Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts	))))	WT Docket No. 05-194

WRITTEN TESTIMONY OF PATRICK W. PEARLMAN ON BEHALF OF NASUCA EN BANC HEARING, JUNE 12, 2008

Good morning, Chairman Martin and Commissioners. My name is Patrick W. Pearlman. I am a Deputy Consumer Advocate with the Consumer Advocate Division of the West Virginia Public Service Commission and I am appearing on behalf of the National Association of State Utility Consumer Advocates ("NASUCA"), of which my office is a member. I am a member of NASUCA's Telecommunications Committee and one of the team of attorneys that drafted and filed written comments on NASUCA's behalf in this proceeding. I have also prepared a number of ex parte submissions from NASUCA to the Commission in this proceeding. On behalf of myself and over 40 other consumer advocates' offices, and the consumers we represent, I thank you for the opportunity to appear before the Commission in order to offer testimony expressing NASUCA's views on the matters presented by the Cellular Telephone & Internet Association's ("CTIA") petition, as well as other issues relating to early termination fees ("ETFs").

I. INTRODUCTION.

Early termination fees are commonly charged by wireless carriers when customers cancel service contracts before the expiration of the service term. The issue

cited originally – and still – before the Commission in this proceeding is whether, under Section 332(c)(3)(A) of the Federal Communications Act, state laws that apply to wireless ETFs regulate "other terms and conditions of" commercial mobile radio service ("CMRS"), or whether such laws regulate "rates charged by" CMRS providers and are therefore prohibited under that section of the Act. I say "originally" because, over the past year or so, other issues have been raised in conjunction with this proceeding that members of the Commission have suggested they would like to consider, namely: (1) whether the Commission should promulgate regulations that would apply to wireless carriers' ETFs and related business practices; and (2) the growing use of ETFs in other communications industries subject to the Commission's jurisdiction, such as cable operators, broadband service providers and providers of IP-enabled communications services.

NASUCA's comments in this proceeding have, to-date, been almost entirely focused on the issue of preemption presented by CTIA's March 15, 2005 petition for declaratory ruling that was the subject of the Commission's May 2005 public notice.. Rather than try to summarize all the arguments NASUCA has submitted in its extensive comments filed with the Commission in response to CTIA's petition, I would like to focus my testimony on a couple of critical points in those materials that are probably most pertinent to today's hearing. Beyond the question of preemption, which has already been the subject of extensive comment and debate, the focus of NASUCA's testimony today addresses several critical points the Commission is considering in this hearing, such as whether to adopt standards limiting wireless carriers' ETFs and whether the spread of ETFs to other sectors of the communications industry is a cause for concern.

II. THERE IS NO BASIS FOR PREEMPTING STATE LAWS APPLICABLE TO ETFs.

As set forth more fully in NASUCA's comments and written submissions in this proceeding, the Commission must conclude that the application of state laws to wireless ETFs is not preempted by section 332(c)(3)(A) of the Act but rather is allowed under the states' authority to regulate "other terms and conditions" of wireless service that Congress expressly preserved. That ETFs are not rates but part of the "other terms and conditions" is shown by the manner in which wireless carriers describe ETFs in their marketing materials and service contracts, typically buried in the fine print and segregated from the description of charges consumers pay for actual service. Moreover, this conclusion is consistent with the plain and ordinary meaning of "rates," as understood and accepted in public utility law and previously articulated by the Commission. The legislative history of the 1993 amendments to Section 332(c)(3) of the Act compels the conclusion that state regulation of ETFs falls within the "other terms and conditions" of wireless service that are within states' authority to regulate rather than "rates" regulation that Section 332(c)(3) largely prohibits them from regulating.

When Congress amended the Act in 1993 to include the preemption provisions of Section 332(c)(3)(A) of the Act, it did not define the relevant phrases "rates charged by" or "other terms and conditions of" CMRS. But while it may not have provided a statutory definition of these terms, Congress did provide a detailed description of the matters that fell within "other terms and conditions" of CMRS that are subject to laws and regulations enacted by states. The matters described by Congress in the legislative history of the 1993 amendments to Section 332(c)(3) make it crystal clear that the scope

of matters subject to state authority was meant to be broadly defined, in contrast to the correspondingly narrow scope of preempted "rates" regulation:

> It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. *By "terms and conditions," the Committee intends to include such matters as* customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; *the bundling of services and equipment*; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a states lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*[1]

One matter that Congress expressly included within the scope of "other terms and conditions" of CMRS that states may continue to regulate is particularly relevant to the question presented by CTIA's petition, namely "the bundling of services and equipment" by wireless carriers. In its petition, CTIA admitted several times that wireless carriers employ ETFs to subsidize the costs of equipment and other accessories that are bundled together with a wireless customer's service. For example, CTIA's petition noted that:

- An ETF is "an amount of money that the customer agrees to pay a wireless provider for the services *and equipment* previously provided by the carrier;"[2]

- Wireless carriers' costs for acquiring new customers are significant because those costs "include the costs of *subsidizing goods and accessories*, including handset rebates and discounts;"[3]

- ETFs enable carriers to offer customers "lower up front costs in exchange for a commitment to a term contract," and that "the longer

[1] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H. Rpt. 111, at 4 (1993) (emphasis added).

[2] CTIA Petition at 11 (emphasis added).

[3] *Id.* at 12 (emphasis added).

> assured commitment under these term contracts enables the carriers *to reduce handset prices*."[4]

Other wireless carriers, in comments supporting CTIA's petition in this proceeding, likewise openly admitted that ETFs are part and parcel of their practice of bundling wireless service and equipment.[5]

Nor are the wireless industry's admissions limited to this proceeding; they have also been made to federal courts in the context of preemption arguments. For example, in a brief filed with the United States Court of Appeals for the Eighth Circuit, CTIA noted that wireless carriers enter into term contracts coupled with ETFs in order to provide wireless equipment at heavily discounted prices.[6] In that brief, CTIA further noted that term contracts and ETFs were endorsed by the Commission in its 1992 order concluding that "subsidizing wireless phones in this way 'is an efficient promotional device which reduces barriers to new customers.'"[7] Likewise, T-Mobile, which participated in this

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[4] *Id.* at 15 (emphasis added).

[5] *See* Verizon Wireless Comments at 15 (fixed-term plans depend on ETFs to allow carriers to offer a substantial subsidy to offset the price of new handset equipment); Cingular Comments at 6 (ETF-supported term rate plans allow carriers to recoup expenses associated with customer acquisition and reduced handset prices); Dobson Comments at 2 (fixed long-term arrangements coupled with ETFs allow the carrier's handset subsidy to be amortized over a long term); Nextel Comments at 4-5 (in order to provide competitive offerings, Nextel bundled equipment and rate plans that included service agreements with an ETF); Sprint Comments at 2-3 (term plans, which include ETFs, allow customers to get free or heavily discounted phones and lower prices during the term); T-Mobile Comments at 5 (plans that include ETFs allow customers to be offered handsets or accessories at low or no cost and reduced rates for service).

[6] *See Cellco v. Hatch*, No. 04-3198, Brief for amicus CTIA at 12-13 (8th Cir., filed Nov. 12, 2004).

[7] *Id.* at 12, *citing In re Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 F.C.C.R. 4028, 4030 (1992) ("*Cellular Bundling Order*"); *see also id.* at 4029, ¶10 (discussing fixed term contracts).

proceeding, made the same concession to the United States Supreme Court in a petition for certiorari recently filed with the Court.[8]

CTIA's reference in its *Cellco* brief to the Commission's 1992 *Cellular Bundling Order* drives home a significant point – namely that, when adopting Section 332(c)(3)(A), Congress was fully aware of the wireless carriers' practice of bundling equipment and service together, and the central role ETFs played in furthering that practice. The Commission's *Cellular Bundling Order* was released on June 10, 1992 – over a year before Congress amended Section 332(c)(3)(A). As NASUCA noted earlier, by specifically including the practice that is the subject of CTIA's petition (*i.e.*, bundling equipment and service) within the matters it defined as "other terms and conditions" of CMRS, the ETFs that wireless carriers admit are central to that practice of necessity fall within the scope of matters states may continue to regulate after 1993.[9] Any other

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[8] *See T-Mobile USA v. Laster*, No. 07-976, Petition for certiorari, pp. 6-7 (filed Jan. 23, 2007) ("Wireless service and phones often are sold together in 'bundled' transactions, in which consumers receive a free or significantly discounted phone in exchange for agreeing to wireless service contracts for a term of one or two years."); *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/05/07-976_pet.pdf. The Court ultimately declined to review the case.

[9] *See, e.g., Cellular Bundling Order*, 7 F.C.C.R. at 4029 ("Finally, *insofar as bundled offerings of cellular CPE and cellular service require that customers obtain service from a specified carrier for a fixed term*, we asked whether such agreements might be discriminatory or be used to eliminate competition within the cellular market.") (emphasis added); *id.* at 4030 ("Finally, the record reveals that *an integral part of any packaged offering of cellular CPE and service is the mandatory service requirement.* As we noted in the Notice, carriers can use the minimum service commitment as a vehicle for predatory pricing or other anticompetitive conduct only if they can eliminate competition and monopolize the cellular market. . . . There is no evidence that this has occurred or is even possible, particularly because the minimum service periods of three months to one year, identified by evidence in the record, are relatively short.") (emphasis added).

conclusion would be in contravention of Congress' "clear and manifest" intent not to preempt state authority to regulate such matters.

NASUCA emphasizes this point for two reasons. First, to impress upon the Commission the need to consider and implement the clear intent of Congress, expressed in the legislative history of Section 332(c)(3), on this issue. And second, to point out the fact that, insofar as NASUCA can discern, not a single wireless carrier in this proceeding has bothered to discuss the legislative history of the 1993 amendments to 47 U.S.C. § 332(c)(3), let alone rebut NASUCA's reading of that history. While the wireless industry may choose to ignore Congress' clearly expressed intent, the Commission cannot.

III. ADOPTING STANDARDS GOVERNING ETFs BEFORE REEXAMINING THEIR ECONOMIC JUSTIFICATIONS AND EFFECTS ON COMPETITION WOULD BE UNWISE AND LIKELY ARBITRARY.

Next, NASUCA will address another issue that has been the subject of much press of late, namely that the Commission may be considering adopting standards regulating, to some extent, wireless carriers' ETFs.[10] Press accounts typically indicate that such standards are being considered as some sort of *quid pro quo* for preempting states' authority over wireless ETFs, and that this "deal" has been shopped around to certain consumer groups. With regard to these press accounts, there are two initial points that NASUCA must address.

First, NASUCA has not been approached with such a proposal and thus has no basis upon which to assess the accuracy of the press accounts or the parameters of such a proposal. Second, and more importantly, NASUCA is opposed to the notion of accepting

[10] *See, e.g.*, John Dunbar, "FCC Chief Wants Cell Phone Cancellation Fees Regulated," Associated Press (May 23, 2008); available at http://ap.google.com/article/ALeqM5hFmVAv-IB4T3cDSapIMM3NMf-lWAD90RG9100.

the preemption of state laws that may be asserted to protect consumers from unreasonable wireless ETFs and related business practices, in exchange for some degree of federal regulation ameliorating, perhaps, some of the more egregious aspects of such fees. NASUCA's position, and that of its individual members, has been consistent and well-known throughout this proceeding.

While NASUCA is opposed to any effort to preempt the authority Congress clearly intended states to continue to exercise in the 1993 amendments, NASUCA is not necessarily opposed to the promulgation of federal standards regulating wireless carriers' ETFs and other business practices related to such fees in the absence of such preemption. Federal standards governing wireless ETFs may provide some protection against unreasonable, unfair, deceptive or misleading business practices from which consumers in a few states or U.S. territories may not presently be protected. Moreover, such standards may promote consumers' ability, in a competitive marketplace, to reap the benefits of competition by being able to shop for the best price and best quality service. To coin an oft-repeated and usually inaccurate phrase, such standards may well represent a "win-win" situation for American consumers. Of course, all this depends on the standards that are actually proposed, the mechanisms and resources dedicated to their enforcement and the willingness of federal government to enforce those standards. Quite frankly, NASUCA's experience – and that of countless individual consumers – with federal enforcement efforts cautions against optimism.

However, adopting federal regulations governing ETFs without first re-examining their economic and public interest justifications would be unwise, if not arbitrary, action on the Commission's part. There is a fundamental question the Commission must

address before moving on to establishing limits on ETFs or related practices, namely whether ETFs are reasonable or justified in the first place. The wireless industry no doubt would like to skip over this particular issue in promoting the notion that prorating current ETFs is the cure for consumers' malady. The Commission, however, must not and cannot ignore this issue. Only after the Commission satisfies itself that wireless carriers' ETFs are economically justified, and reasonable from a public policy standpoint, should the Commission proceed to consider such standards in the proper procedural context.

A. THE ECONOMIC JUSTIFICATIONS FOR, AND EFFECTS ON COMPETITION OF, ETFs FIRST NEED TO BE MORE CLOSELY EXAMINED.

In considering formulae for prorating ETFs, the Commission is acting upon an assumption that such fees are justified in the first place, an industry proposition that is all too often accepted by government officials as fact without ever having been demonstrated as true. Before the Commission adopts any formula for prorating ETFs, it must determine whether ETFs are economically justified and serve the public interest, something the Commission has not done to-date. The Commission has not seriously examined the fundamental rationale for wireless ETFs since its 1992 *Cellular Bundling Order* and, quite frankly, even in that Order the Commission's analysis regarding ETFs was virtually non-existent.

In response to CTIA's petition in this proceeding, NASUCA urged the Commission to re-examine the economic and policy justifications underlying its 1992 decision approving wireless carriers' bundling of service and equipment. NASUCA cited abundant evidence that wireless customers are dissatisfied with carriers' widespread use of ETFs and noted that the wireless industry – and wireless market – has changed

dramatically since issuance of the *Cellular Bundling Order*.[11] For example, in 1992 there were only 11 million wireless users nationwide[12] and there was little evidence of consumer harm or dissatisfaction associated with lengthy service contracts coupled with ETFs. Indeed, when the FCC issued its *Cellular Bundling Order*, most cellular carriers' service contracts were usually for terms of less than one year.[13] Today, there are over 260 million wireless users in the United States, many carriers utilize one- to two-year minimum service contracts that are often extended for minor changes in service, and the Commission and states receive thousands of complaints regarding such practices each year.[14]

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[11] NASUCA Comments, pp. 32-34; NASUCA Reply Comments, pp. 27-28.

[12] *See* Wireless Competition Bureau, Federal Communications Commission, *Twelfth Annual CMRS Report*, Table A-1 (Feb. 2008) ("*12th CMRS Report*").

[13] *See Cellular Bundling Order*, 7 F.C.C.R. at 4029, ¶12.

[14] The thousands of individual comments from consumers received by the Commission in this and other Commission proceedings provides ample evidence of consumers' widespread dissatisfaction with wireless ETFs. The problems identified by Debra Edwards in her now-withdrawn cross-petition for declaratory ruling in WT Docket No. 05-193, which involved issues virtually identical to those raised in this proceeding, are symptomatic. Ms. Edwards' state court class action lawsuit against SunCom alleged that the wireless carrier imposed, or sought to impose, ETFs on customers long after their term contracts expired. *See In re: SunCom Operating Company, LLC's Petition for Declaratory Ruling*, Opposition and Cross-Petition of Debra Edwards, WT Docket No. 05-193, pp. 8 & 12 (filed March 4, 2005). Likewise, in *Beckermeyer v. AT&T Wireless*, 69 Pa. D. & C.4th, 2004 Pa. D. & C. 117 (Common Pleas Court, Oct. 22, 2004), the complaint focused on both AT&T's and Panasonic's refusal to provide the plaintiff with information necessary to program his handset to operate on another carrier's network, despite the fact such changes could readily be made by changing the system operator code. These sorts of matters exemplify the problems that the Commission indicated would prompt it to reconsider its 1992 order. *See Cellular Bundling Order*, 7 F.C.C.R. at 4030, ¶18 ("Nevertheless, if in the future, it comes to our attention that carriers' exclusive distribution agreements with CPE manufacturers are resulting in anticompetitive abuse, we will not hesitate to revisit this area."); *id.* at 4035, ¶31 ("While we recognize the customer benefits of CPE discounting as a part of the sale of cellular service, we intend to monitor the bundling of cellular service and cellular CPE. Our continuing interest is based on our intention that bundling not be used anticompetitively. If parties can

Moreover, as NASUCA pointed out, the economic and policy assumptions that may have justified the Commission's *Cellular Bundling Order* have radically changed since 1992. The telecommunications industry, including wireless, is widely recognized as a declining cost industry.[15] Furthermore, the wireless industry has become increasingly concentrated in the hands of a few carriers and equipment manufacturers.[16]

Recognizing these dramatic changes in the wireless market, both NASUCA and the National Association of Regulatory Utility Commissioners ("NARUC") adopted resolutions last year, calling on the Commission to take a fresh look at the economic and public policy assumptions upon which the 1992 *Cellular Bundling Order* was based. Copies of those resolutions are attached to NASUCA's testimony as Attachments 1 and 2.

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demonstrate that carriers' incentive offerings lead to anticompetitive abuses, the Commission will be open to further action.").

[15] *See, e.g., Cellular Bundling Order*, 7 F.C.C.R. at 4031, ¶23 n.39.

[16] The Commission's own reports make clear the degree to which the wireless service market has become increasingly concentrated in the hands of a few carriers. According to its latest report on wireless competition, the top five carriers (AT&T Mobility, Verizon Wireless, Sprint Nextel, T-Mobile and Alltel, including carriers recently acquired by these five) controlled 84% of the wireless market. *See 12th CMRS Report*, Table A-4. The market looks like it will only become increasingly concentrated, with Verizon Wireless' recent announcement that it intends to acquire Alltel, reducing the number of major carriers to four and giving Verizon Wireless alone a 28% share of the wireless market. *See* Marguerite Reardon, "Verizon Wireless To Buy Alltel," *C/Net News* (June 5, 2008); available at http://news.cnet.com/8301-10784_3-9960664-7.html.

The wireless equipment market is similarly, though marginally less, concentrated. For example, in 2005, Strategy Analytics estimated that Nokia has a 32.2% share of the worldwide wireless market, while Motorola has an 18% share and Samsung holds 13% of the market. In other words, three handset manufacturers hold over 63% of the market. Three other manufacturers (LG Electronics, Samsung and Sony Ericsson) accounted for another 17% of the market. *See* Mike Dano, "Biggest Handset Makers Take More Market Share," *RCR Wireless News* (July 28, 2005).

In addition, testimony and sworn declarations submitted by economists in this proceeding and in pending state court proceedings suggest that the Commission is on shaky ground if it continues to simply assume, without adequate empirical support, that wireless ETFs are justified (if they ever were), from either an economic or public policy perspective. For example, in this proceeding, economists Allen Rosenfeld and Lee Selwyn have both submitted declarations raising serious questions about the validity of the economic justifications or benefits advanced by wireless carriers in support of ETFs.[17]

In addition, Dr. Selwyn recently testified in a class action lawsuit against Sprint Nextel in California state court regarding the economics of Sprint Nextel's ETFs and related practices. Among other things, Dr. Selwyn testified that the average wholesale cost of a wireless handset in 2006 was $115, according to the U.S. International Trade Commission, while the average retail price of a handset in 2006 was $65.67, according to CTIA. Dr. Selwyn's analysis suggested that, after adding Sprint's $35 service activation fee to the $65.67 average handset price paid by consumers, Sprint's average handset subsidy amounted to only $14.33 – or approximately 1/14th of Sprint's current $200 ETF.[18] Dr. Selwyn's analysis further undermined assertions by Sprint and other wireless carriers that the carriers "give away" some handsets. Dr. Selwyn concluded that it was reasonable to assume that Sprint's $35 activation fee exceeded its out-of-pocket cost for

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[17] *See* USPIRG ex parte, Declaration of Allen Rosenfeld (July 6, 2006); Wireless Consumers Alliance ex parte, Declaration of Lee L. Selwyn (May 11, 2006).

[18] *See Ayyad, et al. v. Sprint Spectrum, L.P.*, Case No. RG03-121510 (Cal. Super. Ct., Alameda County), Reporter's Transcript of Proceedings, pp. 399-404 (May 22, 2008). A copy of the relevant portions of Dr. Selwyn's testimony is provided as Attachment 3.

lower-end handsets purchased at wholesale prices and thus allows Sprint to turn a profit on its activation fee alone.[19]

Further, Dr. Selwyn calculated that Sprint's profit margin on its contractual – as opposed to optional – service was roughly $0.70/month, meaning that Sprint lost approximately $9.24 in revenue using the carrier's estimate of the average number of months remaining (13.2) when its customers terminate service early.[20] Using this figure, Dr. Selwyn calculated that the total revenue losses associated with the 1.9 million class members who terminated service amounted to roughly $17.6 million. At the same time, Dr. Selwyn noted, Sprint charged those customers $283 million in ETFs – roughly 13-14 times the carrier's actual losses stemming from the customers' early termination of service.[21]

While the wireless industry no doubt will ignore or downplay this data, the Commission must not. Given the Commission's express commitment to review its *Cellular Bundling Order* should new information come to light, such figures compel a much closer examination by the Commission of the economics of wireless ETFs, something it has not heretofore done.

Likewise, evidence of the anticompetitive effects of wireless carriers' ETFs serves as another, independent but related basis for taking a hard look at these fees. In their declarations filed with the Commission, both Drs. Rosenfeld and Selwyn examined the effect ETFs had on wireless carriers' customer "churn" rates – which in turn reflects

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[19] *Id.* at 404-05.

[20] *Id.* at 442-52.

[21] *Id.* at 452-53.

the relative freedom consumers have to seek the wireless service that best fits their needs in terms such as cost and quality. Dr. Rosenfeld noted, for example, that much of the churn rates experienced by the wireless industry (18-42% annually) were accounted for by customers who switched carriers when their service contracts expired. Dr. Rosenfeld concluded that the annual churn rates would have been significantly higher if ETFs had not deterred customers still under contract from switching.[22]

Dr. Rosenfeld's findings corroborate those found in surveys conducted by both the U.S. Public Interest Research Group ("USPIRG") in August 2005, and by the Government Accountability Office ("GAO") in April 2003. USPIRG's survey[23] found that ETFs were a substantial factor in reducing voluntary "churn" by wireless customers. For example, USPIRG found that only 10% of wireless customers paid an ETF during the preceding three years (2002-2004), meaning that if one assumes a customer would pay such a fee only once during that period, only about 3% of wireless customers per year pay the fees to change service – substantially less than the overall annual churn rates identified by the FCC.[24] Based on this survey result and an estimated weighted average

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[22] USPIRG ex parte, Rosenfeld Declaration, pp. 6-8.

[23] Edward Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," *MASSPIRG Education Fund Report* (August 2005); available at http://www.masspirg.org/uploads/DK/Ji/DKJih9bWf5ElRF9_MDigzQ/_Locked_In_A_Cell_.pdf. The survey was actually conducted by IPSOS North America, a nationally-recognized polling firm.

The Commission's own reports corroborate – though in understated fashion – the findings of the GAO, USPIRG and Drs. Selwyn and Rosenfeld. In its most recent report on the status of competition in the wireless market, the Commission noted that wireless "[p]roviders have been attempting to differentiate themselves through exclusive arrangements to reduce churn" and that "ETFs may also be a way to reduce churn" and are used "to curb contract cutting." *12 CMRS Report*, p. 85, ¶188.

[24] *See 12th CMRS Report*, p. 84, ¶187.

early termination fee of $170 per phone (during the time period in question), USPIRG estimated that wireless customers paid approximately $837 million dollars a year in ETFs.[25] Moreover, the USPIRG study found that 36% of survey respondents indicated that they considered switching carriers during the term of their contracts but were discouraged from doing so by their carrier's ETF.[26] Similarly, in a survey appended to the GAO's 2003 study, 28% of respondents indicated that, at some point, they had wanted to change wireless carrier but did not – and of these respondents, 70% indicated that the ETF imposed by their wireless carrier was either a "very important" or a "somewhat important" factor in deciding not to switch.[27]

Dr. Selwyn's recent testimony in the California class action suit against Sprint likewise showed a strong correlation between the carrier's ETF and reduced customer churn. In his testimony, Dr. Selwyn noted that Sprint reported in its 2002 10-K report to the Securities and Exchange Commission ("SEC") that its monthly churn rate first increased dramatically (from 2.6% to 3.3%), after it loosened its credit and deposit standards to attract lower end customers, but then decreased just as sharply (from 3.3% to 2.7%) after it began enforcing its ETFs much more rigorously, among other things.[28]

Finally, in its 2005 study, USPIRG offered a basis to quantify the enormous anticompetitive costs that ETFs have imposed on wireless customers in the United States.

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[25] "Locked in a Cell," p. 14.

[26] *Id.* at 19.

[27] Report to Congressman Anthony Weiner, "FCC Should Include Call Quality in Its Annual Report on Competition in Mobile Phone Services," GAO-03-501, Appendix II, Results of Survey on Mobile Phone Service, Qts. 23-24 (April 2003).

[28] *See Ayyad v. Sprint Spectrum,* Reporter's Transcript of Proceedings, pp. 405-414 (May 22, 2008).

Based on its survey results and estimated costs associated with those customers who , actually paid ETFs, those who did not switch carriers because they could not afford the ETFs, and those customers who did not switch carriers because the ETFs exceeded any benefit of switching, USPIRG calculated that ETFs cost American wireless consumers over $4.6 billion from 2002 through 2004 alone.[29]

No doubt the wireless industry will disagree with the findings and analysis contained in the foregoing materials and can offer, as Verizon Wireless has in this proceeding,[30] contrary findings and conclusions of their own economists. That there is conflicting data or analyses is not the issue, however. The issue is that there are clearly genuine and serious questions regarding the economic justification for wireless ETFs in the first place. There are also genuine and serious questions regarding the effect of ETFs on consumers' ability to make competitive choices between carriers based on price and quality. Again, the Commission has not seriously studied these questions in the sixteen years since its *Cellular Bundling Order*. It is high time for it to do so, and certainly it is appropriate to study these questions before adopting any proration formulae or standards based on untested assumptions.

In short, the Commission is "buying a pig in a poke" if it simply concludes that it is enough to adopt some proration of current ETFs without first satisfying itself that ETFs are reasonable and justified in the first place. Prorating a $200 ETF over a wireless service contract's term, according to some formula adopted by the Commission, does neither the consumer nor the market any good if the $200 ETF is not economically

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[29] *Id.* at 18-21.

[30] *See* Verizon Wireless ex parte, Declaration of Jerry Hausman (Oct. 25, 2005).

justified in the first place. If, and only if, wireless carriers demonstrate that their current ETFs and related practices are economically justified and that the need for such fees outweighs their negative effects on consumer choice in a competitive market, should the Commission consider moving on to the question of setting standards governing ETFs or any scheme for prorating those fees. By no means are we there yet.

With regard to preserving consumer choice in a competitive market, NASUCA offers one final point, namely the anti-consumer, anti-competition synergy that results from coupling ETFs with wireless providers' and wireless equipment manufacturers' practice of "locking" handsets and thereby forcing consumers to buy new equipment every time they change carrier. Handset "locking" simply raises the bar that much higher for consumers already faced with steep wireless ETFs. For that reason, NASUCA supported Skype Communications' petition to apply the *Carterphone* decision to the wireless industry.[31] Any serious effort to eliminate the barriers that stand in the way of consumers reaping the full benefits of a competitive wireless market therefore must also address handset "locking."

B. In Any Event, This Proceeding Is Not The Proper Vehicle For Adopting Federal Standards Governing ETFs.

Regardless of any possible benefit to consumers that may result if the Commission adopts standards limiting, to some extent, wireless carriers' ETFs, this proceeding is not an appropriate vehicle for such action by the Commission. In its May 1, 2008 *ex parte* submission to the Commission, Verizon Wireless expressed its view that the Commission cannot, at present, adopt any standards or regulations in this proceeding

[31] *In re Skype Communication S.A.R.L.*, Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (Feb. 20, 2007); *see also* n. 14, *supra*, discussing *Beckermeyer*.

because such action would amount to a rulemaking that has not been the subject of public notice and comment.[32] On this point, at least, NASUCA and Verizon Wireless agree.[33]

The Commission cannot adopt any rules associated with wireless carriers' ETFs until after it initiates a proper rulemaking proceeding and provides public notice thereof. The Commission's public notice issued in response to CTIA's petition makes it clear that this proceeding is limited to the issue of whether, under Section 332(c)(3)(A) of the Act, ETFs are "rates charged by" wireless service providers and therefore not subject to state regulation, or whether ETFs constitute "other terms and conditions of" wireless service expressly subject to continuing state authority.[34]

Standards or regulations governing wireless carriers' ETFs and business practices relating to these contractual penalties would be legislative rules that may only be adopted by the Commission *after* providing adequate public notice of its proposed rules and a meaningful opportunity for public comment on those rules, in accordance with the Administrative Procedure Act.[35] Nor does the public notice of this hearing give the public adequate notice and opportunity to comment upon any standards or rules governing wireless ETFs. Furthermore, adoption of federal standards governing wireless ETFs under the circumstances of this proceeding cannot be considered the "logical outgrowth" of CTIA's petition since the development or adoption of such standards does not logically flow from the issue whether such fees are "rates" or "other terms and conditions" of wireless service under Section 332(c)(3)(A).

[32] Verizon Wireless ex parte, pp. 3-5 (May 1, 2008).

[33] *See* NASUCA ex parte, pp. 3-4 (May 20, 2008).

[34] *See* Public Notice, DA 05-1389 (May 18, 2005).

[35] *See, generally*, 5 U.S.C. § 553.

Finally, as Verizon Wireless has noted, any standards that the Commission might adopt would apply only prospectively and would not serve as a basis for retroactive liability of wireless carriers.[36] NASUCA agrees but notes that, by the same token, any standards that the Commission might adopt should not retroactively shield wireless carriers from liability in ongoing state proceedings.

IV. ETFs IMPOSED FOR OTHER COMMUNICATIONS SERVICES.

The use of ETFs has been spreading rapidly to other sectors of the communications industry, such as cable operators, broadband providers and providers of IP-enabled communications services. Some NASUCA members, such as myself, are not involved in the regulation of cable, broadband or IP-enabled communications services and thus NASUCA's experience with ETFs charged by these entities is somewhat limited. That said, however, there is certainly growing cause for alarm.

There is a growing body of information indicating that ETFs are becoming increasingly popular among cable operators, Internet service providers, and IP-enabled services providers.[37] Chairman Martin himself has expressed concerns regarding the

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[36] Verizon Wireless ex parte, p. 3 (May 1, 2008).

[37] **Broadband service:** *See* John Dunbar, "Pulling Plug on Net Service Not Easy," *USAToday* (April 9, 2007); available at http://www.usatoday.com/tech/techinvestor/industry/2007-04-09-net-fees_N.htm?POE=TECISVA; Bob Williams, "The Next Big Thing in Broadband: Early Termination Fees," *HearUsNow.org* (April 9, 2007) available at http://www.freepress.net/news/22281.

Satellite Television: *See* "DirectTV Will Not Refund Early Termination Fee," *pissedconsumer.com* (April 19, 2008); available at http://directv.pissedconsumer.com/directv-will-not-refund-early-termination-fee-20080419118458.html; "DirectTV Complaint – Bogus Early Termination Fee," My3cents.com (Jan. 11, 2008); available at http://www.my3cents.com/showReview.cgi?id=31934.

spread of ETFs to other communications industries.[38] NASUCA shares such concerns.

Based on its experience with the wireless industry, which apparently is the "model" being followed in these other industries, NASUCA believes that the growing use of ETFs and longer service contracts is driven less by the service providers' need to recover their costs of subsidizing equipment and more by their desire to stymie customers' freedom to seek, in a competitive market, the best price and service for their needs.

Accordingly, just as NASUCA urges the Commission to take a fresh look at the economic justifications and anti-competitive effects of wireless carriers' ETFs in a rulemaking, so it urges the Commission to take an initial look at the same issues in conjunction with other communications providers' growing use of ETFs, also in a rulemaking. In the meantime, the Commission should not interfere with states' and individual consumers' efforts to obtain protection from such practices under existing state laws.

Bundled service: *See* "Comcast Triple Play, Now With 24-Month Contract and ETF," The Consumerist (May 7, 2007); available at http://consumerist.com/consumer/contracts/comcast-triple-play-now-with-24-month-contract-and-etf-258444.php; Phuong Cat Le, "Consumer Smarts: Know what the fine print says about early termination fees," seattlepi.com (April 14, 2008); available at http://seattlepi.nwsource.com/lifestyle/358990_consumer15.html.

[38] *See, e.g.*, Cecilia Kang, "Scrutiny of Phone Fees May Broaden to TV, Internet," *Washington Post*, p. D01 (May 31, 2008); Martin H. Bosworth, "FCC, Congress May Limit Cable, Cell Phone Termination Fees," *consumeraffairs.com* (Sept. 12, 2007); available at http://www.consumeraffairs.com/news04/2007/09/fcc_etc.html.

V. CONCLUSION.

Thank you for your consideration of NASUCA's views regarding these issues. I look forward both to your questions today and to the opportunity to provide further input into future inquiries on these topics.

Respectfully submitted,

/s/ Patrick W. Pearlman
Deputy Consumer Advocate
The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

June 12, 2008

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cellular Telephone & Internet Association's	)	WT Docket No. 05-194
Petition for Declaratory Ruling Regarding	)	
Early Termination Fees in Wireless Service	)	
Contracts	)	

WRITTEN TESTIMONY OF PATRICK W. PEARLMAN
ON BEHALF OF NASUCA
EN BANC HEARING, JUNE 12, 2008

ATTACHMENT 1
(NASUCA RESOLUTION 2007-03)

THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES RESOLUTION 2007- 03

CALLING FOR FCC REEXAMINATION OF WIRELESS CARRIERS' EARLY TERMINATION FEES

WHEREAS, Commercial mobile radio service ("CMRS" or "wireless") providers typically require customers to sign service contracts that obligate customers to maintain service with the wireless carrier for one or more years and often extend the contract's term in response to customer-initiated changes in service; *and*

WHEREAS, Most wireless carriers impose Early Termination Fees ("ETFs") ranging from $150 to $240 on customers who seek to, or for various reasons must, cancel their service prior to the expiration of the service contract's term; *and*

WHEREAS, In addition to ETFs imposed by wireless carriers, many independent vendors of wireless equipment and services impose additional ETFs that vary in amount, depending on the vendor; *and*

WHEREAS, It was estimated that ETFs cost consumers $4.6 billion from 2002 through 2004 in penalties paid or foregone opportunities to obtain lower-cost services, and thereby limit consumers' choices among carriers and services;

WHEREAS, Consumer complaints regarding ETFs are consistently in the top five categories of informal complaints and inquiries received by the Federal Communications Commission's ("FCC's") Consumer and Governmental Affairs Bureau ("CGB"); *and*

WHEREAS, Consumers seeking redress on service quality and/or billing issues often have no state or federal venue for recourse, either through the courts, their state utility commission, their state attorneys general or the FCC, and are tied to their contracts due to the onerous ETFs; and

WHEREAS, Wireless carriers continue to assert that ETFs are necessary in order to reduce, or subsidize, customers' costs of wireless products (*i.e.*, handsets) and services (rate plans) and to ensure that carriers' fully recover customer-acquisition costs; *and*

WHEREAS, The FCC has not revisited the economic or policy assumptions underlying its 1992 determination that "subsidizing wireless phones" via the utilization of ETFs coupled with fixed term contracts "is an efficient promotional device which reduces barriers to new customers"; *and*

WHEREAS, Conditions in the wireless market that may have justified the economic and policy assumptions underlying the *Cellular Bundling Order* have changed radically since 1992; *and*

WHEREAS, The wireless industry has flourished since 1992, growing its subscriber base from just under 9 million to over 219 million by mid-2006, and consistently showing solid revenue and profit increases compared to the traditional wireline sector during this time frame; *and*

WHEREAS, Wireless carriers have aggressively sought and obtained designation as Eligible Telecommunications Carriers ("ETCs") under 47 U.S.C. §214(e), allowing them to support their costs to serve customers in high-cost areas with monies disbursed from the Federal Universal Service Fund ("USF"); *and*

WHEREAS, According to the most recent data compiled by the Universal Service Administration Company, the total amount of Federal USF subsidies received by wireless carriers has more than doubled in the last two years, from $471 million to approximately $1 billion in 2006, and constitutes over 99 percent of all Federal USF subsidies received by competitive ETCs; *and*

WHEREAS, The wireless industry has become increasingly concentrated in the hands of a few carriers and equipment manufacturers since 1992; *now therefore be it*

RESOLVED, That the National Association of State Utility Consumer Advocates ("NASUCA") calls upon the Federal Communications Commission to reexamine the economic and policy assumptions underlying its 1992 *Cellular Bundling Order,* in order to determine whether wireless carriers' – or their independent vendors' – use of ETFs remains an "efficient promotional device" that benefits *both* consumers and wireless carriers; *and be it further*

RESOLVED, That the FCC should fully investigate the equipment and customer acquisition or retention costs cited by the wireless industry as justification for ETFs, in order to determine whether such costs are being reasonably and appropriately recovered from consumers; *and be it further*

RESOLVED, That this Resolution shall not, in any way, be construed as endorsing the proposition, asserted by wireless carriers, that the FCC has exclusive jurisdiction over wireless carriers' ETFs under 47 U.S.C. §332(c)(3)(A); *and be it further*

RESOLVED, that the NASUCA Telecommunications Committee and Consumer Protection Committee, with the approval of the Executive Committee of NASUCA, are authorized to take all steps consistent with this Resolution in order to secure its implementation.

ADOPTED BY THE MEMBERSHIP

June 12, 2007

Denver, Colorado

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cellular Telephone & Internet Association's	)	WT Docket No. 05-194
Petition for Declaratory Ruling Regarding	)	
Early Termination Fees in Wireless Service	)	
Contracts	)	

WRITTEN TESTIMONY OF PATRICK W. PEARLMAN
ON BEHALF OF NASUCA
EN BANC HEARING, JUNE 12, 2008

ATTACHMENT 2
(NARUC RESOLUTION)

Resolution Calling on the FCC to Reexamine Wireless Carriers' Early Termination Fees

WHEREAS, Many wireless customers sign service contracts with wireless carriers that include early termination fees (ETFs) and obligate customers for one or more years; *and*

WHEREAS, Some contracts are extended by carriers due to customer initiated changes; *and*

WHEREAS, In addition to these ETFs, many independent vendors of wireless equipment and services may impose additional ETFs that vary in amount, depending on the vendor1; *and*

WHEREAS, From 2002-2004 the U.S. Public Research Interest Group estimated that ETFs cost consumers $4.6 billion in penalties for canceling their contracts or lost opportunities to obtain lower-cost services, thus limiting consumers' choices among carriers and services;[2] *and*

WHEREAS, Wireless carriers continue to assert that (1) ETFs are necessary in order to reduce, or subsidize, customers' costs of wireless products (*i.e.*, handsets) and services (rate plans) and to ensure that carriers fully recover customer-acquisition costs;[3] and (2) ETFs may help lower transaction costs by isolating the cost of prematurely cancelled services to the cost-causer; *and*

WHEREAS, Wireless carriers provide prepaid services, including pay-as-you-go, month-to-month, hybrid plans and in few cases pro-rated plans which customers may purchase in advance; *and*

WHEREAS, Conditions in the wireless market that may have justified the economic and policy assumptions underlying the *Cellular Bundling Order* have changed since 1992; *and*

WHEREAS, The wireless industry has flourished since 1992, growing its subscriber base from just under 9 million, according to the wireless industry's website, to over 239 million by July 3, 2007, and consistently showing solid revenue and profit increases compared to the traditional wireline sector during this time frame;[4] *and*

WHEREAS, Wireless carriers have sought and obtained designation as Eligible Telecommunications Carriers ("ETCs") under 47 U.S.C. §214(e), allowing them to support their

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1 *See In re Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, WT Docket No. 05-194, Utility Consumers Action Network Comments, pp. 15-19 (Aug. 5, 2005).

2 *See* Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," U.S. PIRG Education Fund, pp. 20-21 (Aug. 2005) available at: http://www.uspirg.org/uploads/6K/L1/6KL1e4XLE1QzgyFz7hpKKQ/lockedinacell05.pdf.

3 *See* "Early Termination Fees – CTIA Position," http://ctia.org/industry_topics.cfm/TID/41/CTID/12 (accessed Feb. 5, 2007).

4 *See* http://files.ctia.org/pdf/CTIAMidYear2006Survey.pdf.

costs to serve customers in high-cost areas with monies disbursed from the federal Universal Service Fund ("USF"); *and*

WHEREAS, According to the most recent data compiled by the Universal Service Administration Company, the total amount of federal USF subsidies received by wireless carriers has more than doubled in the last two years, from $471 million to approximately $1.10 billion in 2006, and constitutes over 99 percent of all federal USF subsidies received by competitive ETCs; *and*

WHEREAS, On July 12, 2007, the National Association of State Utility Consumer Advocates (NASUCA), passed a resolution calling on the Federal Communications Commission to reexamine the 1992 Cellular Bundling Order to determine if use of ETFs benefits *both* consumers and wireless carriers; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its July 2007 Summer Meetings in New York, New York, calls upon the Federal Communications Commission to reexamine the economic and policy assumptions underlying its 1992 *Cellular Bundling Order,* in order to determine whether wireless carriers' – or their independent vendors' – use of ETFs remains a needed and "efficient promotional device" that benefits *both* consumers and wireless carriers; *and be it further*

RESOLVED, That the FCC should fully investigate the equipment and customer acquisition or retention costs cited by the wireless industry as justification for ETFs, in order to determine whether such costs are being reasonably and appropriately recovered from consumers; *and be it further*

RESOLVED, That this Resolution shall not, in any way, be construed as endorsing the proposition asserted by wireless carriers that the FCC has exclusive jurisdiction over wireless carriers' ETFs under 47 U.S.C. §332(c)(3)(A).

Sponsored by the Committee on Consumer Affairs
Adopted by the NARUC Board of Directors July 18, 2007

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cellular Telephone & Internet Association's	)	WT Docket No. 05-194
Petition for Declaratory Ruling Regarding	)	
Early Termination Fees in Wireless Service	)	
Contracts	)	

WRITTEN TESTIMONY OF PATRICK W. PEARLMAN
ON BEHALF OF NASUCA
EN BANC HEARING, JUNE 12, 2008

ATTACHMENT 3
(EXCERPTS OF TESTIMONY OF LEE L. SELWYN IN *AYYAD v. SPRINT*)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF ALAMEDA

3 BEFORE THE HONORABLE BONNIE SABRAW, JUDGE

4 DEPARTMENT 22

5 ---oOo---

6

7 RAMZY AYYAD, et al.,

8 Plaintiffs,

9 vs. Case No. RG03-121510

10 SPRINT SPECTRUM, L.P.,

11 Defendant.
/

12

13

14

15

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 COUNTY ADMINISTRATION BUILDING

18 THURSDAY, MAY 22, 2008

19

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25

26

27

28

Teri F. Rosette

Certified Shorthand Reporter No. 6631

1 APPEARANCES:

2	For the Plaintiffs:	SCOTT A. BURSOR, Attorney at Law
3		
4		JACQUELINE E. MOTTEK, Attorney at Law
5	For the Defendant:	DOMINIC SURPRENANT, Attorney at Law
6		
7		CHRISTOPHER TAYBACK, Attorney at Law

* * *

1 MR. BURSOR: Your Honor, there's going to be another
2 break at some point; is that right?
3 THE COURT: Yes.
4 MR. BURSOR: I may not need the computer until then.
5 It doesn't seem to be lighting up. But maybe we can break
6 take a break when I get to that.
7 THE COURT: Okay. We'll see if we can get it going.
8 DIRECT EXAMINATION (Cont'd)
9 BY MR. BURSOR:
10 Q. Good morning, Dr. Selwyn. Welcome back.
11 A. Good morning.
12 Q. Do you remember where we left off in your testimony,
13 we were talking about the United States International Trade
14 Commission?
15 A. Yes. I think so.
16 Q. And I had written up on the board here a summary of
17 your testimony about the Commission tracking handset wholesale
18 prices?
19 A. Yes.
20 Q. And I believe right when we broke at the end of the
21 day you had testified that the wholesale cost of phones from
22 1999 through '06 ranged from a hundred to $117?
23 A. Yes. That's correct.
24 Q. I want to pick up where we left off. So I'm going
25 to take this price range from the ITC, and I'm going to start
26 a new page. Have you had occasion to study data on the
27 average retail price paid for consumers for handsets?
28 A. Yes.

1 Q. What data have you seen on that?
2 A. There was data that was released by the Cellular
3 Telephone and Internet Association, which is the trade
4 association of the cellular industry, that indicated that the
5 average retail price that consumers paid for handsets was
6 $65.67.
7 Q. What year was that?
8 A. In 2006.
9 Q. And what is CTIA?
10 A. CTIA, Cellular Telephone and Internet Association,
11 is the trade association whose members include the -- all of
12 the principal wireless carriers.
13 Q. And this figure that you've testified to this
14 morning comes from CTIA; is that right?
15 MR. SURPRENANT: Objection, Your Honor. Outside the
16 scope of his designation.
17 THE COURT: In terms of the source of that number,
18 I'm going to allow him to testify as to the source of the
19 number.
20 THE WITNESS: Yes. That's correct.
21 BY MR. BURSOR:
22 Q. Who was the first person to call the CTIA data to
23 your attention?
24 A. Actually, it was Mr. Surprenant who brought that
25 number to my attention during one of the depositions.
26 Q. How many times has Mr. Surprenant taken your
27 deposition?
28 A. I don't know. Half a dozen or so.

1 Q. Have you had occasion to study Sprint's activation
2 fees?
3 A. Yes.
4 Q. How much was Sprint's activation fee in 2006?
5 A. I believe it was typically around $35.
6 Q. Now, you understand that one of the areas of dispute
7 in this case concerns handset subsidies; right?
8 A. Yes.
9 Q. The supposed difference between the wholesale price
10 that Sprint pays for handsets on the one hand and the amount
11 that they receive in revenue for them on the other?
12 A. Yes.
13 Q. And as we've walked through the 10-Ks -- and we're
14 going to get back to our journey through the 10-Ks in a few
15 minutes -- we've seen references to selling handsets at or
16 below cost?
17 A. Yes.
18 Q. Were you able to reach any conclusions about the
19 magnitude of handset subsidies on average?
20 A. Yes.
21 Q. What were your conclusions?
22 A. Well, if you look at the numbers that you just put
23 up there --
24 Q. I'm sorry. I'm going to bring it closer.
25 A. So we have from the ITC data the cost range. To be
26 fair, since we're looking at revenue numbers for 2006, we
27 should use the 2006 cost, which my recollection is it's
28 approximately $115. That is the ITC taking the 2006 imports

1 and dividing it -- import value and dividing it by the number
2 of units imported.
3 MR. SURPRENANT: Your Honor, I don't have a problem
4 with this, but I can't see. So let me just walk over there.
5 THE WITNESS: I can remember it now. So maybe you
6 should write $115 as the comparable cost to those revenue
7 figures just to make it clear.
8 MR. BURSOR: Okay. 115.
9 THE WITNESS: We have two components of handset
10 revenue; that's $65.67, which is the average retail price of
11 the handset charged by CTIA members, and then there's the $35
12 activation fee, which is also part of the price of the
13 handset. So if you add those two together, we get $100.67.
14 BY MR. BURSOR:
15 Q. And so can we subtract that from 115 to determine a
16 an average handset subsidy?
17 A. Yes.
18 Q. Can you do that math in your head?
19 A. Approximately $114 and I think 33 cents.
20 Q. Actually, $14.33.
21 A. What did I say? 400?
22 Q. You said 114.
23 A. No. No. No. 14.
24 Q. 14.33?
25 A. 14.33.
26 Q. I know some of the jurors in the back have had a
27 hard time seeing. So each of these figures comes from a --
28 well, except for the activation fee, the $35 activation fee,

1 the other two figures come from sources external to Sprint;
2 correct?
3 A. That's correct.
4 Q. Did you also examine Sprint's internal figures for
5 handset costs?
6 A. Yes, I did.
7 Q. And what did you find?
8 A. Well, they were several times the ITC -- I'm trying
9 to remember the precise number, but my recollection is they
10 were up in the range of 250 to $300. I don't know how that
11 calculation was made, what else was included, whether or not
12 various types of other retail related costs or handling costs
13 were included. Returns, warranty issues. It could have been
14 a number of things.
15 I mean, I would be surprised if Sprint's number were
16 precisely the same as the industry average, but I would also
17 be even more surprised if it were that different.
18 Q. And what conclusions -- based on your study of the
19 USITC data, of the CTIA data, and of Sprint's internal data,
20 what conclusions, if any, were you able to draw with respect
21 to the magnitude of handset subsidies?
22 A. I think -- again, I have no reason to believe that
23 the type of handset that Sprint provides is materially
24 different, the mix of handset that Sprint provides is
25 materially different than what we're finding industry wide.
26 So I think we can certainly use the ITC cost figure as a rough
27 approximation. So that's around $115 in 2006. And we have
28 roughly a hundred dollars and some change in revenue per

1 handset in that same period of time. So roughly we're looking
2 at a $14 and some change subsidy.
3 Q. On average?
4 A. On average.
5 Q. Now, I want to ask you a question that Sprint's
6 counsel asked rhetorically in his opening statement. He held
7 up a handset and he asked, "If we give this handset away for
8 free, you know there has to be some kind of a subsidy on that
9 because we didn't buy it for free." You weren't here, but can
10 you understand what I just said?
11 A. Yes.
12 Q. Is it possible -- can you explain how you would
13 understand or respond to that question?
14 A. Well, first, as a general matter, Sprint doesn't
15 give away handsets for free because at a minimum they charge a
16 $35 activation fee.
17 Q. Okay. So based on the activation fee alone, is it
18 possible -- well, are there handsets that might cost less than
19 $35?
20 A. Yes. I believe so. In fact, I recently purchased
21 one from an electronics -- from J & R Electronics of New York
22 for $35. And that was J & R's retail price and this was
23 without any service activation requirements. So I'm assuming
24 that whatever wholesale price J & R paid was less than $35.
25 Q. So I just want to make clear. The 115 figure from
26 USITC, that's an average figure; right?
27 A. Right. It would include my $35 handset, and it
28 would include 300 and $400 PDA type handsets.

1 Q. Based on your analysis of handset price data, is it
2 possible that a company could actually turn a profit on the
3 handset itself simply through the activation fee?
4 A. It's possible. We would have to look at the type of
5 phones that are being offered under the so-called free
6 arrangements. But certainly there are low-end phones that
7 have wholesale prices down in that range. So if that's what
8 they are giving away for, quote, free, then they may well be
9 turning a profit of $35.
10 Q. Okay. Dr. Selwyn, I want to provide you with a copy
11 of Exhibit 416. And we're going to resume our journey through
12 Sprint's 10-K reports.
13 THE COURT: Is that one you gave us yesterday or a
14 new one?
15 MR. BURSOR: I have extras for Your Honor. And
16 these are the ones we discussed yesterday.
17 THE COURT: Okay.
18 BY MR. BURSOR:
19 Q. Dr. Selwyn, do you have Exhibit 416?
20 A. Yes.
21 Q. Have you seen it before?
22 A. Yes.
23 Q. What is it?
24 A. This is the Sprint 10-K form for the year ended
25 December 31st, 2002.
26 Q. Where did you get it from?
27 A. As with the others, my staff downloaded it from the
28 SEC web site.

1 Q. Did the chief executive officer of Sprint sign this
2 one like the others?
3 A. Yes.
4 Q. Did the chief financial officer of Sprint sign this
5 one like the others?
6 A. Yes.
7 Q. Did the chief accounting officer of Sprint sign this
8 one like the others?
9 A. Yes.
10 Q. Did Sprint's outside auditors audit this one like
11 the others?
12 A. Yes.
13 Q. And did the outside auditors sign off on this just
14 like the prior 10-Ks?
15 A. They did.
16 Q. Did you review this 10-K in the course of your work
17 in this case?
18 A. I did.
19 Q. Why?
20 A. Again, I was trying to extract certain information,
21 certain financial information from it, but also was looking to
22 determine whether or not there was any information that was
23 being provided by Sprint relative to termination fees.
24 Q. Let me ask you to look at page 42 of 118. And
25 again, I'm going to use the numbers. I hope they are not cut
26 off on that one again.
27 A. I have them.
28 Q. Is that copy okay?

1 A. Yes.
2 Q. Do you have that page, Dr. Selwyn?
3 A. I do.
4 Q. Do you see in the last paragraph there's a
5 discussion of the program targeting the subprime customer
6 segment?
7 A. The clear pay program, yes.
8 Q. Right. And did you study that?
9 A. I did.
10 Q. And could you describe again what the clear pay
11 program was just to refresh us?
12 A. The clear pay program was an effort by Sprint to
13 attract what are considered to be subprime customers. That
14 is, customers who would not have qualified for credit and
15 therefore not be eligible for a post pay calling plan under
16 the previous Sprint credit policies. So Sprint relaxed its
17 credit and deposit policies for the purpose of attracting
18 additional customers.
19 Q. What happened when Sprint did that?
20 A. Well, what is reported in the 2002 10-K is that its
21 churn rate increased -- in fact, it increased fairly
22 dramatically -- as a result of defaults among customers who
23 were attracted under this plan.
24 Q. What was the churn rate in 2002 after subprime was
25 targeted? Actually, I apologize Dr. Selwyn. I don't see it
26 on this page. Just give me a moment. I think you'll find it
27 on page 44, two pages in. Second paragraph on that page.
28 A. It increased to 3.3 percent from 2.6 percent in

1 2001.
2 Q. Is that a significant increase?
3 A. Yes.
4 Q. In 2002 -- could you just give us a rough estimation
5 of the magnitude of the effect of that churn rate on a
6 subscriber base of 14 million subscribers?
7 A. Let me try to do a quick calculation. So we went
8 from 2.6 to 3.3, which is an increase of .7 percent per month.
9 So if you multiply that by 12, you get 8.4 percent for the
10 year. And what did you say? 14 million was the subscriber
11 amount?
12 Q. Roughly.
13 A. So if we multiply that by 14 million, we would get
14 an increase in churn of roughly 1,176,000 customers.
15 Q. Just by going from 2.6 to 3.3, Sprint is going to
16 lose an extra how many customers?
17 A. 1,176,000.
18 Q. How would that impact Sprint's bottom line?
19 A. It would certainly cut into Sprint's profits, yes.
20 Q. You can set that one aside, Dr. Selwyn. Just pile
21 it up right there.
22 MR. BURSOR: Your Honor, I'm providing Dr. Selwyn
23 with Exhibit 417. It is the Sprint corporation form 10-K for
24 the fiscal year ended December 31, 2003.
25 BY MR. BURSOR:
26 Q. Dr. Selwyn, do you have Exhibit 417?
27 A. I do.
28 Q. Have you seen it before?

1 A. I have.
2 Q. What is it?
3 A. It's the Sprint corporation form 10-K filed with the
4 Securities and Exchange Commission for the year ended December
5 31st, 2003.
6 Q. Where did you get it, sir?
7 A. As with the others, it was downloaded by my staff
8 from the Securities and Exchange Commission web site.
9 Q. Did you study this as part of your work in this
10 case?
11 A. I did.
12 Q. Why?
13 A. Same reason as the others. I wanted to extract
14 certain financial information, and I also wanted to see
15 whether or not and how the effects of early termination fees
16 were discussed in the 10-Ks.
17 Q. Did the chief executive officer of Sprint sign this
18 one like the others?
19 A. Yes.
20 Q. Did the chief financial officer sign this one like
21 the others?
22 A. Yes.
23 Q. Did the chief accounting officer sign this one like
24 the others?
25 A. Yes.
26 Q. Was this one audited like the others?
27 A. Yes.
28 Q. Did the outside auditors sign off on this one like

1 the others?
2 A. Yes.
3 Q. Can you turn to page 56 of 165.
4 A. I have it.
5 Q. Do you see there's a discussion of churn in the
6 middle of that page?
7 A. Yes.
8 Q. Are you aware of what was happening with enforcement
9 of the early termination fee at this point in time in terms of
10 whether it was being enforced more or less or the same?
11 A. The churn rate dropped back down to 2.7 percent from
12 the 3.3 percent that was reported for 2002.
13 Q. And do you have -- based on your study of the data
14 in this case, do you have an understanding as to why the churn
15 rate dropped in 2003?
16 A. Sprint explains that it dropped as a result of
17 increased collection activity and tighter credit.
18 Q. What do you mean increased collection activity? And
19 Dr. Selwyn, I just want to caution you. We're not supposed to
20 read from the -- we're not supposed to read verbatim from the
21 document because of a pending issue.
22 THE COURT: I think he's refreshing his
23 recollection.
24 THE WITNESS: Well, there were references in here to
25 effective customer retention programs and credit management.
26 I read credit management to connote perhaps a combination of
27 tighter credit. That is, a tightening of the requirements to
28 obtain credit as well as increased efforts to collect overdue

1 accounts.
2 MR. SURPRENANT: Your Honor, objection. Move to
3 strike. The witness's answer was "perhaps." He is just
4 speculating.
5 THE COURT: Objection is overruled. The answer may
6 remain.
7 BY MR. BURSOR:
8 Q. Now, we've just reviewed a series of 10-Ks that
9 talked about the situation with the subprime market that
10 Sprint decided to get into; right?
11 A. Yes.
12 Q. And did that cause an increase in defaults?
13 A. That's what the 10-K seems to be saying, yes.
14 Q. And the company at this time is -- are they still
15 selling the handsets below cost with these subsidies that we
16 talked about?
17 A. Yes.
18 Q. Was there any data that you saw reporting any
19 significant losses caused by handset costs to these subprime
20 customers?
21 A. Separate and apart from the general statement of
22 selling handsets below cost?
23 Q. Right.
24 A. No.
25 Q. Each of these 10-Ks that we've looked at so far,
26 Dr. Selwyn, have they included references to the sale of
27 handsets below cost every single year?
28 A. Yes.

1 Q. Have they included references to CPGA? I know we
2 spent a lot of time on that yesterday; right?
3 A. Cost per gross add.
4 Q. Right.
5 A. Yes.
6 Q. And we probably spent half an hour explaining what
7 cost per gross add was; right?
8 A. Yes.
9 Q. And we did that by reference to I think the '99
10 10-K, but that's something that's in there every year; is that
11 true?
12 A. Yes.
13 Q. From '99 to 2003, in each of 10-Ks did you see any
14 statement drawing any connection between the amount of the
15 early termination fee and cost per gross add?
16 A. No.
17 Q. In any one of these 10-Ks that we have reviewed, did
18 you see any statement drawing any connection between the
19 amount of the ETF and the amount of any handset subsidy?
20 A. No.
21 Q. In any one of these 10-Ks that we've reviewed, did
22 you see any statement suggesting any connection between the
23 amount of the ETF and any kind of cost for handsets?
24 A. No.
25 Q. In any one of these 10-Ks that we have reviewed, did
26 you see any connection between the amount of the ETF and the
27 recoupment of any costs at all?
28 A. No. There was no reference to the ETF in any of

1 these 10-Ks.
2 Q. Now, did the company in the 2003 10-K in their
3 discussion of churn at page 56, did they draw a distinction
4 between voluntary and involuntary churn?
5 A. Yes.
6 Q. And do you have an understanding of what that
7 distinction is?
8 A. Yes.
9 Q. Can you explain it?
10 A. Voluntary churn occurs when a customer in good
11 standing, that is, who is not in a billing in arrears
12 situation, makes a decision to discontinue service.
13 Involuntary churn arises when Sprint, typically due to
14 nonpayment of an account, discontinues, that is, cuts off the
15 customer's service.
16 Q. And was there an explanation in the 2002 and 2003
17 10-Ks as to whether the increase in connection with the
18 targeting of the subprime market, the increase in churn, was
19 that the result mostly of voluntary or involuntary churn?
20 A. Let me answer your question and then I'll get myself
21 some water. Yes. The 2003 10-K reports that the increase in
22 involuntary churn resulted from the discontinuation of the
23 clear pay program.
24 Q. Let me make sure I understand. Go ahead and get
25 your water, sir. So this is what I want to ask you about,
26 Dr. Selwyn. When churn went from 2.6 in 2001 -- can you see?
27 A. Yes.
28 Q. When it went from 2.6 in 2001 to 3.3 in 2002, what

1 kind of churn was that, was primarily responsible for that
2 increase? Was it voluntary or involuntary?
3 A. It was primarily involuntary.
4 Q. And that means that it was primarily Sprint
5 canceling the customers' accounts?
6 A. Yes.
7 Q. Because there was a high rate of nonpayment on the
8 subprime folks?
9 A. Apparently that's the case, yes.
10 Q. Is that surprising?
11 A. No. If you make -- if you relax credit standards,
12 then you end up with additional customers. But you also end
13 up with a higher than average percentage of customers who then
14 encounter difficulty paying their bills. Same thing occurring
15 right now with respect to subprime mortgages.
16 Q. So this was not something that would be unexpected;
17 is that fair?
18 A. I wouldn't think it would be unexpected, no.
19 Q. Were you able to draw any conclusions from the fact
20 that Sprint made the business judgment to enter that market?
21 A. Well, I'm assuming -- and I think it's a reasonable
22 assumption -- that Sprint made a business judgment that even
23 though there would be some elevation, some increase in the
24 rate of default in the number of customers who would end up
25 defaulting on their account, that factoring that in against
26 the gain in additional customers that resulted from the
27 relaxation of credit policies would produce a net profit.
28 Q. So that was a business judgment that Sprint made.

1 customer has, let's say, 12 months left on the contract and
2 discontinues it, then the revenue loss to Sprint has to be
3 reckoned with respect to the amount to which the customer was
4 obligated to pay, which in this case would be that 39.95 a
5 month. So we would look at the contractual portion of the
6 total service arrangement because that's all that's included
7 within the contract.
8 Q. Let me see if I can try to clarify that a bit. Is
9 it accurate to summarize that answer by saying you don't have
10 an obligation to buy the extra stuff beyond the contract?
11 A. That's right.
12 Q. And did you make some determination as to what
13 portion of Sprint's revenues comes from the contractual side
14 and which portion of the revenues comes from optional
15 services?
16 A. Well, yes, I did. Although the actual a source of
17 that came from one of Sprint's witnesses who provided data for
18 the period 2001 through 2006 showing the portion of
19 Sprint's -- and we're talking about Sprint Wireless here. Of
20 Sprint's total revenues that were associated with the fixed
21 monthly plan charges versus the optional service charges.
22 Q. So these data on the percentage of revenues from the
23 optional charges as compared to the contractual charges, you
24 took those from Dr. Taylor?
25 A. Yes.
26 Q. And who is he?
27 A. He is one of Sprint's experts.
28 Q. And you don't have any reason to dispute these

1 figures; do you?
2 A. No.
3 Q. You accept them?
4 A. I'm accepting them as presented, yes.
5 Q. Okay. So according to Dr. Taylor's numbers, about a
6 third of Sprint's revenue is from optional charges.
7 A. Approximately that, yes.
8 Q. Why does that matter?
9 A. Well, we're trying to examine the effect on the
10 financial consequences for Sprint resulting from early
11 terminations. If a customer discontinues service, the
12 customer will cease paying the fixed monthly charge and will
13 enable Sprint then to avoid the costs associated with
14 providing the services. If we can go back to the previous
15 slide for a moment.
16 Q. Sure.
17 A. The services that show up in the left-hand column,
18 that's what's covered by the fixed monthly charge.
19 Q. So these on the left-hand column is about two-thirds
20 of the revenue.
21 A. That represents about two-thirds of the revenue.
22 Q. And these on the right-hand part of the column
23 represent about one-third of the revenue.
24 A. Yes.
25 Q. According to Dr. Taylor.
26 A. Yes.
27 Q. And I see you put on the chart Sprint breaks even on
28 the contract service. I know we are going to get there, but

1 can you just give us a shorthand explanation of why that is?
2 A. Well, as it turns out, the way that Sprint has
3 designed its pricing is that essentially if all its customers
4 were to do was to purchase only the contract services and
5 never purchase any optional services, then Sprint would
6 roughly break even.
7 In other words, Sprint has designed its pricing
8 model so that essentially all of the profit comes from
9 optional services, and the core services that are covered by
10 the monthly plan charges are essentially designed to break
11 even.
12 Q. All right. I want to do the math to see how you get
13 there, Dr. Selwyn. Okay?
14 A. Okay.
15 Q. So let's go to your last slide. What did you
16 calculate on this last slide?
17 A. Well, what I did here on the top line --
18 Q. Was this your calculation of the profit margin of
19 Sprint on the contract?
20 A. Yes.
21 Q. All right. And you did that for each year from '99
22 through 2005?
23 A. Yes.
24 Q. And what do we have in this first line labeled
25 "Contract Revenues Without Optional Charges"? What is that?
26 A. That represents the total revenues that Sprint
27 reported in its 10-K reduced to exclude the proportion of
28 revenues identified by Dr. Taylor as coming from optional

1 services. So roughly reduced by a third, but it was actually
2 done -- whatever his number was for each year is what I used.
3 Q. Let me make sure I understand. For this line here,
4 you started with the reported audited figure from the 10-Ks
5 and Qs; right?
6 A. Correct.
7 Q. And you reduced it by Dr. Taylor's figures for the
8 break-out of optional and contractual services.
9 A. Correct. Then I divided that by number of
10 subscribers, and I divided it again by 12 to express it on a
11 monthly basis.
12 Q. And is that the correct way to do it?
13 A. Yes. I believe it is.
14 Q. Now, I want to ask you about the second line,
15 average variable cost per subscriber. What is that?
16 A. Again, the goal here was to identify only those
17 costs that are affected by the number of subscribers, that
18 vary as the number of subscribers changes.
19 Q. Is that why you had the regressions with the trend
20 lines?
21 A. Yes.
22 Q. All right. So this may have been a roundabout way
23 of getting there, but you used the data from those regressions
24 to calculate these figures?
25 A. Well, not precisely. I used a slightly different
26 calculation, but the effect of the calculation was to identify
27 and isolate costs that had changed. What I did was take a
28 base year of 1999, and then I compared the change in total

1 operating expenses for each year relative to 1999 against the
2 change in number of subscribers between that year and 1999.
3 What I was attempting to do was identify the variation, the
4 variable costs associated with those additional customers that
5 were brought into the service, put on the network, from and
6 after 1999.
7 Q. Okay. Now, we already talked about the fact that
8 you excluded the revenue from optional services -- the revenue
9 from optional charges from the top line. So are you just
10 including all the costs in the second line?
11 A. No.
12 Q. Why not?
13 A. Well, the optional services do have certain costs
14 associated with them. They are relatively small compared to
15 the core services, those basic contractual services. But if
16 I'm going to exclude optional revenues, then I need to make a
17 corresponding exclusion of costs associated with those
18 optional revenues.
19 Q. And if you didn't do that, you would understate the
20 amount of profits; right?
21 A. I would -- yes. If I didn't make that exclusion, I
22 would be assigning costs to the monthly services that would be
23 too high, and hence I would be understating profit.
24 Q. Right. So if you are going to do this in a
25 scientific and mathematically valid way, you've got to exclude
26 some portion of those costs; correct?
27 A. Yes.
28 Q. How did you do that?

1 A. Unfortunately, Sprint data does not identify
2 specifically what the costs are as between its core services
3 and its optional services. So I had to look at other sources
4 for that. And I found several that I felt were relevant and
5 that I could rely on.
6 Q. Well, let me ask you this: Did you develop an
7 estimate of the profit margin on optional services?
8 A. Yes, I did.
9 Q. And what is that margin?
10 A. I estimated that the cost of optional services were
11 10 percent of the revenues. In other words, the operating
12 margin, profit margin, was about 90 percent.
13 Q. How did you do that?
14 A. I had several sources. A professor at MIT that
15 Sprint has used as an expert in the past recently estimated
16 the cost per minute of use of wireless networks, wireless
17 services, to be approximately four-tenths of one cent. So if
18 we compared that figure with the 45 cent overage charge, we
19 would end up assuming that the optional service cost is about
20 one percent of revenues and hence the profit margin would be
21 99 percent.
22 I looked at -- the Sprint expert in this case, the
23 one that had looked at those third quarter 2006 figures, he
24 estimated the cost of optional services at about 19 percent of
25 revenues. So we had on the one hand a one percent figure and
26 we had a 19 percent figure.
27 Also looked at several other sources. The same MIT
28 professor whose name is Jerry Hausman had written a paper that

1 was published in the National Tax Journal three or four years
2 ago that estimated the long-run cost of a wireless minute at
3 about five cents. So that puts us much closer to the 10
4 percent. In other words, five cents compared to 45.
5 One of the better data sources that I found,
6 however, was a cost study that Sprint itself had done and
7 submitted in a case at the New York Public Service Commission
8 in 2002 -- I believe that was the year -- in which it
9 estimated the cost at 3.9 cents a minute. So now we're sort
10 of a little under 10 percent of that 45 cents.
11 So looking at this range, I had a figure of one
12 percent. I had a figure of 19 percent. I had another figure
13 that was a little below 10 percent. I had a fourth figure
14 that was a little above 10 percent. And I felt that 10
15 percent was a reasonable estimate of the costs associated with
16 optional services.
17 Q. Okay. So you started with the price of an overage
18 minute of 45 cents; right?
19 A. Yes.
20 Q. And one of the sources you mentioned was Sprint's
21 own cost study?
22 A. Yes.
23 Q. And what was the conclusion of Sprint's own cost
24 study that it did?
25 A. Sprint's own cost study was that the cost was 3.9
26 cents per minute.
27 Q. And so based on those data, what was your conclusion
28 as to the likely profit margin on an overage minute?

1 A. Well, if I use the 3.9 cents -- I divide 45 cents by
2 3.9 cents, I would end up with a profit margin of about 91
3 cents. 91 percent.
4 Q. What about other types of optional services besides
5 overage like data services and text messaging? Did you draw
6 any conclusion as to the profitability of those services?
7 A. I did. We didn't have any specific cost information
8 for some of these other services, but they do bear a
9 relationship to voice minutes. For example, Sprint's -- when
10 you place a call on most wireless services, and certainly this
11 is the case for all of Sprint's services, the voice signals
12 are translated into a digital format and are sent in digital
13 format over the network.
14 Sprint offers other services that also use the same
15 digital network. And let me give you two examples. One is
16 photos, that is, taking a picture with a camera phone and
17 sending it as a -- sending it to someone else. And the second
18 are text messages. The amount of data that is involved in
19 transmitting a typical photo that would be taken with a
20 wireless camera phone is approximately between -- equivalent
21 to something between eight and 15 seconds' worth of voice
22 calling.
23 So even using the high end of that range, if a
24 minute of voice calling is 3.9 cents, then it represents the
25 cost of sending a photo is probably something closer to about
26 one cent. And I believe Sprint charges 20 cents to transmit a
27 photo so that would imply a profit margin of 95 percent. That
28 is, five percent of revenues representing costs.

1 Text messages also use that same digital network,
2 except here we're talking about a really miniscule amount of
3 data relative to the amount of data that is required to handle
4 a voice call.
5 Sprint's charge for text messages is also 20 cents.
6 The amount of data involved is probably less than a 10th that
7 of a photograph, maybe even closer to a hundredth to that of a
8 photograph. We're talking about an immeasurably small amount
9 of cost in terms of tenths of hundredths of a cent as against
10 the 20 cent price.
11 So once again, I think, if anything, my 10 percent
12 cost estimate is probably on the high side. But I certainly
13 think that it is a reasonable approximation for the study that
14 I've done.
15 Q. Okay. So you've adjusted the cost line to account
16 for that; correct?
17 A. Yes.
18 Q. And what does the final line on the graph show or on
19 the chart?
20 A. The final line on the chart shows that if we compare
21 the monthly revenues with the variable costs and we subtract
22 that second line from the first line, we can estimate the
23 profit margin associated with the contractual services.
24 Q. And you have previously expressed the opinion that
25 Sprint roughly breaks even on the contractual services?
26 A. Yes.
27 Q. And do these figures bear that out?
28 A. Well, I think they do. What I did was to

1 calculate -- as you see, some of them have negative values,
2 some of them are positive values. So some years they were
3 ahead, some years they were behind on them. But I made a
4 calculation of the weighted average of those profits or
5 losses, weighting them by the number of subscribers in each
6 year. And when I did that, I had come up with an estimate of
7 the weighted average profit margin on contractual services at
8 approximately 70 cents per month.
9 Q. So based on your calculations, Sprint's margin on
10 contractual services is roughly 70 cents a month?
11 A. Yes.
12 Q. And you've characterized that as roughly breaking
13 even?
14 A. Well, yeah. Because we're looking at -- you know,
15 comparing 70 cents to $40 in revenue. It's only a little
16 over -- it's not even two percent of revenue or approximately
17 two percent of revenue would represent that lost profit.
18 Q. I want to ask you to help me with some math,
19 Dr. Selwyn. Sprint's counsel has told us that the average
20 customer that terminates leaves the company with 13.2 months
21 remaining on the contract. And you've seen that figure in
22 some of Sprint's expert reports; correct?
23 A. Yes.
24 Q. And according to your analysis, Sprint has roughly a
25 70 percent monthly margin; correct?
26 A. 70 cents.
27 Q. 70 cents?
28 A. Yes.

1 Q. All right. Can you use those two figures to
2 estimate Sprint's loss from early termination on average?
3 A. Yes. If we multiply the 70 cents times that 13.2
4 months, we can estimate the loss at $9.24 on average.
5 Q. What is the amount of Sprint's early termination
6 fee?
7 A. It had been $150. I think it's currently $200.
8 Q. So currently roughly 20 times the average loss?
9 A. Yes.
10 Q. I want to see if you can help me calculate the
11 actual loss not on average, but across the entire class in
12 this case. So if we take your $9.24 number and we multiply it
13 by the number of class members in this case, would that give
14 us an estimate of the actual loss to Sprint from the early
15 terminations by the entire class?
16 A. Yes.
17 Q. Now, you know that Mr. Dippon has told us how many
18 class members there are; right?
19 A. Yes.
20 Q. And he told us that there are 1,906,853 class
21 members; correct?
22 A. That's my recollection, yes.
23 Q. If we tried to determine what Sprint's total loss is
24 from the early terminations of all those class members, how
25 would we do that?
26 A. We could multiply those two together, and we would
27 get $17,619,322.
28 Q. Do you know how much Sprint charged those class

1 members in early termination fees?
2 A. I think the figure that was provided in the most
3 recent testimony by Mr. Dippon was roughly 283 million.
4 Q. So roughly 13 or 14 times the amount of the actual
5 loss?
6 A. 16 times.
7 Q. 16 times the amount of the actual loss?
8 MR. BURSOR: Your Honor, this would be a good point
9 to break for the day.
10 THE COURT: You are not going to finish within the
11 next five minutes?
12 MR. BURSOR: (Shakes head from side to side.)
13 THE COURT: All right. Ladies and gentlemen, we
14 will take the recess at this point. Please keep in mind the
15 admonitions. You will not be coming back until Tuesday. I'm
16 sorry. I'm getting a jump on the weekend, I guess. This is
17 Thursday, not Friday. We will see you tomorrow morning at 9
18 o'clock.