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Catrice C. Williams, Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, Massachusetts 02118-6500

Re: Investigation by the Department of Telecommunications and Cable on its own motion concerning the modernization of its billing and termination consumer protection regulations

Dear Secretary Williams:

On June 30, 2011, the Department of Telecommunications and Cable (the "Department"), on its own motion, issued a Notice of Public Informational Forums ("Notice") to consider modernizing its billing and termination consumer protection regulations, which are currently applicable to telephone and cable television service providers offering retail residential services in Massachusetts. On July 7, 2011, the Department issued a Revised Notice, which included scheduling corrections and set a deadline for interested parties to file initial comments by August 22, 2011, and reply comments by September 16, 2011. Accordingly, the Attorney General submits this letter as her initial comments and preliminary recommendations that she intends to supplement and refine in her reply comments due next month.

The Attorney General's office works to protect telephone ratepayers and all consumers in the Commonwealth from unfair business practices. The Attorney General has significant interest in billing and termination consumer protection regulations applicable to telephone and cable television service. Recently, the Attorney General advocated before the Federal Communications Commission ("FCC") for better consumer information and disclosure rules to prevent wireless phone consumers from experiencing "bill shock."

In addition to investigating and taking legal action against businesses that engage in false and deceptive practices aimed at consumers, the Attorney General works to mediate consumer

complaints between consumers and businesses. Thus far in 2011, the Attorney General has received a total of 593 complaints concerning cable, satellite television, wireless telephone and landline telephone services. Of these complaints, 373 dealt with billing disputes and 10 dealt with service termination. In 2010, the Attorney General received a total of 1,250 complaints concerning cable, satellite television, wireless telephone and landline telephone services. Of those complaints, 782 complaints dealt with billing issues and 16 complaints dealt with service termination. The Attorney General received a similar number of complaints regarding these services in each year from 2006 through 2009. The sheer volume of billing complaints and disputes brought to the attention of the Attorney General's Office provides compelling evidence that consumers require protection in the form of billing and termination regulations. Furthermore, the volume of these complaints is likely not indicative of the full extent of the problem, because many consumers are unaware that they can seek redress from the Attorney General's Office, or do not take the time to do so.

The importance of billing and termination regulations for consumers is essential.

Billing and termination regulations are important for all consumers, and particularly for the elderly, non-English speaking, and other vulnerable populations. The Attorney General has reviewed numerous complaints encompassing a wide variety of concerns, including:

- Failure to terminate service for an elderly parent with Alzheimers although a child, who has power of attorney, has explicitly requested such termination;
- Third-party charges appearing on telephone bills;[1]
- Service being changed over to another company without the consumer's full understanding of the implications of the conversion;
- Termination of service to an elderly consumer who relies on Life Alert emergency service;
- A disabled woman's service was terminated although a relative explained she had power of attorney and had sought to have the bill sent to her.

Consumer complaints demonstrate the need for the Department to assist to ensure that consumers have a remedy if they encounter problems with billing or termination of service. Also, complaints can provide evidence of market imperfections (*e.g.*, cramming, inadequate information in the marketplace, etc.). If the Department were simply able to monitor billing and termination complaints but did not have corresponding regulations, it would lack the requisite tools to ensure that overcharges are corrected, and that consumers have a way to resolve their complaints in an objective manner.

These complaints further highlight consumers' inabilities to truly "negotiate" with cable television and telecommunications service providers (wireline and wireless) and demonstrate that consumers often lack meaningful competitive choice. High transaction costs (*e.g.*, termination

[1] The Attorney General acknowledges that the FCC has a "cramming" proceeding underway, but supports the Department's endeavor to address these issues, because it is unclear when and how the FCC will issue final rules on this matter. Massachusetts consumers should not be harmed by the FCC's delay in addressing this important matter. At a minimum, the Attorney General urges the Department to submit comments in the FCC's proceeding in support of adequate consumer protection against cramming. *See In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116; 09-158; and CC Docket No. 98-170, *Notice of Proposed Rulemaking*, rel. July 12, 2011, at para. 1.

liabilities, loss of an e-mail address, new equipment, new handset, the need to learn a new provider's technology) deter consumers from migrating among service providers.

There is insufficient competition to protect consumers.

The Attorney General urges the Department to view skeptically the probable claims from the industry that "robust" competition protects consumers adequately, and, therefore, billing and termination regulations are purportedly superfluous. The industry may also contend that because so many consumers have wireless service, procedures are not as important as they were when consumers could only rely on wireline service. However, medical alert systems are connected to wireline service; the elderly may not have wireless service;[2] and rural areas may not have reliable wireless service.

Furthermore, for those consumers who have abandoned their wireline service, wireless consumer protection measures – where they can be imposed in a manner consistent with the limited authority preserved for the states – are more important now than ever because wireless service has evolved from a discretionary, optional service to being many customers' sole way of reaching the public switched telephone network ("PSTN"). Accordingly, as consumers increasingly "cut the cord" from wireline service to wireless service, wireless consumer protection becomes essential.[3] Consumers' migration from one form of technology to another form of technology should not result in an erosion of consumer protection measures.

The Department should acknowledge and address as necessary any ambiguity regarding jurisdiction over wireless carriers, including the ambiguity of state authority over early termination fees (ETFs) imposed by wireless carriers.

The Attorney General urges the Department to consider carefully the scope of its authority relative to the wireless industry, and specifically, the scope of "terms and conditions" that it is explicitly authorized to regulate. Despite the unresolved issue of early termination fees and whether they constitute rates that states may not regulate, or terms and conditions that states may regulate, the Telecommunications Act of 1996 clearly authorizes state commissions to regulate the terms and conditions established by wireless carriers. Title 47 of the United States Code, Section 332(c)(3) specifically instructs that:

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[2] Data shows that few elderly consumers view wireless service as an economic substitute for wireline service (they may own wireless service, but they use wireless service in addition to rather than instead of wireline service). Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July – December 2010*, released June, 2011, available at: http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf, at 8.

[3] Some Massachusetts consumers have become "cord-cutters," meaning that they no longer subscribe to wireline service but rely solely on their wireless telephone. In the final six months of 2010, 29.7% of U.S. households only had wireless telephones. In a separate (but older) report with state-specific data, National Center for Health Statistics researchers estimated that 9.3% of Massachusetts households were wireless-only in 2007 compared to an estimate of 14.7% of total households in the United States that were wireless-only. *Id*; *see also*, Blumberg S.J., Luke J.V., Davidson G., Davern M.E., Yu T., Soderberg K., National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, January–December 2007*, rel. March 11, 2009 (National Health Statistics Reports, Number 14), available at: http://www.cdc.gov/nchs/data/nhsr/nhsr014.htm.

> . . . no State or local government shall have any authority to regulate *the entry of or the rates charged* by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services*. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C., § 332(c)(3)(A) (emphasis added).

The FCC has an open docket examining wireless provider ETFs, *i.e.*, the fees that providers often charge customers to discontinue service when a contract term has not expired. The topic has been circulating for some time and had its beginnings in FCC wireless docket No. 05-194, which was opened in response to a Petition for Declaratory Ruling submitted to the FCC by the Cellular Telecommunications & Internet Association ("CTIA") in March 2005. The petition sought a finding by the FCC that early termination fees were considered "rates charged" and thus subject to FCC jurisdiction in accordance with the Telecommunications Act of 1996 ("the 1996 Act"). *See* 47 U.S.C., § 332(c)(3)(A). The CTIA Petition was in response to several class action lawsuits alleging unfair competition and unfair trade practices, and CTIA alleged that states cannot make laws regarding rate regulation of wireless carriers, according to the 1996 Act. By contrast, consumer advocates asserted that ETFs should be treated as "terms and conditions", thereby not preempting states from regulating ETFs. Soon thereafter, wireless providers voluntarily started pro-rating ETFs in order to head off an FCC Order or legislation from the U.S. Congress.

The issue of state and federal authority over wireless ETFs remains unclear. As described by a 2009 Government Accountability Office (GAO) report:

> [I]n 1993, Congress developed a wireless regulatory framework that expressly prohibited states from regulating the market entry or rates charged by wireless phone service carriers, while retaining states' authority to regulate other "terms and conditions" of wireless service. In an accompanying report, Congress stated that "terms and conditions" was intended to include billing practices and disputes, as well as other consumer protection matters. The report further stated that examples of service it provided that could fall within a state's lawful authority under "terms and conditions" were illustrative and not meant to preclude other matters generally understood to fall under "terms and conditions." Despite this guidance, whether specific aspects of service are considered "rates" or "terms and conditions" has been the subject of disputes at FCC, in state regulatory bodies, and in the courts. For example, courts have recently been grappling with cases about whether billing line items and early termination fees are defined as "rates," and are therefore not subject to state regulation, or as other "terms and conditions," which may be regulated by states. Such cases have not resolved the issue, as courts have reached different conclusions about the meaning of these terms or await action by FCC.

United States Government Accountability Office, *FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34, November 2009, at 33, citing H.R. Rep. No. 103-111 (1993).

Where its authority so permits, the Department should regulate the aspects of wireless billing and termination that relate to the terms and conditions of wireless service.

If the Department is able to reconcile its proposed rules with the limitations set forth in the 1996 Act, the Department's billing and termination regulations should apply, as is appropriate, to wireless providers. Wireless providers may assert that the industry is sufficiently competitive that such regulations are unnecessary. Nevertheless, the Attorney General is not persuaded that wireless markets in Massachusetts are sufficiently competitive to protect consumers, especially when viewed in light of recent FCC annual reports.

In 2010, for the first time since 2003, the FCC refrained from concluding that the wireless market was effectively competitive and instead stated:

> [a]s described in this Mobile Wireless Competition Report, the mobile wireless ecosystem is sufficiently complex that any review or analysis of competitive market conditions must take into consideration a multitude of factors. As a result, rather than reaching an overarching, industry-wide determination with respect to whether there is "effective competition," the *Report* complies with the statutory requirement by providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes. As the mobile wireless marketplace evolves, driven in particular by mobile wireless broadband and data usage, the Commission's analyses and policies with respect to key inputs – such as spectrum – also must evolve in order to ensure a robust level of competition going forward.

In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66 (Terminated), *Fourteenth Report*, rel. May 20, 2010, at para. 3 (citation omitted).

Similarly, this year on June 27, 2011, the FCC released its Fifteenth Annual Report on Mobile Wireless Competition, which concludes:

> [t]he *Fourteenth Report* examined, for the first time, competition across the entire mobile wireless ecosystem, including an analysis of the "upstream" and "downstream" market segments, such as spectrum, infrastructure, devices, and applications. Consistent with the Commission's first seven Annual Commercial Mobile Radio Service (CMRS) Competition Reports, the *Fourteenth Report* did not reach an overall conclusion regarding whether or not the CMRS marketplace was effectively competitive, but provided an analysis and description of the CMRS industry's competitive metrics and trends. The *Fifteenth Report* follows the same analytical framework used in the *Fourteenth Report*, with certain improvements based on responses to that *Report*. Thus, the *Fifteenth Report* makes no formal finding as to whether there is, or is not, effective competition in the industry. Rather, given the complexity of the various inter-related segments and services within the mobile wireless ecosystem, the *Report* focuses on presenting the best data available on competition throughout this sector of the economy and highlighting several key trends in the mobile wireless industry.

In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation

Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133 (Terminated), *Fifteenth Report*, rel. June 27, 2011, at para. 2.

The Fifteenth Report notes that at "year-end 2009, the four nationwide service providers accounted for just over 90 percent of the nation's mobile wireless subscribers (including wholesale subscribers), with AT&T and Verizon Wireless together accounting for 62 percent." *Id.*, at para. 8. Further, The FCC calculated Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA) margins of over 18 percent for the seven largest mobile wireless carriers and over 40 percent for the two largest carriers (AT&T and Verizon Wireless). *Id.*, at para. 2. The Fifteenth Report further analyzes how the quantity of facilities-based mobile wireless providers with coverage in a census tract varies based on median income levels. Not surprisingly, the average number of providers increases as income increases. The FCC reports that "the greatest difference in deployment appears to be between census tracts with median household income levels below and those with income levels above $50,000 per year." *Id.*, at para. 124.

The foregoing information and supporting data holistically demonstrate to the Attorney General that the wireless market is insufficiently competitive, and that the terms and conditions of wireless carriers should be closely examined by the Department. This is especially true in light of two major wireless service companies, AT&T and T-Mobile, seeking approval from the FCC to merge. If the merger is approved, the wireless market will become even more concentrated, and have the potential to negatively impact consumers.

Conclusion

The Attorney General appreciates the opportunity to offer these preliminary comments and recommendations, and looks forward to submitting more specific comments and recommendations next month.

Respectfully submitted,

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cc: Notice List (via e-mail only)