

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

**WIRELESS EARLY TERMINATION FEES**

**Statement of  
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**on behalf of**

**AT&T Mobility LLC**

**June 12, 2008**

Chairman Martin and members of the Commission, thank you for the opportunity to speak today. My name is Seamus Duffy, and I am a partner in the law firm of Drinker Biddle & Reath LLP.<sup>1</sup> I represent AT&T Mobility in the “Cell Phone Early Termination Fee Cases,” a coordinated proceeding which comprises a number of class actions against AT&T Mobility and other wireless carriers now pending in the Superior Court of Alameda County, California. I’ve also represented the company in similar actions filed in other states around the country. The coordinated proceedings in California challenge the legality of the early termination fees, or “ETFs,” in wireless service contracts under California law. The purpose of my testimony today is to explain the legal bases for preemption of state regulation of ETFs.

ETF-backed term contracts are only one of several choices available to consumers in the wireless marketplace. Consumers who do not want an ETF can either subscribe to month-to-month post-paid service or avoid any commitment whatsoever by purchasing prepaid service. And many do. ETF-backed term contracts give customers the ability to lower their monthly charges and up-front handset costs in exchange for their promise to pay monthly charges for the life of their contract or, alternatively, to pay the ETF in lieu of the remaining charges. The overwhelming popularity of these rate plans has fueled the tremendous increases in wireless penetration, usage, and technical innovation documented by the Commission’s annual reports on wireless competition. These facts belie the claims of the class action bar and others that ETFs are somehow anti-consumer. To the contrary, ETFs empower consumers to trade with their loyalty and thereby buy down the price of services. Outlawing ETFs would effectively remove this power.

But the critical legal question before the Commission today, and the one I will address, is

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<sup>1</sup> A brief description of my professional background is attached as Exhibit 1.

not *whether* ETFs are reasonable components of wireless carriers' rate plans but rather *who will decide* that question – this Commission, pursuant to national policies mandated by Congress, or 50 different state courts and juries, under the class action regime.

### **THE CLASS ACTION BAR'S ATTEMPT TO REGULATE WIRELESS ETFS**

It is important to emphasize that these lawsuits do not challenge the adequacy of the carriers' disclosure of their ETFs, nor do they allege simple breaches of contract. To the contrary, they challenge the reasonableness or lawfulness *per se* of the ETFs under state law and ask the courts to enjoin their enforcement. As we sit here today, the Alameda County Superior Court is poised to determine whether the ETFs contained in Verizon Wireless' and Sprint Nextel's term contracts are unreasonable, and therefore invalid, under California law. In doing so, the California court will violate both Section 332(c)(3)(A) and this Commission's 1995 order denying California's petition to continue regulation of intrastate wireless rates.<sup>2</sup> The fact that the Cell Phone Termination Fee Cases have progressed to this point demonstrates the urgent need for Commission action.

### **STATE REGULATION OF ETFS IS EXPRESSLY PREEMPTED BY SECTION 332**

Section 332 of the Communications Act provides that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . .”<sup>3</sup> As the Commission has observed, this provision demonstrates “an unambiguous congressional intent to foreclose state regulation in the first instance;”<sup>4</sup> in other words, an intent “to establish a national regulatory policy for [wireless], not a policy that is balkanized state-by-

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<sup>2</sup> *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486 (1995). (“*California Preemption Order*”).

<sup>3</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>4</sup> *California Preemption Order*, 10FCC Rcd at 7495, ¶ 18.

state.”<sup>5</sup> Consistent with these principles, the Commission has broadly interpreted the prohibition against regulation of “rates charged” to include “both rate levels and rate structures.”<sup>6</sup>

An ETF is a “rate” because the ETF is an amount of money that a term-contract subscriber agrees to pay for wireless service and equipment if he or she does not complete the term of the contract. When a subscriber enters into a term contract for wireless service, he or she agrees *either* to pay the monthly charges for the duration of the term *or* to pay the ETF upon early termination. In other words, a term contract backed by an ETF offers the subscriber a choice of paying *alternative rates* for alternative service commitments.<sup>7</sup>

In the wireline context, the Commission and the courts have recognized that fees charged for early cancellation of a service commitment are part of the “rates charged” for the telecommunications service. For example, in *MCI Telecommunications Corporation. v. FCC* the D.C. Circuit upheld the FCC’s determination that AT&T’s charges for early termination of private line service constituted “rates.”<sup>8</sup> The court reasoned that part of the carrier’s cost of providing the service was the cost incurred from “early termination of service.”<sup>9</sup> The early

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<sup>5</sup> *Id.* at 7498, ¶ 24.

<sup>6</sup> *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, ¶ 20 (1999).

<sup>7</sup> Section 332 also preempts state regulation because ETFs further function as elements of CMRS providers’ “rate structures.” By using the ETF to ensure a minimum return from a service contract, carriers can offer subscribers reduced or eliminated handset prices and service activation fees and lower monthly service charges in exchange for their commitment either to maintain service over the term of the contract or to pay the ETF. Elimination of ETFs would result in increased handset prices, increased service activation charges, increased monthly service charges, or some combination thereof.

<sup>8</sup> *MCI Telecomm. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987); *see also In re Ryder Commc’ns, Inc. v. AT&T Corp.*, 18 F.C.C.R. 13,603, 13,617, ¶ 33 (2003). *Cf. In the Matter of Telephone Number Portability*, 18 FCC Rcd 20971, 20975-76 (2003) (noting that ETFs allow wireless carriers to hedge against unmitigated customer migration and “recover[] their investment in their customers”).

<sup>9</sup> *MCI*, 822 F.2d at 86.

termination charges were designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs. The court held that “[t]his adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive . . . service.”<sup>10</sup> The *Ryder Communications* decision cited in our opening comments is to the same effect. And the reasoning in these decisions applies with equal force to wireless ETFs.

Any doubt as to the applicability of Section 332(c)(3)(A) to state regulation of ETFs must be resolved in a manner that promotes federal wireless regulatory policy. Since at least 1993, the policy of the United States has been to foster the growth and development of mobile services through the promotion of competition and the removal of unnecessary regulatory burdens.<sup>11</sup> As a result, wireless carriers generally operate and have come to structure their offerings on a national basis.<sup>12</sup> State-by-state regulation of ETFs—whether by statute, administrative rule, or class action lawsuit—would undoubtedly “lead to a patchwork of inconsistent rules”<sup>13</sup> prohibiting, conditioning or permitting the use of ETFs in structuring CMRS rate plans. An ETF

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<sup>10</sup> *Id.* Similarly, a number of courts have specifically held that wireless carriers’ ETFs constitute “rates charged” within the meaning of Section 332(c)(3)(A), and that state regulation of ETFs is therefore preempted. *Chandler v. AT&T Wireless Servs., Inc.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. July 21, 2004); *Redfern v. AT&T Wireless Servs., Inc.*, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003); *Aubrey v. Ameritech Mobile Commc’ns, Inc.*, 2002 WL 32521813 (E.D. Mich. 2002); *Simons v. GTE Mobilenet, Inc.*, No. H-95-5169, slip op. (S.D. Tex. April 11, 1996); *Dias v. AT&T Wireless Servs., Inc.*, No. BC316195, slip op., (Cal. Super. Ct. July 20, 2007); *Consumer Justice Found. v. Pac. Bell Tel. Co.*, No. BC214554, slip op. (Cal. Super. Ct. July 29, 2002).

<sup>11</sup> See Seventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 – Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd 12985, 12987 (2002); Second Report and Order, *In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 (¶¶ 13-15) (1994).

<sup>12</sup> *In the Matter of Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates’ Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170; CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 (2005).

<sup>13</sup> *Id.*

acceptable in Texas could be found to violate Illinois law. Indeed, regulation of ETFs by state class actions presents the possibility that rules would vary not only by state but by *carrier*. One Alameda County jury may find Verizon Wireless' ETF in violation of California state law, while another finds Sprint Nextel's compliant. The resulting arbitrary application of different rules to similarly situated carriers would be disruptive to say the least.

### **CONCLUSION**

In light of Congress's express statutory command in Section 332, the important and well-established federal policy interests at stake, and the clear threat to those policies posed by the prospect of state class action judgments in the ETF cases now pending, the Commission should affirm that ETFs constitute "rates charged" by wireless carriers and that, therefore, Section 332(c)(3)(A) prohibits their regulation by state and local governments.

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Once again, I thank the Chairman and the Commission for the opportunity to speak on this important issue and I look forward to responding to your questions.

## **Exhibit 1**

**Seamus C. Duffy** is chair of the Drinker Biddle & Reath LLP Communications Litigation Practice Group. He joined Drinker Biddle in 1988 following a one-year clerkship in the United States District Court in Philadelphia. Mr. Duffy concentrates his practice on class action and other complex litigation, with a particular emphasis on litigation involving the telecommunications industry. Mr. Duffy has defended telecommunications carriers in class action litigation nationwide, on issues ranging from sales practices to quality of service to rate structure. He has represented carriers in state and federal court cases across the continental United States, in federal multidistrict litigation proceedings, and in proceedings before the FCC.