I’m Alan Plutzik. I represent Wireless Consumers Alliance (WCA), an advocacy organization for consumers of wireless services that has been an active participant in this proceeding.¹ I am also co-counsel for plaintiffs in California class actions that challenge certain cellphone carriers’ early termination fees (“ETFs”). In WCA’s view, the Commission should deny CTIA’s petition for a declaratory ruling preempts state laws or state regulation regarding ETFs.

1. The Cellphone Industry’s Preemption Proposal Presents an Issue of Concern to Tens of Millions of American Consumers

CTIA’s petition seeks broad, sweeping relief that would extinguish the legal rights of tens of millions of consumers nationwide. The undisputed evidence in the California class action against Sprint shows that approximately 2,000,000 Sprint customers paid or were charged ETFs between July, 1999 and March, 2007. Extrapolating from that figure, the number of cellphone customers of all carriers in the country as a whole who paid or were charged an ETF may be as high as forty to fifty million people. And that does not even include the millions of Americans who did not pay and were not charged an ETF but were forced to put up with bad service, overcharges or unfair treatment because they were unable or unwilling to incur an ETF.

Because the CTIA’s proposal would disenfranchise such a high percentage of the U.S. population, the Commission should use particular caution in considering the merits of the CTIA petition. There is a significant potential for a public outcry if the wrong

¹ Attached hereto as Appendix A is a list of the filings made by WCA in this proceeding.
decision is made. The Commission should not lightly interfere with the ability of the states to protect their own citizens.

2. Preemption Is a Legal Question, Not a Question of Regulatory Policy

The cellphone industry argues that the Commission should preempt because wireless carriers shouldn’t be subjected to a “patchwork” of state laws regarding ETFs. But whether 47 U.S.C. Section 332(c)(3)(A) preempts state laws affecting ETFs is a legal issue, not a question of regulatory policy. The Court in *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006), so held in reversing a Commission order preemptioning state regulation of line items on customer bills. The court ruled that *the intent of Congress* is the touchstone of preemption analysis – and it found that Section 332 did not reflect a Congressional intent to impose a uniform national regulatory regime on cellphone companies.


Section 332 preempts only state regulation of “rates charged” for cellphone service. It expressly allows states to regulate “other terms and conditions” of service. The Commission cannot go beyond the clear language of the statute and try to preempt anything other than state regulation of rates.

---

2 *Bates* at 449 (“we… have a duty to accept the reading [of the statute] that favors preemption.”) *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947) (“the historic police powers of the States [a]re not to be superseded … unless that was the clear and manifest purpose of Congress.”).
3. ETFs Are Not “Rates Charged”

In determining whether ETFs are “rates charged,” the Commission is not writing on a blank slate. The Courts have spoken. The Commission itself has spoken. The answer is clear: ETFs are not “rates charged.”

The NASUCA court held that a “rate” within the meaning of Section 332 is “[a]n amount paid or charged for a good or service,” or “a charge per unit of a public-service commodity.” *Id.*, 457 F.3d at 1254. ETFs don’t satisfy either definition. They aren’t charges for service at all. Rather, they’re charges imposed for the termination of service. *Every Court before which this issue was actually litigated has held that ETFs are not “rates charged.”* See citations attached to this presentation as Appendix B.³ The industry’s attempt to characterize ETFs as “part of their rate structure” rather than as “rates” doesn’t change a thing. As the NASUCA court cautioned:

> The inclusion of the specific components of “rate levels” or “rate structures” within the general term “rates” does not magically expand the authority of the Commission beyond what the statutory language allows.”

The industry argues that ETFs are “rates charged” because they affect rates – in other words, that if ETFs were eliminated, reduced or modified, monthly rates would go up or handset discounts would shrink. The NASUCA court rejected that argument too, holding that Section 332(c)(3)(A) preempts only “rates charged,” not merely contract provisions that affect rates.⁴ Indeed, the court correctly noted that the Commission itself

---

³ Only two courts have ever held otherwise – and in both of those courts, the party opposing preemption failed to show up and argue the point. See Appendix B.

⁴ *NASUCA*, 457 F.3d at 1256 (“That the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of ‘rates’ and outside the ambit of state regulation of ‘other terms and conditions.’”). *See CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (to equate state action that may increase the cost of doing business with rate regulation would forbid nearly all forms of state regulation, a result at odds with the “other terms and conditions” language of Section 332).
had “disavowed” the argument that a regulation with some effect on prices is per se regulation under Section 332(c)(3)(A). *Id.*

Moreover, the assertion that there is a direct link between ETFs, monthly rates and handset prices has been refuted by real-world events. Verizon pro-rated its ETFs. Other carriers announced that they would follow suit. The sky didn’t fall. Monthly rates and handset prices didn’t go up. Evidence offered during the recent Sprint ETF trial showed that over an eight-year period ending in 2007, the ETFs that Sprint collected were less than 1/2 of 1% of the company’s total wireless revenues – not nearly enough to have an effect on real-world monthly service or handset prices.

4. **Preemption Would Be Unfair and Harmful to Consumers**

The Commission not only lacks authority to preempt; it *should not* preempt even if it concludes it has the authority to do so because preemption would be unfair and harmful to consumers. Commission records show that ETFs elicit large numbers of consumer complaints, year after year. Verizon’s CEO, Denny Strigl, admitted publicly in 2006 that ETFs were a “black eye” for the industry; that customers hated them, and that they were unfair. Now his company is claiming that ETFs are good for consumers. But Mr. Strigl was right the first time – ETFs cause real harm to real people:

- Linda Mackenzie of Fresno, California couldn’t get adequate service.

Sprint told her it would charge her *four* ETFs, for a total of $600, if she quit, so she hung on to the end of her contract. But she needed cellphone service, so she subscribed to a

---

5 *See In re Wireless Consumers Alliance*, 15 FCC Rcd 17021 (2000) (hereinafter cited as “WCA”), at Paragraph 24 (although state-court damage awards may affect “rates,” they are *not* rates and are not preempted by Section 332); *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. 19898 (1999) (the cellphone industry is not exempt from the neutral application of state contract or consumer fraud laws).
second company’s service and paid two monthly rates to two different companies at the same time until her Sprint contract ran out.

- Michael St. Amand of Los Alamitos, California, couldn’t receive service at his home. He asked Verizon to fix the problem but Verizon wasn’t able to do so. St. Amand couldn’t remain on a service that he wasn’t able to use, and he refused to pay the ETF Verizon charged him when he terminated his service. Instead, he took Verizon to arbitration. The arbitrator ruled that the ETF should never have been imposed.

- Sprint secretly extended the contracts of Jeweldean Hull of Boise, Idaho, when she changed her phone number, and Jerry Deganos of Loma Linda, California when he changed his plan. When they terminated, they believed they had fulfilled their contracts. But Sprint charged them both ETFs.

- Verizon did the same thing to Rhonda Avery, a single mother from Bakersfield, California and a 12-year Verizon customer. She thought her contract was over. But unbeknownst to her, Verizon had secretly renewed it. Verizon now claims she owes it five ETFs, or $875. The unpaid charges, which she can’t afford to pay, have ruined her credit and prevented her from refinancing her house.

Stories like these are commonplace. An estimated 40 to 50 million cellphone consumers throughout the country have been charged an ETF. Fortunately, consumers have rights under state law – rights to seek relief for breach of contract, consumer fraud and unfair business practices, rights to defend themselves when a carrier makes an illegitimate claim that they owe an ETF. The carriers want this Commission to deprive consumers of those rights.
The cellphone carriers say they deserve special treatment because they do business nationally. But Wal-Mart, General Motors and hundreds of other companies are also national in scope. Customers of those companies can avail themselves of the contract, fraud and consumer protection laws of the states where they live. Why should cellphone customers be second-class citizens?

Meanwhile, even as they urge the Commission to preempt the rights of their subscribers to invoke state laws to challenge ETFs, the cellphone companies want to preserve their own right to sue their subscribers for ETFs under those very same laws. The defendants’ own contracts so provide. In fact, Sprint, Nextel, Verizon and AT&T have already filed cross-claims for breach of contract in the California cases under which they are seeking relief against every single class member. See Sprint Cross-Claims, attached hereto as Appendix C. However, when the carriers sue, they don’t want the subscribers to be able to assert contract defenses or counterclaims for consumer fraud, unconscionability or improper liquidated damages. Instead, they want this Commission to put its thumb on the scales of justice and make every subscriber who is charged an ETF pay, even if he or she was charged unfairly. Under CTIA’s preemption proposal, the carriers would continue to have the right to seek relief against their subscribers in court or through arbitration but the subscribers would be prohibited from defending themselves. Where is the justice in that result?

Without the ability to seek relief under state laws, in state courts, consumers would have no avenue to vindicate their rights. The Commission isn’t equipped to adjudicate the complaints of thousands or tens of thousands of individual consumers. It can’t do so, and it has indicated that it doesn’t want to do so. You heard from H.P.
Schroer, who sought relief from this Commission, was turned away on the grounds that the Commission lacked authority to help him, and then filed a classwide arbitration against Verizon. After years of intensive litigation, the arbitrator has certified his case to go forward as a 49-state class. And now the same Commission that turned a deaf ear to Mr. Schroer is being pressed to step in and prevent him from pursuing his claims in the only forum that has agreed to hear them.

Moreover, CTIA wants the Commission to extinguish Mr. Schroer’s claims, and the claims of the 40 to 50 million other subscribers who were charged or paid ETFs, retroactively. The claims of these subscribers amount, in the aggregate, to billions of dollars. But the industry is careful to say that if the Commission adopts any regulations limiting ETFs, those regulations should not be retroactive because that would be unfair to the carriers. See Verizon May 1, 2008 ex parte submission. That’s inconsistent and grossly unfair.

5. That Cellphone Companies Incur Upfront Costs or Provide Handset Discounts Doesn’t Justify Preemption

That cellphone companies incur upfront costs or provide handset discounts isn’t a justification for treating ETFs as sacrosanct. As the evidence at the California Sprint trial demonstrated, the lion’s share of these supposed upfront costs are not handset subsidies but advertising expenses and commissions. True handset discounts, to the extent they exist, are dwarfed by the amount of the ETF.

In any event, most businesses incur upfront costs that they recover over time. Many incur advertising expenses, pay commissions or allow their customers to finance their purchases of equipment through upfront discounts, just as the cellphone companies do. But they don’t claim that that immunizes them from liability under state consumer
protection laws – laws like the prohibition against improper liquidated damages, which has been a longstanding part of the law of all fifty states and the Uniform Commercial Code. The duty of complying with these laws falls no more harshly on cellphone carriers than on other businesses. Indeed, there is no “patchwork” of conflicting laws when it comes to laws limiting liquidated damages – the laws of all 50 states are substantially similar to each other and to the UCC provision.

Furthermore, there is no link between ETFs and the recoupment of upfront costs or handset discounts. In the California, Sprint was unable to offer even a single document that purported to show any connection between ETFs and the recovery of any costs. To the contrary, internal Sprint and Nextel documents and testimony introduced at the trial showed that those companies’ ETFs were not adopted to recover costs. Rather, they proved that both companies regarded ETFs as “penalties” intended to coerce customers not to switch carriers. See Trial Exh. 543 at p. 06390 (Nextel Vice-President of Pricing Scott Wiener, who later served in the same capacity for Sprint, and who was responsible for implementing ETFs at both companies, refers to ETFs as penalties, stating, “The govt will never, never accept such penalty amounts….”); Trial Exhibit 294 at p. SPR 0509 (internal Sprint document characterizing Sprint’s ETF as a “penalty.”7

Indeed, proof positive that Sprint’s ETFs were not intended to defray any costs is found in the fact that Sprint never expected to collect or otherwise enforce the ETFs. Thus, in the internal document from December, 1999, in which it posed the question of whether ETFs would be beneficial for the Company, Sprint assumed a zero collection

6 See, WCA, at Paragraph 33 (the award of damages for breach of contract or consumer fraud is simply a cost of doing business).

7 Copies of exhibits from the Sprint trial are attached hereto as Appendix D, in exhibit number order.
rate. Trial Exhibit 306 at p. SPRINT 0584 (“The previous analysis assumed that the contract termination fees would not be collected.”) Moreover, for the first several years, Sprint’s collection rate for ETFs was a single-digit percentage. Trial Exhibit 302 at p. SPR 0777 (during the last half of 2002, Sprint wrote off or waived 92% of its ETFs; Trial Exhibit 301 (collection rate of 7%). Indeed, collections were so low as to lead Sprint’s internal auditors to fear that the costs of administering the ETF might exceed the revenues generated by it. Trial Exhibit 301 at p. SPRINT0212. Clearly, this was not a charge that was designed to recover costs, upfront or otherwise.

6. The Courts in the Existing Class Actions Are Not Being Asked to Engage in Ratemaking

The carriers argue that the Commission must preempt the existing class action lawsuits because the courts, in the guise of ruling on the “reasonableness” of ETFs, are being asked to engage in ratemaking. However, that argument is outrageously deceptive. The cellphone industry has improperly conflated the legal requirements for liquidated damages under state contract laws with judicial “ratemaking.”

California law requires the party imposing a liquidated damages clause in a consumer contract – in this case, the carrier – to conduct a reasonable endeavor to estimate the actual damages it would suffer upon breach, and limits the liquidated damages amount to the amount so determined. It also forbids the imposition of liquidated damages at all unless actual damages are extremely difficult or impracticable to determine. See, e.g., Beasley v. Superior Court, 235 Cal.App.3d 1383 (1991). The Courts in the pending class actions are being asked to determine whether the carriers’ ETFs meet the statutory standards. There is no ratemaking going on in those courts – not least because ETFs are not “rates.” Rather, the courts are merely enforcing neutral
longstanding state consumer protection statutes. That is precisely the role that Congress, in Section 332, permitted and intended them to perform – and a role that the Commission, in *Wireless Consumers Alliance*, endorsed and approved.8

7. Conclusion

Statutory and decisional law prohibits the Commission from giving the cellphone carriers a “get out of court” card for early termination fees. Congress has spoken in the statute. It said that only state laws or regulations that challenge the “rates charged” by cellphone companies are preempted, and it expressly provided that state courts and regulatory bodies are free to adjudicate matters regarding “other terms and conditions” of service. The courts have spoken about what the statute means. They have held, in every case in which the issue was contested, that ETFs are “terms and conditions,” not “rates.” Accordingly, the Commission lacks the authority to preempt. Moreover, preemption would retroactively wipe out billions of dollars of claims by tens of millions of consumers, and would unfairly deprive consumers of access to the courts in the future, while giving no assurance that the Commission would or could provide comparable relief. The Commission should deny CTIA’s petition for declaratory relief.

---

8 See *WCA* at Paragraphs 36, 38 (the award of monetary damages based on a State contract or tort action is not necessarily equivalent to rate regulation and does not require the court to prescribe, set or fix rates).
Appendix A

Filings of Wireless Consumers Alliance in FCC Docket 05-194
CTIA Petition, Cellular Early Termination Fees (“ETFs”)

8/5/05 – Original Comments

8/25/05 – Reply Comments

9/23/05 – Letter – Giving to to the FCC United States International Trade Commission (USITC) data showing the average wholesale price for handsets.


3/20/06 – Letter – Redacting confidential information in the Protective Order


5/11/06 – Declaration of Lee L. Selwyn – in regard to Reply Comments

5/31/06 – Appended redaction of Declaration of Lee L. Selwyn


Appendix B – List of Relevant Cases

Cases Rejecting the Proposition that Claims Affecting ETFs are Preempted

*Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 at *36 (S.D. Iowa 2004);

*Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004), attached to WCA’s Initial Comments, filed 8/5/05, as Exhibit A;

*Gatton v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 25922 (C.D. Cal. April 18, 2003);

*Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002), Exhibit G to CTIA’s initial Petition;

*State of Iowa v. United States Cellular Corporation* 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000);

*Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000);


*Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, 2004 Cal. PUC LEXIS 577 (December 16, 2004);


Cases Rejecting § 332 Preemption in Analogous Circumstances


*Mountain Solutions v. State Corporation Commission of Kansas*, 966 F. Supp. 1043 (D. Kan. 1997) (holding state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by § 332);


*Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004) (suit alleging improper billing not preempted by § 332).

Relevant Commission Authorities Rejecting Preemption


*In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19901, ¶ 7 (1999);

Cases Finding Preemption Where the Party that Would Have Opposed Preemption Did Not Argue the Issue

Redfern v AT&T Wireless, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. 2003);

Chandler v. AT&T Wireless, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill., July 21, 2004);

Appendix C
REED SMITH, LLP
Michele Floyd (Bar No. 163031)
Two Embarcadero Center, Suite 2000
San Francisco, California 94111-3922
Telephone: (415) 543-8700
Facsimile: (415) 591-8269
mfloyd@reedsmith.com

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Dominic Surprenant (Bar No. 165861)
A. Brooks Gresham (Bar No. 155954)
Ross E. Davidson (Bar No. 204566)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
dominicsurprenant@quinnemanuel.com
abrooksgresham@quinnemanuel.com
rossdavidson@quinnemanuel.com

Attorneys for Defendants and Cross-Complainants
Nextel of California, Inc., Sprint Spectrum, L.P. and
Wirelessco L.P.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Coordination Proceeding Special Title
(Rule 1550(b))

In Re: CELLULAR TERMINATION FEE CASES

This document relates to:

NEXTEL OF CALIFORNIA, INC.,
SPRINT SPECTRUM, L.P. and
WIRELESSCO, L.P.,

Cross-Complainant,

vs.

JEWELDEAN HULL, CHRISTINE
MORTON, RICHARD SAMKO,
AMANDA SELBY, RAMZY AYYAD,
and MEMBERS OF THE "ETF PAYER CLASS"

Cross-Defendants

FILED
ALAMEDA COUNTY
AUG 6 2006
CLERK OF THE SUPERIOR COURT
By
Deputy

Judicial Counsel Coordination Proceeding No. 4332

CROSS-COMPLAINT OF NEXTEL OF CALIFORNIA, INC., SPRINT SPECTRUM, L.P. AND WIRELESSCO, L.P.

The Honorable Ronald M. Sabraw

Filing Date: June 24, 2005
Trial Date: None Set

EXHIBIT 327

SPRINT NEXTEL CROSS-COMPLAINT
Pursuant to the Court's June 9, 2006 Order Granting Motion of Plaintiffs for Class Certification of an ETF Payer Class, cross-complainants Nextel of California, Inc., Sprint Spectrum, L.P., and Wirelessco L.P. (collectively "Sprint Nextel"), by and through their undersigned attorneys, hereby cross-complain against cross-defendants Jeweldean Hull, Christine Morton, Richard Samko, Amanda Selby, Ramzy Ayyad, and against all members of the "ETF Payer Class" certified by this Court on June 9, 2006 (collectively "cross-defendants"). Sprint Nextel makes the following allegations based upon information and belief.

**NATURE OF THE ACTION**

1. Each cross-defendant alleges that they entered into a Wireless Services Customer Agreement ("Customer Agreement") with one or more of the Sprint Nextel entities for the provision of wireless services. To the extent this is true, each cross-defendant agreed to remain the respective Sprint Nextel entity's customer for a one or two year period from the date they entered into their contract, but each and every cross-defendant retained the option of terminating their obligations under the respective Customer Agreement early in exchange for payment of an early termination fee ("ETF").

2. Each cross-defendant alleges that they have paid one or more ETFs, and/or that they have been charged one or more ETFs. To the extent any cross-defendant paid, or were charged, an ETF, they paid such an ETF, or were charged an ETF, as a result of the exercise of an option to terminate a Customer Agreement prior to the agreed-upon term expiration.

3. Cross-defendants have filed suit against one or more Sprint Nextel entities, on behalf of themselves and a putative class of California consumers, in the Superior Court for the State of California, County of Alameda, Judicial Council Coordination Proceeding No. 4332, alleging that one or more Sprint/Nextel entities violated Cal. Civ. Code § 1671(d); Cal. Civ. Code §§ 1750, et seq.; and/or Cal. Bus. and
Prof. Code §§ 17200, et seq. They also assert claims for unjust enrichment/common law restitution and a common count for money had and received. Cross-defendants' claims are based on the ETFs they allegedly paid to, or were charged by, one or more Sprint Nextel entities.

4. Cross-defendants are part of a certified class which is defined as a class of persons who have paid, or who have been charged, an ETF by one or more Sprint Nextel Entities.

5. According to cross-defendants, the Sprint Nextel ETF provisions are unenforceable because they are either a liquidated damages provision that violates California law, or they are unconscionable contract provisions. Cross-defendants seek, among other things, to have the Court declare that the Sprint Nextel ETFs are void and to order the pertinent Sprint Nextel entities to return any ETFs they collected from cross-defendants. Cross-defendants also seek a declaration that no cross-defendant owes any charged ETF.

6. Sprint Nextel filed an answer in which Sprint Nextel generally denies plaintiffs' claims, and Sprint Nextel specifically denies that the ETF is an unlawful liquidated damages provision. Sprint Nextel further and alternatively contends that the ETF constitutes an alternative performance option, under which a subscriber may terminate service before the end of the agreed term in exchange for payment of an ETF. In any event, Sprint Nextel contends that its ETF is valid and enforceable.

7. Sprint Nextel further contends that any state law that would invalidate the ETF provisions in Sprint Nextel's Service Agreements is preempted by federal law.

8. In the event, and only in the event, that the Court disagrees with Sprint Nextel and determines that: (i) cross-defendants in fact breached their Customer Agreements by terminating early; and/or (ii) that the ETF clause is not a valid alternative performance option, but instead, is a liquidated damages provision that violates California law, or is otherwise unenforceable under California law; and/or (iii) that such California law claims are not federally preempted, then Sprint Nextel brings this cross-complaint to
recover the actual damages sustained by Sprint Nextel as a result of cross-defendants' early
termination of their respective Customer Agreements.

PARTIES

9. Cross-complainant Nextel of California, Inc. is a Delaware
corporation with its primary place of business in Irvine, California.

10. Cross-complainant Sprint Spectrum, L.P. is a Delaware partnership
and a named defendant in this action.

11. Cross-complainant Wirelessco L.P. is a Delaware partnership and a
named defendant in this action.

12. Cross-defendant Jeweldean Hull ("Hull") is a resident of Toluca Lake,
California, and a named class representative in this action making claims against Sprint
Nextel.

13. Cross-defendant Christine Morton ("Morton") is a resident of San
Pablo, California, and a named class representative in this action making claims against
Sprint Nextel.

14. Cross-defendant Richard Samko ("Samko") is a resident of Burbank,
California, and a named class representative in this action making claims against Sprint
Nextel.

15. Cross-defendant Amanda Selby ("Selby") is a resident of San
Francisco, California, and a named class representative in this action making claims
against Sprint Nextel.

16. Cross-defendant Ramzy Ayyad ("Ayyad") is a resident of Contra Costa
County, California and a named class representative in this action making claims against
Sprint Nextel.

17. Unnamed cross-defendants are members of the "ETF Payer Class" as
defined by this Court in its Class Certification Order of June 9, 2006. They (1) had a
One or more Sprint Nextel entities and each and every named unnamed cross-defendant class member entered into a Cross-Defendant Agreement. Pursuant to their Customer Agreements, one or more Sprint Nextel entities agreed to provide wireless services to cross-defendants in exchange for monthly payments to be made by cross defendants for a specified period of time. Under the Customer Agreements, cross defendants agreed to maintain their service for a specified period of time, typically 12 months.

To the extent cross-defendants paid an ETF to Sprint Nextel, they did not do so as a result of the termination of service prior to the end of their Customer Agreement period. To the extent cross-defendants were charged an ETF, but have not yet paid an ETF, they were charged an ETF because they elected to terminate their Customer Agreement by cancelling their account through any number of means.

One or more Sprint Nextel entities provided wireless services as required by the particular Customer Agreement in which each cross-defendant entered. The Sprint Nextel entities' Customer Agreements were binding and in the event the Court determines that the ETF provision in any Customer Agreement to which any or all cross-defendants claim to be a party is void and unenforceable.

From July 23, 1999 to class period end date, and (3) were charged an ETF in connection with that cancellation.
unenforceable, and that any or all cross-defendants have breached their Customer
Agreements by terminating early, then cross-defendants owe the Sprint Nextel entities
compensation for the damage caused by failing to complete the term period of each
Customer Agreement.

25. As of the date of the filing of this Cross-Complaint, cross-defendants' claims have been certified as a class action. Sprint Nextel expressly reserves the right to assert the claims set forth herein against individual members of the plaintiff class on an individual basis, including, but not limited, to the named representatives, in the event this case is decertified as a class action, or against select individuals who elect to opt out of the class action certified, and/or as a setoff in answer to any complaint or action.

FIRST ALTERNATIVE CAUSE OF ACTION

(Breach of Contract, Against All Cross-Defendants)

26. Sprint Nextel re-alleges and incorporates by reference the allegations contained in Paragraphs 1 through 25 of this Cross-Complaint as if fully set forth herein.

27. The Customer Agreement(s) cross-defendants executed were binding and enforceable.

28. In the event the Court determines that the ETF provision set forth in the cross-defendants' Customer Agreement is an invalid liquidated damages clause, or is otherwise unenforceable, and that the Customer Agreement did not allow cross-defendants to terminate prior to the agreed-upon terms in the Customer Agreement, then cross-defendants damaged Sprint Nextel by terminating their contracts early and/or failing to pay all amounts due to the pertinent Sprint Nextel entities. Damages incurred by the Sprint Nextel entities include, but are not limited to, the excess of remaining monthly payments due under the Customer Agreement over the cost of serving cross-defendants for the remainder of the agreed-upon contract term.
29. The pertinent Sprint Nextel entities performed all of their duties and obligations under the Customer Agreements, except those excused by cross-defendants' breach in the event the Court determines that any one or more of the cross-defendants breached their Customer Agreement.

30. The pertinent Sprint Nextel entities hereby seek all damages directly and proximately suffered.

SECOND ALTERNATIVE CAUSE OF ACTION
(Unjust Enrichment, Against All Cross-Defendants)

31. Sprint Nextel re-alleges and incorporates by reference the allegations contained in Paragraphs 1 through 30 of this Cross-Complaint as if fully set forth herein.

32. The Customer Agreement to which each cross-defendant asserts they were a party was valid and enforceable. However, in the event the Court finds that any portion of cross defendants' Customer Agreements are void, or otherwise unenforceable, then cross-defendants are liable to the pertinent Sprint Nextel entities for the benefits they received under the contract.

33. If cross-defendants were a party to a Customer Agreement with one or more Sprint Nextel entities, they received certain benefits as consideration for which cross-defendants agreed not to cancel service without either (1) completing a certain period of service with the pertinent Sprint Nextel entities or (2) paying an ETF.

34. If cross defendants were a party to Customer Agreements with one or more Sprint Nextel entities and paid an ETF, cross-defendants canceled service without completing the agreed-upon period of service with the pertinent Sprint Nextel entities.

35. If cross-defendants are relieved of the obligation to pay the ETF, justice and fairness should not permit them to retain the benefits they received from Sprint Nextel without paying fair compensation for the losses they caused the pertinent Sprint Nextel entities by reason of their early termination of the Customer Agreements.
36. Accordingly, if cross-defendants are relieved of the obligation to pay the ETF, they will be unjustly enriched and the amount of the benefits they received should be restored to the pertinent Sprint Nextel entities as restitution.

PRAYER

WHEREFORE, Sprint Nextel prays for judgment as follows:

1. For an award of damages against each cross-defendant, including incidental and consequential damages, in a specific amount to be proven at trial;

2. For an award of interest on the above;

3. For an award of Sprint Nextel's reasonable attorneys' fees and costs incurred herein;

4. If the Sprint Nextel entities' Customer Agreements are held void, for an award of restitution of benefits conferred by the pertinent Sprint Nextel entities; and

5. For such other and further relief as the Court may deem proper.

DATED: August 7, 2006

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By

Dominic Suprenant
A. Brooks Gresham
Ross E. Davidson
Attorneys for Defendants
and Cross-Complainants
Nextel of California, Inc., Sprint Spectrum, L.P. and Wirelessco L.P.

REED SMITH, LLP
Michele Floyd
Attorneys for Defendants
and Cross-Complainants
Nextel of California, Inc., Sprint Spectrum, L.P. and Wirelessco L.P.
Appendix D
### Tables - Price Restructure - Plan Implementation

December 15, 1999

Primary Packages - No FIMF, two versions, loaded at market level

<table>
<thead>
<tr>
<th>Regular/Standard plans</th>
<th>Flextime</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.99</td>
<td>19.99</td>
</tr>
<tr>
<td>29.99</td>
<td>29.99</td>
</tr>
<tr>
<td>49.99</td>
<td>49.99</td>
</tr>
<tr>
<td>69.99</td>
<td>69.99</td>
</tr>
<tr>
<td>99.99</td>
<td>99.99</td>
</tr>
<tr>
<td>149.99</td>
<td>149.99</td>
</tr>
<tr>
<td>199.99</td>
<td>199.99</td>
</tr>
<tr>
<td>Additional Phone Plan</td>
<td>Additional Phone Plan</td>
</tr>
</tbody>
</table>

### Attachable Plans

(Eligible options, all priced at $9.99)

- Free Nights & Weekends
- Free Long Distance
- Wireless Web bundle
- Off Peak 200 minutes
- Roaming Special Rate (.35/min.)
- PCS to PCS
- Flextime Plan Option
  - (in conjunction with a Flextime Primary Plan)
- Add an additional phone
  - (in conjunction with Additional Phone Primary Plan)
**Attachable Plans** (outside of options)
Activation Fee - 35.00 (No SUR to require)

Primary price plans would require Service Type CT.

**Service Type CT Plans** (which include automatic promotions)

- **Contract with 1 Option** (Includes $9.99 recurring credit)
- **Contract with 2+ Options** (Includes $19.98 recurring credit)
- **No Contract** (Includes $9.99 recurring credit)

Assumption: All customers receive one option fee.

*If we opt to award $100 EQ credit rather than 2 free options for contracts, would included the EQ CR with the Contract CT plans.

We can include the $150 contract penalty fee in the Contract CT plans. If all services are expired, fee will pop up in window. Advocate can override. If customer wants to swap to "no" contract, not sure what will happen in window.

---

**The Tables Process**

- Regular version of Primary Price Plan
- Attachable Plans
- Service Type CT Plans
- Automatic Promotions
- Penalty or Contract Cancellation Fee

Two versions of the Plan are created. Attachable plans are selected. Service Use Rules require a dummy plan which automatically drives promotional credit and cancellation fee.
Attachable Plan Questions

Free Nights & Weekends - A different version to match minute bundles?
Are FN/W and Free LD mutually exclusive?
Wireless Web bundle - This is data, not text messaging. Are we offering text messaging at well? Is there only one version of the WW bundle?
Off Peak 200 minutes - Is this to sell in combination with the free and clear option only?
PCS to PCS - Are we offering the local or national version?
Flextime Plan Option - We have to build the primary plans separately. Do we want to be able to offer as an attachable? If so, we can set up as an attachable that includes the 9.99, and ties to the flextime packages. The alternative is to build 9.99 into the MRC on the flextime versions (ie. 19.99 would become 29.98).

Add an additional phone - The "new" way to sell add-a-phone. This provides the flexibility to attach multiple phones to one account sharing one bucket of minutes. This option allows ALL of the new price restructure plans to pool. Is that a problem? Service use rules would require the advocate to select the additional phone plan package, and select the attachable add an additional phone plan (with zero minutes). Is it a problem if the plans will pool? If so, we will have to build the plans separately.

Cell One

Family Plan

Pooling

Financially execute
The cost of administering the contract terms related to ETP exceeds the benefit of collecting the fee.

Customer dissatisfaction due to incorrect billing when termination fees are inappropriately applied.

Lost revenue due to un billed charges or un collected receivables.

Potential Risks

- Assess current / previous ETP work performed and complete additional analysis as required.
- Review the collection of ETP to determine how often the fee is recovered.
- Appropriate accounts.
- Review the billing of ETP to determine if the fee is being completely and accurately billed to the customer.

Objectives

14% in 2003.

Currently, an initiative is underway to increase the collection rate of the ETP from 7% to 12%.

2002 from the consumer and business early termination charge was $40.8 million (Net of $40.2 million in revenue recognized in 2001). The early termination of a consumer service plan may also result in the customer being billed for an early termination fee.

Sprint PCS offers both fixed length service plans and month-to-month service plans. Sprint PCS offers both fixed length service plans and month-to-month service plans. At the request of Sprint PCS Finance Executives, Corporate Audits Services (CAS) will review the accounts of billing and collection of early termination fees (ETP) to identify potential revenue opportunities.

Background, Objectives, and Potential Risks
The PSC Consumer Accounts With Low Accounts Disconnected between July 2002 and December 2002. The following summarizes the ETF process and outlines the testing steps that CAS will complete.

Approach & Scope

Audit Approach and Scope
<table>
<thead>
<tr>
<th>Primary Author</th>
<th>Title</th>
<th>Email</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Stevenson</td>
<td>Director Consumer Collections</td>
<td><a href="mailto:John.Stevenson@mycompany.com">John.Stevenson@mycompany.com</a></td>
<td>123-456-7890</td>
</tr>
<tr>
<td>Mike Bray</td>
<td>VP Receivables Management</td>
<td><a href="mailto:Mike.Bray@mycompany.com">Mike.Bray@mycompany.com</a></td>
<td>234-567-8901</td>
</tr>
<tr>
<td>Seve C. Hassay</td>
<td>Director Finance</td>
<td><a href="mailto:Seve.Hassay@mycompany.com">Seve.Hassay@mycompany.com</a></td>
<td>345-678-9012</td>
</tr>
<tr>
<td>Holly Vargas</td>
<td>Director Finance</td>
<td><a href="mailto:Holly.Vargas@mycompany.com">Holly.Vargas@mycompany.com</a></td>
<td>456-789-0123</td>
</tr>
<tr>
<td>Scott Webster</td>
<td>Vice President Finance</td>
<td><a href="mailto:Scott.Webster@mycompany.com">Scott.Webster@mycompany.com</a></td>
<td>567-890-1234</td>
</tr>
</tbody>
</table>

**Audit Specific**

**STANDARD DISTRIBUTION LIST**

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ron Leary</td>
<td>President / Chief Operating Officer</td>
</tr>
<tr>
<td>Robert Delbridge</td>
<td>Executive Vice President / Chief Financial Officer</td>
</tr>
<tr>
<td>John Meyer</td>
<td>Senior Vice President / Controller</td>
</tr>
<tr>
<td>Neil Lutchen</td>
<td>Executive Assistant</td>
</tr>
<tr>
<td>Chip Stovall</td>
<td>Executive Assistant</td>
</tr>
<tr>
<td>Don Weller</td>
<td>Director, Finance</td>
</tr>
<tr>
<td>Peter Sjooerup</td>
<td>Vice President / Controller</td>
</tr>
<tr>
<td>Jennifer Luna</td>
<td>Executive Assistant</td>
</tr>
<tr>
<td>David Lyson</td>
<td>Senior Vice President, Strategy</td>
</tr>
<tr>
<td>Jim Marshall</td>
<td>Executive Assistant</td>
</tr>
<tr>
<td>Robert Young</td>
<td>Executive Vice President / Compliance</td>
</tr>
</tbody>
</table>

**Sprint**
July 15, 2003
Status Update
for 2003 / 2004
PCS Contract Asset Improvements
Elements to close the 2003 ARPU gap ($24M).

Termination Fees: An increase of the ETF rate was identified as one of the

These efforts should also increase the current collection rate of Early

Contract Asset Background and Objectives
REDACTED

Current Early Termination Fee collection rate review

REDACTED

Methodology
This resulted in a net over credited ETF balance of $1.76M during the period analyzed.

- Customers that should NOT be charged an ETF had improper billing adjustments.
  - They are over credited by $3M.
- 92% of ETF charges were written-off or adjusted (82% are sub-prime customers).
  - Customers that should be charged an ETF are effectively billed, however.

Key Findings:

Result, $20-$45 million in revenue is lost annually.

Process associated with the billing and collection of ETF inadquate. As a result, all consumer accounts deactivations from 7/1/02 - 12/31/02 were reviewed to quantity ETF billing and collection rates. They found the

Corporate Audit Services reviewed the adequacy of billing and collecting ETF.
Channel customers' asset through:

Integration of Asset Systems - Provide specialists' visibility to customer asset regardless of the sales

- Change Customer Solutions Specialists culture in regards to aligning of the ETF

- Decrease if not eliminate improper billing adjustments

- Only charge those customers that degrade service during their contract term.

Automate the process in which Customer Solutions Specialists waive the ETF to be able to:

- Send a contract confirmation letter to customers to enforce the contract asset

Enforce Asset Rate

- Contractors as possible and increase collection of ETFs

Attached spreadsheet to become more effective to secure as many existing PCS customers on Action Plan
REDACTED
The customer is moving out of the coverage area.

The customer is converting from two separate plans each with an Advantage Agreement to an AAP plan.

Plan:

They completed the Access/AdvantEdge verification process. Removed from Warrant 6/27.

The customer claims no knowledge of the Advantage Agreement and account notes do not indicate:

- The customer has accepted the transfer of liability save other.
- The customer is deployed for active military duty or remains the Soldiers' Relief Act.
- The customer has died.
- The customer is cancelling within the first 14 days (this includes installment billing customers).
- Current Customer Solutions M&A notified to waive when:
  - Waiving the activation fee.
  - Review and adjust current M&As to waive activation fees as necessary to stop.

Challenges Customer Solutions Specialists Department.

Target Implementation - 6/27.
Voice Capture Contract Assent
Customer Solutions Voice Capture

RMS+Scraping

Sprint Stores

IVRU Scraping

Clear Commitment

TelcoSales

Capturing Assent at Sprint Stores and TelcoSales
**December 1 Analysis**

**First Advantage Choices**
- Free and Clear
- Free Nights and Weekends
- FlexTime
- Wireless Web (not modeled)

**Second Advantage Choices**
- Free and Clear
- Free Nights and Weekends
- FlexTime
- Wireless Web (not modeled)

**Current Analysis**

**First Advantage Choices**
- Free and Clear
- Free Nights and Weekends
- FlexTime
- Wireless Web (modeled)

**Second Advantage Choices**
- Wireless Web (modeled)
- FlexTime
- Add-A-Phone
- Off Peak Option (200 minutes)
- Off Network Option

**Explanations of the differences between December 1 and current contract analysis**

1. **Although in this recent analysis Wireless Web (an expensive advantage) was added to the mix of modeled options, the cost of the first advantage decreased by $15 from $145 to $130 mainly due to adding the churn benefit of 28% to the FlexTime product.** This made the cost of FlexTime negative.

2. **The cost of the second advantage decreased by $50 from $155 to $105 because of the following:**
   - Flextime and AAP incorporate a inherent churn benefit in the product
   - The Offpeak option as the second advantage is limited to 200 minutes
   - The Off network advantage average cost is only about $80

3. **The churn benefit has decrease by $31 from $140 to $109 because two of the advantages (FlexTime and AAP) have a churn benefit inherent in the product itself. The churn benefit of a contract on those two products is still 50% in the first year but it is 50% of a much lower number.**

4. **There is a slight increase in the margin from additional paid advantages of $3 between the two analyses because the cost of the additional advantage has decreased.**

5. **The original analysis assumed that there would be a 100% waiving of the $35 activation fee for those subs willing to sign a contract. The current analysis assumes no waiving of the activation fee, therefore a $35 increase.**

6. **The current analysis includes a 50% collection rate on those subs breaking the contract. The previous analysis assumed that the contract termination fees would not be collected. This corresponds to an $14 improvement.**
**Differences in the December 1 analysis with the Current Analysis**

<table>
<thead>
<tr>
<th></th>
<th>With Contract</th>
<th>Without Contract</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>December 1 Presentation</strong></td>
<td>352</td>
<td>402</td>
<td>378</td>
</tr>
<tr>
<td><strong>Present Analysis</strong></td>
<td>437</td>
<td>426</td>
<td>431</td>
</tr>
</tbody>
</table>

**Changes from Previous Analysis**

1. Cost of First Advantage
   - With Contract: 15
   - Without Contract: 15
   - Average: 15

2. Cost of Second Advantage
   - With Contract: 50
   - Without Contract: 0

3. Churn Benefit
   - With Contract: -31
   - Without Contract: 0

4. Margin on "paid for" additional Advantages
   - With Contract: 3
   - Without Contract: 11

5. Waiving of Activation Fee
   - With Contract: 35
   - Without Contract: 0

6. Contract Termination Fee
   - With Contract: 14
   - Without Contract: 0

**Total Changes**

- With Contract: 86
- Without Contract: 26
THIS IS A BLANK SHEET
THIS IS A BLANK SHEET
my question is can we do it under the contract? alternatively, this has been one of those ... the gov't will never, never accept such penalty amounts and for the most part i think a lot of the b-itching is real.

--- Original Message ---
From: Wiener, Scott
Sent: Tuesday, January 20, 2004 3:46 PM
To: Wajnasz, Mike
Subject: RE: gsa contract request

we did not cover off on this specifically, but i wanted to get rita's feedback on the service term and ETF for GSA upgrades. Not sure how we would support, but i do not think it is unreasonable to ask for this with the new program. If you feel differently, i will amend the note below to let rita know that these would not apply to GSA.

--- Original Message ---
From: Fan, Su
Sent: Tuesday, January 20, 2004 5:07 PM
To: Wiener, Scott
Cc: Wajnasz, Mike; Wiener, Scott; Chinn, Mark
Subject: RE: gsa contract request

Hi rita,

below is the upgrade language that will be used on the corporate VPL contract to reflect the upgrade pricing for Feb 2.

In speaking with Mike, he feels the same language could be used for the GSA contract.

Subscriber Handset Upgrade and Replacement Term: The price for upgrades to or replacement of existing Subscriber Handsets will be the regular retail price with no minimum service term (zero months); however, any minimum service term left from the previous Subscriber Handset must be satisfied, as applicable. If Customer agrees to a minimum service term of twelve (12) months from the date of the upgrade or replacement Subscriber Handset purchase, the price for upgrades to or replacement of existing Subscriber Handsets will be the national promotion price, easy termination fee for the end of the twelve (12) months minimum service term, or $200 early termination fee per Subscriber Handset, whichever is less. A Subscriber Handset may be upgraded only once in a twelve (12) month period. For each Subscriber Handset purchased at the national promotion price or the special promotion price.

Special Promotion Pricing: Company reserves the right to offer, from time to time, to Customer, on a limited time basis, special promotion pricing for certain Subscriber Handset Units. The discounts notified above in Table 1 above shall not be applied to such special promotion pricing. The Subscriber Handset Units offered under the special promotion pricing promotions is subject to change at any time in Company's sole discretion.

Let me know if you have any questions.

Thanks,
Su

--- Original Message ---
From: Wiener, Scott
Sent: Thursday, January 15, 2004 3:49 PM
To: Fan, Su; Chinn, Mark
Cc: Wajnasz, Mike
Subject: RE: gsa contract request
	hanks for the update su.

--- Original Message ---
From: Fan, Su
Sent: Thursday, January 15, 2004 12:34 PM
To: Wiener, Scott; Chinn, Mark
Subject: RE: gsa contract request

Scott,
Mike's team and I have a meeting scheduled for tomorrow with Bruce Cox and Chip Copeland. We'll be discussing the changes we needed to the VPL contract to reflect Feb's upgrade pricing. Once they have the language, I'll forward it to Rita to incorporate it in the master GSA contract. I'll copy you on it.

Thanks,
Su

---Original Message---
From: Weiner, Scott
Sent: Wednesday, January 14, 2004 12:20 PM
To: Rie, Sq Chtn, Mark
Cc: Wagner, Mike
Subject: gsa contract request

Su- Mike and I have a standing monthly meeting with Leon where we review pricing items/priorities — in today's meeting, I was asked if we could send Rita Figueres on his team the correct customer upgrade language — reflecting the change starting in Feb 2004 that handset upgrades would now be at the same purchase price as handset activations — so that Rita can make the contract modification to the master GSA contract.

can you follow up and just cc me on whatever you send off to Rita -- thanks, scott