

**Consumers  
Union**

Nonprofit Publisher  
of Consumer Reports



Consumer Federation of America



*Testimony of*

**Chris Murray**  
Senior Counsel  
Consumers Union

*On behalf of*

**Consumers Union, Consumer Federation of America, and Free Press**

*Regarding*

**“Wireless Consumer Issues”**

*Before the*

U.S. Senate Committee on Commerce, Science and  
Transportation

*On*

October 17, 2007

Chairman Inouye, Vice Chairman Stevens, and esteemed members of the Committee, thank you for the opportunity to testify again before you on behalf of Consumers Union (CU)<sup>1</sup> (non-profit publisher of *Consumer Reports*), Free Press, and the Consumer Federation of America.

Consumers are not as satisfied as they should be with the wireless industry as a whole. In an annual consumer satisfaction survey<sup>2</sup> of 20 industries conducted by our magazine, Consumer Reports, we see that “cell-phone service” ranks near the bottom of the list (18 of 20), with only “computer makers’ tech support” and “digital cable TV service” receiving lower marks.

According to the OECD,<sup>3</sup> U.S. subscribers also pay more per month than wireless subscribers in other countries.<sup>4</sup> The average U.S. subscriber pays \$506/year, well above the OECD average of \$439/year, and significantly above countries such as Sweden (\$246) and Germany (\$317).

Consumers Union endorses the legislation proposed by Senator Rockefeller and Senator Klobuchar, the Cell Phone Consumer Empowerment Act of 2007. We think that the aim of this bill is on target—to provide consumers more fairness in the marketplace and to provide them with better information about the cell phone service they are buying.

---

<sup>1</sup> Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 4.5 million paid circulation) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

<sup>2</sup> Consumer Reports, “*Upfront: News, Trends, Advice*,” p. 8 (October 2007).

<sup>3</sup> Organization for Economic Co-operation and Development, “OECD Communications Outlook 2007”

<sup>4</sup> The industry is quick to note that on a per minute of use basis, U.S. consumers are better off, because U.S. wireless subscribers use 800 minutes/month on average, and their European counterparts, only 200 minutes/month. But if this is a high fixed-cost industry as the companies have claimed elsewhere, metrics based on minutes of use should matter less and aggregate numbers matter more.

Markets work best with good information, and this bill aims to get real information into consumers' hands.

Today I would like to raise three pocketbook concerns with the wireless industry:

- 1) Early Termination Fees that companies are charging consumers (especially when subscribers are not receiving any subsidy for new phones);
- 2) The pernicious practice of handset locking, causing consumers to throw perfectly good phones in the trash if they want to switch carriers (or causing them to pay extra for phones "affiliated" with the network); and
- 3) The tight control wireless companies are exercising over applications development (such as mapping applications, ringtones, etc.), which causes consumers to pay higher prices for services and stops innovation from reaching the market.

But looking beyond these consumer cost issues, I also want to highlight some very serious free speech issues raised by an incident a few weeks ago between Verizon and NARAL, where political messages were prevented from reaching subscribers by actions of the network operator. Outside the U.S., text messaging (also called SMS, for "Short Message Service") has been called the most important technological development for political advocacy in the last five years,<sup>5</sup> with activists using text messaging to monitor elections (e.g. Nigeria), and encourage political change (Phillipines and Ukraine). We have even seen allegations of governments blocking text messages (Belarus, Cambodia and Albania) to thwart political protest or ensure activists did not have "improper" influence over elections.

Surely blocking political messages would not be tolerated from the U.S. government—but do we have any enforceable protections against a wireless network operator? If this were a phone call being blocked, the non-discrimination provisions of the

---

<sup>5</sup> Ethan Zuckerman, "Mobile Phones and Social Activism: Why cell phones may be the most important technical innovation of the decade," white paper available at [MobileActive.org](http://mobileactive.org): <http://mobileactive.org/mobile-phones-and-social-activism-ethan-zuckerman-white-paper> (May 9, 2007).

Communications Act would prevent this practice<sup>6</sup>—why should we abandon this policy for data?

While I am glad that Verizon changed its policy rapidly to ensure no further blocking would occur, why did this require a policy shift in the first place? Is the new policy permanent, or can it change as rapidly as their Terms of Service, with little or no notice to subscribers? Does this new policy have the force of law, or the enforceability of a pinkie swear? The FCC has told the policy community that if any kind of blocking incident occurs they will deal with it rapidly. Yet so far the response from the Commission has been radio silence.

Consumers have an expectation that their phone calls will not be tampered with by the phone company, and an expectation that text and data should be protected in the same manner as a voice call. The details of the Verizon text message blocking incident are not clear; what is clear is that this warrants further scrutiny and we encourage this Committee to hold hearings on this important matter.

While the wireless industry will argue that non-discrimination with the force of law is unnecessary because policymakers should rely on the force of competition to police bad behavior in this arena—yet at every turn the industry is operating to throw gravel in the gears of competition, with Early Termination Fees, handset locking and other practices that increase switching costs. They cannot have it both ways.

---

<sup>6</sup> Either blocking data is a violation of the communications act, or it is not. The idea that this can issue can live in some sort of regulatory limbo forever is folly. The industry would have us believe that we do not require enforceable non-discrimination because of a vague notion that “consumers will never stand for blocking.” Perhaps what they mean is that as long as it is a story for the Wall Street Journal, New York Times, or Washington Post, then there is some form of discipline on this kind of conduct. However, at a certain point if blocking data is not declared to be a violation of the Communications Act, it ceases to be remarkable and therefore ceases to be a story. But if it would be a clear violation of the Act for a company to block a phone call on political grounds, there is no reason it should be acceptable for that company to block our political messages or any other legal data.

Early Termination Fees (ETFs) are ubiquitous in the wireless industry, with some carriers charging as much as \$200 if a customer would like to leave before their (generally two-year) contract is completed. Verizon (and as of yesterday, AT&T) should be lauded for adopting a policy of pro-rating<sup>7</sup> these fees, but the other carriers have not taken this common sense, pro-consumer step. And let us be clear, it was “encouragement” from policymakers and lawsuits regarding these unseemly and unfair contracts in certain states that are helping pressure the carriers into pro-rating ETFs. That is why we applaud Senator Rockefeller’s and Senator Klobuchar’s bill which would require all carriers to pro-rate ETFs.

Early Termination Fees make it expensive for a wireless subscriber to vote with her pocketbook and switch carriers—and the justification for charging these penalties seems to be evaporating. The iPhone offers the clearest example—AT&T subscribers who want the iPhone will receive not one thin dime of subsidy, yet they will be charged a full \$175 penalty if they want to leave before their contract is up. The story the wireless industry had been telling us about ETFs used to be “subsidy, subsidy, subsidy.” We have yet to hear a convincing new story.

Imagine the shock of a consumer who buys a family share plan from a wireless company and then tries to terminate that plan—each family member will be liable for the full Early Termination Fee. For instance, let’s say a family of five wanted to leave for another carrier with better service. That family could face nearly \$1000 in termination penalties if they haven’t completed their two-year contract. This is certainly a strong deterrent to competition.

---

<sup>7</sup> Verizon’s ETF discount is not exactly a “pro-rate,” which by definition would mean a fee reduction proportionate to the amount of time a subscriber has spent with the company—i.e. halfway through the contract should be a 50% reduction in ETF. Verizon reduces its \$175 ETF by \$6/month, resulting in a \$72 ETF discount at the end of the contract’s first year; the subscriber would still pay more than 50% of the ETF halfway through the contract.

Another problematic practice—and the practice our survey results<sup>8</sup> tell us users hate the most—is when carriers extend contracts for any change in service plan—whether the change benefits the wireless carrier or not. In other words, if I am a wireless customer and I decide to increase my bucket of minutes, my carrier may automatically extend my contract for another year or two, and saddle me with another Early Termination Fee if I decide to leave before the contract is up.

Mobile phone “locking” is another area of concern for consumers. In Europe, phones work seamlessly between networks and carriers do not exercise control over which phones subscribers can use. This has created a robust, independent market for mobile phones where users have far greater choice than U.S. subscribers. In the U.S., analysts estimate that 90 to 95% of handsets are sold by the wireless carriers, whereas in some Asian markets approximately 80% are sold independently from the carrier.<sup>9</sup>

There are two basic kinds of mobile phone locking:<sup>10</sup> software locks (which actually disable the phone when the user leaves), and “approved phones only” policies (which do not allow users to activate phones they purchase through the network operator, even when independent phones are technologically compatible with the network).

Imagine that a consumer purchased an expensive new television set and decided to switch cable or satellite providers, but the provider said “I’m sorry, your new TV will not work on our cable system, you’ll have to purchase a new one.” Policymakers would not tolerate this behavior for long, yet this practice has been pervasive in the wireless industry

---

<sup>8</sup> Consumer Reports, “*Annual Cell Phone Survey*” (Dec. 2007).

<sup>9</sup> Marguerite Reardon, “Will ‘unlocked cell phones’ free consumers?” *CNET News.com*, January 24, 2007, available at: [http://news.com.com/Will+unlocked+cell+phones+free+consumers/2100-1039\\_3-6152735.html?tag=st.prev](http://news.com.com/Will+unlocked+cell+phones+free+consumers/2100-1039_3-6152735.html?tag=st.prev).

<sup>10</sup> For more information on mobile phone locking, see Professor Wu’s paper, “*Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband*.” New America Foundation Working Paper #17, Wireless Future Program (February 17, 2007).

for several years now. CU is grateful to Senator Klobuchar and Senator Rockefeller for requiring in their proposed legislation that the FCC study this issue of mobile phone locking.

Application and functionality blocking is another practice that costs consumers money, and denies our economy the dynamic benefits of innovation. As a recent Wall Street Journal article<sup>11</sup> notes, handset manufacturers have been trying to offer consumers services for free on new handsets, but network operators such as AT&T and Verizon have said “no” to those free services because they compete with services that the wireless carriers want to charge for.

According to the article, RIM (manufacturer of the Blackberry) wanted to offer a free mapping service to customers who buy the Blackberry, but AT&T said no, because they had a service that they wanted to charge users \$10 a month for.

Another example is Verizon’s Worldphone by RIM, which has the capability built in to work on cellular networks in Europe, as well as to work on other GSM networks here in the States. Yet Verizon locks down the device so that they can charge users extra fees for the privilege of phones working as they were actually designed to work. That is, the GSM capability built into the \$600 handset simply won’t work unless a user pays Verizon for a more expensive “international plan.” As a user who does a lot of international travel, I don’t need their international service plan—I just need my phone to work as it was designed.

Yet another instance of troubling conduct is the slow rollout of mobile phones that also do Wi-Fi—these phones allow consumers to use the Internet when they are near a Wi-Fi Internet “Hotspot.” Most U.S. carriers are not making these phones available to consumers, although T-Mobile is currently offering them. But as the Chairman of the FCC

---

<sup>11</sup> Jessica Vascellaro, “Air War: A Fight Over What You Can Do on a Cell Phone – Handset Makers Push Free Features for Which the Carriers Want to Charge.” Wall Street Journal (June 14, 2007).

noted in a recent USA Today article,<sup>12</sup> “[i]nternationally, Wi-Fi handsets have been available for some time, . . . but they are just beginning to roll out here. . . . I am concerned that we are seeing some innovations being rolled out more slowly here than we are in other parts of the world.”

We can do better. It’s not that consumers have no choices in this market; the issue is that they have fewer choices without openness and they would have more choices with it.

Today, Consumers Union would like to issue three broad challenges to the wireless industry:

1. **Stop charging consumers undue Early Termination Fees.** Early Termination Fees should be eliminated or pro-rated across the industry immediately.
2. **Stop crippling mobile phones.** Consumers who pay hundreds of dollars for a new phone should fully expect that phone to do all the things the manufacturer designed it to do. Network operators who lock down the functionality of mobile phones to better suit their business interests should be scrutinized by the FCC and Congress.
3. **Stop preventing new applications from reaching consumers.** Wireless carriers are locking out competitive applications because they don’t want “revenue leakage.” This kind of anti-innovation protectionism flies in the face of a century of open communications policymaking.

Wireless Internet services will increasingly become the way that consumers connect to the Internet. If we allow anti-innovation practices to continue, we should expect our

---

<sup>12</sup> Leslie Cauley, “New Rules Could Rock Wireless World: Consumers, not carriers, may get to choose devices.” USA Today, (July 10, 2007).

international broadband rankings to continue to slide, innovation to be less robust, and our mobile phone markets to continue to lag behind Europe and Asia.

In contrast, by embracing openness, policymakers have an opportunity to save consumers money, get exciting new applications to market, regain our standing as a world leader in broadband, and provide citizens with a new wireless “town square” that is open and democratic. Consumers Union fervently hopes that policymakers will choose the latter.

Mr. Chairman and Mr. Vice Chairman, I’m grateful for the opportunity to testify before your Committee today. Thank you.