

**Consumers
Union**

Nonprofit Publisher
of Consumer Reports



Consumer Federation of America



Testimony of

**Jeannine Kenney
Senior Policy Analyst
Consumers Union**

on behalf of

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

before the

**United States Senate
Committee on Commerce, Science and Transportation**

regarding

Wireless Communications Issues & Spectrum Management Reform

March 14, 2006

**Consumers Union
Headquarters Office**
101 Truman Avenue
Yonkers, New York 10703-1057
(914) 378-2029
(914) 378-2992 (fax)

Washington Office
1666 Connecticut Avenue, NW
Washington, DC 20009-1039
(202) 462-6262 Suite 310
(202) 265-9548 (fax)

West Coast Regional Office
1535 Mission Street
San Francisco, CA 94103-2512
(415) 461-6747
(415) 431-0906 (fax)

South West Regional Office
1300 Guadalupe, Suite 100
Austin, TX 78701-1643
(512) 477-4431
(512) 477-8934 (fax)

**Testimony of
Jeannine Kenney
Senior Policy Analyst
Consumers Union**

U.S. Senate Committee on Commerce, Science and Transportation
regarding
Wireless Communications Issues & Spectrum Management Reform
March 14, 2006

SUMMARY

Consumers Union,¹ Consumer Federation of America,² and Free Press³ appreciate the opportunity to testify on wireless communications issues and spectrum reform. In light of the recently announced acquisition of BellSouth by AT&T, critical questions of market competition and consumer protection are more important than ever.

If the merger is approved, AT&T will have sole control over Cingular Wireless, the largest cellular carrier in the nation that leads all others not just in market dominance, but also in customer dissatisfaction and complaints. AT&T will become far and away the largest provider of phone service and DSL, dominating the market for bundled services in local, long distance and wireless services within its 22-state market stretching coast to coast. As the new company rolls out its multi-channel video service, its market power will dwarf even the largest cable companies. An integrated voice, video, broadband and wireless provider with such sweeping market control will have little incentive to discipline prices or tolerate competition. And competitors unable to offer the full bundle of services within AT&T's region will have even less incentive and ability to compete for the lower-volume, lower margin customers unable or unwilling to buy the bundle.

The centrality of Cingular to this merger demands full Congressional scrutiny of increasing signs that wireless consolidation is solidifying regional dominance, and leading toward, at best, a duopoly that will undermine robust competition and inflate prices, leaving low and moderate income consumers and underserved communities facing enormous barriers to participation in our digital economy. As concentration in wireless phone service has increased, competition in broadband is, and will remain, moribund without Congressional action. Last year's announcement that the newly merged Sprint/Nextel will partner with large cable providers have deflated hopes that the company would emerge as a broadband competitor to DSL and cable modem. And with the Federal Communications Commission's decision to allow cable and telephone companies to exclude broadband competitors from their wires, most consumers are left with, at best, just those two broadband providers. As a result, wireless broadband provided by new market players unaffiliated with dominant phone and cable companies now offers the only meaningful hope for competition in the broadband marketplace.

In this environment, spectrum policy becomes increasingly important in ensuring that new competitors to dominant broadband and wireless phone providers emerge and that broadband becomes available to those who don't have access to it or can't afford it. Advances in

technology provide the Committee with new opportunities to make currently unused spectrum within the broadcast band newly available to wireless broadband competitors for unlicensed use.

In virtually every market in the nation, between 20% and 80% of allocated television channels are unlicensed and unused. They are ripe for transition to broadband technologies and will be essential in expanding the availability and affordability of broadband. Today, the inadequate volume and quality of existing unlicensed spectrum is a significant barrier to expansion of wireless broadband services. With more and better quality unlicensed spectrum, new opportunities emerge for vigorous competition in wireless broadband; for communities to offer affordable broadband service where it has never before been available; and to spur the emergence of wireless broadband as a true competitor to dominant wireline broadband providers. But to ensure that unlicensed spectrum will maximize broadband access for underserved rural and urban consumers, Congress must clarify and protect the rights of localities to offer broadband service.

Additionally, the reclamation and auction of spectrum in the 700MHz band provides Congress with a new opportunity to enhance competition in wireless phone and broadband. How and to whom spectrum in that band is auctioned will determine whether new competition in broadband and wireless phone service emerges or whether the market position of already dominant wireless providers is solidified. To ensure that wireless broadband emerges as a competitor to cable modem and DSL, it will be critical that at least some spectrum licenses go to providers unaffiliated with wireline broadband providers, preferably new market entrants and smaller market players.

Finally, as concentration in wireless has increased and consumer complaints have grown, the wireless industry has attempted to erode states' authority to protect consumers from carriers' deceptive and misleading billing practices; unreasonable, unfair, and anticompetitive contract terms; and inadequate privacy safeguards for customer calling records. States have been the first line of defense for telecommunications consumers, particularly in complaint-ridden cellular services. They've identified and taken action against carrier practices that harm wireless consumers. The Federal Communications Commission is ill-positioned to resolve the hundreds of thousands of telecommunications complaints that states receive each year. Congress must either enact strong, enforceable federal consumer protection and privacy laws or protect the ability of the states to safeguard consumers.

As the Committee considers the wireless and spectrum policy issues before it, we offer the following recommendations:

- Provide careful oversight of the proposed AT&T acquisition of BellSouth, particularly with respect to competition in wireless phone service, and urge the Department of Justice and Federal Communications Commission to reject the merger unless wireless assets are divested to ensure head-to-head competition between Cingular Wireless and the wireline company. Urge DOJ and FCC to impose permanent network neutrality conditions to prevent AT&T from discriminating against users and competitors on Internet services.

- Require that, at a minimum, a portion of the spectrum within the 700 MHz band is reserved for new market entrants and designated entities, and that dominant market players Cingular and Verizon are precluded from bidding on licenses in markets where they own significant amounts of spectrum.
- Report and seek final enactment of legislation comparable to S. 2332, the American Broadband for Communities Act sponsored by Senator Stevens, and S. 2327, the Wireless Innovation Act, sponsored by Senator Allen and cosponsored by other Committee members. We strongly support both bills. Each would make new unlicensed spectrum available in the unoccupied channels of the broadcast band while protecting existing broadcasters operating within that band from interference. Action in this area is among the most meaningful the Congress may take to foster development of, competition in, and affordable access to wireless broadband services.
- Report and seek final enactment of S. 1294, the Community Broadband Act introduced by Senators McCain and Lautenberg, to ensure that communities and the entrepreneurs with whom they partner can take advantage of low-cost, affordable technologies to offer new, innovative and affordable wireless broadband services to local residents.
- Report and seek final enactment of S. 1350, the Wireless 411 Privacy Act, which we strongly support, to ensure that any wireless phone directory that may be created does not trench upon consumers' right to keep their cell phone numbers private or result in higher costs to consumers from unwanted incoming calls.
- Report and seek final enactment of legislation prohibiting fraudulent practices used to obtain consumers' detailed and private cell, landline or VOIP phone records; imposing tough penalties on those who engage in fraudulent practices; requiring tough new federal standards for telephone companies' internal safeguards for consumer phone records; and requiring such providers to seek affirmative consent before private calling records are shared. Regrettably, Consumers Union cannot support the Protecting Consumer Phone Records Act because it preempts the states' ability to require compliance with tough consumer phone records privacy requirements, while providing no guarantee that federal phone record privacy protections will be strengthened. We look forward to working with the Committee to strengthen the legislation.
- Clarify and confirm the role of the states in regulating terms and conditions for wireless phone services as provided under Section 332 of the Communications Act of 1934, and reject wireless carriers' attempts to undermine the strong consumer protections against anticompetitive, predatory and unfair practices by wireless carriers.
- Urge FCC to reject the pending wireless industry petition to preempt state regulation of early termination fees and to reconsider its 2005 Order preemption states from regulating line-item billing abuses.

DECLINING COMPETITION IN WIRELESS SERVICES

DECLINING COMPETITION IN WIRELESS TELEPHONE SERVICES

If AT&T's acquisition of BellSouth is approved, and we urge that it not be, AT&T will be the dominant provider of both wireless and wireline services in its enlarged 22 state region with complete control over Cingular, giving it unprecedented ability to foreclose competition not just in bundled services, but also in single components of that bundle.

Today, competition in telecommunications markets is focused largely on selling bundles of video, voice (wireline and wireless) and Internet services to the high-end, high margin customer who can afford it. Sprint/Nextel's announcement last year that it will enter into a joint venture with several cable operators underscores this point. To compete with Cingular and Verizon Wireless in the AT&T and Verizon territories, Sprint/Nextel needs the additional service components of cable—video and cable modem. And cable needs a wireless service. The joint venture reflects market realities that wireless competitors lacking other bundle components faced significant market disadvantages even before the announced AT&T/BellSouth merger.

In the face of AT&T's bundled offerings and enhanced market power, it will be increasingly difficult for single or dual service telecommunications providers to compete on smaller bundles or individual products, including wireless, giving AT&T the power undermine single-service competitors or relegate them to niche markets. Moreover, the few companies offering bundled services within their own territories will have little incentive to invest in and aggressively market cellular and long distance to low-volume, low-margin customers within AT&T's market. As a result, over time, it is realistic to expect inflated prices for low-volume, single-service cellular plans.

In fact, since the most recent wave of wireless mergers, the dominant carriers have substantially increased the baseline price for low-volume cell-phone usage plans, forcing consumers to pay substantially more before they could receive many of the new features the companies are offering. For example, Cingular's entry-level plan has shot up from about \$30 to almost \$40 per month in the last two years. Verizon is also charging about \$40 a month for a similar entry-level plan—up about 15 percent over the last two years. Clearly, as these carriers become more dominant in their wireline core territories, they've been able to raise prices for low-volume cell phone users, reversing the trend of cellular service becoming more competitive with unlimited-usage, basic local telephone service, which usually costs about \$20 per month.

As cable enters the voice market with Internet telephony, at best two competitors emerge: the dominant cable provider and the dominant Bell. While the consolidation of AT&T with BellSouth strengthens AT&T's ability to compete with cable, consumers well know that competition between two competitors is not enough. Moreover, any aggressive competition that emerges among the two providers will likely be confined to the bundle, leaving the lower income consumer paying inflated prices providers charge for unbundled service components.

The end result is likely to be that the consumer at the bottom end of the market will be faced with few choices and the prospect of inflated rates. Wireless is not yet a true substitute for wireline phone service, leaving predictions that consumers unhappy with their wireline carrier can simply dump their landline in favor of wireless. Even the lowest cost cellular services exceed prices for local wireline service, with the exception of still-niche prepaid wireless plans that account for only a fraction of the market. Therefore, for wireless to function as a competitor to wireline, rates for the lowest cost, unbundled wireless plans must fall much more. With the merger consolidating AT&T's position and the best case scenario of duopoly competition, that becomes far less likely to occur.

Whether VOIP can become a meaningful competitor in local service and have some price policing effect on wireless depends entirely on whether Congress adopts meaningful and enforceable network neutrality legislation. BellSouth, AT&T, and Verizon have unblushingly stated their intention to impose access fees on VOIP providers and other content and service providers. In addition to their unfettered ability to block or impede data transmission for VOIP calls, their control over broadband networks and ability to charge access fees gives network owners like AT&T to the ability to impose costs on VOIP that ensure it cannot compete with local or long distance.

At best, consumers within AT&T's territory will have two choices for bundled packages of services: AT&T and the dominant cable monopoly. A choice between two dominant providers intent in competing only on bundles rather than single service offerings is simply not enough to protect the so-called "low-value" consumer who needs or can afford just one or two services. And whether cable will even serve as an effective competitor in bundled services depends upon how aggressively it enters the telephone market, and upon its the terms of its agreement with Sprint Nextel to offer wireless services in its package of offerings.

DECLINING COMPETITION IN BROADBAND

Today, the United States ranks 16th in the world for broadband penetration per capita. Even as other technology markets are exploding in growth and innovation, the cost and speed of broadband has remained relatively constant for years. While American consumers are asked to settle for the FCC's broadband standard of 200 kbps, companies in Japan, South Korea, and most of Western Europe are selling connections 100 times faster for similar prices. The digital divide in global broadband competitiveness is a slow-motion disaster for our long term economic prospects.

This nation's shortcomings in broadband deployment is explained, in large part, by the lack of competition in the broadband market, the absence of a national broadband policy, and the disincentives for the duopoly of network giants to invest in higher capacity service. Cable and DSL providers control almost 98 percent of the residential and small-business broadband market. And about a quarter of U.S. has access to either cable modem or DSL, but not both. Meanwhile, the FCC's own data shows that satellite and wireless broadband continue to lose market share, demonstrating that intermodal competition is virtually nonexistent in broadband.

Though the total number of connections has increased, the percentage of U.S. households with no access to broadband has remained constant at 19 percent. Broadband penetration rates in urban areas are substantially higher than for rural areas where some 30% of consumers have only one source of broadband: satellite, which is slow and expensive. The urban/rural digital divide is not closing—it is widening. According to a recent Pew study, urban penetration rates are 39% compared to 24% for rural areas. In 2004, the gap was 29% to 16%. In 2002, it was 18% to 6%.

Reports of a broadband price war are misguided. Analysis of “low-priced” introductory offers by companies like SBC and Comcast, in an August 2005 joint report by Free Press, Consumers Union, and Consumer Federation of America, reveal that these are little more than gimmicks designed to capture market share. At the end of the introductory period, usually pursuant to a long-term contract, rates rise significantly. Moreover, the so-called “price war” boils down to offering half the speed at half the price from comparable offers two years ago.

Consumers need, at a minimum, a third competitive option—wireless broadband that is less expensive and which doesn't depend on DSL or cable modems. It offers the best and perhaps now the only way to close the digital divide and enhance competition, particularly in light of FCC's decision to reclassify cable and DSL as information services, foreclosing competition from other providers through leased access. Further, we need to promote market conditions that enhance the development of WiMax and other new wireless technologies as low-cost infrastructure alternatives for last-mile service delivery. 21st Century broadband policy must anticipate a future when digital networks are hybrids of wireless and wireline facilities with robust intermodal competition.

To date, meaningful competition in broadband from wireless carriers has not emerged, and promises that mergers among wireless carriers might bring it have fallen flat. Among the benefits that FCC cited in its 2005 Order approving the Sprint Nextel merger was entry of another competitor to DSL and cable modem in the fixed broadband market. Yet just months after the merger was approved, Sprint Nextel announced a joint venture with four cable partners – Comcast, Cox Communications, Time Warner Cable and Advance/Newhouse Communications – to offer a bundle of voice, video, high-speed data and wireless telephone services. Sprint Nextel's Chief Operating Officer said the company would not compete directly against its cable company partners and hoped to further expand its partnership to other large cable operators Cablevision and Charter Communications. The venture merely solidifies the cable modem/DSL broadband duopoly. This development also demonstrates the difficulty of generating head-to-head competition in a marketplace where leading providers seek not to compete on individual services but instead on the bundle. It is wishful thinking to believe that a wireless carrier owned by a wireline company will offer consumer broadband service to compete with DSL and cable. Therefore consumers seeking affordable, unbundled broadband services must look to other means for affordable, ubiquitous broadband.

THE COMPETITIVE POTENTIAL OF WIRELESS BROADBAND USING UNLICENSED SPECTRUM

Wireless broadband using unlicensed spectrum offers a new opportunity to provide affordable broadband to rural and other underserved areas. But, equally important, wireless broadband can offer an affordable competitive alternative to areas that have access only to a

single high-priced, monopoly provider. Wireless broadband providers currently operate in a vigorously competitive marketplace—unlike their wireline cousins. But wireless services currently rely on a limited band of unlicensed, or open-market, spectrum in the 2.4 and 5.0 GHz bands, long dubbed the “junk bands.”

Broadband is offered today by thousands of Wireless Internet Service Providers (WISPs) using unlicensed spectrum. Wireless broadband is already an economic generator for thousands of small and mid-sized businesses that provide “hot spots” in places where people gather, like coffee shops, conference centers and airports. But companies, communities and non-profits are also using wireless broadband to connect parks, neighborhoods, and even entire cities and towns. To date, over 300 communities ranging in size from tiny rural villages to major metropolitan areas have put wireless broadband to good use—offering affordable broadband to local households, often for the first time. With off-the-shelf affordable technology, communities, working in partnership with entrepreneurs, are creating high-speed wireless networks at a fraction of the cost of wired facilities. WiFi has been deployed in densely populated urban areas and sparsely populated rural areas.

But the growth potential of this industry is limited because under current licensing schemes, unlicensed wireless broadband is limited to the high-frequency junk bands. This, though well-suited to carry a high volume of data, does not easily permit signals to penetrate through obstacles, such as trees or walls. Moreover, the bands are also extremely crowded; unlicensed wireless broadband transmitters share this spectrum with other consumer electronic devices.

In order for wireless broadband to become an option for more Americans, providers need access to unlicensed low-frequency spectrum below 1 GHz—less crowded spectrum with propagation characteristics that allow signals to travel through buildings, trees and other obstacles. Lower frequency spectrum will allow wireless broadband networks to reduce the number of transmitters necessary to cover a square mile. The cost savings will be passed on in the form of lower consumer prices. Not only will this open the market for new services and new entrants, it will open the public airwaves for further innovation. If the history of high-frequency WiFi is any indicator, the emergence of low-frequency wireless broadband will become an explosive economic engine.

UNLICENSED SPECTRUM IN THE TV WHITE SPACES—THE MEANS TO AFFORDABLE BROADBAND & RENEWED COMPETITIVE OPPORTUNITIES

Among the most important priorities for broadband policy is finding low-frequency spectrum to make available for unlicensed use. To enhance broadband access to those who lack it and increase broadband competition where it is currently limited, the Committee should approve legislation to open unoccupied broadcast channels—or white spaces—for unlicensed, non-interfering uses. Consumers Union therefore strongly endorses S. 2332, the American Broadband for Communities Act sponsored by Chairman Stevens, and S. 2327, the Wireless Innovation Act, sponsored by Senator Allen and cosponsored by other Committee members. Moving these bills forward is among the most meaningful action Congress could take to foster development of, competition in, and affordable access to wireless broadband services.

Both bills make available unused broadcast spectrum below 698 MHz for use by unlicensed devices, and call on the FCC to complete a proceeding it began more than two years ago. FCC's proceeding would establish technical and device rules to facilitate use of white spaces by unlicensed devices, while providing for strict protections against interference with television signals. Despite a flood of support from industry groups, engineers and the public interest community, this FCC proceeding has stalled. It is time for Congress to step in by enacting white spaces legislation.

Vacant TV channels are perfectly suited for wireless broadband and other unlicensed wireless Internet services. Signals can travel far and pass through dense objects and topographical barriers. And greater access to vacant TV channels would facilitate a market for low-cost, high capacity and mobile wireless broadband networks. Using these white spaces, the wireless broadband industry could deliver Internet access to every American household at high speeds and low prices — for as little as \$10 a month by some estimates. At a time when more than 60 percent of the country does not subscribe to broadband either because it is unavailable or unaffordable, this would represent an enormous social benefit and a catalyzing economic engine, particularly in rural areas.

According to a November 2005 analysis by Free Press and the New America Foundation, *“Measuring the TV ‘White Space’ Available for Unlicensed Wireless Broadband,”* virtually every market in the country has unoccupied broadcast channels allocated for television broadcasting but not actually in use. The study found that rural areas, which suffer most from lack of broadband access, have the greatest amount of available white space. Yet even in urban areas, substantial white spaces are also available. The following summarizes the percentage of the digital broadcast spectrum the study found would remain unused even after the digital transition, in select markets:

- Juneau area – 74%
- Honolulu area – 62%
- Phoenix area – 44%
- Charleston area – 72%
- Helena area – 62%
- Boston area – 38%
- Jackson area – 60%
- Fargo area – 82%
- The Dallas-Ft. Worth area – 40%
- San Francisco area – 37%
- Portland area – 66%
- Tallahassee area – 62%
- Portland area – 58%
- Seattle area – 52%
- Las Vegas – 52%
- Trenton area – 30%
- Richmond area – 64%
- Omaha area – 52%
- Manchester area – 46%
- Little Rock area – 60%
- Columbia area – 70%
- Baton Rouge area – 44%

We applaud Chairman Stevens and Senator Allen for their leadership in working to make more and better spectrum available for wireless broadband and other innovations yet to come. We look forward to working with members of the Committee toward enactment of this important legislation.

PROTECTING THE RIGHTS OF COMMUNITIES TO OFFER WIRELESS BROADBAND SYSTEMS

State laws preventing or deterring communities from providing wireless and other broadband services is additional roadblock to broadband roll out—a deterrent that dominant carriers have sought to erect even as they deny service to many small towns, villages and rural areas. More than a dozen states have laws on the books that prohibit or restrict the ability of a local government to offer broadband to its citizens, either as a public provider or (as in the majority of cases) as a partner with a private sector provider. In the last 18 months, fourteen states have attempted to enact or expand such restrictive statutes. In states without such laws, community broadband has been a critical force in the telecommunications market, bringing service to rural and low-income consumers, attracting business, and narrowing the digital divide.

Congress must ensure that communities cannot be preempted from launching their own community broadband networks. We therefore strongly endorse S. 1294, the Community Broadband Act, introduced by Senators McCain and Lautenberg, to ensure that communities and the entrepreneurs with whom they partner can take advantage of low-cost, affordable technologies to offer new, innovative and affordable wireless broadband services to local residents.

SPECTRUM AUCTION POLICY—MAKING ROOM FOR NEW ENTRANTS & SMALLER PLAYERS

Congress also has the unique and important opportunity to ensure that reclaimed spectrum in the 700 MHz band will be used to facilitate robust competition in both the broadband and wireless telephone market. It should be no surprise that as wireless phone carriers have merged, ownership of spectrum has been concentrated in the hands of a few dominant market players. Even after the Department of Justice required AT&T Wireless to divest some of its spectrum assets as a condition of its merger with Cingular, Cingular still retains ownership of up to 70 of 189 MHz available in some markets. In many others, it controls one-third of the available spectrum.

Congress should put a stop to consolidation of spectrum ownership by ensuring that at least a portion of the reclaimed spectrum will be allocated for smaller existing players and new market entrants who may offer new competitive opportunities across a range of wireless services. In addition, major players Cingular and Verizon, in which spectrum ownership is already highly concentrated, should be precluded from bidding on spectrum in key markets. If large, already dominant telecommunications providers are the only entities that can successfully bid on spectrum licenses in the valuable 700 MHz band, the risk of foreclosing enhanced competition in both wireless phone and broadband service is great. Large market players already offering wired broadband services are unlikely to use new spectrum to offer affordable wireless Internet services that compete with their wired offerings. They're more likely to use new spectrum to expand existing wireless service offerings to high-value consumers rather than provide new, affordable services to average consumers. The battle for the bundle, and only the bundle, will continue.

In addition, Consumers Union has recommended in recent comments to FCC, that small, minority and women-owned businesses have meaningful access to spectrum licenses during its upcoming 2006 wireless auctions. To do so, the Commission must enhance the effectiveness of

its “designated entity” (DE) program by preventing “large, in-region wireless carriers,” from partnering with DEs in order to access additional spectrum. A designated entity is a small business that is eligible for an auction bidding credit in order to allow it to compete in a spectrum auction. We also urged the Commission to conduct additional study regarding ways to further improve access to spectrum licenses for small businesses, particularly minority and women-owned businesses, in order to decrease barriers to market entry and pass along the benefits of competition and access to consumers.

CONSUMER PROTECTION IN WIRELESS SERVICES

STATE PREEMPTION: UNFAIR CONTRACT TERMS & DECEPTIVE BILLING PRACTICES

In light of growing concentration in wireless telephone markets, we are increasingly concerned about efforts to preempt state regulatory authority over terms and conditions of cellular service. Under Section 332 of the Communications Act of 1934, states retain regulatory authority over cellular carriers, preempted only from regulating market entry and rates, with regulation of terms and conditions expressly reserved for them. Under this authority, states have aggressively sought to regulate and take other action against deceptive, misleading and anti-consumer practices of the cellular industry.

Through court challenges, petitions to the Federal Communications Commission and appeals to Congress, carriers have sought, in some cases, successfully, to erode this vital and distinct role for state regulation of wireless carriers. Last year, the FCC preempted state regulation of line-item bill abuses—a decision currently under appeal in the 11th Circuit. And a cellular industry petition pending at the FCC seeks preemption of state efforts, including generally applicable laws, to curb coercive, anti-competitive early termination fees. If successful, these preemption efforts will badly erode the consumer gains made by states regulating deceptive and misleading carrier tactics.

Low consumer satisfaction with their carriers, growing numbers of consumer complaints about cellular bills and service, and the substantial, artificial barriers that prevent consumers from switching carriers, belie the cellular industry’s argument that competition in wireless renders regulation unnecessary. Last year, the Federal Communications Commission received more than 25,000 complaints about wireless service. While down slightly from 2004, the number remains disturbingly high. The complaints FCC receives are just a fraction of the hundreds of thousands handled by the states. And even those underreport consumer dissatisfaction. A 2003 study by AARP found that nearly half of all cell phone users (46%) reported not knowing whom to contact in case their cell phone provider could not resolve a billing or service problem to their satisfaction. Only four percent cited the Federal Communication Commission (FCC) as a potential contact, and 18 percent said they would not contact anyone but their provider.

Consumers Reports’ recent and largest-ever annual survey of 50,000 cell phone users across 18 major metropolitan markets found that consumers rank cell phone carriers below HMOs and digital cable service in terms of overall satisfaction. Only 47 percent of our respondents said they were either completely or very satisfied with their service—a low showing for any service. And notably, consumers ranked the nation’s largest carrier, Cingular, either lowest or second lowest among all carriers in *every* market surveyed. It received consistently low

marks in handling customer questions and complaints. That finding tracks FCC's own complaint data. In 2004, the complaint rate for AT&T & Cingular Wireless as nearly four times the rate for Verizon Wireless. Meanwhile, some smaller regional carriers Alltel and U.S. Cellular had some of the lowest complaint rates.

Billing complaints, including questionable line items, top the types of complaints received by regulators. Consumers pay inflated prices when line-items not included in the advertised cost of the package are added to their bill. A 2004 NASUCA petition asked FCC to prohibit the nearly ubiquitous carrier practice of including line-items purportedly to recover "regulatory" fees or charges where none have been authorized or imposed by government. In denying NASUCA's petition last year, the Commission simultaneously classified regulation of line-items as rate regulation, fully preempting the states from protecting their consumers.

Early termination fees (ETF)—penalties for switching carriers mid-contract—range from \$150 to \$240 *per phone* and are almost never pro-rated by the elapsed contract period. Contract terms often extend beyond the one or two years from the original agreement, because the contract length is usually extended when consumers upgrade their plan or buy a new phone. Early termination penalties erect enormous financial disincentives for consumers to switch carriers, even if they are unhappy with the current carrier's service, quality or price or could get a better deal elsewhere. A 2005 survey by the U.S. Public Information Research Group found that 36 percent of respondents said early termination fees had prevented them from switching carriers and that nearly half of all cell phone customers would switch if early termination fees were eliminated. Consumer Reports' 2005 survey found comparable results: half of consumers who wanted to switch said they wouldn't because of their long-term contracts. Elimination of non-prorated early termination fees would promote greater competition, improve quality and enhance customer service.

Federal preemption of state authority over cellular carriers would leave consumers without redress and protection. FCC is ill equipped to handle the thousands of consumer complaints it receives, let alone resolve them. Congress should urge the FCC to reconsider its 2005 decision preempting state authority over line-item billing abuses by cell phone providers and urge its rejection of the wireless industry petition to prohibit state regulation of early termination fees.

PROTECTING PRIVATE CALLING RECORDS

In recent months, widespread media attention about the ease with which one's private and detailed calling records may be obtained and how widely carriers may share those records with other businesses has only intensified consumer demand for privacy protections.

We applaud the leadership of Chairman Stevens, Co-Chair Inouye, Senator Allen and members of this committee who have worked to address consumer concerns about carrier breaches of private phone records. And while we respect the Committee's effort to craft a solution to the problem of phone records privacy breaches, we cannot support S.2389, the Protecting Consumer Phone Records Act, as introduced, due to our strong concerns about its preemption provisions. While we support provisions prohibiting pretexting and authorizing new penalties against bad actors, the bill's broad preemption provision clearly represents a step

backward in consumer privacy protections. The bill fails to mandate new federal regulations requiring carriers to safeguard consumer proprietary network information or give consumers the right to opt-in before CPNI is shared, while simultaneously preempting states from taking either action.

Many states already have enhanced privacy protections for consumer phone records. For example, California requires opt-in consent prior to sharing of CPNI. Arizona is about to implement new regulations, several years in the making, that will require carriers to confirm their subscribers' intent to allow their CPNI to be shared with others. Other states are working to improve phone record privacy protections. Illinois Governor Blagojevich recently announced his intention to propose legislation to require carriers to implement tougher privacy safeguards. S. 2389 would preempt all of these efforts and others currently contemplated without putting in their place meaningful federal privacy protections.

We look forward to working with the committee to strengthen the bill and suggest the following additional provisions:

First, in addition to enhanced penalties and explicit prohibitions on pretexting, Congress should require that the Federal Communications Commission prescribe regulations requiring carriers and VOIP providers to maintain stringent internal technical, physical and administrative safeguards to help ensure that phone companies diligently protect the security of their customers' phone records. Consumers have entrusted their most private calling information to their carriers who have a duty to closely guard them. That the safeguards phone companies currently have in place are inadequate to protect consumers' privacy is demonstrated by the explosion in the unscrupulous businesses that offer to sell phone records.

Second, Congress should require that all carriers receive affirmative consent prior to sharing their customers' proprietary network information (CPNI) with joint venture partners, contractors or others. Carriers have a first obligation to their customers, not their business partners. CPNI includes, among other things, customers' most private calling activities including who they called, when they called them and how long they talked. Prior to a decision by the United States Court of Appeals for the Tenth Circuit, the Federal Communications Commission required that consumers provide affirmative "opt-in" consent before their CPNI could be shared. FCC Chairman Kevin Martin noted in his testimony to the House Energy and Commerce Committee earlier this year that the shift from opt-in to opt-out consent has resulted in much broader dissemination of consumer phone records and may have contributed to the proliferation of online businesses offering to sell consumer phone records.

We look forward to working with the Committee to strengthen the privacy protections in S. 2389 by including these key provisions or eliminating the federal preemption of state phone records privacy laws.

WIRELESS 411—PROTECTING THE PRIVACY OF CELL PHONE NUMBERS

The privacy of consumer's cell phone numbers and calling records has rightfully gained significant attention in recent years. The cellular industry's interest in creating a wireless phone

directory provoked widespread consumer concern when it was first contemplated several years ago. And although plans for such a directory may have temporarily stalled, consumer concern about the privacy of phone numbers has not.

We therefore support S. 1350, The Wireless 411 Privacy Act, introduced by Senators Specter and Boxer. The legislation would give consumers greater control over whether and with whom their cell phone number is shared. That approach stands in stark contrast to the near absence of control consumers have over the sharing of far more detailed CPNI.

Consumers view cell phones as more private than landline phones. When their cell phone rings, they expect that the person on the other end to be someone to whom they personally gave their phone number. Because most cell phone customers pay for their incoming calls, consumer control over their number should be viewed through the lens of both privacy and out-of-pocket costs.

The legislation will help ensure that the more than 180 million cell phone customers in the U.S. have control over how and when – or even if – their cell phone numbers are included in any directory of cell phone numbers. It is imperative that Congress codify privacy protections for cell phone consumers so that all consumers, in particular those who wish to remain unlisted, will be protected. It is not adequate to merely rely on industry promises to protect privacy, since such voluntary protections could easily disappear in the future. Moreover, carriers have a strong financial incentive to ensure that as many subscribers as possible are listed in the directory; it has been estimated that a directory would as much as \$2 billion per year through directory assistance charges and additional usage minutes by 2008.

Importantly, the bill ensures that carriers receive affirmative opt-in consent before any subscriber is listed in a wireless 411 directory. Experience tells us that opt-out consent is entirely inadequate in protecting consumers. When the wireless directory was contemplated, several carriers began securing opt-out “permission” by inserting language in wireless phone contracts allowing the carrier to include the cell phone number in a directory and, in some cases, charge fees to consumers if they choose to have their name removed.

The “Wireless 411 Privacy Act” is a common-sense solution that allows the wireless industry to develop a new business while still respecting the privacy wireless consumers have expected for more than 20 years. It provides consumers a means to control their cell phone bills by remaining unlisted, thereby limiting exposure to uninvited calls.

CONCLUSION

We appreciate the opportunity to present our views on the many critical questions of wireless market competition and consumer protection and look forward to working with Congress to ensure that all consumers have access to the benefits of the digital age.

¹ 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 good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. 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 more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

³ Free Press is a national nonpartisan organization with over 200,000 members working to increase informed public participation in crucial media policy debates