

Testimony of Christopher Guttman-McCabe
Vice President, Regulatory Affairs, CTIA – The Wireless Association®

Good afternoon Mr. Chairman and Commissioners, my name is Christopher Guttman-McCabe, Vice President of Regulatory Affairs at CTIA – The Wireless Association®. Thank you for the opportunity to testify today.

The key element of my testimony this morning is “choice.” Wireless consumers in the United States are presented a multitude of service choices – carriers offering prepaid, postpaid, month-to-month, pay-per-day, pay-per-minute, purchase a full price handset and receive service at the same rates as contract customers, bring a handset and get a SIM Card with your service, get your handset subsidized and enter a contract, and much more. U.S. wireless carriers are constantly modifying their business practices to accommodate ever changing tastes of American consumers. Whether it is the pro-rating of ETFs or the movements to permit changes in the middle of contracts, the addition or extension of trial periods, the creation of free “test drives,” all-you-can-eat service plans, or the announcement of new devices, the unveiling by one carrier will be quickly followed by competitive announcements. The by-product of these pitched battles is constantly improving products, services, and prices for consumers.

The parties opposing CTIA’s Petition do not seek merely to restrict or condition the use of ETFs – they seek to restructure wireless rates. In so doing, they would dismantle one of the primary elements of wireless growth and consumer benefit in the past decade: The term contract backed by a standardized ETF. This rate structure – which, as the Commission has observed, reduces up-front and monthly fees – has enabled millions of consumers, including consumers who otherwise could not afford devices and service, to enjoy the benefits of wireless.

Under ETF-backed contracts, consumers agree to pay either the monthly access charge for the full term of the contract, or, if they wish to terminate their contract prematurely, an ETF. Overwhelmingly, consumers choose this option. Why Consumers' Union would want to take this option away from consumers, particularly low-income consumers, is nothing short of confusing. Preventing consumers from having the choice of a discounted phone, or discounted service, or both, would result in a lower-price option being removed. That outcome cannot be good for consumers.

Against this backdrop, the FCC is considering regulation of early termination fees. We welcome today's dialogue. At the outset, Congress already has made the policy and legal decision that states shall not regulate the rates of wireless carriers. Early Termination Fees are part of carriers' rates. From a conceptual point of view, when the ETF is an element of the discussion and ultimately the contract between a customer and a carrier, customers' out-of-pocket costs are lower. In its absence, when a customer chooses to not have it be part of the offering, and there is no contract, customers' out-of-pocket costs are higher. This is not a hypothetical event, it is reality – today.

In March 2005, CTIA filed a Petition for Declaratory Ruling with the Commission asking you to exercise the exclusive statutory authority given to you by Congress and prevent inconsistent regulation of early termination fees. I am here today to ask the Commission to grant our Petition. We are not seeking a “get out of court free card” as some have suggested. What we are asking for is that if there is to be an analysis of whether an ETF should exist, or whether it is reasonable, that analysis should be done at the FCC. The Petition is directed at efforts to prohibit, restrict, or condition the

inclusion of ETFs in a wireless carrier's rate structure pursuant to a judgment by a state or local government, whether through regulation, legislation, or litigation.

This request is supported in Circuit Court precedent. In the 11th Circuit's Truth-in-Billing proceeding, the court used the dictionary definition to define a rate, finding that a rate is "[t]he amount of a charge or payment ... having relation to some other amount or calculation," as well as "the amount paid or charged for a good or service."¹ Under either interpretation, the Court's analysis would include ETFs within the definition of rates.

The Court also said that "the prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for the service."² As stated above, the ETF does affect the amount that a user is charged for the service. One can look to the DC Circuit, where they specifically declared ETFs a "rate" in the wireline context, using as a base for the decision the same dictionary, Blacks Law, and the same definition of rates as the 11th Circuit.

A "rate" is a charge to a customer to receive service. *See generally* Black's Law Dictionary 1134 (5th ed. 1979). Part of AT & T's cost of providing private-line service is the cost incurred from last-minute cancellation of orders and early termination of service. The [cancellation and discontinuance] charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT & T to incur the costs. This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service. We therefore conclude that the Commission reasonably found that the ... charges are "rates" within the meaning of the Agreement.³

Regardless of which interpretation is used for analysis, the result remains the same, early termination fees are part of the rate or rate structure which Congress determined was exempt from State review.

¹ *NASUCA v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006).

² *NASUCA v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006).

³ *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C.Cir. 1987).

CTIA and its member companies are not opposed to the Commission's consideration of regulation in the early termination fee space. We are opposed to inconsistent state-by-state regulation or rulings. One thing is clear. If early termination fees go away, consumers will not be better off. So, we need to strike an appropriate and fair balance. I look forward to your questions. Thank you.