, for your leadership in proposing Senate Bill 2033 which would address it on a nationwide basis.

Senator KLOBUCHAR. Thank you.

Mr. Murray, would the FCC be able to bring an action like Ms. Swanson did and they've just chosen not to?

Mr. MURRAY. Well, it seems they've chosen to not do a lot of things, and that's my main concern here, is that this is the agency that brought us media consolidation, they brought us the consolidation of the ISP marketplace from 6,000 down to just a handful of independent Internet service providers. So I'm a little bit loathe to

just hand over the keys to the kingdom to the FCC and trust them to enact a comprehensive set of rules that will protect consumers.

One thing that we don't have at the Federal level that we do have at the State level is unconscionability standards. These are the contract law provisions that basically say you can charge damages from consumers, but you can't charge them penalties. Well, there's no Federal equivalent of that, so what do we do? Are consumers just sort of out of luck and the entire body of law that rests at the State level just evaporates? I don't know.

I guess I want to be candid: I don't trust the FCC to come up with a comprehensive set of regulations. I think that what you've done here is a rather mildly targeted set of things. As you know, we actually were fairly aggressive in asking you to do more than you did here. But I think this is a modest proposal. It's a good place to start a discussion and we're quite grateful for you introducing this bill.

Senator KLOBUCHAR. Thank you.

Mr. MCADAM. Madam Chairwoman.

Senator KLOBUCHAR. Yes, Mr. McAdam.

Mr. MCADAM. Something brief here. I want to be very clear. What we are suggesting would not at all preempt the state from taking those kinds of actions. I would argue that this system is actually working. The fact that Attorney General Swanson could file that lawsuit has gotten a lot of publicity. I think it's important that that continue as we move forward.

I would also say that the competitive markets punish bad behavior. And if you take a look at the results that are published each quarter by the various wireless companies, there are clearly winners and losers, and I would say there are clearly winners and losers based on how friendly they are for customers to do business with.

Senator KLOBUCHAR. Thank you.

Attorney General Swanson, do you want to follow up?

Ms. SWANSON. Senator Klobuchar, if I may. I would strongly urge the United States Congress not to preempt the states' ability to do better for their consumers. Often states are the laboratory of democracy. They're the ones who are with their constituents and do better and do pass laws, and I think it's very important, as your bill does, to recognize the ability of the States to pass more protective consumer protection legislation.

Let me give you an example. I had heard in the Minnesota Attorney General's office from many veterans, people serving our country, as I mentioned in my opening statement, in Iraq, in Afghanistan, they were in a long-term, 2-year contract, they were deployed overseas to serve this country and do what the government asked them to do, and they were told by their cell phone carrier: Okay, we can terminate your contract, but you're going to have to pay a $200 termination fee to serve your country.

In Minnesota we were able to get a bill passed this session that says carriers can't do that. We extended the provisions of the Federal Service Member Civil Relief Act to disallow carriers from doing that and saying if you're deployed to active duty you can get out and you can get out without a termination penalty. That kind of law—our constituents are now protected. If one of our Minnesota

constituents is sent overseas, they're protected and they don't have to pay additional sacrifice to serve the country. That kind of law ought not to be preempted by Congress.

Senator KLOBUCHAR. Thank you, Attorney General. I know we are—this is a piece of our bill and it's also on another bill pending in Congress. But I think sometimes it's easier for the States to act more quickly.

I wanted to get to another area where we've talked about how we can have more transparency so consumers can make better choices, and that's the billing. One of the things that's hard for me as a member of this Commerce Committee, I can't really evaluate my bill or compare it to other bills. I wondered—one of the things that's most concerning me, what I've seen in some of the consumer complaints I've looked at is this regulatory fee issue. I'm used to, from having worked in this area before, seen States or Federal Government require parts of bills that show if it's a Federal tax or whatever it is. But there's this vague regulatory fee that seems to differ between carriers, or regulatory charges.

I just wondered. Maybe, Mr. Murray, you want to take a stab at this first. Who determines that fee and what is the amount determined? Is it something that the government says, this is your regulatory fee?

Mr. MURRAY. Sure. Well, this is a great example of where it's difficult for competition to work. It's difficult for me to vote with my feet as a consumer if the choices are the same with every carrier. If every carrier is charging the same junk fee, how do I vote with my dollars and feet?

What we see in this particular instance is fees where we'll call it a regulatory fee even though it's not mandated by any Federal, State, or local government authority, nor is it authorized by those authorities. What that seems to be a mechanism for is to allow carriers to advertise a lower price to consumers, so that they say, hey, this plan is $35 a month, but then when you get your bill at the end of the month it comes with a few surprises.

I think that the approach that you set out in the bill is the right one, which is if you have express authorization to charge this from a State, local, or Federal authority, great, include it on the bill; but if it's not authorized and it's not required under some particular regulation, then it needs to be separated.

Senator KLOBUCHAR. So in other words, one carrier could say it was two dollars and another carrier could say it's three dollars?

Mr. MURRAY. Sure.

Senator KLOBUCHAR. And that's just added to your bill, when you're just as a consumer trying to decide between types of carriers based on what the monthly charge is?

Mr. MURRAY. Right, and it's not clear to me what they're charging it for, because if its for E–911 cost recovery, there's another fee for that. If it's for number portability, they were already supposed to have recovered that in the first 5 years. So it just seems to me like this is overhead. It's the "we can charge it" fee, so here you go.

Senator KLOBUCHAR. Mr. Pearlman, you wanted to add something?

Mr. PEARLMAN. Yes. And this has been an area in which I think NASUCA and my office has been very active, is in dealing with the so-called regulatory line item charges that crop up. It's a problem across the telecommunications industry. We're not talking just about wireless carriers, but also landline long distance carriers who have with increasing frequency adopted this sort of government-sounding line item charges. They all seem to be in around the same ballpark range.

But one of the concerns that we have with those charges is not just the name, Federal Program Cost Recovery fee and so forth, but the fact that oftentimes on consumer bills the charges are aggregated into one lump sum, one line item on your bill. So $3.50 will show up or $4 or $5 will show up under the line item "Taxes, fees, and surcharges." Figuring out what those are—and even if you go to the terms and conditions that the carriers have on their websites or in their sales material, oftentimes it will simply give you the potpourri of charges that they may impose on your bill. So actually figuring out which charge is actually showing up on your bill and what that charge is for is next to impossible.

Frankly, that's the experience that my wife, who is a telecommunications manager for her company and contacts——

Senator KLOBUCHAR. That's an interesting marriage.

Mr. PEARLMAN. Pardon?

Senator KLOBUCHAR. That's an interesting marriage.

Mr. PEARLMAN. Well, it's not James Carville and Mary Matalin, but we have some interesting conversations.

But she is constantly told when she contacts her carrier, wireless or long distance, that: The Government makes us put this charge on your bill. That is what she's told. So I hear about it all the time in that regard.

Senator KLOBUCHAR. Mr. McAdam or Mr. Higgins, would you like to add anything?

Mr. MCADAM. I would be happy to. Madam Chairwoman, we spend a lot of time making sure that our bills are very clear with customers. In fact, since Verizon Wireless was formed 8 years ago we've gone through five total bill redesigns, where we invite the customers and we talk about what's clear and what's not clear and we make actual changes.

Now, when a customer comes into our store we clearly call out what a 2-year contract will charge, what a 1-year contract will charge. And when they purchase, on the back of their receipt they get what we call a first bill estimate, which lays out the detail of the bill as much as we can estimate.

Now, to the specific issue of regulatory fees. I know you know this: We have the lowest regulatory fee in the industry right now. But it's an example of where a national framework would be useful, because every municipality is able to layer on additional fees and in some ways tax the wireless user. A lot of them don't want us to show that on the bill. Our view is that it should be; a bright light should be shined on that so that every customer understands what government fees and mandates are costing them on their bill.

These are pass-throughs for us. We don't make a penny on any of it. There's no advantage for us to put these fees on a bill.

Senator KLOBUCHAR. Mr. Higgins.

Mr. HIGGINS. Yes, I agree with Mr. McAdam from the standpoint that we don't add additional surcharges just to pad our profit. Any regulatory requirements that we do have, whether it be USF, 9-1-1, whatever it is, we try to aggregate that and then equally put that on the bill, so that we're recovering that cost, but certainly it's a pass-through to the consumer. In my comments that's what I was trying to say, in that when you only have a few thousand consumers to pass that over it's usually more expensive to do that in a rural network than it might be in a network that's a national network.

Senator KLOBUCHAR. So is there a national competitor in the area that you serve?

Mr. HIGGINS. Yes, there is.

Senator KLOBUCHAR. Do they have the exact same regulatory fee that you do?

Mr. HIGGINS. Not exactly, and I would agree from the standpoint—we have phones with all of our competitors so that we can look at the bills and see exactly who's charging what. And it is difficult at times to determine exactly what that is. But what we do also find is that in a lot of cases from a competitive standpoint it is expensive as a rural carrier to be able to try to take some of these mandates and fund them, spend the money. Then in a lot of cases we can't charge the customer for that. We just have to eat that cost.

That hits into the margins that we're trying to survive on, which is difficult to do, which in effect can decrease competition. There are probably almost half of the rural carriers 5 years ago that were around that have either been bought up or have gone out of business. But I think you heard testimony today that those are the carriers that will build, as I said in my testimony, the cell site out in the middle of nowhere, perhaps in the area where your constituent was driving that they didn't have service there. Those aren't very profitable, those aren't very profitable cell sites. But we will build them because we live there and we'll spend that money even though it may be questionable.

Certainly national carriers, they've got shareholders to report to. They're going to build cell sites where they're going to have—I'm not saying they're never going to build in a questionable area, but certainly they have a capital budget; they're going to have to build in areas where they get the most minutes. And I would do the same thing if I were them.

But it's important that the rural carrier have a place in this marketplace because they're going to build those less profitable sites and give better quality service to the rural constituent.

Senator KLOBUCHAR. Thank you.

Dr. Ellig, you look like you really want to talk.

Dr. ELLIG. Yes. This is one of the rare occasions where I can walk into a committee meeting and actually say I've got a study on this.

Senator KLOBUCHAR. Oh, very good.

Dr. ELLIG. And I'm sure the Committee staff was delighted when the courier lugged in the copies of the 30-page law review article prior to the hearing. But we looked at this a couple of years ago, at all of the add-on charges on wireless bills that are on top of the

actual published price that the companies advertise. If you break that down, about three-quarters of those charges are actually taxes, and I don't mean that as a euphemism. I mean the things that actually are: the Federal excise tax on telecommunications, which is now gone on wireless bills; and then State and local taxes that apply to telecommunications or to wireless. So about three-quarters of the add-on charges are things that governments themselves call taxes, and as best I can tell from looking at your bill, the intention is that those things could still be added onto the bill, the wireless bill.

Of the remainder, the remaining 25 percent, about 16 percent of what is left are these things labeled regulatory fees in various ways. Then the other piece of it is the universal service assessment. I'm not sure from the language of your bill if the intention is to prevent companies from adding the universal service charge and the regulatory fee to the phone bill.

If that is the intention, though, it seems to me that actually significantly reduces disclosure and transparency in a way that's especially harmful because it deprives the consumer of information the consumer would probably not otherwise get. If a consumer as citizen wants to make an intelligent decision about, do I like what the Federal Universal Service Fund is doing or not, do I think that these regulatory charges are a good deal or not, you would certainly want the consumer to have that kind of information on their bill.

That doesn't mean that some of the regulations that these things pay for are a bad idea. I suspect a lot of consumers would say, okay, if it costs me an extra buck or two a month to get E–911 service, that's a pretty good deal, I'm willing to pay for that. So I'm not saying that it needs to be on there because these things are a bad thing, but simply in the interest of transparency and letting the consumer know how much some of these things cost it would be a good idea to at least avoid preventing the companies from breaking those kind of things out separately on the phone bill.

Senator KLOBUCHAR. Okay, quick, Mr. Murray.

Mr. MURRAY. I think the bill's language is actually clear both in intent and the actual language of the bill that that's not what it's designed to do. What it's designed to do is to take any charges that are bona fide charges, as you mentioned USF, E–911. These are clear requirements that municipalities and localities have put on the companies; no problem including those in the bills.

The question is these sort of muddy charges, which are regulatory, but it's a little fuzzy as to exactly what it covers. Maybe it covers property tax, maybe it covers something else. But there's no requirement for the company to actually charge that to consumers. There's no pass-through. It's not like USF or E–911, where there's a clear pass-through; there's a requirement, the company passes it on to the subscriber.

You know, you buy a box of cereal, you don't get to the register and have to pay property tax on top of what you bought. You have a price, you pay that price at the end. And if there's a clear additional charge, it would be okay under the clear language of the Klobuchar bill for the companies to go ahead and pass through anything that is required by a local authority.

Senator KLOBUCHAR. Thank you.

The last area I wanted to touch on—and by the way, Mr. Higgins, I appreciated your comments on the locking and unlocking, which in our bill we've asked for a study because we really wanted to get a sense of where the competitive marketplace could go. But maybe we can talk about that later, at another time.

But I wanted to just end here with talking a little bit about the ETF, the early termination fees. Attorney General Swanson, I think back to my days when I was involved in this industry and understanding the local and long distance services were under some requirements that their rates be just and reasonable. Again, here we know that, because of this different type of market, that there has been preemption on the rate issue and nothing in our legislation is trying to change that.

But it started me thinking about how now when we have for so many customers the cell phone is their only phone and yet they have chosen to do that, but there is no requirement that these rates be just and reasonable, understandably because of this FCC preemption. So I was wondering if you look at the ETF issue, the early termination fee issue, that there should be some justification that it should be just and reasonable. That's all we're trying to do in this bill, that there's some analogy there, where you even look at the car industry; when a consumer leases a car, Federal law requires that any fee for turning in the car before the end of the lease term must be reasonable in light of the anticipated or actual harm caused by the early termination. A first year law student knows that contracts can't contain a penalty clause, that it must be based like a liquidated damages clause. That's what I realize this whole ETF thing makes me think of, that it must be reasonable damages and a reasonable estimate on damages.

So here you have a situation—and I appreciate the fact that Verizon is now starting to prorate, although not on an equal monthly basis, and AT&T has announced that they're going to, but we don't know what it is yet. It seems to me that if you apply any of those other legal principles with cars or liquidated damages, that you wouldn't be allowing this ETF to basically charge excessive amounts.

So could you address that?

Ms. SWANSON. Yes, Senator Klobuchar, I'd be happy to. I think the bill is very narrowly tailored and reasonable in that respect. It simply says that there has to be some correlation between the company's cost and the fee. Companies historically have tried to justify the cost of the early termination fees by saying, well, we're giving you discounts on the phone and we're trying to recoup the phone. But in my experience, many times these early termination fees are charged where the company has little or no cost at all if the customer walks early, particularly in the cases that I mentioned where the companies are automatically renewing or automatically extending the contracts. They long ago recouped the cost of the phone or recouped whatever costs they as a company have, and it simply becomes punitive for the consumer, punishing them for shopping around.

I believe those early termination fees, as well as the long-term contracts, simply are anti-competitive, and if you want to encour-

age competition in this industry in a way that makes sense for consumers and allows consumers simply to shop and compare, have transparency, and be able to vote with their feet, then the regulation of the early termination fee is very reasonable and makes a lot of sense for consumers.

Senator KLOBUCHAR. Anyone else want to respond? Mr. Pearlman?

Mr. PEARLMAN. Sure, I'll take a quick stab at that one. I think one thing that relates to this question of early termination fees and the subsidies for equipment and customer acquisition costs—and we certainly agree with Attorney General Swanson that, certainly in the case of a contract being extended, whatever rationale there was for an early termination fee has evaporated. Whatever those costs were presumably were recovered in the first year or 2 years, what have you.

But one of the concerns that we raised with the FCC previously was the fact that the last time anyone looked at the actual costs associated, what the subsidy was, what the cost of the handset was, what the cost of the customer acquisition was, was 1992. And certainly a lot of things have changed since 1992. The telecommunications industry is generally a decreasing cost industry. That's the general understanding. But no one has looked and apparently, despite our urging, no one is inclined to take a look at what that actual cost justification is that early termination fees are supposedly based on. We would like to see some effort made in that regard.

If the phones really cost that, if the customer acquisition costs are so great, prove it. Show us that the early termination fees are even justified.

The other point that I just want to make sure I get out on the record is our contention has always been that early termination fees are not rates, that they are indeed penalties. They are other terms and conditions that under the 1993 amendments to the Communications Act remain within the purview of States to review and deal with, and indeed many of the State laws, many of the State court actions that we discuss in our testimony, were not preempted on that basis alone. So I just wanted to point that out.

Mr. MCADAM. Madam Chairwoman.

Senator KLOBUCHAR. Yes, Mr. McAdam.

Mr. MCADAM. As a placeholder, since it's come up a number of times, I would like, if you would approve, the opportunity to speak about NARAL. But let me just address the early termination fee here.

Senator KLOBUCHAR. I just thought people were getting hungry, but we are more than happy to go on to that topic.

Mr. MCADAM. I just want to go, make sure the record reflects that we do not charge early termination fees for military, we do not charge early termination fees if someone moves out of our coverage area. We let them out of our service.

Typically, a customer acquisition costs us between $300 and $400. We only charge a blended rate to reflect, as Attorney General Swanson said, some customers cost us less. So the $175 we believe is reasonable. And we do have a consistent monthly reduction.

Now, I would say again that competition is working because, as you pointed out, AT&T followed suit yesterday, and I don't believe it will be long before the rest of the industry does, because customers will vote with their feet. I would encourage other members of the panel when an industry member moves in the direction that the panel is advocating to please be a bit more vocal about it because it will highlight the pressure and make other carriers move.

Senator KLOBUCHAR. Thank you, Mr. McAdam. We also note they did it the day before this hearing.

Okay, Dr. Ellig.

Dr. ELLIG. Well, I think this discussion underscores the importance of the point I made earlier about substitution of one term in a contract for another term, that when we have a complex contract with a lot of terms and some terms that haven't even been invented yet, that could be invented, I don't think we can analyze this just by looking at the size of the early termination fee versus whether there's some sort of a cost-based justification for that fee. In a reasonably competitive market, which wireless pretty likely is, if the companies are earning a stream of revenues from the early termination fee, either because people are paying it when they leave or because they stay so they don't have to pay the fee and so instead they're paying a higher price than they otherwise would for phone service until the contract is up, if there is a stream of revenue associated with that early termination fee and the companies are now told, well, you can't charge that or you have to reduce that, if other terms of the contract are not regulated they can adjust the other terms of the contract to make up for that.

So that it's basically, as I said, like playing whack-a-mole or like pushing in one side of a balloon and the other side pops out. So it's not clear to me that regulations or even jawboning that reduces early termination fees necessarily makes consumers better on net. What I want to know is what else is changing in the contract at the same time or what else might have changed that now won't change because the companies decided to reduce the early termination fee instead of, say introducing a new rate plan that's five bucks cheaper next year as costs went down or something.

It's the foregone alternative that we have to be aware of. We simply can't look at one contract term and say, well, we're going to whack this one down and so we know consumers are better off, because something else will change.

Senator KLOBUCHAR. We get the point.

Mr. Murray and then we'll go back to Mr. McAdam, and then you can respond to that, Mr. Murray, what he's talked about.

Mr. MURRAY. What's different if you reduce the ETF is that competition really works better. This is not your ordinary contract clause. This is not some little privacy thing in your terms of service, not to diminish the value of privacy. But this is the primary thing that prevents competition from working in this marketplace. If you get rid of it—and I guess I would like to challenge AT&T today. If the justification for this is some revenue stream, they're not giving any money to those iPhone subscribers. I challenge AT&T today to get rid of that ETF for all those iPhone subscribers.

But I'll put that to the side. What's changing if you improve competition in the marketplace is that then it is much harder for those

companies to raise prices. It puts downward pressure on prices and it puts upward pressure on quality.

Senator KLOBUCHAR. Okay. Mr. McAdam, you wanted one point that you wanted to make about the NARAL issue, and then we'll let Mr. Murray or Ms. Swanson, whoever, respond to it.

Mr. MCADAM. Thank you, Madam Chairwoman. I want to make sure the Committee knows how important we believe this issue is. It goes to the foundation and the core values of our company and that's why I want to make sure you understand what happened in this particular instance.

When text messaging was introduced several years ago, it became obvious that there were a lot of bad actors out in the community that would send unwanted messages to our customers. And we listened to our customers and they said: We don't want unsolicited messages. So we did put a policy in place that blocked controversial text messages.

Unfortunately, we didn't update that policy as life moved on. And then short codes were introduced, that gives customers the ability to opt in to get that information. Once this was brought to our attention, we realized that—we call it, not too affectionately, dumb policies in our company that outlive their usefulness. It took about 15 minutes of discussion to realize this was one of those dumb policies and we turned very quickly.

Now, I also want to state for the record that we found out about this controversy when a New York Times reporter called us. We asked them to fax the letter over to us because we did not receive the letter, and we actually changed this policy and fixed it before we received the letter from NARAL. So it's a slightly different story than you may hear in the press and I wanted to set the record straight, and thank you very much.

Senator KLOBUCHAR. Thank you, Mr. McAdam.

Mr. Murray?

Mr. MURRAY. Well, I would say I do believe Verizon's response was the right one to this incident. But this is a really, really serious incident. In today's op-ed in the *Post,* we've got both the head of the Christian Coalition and the head of NARAL Pro-Choice America writing on the same side of this issue. When we have strange bedfellows like that it raises some questions: Why is this, that this would capture people's attention?

Yes, it was in *The New York Times* and that generated a response. But the question is what if *The New York Times* story hadn't emerged, or what if we find ourselves where we have actually formalized this sort of informal understanding of this marketplace and say, you know, it's not a problem for network operators to block political speech. At that point it ceases to be news and it ceases to be remarkable, and therefore it ceases to be a story.

So my concern here is that without enforceable protections—we know that the company cannot interfere with your phone call. Why should consumers have a different expectation for text? The wireless Internet marketplace is increasingly going to be the way that consumers communicate with each other, that the market reaches consumers, as we move into the 21st century. And the open Internet model worked really well because of the nondiscrimination protections of Title II. I don't see why we should accept anything less

in the wireless marketplace, and I think that this issue deserves further scrutiny.

Senator KLOBUCHAR. All right. Well, I want to thank all of our witnesses and just conclude by saying that we are working very hard on this bill and will continue to work with all of you. I was listening to you, Mr. McAdam, as you talked about your policies and looking at them again and talking about life moving on and outdated policies. This is sort of how we look at the cell phone rules right now, that life has moved on, we've gone from a few customers to 200 million, we've gone to $100 billion a year in revenues, and we think we need to do some fixing of the regulations without interfering with the great growth that we've seen with cell phones.

So I want to thank you all for coming. We look forward to working with you in the future, and the hearing is adjourned and everyone can turn on their cell phones.

[Whereupon, at 12:28 p.m., the hearing was adjourned.]

# A P P E N D I X

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Thank you, Mr. Chairman, for holding this hearing on consumer wireless issues.

The wireless industry has seen explosive growth and amazing innovation over the past decade. Currently, there are more than 245 million wireless customers in the U.S.—in 1997 there were only 55 million. Cell phones continue to be packed with additional features and applications, and in doing so bring more value to consumers—just look at the evolution from the "old" Motorola flip phone to the new Apple iPhone.

This growth and innovation has been realized in part due to the light regulatory environment that exists. The industry hasn't been bogged down by the traditional regulatory regime, which has immersed the wireline industry. Greater flexibility has been given to the wireless industry in exploring business practices and service offerings that have resulted in impressive benefits to the consumers—lower per minute charges, more functionality, and more tiered services.

Despite this exponential growth and innovation, there are still many areas in America, including my state of Maine, where there is spotty cell phone reception—or worse, no reception at all. In fact, a 2006 study in Maine identified over 2,000 dead zones where wireless coverage is not available. This is very concerning given the testimony this committee heard in June from Chief Deputy Everett Flannery of Kennebec County about this "wireless gap" in rural areas and its impact on public safety and the ability of first responders to communicate in critical and sometime life threatening situations. So having ubiquitous wireless coverage for all Americans is paramount and should be the main goal of any policy initiative.

Certainly we must monitor industry's business practices regarding customer service because there have been significant lapses. The industry was initially very resistant to wireless local number portability or "WLNP." But now industry has a voluntary standard of two and half hours to complete these porting requests, and have ultimately benefited from WLNP as more and more Americans go completely wireless by migrating their landline numbers to cell phones.

We're also all aware of the recent incident where a large wireless carrier blocked text messages sent among members of a prominent women's rights organization. This was a significant error on the part of the carrier and shouldn't have occurred. While the carrier involved did reverse its policy within several hours of the dispute being publicized, would this have been resolved as quickly for a consumer with fewer resources at their disposal? In response to this, Senator Dorgan and I have sent a letter to the FCC requesting the Commission look into this further since this seems to parallel concerns raised with the issue of net neutrality.

Out of more than 230 million wireless customers, the Better Business Bureau received approximately 28,800 wireless complaints in 2006, the highest number of complaints for an industry. Yet the Bureau further reported that wireless had a 91.7 percent complaint settlement rate while the across industry average was only 73 percent—this demonstrates that the industry is taking the initiative and working with consumers to resolve problems that do arise. Carriers are also making positive consumer offerings such as introducing innovative pricing plans and service offerings, and upgrading their networks to accommodate new communications and data applications that are being added to phones bringing more functionality to customers.

There is no question of the amazing innovation and growth that the wireless industry has witnessed over the past decade. We're continuing to see significant advancements in wireless devices, applications, and services—some of which we would have never even thought of a few years ago. With this growth and innovation, the market is competitive and being responsive to issues that arise. Possibly unfair business practices have occurred which must be investigated fully. We should continue to monitor this but also focus effort on working with industry to accelerate deployment efforts so there is ubiquitous wireless coverage throughout the U.S. and

all Americans can reap the amazing benefits that wireless communications has to offer.

Thank you, Mr. Chairman, for holding this hearing today. I look forward to the witnesses' testimony.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARIA CANTWELL TO HON. LORI SWANSON

*Question.* In preparation for the hearing, I had the opportunity to read a number of unfiltered wireless complaints received by my State's Attorney General's office. While a few of the complaints involved a significant amount of money, for the most part, these complaints appear to be of relatively small dollar value. Based on what I read, my sense is that consumers first attempt to resolve these outstanding issues with the wireless companies. If their problem can't be resolved, at some point, either they figure it is more trouble or time than it's worth and give up, or they get angry and file a complaint. Is that your experience in Minnesota? Do you think that there are many more consumers with unresolved disputes with their wireless carriers than the number of complaints may indicate?

Answer. Senator Maria Cantwell, I thank you for your question following my testimony on consumer wireless issues. It is my observation that there are far more consumers with unresolved disputes with their wireless carriers than the number of complaints received by government or non-profit agencies, such as the Better Business Bureau. In fact, it has been my Office's experience that generally less than 1 percent of the aggrieved population will actually take the time to complain to a third party, such as a state or Federal regulatory agency, about a company with which they are having a dispute.

As you indicate, most consumers try first to resolve their dispute directly with their wireless provider. This Office has observed first hand that the wireless industry takes the attitude that it is their way or the highway, thus leaving the consumer feeling powerless to try to do anything against their wireless provider. Many consumers simply drop the issue, as they feel that they are left with no option but to stay with their current wireless provider or pay a huge termination fee to change providers or cancel their service. As I testified, the wireless providers routinely charge a contract termination fee that ranges from $150 to $250 to terminate the contract before the wireless company believes it ends. Further, the wireless industry has extended some consumer contracts by 2 years without the consumers' knowledge when the consumer makes a small change to their plan, thus locking some consumers in for years. These contract termination fees are a significant block to the consumer's ability to change carriers. To the vast majority of Americans, $100 is still a significant amount of money and may constitute their weekly grocery budget. Consumers should not be locked into a long term wireless contract with prohibitive early termination fees simply because the wireless industry exerts its power over the consumers. It is important that there be legislative initiatives to protect consumers from the unfair trade practices of the wireless industry. The need for protection is demonstrated by the fact that of the 3,600 industries surveyed, the wireless industry has been the most complained about industry in the United States for several years running.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO LOWELL C. MCADAM

*Question 1.* An article in the October 16 edition of *The Wall Street Journal* discussed a specialized form of direct mail referred to as trans-promotional marketing, where ads and promotional offers are placed directly on a consumer's bill or statement. Does Verizon Wireless currently place any advertisements or promotional offers on consumers' bills? Does Verizon Wireless have plans to place advertisements or promotional offers on consumers' bills in the future? Do you see any potential harm to consumers if advertisements or promotional offers are placed on consumers' bills?

Answer. Verizon Wireless does not as a general practice place third party advertising in bills, either in paper or online, and Verizon Wireless has no plans to include such advertising in its bills. Verizon Wireless does place promotional messages related to Verizon Wireless service in its bills. We do not see any potential harm to consumers from these promotional offers being placed on consumers' bills.

*Question 2.* In Dr. Ellig's testimony, he cited FCC data that the wireless churn rate is between one and one half percent and 3 percent per month. Without divulg-

ing any proprietary information, have you seen any noticeable change in the churn rate since your company has implemented its new policy on early termination fees? If so, can any of the change be attributed to the pro-rating of early termination fees?

Answer. Verizon Wireless has the lowest churn/highest customer loyalty (total, retail and retail postpaid) in the wireless industry. Our churn rates have improved or remained basically flat every quarter since the ETF pro-ration was introduced in November 2006. We do not believe the pro-rated ETF has had any noticeable impact on our retail postpaid churn rate.

*Question 3.* While I am very excited about the potential of wireless location-based services, I am very conscious about its privacy implications. Last year, when this committee took up legislation to address the practice of pre-texting, my colleagues and I learned a considerable amount about cell phone records and, more generally, the data surrounding a call. Recently, your company announced its new policy about sharing customer information within the Verizon family of companies and giving customers the option of opting-out. Why not have consumers affirmatively opt-in?

Answer. First, to clarify, Verizon Wireless does seek opt-in consent from its customers prior to enabling commercial location-based services. The opt-out policy that you are referencing does not relate to location-based services. The opt-out consent process makes it easier for our customers to receive information about the "family" of other Verizon products—landline local and long distance, such as VoIP, DSL, FiOS, etc. Because the FCC requires a wireless company's customer to consent through not exercising the opt-out right before the customer's CPNI can be shared with the company's wireline affiliates, we needed to take this step.

*Question 4.* Do you believe that there will ever be a commercial wireless directory? And what is Verizon Wireless's current position on the creation of a wireless directory?

Answer. My predecessor at Verizon Wireless, Denny Strigl, testified on this very issue before the Senate Commerce Committee in 2004. His remarks were straightforward and delineated Verizon Wireless as the leading opponent to a wireless directory. In fact, I would say that our opposition killed this idea. We continue to oppose the establishment of such a directory, and I will repeat some of Mr. Strigl's testimony, which continues to be our policy at Verizon Wireless.

We at Verizon Wireless think a Wireless Telephone Directory would be a terrible idea, and we will not publish our customers cell phone numbers or otherwise participate in a wireless directory plan.

Here's why we will not participate in a directory assistance program: Since we started this business, we have not published our customers' wireless phone numbers. We did this consciously, for the sake of preserving customers' privacy and control over their bill and discouraging interruptions from unwanted calls. We do not believe those basic reasons have changed.

In fact, we see more reason today than ever to protect customers' privacy. The floodgates are open to spam, viruses, telemarketing and other unwanted, unsolicited messages on landline phones, computers and in mailboxes. We think our customers view their cell phones as *one* place where they don't face these intrusions, where they have control over their communications.

And if there's any doubt, our customers—and some of your constituents—are reiterating loudly and clearly that they don't want their wireless phone numbers published.

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## RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO PATRICK PEARLMAN

*Question 1.* Recently, Verizon Wireless announced its new policy about sharing customer information within the Verizon family of companies and giving customers the option of opting-out. Mr. Pearlman, do you see any potential dangers to consumers by requiring consumers to opt-out rather than permit them to opt-in?

Answer. Yes, we [1] certainly believe that forcing consumers to affirmatively "opt-out" of a carrier's policy of sharing confidential, personal information about that customer within the carrier's corporate family presents potential dangers to consumers. The harms flowing from the disclosure of consumers' confidential information have been well documented by, among others, Congress and the Federal Communications Commission ("FCC"). Moreover, the glaring shortcomings of "opt-out" procedures in

[1] As I noted in my oral testimony to the Committee, my responses are provided on behalf of my office, the Consumer Advocate Division of the Public Service Commission of West Virginia, and also on behalf of the National Association of State Utility Consumer Advocates ("NASUCA"), of which my office is a member.

protecting consumers' sensitive information have been recognized by many, including the FCC, consumer advocates, and state law enforcement officials and regulators. As recently as April 2007, those shortcomings prompted the FCC to reverse its rules utilizing an "opt-out" mechanism for carriers wishing to share such information with joint venturers and independent contractors and to instead adopt an "opt-in" mechanism prohibiting such disclosures unless consumers gave express, informed consent to the disclosure. The same concerns that warranted the FCC's policy reversal regarding carriers' disclosure of sensitive customer information to joint venturers and independent contractors apply with equal vigor to carriers' disclosure of such information to myriad affiliates—many of whom may not be subject to the Communications Act at all.

It goes without saying that customer proprietary network information ("CPNI")[2] is commercially valuable. Indeed, the practice of "pretexting,"[3] which both Congress[4] and the FCC[5] have taken pains to address, highlights the value of CPNI and the lengths to which businesses and individuals will go to obtain it. In enacting the Telephone Records and Privacy Enforcement Act, Congress recognized that the unauthorized disclosure of telephone records is a serious problem, declaring that such a disclosure "not only assaults individual privacy but, in some instances, may further acts of domestic violence or stalking, compromise the personal safety of law enforcement officers, their families, victims of crime, witnesses, or confidential informants, and undermine the integrity of law enforcement investigations."[6]

Likewise, in its April 2007 rulemaking dealing with pretexting, the FCC detailed the record of consumer harms stemming from the unauthorized disclosure of CPNI. The FCC noted that, since February 2005, more than 150 major security breaches had been reported, resulting in the personal information of over 54 million Americans being compromised.[7] Likewise, the record before the FCC identified numerous lawsuits having been brought by telecommunications carriers seeking to enjoin pretexting activities, clearly indicating that pretexters had been successful in gaining unauthorized access to CPNI—despite carriers' statutory obligation to vouchsafe such sensitive information. In such cases, defendants or their agents sometimes posed as an employee/agent of the carrier, or as a customer of the carrier, to induce customer service representatives to provide such persons with call records of a targeted customer.[8] Customer service representatives appeared to be an all-too-easy mark for such unscrupulous persons. The FCC noted that the Federal Trade Commission had also filed suits against several pretexters under laws barring unfair and deceptive trade practices, and that numerous states, including California, Florida, Illinois, Missouri, and Texas had sued data brokers for pretexting phone records.[9]

Nor is the unauthorized disclosure of customers' private network information limited to the context of "pretexting"—in the past, persons have not had to resort to pretexting in order to obtain customers' private network information. Unauthorized disclosures can be the result of simple negligence by telecommunications carriers. For example, in its rulemaking, the FCC noted that AT&T had "recently notified" the agency that it had failed to send CPNI "opt-out" notices to 1.2 million customers, and that this failure resulted in the marketing to customers who may have

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[2] The Communications Act defines CPNI as:

(A) Information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) Information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

47 U.S.C. § 222(h)(1).

[3] "Pretexting" is the practice of pretending to be a particular customer or other authorized person in order to obtain access to that customer's call detail or other private communications records. *See In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services,* Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 6927, 2007 FCC LEXIS 2679, ¶ 1 n. 1 (2007).

[4] *See* Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476, 120 Stat. 3568, (2007), *codified* at 18 U.S.C. § 1039.

[5] *See* n. 3, *supra.*

[6] 120 Stat. 3568, § 2(5).

[7] 22 F.C.C.R. at ¶ 41 n. 131, *citing* National Association of Attorneys General Comments, pp. 7–9.

[8] 22 F.C.C.R. at ¶ 12 (citations omitted).

[9] *Id.* (citations omitted).

otherwise opted out.[10] It is worth noting that AT&T's "notification" was not entirely voluntary. Instead, the carrier confessed its omission only after the FCC issued a forfeiture order against AT&T (and other carriers) for failing to file its annual certification averring that it was maintaining CPNI in compliance with the FCC's rules.[11] Likewise, the FCC noted recent law enforcement investigations documenting the ease with which persons could obtain the confidential calling records of consumers without having to engage in pretexting.[12]

The harms to consumers reflected in the record before the FCC were sufficiently compelling to warrant a reversal of the agency's policies with regard to the sharing of CPNI by carriers with joint venturers and independent contractors. Under the FCC's prior rules, carriers could disclose CPNI to persons in joint ventures with the carrier, or the carrier's independent contractors, so long as the affected customer had not "opted-out" of such practice, *i.e.,* affirmatively requesting the carrier to not disclose the customer's CPNI. In its 2007 rulemaking, the FCC reversed itself, and modified its rules to require telecommunications carriers to obtain "opt-in" consent from a customer before disclosing that customer's CPNI to a carrier's joint venture partner or independent contractor for the purpose of marketing communications-related services to that customer, based on "new circumstances" that forced it "to reassess [its] existing regulations."[13] Specifically, the FCC concluded that:

> [T]here is a substantial need to limit the sharing of CPNI with others outside a customer's carrier to protect a customer's privacy. The black market for CPNI has grown exponentially with an increased market value placed on obtaining this data, and there is concrete evidence that the dissemination of this private information does inflict specific and significant harm on individuals, including harassment and the use of the data to assume a customer's identity. The reality of this private information being disseminated is well-documented and has already resulted in irrevocable damage to customers. *While there are safeguards in our current rules for sharing CPNI with joint venture partners and independent contractors, we believe that these safeguards do not adequately protect a customer's CPNI in today's environment. Specifically, we find that once the CPNI is shared with a joint venture partner or independent contractor, the carrier no longer has control over it and thus the potential for loss of this data is heightened.* We find that a carrier's section 222 duty to protect CPNI extends to situations where a carrier shares CPNI with its joint venture partners and independent contractors. *However, because a carrier is no longer in a position to personally protect the CPNI once it is shared—and section 222's duties may not extend to joint venture partners or independent contractors themselves in all cases—we find that this sharing of data, while still permitted, warrants a requirement of express prior customer authorization.*[14]

In abandoning the "opt-out" mechanism for joint venturers and independent contractors, the FCC relied not only on the well-documented harms resulting from the unauthorized disclosure of customers' proprietary information discussed above, but also relied on abundant evidence in the record demonstrating that "opt-out" regimes fail to give consumers an adequate opportunity to give "informed" consent to the disclosure of their CPNI. The FCC noted that the average consumer would often find the "opt-out" notices provided by carriers, which allowed them to share information with joint venture partners and independent contractors unless otherwise directed, vague and incomprehensible. In addition, the agency noted that many studies of opt-out regimes reflected this consumer confusion and cited evidence in the record reflecting that consumers overwhelmingly prefer "opt-in" mechanisms to protect their

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[10] 22 F.C.C.R. at ¶ 12 n. 31.

[11] *See AT&T, Inc.,* Notice of Apparent Liability for Forfeiture, 21 F.C.C.R. 751 (2006); *see also* 47 C.F.R. § 64.2009(e).

[12] 22 F.C.C.R. at ¶ 12 n. 31, citing Law Enforcement and Phone Privacy Protection Act of 2006, H.R. Rep. No. 109–395, 109th Cong. 2d Sess. 2 (2006) (citing Frank Main, "Anyone Can Buy Cell Phone Records: Online Services Raise Security Concerns for Law Enforcement," *Chicago Sun-Times,* A3 (Jan. 5, 2006). For instance, a Chicago police official obtained call records of an undercover narcotics officer's telephone number, and received accurate call records within 4 hours of the request. *Id.* Similarly, in 1999, law enforcement authorities discovered that an information broker sold a Los Angeles detective's pager number to an Israeli mafia member who was trying to determine the identity of the detective's confidential information. *Id.,* citing Frank Main, "Cell Call Lists Reveal Your Location: Anybody Can Pay to Track Where You Used Phone," *Chicago Sun-Times,* A3 (Jan. 19, 2006). The FCC also noted that a political Internet blogger purchased the cell phone records of former Presidential candidate General Wesley Clark. *Id.,* citing Frank Main, "Blogger Buys Presidential Candidate's Call List: Nobody's Records Are Untouchable, as $90 Purchase Online Shows," *Chicago Sun-Times,* A10 (Jan. 13, 2006).

[13] 22 F.C.C.R. at ¶ 37.

[14] *Id.* At ¶ 39 (emphasis added).

confidential, private information.[15] The FCC agreed—sensibly in our opinion—with the National Association of Attorneys General's ("NAAG") assessment, that such studies "serve as confirmation of what common sense tells us: that in this harried country of multitaskers, most consumers are unlikely to read extra notices that arrived in today's or last week's mail and thus, will not understand that failure to act will be treated as an affirmative consent to share his or her information."[16]

The same rationale, and concerns, warranting the FCC's abandonment of its prior "opt-out" regime in favor of an "opt-in" regulatory framework for joint venturers and independent contractors, justifies eliminating the "opt-out" regime that applies to carriers' sharing of CPNI to affiliates.[17] The mergers and consolidation experienced in the telecommunications industry since the 1996 amendments to the Communications Act (think of the torturous path taken by Southwest Bell in its evolution into AT&T) have resulted in carriers with myriads of affiliates that leave consumers, and even regulators, in the dark regarding those affiliate relationships. A Verizon customer, for example, may know that MCI is now a Verizon affiliate, but few know that Southernnet, Brooks Fiber, or Intermedia Communications (MCI affiliates) are now part of Verizon. The idea that a consumer "expects" or "accepts" the Verizon local carrier to share his or her CPNI with such affiliates is simply not credible. Likewise, the notion that a Verizon local service provider can exercise control over consumers' CPNI once it has been disclosed to its affiliates is far-fetched. Many affiliates—such as Internet Service Providers, cable operators, providers of Voice-over-Internet Protocol ("VoIP") service—may not be telecommunications carriers that are subject to the restrictions on disclosure of CPNI applicable to such entities under 47 U.S.C. § 222, and thus, once disclosed, the obligation to protect such information quickly dissipates. Finally, there is another harm associated with carriers freely sharing CPNI with their affiliates, absent a customer's exercise of his or her "opt-out" ability, namely the competitive advantages derived by affiliates against non-affiliated competitors. I see no reason why both consumers and potential competitors should be placed at a disadvantage by allowing the free flow of CPNI within a carrier's family of affiliates.

Finally, limiting the flow of CPNI within the extended corporate family by requiring an "opt-in" mechanism is consistent with other laws enacted by Congress to protect citizens' expectation of privacy. Indeed, most privacy laws enacted by Congress, such as the Family Educational Rights and Privacy Act,[18] Cable Communications Policy Act,[19] Electronic Communications Privacy Act,[20] Video Privacy Protection

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[15] *Id.* At ¶ 40 & n. 129. The studies noted by the FCC are telling. For example, the Electronic Privacy Information Center ("EPIC") cited numerous studies in which consumers expressed overwhelming support for "opt-in" procedures to maintain the privacy of their personal information. Thus, an April 2001 study by the American Society of Newspaper Editors and the First Amendment Center showed that 76 percent of respondents supported opt-in as a standard for sharing of driver's license information. A September 1999 study by Forrester Research found that 90 percent of Internet users wanted to be able to control how their personal information is used after its collection. An August 2000 survey conducted by Pew Internet and American Life Project found that 86 percent of Internet users favor opt-in privacy policies, results virtually identical to those obtained in a March 2000 BusinessWeek/Harris poll. *See In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services,* Docket No. 96–115, EPIC Comments at 9–10 (April 14, 2006). Nor do consumers limit their preferences to academic studies—as EPIC noted in its comments to the FCC—when consumers are given a chance to express their preference at the voting booth, they overwhelmingly prefer "opt-in" as the way to safeguard their private information, despite heavy industry lobbying to convince them to vote otherwise. *Id.* at 10 (discussing a 2002 North Dakota referendum in which an opt-in measure was approved by 73 percent of voters, despite industry outspending proponents of greater privacy protection by 7:1).

[16] *Id.* at ¶ 44 & n. 146.

[17] It must be noted that, in its rulemaking, the FCC drew a distinction between joint venturers/independent contractors and affiliates, observing that "many customers accept and understand that carriers will share their information with affiliates and agents—as provided in our existing opt-out rules—there is less customer willingness for their information to be shared without their express authorization with others outside the carrier-customer relationship." *Id.* at 40. There was no basis in the record, however, for the FCC's distinction. In its rulemaking order, *the FCC failed to cite any evidence, in the record or otherwise, in support of its "observation"* that "many consumers accept and understand that carriers will share their information with affiliates and agents." In fact, *the only evidence cited by the FCC in support of its observation actually contradicted that observation,* since it consisted of comments submitted by consumer advocates noting that studies demonstrated consumers "generally" support opt-in mechanisms that provide "better protection" of their privacy and give them "more control" over the sharing of such information. *Id.* at 40 n. 129.

[18] 20 U.S.C. § 1232g.

[19] 47 U.S.C. § 551.

[20] 18 U.S.C. § 2510 *et seq.*

Act,[21] Driver's Privacy Protection Act,[22] and Children's Online Privacy Protection Act,[23] do not employ an opt-out approach but rather require an individual's explicit consent before private information is disclosed or employed for secondary purposes. Moreover, even the FCC has noted that "the use of opt-in approval methods appear to have become increasingly common, such as in the mobile wireless context."[24]

*Question 2.* As mobile-based commerce and location-based commerce grows, are there specific consumer protection issues that you believe Congress should keep its eye on?

Answer. Yes, there a host of consumer protection issues that our experiences at the state and local level lead us to believe Congress should consider addressing at this time, or at least monitoring closely. Congress should consider these issues in the context of not just traditional voice telephone service, but as technologies continue to converge in an evolving and disparately regulated marketplace, these issues should be considered in the context of cable, wireless, broadband and VoIP services.

At a minimum, we believe that Congress should remain focused on providing all consumers with the following minimum protections regardless of their telecommunications service or provider:

1. Clear and consistent disclosure of service-related rates and other terms and conditions of service, including additional fees, surcharges, and taxes imposed or collected by the service provider, provided before the customer signs up for service.

2. The provision of adequate, prior notice of disconnection and conditions under which disconnection can be avoided.

3. The provision of adequate, prior notice of material changes in the service-related rates and other terms and conditions of service, including additional fees, surcharges and taxes imposed or collected by the service provider.

4. The provision of adequate billing detail and the provision of sufficient time and opportunity to pay the bill. Moreover, Congress should make it clear that a customer should not be subject to a fee or surcharge in order to receive a monthly bill, paper or otherwise, that adequately itemizes the services for which the customer is being billed. Carriers have often sought to impose "paper billing fees" or "bill itemization fees" in connection with the rendition of a monthly bill. The FCC and state agencies have recognized that the monthly bill customers receive is the most important source of information for most consumers regarding their service or rates and charges. Consumers should not be forced to pay extra in order to obtain this information. Moreover, carriers have often sought to implement billing on less-than-monthly frequency. Such billing is acceptable so long as consumers retain the option to choose such billing intervals and are not penalized if they retain monthly billing.

5. The ability to contact a "live" customer service representative of the service provider(s) in a timely manner, at no cost. In our experience, consumers are extremely unhappy with automated voice recognition and other automated answering processes adopted by carriers and other providers to respond to customers' service-related questions or problems. Moreover, Congress should monitor carriers' and providers' efforts to terminate "problem" customers (*i.e.,* customers who contact customer service frequently) in order to ensure that consumers are not being penalized for being provided with inadequate service by the carrier or provider.

6. The ability to cancel service without penalty, especially if the consumer experiences inadequate service (in terms of coverage, quality, dropped calls, unavailability of provider facilities), or if the service conditions materially change (such as technology conversions that adversely affect a consumer's existing service—such as requiring wireless CDMA customers to convert to GSM service). We have observed, with increasing concern, the spread of "early termination fees" from the wireless market into other, communications-related fields—such as broadband or VoIP service. In connection with this issue, Congress should also consider the degree to which carriers and providers of similar services rely on

[21] 18 U.S.C. § 2710.
[22] 18 U.S.C. § 2721.
[23] 15 U.S.C. § 6501.
[24] 22 F.C.C.R. at ¶ 45 n. 148, *citing, e.g.,* "The Mobile Revolution Will Be Advertised," *Wireless Business Forecast,* 2006 WLNR 4911016 (Mar. 23, 2006) (discussing the use of opt-in approval processes in mobile wireless marketing); Betsy Spethmann, *Next-Tech.,* Promo, 2005 WLNR 10551271 (July 1, 2005) (discussing the use of an opt-in approval process by Verizon Wireless).

long-term contracts that constrain consumers' ability to freely shop among providers based on the cost and quality of service.

7. The issuance of reasonable credits for out-of-service conditions that is consistent with the duration of the service outage.

8. The provision of adequate protections against slamming (unauthorized changes in service or provider) and cramming (inclusion of unauthorized charges on the customer's monthly bill).

9. The ability to transfer telephone numbers when changing carriers or service providers, known as number portability.

10. The ability to use communications devices (phone, modem, etc.), also known as customer premise equipment, of the customer's choosing and the ability to use that equipment with other providers' services. Handset locking is the most well-known example of such practice today.

11. The ability to access Enhanced 911.[25]

12. Encouragement and support for programs (*e.g.,* Lifeline) that assist low-income consumers to utilize all modes of telecommunications and similar services.

13. There must be a uniform and clear source of information to allow consumers to objectively compare their various choices.

14. Appropriate provision of service and equipment suitable for consumers with disabilities.

15. Limiting consumers' liability for purportedly unauthorized usage charges to an objectively reasonable amount (*e.g.,* $50). It is our experience that many carriers subscribe to anti-fraud services, such as FairIsaac, that allow them to engage in real-time monitoring of customers' accounts. For example, Toward Utility Reform Network (another NASUCA member) is aware of one instance in which a wireless carrier notified a customer of unusual calling in real time, was advised that the customer's cell-phone had been stolen, and then billed the customer for thousands of dollars in unauthorized calls anyway. Since carriers have access to technology permitting them to see, in real-time, unusual account activity to monitor and prevent fraud, it is reasonable to require them to mitigate their damages prior to holding the customer responsible for the monetary consequences of such fraudulent activity.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO CHRIS MURRAY

*Question 1.* An article in the October 16th edition of *The Wall Street Journal* discussed a specialized form of direct mail referred to as trans-promotional marketing, where ads and promotional offers are placed directly on a consumer's bill or statement. Do you see any potential harm to consumers if advertisements or promotional offers are placed on consumers' bills?

Answer. This raises several questions. First, why should consumers have to tolerate their bills being turned into junk mail, when the trend has been toward clear and understandable bills? Advertising on bills seems directly at odds with this goal, and consumers are already confused enough with their bills. More advertising on bills would potentially have the effect of less careful reading of bills, resulting in missed charges.

Furthermore, what benefit would consumers receive for the privilege of being bombarded with more junk mail? One question here is who will benefit from the advertising revenue? Generally, advertising revenue is an offset to services that customers receive for free (such as free television or radio). Here, there is no such benefit, as the customer is already paying for the wireless service they are receiving. The entire benefit inures to the wireless company.

*Question 2.* In Dr. Ellig's testimony, he cites FCC data that the wireless churn rate is between one and one half percent and 3 percent per month. Based on that rate, the typical wireless carrier can expect to lose about one-third of its customers every year. Do you expect the churn rate to increase with a pro-rated early termination fee? And what does the high churn rate indicate about overall consumer satisfaction with their wireless provider?

Answer. In a Jan. 2008 *Consumer Reports* survey of 20 different industries, wireless subscribers' satisfaction was near the bottom of the list. Wireless churn is indeed significant, and likely based on low customer satisfaction. Keeping customers

[25] E–911 is the technology needed to send the location of a caller to the emergency operator.

should be about better prices and quality of service, as opposed to locking them in with high switching costs, such as Early Termination Penalties and handset locking. For carriers who improve their quality of service and price, churn will unquestionably be lower than for carriers with poor service quality and high prices.

The wireless industry has a history of fighting reduced switching costs at every turn, such as their opposition to the number portability mandate—it was only when one carrier with high marks on service quality realized they could capture more customers with number portability that they reversed course and supported the mandate. The result in the marketplace was that carrier captured more customers with number portability. ETF pro-rating is not only a matter of basic fairness, it will result in carriers with better service quality winning more customers.

*Question 3.* Do you believe there is ever going to be a commercial wireless directory? If so, do you believe consumers would be permitted to opt-in or be required to opt out?

Answer. Whether a commercial wireless directory will ever exist is a matter for policymakers to decide; it is difficult to speculate on the political feasibility of such a directory. However, it is clear that were such a directory to exist, it should be opt-in. An opt-out directory will result in wireless numbers being far more available to both the general public and marketers, and would place an undue burden on consumers to keep their wireless numbers private. The concern here stems from the fact that wireless calls are billed for both calling out and receiving a call. Aside from the annoyance of answering calls on a private cell phone from unexpected sources, there is also a material cost to the consumer to receive such calls.

*Question 4.* As mobile-based commerce and location-based commerce grows, are there specific consumer protection issues that you believe Congress should keep its eye on?

Answer. The Location Based Services (LBS) marketplace will indeed raise some thorny challenges even as it delivers significant value to consumers. Privacy concerns are paramount—can consumers' location be tracked through these new tools? Will their location be transparent to family and friends? Random strangers? Will the data from LBS be used by third parties in an aggregated fashion? In a disaggregated fashion? Do current statutory protections for electronic communications apply to geolocation data, *e.g.,* ECPA (Electronic Communications Privacy Act), etc?

LBS services are clearly going to figure prominently in the economy of the 21st century, but before policymakers permit broad and perhaps unintended uses of LBS, further inquiry is needed to highlight potentially anti-consumer problems with these services. This is a perfect topic for hearings within the Senate Commerce Committee.