Ruth Milkman, Chief, Wireless Telecommunications Bureau
Joel Gurin, Chief, Consumer & Governmental Affairs Bureau
Mark Stone, Deputy Bureau Chief, Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

January 6, 2010

Re: Verizon Wireless' Early Termination Fee for Advanced Devices and Access to Verizon Mobile Web (WT Docket No. 05-194, CG Docket No. 09-158); Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Services (WT Docket No. 09-66)

Dear Ms. Milkman, Mr. Gurin, and Mr. Stone,

Free Press, Consumers Union, and Media Access Project write in response to your letter to Verizon Wireless ("Verizon") of December 4, 2009 and the response from Verizon of December 18, 2009. The Wireless Telecommunications and Consumer & Government Affairs Bureaus took the proper first step in requesting more information, and Verizon failed to respond adequately. As public interest advocates, we are concerned that many statements from Verizon appear to contradict prevailing evidence or, at worst, mislead the Commission in its ongoing investigations of consumer disclosure and competition in wireless services. We urge you to take further action in these inquiries, and to recognize that artificial early termination penalties and arbitrary charges demonstrate a lack of effective competition in wireless services. To fulfill the Commission's statutory mandate of promoting the public interest in communications, we urge you to continue your investigation and take all other appropriate action.

The letter from the Bureaus raised questions concerning, among other things, Verizon's rationale for doubling its early termination fee, the calculation behind the fee itself, and how the increase related to the cost differential between Verizon's wholesale cost of advanced devices and the retail price charged to consumers. The letter also asked whether and when consumers are charged minimum accidental data usage fees, and how both data usage fees and early termination fees are disclosed to consumers. Verizon's response failed to answer any of the letter's specific inquiries in adequate detail.

In at least two respects, Verizon's answers stand contrary to prevailing evidence. Verizon essentially denies that it routinely bills customers for accidental web usage, stating that it "strives to ensure that customers are not billed for minimal accidental data usage charges." Verizon insists that charges are only incurred after navigating beyond the "Verizon Wireless Mobile Web homepage" and should not routinely occur; yet, hundreds of consumers have complained of inadvertent charges.[1] In fact, Verizon seems clearly aware of these problems and

[1] *See* David Pogue, "Verizon Responds to Consumer Complaints," *New York Times* (Dec. 21, 2009), *available at* http://pogue.blogs.nytimes.com/2009/12/21/verizon-responds-to-consumer-complaints/.

chooses not to engage in any proactive solution, as Verizon's letter acknowledges that the company will offer subsequent service credits to consumers who complain. But the burden should not fall on a consumer to correct the harms of misleading and arbitrary billing practices – those practices should not occur in the first place.

Verizon also asserts that it fully discloses its early termination penalties, including those for advanced devices. However, contrary to Verizon's assertions, many prominent television ads for the Motorola Droid offer no discussion of contracts or penalties.[2] Verizon's print advertisements similarly fail to clearly disclose the early termination fee.[3] In its most detailed example of disclosure, Verizon's "rate card" attached as Exhibit F to its letter does contain a small "A" logo and the phrase "Advanced Device" – but despite the presence of other detailed information concerning prices, no mention is made of what this designation means. The Commission should not require consumers to understand, on the basis of as little information as the phrase "advanced device," that the prominently advertised $199 price comes with a potential $350 penalty.

Verizon fails to answer the Commission's questions concerning its rationale for doubling the early termination fee and how the higher penalty relates to the cost paid by Verizon for the advanced devices. For example, Verizon asserts – without offering any documentation – that the cost differential between its acquisition cost and the subsidized "retail" price it charges consumers for advanced devices is "more than twice as large" as the differential for basic devices. This statement is hardly comforting, as public interest groups have offered recent data indicating that the cost differential for typical wireless devices is under $15.[4] Even if the cost differential were *ten times* this amount, at $150, Verizon's original, non-doubled early termination fee of $175 would still generate a windfall when customers who purchase a subsidized advanced device immediately terminate service.

Changing its tune from earlier statements, Verizon now asserts that early termination penalties are in fact designed to recoup a wide variety of ordinary business expenses besides the cost of the handset. These expenses suddenly include advertising, sales commissions, and customer service costs, as well as Verizon's investment in its data network. We echo the concerns raised by Commissioner Clyburn over this "shifting and tenuous rationale" for these

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[2] *See, e.g.*, Paul Miller, "New DROID ads show off Android, will make a man out of you," *Engadget*, *at* http://www.engadget.com/2009/11/09/new-droid-ads-show-off-android-will-make-a-man-out-of-you/.

[3] Verizon asserts that "[e]very print advertisement that promotes the sale of an 'Advanced Device' clearly discloses that the advertised price requires a two-year contract, and that an ETF starting at $350 may apply." Verizon's own exhibit B refutes this by only noting the ETF in the very fine print, which appears from the image layout to be on the back of the advertisement.

[4] *See, e.g.*, Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (July 13, 2009), at 20 (Public Interest Reply Comments).

penalties.[5] We also second the Commissioner's statement that "[c]onsumers already pay high monthly fees for voice and data designed to cover the costs of doing business,"[6] fees that now include a mandatory $30 per month data usage fee that smartphone users must pay for the same network investment.[7] Any risk faced by Verizon in signing up new customers should be more than adequately compensated by the company's substantial wireless operating margins, which it has maintained despite the overall weakened economy.[8]

Verizon says that consumers locked into long term contracts who do not want to pay the early termination penalty "have choices" – specifically, they can continue to pay for service until their contract runs out. But a choice between paying too much for an unwanted service and paying an inflated early termination penalty is no choice at all.

The Commission should demand accurate and complete answers from Verizon on these important questions. In the upcoming report on the status of competition for commercial mobile services, we urge the Commission to recognize the impact of early termination penalties and other poorly disclosed charges on the level of effective competition over service quality and price. Early termination penalties and exclusive agreements for handsets lock customers into lengthy contracts, facilitating an environment of parallel pricing, hidden charges, high operating margins, and reduced capital expenditures – all signs that competition is not effective, and that additional Commission oversight is needed. Consequently, we ask the Commission to continue this investigation, to accelerate its open proceeding on consumer disclosure and truth-in-billing, and to evaluate additional remedies to protect consumers and to promote competition.

Sincerely,

Chris Riley
Free Press

Joel Kelsey
Consumers Union

Matt Wood
Parul P. Desai
Media Access Project

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[5] Statement of Commissioner Mignon Clyburn Regarding Verizon Wireless's December 18 Letter on ETFs (Dec. 23, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295371A1.pdf.

[6] *Id.*

[7] *See, e.g.*, Ed Oswald, "Verizon Makes Data Plans Mandatory on Smartphones," *Technologizer* (Nov. 3, 2008), *available at* http://technologizer.com/2008/11/03/verizon-makes-data-plans-mandatory-on-smartphones/.

[8] Public Interest Reply Comments at 7-8 (noting that Verizon's wireless division had a Q1 2009 operating margin of 46%, continuing a trend of supracompetitive profit margins).