

Alan R. Plutzik Presentation on Behalf of Wireless Consumers Alliance
FCC Open Meeting on Early Termination Fees
June 12, 2008

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 preempting 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 preempting 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.

The Supreme Court has held that preemption is "disfavor[ed]." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).² A federal statute will not preempt state law unless its language clearly and unambiguously expresses Congress's intention to preempt. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

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 disfavors preemption.") *See Medtronics, 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 that adds 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.*⁵

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.⁶ 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 recoument 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.

1/11/06 – Letter – Discussing *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 at *14-*15 (8th Cir. December 9, 2005).

3/1/06 – Letter – Attaching for the Commission the ‘Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers’ Early Termination Fees’, a CA statute - Cal Civ Code § 1671, and a MN statute - Minn. Stat. § 325F.695.

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

4/18/06 – Reply Comments – to “White Paper” of Verizon Wireless

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

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

7/7/06 – Letter – Attaching ‘Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers’ Early Termination Fees’ and appendix of cases including *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California*, Case No. G034991 (Cal. Ct. App., 4th Dist., June 20, 2006).

4/5/07 – Letter – Attaching ‘Wireless Consumers Alliance Presentation Re Early Termination Fees’.

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);
- Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996);
- 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);
- Pacific Bell Wireless, LLC v. Public Utilities Commission* (2006) 140 Cal.App.4th 718.

Cases Rejecting § 332 Preemption in Analogous Circumstances

- Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000) (case challenging wireless company’s late fees not preempted under § 332);
- 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);
- Dakota Systems, Inc. v. Viken*, 694 N.W.2d 23, 40, 2005 S.D. LEXIS 28 (So. Dakota Supr. Ct. Feb. 23, 2005) (state licensing and tax statutes 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 Wireless Consumers Alliance* (2000) 15 FCC Rcd 17021;
- In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19901, ¶ 7 (1999);
- Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1737, 1745 ¶ 20 (1997).

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);

Consumer Justice Foundation v. Pacific Bell Tel. Co., No. BC 214554 (Cal. Super. Ct. July 29, 2002) (Unpublished California trial court decision – not citable under California law. *Santa Ana Hospital v. Superior Court*, 56 Cal.App.4th 819, 831 (1997)).

Appendix C



FILED
ALAMEDA COUNTY

AUG 07 2006

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By [Signature]
Deputy

1 REED SMITH, LLP
Michele Floyd (Bar No. 163031)
2 Two Embarcadero Center, Suite 2000
San Francisco, California 94111-3922
3 Telephone: (415) 543-8700
Facsimile: (415) 391-8269
4 mfloyd@reedsmith.com

5 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Dominic Surprenant (Bar No. 165861)
6 A. Brooks Gresham (Bar No. 155954)
Ross E. Davidson (Bar No. 204566)
7 865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
8 Telephone: (213) 443-3000
Facsimile: (213) 443-3100
9 dominicsurprenant@quinnemanuel.com
abrooksgresham@quinnemanuel.com
10 rossdavidson@quinnemanuel.com

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

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA

15 Coordination Proceeding Special Title
(Rule 1550(b))

Judicial Counsel Coordination
Proceeding No. 4332

16 In Re: CELLULAR TERMINATION FEE
17 CASES

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

The Honorable Ronald M. Sabraw

18
19
20 This document relates to:
21 NEXTEL OF CALIFORNIA, INC.,
SPRINT SPECTRUM, L.P. and
22 WIRELESSCO, L.P.,

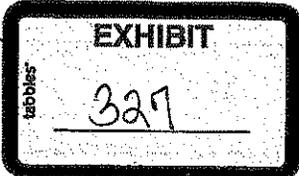
Filing Date: June 24, 2005
Trial Date: None Set

23 Cross-Complainant,

24 vs.

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

28 Cross-Defendants.



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

9
10 **NATURE OF THE ACTION**
11

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

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

24 3. Cross-defendants have filed suit against one or more Sprint Nextel
25 entities, on behalf of themselves and a putative class of California consumers, in the
26 Superior Court for the State of California, County of Alameda, Judicial Council
27 Coordination Proceeding No. 4332, alleging that one or more Sprint/Nextel entities
28 violated Cal. Civ. Code § 1671(d); Cal. Civ. Code §§ 1750, et seq.; and/or Cal. Bus. and

1 Prof. Code §§ 17200, et seq. They also assert claims for unjust enrichment/common law
2 restitution and a common count for money had and received. Cross-defendants' claims are
3 based on the ETFs they allegedly paid to, or were charged by, one or more Sprint Nextel
4 entities.

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

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

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

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

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

1 recover the actual damages sustained by Sprint Nextel as a result of cross-defendants' early
2 termination of their respective Customer Agreements.

3
4 PARTIES

5
6 9. Cross-complainant Nextel of California, Inc. is a Delaware
7 corporation with its primary place of business in Irvine, California.

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

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

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

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

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

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

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

27 17. Unnamed cross-defendants are members of the "ETF Payer Class" as
28 defined by this Court in its Class Certification Order of June 9, 2006. They (1) had a

1 wireless telephone personal account with one or more Sprint Nextel entities with a
2 California area code and a California billing address, (2) cancelled the account at any time
3 from July 23, 1999 to [class period end date], and (3) were charged an ETF in connection
4 with that cancellation.

5
6 **OPERATIVE FACTS**
7

8 18. One or more Sprint Nextel entities and each and every named and
9 unnamed cross-defendant class member entered into a Customer Agreement. Pursuant to
10 their Customer Agreements, one or more Sprint Nextel entities agreed to provide wireless
11 services to cross-defendants in exchange for monthly payments to be made by cross-
12 defendants for a specified period of time. Under the Customer Agreements, cross-
13 defendants agreed to maintain their service for a specified period of time, typically either
14 12 or 24 months.

15 19. To the extent cross-defendants paid an ETF to Sprint Nextel, they did
16 so as a result of the termination of service prior to the end of their Customer Agreement
17 period.

18 20. To the extent cross-defendants were charged an ETF, but have not yet
19 paid an ETF, they were charged an ETF because they elected to terminate their Customer
20 Agreement by cancelling their account through any number of means.

21 21. One or more Sprint Nextel entities provided wireless services as
22 required by the particular Customer Agreement into which each cross-defendant entered.

23 22. Sprint Nextel complied with all of the provisions of the Customer
24 Agreements into which each cross-defendant entered.

25 23. The Sprint Nextel entities' Customer Agreements were binding and
26 enforceable.

27 24. In the event the Court determines that the ETF provision in any
28 Customer Agreement to which any or all cross-defendants claim to be a party is void and

1 unenforceable, and that any or all cross-defendants have breached their Customer
2 Agreements by terminating early, then cross-defendants owe the Sprint Nextel entities
3 compensation for the damage caused by failing to complete the term period of each
4 Customer Agreement.

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

11
12 **FIRST ALTERNATIVE CAUSE OF ACTION**

13 (Breach of Contract, Against All Cross-Defendants)

14
15 26. Sprint Nextel re-alleges and incorporates by reference the allegations
16 contained in Paragraphs 1 through 25 of this Cross-Complaint as if fully set forth herein.

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

19 28. In the event the Court determines that the ETF provision set forth in
20 the cross-defendants' Customer Agreement is an invalid liquidated damages clause, or is
21 otherwise unenforceable, and that the Customer Agreement did not allow cross-defendants
22 to terminate prior to the agreed-upon terms in the Customer Agreement, then cross-
23 defendants damaged Sprint Nextel by terminating their contracts early and/or failing to pay
24 all amounts due to the pertinent Sprint Nextel entities. Damages incurred by the Sprint
25 Nextel entities include, but are not limited to, the excess of remaining monthly payments
26 due under the Customer Agreement over the cost of serving cross-defendants for the
27 remainder of the agreed-upon contract term.

Appendix D

Tables - Price Restructure - Plan Implementation

December 15, 1999

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

<u>Regular/Standard plans</u>	<u>Flextime</u>
19.99	19.99
29.99	29.99
49.99	49.99
69.99	69.99
99.99	99.99
149.99	149.99
199.99	199.99
Additional Phone Plan	Additional Phone Plan

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

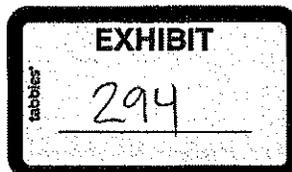
Flextime Plan Option

(in conjunction with a Flextime Primary Plan)

Add an additional phone

(in conjunction with Additional Phone Primary Plan)

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19⁹⁹

2 plans
1 account

49 ⁹⁹	- 2 credits
500	
999	-
999	-

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 free.
 *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.

?

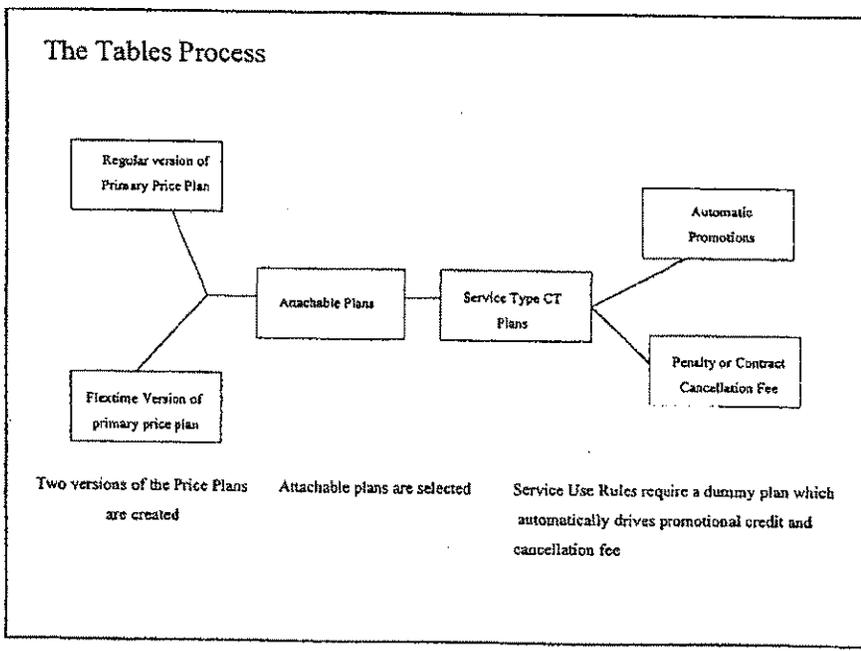
* Text messaging
 30 free
 10 additional

* add-a-plan
 financials

* who's bound by contract

* shared minutes

* *



60
500

60
360

80 80
800 700

→ Can pool minutes

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 as 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.

yes
yes

NO, OK w/ FN/W
National, may

OK

\$ 9.99
for
200
minutes.

→ FN+W
→ Local
→ add-a-phone
→ 19.99 per additional phone
→

50
15
64

32.50 32.50

250 2.50

all plans pool

pooling
add-a-phone

→ Cell-one
Family Plan

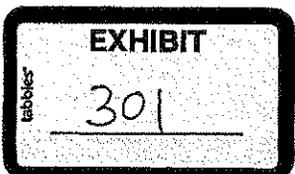
Pooling

- financial
- execute



Corporate Audit Services

2003 PCS Early Termination Fees Review
Planning Package



Team Members

- Jill Gengelbach-Wylie
- Derek Hodson
- Jean Kolich
- Jeffrey McCall
- John Waggoner



Table of Contents

3	Background, Objectives, & Potential Risks
4	Approach & Scope
5	Timeline & Audit Contacts
6	Report Distribution List



Background

At the request of Sprint PCS Finance Executives, Corporate Audit Services (CAS) will review the adequacy of billing and collecting the early termination fee (ETF) to identify potential revenue opportunities. Sprint PCS offers both fixed length service plans and month-to-month service plans depending on the qualifications of the customer. The early termination of a consumer service plan may require the customer to pay an early termination fee between \$50 and \$150. Net revenue recognized in 2002 from the consumer and business early termination charge was \$40.8 million (Net of \$401.2 million in write-offs). Currently, an initiative is underway to increase the collection rate of the EFT from 7% to 12%-14% in 2003.

Objectives

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

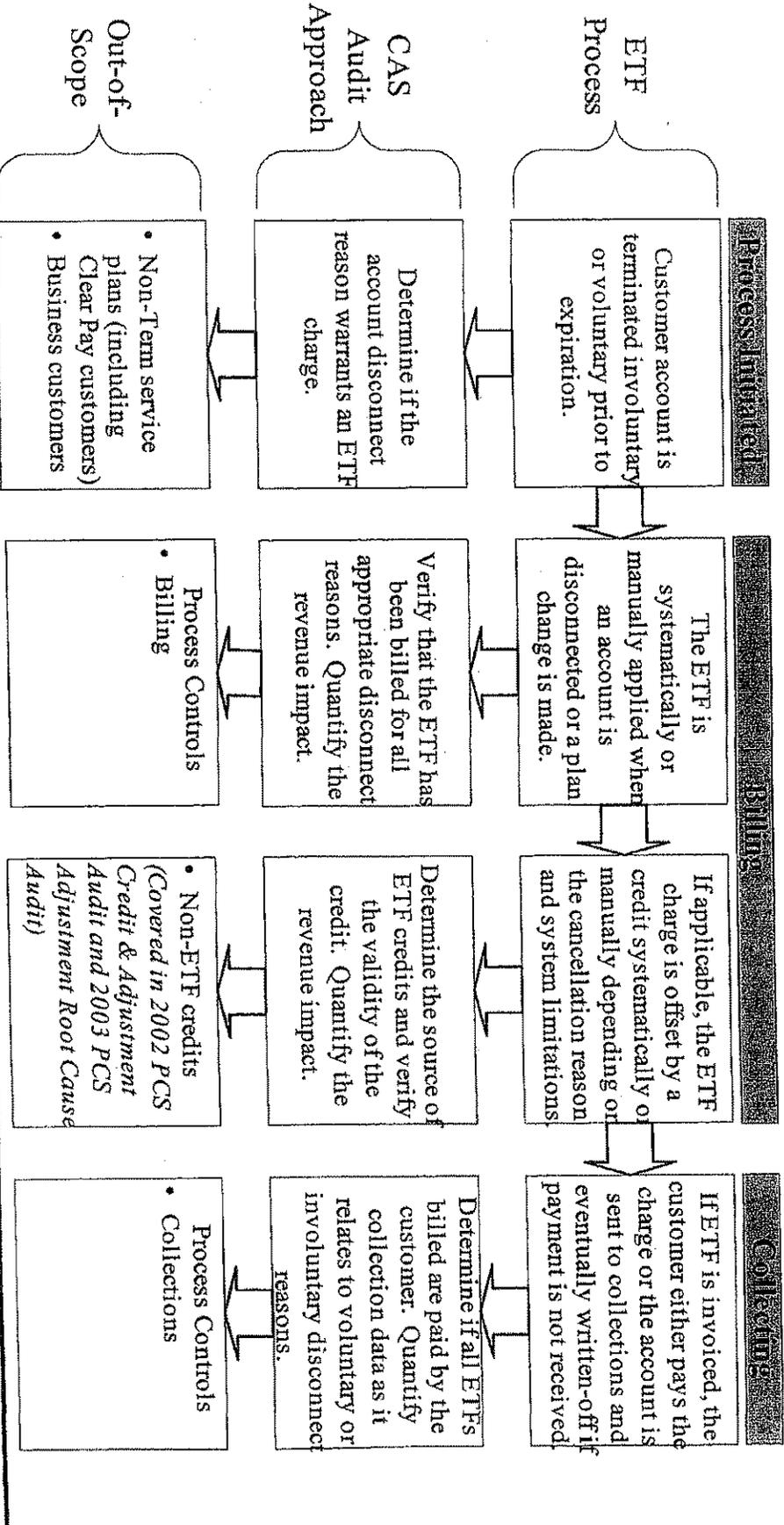
Potential Risks

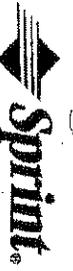
- Lost revenue due to unbilled charges or uncollected receivables
- Customer dissatisfaction due to incorrect billing when termination fees are inappropriately applied
- The cost of administering the contract terms related to ETF exceeds the benefit of collecting the fee



Approach & Scope

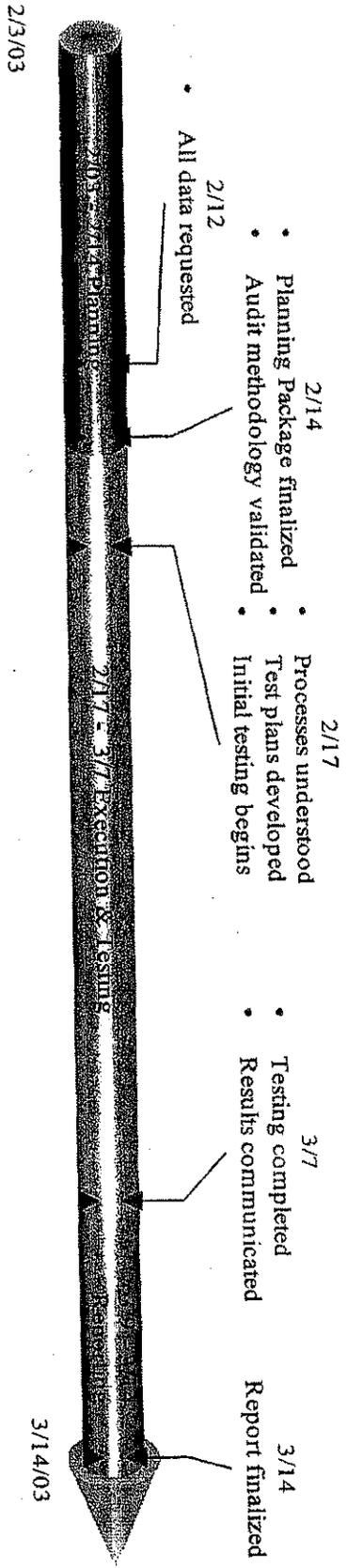
The following summarizes the ETF process and outlines the testing steps that CAS will complete. The review will focus on PCS consumer accounts with term agreements disconnected between July 2002 and December 2002.





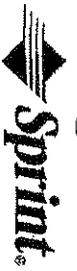
Audit Timeline and Contacts

Timeline



Audit Contacts

- John Waggoner, Director 913-315-6339
- Jeff McCall, Manager 913-315-6399
- Derek Hodson, Senior 913-315-6179
- Jill Gengelbach-Wylie, Auditor 913-315-6184
- Jean Kolich, Auditor 913-315-6149



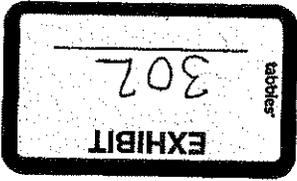
Report Distribution List

STANDARD DISTRIBUTION LIST

Ron LeMay, President / Chief Operating Officer
Simon Kuo, Executive Assistant
Robert Dellinger, Executive Vice President / Chief Financial Officer
Neil Uebelein, Executive Assistant
John Meyer, Senior Vice President / Controller
Chip Stovall, Executive Assistant
Len Lauer, President
Jim Marshall, Executive Assistant
Steve Nielsen, Senior Vice President, Finance
Eric Slusser, Vice President / Controller
Don Whetsel, Director, Finance
David Tyson (Interim Director), Staff Ops
Robin Shrock, Manager-Executive Reporting & Compliance
Ernst & Young

AUDIT SPECIFIC

PCS Finance
Scott Wagner, Vice President, Finance
Holly Valenta, Director, Finance
Steve Cassidy, Director, Finance
Receivables Management
Mike Bray, VP Receivables
John Stevenson, Director Consumer Collections
PCS Marketing
Chip Novick, VP Strategic BU
Lesley Elwell, Director Marketing Operations
Vincent Desantis, Director Emerging Markets



PCS Contract Assent Improvements for 2003 / 2004

Status Update
July 15, 2003

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Contract Assent Background and Objectives

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- These efforts should also increase the current collection rate of Early Termination Fees. An increase of the ETF rate was identified as one of the elements to close the 2003 ARPU gap (\$24M).

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Methodology

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- Current Early Termination Fee collection rate review

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Contract Assent to Meet PCS Objectives

REDACTED

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How PCS Currently Assents Contracts

REDACTED

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Overall PCS Effectiveness Capturing and Assenting Contracts

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Source: *Marketing Strategy & Analysis Contract IQ 2003 Report.*

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Current ETF collection rate

- Corporate Audit Services reviewed the adequacy of billing and collecting the early termination fee (ETF) to identify potential revenue opportunities. All consumer accounts deactivations from 7/1/02 - 12/31/02 were reviewed to quantify ETF billing and collection rates. They found the process associated with the billing and collection of ETF inadequate. As a result, \$20-\$45 million in revenue is lost annually.

- Key findings:

- Customers that should be charged an ETF are effectively billed, however:
 - 92% of ETF charges were written-off or adjusted (82% are sub-prime customers)
 - They are over credited by \$3M.
- Customers that should NOT be charged an ETF had improper billing adjustments
 - This resulted in a net over credited ETF balance of \$16M during the period analyzed (3002 - 4002).

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Source: 2005 PCS Early Termination Fee Review Report performed by Derek Hodson. Customer Solutions analysis differs from CCS.

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Action Plan

Facilities identified to become more effective to secure as many existing PCS customers on contracts as possible and increase collection of ETF:

- Enforce Assent Rate

- Send a contract confirmation letter to customers to enforce the contract assent
- Automate the process in which customer solutions specialists waive the ETF to be able to:
 - Only charge those customers that deactivate service during their contract term.
 - Decrease if not eliminate improper billing adjustments
- Change Customer Solutions Specialists culture in regards to waiving of the ETF
- Integration of Assent Systems - Provide specialists visibility to customer assent regardless of the sales channel customers assented through.

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Contract Confirmation Letter

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Automate ETF charge in billing system

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Changing Customer Solutions Specialists Culture

- Target implementation – 6/27
- Review and adjust current M&Ps to waive activation fees as necessary to stop waiving the activation fee
- Current Customer Solutions M&P indicate to waive when:
 - The customer is canceling within the first 14 days (this includes installment billing customers).
 - The customer has died.
 - The customer has been deployed for active Military duty or references the Soldiers Relief Act.
 - The customer has accepted the Transfer of Liability save offer.
 - ***The customer claims no knowledge of the Advantage Agreement and account notes do not indicate they completed the Assent IVRU verification process. Removed from Wizard 6/27***
- Comm Plan:
 - 6/25 - 6/27 CAS (client services) Partnering call and BUS (business) partnering call communication (weekly call with Managers and Team Leads to discuss changes to processes, new programs, etc. This is typically the first contact/communication we have with the centers.)
 - 6/27 Updated/new solutions posted
 - 6/29-7/6 Clear Connections (30 minute session once a week, facilitated by the Team Lead or Sr. Specialist to review information that will have an impact on the way the specialists deal with the customers through changes in processes, new information, programs, etc.)
 - 7/7-7/11 AVI (blurbs that are placed on the tvs in the centers to make them aware of changes, this blurb will send them to the solution for further information)
- The customer is converting from two separate plans each with an Advantage Agreement to an AAP plan.
- The customer is moving out of the coverage area

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Changing Collections Specialists Culture

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Integration of Assent Functionality to Systems to provide Assent Visibility

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Ability to Capture Contract Assent for Add-A-Phone Customers

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Systematically capture/extend contract term for equipment/service offers

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Fully Deploy Voice Capture in Call Centers

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Deployment of Signature/Voice Assent

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Voice Capture Contract Assent

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Appendix A - Customer Solutions Voice Assent Scripting

ADVANTAGE AGREEMENT ASSENT ASSURANCE

Now I'm going to confirm your Advantage Agreement. Your responses to the following questions will be recorded. Is that okay?

Can you please state your full name?

Thank you. Now tell me please state your social security number.

Thank you. Please state your date of birth.

You have agreed to a 1 year Advantage Agreement. Are you able to terminate the Agreement for cancelling your service with Sprint? It's up to you. You agree to provide your service of 1 year. It's up to you. Are you able to provide your service for 1 year? Do you understand and agree to the conditions of this contract?

Thank you. This concludes the Advantage Agreement confirmation.

YES

NO

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Appendix A - Scripting

Premiere pop-up box (Plan/CSA Swap or adding new AA to existing account):

Voice Recording

Now Recording

Your plan change requires confirmation of a new Sprint PCS Advantage Agreement.

Your Previous 1-Year Advantage Agreement Satisfaction Date was 8/23/2002.

Your new 1-Year Advantage Agreement Satisfaction Date is 12/18/2002.

To confirm your new agreement, your responses to the following questions will be recorded. Is that okay?

Can you please state your full name?

Thank you. Now will you please state your Social Security Number?

Thank you. Please state your Date of Birth.

You have agreed to a Sprint PCS Advantage Agreement. There is a \$150 Early Termination Fee for cancelling your service with Sprint PCS before the agreement expires. This applies if you should decide to cancel your service or if Sprint PCS terminates your service for breach of your obligations. Do you understand and agree to the conditions of this contract?

Okay, thank you. This concludes the Sprint PCS Advantage Agreement confirmation.

AGREE

DISAGREE

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Capturing Assent at Sprint Stores and Telesales

- Telesales:



Clear Commitment
IVRU Scripting

- Sprint Stores



RMS+Scripting

- Customer Solutions Voice Capture



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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

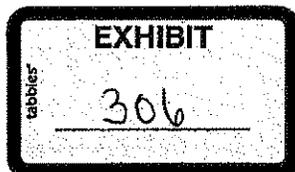
Free and Clear
Free Nights and Weekends
FlexTime
Wireless Web (modeled)

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.



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Differences in the December 1 analysis with the Current Analysis

	<u>With Contract</u>	<u>Without Contract</u>	Average
December 1 Presentation	352	402	378
Present Analysis	437	426	431
<i>Changes from Previous Analysis</i>			
1 Cost of First Advantage	15	15	
2 Cost of Second Advantage	50	0	
3 Churn Benefit	-31	0	
4 Margin on "paid for" additional Advantages	3	11	
5 Waiving of Activation Fee	35	0	
6 Contract Termination Fee	14	0	
Total Changes	86	26	

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THIS IS A BLANK SHEET

OUTSIDE COUNSEL EYES ONLY
SPRINT0586

OUTSIDE COUNSEL EYES ONLY
SPRINT0587

THIS IS A BLANK SHEET

OUTSIDE COUNSEL EYES ONLY
SPRINT0587

Unknown

From: Wiener, Scott
Sent: Tuesday, January 20, 2004 3:45 PM
To: Wajsgras, Mike
Subject: RE: gsa contract request

my question is can we do it under the contract? alternatively, this has been one of those ... the govt will never, never accept such penalty amounts and for the most part i think a lot of the b-tching is real

-----Original Message-----

From: Wajsgras, Mike
Sent: Tuesday, January 20, 2004 5:07 PM
To: Wiener, Scott
Subject: FW: 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 3:36 PM
To: Fister, Rita
Cc: Wajsgras, 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 Terms: 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 still 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 for such Subscriber Handsets and the discounts in Table 1 above, shall apply to any upgrades or replacements purchased hereunder. For such Subscriber Handsets purchased at the national promotion price, early terminations prior to the end of the twelve (12) month minimum service term, are subject to a \$200 early termination fee per Subscriber Handset (in addition to Customer's payment responsibilities for each terminated Subscriber Handset). A Subscriber Handset may be upgraded only once in a twelve (12) month period with a Subscriber Handset purchased at either 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 limited time basis, special promotion pricing for certain Subscriber Handset Units. The discounts set forth above in Table 1 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 3:40 PM
To: Fan, Su; Chinn, Mark
Cc: Wajsgras, Mike
Subject: RE: gsa contract request

thanks 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,

1
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NEXT06390



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: Wiener, Scott
Sent: Wednesday, January 14, 2004 12:20 PM
To: Fan, Su; Chinn, Mark
Cc: Wajsglas, 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 morning meeting, I was asked if we could send Rita Fistero 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