



TELECOMMUNICATIONS

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FCC HOLDS PUBLIC HEARING ON EARLY TERMINATION FEES

Washington, DC: The Federal Communications Commission held a public hearing regarding early termination fees (“ETFs”) last week. The hearing included members of the industry, experts in economics and law, state regulators, consumer protection advocate representatives from governmental and non-governmental bodies, and individual consumers. All presented their arguments and evidence in favor or against the regulation of ETFs.

Executives from DIRECTV and Verizon argued that ETFs lower the barrier to entry for consumers, thereby allowing consumers who would not normally be able to participate in wireless markets, to gain entry. They reasoned that subsidized equipment (and installation in the case of DIRECTV) with an attached service

contract that includes early termination fees, allows consumers to pay minimal or no upfront costs, paying their remaining costs over the term of their contract.

From this premise, they argued that if equipment and service were purchased separately, consumers would have to be charged large upfront fees, which would create an economic barrier for many consumers. Industry executives and a lawyer that has represented AT&T in ETF lawsuits argued that consumers currently have the option of buying equipment and service plans separately, including month to month post paid and prepaid service plans, and, separately, the option of a term commitment and a subsidized phone with an ETF contract. These parties claimed that consumers have overwhelmingly opted for service plans that offer minimal upfront costs in return for a service commitment and ETFs.

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AT&T's counsel also argued that Congress has tried to foster a nationwide policy of wireless regulation rather than different state-by-state regimes. He argued further that an ETF is a rate because it is an agreed upon amount that consumers agree to pay if they do not complete their contract. On this basis, he concluded that because ETFs are rates, states have no authority to regulate them.

However, Pamela Gilbert, attorney and long time consumer advocate, argued that the cell phone industry is asking the FCC for retro-active action that would immunize them from the orders entered in multiple lawsuits addressing the legality of ETFs that are pending throughout the country. She argued that even industries that are not regulated are prohibited from having clauses in a contract that coerce consumers into buying or staying with a service.

Ms. Gilbert, and others, including Patrick Perlman, Deputy Consumer Advocate for the West Virginia Public Service Commission, argued that the Commission should not consider adopting rules that would pre-empt state laws. He stated that in 1992 the FCC approved an order for cellular bundling of equipment and services by offering subsidized prices for handsets and contracts that include early termination fees. He stated that the FCC had done this with a relative lack of information and a lack of scrutiny on the effects of that decision since 1992. "For the FCC or Congress to take action preempting the states would be a mistake." Moreover, in his view, if any by the Commission to regulate ETFs through pro-rating regulations without closely examining the

economics of that process would be a mistake.

Lee Selwyn, who has appeared as an expert in telecommunications issues for years, disputed the claims made by representatives of the wireless industry that ETFs allow them to recover marketing charges and overhead charges incurred from customer turnover. Dr. Selwyn disputed this claim citing data that indicated that, in fact, the main source of profitability for cell phone carriers are the charges consumers pay for optional features. He argued further that the actual cost of a customer termination is only \$9 in lost profit, which does not justify \$150-\$200 in early termination fees often charged to customers. In addition, he disputed the claim that early termination fees materially help carriers to recoup advertising and marketing costs. Indeed, Dr. Selwyn pointed to data showing that Sprint spending under 10% of its revenue on advertising and that, in any event, these expenditures are just a cost of doing business.

Consumer advocates argue that the FCC should not pre-empt state laws or courts. They asked the FCC to consider minimum standards for cell phone companies, in order to protect consumers in states that choose not to regulate/enforce laws against carriers. In response to the carrier suggestion that minimum guidelines including increased disclosure or a possible trial period for carrier service, advocates say this is simply not enough as, among other things, it does not protect consumers where they have service problems or other issues with carrier performance.

TLG Commentary: *The FCC's consideration of this preemption issue, at the behest of the large carriers, is a microcosm of the overall state of affairs and policy at the FCC in recent years. Moreover, the issues and arguments presented at the hearing are reflective of a broader debate that is required into the proper role of the FCC in balancing the interests of the large carriers, resellers and other telecommunications providers and consumers. This debate involves not only the points and issues presented at the hearing, but many other critical points that need to be aired but were not raised at the hearing.*

We will be presenting these points and moderating a wide ranging discussion of these critical issues on our interactive blog at <http://www.telecomandtechnologylawblog.com>.; Please join in and let us know what you think.

If you have questions about this issue, or if we may be of assistance to you, please feel free to contact us.

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