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P R E S S R E L E A S E

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States Urge FCC for Partnership, not Preemption, in ETF Debate

WASHINGTON—State regulators urged the Federal Communications Commission to maintain a cooperative relationship as it examines cellular phone fees for breaking wireless contracts, stressing that partnership, not preemption, is the best way to protect consumers.

In testimony today at the FCC's hearing on early termination fees (ETFs), Indiana Regulatory Utility Commissioner Larry Landis applauded the FCC for analyzing the issue and said that State officials are important allies on the consumer protection beat.

"Experience and common sense suggest that a partnership with State authorities is key to any new federal rules designed to protect these wireless consumers," Commissioner Landis said.

Commissioner Landis, testifying on behalf of the National Association of Regulatory Utility Commissioners, noted that NARUC passed a resolution last year that encouraged the FCC to examine the basis for ETFs. Since that time, Congress has held several hearings and introduced a number of bills to deal with the issue, he said.

Noting that ETFs are a common consumer complaint, Commissioner Landis said that maintaining the current cooperative federalism approach between the FCC and State utility regulators is the best way to ensure that customers nationwide are protected.

"States are almost always the first to provide relief and the bulk of enforcement when new abuses emerge," Commissioner Landis said. "States are closest to their citizens and our commissions or Attorneys General have a real direct political imperative to act quickly and be responsive to complaints."

Commissioner Landis also reiterated that NARUC agrees with FCC Chairman Kevin Martin that ETFs are not rates. Any ruling to the contrary would run counter to the public interest, Commissioner Landis said. "From a policy perspective, basing any FCC ETF rule on a legal finding that ETFs are … 'rates' makes no sense," he said. "There is no logical reason to take State cops of the beat—whether they be State Attorneys General or a NARUC member commission. There is simply no possible justification to limit the number of cops that can enforce any federal standard."

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NARUC is a non-profit organization founded in 1889 whose members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate telecommunications, energy, and water utilities. NARUC represents the interests of State public utility commissions before the three branches of the Federal government.

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Before the

FEDERAL COMMUNICATIONS COMMISSION

June 12, 2008

Hearing on Early Termination Fees

Summary Remarks of Indiana Utility Regulatory Commissioner Larry S. Landis

I. INTRODUCTION:

Good Morning. My name is Larry Landis. I'm a Commissioner with the Indiana Utility Regulatory Commission and am privileged today to be representing the National Association of Regulatory Utility Commissioners.[1]

My thanks to the FCC for the opportunity for NARUC to participate in this hearing. It has been my privilege, as a result of other NARUC appointments,[2] to work closely with all five FCC Commissioners. Before discussing NARUC's views, I wanted to thank each as individuals, but there simply is not sufficient time, so on behalf of my colleagues, I want to extend NARUC's appreciation to all five commissioners collectively for their support of a cooperative federal-State approach to tackling intercarrier compensation, universal service, and other issues, as well as the recent re-invigoration of the Joint Conference on Advanced Services.

As it happens, the topic de jure – enforcement/dispute resolution involving Early Termination Fee (ETF) issues -- is another area where a cooperative federal-State approach necessarily will yield the optimal outcome that best serves both consumers and the public interest. I believe too much has been

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[1] NARUC is a nonprofit organization founded in 1889. NARUC's members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications, energy, and water utilities. They have oversight over telecommunications services and are obligated to ensure that local telephone service is provided *universally* at just and reasonable rates. Congress and the courts have consistently recognized NARUC as a proper entity to represent the generic interests of State utility commissions. See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g; 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976). In the Federal Telecommunications Act,[1] Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the board on universal service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.")

[2] Commissioner Landis currently serves as a NARUC representative to the Federal State Joint Board on Universal Service and the Joint Conference on Advanced Services. He was also an active member of NARUC's Task Force on Intercarrier Compensation which acted as a facilitator for the creation of the industry-sponsored "Missoula Plan."

made of the occasional differences between regulators and the wireless industry. Even the relatively casual observer can see the success story the industry demonstrates - as of Wednesday, serving an estimated 260,120,000 subscribers. Steve Largent is justifiably proud of quoting studies suggesting upwards of 80% to 85% of those subscribers are well satisfied or satisfied with their service. But we also need to look at the flip side. Apparently, at least some 40 million customers are less than satisfied. *My personal belief* is that a majority of those probably easily resolved issues, rather than serious complaints. But it is to the concerns of those remaining customers, which cannot be ignored, that I speak today. Experience and common sense suggest a partnership with State authorities is key to any new federal rules designed to protect these wireless consumers.

II. OVERVIEW OF NARUC'S POSITIONS:

Due to time constraints, NARUC is filing a slightly longer document along with my summary overview in the record. Basically there are only two points to cover: (1) the FCC's policy on ETFs is ripe for review, and (2) any federal approach should not take State "cops" off the beat: partnership – not preemption – is the preferred policy.

FCC's Policy on ETFs is Ripe for Review

In July of last year, NARUC recognized the need for some FCC examination of these issues. We passed a resolution urging the FCC to open a rulemaking to examine the basis for ETFs.[3] Since then, several bills have been introduced, a couple of discussion drafts circulated, and hearings were held in both the House and Senate addressing wireless ETFs and other issues. Last year, NARUC filed comments based on that July 2007 resolution specifically commending the FCC for its interest in wireless ETFs and urging the Commission to act expeditiously on a related outstanding petition for declaratory ruling. For the same reason, NARUC commends the FCC for holding this hearing today.

We also commend those wireless carriers that have already either publicly announced plans to pro-rate ETFs over the life of the contract – or actually started to do so for new contracts.[4] These are positive steps. Some have

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[3] See *Resolution Calling on the FCC to Reexamine Wireless Carriers' Early Termination Fees* Available at <http://www.naruc.org/Resolutions/CA-1%20Resolution%20Calling%20on%20the%20FCC%20to%20Reexamine%20Wireless%20Carriers%20Early%20Termination%20Fee_July07.pdf>. **NARUC has not taken a specific position on what any ETF rule should be – only that the FCC should re-examine its existing policies and that State's should not be preempted.**

[4] "AT&T Prorated Early Termination Fees Now in Effect," Mobile Burn, PA - May 29, 2008 ("AT&T's new prorated Early Termination Fee (ETF) policy went into effect recently. The new policy is only applicable to contracts signed on or after May 25th.") Available at: <http://www.mobileburn.com/news.jsp?Id=4700>

pointed out certain ambiguities and other concerns regarding the scope and details of these new carrier commitments for contract changes. We urge the Commission to work with carriers and stakeholders to clarify these issues.

Partnership - not Preemption[5]

NARUC generally agrees with Chairman Martin: ETFs are not rates.[6] If the FCC made such a finding, industry attorneys will argue that the FCC is the only possible venue for customers with complaints to seek resolution. From a policy perspective, basing any FCC ETF rule on a legal finding that ETFs are Section 332 "rates" makes no sense. There is no logical reason to take State cops off the beat – whether they are State Attorneys General or NARUC member commissions. There is simply no possible justification to limit the number of cops that can enforce any federal standard.[7]

When needed, States are almost always the first to provide relief and enforcement when new abuses emerge. States are closest to their citizens and our commissions or Attorneys General have a real direct political imperative to act quickly and be responsive to complaints. Moreover, State proceedings and enforcement actions generally can be completed more quickly than at any federal agency's. NARUC does endorse federal rules from time to time.[8] But the association recognizes two undeniable facts: (1) The federal government will *always* lack the manpower to help *all* consumers in *every* State, and (2) In many cases, whatever assistance they may provide will be complicated by distance and time zones. As the FCC has acknowledged in some contexts, this means that even where federal minimum standards may be appropriate, State/local governments must be allowed to enforce the federal standards using existing procedures and remedies – including perhaps more punitive measures for violations.[9]

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[5] See August 2, 2006 *Resolution on State Jurisdiction over Wireless Industry.* Available at <http://www.naruc.org/Resolutions/TC-1_StateJurisdictiononWireless0706.pdf>.)

[6] See Kirby, Paul, "MARTIN INDICATES FCC WON'T RULE ETFs ARE PART OF WIRELESS RATE STRUCTURE" TR Daily, 13 December, 2007 ("FCC Chairman Kevin J. Martin told a Senate panel today that he doesn't think the FCC will rule that early termination fees (ETFs) imposed by wireless carriers are part of the rate structure, and thus exempt from oversight by states. He also indicated he doesn't think ETFs should be considered rates, as the wireless industry has urged.")

[7] Note, strictly speaking, it is black letter law that States can only do what their authorizing statutes allow. Technically, in the case of a national rule, States would be enforcing State law up to the federal standard.

[8] See, e.g., NARUC's August 2, 2006 *Resolution Supporting Federal Legislation To Combat Caller Identification Spoofing*, available at <http://www.naruc.org/Resolutions/TC-4_CallerIDSpoofing0706.pdf>. See also the July 2005 *NARUC Legislative Task Force Report on Federalism and Telecom*, available under Technical Resources link at <http://www.naruc.org/committees.cfm?c=53>.

[9] The FCC has frequently recognized States' core competency with respect to consumer protection. For example, a May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement, noting:

> Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . .We agree with NARUC that the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. As NARUC describes, establishing the State commissions as the primary administrators of slamming liability issues will

If the FCC chooses to establish a rule (without a finding that ETFs are "rates" within the meaning of 47 U.S.C. § 332), it is black letter law that that rule would be a de facto national *minimum* standard. It might even be possible to construct a rule that would be a federal ceiling. However, in either case, *there is no possible rationale for the FCC to limit consumer access to State remedies or penalties for federally defined inappropriate or abusive conduct* (or related lawsuits under laws of general applicability - that find the WAY any ETFs were imposed constituted a fraudulent or deceptive practice).

Indeed, if the FCC chooses to establish such a standard, to avoid unnecessary and wasteful litigation at taxpayer expense, it should clarify both that ETFs are NOT Section 332 "rates" and that State enforcement of the federal standards using existing State enforcement mechanisms, including variable penalties/fines, as well as laws of general applicability, continues to be permissible.

Even should the FCC choose to make a finding that ETFs constitute rates, which seems clearly inconsistent with the text of the statute, the legislative history, and existing case law, it should make clear that such a finding does not immunize carriers that choose to defraud or deceive their customers from court action under State laws of general applicability – even if there is an incidental impact on ETFs/rates.

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ensure that "consumers have realistic access to the full panoply of relief options available under both State and federal law." . . .Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming. . . . we conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum for the resolution of slamming disputes. [emphasis added] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* CC Docket No. 94-129, FIRST ORDER ON RECONSIDERATION, 15 FCC Rcd 8158 (Rel. April 13, 2000).

APPENDIX - NARUC's Filed Statement

NARUC represents the interests of commissions in each State charged with the oversight of, among other things, telecommunications carriers.[10] NARUC's members share the FCC commitment to assure all U.S. citizens receive the benefits of competitive markets and new services. NARUC has many times in the past worked cooperatively with the FCC to address specific problems. We have similar interests and keen insight into what is actually happening in markets across the country. *Experience and common sense suggest a partnership with State authorities is key to assuring effective federal rules to protect wireless consumers.* As described in more detail below – we commend the FCC for holding this hearing and respectfully suggest – should the FCC decide to establish a rule on ETFs, it should not be crafted so as to curtail State enforcement or existing State avenues for relief.

Penetration Intensifies, and – in Many Areas, Competition Flourishes - but Problems Remain

Currently, as a matter of federal law, States retain jurisdiction over "other terms and conditions of wireless service."[11] This means States can – *when circumstances warrant* – step in to handle carrier abuses. Still, in the face of this potential oversight, the wireless industry, by any measure, remains wildly successful. To date, we believe this dual jurisdictional model has served the wireless industry quite well, demonstrated by its rapid growth over the past 15 years.

According to CTIA, The Wireless Association, over 250 million Americans now subscribe to a cellular-phone service. Factored against the latest U.S. Census Population figures[12] that places the penetration rate at just over 82 percent. In just the last ten years, that number has more than quadrupled from 55 million subscribers in 1997. Mobility along with improved call quality and new functions offered by wireless carriers make this service attractive to consumers and is leading an increasing percentage to "cut the cord" and discontinue wireline phone services. This increase in consumer reliance solely on wireless is a testament to continued improvements in service coverage, pricing in various packages, and reliability.

According to a February 2008 Federal Communications Commission report, available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf>, competitive options abound. The FCC's analysis indicates that (1) 280 million people, or 99.8 percent of the U.S. population, have access to one or more different operators offering mobile telephone service, (2) more than 95 percent of the U.S. population lives in areas with at least three mobile telephone operators competing to offer service, and (3) more than half of the U.S. population lives in areas with at least five competing operators.

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10 See note 1.

11 Under 47 U.S.C. § 332 (1993), State authority is broad. Though States may not regulate wireless "rates" without first getting the FCC's permission, they can address "other terms and conditions" of service, which includes "customer billing information and practices and billing disputes and other consumer protection matters . . .siting issues . . .transfers of control; the bundling of services and equipment; and . . .such other matters as fall within a state's lawful authority." H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 at 261-2 (1993).

12 See *U.S. Census Population Clock*, available at <http://www.census.gov/main/www/popclock.html>.

Unfortunately, some problems remain.[13] Data from entities as diverse as State Attorneys General and the Better Business Bureau[14] indicate that complaints about wireless telephone service and supplies remain among the top, if not the top, of complaints received within recent years. Indeed, just a few months ago, the January 2008 issue of Consumer Reports published its Annual Survey of Cell-Phone Service, arguing that "cell-phone service seems to stubbornly resist improvement." The survey of more than 47,000 readers in 20 major metropolitan areas found that fewer than half of respondents were completely or very satisfied. For the sixth year in a row, cell service remains among the lower-rated services that Consumer Reports rates.[15]

Market Forces Cannot Correct all Consumer Abuses or Maintain Public Safety Policy Initiatives

History, economics, and common sense suggest there are some problems market forces by themselves simply cannot be relied upon to correct. Also, there are some social policy imperatives – both federal and State – that market forces either will not address, or will inject unacceptable delay in attainment of the policy objective.[16]

In the first category are problems that result from practices that actually enhance a particular market participant's profits. The classic example is slamming. State and federal rules banning the practice have been in place for over ten years – but complaints continue. Privacy concerns. as well as

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13 See, e.g., (1) ***Sprint Nextel hit with class action Lawsuit - claims carrier illegally extended contacts*** (Jeffrey Silva) RCR Wireless News Feb 7, 2008 Sprint . . . has been hit with a class action . . . alleging [it] is defrauding wireless consumers . . . "by extending consumers' contracts for up to two years without providing adequate notice or obtaining meaningful consent . . . when consumers made small changes to their . . . service, such as adding extra minutes or purchasing a new telephone; when they responded to solicitations . . . for additional products . . . and when the consumer received 'courtesy discounts'" Story at <http://www.rcrnews.com/apps/ pbcs.dll/article?AID=/20080207/FREE/950510909/1002/FREE>. (2) ***Cramming your phone bill***, (Bennett Hall) Mid-Valley, Jan 5, 2008 ("[B]ills . . . keep getting longer and more complicated. With pages of line items detailing various taxes, service charges, option packages and access fees, they can be extremely confusing. And that, say consumer advocates, has opened the doors for abuse . . . [m]any of the latest cramming scams target smart phones and other wireless devices," (3) ***Conn. Lawmakers Want to Fix Cell Charges*** (Susan Haigh) AP, Hartford, CT. Feb 7, 2008 ("[T]he concern is legitimate, but the question is whether state law is pre-empted," [the State AG] said." Story at <http://www.chron.com/disp/story.mpl/ap/fn/5523157.html>, & (4) ***Cell phones remain mum in tunnels*** Boston Globe - Feb 3, 2008 (Aram Boghosian) Fifteen billion dollars and still there is no cellphone service in the Big Dig. See <http://www.boston.com/news/local/articles/2008/02/03/cellphones_remain_mum_in_tunnels/>.

14 The Council of Better Business Bureaus (CBBB) began tracking cell phone complaints in 1997. Between 2001 and 2002 cell phone complaints jumped to the top of the most-complained about business. In 2003, it dropped only slightly to number two and in 2004 and 2005 regained the number one position, higher than even used car dealerships. In 2004, CBBB attempted to determine why complaints had risen so rapidly and found the greatest source of complaints fell into three categories: complaints about billing; complaints about the quality of customer service; and complaints about misrepresentation or miscommunication by sales or customer service personnel.

15 The 2008 Consumer Reports survey results also show some bright spots. Last fall, all the rated service providers pledged to join Verizon by prorating their $150-$200 early termination fees. Others said they will join Alltel and T-Mobile and stop imposing mandatory contract extensions when consumers make minor changes to service plans. See, *Best cell phone deals: Get the most satisfaction and the least grief. Some 47,000 readers tell you how,* Consumers' Reports (Jan 2008), at <http://www.consumerreports.org/cro/electronics-computers/phones-mobile-devices/phones/cell-phone-service-providers/cell-phone-service-1-08/overview/cell-service-ov.htm>.

16 In the second category are important public policy objectives that are implemented through state and federal activities. Such programs include State and federal universal service programs, State and federal emergency communications initiatives, State and federal critical infrastructure programs, State and federal rules limiting abrupt disconnection of essential services without notice, etc. Here too, history teaches that unaided, the market will not vindicate all these objectives, or, as illustrated by the FCC's 2005 VoIP E911 order, may inject an unacceptable delay to reach what policy-makers deem to be a minimally acceptable result. In June 2005, the FCC decided "[a]lthough the Commission is committed to allowing these services to evolve without undue regulation. . . it is critically important to impose E911 obligations on interconnected VoIP providers and to set firm but realistic target deadlines for implementation." This order was released about a year after the FCC preempted a State order for requiring essentially the same thing in an order that cited extensively industry efforts to voluntarily supply E911 Service. See, *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, WC Docket 04-36, WC Docket 05-196 "First Report and Order", (rel. June 3, 2005) at ¶¶ 4-5 available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.doc>.

misleading billing[17] are other areas where profit motive alone may not provide adequate incentives for responsible carrier practice. Some argue that ETFs fall into this category.[18] Of course, no one can credibly claim that market forces can ever deter criminal or fraudulent activity and it is true that some lawsuits are based on the notion that ETFs have been part of some fraudulent or deceptive action by certain industry players.

FCC's Policy on ETFs is Ripe for Review

In July of last year, NARUC recognized the need for some FCC examination of these issues. We passed a resolution urging the FCC to open a rulemaking to examine the basis for ETFs.[19] Since then, several bills have been introduced, a couple of discussion drafts circulated, and hearings held in both the House and Senate addressing, among other things, wireless early termination fees. Last year, NARUC filed comments based on that 2007 Summer Meetings' resolution specifically commending the FCC for its interest in wireless ETFs and urging the Commission to act expeditiously on a related outstanding petition for declaratory ruling. For the same reason, NARUC commends the FCC for holding this hearing today.

We also commend those wireless carriers that have already either publicly announced plans to pro-rate ETFs over the life of the contract – or actually started to do so for new contracts.[20] These are positive steps. Some have pointed out certain ambiguities and lack of clarity regarding the scope and details of these new carrier commitments for contract changes. We urge the Commission to work with carriers and stakeholders to clarify these issues.

Partnership - not Preemption[21]

NARUC agrees with Chairman Martin. ETFs are not Section 332 rates.[22] If the FCC made such a finding, industry attorneys will argue that the FCC is the only possible venue for customers with

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[17] The FCC received over 19,000 comments from consumers in response to a NASUCA petition for a declaratory ruling on billing clarity. The FCC acknowledges in its March 2005 order in that docket, that the bulk of telecommunications consumer complaints received by the Commission involve carriers' bills and charges. See, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CG Docket 04-208 "Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking," (rel. March 18, 2005). [70 Fed Reg. 29979 May 25, 2005].

[18] See, e.g., Kharif, Olga, "Hanging Up on Early-Exit Fees" BusinessWeek - Jun 4, 2008 (" Courthouses from California to New York are flooded with class actions claiming that early termination fees, especially those on wireless contracts, are unfair.") Available at: <http://www.businessweek.com/technology/content/jun2008/tc2008063_586218.htm%3Fchan%3Dtechnology_technology%2bindex%2bpage_top%2bstories&cid=1219534360&usg=AFQjCNFCAjUfdL1gfYGN7VZ_yJyku91xag> See also "Class Action May Proceed Against Cellular Providers", Metropolitan News-Enterprise, CA Jun 10, 2008 ("Various plaintiffs filed suit against seven major cell phone providers . . . for unfair business practices, based in part on the fact that defendants' allegedly required customers to enter into service agreements including a requirement that customers pay early termination fees of between $150 and $200 per telephone number or unit to terminate service prior to the expiration of the contract.") Available at: <http://www.metnews.com/articles/2008/cell061008.htm> See also Huffman, Mark, "Wireless Firms Face Pressure On Termination Fees" Consumer Affairs - May 27, 2008 ("Early termination fees are a growing source of consumer frustration. Some have resorted to lawsuits, claiming the fees are illegal") Available at: <http://www.consumeraffairs.com/news04/2008/05/fcc_termination2.html&cid=1216713830&usg=AFQjCNHuEff5dwVJCzGk_z974nt6zI_BNg>

[19] See *Resolution Calling on the FCC to Reexamine Wireless Carriers' Early Termination Fees* available at <http://www.naruc.org/Resolutions/CA-1%20Resolution%20Calling%20on%20the%20FCC%20to%20Reexamine%20Wireless%20Carriers%20Early%20Termination%20Fee_July07.pdf>. NARUC has not taken a specific position on what any ETF rule should be – only that the FCC should re-examine its existing policies and that State's should not be preempted.

[20] "AT&T Prorated Early Termination Fees Now in Effect" Mobile Burn, PA - May 29, 2008 ("AT&T's new prorated Early Termination Fee (ETF) policy went into effect recently. The new policy is only applicable to contracts signed on or after May 25th.") Available at: <http://www.mobileburn.com/news.jsp?Id=4700>

[21] See August 2, 2006 *Resolution on State Jurisdiction over Wireless Industry.* Available at <http://www.naruc.org/Resolutions/TC-1_StateJurisdictiononWireless0706.pdf>.)

complaints to seek resolution. From a policy perspective, basing any FCC ETF rule on a legal finding that ETFs are rates makes no sense. There is no logical reason to take State cops off the beat – whether they be State Attorney's General or a NARUC member commission.[23] There is no reason to limit the number of cops that can enforce the federal standard.[24]

States are almost always the first to provide relief and the bulk of enforcement when new abuses emerge.[25] States are closest to their citizens and our commissions or Attorneys General have a real direct political imperative to act quickly and be responsive to complaints. Moreover, State proceedings and enforcement actions generally can be completed more quickly than any federal agency. NARUC does endorse federal rules from time to time.[26] But the association recognizes two undeniable facts: (1) the federal government will *always* lack the manpower to help *all* consumers in *every* State, (2) in many cases, whatever assistance they may provide will be complicated by distance and time zones. As the FCC has acknowledged in some contexts, this means that even where federal minimum standards may be appropriate, State/local governments must be allowed to enforce the federal standards using existing procedures and remedies – including perhaps more punitive measures for violations.[27]

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22 See Kirby, Paul, "MARTIN INDICATES FCC WON'T RULE ETFs ARE PART OF WIRELESS RATE STRUCTURE" TR Daily, 13 December, 2007 ("FCC Chairman Kevin J. Martin told a Senate panel today that he doesn't think the FCC will rule that early termination fees (ETFs) imposed by wireless carriers are part of the rate structure, and thus exempt from oversight by States. He also indicated he doesn't think ETFs should be considered rates, as the wireless industry has urged.")

23 States differ in agency resources. This section allows the state to structure that enforcement – through their Attorney General, PUC, or other agency - utilizing either court or state administrative procedures.

24 Note, strictly speaking, it is black letter law that States can only do what their authorizing statutes allow. Technically, in the case of a national rule, States would be enforcing State law up to the federal standard.

25 The examples are myriad. Often State efforts beat federal counterparts by one to three years. Sometimes the gap is longer. For example, by the time the Federal government got around to establishing a national "do-not-call" register, on June 27, 2003 <http://www.ftc.gov/os/2003/01/tsrfrn.pdf>, at least nine States had already established State do-not-call registries. On the public policy front similar gaps between State and federal action to address issues exist. For example, in 1976, South Dakota became the first State to offer a Statewide Deaf Relay program with State appropriated funds. Other States started programs. In 1987, California began the first round-the-clock relay program. That same year NARUC petitioned the FCC to conduct a further notice of inquiry on federal relay services. It was 1990 before a national relay service was sanctioned by Congressional action. (cite) Compare, July 2007 *Testimony of North Dakota Commissioner Clark before the House Subcommittee on Telecommunications and the Internet*, arguing NARUC believes federal standards for consumer protection "may be one way to address carrier concerns over potentially conflicting State regulations. After all, State regulators also want to ensure that compliance costs are minimized so that investment dollars can be focused on providing new service to consumers. However, we also want to be clear that federal standards must be accompanied by State enforcement. Experience has taught us that relying solely on the federal government for enforcement of a mass market like this would be folly. Take for example, the (earlier referenced) Do Not Call List experience. While both States and the federal government have enacted these laws, in practice, enforcement has fallen overwhelmingly to States, in fact, almost exclusively. For illustrative purposes, consider this: North Dakota is a state of only about 640,000 people. In the first 2 ½ years of its strict state do-not-call law, the state Attorney General has enforced 53 settlements, totaling over $64,000, and issued 7 cease and desist orders just in this state alone. In approximately the same time frame, the entire federal government, despite receiving over one million complaints, [had] only issued 6 fines and filed 14 lawsuits. Even more importantly from the consumer's viewpoint, telemarketers were quick to exploit a patchwork of loopholes and "workarounds" to the federal rules and the calls kept coming. It fell to a handful of States to say that "no means no". It is not that federal officials don't care, it is just that there is simply no way they could effectively respond to individual complaints across a nation this large unless States are full partners in enforcement."

26 See, e.g., NARUC's August 2, 2006 *Resolution Supporting Federal Legislation To Combat Caller Identification Spoofing*, available at <http://www.naruc.org/Resolutions/TC-4_CallerIDSpoofing0706.pdf>. See also the July 2005 *NARUC Legislative Task Force Report on Federalism and Telecom*, available under Technical Resources link at <http://www.naruc.org/committees.cfm?c=53>.

27 There is also no logical reason to limit enforcement options. If the behavior is bad – leveraged enforcement, potential injunctive relief, higher fines and penalties can only add to the deterrence and further protect constituents. Even the FCC has frequently recognized States' core competency with respect to consumer protection. For example, a May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement, noting:

> Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . .We agree with NARUC that the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. As NARUC describes, establishing the State commissions as the primary administrators of slamming liability issues will ensure that "consumers have realistic access to the full panoply of relief options available under both State and

If the FCC chooses to establish a rule (without finding that ETFs are "rates" within the meaning of 47 U.S.C. § 332), it is black letter law that that rule would be a de facto national minimum standard.[28] It might even be possible to construct a rule that would be a federal ceiling. However, in either case, *there is no possible rationale for the FCC to limit consumers' access to State remedies or penalties for federally defined inappropriate or abusive conduct* (or related lawsuits under laws of general applicability - that find the WAY any ETFs were imposed constituted a fraudulent or deceptive practice). Indeed, if the FCC chooses to establish such a standard, to avoid unnecessary and wasteful litigation at taxpayer expense, it should clarify both that ETFs are NOT Section 332 "rates" and that state enforcement of the federal standards using existing State enforcement mechanisms, including variable penalties/fines, as well as laws of general applicability, continue to be permissible. Even if the FCC chooses to make a finding that ETFs constitute rates, which seems clearly inconsistent with the text of the statute, the legislative history, and existing case law, it should make clear that such a finding does not immunize carriers that choose to defraud or deceive their customers from court action under State laws of general applicability – even if there is an incidental impact on ETFs/rates.[29]

Without State assistance, consumers are left to small-print "boilerplate" contracts, apt to spend hours on the phone sorting out disputes, even missing work to travel to a providers' store to wait in line for assistance. As consumers increasingly come to rely on wireless and other technologies to replace traditional phone service, their expectations and need for responsive consumer protection will most likely increase.

Conclusion

Wireless service is one that consumers want. It can improve the quality of consumers' lives, economic development and public safety. But it also is clear consumers must have effective avenues for timely resolution of complaints. To the extent the FCC chooses to establish a federal rule governing wireless ETFs, NARUC's members are seeking a middle ground that relies on each level of government doing what it does best. It should be a partnership, not preemption. The "functional federalism" model endorsed by NARUC ensures multiple "cops on the beat" and is a win-win for consumers.

FCC questions or comments concerning this testimony can be directed to
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federal law." . . .Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming. . . . we conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum for the resolution of slamming disputes. [emphasis added] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* CC Docket No. 94-129, FIRST ORDER ON RECONSIDERATION, 15 FCC Rcd 8158 (Rel. April 13, 2000).

[28] Note – NARUC has consistently told both Congress and the FCC, that, to assure needed State flexibility, federal rules should be "[a] floor, not a ceiling," as "...blanket preemption on consumer affairs will restrict consumer redress in the future." Moreover, "...consumers should NOT have to wait for federal rulemaking every time a new issue arises." In some cases, federal rules are necessary and appropriate. Indeed, NARUC does endorse federal rules from time to time. See, note 22, supra.

[29] The wireless industry has continuously alleged federal standards preempt lawsuits brought under state laws of general applicability. In almost all cases to date, no matter how obvious the fraud or deception, industry alleges such State initiated suits necessarily involves "rates" and is preempted by 47 U.S.C. § 332. The FCC should make clear – even if it bases its rules on a finding that ETFs are rates – that such lawsuits are NOT preempted.