# OUTLINE OF TESTIMONY REGARDING S.18

Senate Judiciary Committee/February 1, 2019

Charles Storrow, Leonine Public Affairs, LLP, on behalf of AT&T

## 1. AT&T's Presence in Vermont

a. Acquired Vermont assets (wireless network) of RCC Atlantic d/b/a Unicel in December 2008.

b. Since then AT&T has invested well over $100 million in its wireless network in Vermont, including 60+ new cell sites (on top of appx. 150 sites acquired from Unicel) and hundreds of upgrades to its cell sites.

c. As of December 2017 AT&T has 24 retail locations in Vermont (company owned stores, authorized dealers, and national stores).

d. As of December 2017 approximately 75 employees in Vermont.

## 2. AT&T's Wireless Customer Agreement

a. The agreement begins with clear language in large, bolded font indicating that arbitration on an individual basis is to be used to resolve disputes, rather than jury trials and/or class actions, and that available remedies are limited by the contract.

b. Dispute Resolution Specifics-- Sections 2.0, 2.1 and 2.2

- All disputes with AT&T must be resolved by arbitration or in small claims court (in VT--claims up to $5,000[1]).

- Arbitration to be conducted according to the rules of the American Arbitration Association, which is a well-regarded non-profit organization founded in 1926.

- Arbitration is to take place on an individual basis—class actions are not permitted.

[1] 12 V.S.A. §5531.

- A consumer retains his or her right to seek redress through regulatory agencies such as the FCC, FTC and state attorneys general.

- For claims not exceeding $75,000 AT&T will reimburse a consumer for his or her payment of the filing fee (usually $200) required to initiate arbitration or, if need be, pay it on behalf of the consumer directly.

- The arbitration will take place in the **county** where the consumer's billing address is located.

- AT&T will pay for all costs of arbitration for non-frivolous claims that do not exceed $75,000.

- If the arbitrator awards the consumer more than any settlement offer by AT&T the company will pay the consumer the amount of the award or $10,000, *whichever is greater*, and will pay the consumer's attorney 2X his or her fees and also reimburse the attorney for any expenses he or she paid, such as expert witness fees. This creates an incentive on the part of AT&T to deal fairly with a customer who has a dispute with the company.

***The dispute resolution process provided for in AT&T's Wireless Customer Agreement is fair and reasonable and provides for the resolution of disputes without expensive litigation.***

**3. Presumptively Unconscionable Provisions in AT&T's Wireless Customer Agreement Under S.18.**

Section 1.4—*Billing* disputes must be raised within 100 days of the date of the relevant bill. May be voidable under 12 V.S.A. §465.[2]

In California: "A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained."

[2] 12 V.S.A. § 465 provides as follows: "[e]xcept as otherwise provided by statute, any provision in a contract which limits the time in which an action may be brought under the contract or which waives the statute of limitations shall be null and void."

*Ellis v. U.S. Security Associates,* (2014) 224 Cal.App.4th 1213, 1223 (2014).

Section 4.1—Waiver of Punitive Damages.

Under the bill the provisions in AT&T's Customer Wireless Agreement limiting the time in which an individual can raise a billing dispute and precluding claims for punitive damages would be presumptively unconscionable. However, that may already be the case under existing caselaw.

**4. A major problem with the bill is proposed 9 V.S.A. § 6055(d), which is a confusing "gotcha" provision that will spur unnecessary litigation where there is little or no harm to an individual.**

Proposed 9 V.S.A. § 6055(d) provides that the existence of one of the presumptively unconscionable contract provisions is, in and of itself, a violation of Vermont's Consumer Protection Act. It further provides that if a court agrees a contract provision is unconscionable, the plaintiff can recover $1,000 and his or her attorneys' fees.

The interplay between the first and second sentences of subsection (d) is unclear. The first sentence states in declarative fashion that the inclusion of a presumptively unconscionable contract provision is an unfair and deceptive practice in violation of 9 V.S.A. § 2453, which is the touchstone of Vermont's Consumer Protection Act. The second sentence provides that if a court determines a contract provision is in fact unconscionable the consumer is entitled to $1,000 in statutory damages. Does a court have to determine that a contract provision is in fact unconscionable for it to be deemed an unfair and deceptive practice? The issue is important because, among other things, consumers have a private right of action under the Consumer Protection Act.

Moreover, as drafted subsection (d) does not require a showing of actual harm to the plaintiff. This means that regardless of the ambiguity discussed above a unconscionable contract provision would be considered an unfair and deceptive practice even if the plaintiff was not otherwise harmed.

All of this is further aggravated if the court, per subsection (c), refuses to enforce the entire contract. That would potentially void the arbitration portion of the agreement and open the door to class action litigation that would mainly benefit plaintiff's attorneys.

At a minimum subsection (d) should require a finding of unconscionability *and* actual harm in order to for a contract provision to be considered an unfair and deceptive practice, and subsection (c) should be revised to eliminate the ability of a court to void an entire contract.

5. **Exemptions of local businesses from S.18 may be unconstitutional under the "dormant" commerce clause of the U.S. constitution.**

   Basic principles:

   "The Commerce Clause of the United States Constitution provides that the '[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .' It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce."

   *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

   Dormant Commerce Clause doctrine distinguishes between state regulations that 'affirmatively discriminate' against interstate commerce and even handed regulations that 'burden interstate transactions only incidentally. Regulations that clearly discriminate against interstate commerce are virtually invalid per se."

   *American Booksellers Foundation, et al., v. Howard Dean, et al.,* 342 F.3d 96, 102 (2d Cir. 2003)(citations omitted).

6. **There has been no evidence that existing law is inadequately protecting Vermonters.**